



Refugee Legal:
Defending
the rights of
refugees.

**Submission to the Select Committee on Temporary
Migration**

30 July 2020

**Defending the rights
of refugees.**

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Refugee Legal

Refugee Legal (formerly the Refugee and Immigration Legal Centre) is a specialist community legal centre and the largest provider of free legal assistance to asylum-seekers and disadvantaged migrants in Australia. Since its inception over 32 years ago, Refugee Legal and its predecessors have assisted many thousands of asylum seekers and migrants in the community and in detention.

Refugee Legal specialises in all aspects of refugee and immigration law, policy and practice. Our model involves direct client work, strategic work for change and education and training. In the last financial year, we assisted over 14,285 vulnerable asylum seekers, refugees and migrants. With key partners, we have succeeded for clients in 10 out of 10 High Court cases with the benefits flowing to many thousands of other people seeking asylum. We are also one of the leading providers in Australia of education and training in all aspects of Australia's refugee and immigration program. We play an active role in professional training, community education and policy development. We are a longstanding member of the peak Department of Home Affairs/Immigration and Border Protection-NGO Dialogue and other consultative fora. Refugee Legal has substantial casework experience and is a regular contributor to the public policy discourse on refugee and general migration matters.

1. Overview of submission

- 1.1. We welcome the opportunity to provide a submission to the Senate Select Committee on Temporary Migration (the **Committee**) in relation to the impact of temporary migration on the Australian economy, wages and jobs, social cohesion and workplace rights and conditions. We have focused our submission on the following aspects of the Committee's Terms of Reference:
- (c) policy responses to challenges posed by temporary migration;
 - (d) whether permanent migration offers better long-term benefits for Australia's economy, Australian workers and social cohesion;
 - (e) the impact of...modern slavery and human trafficking on temporary migrants; and
 - (f) any related matters.
- 1.2. We consider that central to any analysis of Australia's temporary migration system must be an acknowledgement of the fundamental importance of the right to seek asylum. It is not necessary, nor desirable, to dilute the refugee protection framework in response to challenges posed by temporary migration. Rather, we recommend that these challenges be addressed through strengthening protections for temporary migrants and creating additional pathways to permanent residency to reduce the potential for exploitation and abuse. In this regard, we draw to the Committee's attention the particular vulnerabilities of refugees, victims/survivors of domestic, family and sexual violence, and victims of modern slavery. We consider that permanent migration for these groups will ultimately offer better long-term benefits for our economy, workers and social cohesion.
- 1.3. The impact of the COVID-19 pandemic has exacerbated many of the challenges experienced by temporary migrants and exposed disparities between permanent and temporary migrants, including in the Australian Government's response. As the Committee considers a national plan for migration following COVID-19,¹ the important contributions made by temporary migrants to the social, economic and cultural life of the nation must be recognised as an essential component of our post-COVID-19 recovery.
- 1.4. This submission is not intended to be an exhaustive discussion of the issues and instead outlines some of the key areas of concern for asylum seekers, refugees and temporary migrants through illustrative case studies.²

2. Recommendations

We recommend that the Australian Government:

- (1) **Recommendation 1:** Ensure the right to seek asylum is realistically accessible and achievable within Australia.
- (2) **Recommendation 2:** Amend the *Migration Act 1958* (Cth) (the **Act**) to grant permanent visas to all recognised refugees, including current holders of Temporary Protection visas and Safe Haven Enterprise visas.
- (3) **Recommendation 3:** Expand access to the family violence provisions in the *Migration Regulations 1994* (Cth) (the **Regulations**) to provide a pathway to permanent residency for victims/survivors of domestic, family and sexual violence who are temporary migrants.

¹ Senate Committee on Temporary Migration, "Upcoming Public Hearings" (Media Release, 27 July 2020).

² To protect the identities of our clients, the case studies in this submission have been modified to ensure de-identification of any personal particulars.

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- (4) **Recommendation 4:** Amend the *Migration Regulations 1994* (Cth) to enable reliance on the family violence provisions in circumstances where the abusive relationship has not yet ceased.
- (5) **Recommendation 5:** In the assessment of applications for Protection visas, direct decision-makers to consider whether applicants are reasonably able to provide evidence of domestic, family and sexual violence, and expressly provide that documentary evidence is not required to substantiate these types of protection claims.
- (6) **Recommendation 6:** Create a new visa pathway to permanent residency for victims of modern slavery that is de-linked from criminal investigations and prosecutions.
- (7) **Recommendation 7:** Provide universal access to medical treatment and Medicare during the COVID-19 pandemic, and immediately expand eligibility for the JobKeeper and JobSeeker payments to include temporary visa holders.
- (8) **Recommendation 8:** Preserve temporary migration as an essential component of the national plan for migration following COVID-19.

