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Temporary Protection Visas in Australia: A reform proposal

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Acronyms

AAT – Administrative Appeals Tribunal
BV – Bridging Visa
COI – Certificate of Identity
CTD – Convention Travel Document
DHA – Department of Home Affairs
IAA – Immigration Assessment Authority
RoSV – Resolution of Status Visa
SHEV – Safe Haven Enterprise Visa
SRSS – Status Resolution Support Service
TPV – Temporary Protection Visa
UMA – Unauthorised Maritime Arrival
UNHCR – United Nations High Commissioner for Refugees

Definitions

Fast-track process	A process established in 2014, whereby applications for protection are assessed by the DHA, and those that are refused are automatically referred to the IAA, which conducts a 'limited merits review'. The IAA review is conducted 'on the papers' rather than through a hearing, and new information may only be presented in 'exceptional circumstances'.
Legacy caseload	Broadly defined as people who arrived in Australia by boat as UMAs between 13 August 2012 and 1 January 2014. It excludes, broadly, people who were sent to regional processing centres in Nauru and Papua New Guinea for processing after July 2013.
Non-refoulement* and constructive *refoulement	A principle of international law which prohibits the return or removal of a person to a place where they have a well-founded fear of being persecuted or face a real risk of being subjected to other serious harm. Constructive *refoulement* can occur if measures taken by a country make life so difficult for a refugee that they 'agree' to return home.
Safe Haven Enterprise Visa	A five-year visa granted to people who arrive in Australia as a UMA and are found to be owed protection.
Trauma-informed	Being trauma-informed at individual or system levels involves being understanding and responsive to the personal impacts of trauma, and helping people who have been affected by trauma to feel physically and psychologically safe and to rebuild a sense of control and empowerment.
Temporary Protection Visa	A three-year visa granted to people who arrive in Australia as a UMA and are found to be owed protection.
Unauthorised maritime arrival	A person entering Australia by sea without a valid visa, who becomes unlawful because of that entry.

Executive summary

The election of a new government in May 2022 provides an opportune moment to reassess Australia's approach to refugees and people seeking asylum. The Labor government has signalled that our treatment of refugees and asylum seekers needs to change—to provide people with greater certainty and more durable protection, and to enable the Australian community to benefit more fully from their contribution.

One of the most detrimental elements of Australian refugee law and policy in the past decade has been the use of temporary visas. Temporary protection has been the only option available for people who arrived by boat and were recognised as refugees. Known as the 'legacy caseload', these people are caught in a system of law and policy that keeps them in a state of perpetual limbo.

This is an inhumane, unsustainable, and inefficient system that inflicts mental harm and creates costly, bureaucratic burdens. Providing permanent protection to the 31,000 men, women, and children in this group—many of whom have been recognised by Australia as refugees in need of protection—would provide them with a resolution of their legal status and enable them to move forward with their lives, while also acknowledging the significant contribution this group has already made to the community through work and social engagement.

This Policy Brief provides concrete recommendations about how to move refugees on temporary visas to permanent visas—using existing powers under the *Migration Act 1958* (Cth) and minor amendments to the *Migration Regulations 1994* (Cth)—as well as recommendations for people whose protection claims have not yet been assessed, or have been refused. The 17 recommendations are intended as a package of coherent and inter-related measures, rather than a suite of different options.

Recommendations

This Policy Brief makes 17 specific recommendations for the legacy caseload:

1. Refugees on Temporary Protection Visas (TPVs) and Safe Haven Enterprise Visas (SHEVs) should be moved onto permanent visas. People who have not yet been assessed or who have previously been refused protection should also be able to apply for a permanent visa that does not require another assessment of their protection claims.

Trauma-informed approach: Establishing trust and clarity and rebuilding lives

2. An interagency group should be established to work with the Department of Home Affairs (DHA) on developing a trauma-informed, integrated community legal and mental health strategy to accompany legal and policy changes.
3. Legal, social and mental health support, including access to interpreting, should be funded to assist individuals with the visa application process.

Group one: People who currently hold, or who have previously held, a SHEV or TPV

4. Outstanding applications for a subsequent TPV or SHEV should be converted to an application for a Resolution of Status Visa (RoSV) via s 45AA of the *Migration Act*. This will require an amendment to the *Migration Regulations* to convert a valid TPV or SHEV application to a RoSV application.
5. For individuals who have not applied for a subsequent TPV or SHEV, amend reg 2.07AQ of the *Migration Regulations* to deem them to have applied for a RoSV.
6. Schedule 1 item 1127AA(3)(c) of the *Migration Regulations* should be amended to include an applicant who holds, or has held, a Subclass 785 visa or Subclass 790 visa.

Group two: People who have previously applied for, and been refused, a SHEV or TPV

7. The Minister should exercise their personal power under s 46A(2) of the *Migration Act* to enable people who have previously applied for, and been refused, a TPV or a SHEV to apply for a RoSV.
8. Regulation 2.08AQ and Schedule 1 item 1127AA(3)(c) of the *Migration Regulations* should be amended to enable people who have applied for, and been refused, a SHEV or TPV to make an application for a RoSV.

Group three: People still waiting for a determination of their visa

9. People with outstanding applications for an initial TPV or SHEV should have their applications converted to an application for a RoSV via s 45AA of the *Migration Act*. This will require an amendment to the *Migration Regulations* to convert a valid TPV or SHEV application to a RoSV application.

Post-visa grant: Mental health, social and employment support

10. The government should consult with relevant non-government organisations (NGOs) and agencies to design a range of services tailored to different groups in the legacy caseload, including mental health and social services, and education, employment, and training assistance programs.

Permission to travel and access to travel documents

11. The policy and process for managing requests for permission to travel should be revised to ensure that requests are processed quickly and with more flexibility when determining whether 'compassionate or compelling' circumstances exist for travel.
12. Individuals who hold a RoSV and who have previously held a TPV or a Subclass 790 SHEV should continue to be eligible for a Convention Travel Document.
13. Individuals who hold a RoSV and who have not had a positive refugee status determination, or who have not had their status determined, should be eligible for a Certificate of Identity (COI).

Family reunion

14. Ministerial Direction No 80 should be repealed, or amended by removing subsection 8(g) of the Direction and all references to subsection 8(g) within the Direction.
15. The policy for current processing priorities for the Refugee and Humanitarian Program should be revised to prioritise those proposed by people on RoSVs.
16. A specialised team should be established within the DHA to work closely with relevant migration agent/lawyer peak bodies, community legal centres and refugee communities to:
    a. identify priority actions to manage and progress Partner visas sponsored by people from the legacy caseload; and
    b. identify policy and legislative reform options for close relatives and children who may no longer fit within the current definitions of 'member of a family unit' or 'dependent child'.
17. Funding should be provided to community legal centres/Legal Aid to provide immigration assistance to families to apply for relevant Family or Humanitarian visas, including access to interpreters.

1 Introduction

In Australia today, there are more than 31,000 people who arrived by boat almost 10 years ago and who are living in the community in an ongoing state of uncertainty. Their rights and life circumstances depend on the type of visa they hold. About two-thirds hold temporary visas which allow them to work, but which do not let them reunite with family members still living overseas. The remainder live on precarious Bridging Visas, some of which have expired. Some have the right to work, some do not, and many cannot access income support. Under current Australian law, none of these people will realistically ever have access to permanent visas. They live in a perpetual state of limbo and, as a marginalised group, many will never feel that they are settled or 'belong'.

