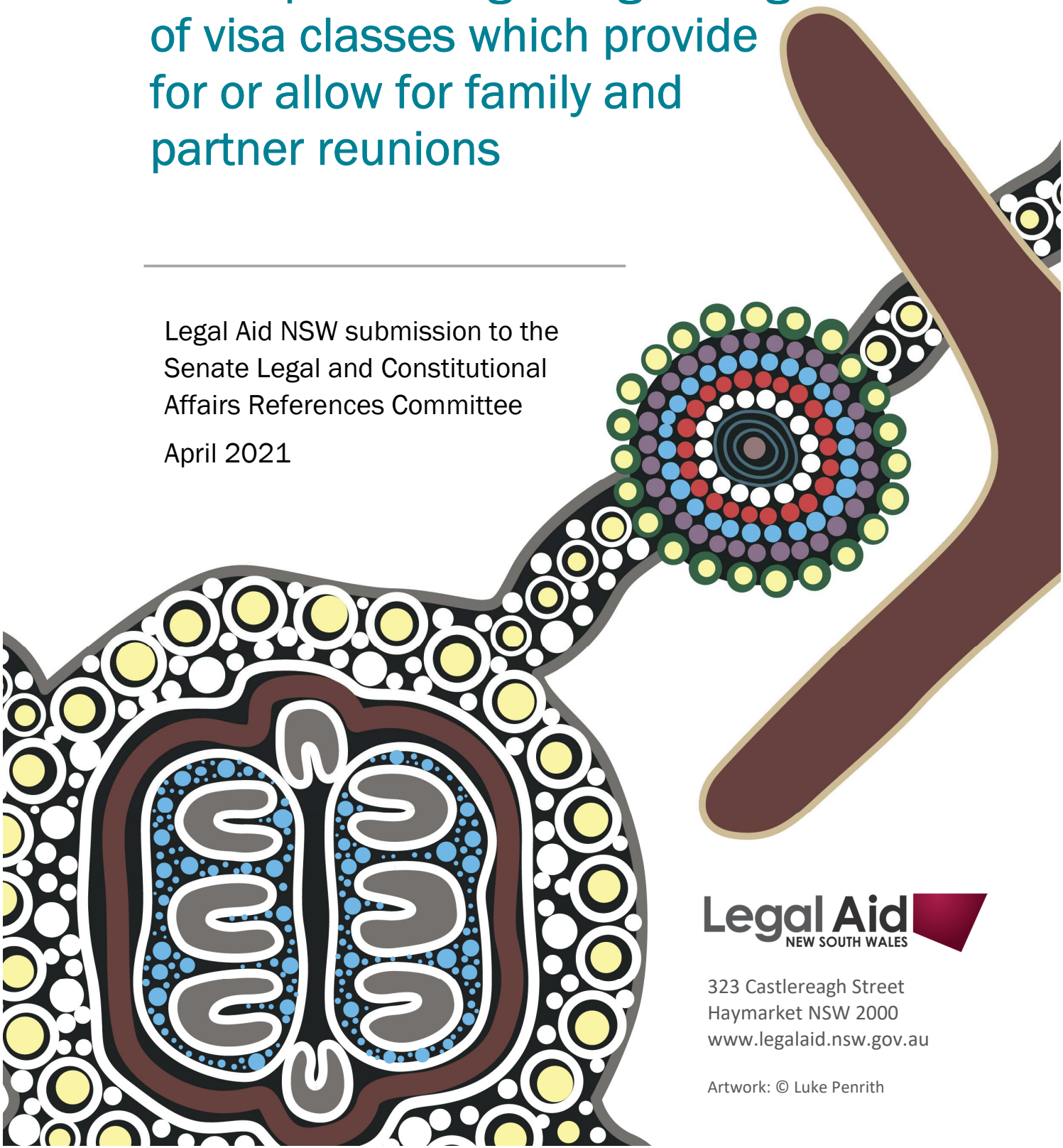
Inquiry into the efficacy, fairness, timeliness and costs of the processing and granting of visa classes which provide for or allow for family and partner reunions

Legal Aid NSW submission to the Senate Legal and Constitutional Affairs References Committee

April 2021



Legal Aid NEW SOUTH WALES

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Acknowledgement

We acknowledge the traditional owners of the land we live and work on within New South Wales. We recognise continuing connection to land, water and community.