3. Fundamental importance of the right to seek asylum

- 3.1. Australia has a long history of advocating for human rights, including internationally. Australia was one of the founding members of the United Nations and Australian Dr HV Evatt was the President of the United Nations General Assembly in 1948, when the Universal Declaration of Human Rights was adopted. The Declaration includes Article 14, which enshrines the “right to seek and to enjoy in other countries asylum from persecution”.³
- 3.2. Consistent with Australia’s obligation not to return a refugee to a territory where their life or freedom is threatened,⁴ it is of profound importance that the right to seek asylum is realistically accessible and achievable.
- 3.3. In this regard, we are concerned about the potential implications of political rhetoric around temporary migration, which has shifted in the past 12 months to focus on the “surge” in the number of asylum seekers arriving in Australia by plane.⁵ While we support and encourage measures to investigate ways to mitigate against the exploitation of temporary migrants, the ability of temporary entrants to assert their right to claim asylum is not, of itself, a cause of abuse of the system; nor should any identified abuse lead to the further erosion of the fundamental right to seek asylum from persecution. In this context, we further note that any identified abuses of this right are complex including exploitation of temporary entrants by third parties.
- 3.4. As such, we urge the Committee to recognise and reinforce the fundamental right to seek asylum, and any measures taken to deal with identified abuse or policy responses to challenges posed by temporary migration (Terms of Reference, para (c)) should not in any way diminish Australia’s responsibility to uphold its protection obligations by preserving ready access to the right to seek asylum.

Recommendation 1: Ensure the right to seek asylum is realistically accessible and achievable within Australia.

³ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948).

⁴ Australia’s non-refoulement obligations arise from international treaties including:

- the *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954), including as incorporated into the *Migration Act 1958* (Cth) (the **Act**);
- the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); and
- the *Convention against Torture and Other Cruel, Inhumane or Degrading treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

⁵ See eg the RMIT ABC Fact Check, *Labor and the Coalition are arguing about asylum seekers coming by plane. Here are the facts* (18 October 2019).

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- 3.5. The importance of Australia's recovery from the impact of the COVID-19 pandemic cannot be over stated, both in terms of the economy and social cohesion. Research shows undeniable social, cultural and economic benefits in investing in refugee contributions.⁶ It would be a missed opportunity if Australia did not utilise this potential to help rebuild post-pandemic.
- 3.6. Modelling by Deloitte Access Economics published in August 2019 suggests that:
*... if Australia increased its humanitarian migrant intake to 44,000 per annum over a five year period, as proposed by Oxfam Australia, economic output could increase by more than \$37.7 billion in net present value terms over the next 50 years and the economy could sustain an average of 35,000 additional jobs every year for the next 50 years.*⁷
- 3.7. Similarly, last year's Australian Government *Review into Integration, Employment and Settlement Outcomes for Refugees and Humanitarian Entrants in Australia* found that the "opportunity cost to governments of not capitalising on the untapped potential of refugees to participate fully in the economic and social life of Australia runs to hundreds of millions of dollars".⁸ This research is borne out in fact, for example through the enormous financial benefit the settlement of Karen refugees in Nhill has generated for the Victorian town's economy.⁹

Case Study 1

Hamad was granted a visitor visa to travel to Australia. Before he left Pakistan, he experienced persecution and was able to escape the country quickly on his visitor visa. Once he arrived in Australia, he lodged an application for a Protection visa, based on his fears of returning to Pakistan. While Hamad waited for his visa application to be processed he remained in the Australian community on a temporary Bridging visa with work rights. He was able to start working for a local business, in his profession as an accountant. Hamad was granted a permanent Protection visa and now runs his own accounting firm which employs 10 local staff members.

- 3.8. Safeguarding the fundamental right to seek asylum not only ensures that Australia meets its human rights obligations, and is able to credibly promote human rights protections globally, but also creates opportunity for economic growth within the country.

4. Uncertainty in temporary protection for refugees

- 4.1. Migration systems which grant recognised refugees only temporary – rather than permanent – protection in Australia create widespread uncertainty (Terms of Reference, para (c)).
- 4.2. In contrast, permanent refugee migration systems create significant benefits, both to the individual and Australia more broadly (Terms of Reference, para (d)).
- 4.3. In 2014, the Coalition government reintroduced a temporary protection migration system for people who arrived in Australia without a valid visa. This was said to be justified by a policy of "deterrence".¹⁰ A large group of those impacted are referred

⁶ See eg Graeme Hugo, *The Economic Contribution of Humanitarian Settlers in Australia*, International Migration (2013); and Graeme Hugo (on behalf of the Australian Government, Department of Immigration and Citizenship), *A Significant Contribution: The Economic, Social and Civic Contributions of First and Second Generation Humanitarian Entrants* (2011).