Temporary protection has a significant detrimental effect on people's mental health and well-being, at times with catastrophic outcomes, including self-harm and suicide.[1] Many refugees have been separated from their families for many years and hold grave, well-founded fears for their safety. They are not permitted to reunite with loved ones because Australia imposes a permanent bar on family reunion. This policy may have led to constructive *refoulement*, with significant numbers from the 'legacy caseload' having departed Australia permanently. Temporary status may also have a negative impact on employment, as some employers will not offer jobs to people with an insecure legal status. Without psychological certainty facilitated by permanent visa status, worsening mental distress and deterioration is foreseeable.

The use of temporary protection is inconsistent with Australia's obligations under international refugee and human rights law. Intended to deter people from entering Australia in irregular or unauthorised ways, it discriminates against people on the mode of their arrival and denies access to family reunion.[2] Australia's approach to temporary protection is also an aberration from international practice. In other countries, temporary protection has generally been conceived as an exceptional, emergency, and time-bound measure. It applies in situations of mass influx, where large numbers of people are fleeing conflict or another humanitarian crisis that makes individual refugee status determination impractical.[3] It forms the backbone of the European Union's response to people fleeing conflict in Ukraine, for instance. The United Nations High Commissioner for Refugees (UNHCR) has stressed that temporary protection must not be used as a permanent holding status; early identification of more permanent solutions is crucial, such as transition to refugee status or another alternative status (including residency status, work visas, or other migration status).[4] Although the Convention relating to the Status of Refugees (Refugee Convention)[5] does not formally require State parties to confer citizenship or permanent residence on refugees in their territory, it does oblige them 'as far as possible [to] facilitate the assimilation and naturalization of refugees'[6] over the longer-term.

In 2014, changes to Australian law meant that people who arrived in Australia without a visa, and were found to be refugees, could only be granted a three-year Temporary Protection Visa (TPV) or a five-year Safe Haven Enterprise Visa (SHEV). At the expiry of that visa, they were only eligible to apply for another TPV or SHEV if government decision-makers still found that they had an international protection need. SHEV holders who fulfil certain 'pathway requirements' relating to work or study in regional areas may be eligible to apply for other visas but, to date, only one person has qualified. The status determination process has also been marked by significant delays and concerns about its fairness.

In practice, the policy applies to people who arrived between 13 August 2012 and 1 January 2014 (the so-called 'legacy caseload'). Most of those who were granted a TPV or SHEV are nearing (or have reached) the end of the visa period. The circumstances in key countries of origin (eg Afghanistan) suggest that most will require ongoing protection. People who are denied further protection are very likely to seek merits and judicial review to secure permission to remain, and such

cases will take years to resolve. The administrative burden and costs of processing applications are also significant.

With the election of a new Labor government, it is an opportune moment to examine concrete ways in which Australia could provide permanent, durable solutions for the legacy caseload. Labor's 2021 National Platform acknowledged that uncertainty was hampering settlement for people on temporary visas, while also denying Australia the benefit of their skills and contributions.[7]

This Policy Brief is divided into four parts. It begins by setting out some guiding principles for reform which underpin the recommendations made in this Policy Brief. Part two provides an overview of the background and operation of temporary protection in Australia, and broadly sets out the various groups in the legacy caseload. Part three sets out the basis for reform and explains why change is necessary. Part four considers what can be done to move people on temporary visas or Bridging Visas for the last decade onto permanent visas, and also outlines recommendations for policy changes in relation to family reunion and access to travel documents.

1.1 Guiding principles for reform

This section is informed by the views of people living on temporary visas, refugee organisations, lawyers and migration agents, who were consulted during the drafting of this Policy Brief. The primary purpose of those consultations was to ensure that the options for reform considered how permanent visas could be granted from a practical perspective, while also taking into account the past and current experiences of people in the legacy caseload—in particular, their future well-being and rights to family reunion.

The following three principles underpin the Policy Brief's approach to reform:

1. **Practical 'do-ability'**

    - The focus is on achieving reforms either within the current legislative and policy framework, or with minimal changes. This means that changes can occur within a relatively fast timeframe. This paper puts forward recommendations that can be achieved within current legal frameworks using existing executive powers and current visas, and with only minor amendments to the *Migration Regulations 1994* (Cth) (*Migration Regulations*), Department of Home Affairs (DHA) policy, and Ministerial guidelines.

2. **Trauma-informed approach**

    - Trauma and rejection have featured strongly in the lives of many in the legacy caseload, particularly people who have experienced protracted delay or been refused visas. Any reforms must be accompanied by a strategy to help reduce mental distress, deterioration, and retraumatisation and to increase community engagement.
    - There must be a well-managed process to support individuals who have previously been refused visas so they can apply for permanent visas.
    - Success in terms of reducing fear, mistrust, and retraumatisation of people in the legacy caseload will only come if government and other stakeholders work closely with local communities, refugee-led communities, non-government organisations (NGOs), and legal representatives.

3. Compatibility with human rights

- Australia is required to protect and promote the human rights of all persons, including refugees and people seeking asylum. While countries have a legitimate interest in implementing border controls, policies that seek to curtail rights and discriminate based on the mode of arrival, or with the objective of deterring irregular arrivals, exacerbate risks and harm to individuals, and may contravene Australia's legal obligations.
- Refugees are entitled to a secure and stable legal status, which should not be subject to regular review. Frequent periodic reviews of the need for protection undermine refugees' sense of security and hinder their ability to successfully integrate.
- The right to family unity is an essential human right. Family reunion is a strong element for successful integration strategies and social cohesion, as well as a critical factor in strengthening mental health and social well-being among refugees.

2 Temporary Protection Visas in Australia

2.1 Temporary protection for boat arrivals

TPVs were first introduced in Australia by the Howard Coalition government in October 1999.[8] The specific intentions behind the TPV were to reduce incentives for asylum seekers to 'bypass effective protection' in other countries and to deter people smugglers.[9] At the end of a three-year period, TPV holders could be granted a permanent protection visa if they could show they had an ongoing need for protection in Australia.[10] The TPV policy was criticised at the time for creating uncertainty, insecurity, isolation, confusion, powerlessness, and health problems among the holders of these visas, as well as for placing an increased burden on community organisations.[11] Between 1999–2007, 11,206 TPVs were granted and—significantly—95 per cent of TPV holders were eventually granted a permanent visa.[12]

In 2008, the Rudd Labor government abolished TPVs[13] on the basis that they were punitive.[14] As part of the government's commitment to providing refugees with a 'fair and certain outcome',[15] a new permanent visa was created, the Resolution of Status (Class CD) Visa (Subclass 851) (RoSV). Refugees on TPVs could apply and be granted a RoSV without having their protection claims reassessed, subject to meeting security and character checks.[16] Approximately 1,000 remaining TPV holders were transitioned onto permanent RoSVs.[17]