We pay our respects to Elders both past and present and extend that respect to all Aboriginal and Torres Strait Islander people.

Legal Aid NSW is committed to working in partnership with community and providing culturally competent services to Aboriginal and Torres Strait Islander people.

1. About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 25 offices and 243 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged. We offer telephone advice through our free legal helpline LawAccess NSW.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 27 Women's Domestic Violence Court Advocacy Services, and health services with a range of Health Justice Partnerships.

The Legal Aid NSW Family Law Division provides services in Commonwealth family law and state child protection law.

Specialist services focus on the provision of Family Dispute Resolution Services, family violence services and the early triaging of clients with legal problems through the Family Law Early Intervention Unit.

Legal Aid NSW provides duty services at a range of courts, including the Parramatta, Sydney, Newcastle and Wollongong Family Law Courts, all six specialist Children's Courts and in some Local Courts alongside the Apprehended Domestic Violence Order lists. Legal Aid NSW also provides specialist representation for children in both the family law and care and protection jurisdictions.

The Criminal Law Division assists people charged with criminal offences appearing before the Local Court, Children's Court, District Court, Supreme Court, Court of Criminal Appeal and the High Court. The Criminal Law Division also provides advice and representation in specialist jurisdictions including the State Parole Authority and Drug Court.

The Civil Law Division provides advice, minor assistance, duty and casework services from the Central Sydney office and 20 regional offices. It focuses on legal problems that impact on the everyday lives of disadvantaged clients and communities in areas such as housing, social security, financial hardship, consumer protection, employment, immigration, mental health, discrimination and fines. The Civil Law practice includes dedicated services for Aboriginal communities, children, refugees, prisoners and older people experiencing elder abuse.

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2. Executive Summary

Legal Aid NSW welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs References Committee Inquiry into the efficacy, fairness, timeliness and costs of the processing and granting of visa classes which provide for or allow for family and partner reunions (**the Inquiry**).

In this submission, we focus primarily on those areas of the migration program where we have the most experience. Those are partner visas (including applications where there is family and domestic violence) and parent visas. In summary, for these classes of visas, we consider that there is a lack of transparency in processes and timeframes for the processing of applications, and in some cases, unrealistic processing timeframes, a lack of coherent reasons for refusal of applications, and no consistency in decision-making. In our view, these issues undermine the integrity of the application processes and create distrust of the process among the migrant community. We also consider that the visa application costs are prohibitive to many people in the migrant community.

The reunification of families should never depend on the wealth of the individuals involved in the process—the visa applicants, the sponsors and their dependants. The perception in the wider community, and amongst our clients, is that family reunion is only available to affluent members of our community and that for many it is unattainable.

A further significant concern to Legal Aid NSW is the adverse impact on family reunification for people who have arrived by boat and have been granted a permanent protection visa. These sponsors or potential sponsors have the lowest processing priority and the effect of this is that these people, who we have accepted as refugees, wait many years to be reunited with partners and children.

We provide further detail regarding our concerns below, and our suggested recommendations to address these issues in response to the terms of reference.

Legal Aid NSW services

Legal Aid NSW provides legal services in the area of migration law, principally by lawyers in the Government Law team in the Civil Law Division. Our services include advice and representation of clients in relation to visa applications lodged with the Department of Home Affairs, review applications to the Administrative Appeals Tribunal's Migration and Refugee Division, and judicial review proceedings following an adverse Tribunal decision.

We also have a dedicated team of lawyers, the Refugee Service, who provide legal services to newly arrived refugees in the areas of civil law (including immigration), family law and crime.