⁷ Deloitte Access Economic, *Economic and social impact of increasing Australia's humanitarian intake – Oxfam Australia* (August 2019).

⁸ Australian Government, *Investing in Refugees – Investing in Australia* (February 2019).

⁹ See eg ABC News, *Karen refugees make \$40m contribution to Nhill economy in Victoria's Wimmera study finds* (24 April 2015).

¹⁰ See Parliament of Australia, Department of Parliamentary Services, Research Paper Series 2017-19, *Developments in Australian refugee law and policy: the Abbott and Turnbull Coalition governments (2013-2016)* p 27.

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to as the “legacy caseload” of asylum seekers, who arrived in Australia by boat between 13 August 2012 and 1 January 2014.¹¹

- 4.4. As a result of this policy change, many of Refugee Legal’s clients are only eligible to hold Temporary Protection visas (**TPVs**) or Safe Haven Enterprise visas (**SHEVs**), which expire after three or five years, respectively, despite Australia finding they are refugees.
- 4.5. As an example of the impact of this policy, stateless Rohingyas from Myanmar, whom the United Nations has described as one of the most persecuted minorities in the world,¹² have been among those trapped in this temporary migration cycle. By reason of their undocumented arrival upon seeking asylum – a right enshrined under international and domestic law – they have been penalised by perpetual visa uncertainty.
- 4.6. If someone is successful in obtaining a TPV or SHEV, their current future visa options are:
 - (a) For TPV holders:
 - the only option is to apply for another TPV or a SHEV, and again demonstrate that all the criteria are met.
 - (b) For SHEV holders:
 - the person can apply for another TPV or a SHEV, and again demonstrate that all the criteria are met; or
 - if the person meets the “SHEV pathway”,¹³ they can apply for certain other Australian visas, including permanent visas, however will only be eligible for another visa if they also meet the requirements of that other visa.
- 4.7. In our experience, the inherent uncertainty which results from the temporary protection system and the practical – and for most, impenetrable – barrier in meeting the SHEV pathway, not only seriously impacts the individuals concerned, but has wider negative implications for the country, including Australian employers. These legal barriers render the possibility of permanent residency illusory for most.

¹¹ For more information regarding this group of asylum seekers, see the Andrew & Renata Kaldor Centre for International Refugee Law, *Factsheet: The ‘Legacy Caseload’* (10 April 2019).

¹² United Nations Secretary-General, *Transcript of Secretary-General’s remarks at press encounter with President of the World Bank, Jim Yong Kim* (2 July 2018).

¹³ The “SHEV pathway” is met if the SHEV holder, for a total of 42 months while holding a SHEV:

- is employed in a SHEV regional area and does not receive the Special Benefit payment; or
- is enrolled and physically attends full-time study in a SHEV regional area; or
- a combination of both of the above options.

See *Migration Regulations 1994* (Cth) (the **Regulations**) Reg 2.06AAB and Sch 1, Pt 4, Item 1404.

Details - including which postcodes are designed as a “regional area” - are included in legislative instruments, see eg IMMI 15/070, IMMI 15/071, IMMI 15/072 and LIN 18/081.

Case Study 2

Zaynab first arrived in Australia in 2013 and was granted a SHEV in 2015. Since her arrival in Australia, Zaynab has worked in aged care. In an attempt to meet the “SHEV pathway”, Zaynab made the hard decision to leave her job and move to regional Australia. Zaynab was hired by Sam, who is an Australian citizen, and owns the local grocery store. Zaynab felt incredibly lucky to find a job, as many people in her situation have not been able to find employment in regional areas. Zaynab has worked for Sam for the past four years and is often left in charge of the store for weeks at a time. Sam has recently experienced significant financial hardship as a result of the COVID-19 pandemic. He cannot afford to train a new employee, but is increasingly concerned about Zaynab’s uncertain visa status, especially because her SHEV is due to expire this year. Despite having met the “SHEV pathway”, there are no permanent visas for which Zaynab is eligible. Her only option is to reapply for another SHEV. Sam is worried about Zaynab’s temporary visa status and thinks he would need to consider closing the shop if she was forced to leave Australia.