In seeking election in 2013, the Coalition stated that it would reintroduce TPVs to deter boat arrivals and to act as a disincentive for potential clients of people smugglers.[18] After winning the election in September 2013, the Abbott Coalition government immediately introduced Operation Sovereign Borders (OSB),[19] a maritime border protection operation led by the Australian military, aimed at stopping the arrival of asylum seekers in Australia. From September 2013, OSB commenced intercepting asylum seekers at sea and returning them to their countries of origin or departure. As part of OSB, the government continued the offshore processing policy introduced by the Gillard/Rudd government, where asylum seekers arriving by sea were taken to offshore processing centres in Papua New Guinea and Nauru, with the stated policy objective that they would never be (re)settled in Australia.[20]

2.2 Temporary protection and fast-track assessment for the 'legacy caseload'

The term 'legacy caseload' was coined by the Abbott Coalition government in 2013 to describe the group of approximately 30,000 asylum seekers who came to Australia by boat between 13 August

2012 and 1 January 2014 and who were not taken to Nauru or Papua New Guinea for processing.[21] In 2014, the government passed changes to the law intended to 'resolve the legacy caseload'. These included:

- a fast-track process for protection claims, whereby applications for protection are assessed by the DHA, and those that are refused are automatically referred to the Immigration Assessment Authority (IAA), which conducts a 'limited merits review' on the papers, and cannot receive or obtain new evidence other than in 'exceptional circumstances'; and
- the grant of a three-year TPV or a five-year SHEV only, with no realistic prospect of applying for a permanent protection visa at the expiry of their visa (unlike the earlier Howard policy).[22]

2.3 The legacy caseload

The number of people in the legacy caseload as of April 2022 is 31,253 people.[23] They come from many countries of origin. The largest number are from Afghanistan, Iran, Pakistan, and Sri Lanka. Other countries include Bangladesh, Iraq, Lebanon, Myanmar, Somalia, and Vietnam. These are all countries where armed conflict, violence, and human rights violations are well-documented, and a significant number of people are stateless.[24]

People who currently hold a TPV or SHEV	People who have applied for, and been refused, a TPV or SHEV	People who have not had their claims processed
19,345 (62%)	9,731 (31%) 138 in immigration detention	2,177 (7%) 37 in immigration detention

Source: Department of Home Affairs (Cth), 'IMA Legacy Caseload: Report on Processing Status and Outcomes' (Report, April 2022) https://www.homeaffairs.gov.au/research-and-stats/files/ima-legacy-caseload-april-2022.pdf.

3 Why reform is needed for the legacy caseload

3.1 A flawed and costly processing system

The visa process has been marked by delays, and there have been concerns about its fairness. On average, it has taken up to six years for people to receive their first TPV or SHEV. Ten years on, some individuals are still waiting for an initial decision.

Protection visa applications have become lengthy and complex processes, and must be completed in English. Cuts to funding for legal assistance and interpreting have left people reliant on over-stretched community legal centres and pro bono clinics to assist with lodging their claims.

Applicants refused at first instance by the DHA have only had access to a highly curtailed review by the IAA, which does not allow for an oral hearing or for any new information to be provided unless 'exceptional circumstances' exist.[25] By contrast, the merits review provided to other asylum seekers by the Administrative Appeals Tribunal (AAT) includes an oral hearing and a full review of the merits of the claim. The IAA's limited review process has meant that people have had their protection claims more readily rejected, especially those found not to be 'credible'.[26]

Statistics confirm that asylum seekers have fared much worse under the fast-track system. The Refugee Council of Australia recently compared the rates at which negative decisions on asylum claims have been remitted to the DHA by the IAA under the fast-track system (from July 2015 to March 2022) and the previous merits review system (from 2009 to 2013).[27] These comparisons reinforce concerns about deficiencies in the limited review process. For example, the rate of remittal

for applicants from Afghanistan dropped from 89 per cent under the previous system to just 17 per cent under the IAA. The rate of remittal for applicants from Sri Lanka fell from 60 per cent to just 6 per cent.[28]

People found to be refugees have been granted either a TPV or SHEV. The SHEV was intended to create an incentive for refugees to work or study in regional areas with the promise of potentially obtaining a permanent visa. While many have moved to regional communities, very few have met the pathway requirements and only one SHEV holder has been granted a permanent visa after meeting the SHEV pathway. The SHEV has not provided the pathway to permanency that many in the legacy caseload hoped for, meaning that—along with TPV holders—the only option at the expiry of the visa is to have their refugee claims reassessed to obtain another temporary visa.

The reassessment of protection claims imposes a significant financial and administrative burden on government, especially since the necessity for protection will remain in most cases. One study estimated the costs of reprocessing protection claims to be at least $300 million.[29] A person whose visa is refused may appeal to the Federal Court of Australia. Since many are self-represented on account of cuts to legal aid, and may have limited English, they consume a great deal of time of the court staff, government lawyers, and judges.

3.2 Separation from family

Despite being recognised as refugees, people on TPVs and SHEVs have not been able to apply to bring their partners, children, or other family members to Australia. So long as their status is temporary, they face a permanent bar on family reunion and thus indefinite separation from their families. This policy has made life so unbearable for some refugees and asylum seekers that, to date, 6,745 individuals have 'chosen' to return home.[30] This may be a form of constructive *refoulement*.

3.3 Deleterious impact on mental health

People in the legacy caseload have been locked in a process that provides no certainty about their future visa status. This, combined with family separation, can contribute to a significant deterioration of their mental health. Several studies have shown that uncertainty around visa applications and temporary legal status causes pervasive anxiety that impacts all aspects of asylum seekers' lives. Since 2014, there have been at least 27 (suspected) suicides by asylum seekers who arrived in Australia by boat.[31]

Women from refugee and asylum seeker backgrounds with a precarious visa status have been at increased risk of family violence. They face significant difficulties accessing support in the areas of housing, financial, health, legal, and social services.[32]

Uncertainty and anxiety of temporary residency status has also had a strong detrimental impact on children. In relation to the former TPV regime, the Australian Human Rights Commission reported in 2006 that, 'because of the uncertainty, children exhibited physiological and psychological symptoms including constant headaches, sleeping problems, problems with concentration and memory, and signs of depression'.[33]

3.4 Poverty and severe economic disadvantage for holders of Bridging Visas

People who have been found not to be owed protection have remained on Bridging Visas, pending judicial review and Ministerial intervention. They have fared worst of all, with an insecure legal status,

no income support, and insecure work, leaving many living in poverty. As at 31 December 2021, there were 2,352 people who had applied for a protection visa and whose Bridging Visa E had ceased,[34] leaving them with no right to work and no access to Medicare.

A small number of asylum seekers waiting for an initial decision from the DHA may be eligible for income support via the Status Resolution Support Service (SRSS), but this is insufficient to ensure an adequate standard of living.[35] The majority are ineligible for any government-funded income support and, if they are without work, they are completely reliant on NGOs for support. Many live in poverty and insecure housing.[36]

3.5 Children born in Australia

The *Migration Act 1958* (Cth) (*Migration Act*) classifies children born in Australia to parents from the legacy caseload as 'unauthorised maritime arrivals'.[37] They receive the same visa status as their parents.[38] For example, Tamil asylum seekers Kokilapathmapriya (Priya) Nadesalingam and Nadesalingam (Nades) Murugappan sought asylum in Australia by boat. Nades arrived in 2012 and Priya in 2013. The couple met in the Australian community, married, and had two children. Both children were given Bridging Visas when they were born, since their parents' protection claims had been refused. After the cancellation of their parents' visas, the children's visas were also cancelled, and they were detained with their parents.