Our lawyers provide 28 clinics a month in western and south west Sydney, Newcastle and Wollongong. In addition, the Refugee Service conducts nine outreach clinics a year in the regional settlement areas of Armidale, Coffs Harbour, Wagga Wagga and Albury.

Legal Aid NSW's Government Law team has specialist immigration lawyers, including immigration outreach lawyers, who see clients in disadvantaged areas of Sydney, particularly in western and south western Sydney.

Legal Aid NSW regularly advises and acts for visa applicants at all levels of the application and review process. We have extensive practical experience acting for clients, predominantly women, who have experienced family violence and are facing the immigration consequences of separation from their sponsor as a result. We also have considerable experience working with newly arrived refugees and asylum seekers.

The comments provided in this submission draw substantially on the practical experience of the Legal Aid NSW's lawyers in providing advice and advocating on behalf of our clients.

Recommendations

Recommendation 1

That the Department of Home Affairs introduce an instalment payment plan whereby one third of the application fee (for example, $2,500 based on the current fee of $7,715) would be paid at the time of application. Once the application was assessed as meeting all statutory requirements (including the status and identity of the sponsor and the applicant) the second instalment would be due. The third and final payment could be paid after health and police checks are completed, at the time of the decision and before a visa is granted.

Recommendation 2

- Partner visa applications should be processed, and visas granted, in order of lodgement, unless there are exceptional circumstances that justify expedition of a particular application. This could include where a person is relying on the family violence provisions for the grant of a permanent visa. These applications should always be granted priority processing.
- Partner visa applications made where the sponsor is the holder of a refugee or humanitarian visa should be processed in a non-discriminatory way and there should be no distinction based only on that person's mode of arrival in the processing priorities.
- The Department of Home Affairs should provide information that is publicly and easily available regarding processing times applicable to major countries of origin of partner visa applications.

- There should be greater transparency in the way in which applications are processed and guidance as to whether processing is based on country of origin of the visa applicant (for example, whether police and other checks take longer from some countries, the age of applicants and the length of relationship).
- The composition of the migration program should be published each year, as was formerly the case. Details of the number of visas available for each subclass of visa that is queued and capped should be publicly available so that people can make informed choices about their options. For example, a holder of a humanitarian visa who has a family member and who is also eligible for a humanitarian or refugee visa may decide to apply for a visa attracting a Visa Application Charge, if aware that the Departmental priorities in terms of composition of the humanitarian visa does not prioritise people from a particular country of origin.

Recommendation 3

That the Department of Home Affairs give the highest processing priority to Partner visa applications where the family violence provisions have been invoked.

Recommendation 4

That the *Migration Regulations 1994* (Cth) be amended to specify that approval of family sponsorship is no longer required after a claim of family violence or child of the relationship exemption is made and accepted.

Recommendation 5

If the English language requirement is to be introduced, the following persons should be exempt from needing to meet the requirement:

- Sponsors and visa applicants who have one or a combination of the following factors:
    - advanced age
    - low literacy levels (even in their own language)
    - those with a permanent or enduring physical or mental incapacity
    - those with hearing, speech, or sight impairments
    - visa applicants who, under the current regime, would have obtained a partner visa on the basis of the domestic and family violence exemptions in the Migration Act 1958 and Migration Regulations 1994
    - visa applicants who have the care of a young child/children
    - visa applicants whose sponsoring partner has died prior to the grant of a partner visa and are experiencing grief following the death of a sponsor

- sponsors who are refugee and humanitarian visa holders and their visa applicant partners.

Recommendation 6

- That the number of Parent and Aged Parent visas available in each program year be increased to a level which significantly decreases the 30 + years waiting time.
- That the household income requirement for temporary parent visas not apply to sponsors who arrived in Australia on a refugee or humanitarian visa, subject to the following:
  - sponsors satisfy the Department of Home Affairs that they are able to support their parents through means other than the provision of household income statements
  - sponsors satisfy the Department of Home Affairs that they will obtain private health insurance, and retain it for the duration of the visa.
- That the published data on processing times, whereby by applicants are told when they are queued (criteria met) and when they are processed (visa granted), be consolidated so that there is one period of time given to applicants.