- 4.8. In addition, research consistently shows that refugees with insecure visa status, such as those holding TPVs and SHEVs, have higher levels of psychological distress compared to those with permanent visas.¹⁴ Experiencing prolonged uncertainty regarding immigration status is associated with harm to mental health, particularly given refugees are commonly exposed to trauma and persecution in their home countries prior to fleeing.¹⁵ This research reflects the experience of many of our clients, who have found themselves in a cycle of perpetual limbo and re-traumatisation which significantly impedes the process of rebuilding their lives.
- 4.9. We are also concerned that vulnerable refugees stuck in this temporary protection cycle do not have access to benefits available to those on permanent Protection visas. The COVID-19 pandemic has brought into the spotlight the serious implications of this disparity (see further Section 7: Exclusion and discrimination during the COVID-19 pandemic).
- 4.10. We should learn from our history in regard to temporary protection migration systems, given that TPVs were first introduced back in 1999. Of the 11,206 people who were granted TPVs between 1999-2007, 95 per cent eventually obtained permanent visas in Australia.¹⁶

Case Study 3

Muhammad arrived in Australia by boat in 2012 but, despite being assessed as having prima facie protection claims upon arrival, due to government policy he was not invited to apply for a Protection visa until 2016. In 2018, he was found to be a refugee and granted a TPV, which is due to expire next year. Muhammad is eager to contribute to the Australian community but continues to suffer from PTSD symptoms. The prospect of having to again relive the trauma he experienced in Afghanistan, in order to apply for a second TPV in 2021, has significantly contributed to the ongoing mental anguish he suffers. Muhammad finds it hard to see a future for himself and lives in fear that he will one day be forced to return to Afghanistan, especially because the situation in Afghanistan has only worsened since he left. He thought that once he was recognised as a refugee, he would feel safe to build a life for himself in Australia. Instead he has been in a perpetual state of uncertainty since he fled persecution nearly a decade ago.

¹⁴ See eg Nickerson A, Byrow Y, O'Donnell M, et al., *The association between visa insecurity and mental health, disability and social engagement in refugees living in Australia*, Eur J Psychotraumatol, (2019) 10(1):1688129.

¹⁵ See eg Procter NG, Kenny MA, Eaton H, Grech C, *Lethal hopelessness: Understanding and responding to asylum seeker distress and mental deterioration*, Int J Ment Health Nurs, (2018) 27(1):448-454.

¹⁶ See Parliament of Australia, *A return to Temporary Protection Visas?* (18 November 2013).

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- 4.11. Given the significant cost on the community sector, and the resources occupied within the Department of Home Affairs, as a result of the continual processing of TPV and SHEV applications every three or five years, we submit that the temporary protection system does not make economic sense.
- 4.12. In our experience, government policies enshrined in the Act, that allow for temporary rather than permanent migration outcomes for refugees, also undercut social cohesion in Australia, which should instead be encouraged (Terms of Reference, para (d)).
- 4.13. Instead of consigning refugees to an unending cycle of proving their asylum claims again and again, these people should be empowered to contribute their all to the Australian society, including the economy. The potential of refugees to positively contribute to the social, cultural and economic life of the nation in a significant way is proven, as outlined above (see Section 3: Fundamental importance of the right to seek asylum).

Recommendation 2: Amend the *Migration Act 1958* (Cth) to grant permanent visas to all recognised refugees, including current holders of Temporary Protection visas and Safe Haven Enterprise visas.

5. Barriers to safety for victims/survivors of violence

- 5.1. There remain substantial barriers to safety in the temporary migration system for victims/survivors of domestic, family and sexual violence¹⁷ (Terms of Reference, para (c)).
- 5.2. Based on our experience providing legal assistance to women affected by violence, it is apparent that perpetrators often use their victim's/survivor's temporary visa status as a means of exerting further coercion and control.¹⁸ While previous reforms to the Act have sought to address these issues, further legislative and policy change is required to ensure that visa status does not continue to be a barrier to safety.¹⁹

Case Study 4

Cassandra came to Australia as a secondary applicant on her husband's temporary skilled visa. Her husband organised their visas. His violence has been escalating in recent months and she wants to leave him, but he tells her that he can have her detained and deported if she tries to end the relationship. She has never reported his violence to the police as English is her second language and she fears that he would become more violent in retaliation. She is scared to return to her home country as she believes that her family will not accept their separation. She feels she has no options and so remains in the violent relationship.

- 5.3. There are presently limited visa options to enable those suffering violence to remain in Australia, particularly where they are the secondary applicant or dependant on their abusive partner's visa. Although the 'family violence provisions'²⁰ provide a

¹⁷ We use this terminology consistently with the Australian Institute of Health and Welfare, *Family, domestic and sexual violence in Australia: continuing the national story* (2019), p 2: 'Family violence' refers to violence between family members. 'Domestic violence' refers to violence between intimate partners. 'Sexual violence' refers to behaviour of a sexual nature against the other person's will.

¹⁸ We refer to domestic, family and sexual violence as a gendered crime in which women are the majority of victims/survivors and men are the majority of perpetrators: see eg Australian Institute of Health and Welfare, *Family, domestic and sexual violence in Australia: continuing the national story* (2019), p vii. Given this, we have focused on women being predominantly at risk and vulnerable within the immigration system. However, we recognise that men can also be victims/survivors of such violence. We also consider LGBTIQ people who are experiencing violence in their relationships should be able to access the family violence provisions.