Children born in Australia can apply for Australian citizenship if they would otherwise be stateless,[39] and they are automatically entitled to citizenship if they remain in Australia until they are 10.[40] This could result in a situation where Australian citizen children have parents who are ineligible for permanent visas and who could be removed from Australia.

3.6 Temporary protection has not worked as a deterrent for boat arrivals

The former Coalition government claimed that TPVs were necessary to deter boat arrivals. However, there is little evidence to support this. Data provided to the Senate Legal and Constitutional Committee by the Department of Immigration and Citizenship in 2012 noted that there was in fact an *increase* in boat arrivals following the introduction of TPVs in October 1999. In the following two years, there was also a significant increase in the number of women (from 7 per cent to 20 per cent) and children (from 7 per cent to 24 per cent) arriving by boat.[41] In 2001, 353 people—of whom 288 were women and children—drowned in the SIEV-X disaster en route to Australia; most were family members of TPV holders already in Australia.[42]

When TPVs were reintroduced in 2014, the then Minister for Immigration and Border Protection, Scott Morrison, stated that temporary protection was a necessary part of a package of measures designed to stop boat arrivals.[43] In fact, asylum seekers still sought to arrive via boat until about 2016, when the numbers dropped largely in response to maritime interceptions and turnbacks.[44]

4 Recommendations for reform

This part sets out recommendations as to how the government can permanently resolve the situation for people within the legacy caseload. The recommendations are intended as a package of coherent and inter-related reforms, rather than a suite of different options. The caseload is not homogenous, and the recommendations set out below are grouped according to the members' differing visas and legal status.[45] That said, it is important to try to treat people consistently and fairly.

The recommendations are informed by the three guiding principles set out in the introduction: the reforms are practical and achievable, trauma-informed, and uphold human rights. They aim to reduce administrative costs by avoiding lengthy and costly protection visa application and assessment processes. Two case studies are set out in the appendix to demonstrate the practical application of the recommendations.

Recommendation

1. Refugees on TPVs and SHEVs should be moved onto permanent visas. People who have not yet been assessed or who have previously been refused protection should also be able to apply for a permanent visa that does not require another assessment of their protection claims.

4.1 Trauma-informed approach: Establishing trust and clarity and rebuilding lives

As outlined above, the impact of temporary protection and the fast-track system on refugees and asylum seekers has left many depressed and suicidal. While a change of government policy can offer people hope for a fresh start, it will be accompanied by apprehension and worry about the transition. If people are faced with mixed messages, the outcomes could be disastrous. The government will need to do a lot of work to rebuild trust, confidence, and communication with the legacy caseload, underpinned by a trauma-informed strategy.

A trauma-informed, whole-of-service, intra- and inter-governmental approach is required that brings together a range of sectors and individuals working within them to support the mental health and psychosocial needs of individuals in this caseload.[46] Mental health literature on traumatised people emphasises the need for coordinated services, safe and predictable environments, and stability of client–provider relationships. Being trauma-informed begins with trauma awareness. Enhanced and facilitated connections with service providers, the community, and family members will strengthen the population and enhance their capacity to engage.

Over the past decade, refugee-led organisations, volunteer groups, individuals, NGOs, community legal centres, and many others have developed close and trusted relationships with people in the legacy caseload. They must be centrally involved in the design and implementation of any new strategy.

Recommendations

2. An interagency group should be established to work with the DHA on developing a trauma-informed, integrated community legal and mental health strategy to accompany legal and policy changes.
3. Legal, social, and mental health support, including access to interpreting, should be funded to assist individuals with the visa application process.

4.2 Permanent Resolution of Status Visas for the legacy caseload

All groups in the legacy caseload should be considered for a permanent RoSV. The RoSV was originally created in 2008 for the purpose of converting individuals on a TPV to a permanent visa, and it is still contained in the *Migration Regulations.* The RoSV provides access to various benefits outlined at 4.3. The process for application and grant of a RoSV is straightforward. It is therefore efficient and practical to amend the regulations to allow this group to be eligible for a RoSV.

The recommendations below outline what amendments would be required to the *Migration Regulations* to allow the various groups in the legacy caseload to be eligible for the grant of a RoSV.

The RoSV has no time of application criteria.[47] Prior to grant, applicants need only meet specific health[48] and security and character requirements.[49] A RoSV can be granted in Australia and can include all family members in Australia; however, the Minister *cannot* grant a visa to those family members who live outside Australia. Once granted a RoSV, the individual can sponsor family members through the family migration program or propose family members through the humanitarian program.

4.2.1 Group one: People who currently hold, or who have previously held, a SHEV or TPV

Recommendations

4. Outstanding applications for a subsequent TPV or SHEV should be converted to an application for a RoSV via s 45AA of the *Migration Act*. This will require an amendment to the *Migration Regulations* to convert a valid TPV or SHEV application to a RoSV application.
5. For individuals who have not applied for a subsequent TPV or SHEV, amend reg 2.07AQ of the *Migration Regulations* to deem them to have applied for a RoSV.
6. Schedule 1 item 1127AA(3)(c) of the *Migration Regulations* should be amended to include an applicant who holds, or has held, a Subclass 785 visa or Subclass 790 visa.

Once the suggested amendment is made, it would simply require an individual to hold a Subclass 785 visa or Subclass 790 visa at the time of application for a RoSV.[50] For those that have already applied for a subsequent SHEV or TPV, their applications can be converted to an application for a RoSV pursuant to the power in s 45AA of the *Migration Act*.[51]

Regulation 2.07AQ of the *Migration Regulations* sets out when an application for a RoSV is deemed to have been made. An amendment which specifies that people who have not yet reapplied for a TPV or SHEV are deemed to have made an application means that they do not have to complete an application. As many in this group are 'unauthorised maritime arrivals' the Minister will need to personally lift the bar pursuant to s 46A(2) of the *Migration Act* so the applications are valid.

This group has already been through a determination process and found to be owed protection. As part of that process, they have had an assessment of their health, character, security and identity. It is recommended that they be granted RoSVs without delay.

4.2.2 Group two: People who have previously applied for, and have been refused, a SHEV or TPV

Recommendations

7. The Minister should exercise their personal power under s 46A(2) of the *Migration Act* to enable people who have previously applied for, and been refused, a TPV or a SHEV to apply for a RoSV.
8. Regulation 2.08AQ and Schedule 1 item 1127AA(3)(c) of the *Migration Regulations* should be amended to enable people who have applied for, and been refused, a SHEV or TPV to make an application for a RoSV.

It is recommended that the Minister determine it is in the public interest for all people in this group to be able to apply for a RoSV.

As outlined above, the fast-track process has been neither fair nor fast. People who have been refused under that system have now been living (and often working) in the Australian community for

10 years or more. Many people have been on Bridging Visas that have had to be regularly renewed, sometimes without work conditions. At other times, Bridging Visas have expired, meaning that people have been rendered unlawful in the community for periods of time awaiting Ministerial intervention. This group is particularly vulnerable and will require support to apply for a RoSV. Allowing access to funded legal assistance will enable legal representatives to assist applicants to lodge applications, enabling more efficient decision-making by the DHA.

4.2.3 Group three: People still waiting for a determination of their case

Recommendation

9. People with outstanding applications for an initial TPV or SHEV should have their applications converted to an application for a RoSV via s 45AA of the *Migration Act*. This will require an amendment to the *Migration Regulations* to convert a valid TPV or SHEV application to a RoSV application.

These are individuals who have applied for a TPV or SHEV but have not had their case finally determined; that is, they are still awaiting an outcome from the DHA or the IAA. It does not make good policy sense to require them to go through a protection assessment almost 10 years after they left their country of origin.

People in this group are as vulnerable as those in group two above: they have been living on a series of Bridging Visas (or in detention) for extended periods of time. They should be given access to funded legal assistance to support them with the conversion of their applications to RoSV applications.

4.3 Post-visa grant: Mental health, social and employment support

Individuals in the legacy caseload have had access to different services and support, including access to English classes. Many are working and may not require significant support once a permanent visa is granted. Others, however, may require support in several areas.

RoSV holders are eligible for Centrelink payments[52] and, as permanent residents, have access to Medicare. In terms of access to tertiary education, people who have a RoSV have access to Commonwealth supported places (CSP); that is, if they qualify to enrol in tertiary study, part of the cost of study can covered by the Commonwealth. HECS-HELP loans (to cover the student fee contributions) are available to RoSV holders.[53]

Recommendation

10. The government should consult with relevant NGOs and agencies to design a range of services tailored to different groups in the legacy caseload, including mental health and social services, and education, employment, and training assistance programs.

4.4 Permission to travel and access to travel documents

It is critical that TPV and SHEV holders be able to travel outside Australia more freely. This could be an important gesture from the government and help to build trust that the other changes needed for permanent residence will happen (since once a permanent visa is granted, people are free to travel). In addition to travelling to visit family and friends, individuals may also have opportunities to travel

for sport, education, training, and employment. In that respect, facilitating travel is of interest to government.

Both SHEVs and TPVs are subject to condition 8570, which restricts the holder from travelling to countries (other than their country of origin) unless they obtain written permission. Requests for permission to travel involve a cumbersome and onerous process, and the DHA must be satisfied that the visa holder has 'compassionate or compelling circumstances'[54] for travel. Current policy guidelines are too restrictive.[55] Recognising that there may be delays before TPV and SHEV holders are granted permanent visas, the DHA policy guidelines should be changed to allow greater leniency when assessing requests for travel.

A practical hurdle is that most people in the legacy caseload will not be able to obtain a passport or travel document from their country of nationality. In compliance with its obligations under the Refugee Convention, the Australian government issues Titre de Voyage/Convention Travel Documents (CTD) to people who have been recognised as refugees. In the past, this has included people who were granted TPVs or SHEVs. These are issued pursuant to the *Australian Passports Act 2005* (Cth) and the *Australian Passports Determination 2015* (Cth) (*Determination*).[56] The Minister may also issue a Certificate of Identity (COI) to people who are stateless or who are unable to obtain a travel document from their country of nationality.[57]

It is important to ensure that RoSV holders who previously held TPVs and SHEVs continue to be able to access a CTD. The *Determination* could also be amended by the Minister to allow for the issuance of a COI to people who hold a RoSV but have not had a protection determination.

Recommendations

11. The policy and process for managing requests for permission to travel should be revised to ensure that requests are processed quickly and with more flexibility when determining whether 'compassionate or compelling' circumstances exist for travel.
12. Individuals who hold a RoSV and who have previously held a TPV or a Subclass 790 SHEV should continue to be eligible for a CTD.[58]
13. Individuals who hold a RoSV and who have not had a positive refugee status determination, or who have not had their status determined at all, should be eligible for a COI.

4.5 Family reunion

The granting of permanent visas will allow individuals to begin the process of family reunion through Australia's family or humanitarian programs. However, there are several barriers to family reunion which will need to be addressed.

Holders of permanent visas can sponsor family members to come to Australia through the Family stream of the Migration Program. Current government policy means that sponsors who arrived in Australia by boat are the 'lowest processing priority'. This policy is contained in Ministerial Direction No 80 (Direction 80)[59] and effectively means that family members of permanent residents who arrived by boat will likely never have their applications considered. Current policy for the Humanitarian Program provides that visa applicants who are proposed by a person who holds a permanent RoSV are Priority 5 (the lowest priority) in terms of processing.[60]

Prolonged family separation has had a profound impact on refugees and their relatives, here and overseas. Family relationships have been under strain. Some families have now been separated for at least 10 years; many people left children at home who have now reached ages where they will no longer be considered a 'member of the family unit'[61] (for the purposes of a Partner visa) or a

'dependent child'[62] (for the purposes of a Child visa). Provision of funded legal assistance to people who cannot otherwise afford to obtain support from a registered migration agent or lawyer is important to ensure that people understand visa options for family reunion, and obtain appropriate assistance to collect relevant documents and evidence for the completion of visa applications.

The processing of applications in the family migration rogram has recently experienced significant delays.[63] Backlogs in processing of Partner visa applications may start to be addressed by the recent announcement by the former government that processing will be demand-driven (that is, not subject to a quota).[64] On 21 January 2022, as part of the former government's response to the ongoing humanitarian situation in Afghanistan, the government allocated at least 5,000 visas to be granted to Afghan nationals within the Family stream over the next four years, primarily for partners of Australian citizens and permanent residents.[65] In order to manage Partner visa applications, the DHA established a specialised team to manage and progress complex cases, with a particular focus on people impacted by Direction 80.[66]

The former government also announced that it would provide 10,000 visas to Afghan nationals through the humanitarian program over four years. The program is currently under strain despite these extra places, with a very large number of applications lodged by people from Afghanistan since August 2021.[67]

Recommendations[68]

14. Direction 80 should be repealed, or amended by removing subsection 8(g) of the Direction and all references to subsection 8(g) within the Direction.
15. The policy for current processing priorities for the Refugee and Humanitarian Program should be revised to prioritise those proposed by people on RoSVs.
16. A specialised team should be established within the DHA to work closely with relevant migration agent/lawyer peak bodies, community legal centres, and refugee communities to:
    a. identify priority actions to manage and progress Partner visas sponsored by people from the legacy caseload; and
    b. identify policy and legislative reform options for close relatives and children who may no longer fit within the current definitions of 'member of a family unit' or 'dependent child'.
17. Funding should be provided to community legal centres/Legal Aid to provide immigration assistance to families to apply for relevant Family or Humanitarian visas, including access to interpreters.

Appendix

Case study one

Hussain arrived by boat in April 2013. He waited five years to have his claim processed and was granted a SHEV. He moved to Adelaide and started work as a bricklayer. He has a wife and three children in Afghanistan. After his SHEV was granted, he was able to travel to Iran to see them in 2019. However, due to COVID-19 travel restrictions, he has not been able to see them since that visit.