¹⁹ For a comprehensive discussion of these issues, see National Advocacy Group on Women on Temporary Visas Experiencing Violence, *Blueprint for Reform: Removing Barriers to Safety for Victims/Survivors of Domestic and Family Violence who are on Temporary Visas* (2019).

²⁰ Division 1.5 of the Regulations.

pathway to permanent residency for some temporary migrants, these provisions are only available in relation to certain Partner visa applications and the Distinguished Talent visa.²¹ Women who hold other visas by virtue of their relationship with their abusive partner – including student visas and skilled visas – are unable to access these provisions.

- 5.4. The current visa framework also provides limited options for women whose children are the subject of family law orders requiring them to remain in Australia. This situation can arise where the other parent is an Australian citizen or permanent resident who seeks joint parental responsibility or visitation rights. In our experience, this leaves victims/survivors of violence with few choices. They can separate from their abusive partner and risk becoming unlawful²² or can remain in the abusive relationship to avoid being forced to leave the country without their child. We consider that where there are ongoing family law proceedings, or where a court makes family law orders, the immigration system must provide a pathway to enable women to safely comply.

Recommendation 3: Expand access to the family violence provisions in the *Migration Regulations 1994* (Cth) to provide a pathway to permanent residency for victims/survivors of domestic, family and sexual violence who are temporary migrants.

- 5.5. The existing legislative framework also requires the abusive relationship to have already ceased before the family violence provisions can be engaged.²³ However, research indicates that the cessation of a relationship may result in an escalation of violence, particularly in the absence of appropriate community and social supports – around one in seven women who separate from their partner experience an increase in violence during the separation.²⁴ This risk is particularly acute for women on temporary visas who are often isolated from family and friends.
- 5.6. The current operation of the law therefore requires victims/survivors of violence to leave the relationship and gamble on their ability to engage the family violence provisions, often without an adequate safety net, nor any certainty as to their ability to remain in Australia. This acts as a substantial barrier to women on temporary visas leaving abusive relationships. We consider that there should be visa options available to victims/survivors of domestic, family and sexual violence that enable these women to make safe choices about separating from their abusive partners.

Recommendation 4: Amend the *Migration Regulations 1994* (Cth) to enable reliance on the family violence provisions in circumstances where the abusive relationship has not yet ceased.

- 5.7. The primary alternative permanent visa option for victims/survivors of violence is a Protection visa. To be successful, applicants must be able to demonstrate that they have a well-founded fear of persecution in their home countries due to, for example, their membership of a particular social group²⁵ – such as women who have

²¹ Subclass 100 – Partner visa: cl 100.221(4) in Sch 2 to the Regulations; Subclass 801—Partner: cl 801.221(6) in Sch 2 to the Regulations; Subclass 820—Partner visa: cl 820.211(8)-(9), 820.221(3) and 820.212(8)-(9) in Sch 2 to the Regulations; Subclass 858—Distinguished Talent: cl 858.321(3) in Sch 2 to the Regulations. See also Subclass 445—Dependent Child: cl 445.223(3) in Sch 2 to the Regulations. There are additional barriers for women who are holders of the Prospective Marriage Visas (subclass 300), who are only able to access the family violence provisions if they married their abusive partner prior to the relationship breakdown: cl 820.212(8)-(9) in Sch 2 to the Regulations.

²² While it may be possible to obtain a Bridging visa for the duration of family law proceedings, these are temporary visas that are unlikely to be granted for longer periods of time to enable ongoing compliance with family law orders.

²³ See eg cl 820.221(3)(a): “the applicant would continue to meet the requirements of subclause 820.211(2), (5) or (6) *except that the relationship between the applicant and the sponsoring partner has ceased*,” (emphasis added).

²⁴ See eg Australian Institute of Health and Welfare, *Family, domestic and sexual violence in Australia: continuing the national story* (2019), p 12.

²⁵ The other grounds for refugee protection are race, religion, nationality and political opinion: s 36(2)(a) of the Act.