He tried hard to stay focused and prevent worsening sleeplessness and rumination over how life could or should be. He completed certificates at TAFE in English and bricklaying, paying international student fees to complete the courses, due to his visa. Further, and also as a result of his temporary visa, he cannot get a bank loan to buy equipment to develop a business of his own. Despite meeting the pathway requirements on the SHEV, he is not qualified for a skilled or employer sponsored permanent visa due to not meeting the English language requirements or having sufficient skills. He feels as though he is a burden to himself and others, despite sending money back home to support his family.

His mental health significantly declined due to the separation from his family and an ever-present struggle to live a meaningful life and find hope in the future. During the takeover by the Taliban last year, his family fled Afghanistan in difficult circumstances after his brother was killed. Physically and emotionally, he is 'here', but also emotionally 'over there'. He feels powerless to intervene and fearful for their safety.

If the recommendations in this Policy Brief were implemented, Hussain would be granted a permanent RoSV. He could commence the process to sponsor his wife and children to Australia via the humanitarian or family migration program.

Case study two

Fatemeh arrived in Australia by boat in September 2012. While in Australia, she met and married another UMA who arrived before her. They had a child together in 2015, who, despite being born in Australia, is also considered an UMA.

Fatemeh applied for a TPV but was refused as the DHA found she could relocate to another part of her home country where she would not face persecution. She was not successful on IAA review, and then appealed to the Federal Court. She is waiting for her case to be decided. As her case is considered 'finally determined', she is not eligible to receive SRSS payments. She is living in the community on a Bridging Visa with work rights, although with childcare responsibilities and minimal English, she can only find casual work as a cleaner. She has a chronic heart condition and requires long-term medication for this and for treatment of major depression. She cannot do physical tasks for enough hours to earn a sufficient wage to support herself and her daughter; she is completely reliant upon her husband's income. Difficulties at home due to the stress of their visa situation has led to family violence. Her husband is controlling, both psychologically and financially. Fatemeh feels physically and emotionally 'boxed' in by her circumstances and will often lie awake at night thinking of her safety. She has sought help several times to leave her husband but, without a stable visa and access to income support, she is fearful she will not be able to provide properly for her seven-year-old daughter.

If the recommendations in this Policy Brief were implemented, both Fatemeh and her daughter would be able to apply for a RoSV and address the social and psychological drivers of her distress. This means identifying and using multiple government and community touch points where Fatemeh can receive comprehensive support that will enable a response without living in fear. Fatemeh would become a central part of a comprehensive and coordinated response comprising legal, health, and social support. With a permanent visa, Fatemeh could make a supported plan for a new life, to leave the family home with her daughter and access adequate financial support from Centrelink. She could improve her English at TAFE and start other studies in community development to pursue her dream to become a community worker.

Endnotes

[1] Elizabeth Newnham et al, 'The Mental Health Effects of Visa Insecurity for Refugees and People Seeking Asylum: A Latent Class Analysis' (2019) 64(5) *International Journal of Public Health* 763; Nicholas Procter et al, 'Lethal Hopelessness: Understanding and Responding to Asylum Seeker Distress and Mental Deterioration' (2018) 27(1) *International Journal of Mental Health Nursing* 448*;* Mary Anne Kenny, Carol Grech, and Nicholas Procter, 'A Trauma Informed Response to COVID-19 and the Deteriorating Mental Health of Refugees and Asylum Seekers with Insecure Status in Australia' (2022) 31(1) *International Journal of Mental Health Nursing* 62; Anna Ziersch et al, 'Temporary Refugee and Migration Visas in Australia: An Occupational Health and Safety Hazard' (2021) 51(4) *International Journal of Health Services* 531.

[2] *Convention relating to the Status of Refugees,* opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) art 31 (*Refugee Convention*); *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 17, 23(1) (*ICCPR*); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 23 (*CRC*); UNHCR, 'Fact Sheet on the Protection of Australia's So-Called "Legacy Caseload" Asylum Seekers' (1 February 2018) https://www.unhcr.org/en-ie/5ac5790a7.pdf. See also Mary Crock and Kate Bones, 'Australian Exceptionalism: Temporary Protection and the Rights of Refugees' (2019) 16(2) *Melbourne Journal of International Law* 522; Frances Nicholson, 'The Right to Family Life and Family Unity of Refugees and Others in Need of International Protection and the Family Definition Applied' (Legal and Protection Policy Research Series Paper No PPLA/2018/01, UNHCR, January 2018) https://www.unhcr.org/5a8c40ba1.pdf.

[3] UNHCR, 'Guidelines on Temporary Protection or Stay Arrangements' (February 2014) https://www.refworld.org/docid/52fba2404.html (*UNHCR Temporary Protection Guidelines*). For an examination of the development of temporary protection in international law and practice, see Crock and Bones (n 2).

[4] *UNHCR Temporary Protection Guidelines* (n 3) [19], [21]. UNHCR has stressed that temporary protection should be solutions-oriented if stay is prolonged, and not used to replace or undermine States' international obligations under the Refugee Convention: at [8]. The European Union Temporary Protection Directive sets a 12-month period, which can be extended to a maximum of three years, after which return or a more secure status must be granted: see *Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in Receiving Such Persons and Bearing the Consequences Thereof* [2001] OJ L 212/12, art 4 (*European Union Temporary Protection Directive*).

[5] Refugee Convention (n 2).

[6] Ibid art 34.

[7] Australian Labor Party, *ALP National Platform* (March 2021) [9]–[10].

[8] *Migration Amendment Regulations 1999 (No 12)* (Cth).

[9] Philip Ruddock, Minister for Immigration and Multicultural Affairs, 'Ruddock Announces Tough New Initiatives' (Media Release MPS 143/99, 13 October 1999) https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22media/pressrel/YOG06%22. Temporary protection for refugees was first put forward as a policy by the One Nation Party in 1998, which stated that 'genuine refugees will be maintained at the current level, but there must be no expectation of automatic permanent residence. If possible they will return to their own country when the unrest in their homeland has been resolved': see One Nation, 'Immigration, Population and Social Cohesion Policy 1998', *AustralianPolitics.com* (Web Page, 1 July 1998) https://australianpolitics.com/1998/07/01/one-nation-immigration-policy.html.

[10] In 2001, as a continuation of its policy to deter unauthorised boat arrivals, the Howard Coalition government began intercepting people who arrived in Australia by boat and taking them to regional processing centres in Nauru and Papua New Guinea, as part of the so-called 'Pacific Solution'. Some of the group processed offshore who were found to be refugees were given temporary visas and allowed to come to Australia. People processed offshore were issued either a three-year 447 Secondary Movement Offshore Entry (Temporary) Visa or a five-year 451 Secondary Movement Relocation (Temporary) Visa.

[11] Greg Marston, 'Temporary Protection, Permanent Uncertainty: The Experience of Refugees Living on Temporary Protection Visas' (Report, Centre for Applied Social Research, RMIT University, July 2003).

[12] Angus Houston, Paris Aristotle, and Michael L'Estrange, 'Report of the Expert Panel on Asylum Seekers' (Report, Australian Government, August 2012) https://apo.org.au/node/30608, 91.
[13] *Migration Amendment Regulations 2008 (No 5)* (Cth).
[14] Chris Evans, Minister for Immigration and Citizenship, 'Budget 2008–09: Rudd Government Scraps Temporary Protection Visas' (Media Release, 13 May 2008).
[15] Ibid.
[16] RoSV holders were eligible for the same entitlements as permanent protection visas, including access to English classes: see Refugee Council of Australia, '2008–09 Budget', *The Federal Budget: What It Means for Refugees and People Seeking Humanitarian Protection* (Web Page, updated 7 May 2022) https://www.refugeecouncil.org.au/federal-budget-what-it-means-for-refugees-and-people-seeking-humanitarian-protection/15/.
[17] *Harriet Spinks, 'A Return to Temporary Protection Visas?', FlagPost (Blog Post, 18 November 2013)* https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2013/November/A_return_to_Temporary_Protection_Visas.
[18] Liberal Party of Australia and National Party of Australia, 'The Coalition's Policy to Clear Labor's 30,000 Border Failure Backlog' (August 2013).
[19] Scott Morrison, Minister for Immigration and Border Protection, and Angus Campbell, Commander of Operation Sovereign Borders, 'Operation Sovereign Borders' (Press Conference, 23 September 2013) https://webarchive.nla.gov.au/awa/20131003014546/http://pandora.nla.gov.au/pan/143035/20131003-1143/www.minister.immi.gov.au/media/sm/2013/sm208387.htm.
[20] Prime Minister of Australia, 'Regional Resettlement Arrangement' (Press Conference, 19 July 2013) https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22media/pressrel/2611766%22
[21] It is accepted that this is not a homogenous group, as will be set out in this Policy Brief; however, the term 'legacy caseload' will be used as a general descriptor to describe the group as a whole.
[22] *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth).
[23] According to the DHA, this number represents people from the

> IMA [illegal maritime arrival] Legacy Caseload who have submitted a valid application that is currently being processed or had their application finalised – either granted or refused. This is not equal to the total number of people who are considered to have 'ever' been in the IMA Legacy Caseload. For example, people who died or departed prior to their application being finalised are not counted in this total as their applications were not processed to finalisation.

Department of Home Affairs (Cth), 'IMA Legacy Caseload: Report on Processing Status and Outcomes' (Report, April 2022) https://www.homeaffairs.gov.au/research-and-stats/files/ima-legacy-caseload-april-2022.pdf, 6.
[24] Ibid 3–5.
[25] Some claimants will have no access to review. This can occur in circumstances where, for example, the DHA assesses the asylum seeker's case to be 'manifestly unfounded', the DHA finds that the asylum seeker has effective protection in another country, or the asylum seeker has produced a 'bogus document' without reasonable explanation. These are known as 'excluded fast track applicants': *Migration Act 1958* (Cth) s 5(1) (*Migration Act*).
[26] For example, if the DHA found that an applicant was not a genuine convert from Islam to Christianity, and thus would not be persecuted on that basis, the IAA will only assess the information provided to the DHA and can refuse to consider additional documentation (eg from witnesses from the applicant's church) on the basis that it is not new information, as it should have been available when the DHA made the initial decision: see *Plaintiff M174/2016 v Minister for Immigration and Border Protection* [2018] HCA 16.
[27] Refugee Council of Australia, 'How Many Cases Are Being Dealt With?', *Fast Tracking and 'Legacy Caseload' Statistics: Review of Fast-Tracking Decisions* (Web Page, updated 17 January 2022) http://refugeecouncil.org.au/fast-tracking-statistics/9/.
[28] Ibid.
[29] John van Kooy, 'Supporting Economic Growth in Uncertain Times: Permanent Pathways for Temporary Protection Visa and Safe Haven Enterprise Visa Holders' (Policy Options Paper, September 2021) https://apo.org.au/sites/default/files/resource-files/2021-09/apo-nid314128.pdf, 2.

[30] Penelope Mathew, 'Constructive Refoulement' in Satvinder Singh Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar Publishing, 2019) 207.
[31] Kenny, Grech, and Procter (n 1).
[32] Marie Segrave, Rebecca Wickes, and Chole Keel, 'Migrant and Refugee Women in Australia: The Safety and Security Study' (Report, 2021).
[33] Australian Human Rights Commission, 'Tell Me About: Temporary Protection Visas' (Fact Sheet, December 2013) https://humanrights.gov.au/our-work/4-what-are-commissions-concerns-about-tpvs, 2–3.
[34] This is according to statistics provided to the Senate Legal and Constitutional Committee about expired Bridging Visa E visas awaiting regrant. It is not clear whether these are all from the legacy caseload, although it is likely there are a significant number that are without Bridging Visas from this caseload: see Department of Home Affairs (Cth), Answers to Questions on Notice, Senate Standing Committee on Legal and Constitutional Affairs, Home Affairs Portfolio, Parliament of Australia, 2022–23 Additional Budget Estimates, AE22-264.
[35] SRSS provides 'needs-based temporary support' to individuals while their claims for protection are being assessed. This support includes income support paid fortnightly (valued at 89 per cent of the Newstart payment), case work support, access to torture and trauma counselling, and access to subsidised medication. Since mid-2018, changes to SRSS mean that asylum seekers who are given the right to work exit the program. Those whose applications are rejected by the DHA and the IAA are generally ineligible for the SRSS program. See Jesuit Refugee Service and St Vincent de Paul Society, 'Access to a Safety Net for All People Seeking Asylum in Australia' (Policy Briefing, June 2021) https://aus.jrs.net/wp-content/uploads/sites/20/2021/07/Safety-Net-Policy-Briefing-June-2021_Updated.pdf.
[36] Australian Human Rights Commission, *Lives on Hold: Refugees and Asylum Seekers in the 'Legacy Caseload'* (Report, 2019) 12; Jesuit Refugee Service and St Vincent de Paul Society (n 36).
[37] Data from November 2021 showed 2,006 children were born in Australia who had one or both parent(s) in the legacy caseload: see Department of Home Affairs (Cth), Answers to Questions on Notice, Senate Standing Committee on Legal and Constitutional Affairs, Home Affairs Portfolio, Parliament of Australia, 2021–22 Supplementary Budget Estimates, SE21-185.
[38] *Migration Regulations 1994* (Cth) reg 2.08 (*Migration Regulations*).
[39] *Australian Citizenship Act 2007* (Cth) s 21(8).
[40] Ibid s 12(1)(b).
[41] Department of Immigration and Citizenship (Cth), Answers to Questions on Notice, Senate Standing Committee on Legal and Constitutional Affairs, Immigration and Citizenship Portfolio, Parliament of Australia, 2012–13 Budget Estimates, BE12-0265.
[42] Sue Hoffman, 'Temporary Protection Visas and SIEV X', *SIEV X* (online, 6 February 2006) http://sievx.com/articles/challenging/2006/20060206SueHoffman.html.
[43] Scott Morrison, Minister for Immigration and Border Protection, 'Reintroducing TPVs to Resolve Labor's Asylum Legacy Caseload' (Press Conference, 25 September 2014) https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22media/pressrel/3414551%22.
[44] Madeline Gleeson and Natasha Yacoub, 'Cruel, Costly and Ineffective: The Failure of Offshore Processing in Australia' (Policy Brief, Kaldor Centre for International Refugee Law, 2021) www.kaldorcentre.unsw.edu.au, 6–7.
[45] While this Policy Brief has tried to capture the main groupings, it is recognised that there are individuals who arrived by boat that may fall into groups outside those listed in part four of this Brief. For example, there is a group of around 1,000 individuals who entered Australia via Ashmore Reef between 2011–13 and, as a result of a series of decisions by the Federal Court of Australia, were not found to be 'unauthorised maritime arrivals': see Australian Human Rights Commission, 'Federal Court Improves Pathways to Protection for More Than A Thousand Asylum Seekers Taken to Ashmore Reef' (Media Statement, 5 May 2021) https://humanrights.gov.au/about/news/media-releases/media-statement-federal-court-improves-pathways-protection-more-thousand. The general reforms outlined in this Policy Brief should also apply to these groups. For those that have not been granted TPVs or SHEVs, consideration will need to be given as to how to amend the *Migration Regulations* (n 39) to allow them to apply for a RoSV.
[46] Nicholas G Procter, '"They First Killed His Heart (Then) He Took His Own Life": Part 2: Practice Implications' (2006) 12 *International Journal of Nursing Practice* 42.
[47] *Migration Regulations* (n 39) sch 2 subclass 851.
[48] Ibid sch 2 cl 851.221 requires applicants to undergo a medical exam; cl 851.222 requires applicants to undergo a chest X-ray. It should be noted that payment for health checks may be a cost barrier for some people. Many in the legacy caseload may have previous health checks completed prior to the grant of their