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separated from their husbands – or that there is a real risk that they will suffer significant harm if forced to return to their home country.²⁶

- 5.8. However, in our experience, the assessment of refugee claims based on family, domestic or sexual violence is often arbitrary and reflects a fundamental misunderstanding about the nature of such violence. For example, factors such as domestic legislation and cultural norms that act as a barrier to the reporting or disclosure of family violence are often overlooked. Applicants may also be expected to produce large amounts of documentary evidence about the existence of violence such as court orders, medical records or police reports that often exceeds the evidence required from other Protection visa applicants.
- 5.9. This is contrary to policy guidance from the Department of Home Affairs and the Administrative Appeals Tribunal, and indicates that regular training is required for decision-makers on the proper assessment of Protection visa applications based on domestic, family and sexual violence claims.²⁷

Case Study 5

Samah applied for a Protection visa after separating from her abusive husband. During her interview with the Department, Samah was repeatedly asked to explain why she continued to place her children at risk by remaining in the relationship and questioned about her parents remaining on good terms with her husband. Her visa application was refused by the Minister's delegate who had concerns about Samah's "delay" in reporting her husband's violence and did not believe that Samah's husband would be likely to seriously harm her or her children if they returned home. Two years later, the Administrative Appeals Tribunal remitted Samah's visa application to the Department with the direction that Samah is entitled to complementary protection and therefore meets the criteria for a Protection visa. The Tribunal accepted that Samah was not able to report the violence earlier as she feared the police and did not know how to access family law services in Australia.

Recommendation 5: In the assessment of applications for Protection visas, direct decision-makers to consider whether applicants are reasonably able to provide evidence of domestic, family and sexual violence, and expressly provide that documentary evidence is not required to substantiate these types of protection claims.

6. Path to nowhere for victims of modern slavery

- 6.1. The temporary migration system does not adequately protect victims of modern slavery (Terms of Reference, para (e)). We use the term 'modern slavery' to encompass human trafficking, slavery, debt bondage, forced labour, forced marriage and other slavery-like practices.²⁸
- 6.2. Based on our experience, visa insecurity and the absence of clear migration pathways for victims of modern slavery exacerbate the risk of continuing exploitation. We provide legal assistance to a subset of such victims in relation to their visa status and, as such, have focused our discussion on issues concerning immigration pathways. However, we note that migrant workers may also experience wage theft and substandard work conditions that, while falling short of modern

²⁶ Section 36(2)(aa) of the Act.

²⁷ Department of Home Affairs Procedures advice manual (PAM3) and Administrative Appeals Tribunal Migration and Refugee Division Guidelines on Gender.

²⁸ We use the definition adopted by the Joint Standing Committee on Foreign Affairs, Defence and Trade, *Hidden in Plain Sight* (Dec 2017), [1.1]. See also the legislative definition of 'modern slavery' in s 4 of the *Modern Slavery Act 2018* (Cth).

slavery, nevertheless result in significant disparity that should be addressed through reform to the temporary migration system.

- 6.3. The true scale of modern slavery in Australia is unknown. Between 2004 and 2017, there were 841 cases of human trafficking and slavery reported to the Australian Federal Police, but only 21 offenders were convicted.²⁹ In 2018, 179 suspected cases of trafficking were investigated³⁰ and prosecutions were initiated against two defendants for forced labour, and forced labour and sex trafficking, respectively.³¹ The Australian Institute of Criminology estimates that only one in five cases of modern slavery are reported or detected.³²
- 6.4. Temporary migrants are particularly susceptible to modern slavery. Visa status is often inextricably linked to employment, either formally or informally. This creates a significant power imbalance between workers and employers, heightened by cultural and language barriers. Coupled with the complexity of the temporary migration system, this has resulted in a “hidden” underclass of temporary migrants who are exploited for their labour.³³

Case Study 6

Budi arrived in Australia with the assistance of a group who claimed that he would be granted Australian permanent residency if he worked for them for three years. The group organised his visa application. When he arrived in Australia, his identity and travel documents were taken and he was escorted to a fruit farm. He was beaten and forced to work over 12 hours each day for minimal pay. He does not speak any English and has no personal contacts in Australia. He could not leave the farm, so continued to work for the duration of the three years, after which he was told that he was an Australian permanent resident. It was only when Budi sought legal assistance that he discovered that his visa had expired and he had been living unlawfully in Australia for years. He fears he will be harmed by the traffickers if he returns to his home country.

- 6.5. There are very limited visa pathways for victims of modern slavery to lawfully remain in Australia. The vast majority have been unlawful – that is, without a valid visa – and are therefore unable to meet the criteria for the grant of other visas.³⁴ Some may also be statute barred from applying for most visas if they (or the perpetrator on their behalf) have previously applied for an Australian visa that has been refused.³⁵
- 6.6. While the Human Trafficking Visa Framework attempts to address this lacuna, it is far too narrow in its scope offering only two visa options:³⁶
 - (a) Bridging visa F – granted to persons assessed by the Australian Federal Police as suspected victims of human trafficking, slavery or slavery-like practices for an initial term of 45 days for ‘reflection and recovery’ that may be extended for a further 45

²⁹ Australian Institute of Criminology, *Estimating the dark figure of human trafficking and slavery victimization in Australia* (2019), p 2.