visas, and it is suggested that policy may be able to direct the use of previous health checks in order to allow for efficient and cost-effective processing.

[49] Ibid cl 851.225.

[50] There may also be some individuals who held one of these visas that expired before they made a subsequent application for a TPV or SHEV. These individuals should be able to apply for a RoSV as well.

[51] Section 45AA(3) of the *Migration Act* (n 26) provides that a regulation (a 'conversion regulation') may provide that an application for one class of visa is converted into an application for a different class of visa.

[52] Department of Social Services (Cth), 'Guide to Social Policy Law: Social Security Guide' (Australian Government, 19 May 2022) [9.2.12] https://guides.dss.gov.au/social-security-guide/9/2/12.

[53] People granted protection visas have access to VET loans and various university loans, such as FEE-HELP, OS-HELP, and SA-HELP. Under the *Higher Education Support Act 2003* (Cth), a 'permanent humanitarian visa holder' is able to access these loans. Schedule 1 clause 1 provides that a 'permanent humanitarian visa holder' has the meaning set out in the *Migration Regulations* (n 39). Under reg 1.03, a 'permanent humanitarian visa' includes a RoSV. This was inserted in 2008 by the *Migration Amendment Regulations 2008 (No 8)* (Cth) in order to 'ensure that holders of these visa[s] are able to access HECS-HELP or FEE-HELP assistance under the *Higher Education Support Act 2003*' (see Explanatory Statement, *Migration Amendment Regulations 2008 (No 8)* (Cth)). See also Australian Government 'StudyAssist' https://www.studyassist.gov.au/.

[54] People granted a TPV or SHEV are usually subject to condition 8570 on their visa. A person subject to condition 8570 cannot return to their home country under any circumstances or any other country unless given permission to travel by the Minister. The person must satisfy the Minister that there are 'compassionate or compelling circumstances' to travel.

[55] Current policy guidance from the DHA explains:

> Under policy, a compassionate circumstance is one relating to humanitarian or humane action or an attempt to alleviate suffering, and a compelling circumstance is one where a person is in a crisis or the situation is overwhelming or requires attention. … All decisions as to whether a visa holder's circumstances are 'compassionate' or 'compelling' are to be made on a case-by-case basis … The following situations are examples of circumstances for travel that are likely to be 'compassionate' or 'compelling': visiting or caring for a '*close relative*' (as per the regulation 1.03) who is seriously ill or dying; or attending the funeral of a 'close relative'. (Emphasis in original.)

Department of Home Affairs (Cth), *Procedures Advice Manual 3* (22 May 2022) [Sch8/8570] ('Condition 8570 – Restricted Travel') (*Procedures Advice Manual 3*).

[56] *Australian Passports Act 2005* (Cth) s 9; *Australian Passports Determination 2015* (Cth) s 6 (*Australian Passports Determination*).

[57] *Australian Passports Determination* (n 57) s 7(1).

[58] A CTD can be issued to a RoSV holder if they previously held a Subclass 785, 447, or 451 visa: see Department of Foreign Affairs and Trade (Cth), 'COI/CTD' (Web Page) https://www.dfat.gov.au/node/149348.

[59] Minister for Immigration, Citizenship and Multicultural Affairs, *Direction 80: Order for Considering and Disposing of Family Visa Applications under s47 and 51 of the Migration Act 1958* (21 December 2018).

[60] *Procedures Advice Manual 3* (n 56) [3.3].

[61] 'Member of a family unit' is defined in *Migration Regulations* (n 39) reg 1.12 and includes a child who has not turned 18 or who has turned 18, but has not turned 23, is not married or engaged, and is 'dependent' on the parent (that is, wholly or substantially reliant on them for financial support to meet basic needs for food, clothing, and shelter: see reg 1.05A).

[62] For the purposes of a Child visa, this includes a child who has not turned 18 or is less than 25 but is 'dependent'.

[63] Refugee Council of Australia, 'Waiting Times', *Family Separation and Family Reunion for Refugees: The Issues* (Web Page, updated 1 March 2021) https://www.refugeecouncil.org.au/family-reunion-issues/2/.

[64] Alex Hawke, Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, '2022–23 Budget Supports Skilled Migration to Drive a Stronger Future' (Media Release, 29 March 2022) https://minister.homeaffairs.gov.au/AlexHawke/Pages/2022-23-budget-release.aspx.

[65] Alex Hawke, Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, 'Commitment to Afghanistan Increased' (Media Release, 21 January 2022) https://minister.homeaffairs.gov.au/AlexHawke/Pages/commitment-to-afghanistan-increased.aspx.
[66] Department of Home Affairs (Cth), Answers to Questions on Notice, Senate Standing Committee on Legal and Constitutional Affairs, Home Affairs Portfolio, Parliament of Australia, 2022–23 Additional Budget Estimates, AE22-081.
[67] On 14 February 2022, the DHA stated that they 'received and receipted, as in deemed to be lawful applications, about 55,000 applications—generally for the XB class visa'. In addition, there were about another 100,000 which had 'not yet been certified as a legal application'. See Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 14 February 2022, 53 (David Wilden).
[68] See further Human Rights Law Centre, *Together in Safety: A Report on the Australian Government's Separation of Families Seeking Safety* (April 2021) https://www.hrlc.org.au/reports/2021/9/1/together-in-safety-report; Refugee Council of Australia, 'Denying Family Reunion for Refugees: Impact of Direction 80' (Web Page, 14 April 2020) https://www.refugeecouncil.org.au/direction-80/.