³⁰ There were 166 cases investigated in 2017 and 105 cases investigated in 2016 in Australia: US Department of State, *2019 Trafficking in Persons Report* (June 2019), p 75.

³¹ There were six prosecutions in 2017 and five prosecutions in 2016 in Australia: US Department of State, *2019 Trafficking in Persons Report* (June 2019), p 75.

³² Australian Institute of Criminology, *Estimating the dark figure of human trafficking and slavery victimization in Australia* (2019), p 6. Accordingly to the Global Slavery Index 2018, there are approximately 15,000 people living in conditions of modern slavery in Australia (figures as at 2016): Minderoo Foundation, *Global Slavery Index – Australia* (2018), available online: <<https://www.globalslaveryindex.org/2018/findings/country-studies/australia/>>.

³³ Using the language adopted by the Joint Standing Committee on Foreign Affairs, Defence and Trade which describes modern slavery as “hidden in plain sight”: Joint Standing Committee on Foreign Affairs, Defence and Trade, *Hidden in Plain Sight* (Dec 2017).

³⁴ See eg the criteria for a Partner visa in Sch 3 to the Regulations.

³⁵ Section 48(1) of the Act read with reg 2.12 of the Regulations.

³⁶ See Joint Standing Committee on Foreign Affairs, Defence and Trade, *Hidden in Plain Sight* (Dec 2017), [6.46]-[6.50].

days.³⁷ A longer-term visa may also be granted for victims who participate in the prosecution of their traffickers, which allows them to remain in Australia for the duration of the criminal justice process.³⁸

- (b) Referred Stay (Permanent) visa – granted to persons who have contributed to, and cooperated closely with, an investigation in relation to another person who was alleged to have engaged in human trafficking, slavery or slavery-like practices.³⁹ This visa entitles the holder to remain in Australia permanently.⁴⁰

- 6.7. Both visas are contingent upon victims of modern slavery contributing to the criminal investigation of their alleged perpetrators, despite the low rates of prosecution and conviction (see para [6.3] above). This creates an erroneous presumption that the value of victims must be solely measured by their ability and willingness to participate in the criminal justice process,⁴¹ and fails to acknowledge that the temporary migration system has contributed to an environment in which such criminal conduct can occur. In our experience, it can also compound the disempowerment and oppression of victims who feel that their protection and future depends on giving evidence against perpetrators no matter what threats of retribution have been made to themselves or their families overseas.
- 6.8. While some victims may be eligible for a Protection visa, for example, on the basis of their membership of the particular social group of trafficked persons⁴² or because there is a real chance that they will suffer significant harm in their home countries if forced to return,⁴³ the law in this area has been subject to inconsistent application.
- 6.9. We consider that, at a minimum, victims of modern slavery should have the opportunity to apply for permanent visas to remain in Australia. This option should exist for all victims irrespective of the investigation and prosecution of perpetrators.

Recommendation 6: Create a new visa pathway to permanent residency for victims of modern slavery that is de-linked from criminal investigations and prosecutions.⁴⁴

7. Exclusion and discrimination during COVID-19 pandemic

- 7.1. The COVID-19 pandemic has exacerbated the challenges faced by temporary migrants that are outlined in this submission and created new barriers to safety and security (Terms of Reference, para (f)).
- 7.2. During the pandemic, we have seen an increase in requests for legal assistance from women who have experienced family, domestic and sexual violence (see Section 5: Removing barriers to safety for victims/survivors of violence). In April 2020, during the first Victorian lockdown in response to COVID-19, almost 30% of all calls received through our telephone advice line were from women who have

³⁷ Clause 1306 in Sch 1 to the Regulations.

³⁸ See Joint Standing Committee on Foreign Affairs, Defence and Trade, *Hidden in Plain Sight* (Dec 2017), Box 6.2.

³⁹ Regulation 2.07AK of the Regulations. The Minister for Home Affairs must also be satisfied that the applicant would be in danger if he or she returned to his or her home country: reg 2.07AK(3)(f).

⁴⁰ See Joint Standing Committee on Foreign Affairs, Defence and Trade, *Hidden in Plain Sight* (Dec 2017), Box 6.2.

⁴¹ Some victims may be unable to engage in the criminal justice process due to the trauma they have experienced: see eg Joint Standing Committee on Foreign Affairs, Defence and Trade, *Hidden in Plain Sight* (Dec 2017), [6.39]-[6.44].

⁴² See s 36(2)(a) of the Act.

⁴³ See s 36(2)(aa) of the Act, referred to as the complementary protection criterion.

⁴⁴ This recommendation is consistent with Recommendation 21 of the Joint Standing Committee on Foreign Affairs, Defence and Trade in its December 2017 report, *Hidden in Plain Sight*: para [6.79] (“The Committee recommends that the Australian Government de-links access to the Support for Trafficked People Program and the Human Trafficking Visa Framework (including the Bridging F visa and Referred Stay (Permanent) visa) from compliance with criminal investigations.”).

experienced violence and were seeking legal assistance in relation to their visa status.

- 7.3. We have also seen a dramatic surge in requests for material assistance from asylum seekers, refugees and temporary migrants, including TPV and SHEV holders (see Section 4: Uncertainty in temporary protection for refugees). There has been a categorical failure to meet the needs of these vulnerable groups during the COVID-19 public health emergency. They have often been excluded from access to Medicare, medical treatment and a financial safety net,⁴⁵ with implications for the protection of their legal rights and ability to meaningfully engage with the immigration system. The result is an inequitable response that has excluded some of the most vulnerable in our community on the basis of their visa status.

Case Study 7

Sara is a restaurant manager. She is the holder of a SHEV. She lost her job in July when the restaurant was forced to close after struggling to recover from the restrictions imposed as a result of COVID-19. She has not been able to find another job. While some of her colleagues have been able to access JobSeeker because they are permanent residents or Australian citizens, Sara is not eligible for this scheme. She is very worried about accessing the Special Benefit payment as this could impact on her eligibility for a permanent visa (see para [4.6] above). But if she cannot find employment soon, she will have no choice but to apply for the payment and potentially forfeit the opportunity to apply for a permanent visa.

- 7.4. We consider that at the forefront of the response to COVID-19 must be the basic principle that the health of one affects the health of all. Accordingly, temporary migrants must not be excluded from the Australian Government's COVID-19 support package and must be guaranteed access to Medicare and medical treatment.

Recommendation 7: Provide universal access to medical treatment and Medicare during the COVID-19 pandemic, and immediately expand eligibility for the JobKeeper and JobSeeker payments to include temporary visa holders.

- 7.5. As the Committee has acknowledged, there is an opportunity for this inquiry to make a "significant contribution to the development of a national plan for migration post-COVID-19".⁴⁶ We consider that any such plan must recognise the important contribution that temporary migrants have made to the social fabric of Australian society and to the relative strength of our economy. Temporary migrants and refugees can similarly play an essential role in Australia's recovery from the impact of COVID-19 (see paras [3.5]-[3.8] above).
- 7.6. However, the Australian Government must ensure that temporary migrants are adequately supported through the pandemic, and in the recovery. This requires the creation of pathways to permanent residency, particularly for holders of temporary protection visas (Section 4: Uncertainty in temporary protection for refugees), victims/survivors of domestic, family and sexual violence (Section 5: Barriers to safety for victims/survivors of violence) and victims of modern slavery (Section 6: Path to nowhere for victims of modern slavery). It also requires a national migration plan that values temporary migrants as colleagues, neighbours and friends who, like

⁴⁵ Temporary migrants are not eligible for the Australian Government's JobSeeker or JobKeeper schemes: see eg Parliament of Australia, Parliamentary Library, *Temporary visa holders and social security: a quick guide* (15 May 2020). TPV and SHEV holders are eligible for the Special Benefit payment. However, to be eligible for a limited range of permanent visas, SHEV holders must work in a designated regional area without accessing Centrelink payments, including the Special Benefit payment, for 42 months (referred to as the "SHEV pathway"): see further Department of Home Affairs, *Safe Haven Enterprise visa pathway* (last updated 30 April 2020), available online: <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/safe-haven-enterprise-790/safe-haven-enterprise-visa-pathway>.

⁴⁶ Senate Committee on Temporary Migration, "Upcoming Public Hearings" (Media Release, 27 July 2020).

each of us, are working to create a better future for ourselves, our families and our communities.

Recommendation 8: Preserve temporary migration as an essential component of the national plan for migration following COVID-19.

8. Conclusion

- 8.1. The temporary migration system provides a vehicle for promoting social cohesion and strengthening the Australian economy. However, there are challenges within the system that must be addressed to reduce the potential for exploitation and abuse of temporary migrants. We urge the Committee to recognise the need to create additional pathways to permanent residency for particularly vulnerable groups including refugees, victims/survivors of domestic, family and sexual violence, and victims of modern slavery. We consider that the long-term benefits of permanent migration for these groups far outweighs the short-term gains of temporary migration.
- 8.2. As the Committee grapples with the role temporary migration will play in a national plan for migration following COVID-19, the fundamental right to seek asylum must be preserved. We strongly encourage the Committee and the Australian Government to harness the potential of refugees by enabling them to participate fully in Australia as permanent residents and recognise the wide-ranging benefits this can bring to the social, economic and cultural life of the nation.