Recommendation 7

- That refusal letters contain meaningful reasons explaining why an application has been unsuccessful, and evidence engagement with the information provided in the application itself.
- That humanitarian visas granted as part of the Community Support Program be taken from a separate allocation of visas and not from the offshore component of the RSHP visa program.
- That the composition of the migration program, including the humanitarian and refugee program, be made publicly available each financial year with details on the number of visas available and, in the case of the humanitarian and refugee program, priority countries of origin and regions in that program year.

Recommendation 8

- Split family visas granted to the partners and dependent of refugee visa holders should be deducted from the Family program of visas, not the Refugee and Special Humanitarian Program.

- That the Department of Home Affairs introduce a visa subclass for the holders of refugee or humanitarian visas to sponsor their partners and/or their dependent children. This subclass should form part of the Family Visa component of the migration program, and not the Refugee and Special Humanitarian Program. Successful applicants should be granted a refugee or humanitarian visa (so that they retain the benefits on arrival of those visa subclasses, such as Centrelink eligibility) but the visas should not be taken from the offshore refugee visa program. They should be a separate and additional allocation in the Family Visa component for partner visas under the split family provision.

Recommendation 9

Where a partner visa application is lodged, no matter the mode of entry or status or place of residence of the sponsor, and there is a child of the relationship included as a secondary applicant, that application should be accorded the highest processing priority, (after family violence provisions applicants).

3. Partner Visas

Partner visas include temporary and permanent, onshore and offshore partner visas, and prospective marriage visas. Planning levels for the current financial year have increased from 47,732 in the 2019/20 financial year to 77,300 places on a one-off basis for the 2021-21 migration program year.[1] Priority for these additional visas is to be given to onshore applicants and applicants where the sponsor resides in a regional area.

3.1 Costs

Whilst we recognise the administrative cost of processing applications for family stream visas, we consider that the cost of partner visas is prohibitive for some sections of the migrant community, in particular, those people who have arrived on a refugee or humanitarian visa or have been granted protection onshore. For this latter group of sponsors, it can mean that they will be unable to sponsor their wife or husband (and often children), or at least not for an extended period of time.

The current application fee for partner visas is $7,715. If there are dependent children included in the application, there is an additional fee of $1,935 per child under 18. There are also the associated costs of police and health clearances, as well as travel costs. If the applicant enters on a Subclass 300 prospective marriage visa, then an additional fee of $1,285 is payable as part of the second stage of processing, that will eventually lead to a permanent visa.

As an example, if the visa applicant is the fiancé of an Australian citizen or permanent resident, and the applicant has two children under the age of 18, and they apply for a prospective marriage visa with the intention of getting married on arrival in Australia, the total cost (not including police or health clearances or travel) is $13,699.14, broken down as follows:

Total cost of a prospective marriage visa application	**Amount**
Initial application fee	$7,715
initial application fee – dependents under 18	$1,935 x 2 = $3,870
permanent visa application fee	$1,285

[1] Budget Measures, Budget Paper No 2, 2020-21.

permanent visa application fee – dependents under 18	$320 x 2 = $640
+ credit card surcharge of 1.4% = $189.14 [2]	$13,510
Total	$13,699.14

For the duration of the temporary visa, and for a period of four years after being granted the permanent visa, the visa holder will generally have no access to Centrelink or other government supports due to the imposition of the Newly Arrived Resident Waiting Period. Their sponsor will be entirely responsible for their support.[3] Particularly for newly arrived refugees, who have often felt the financial strain of the Visa Application Charges, this is an additional and unwarranted impediment to reunification with their family. These are people who have already suffered so greatly and ongoing and lengthy separation from the people they love further exacerbates their trauma.[4]

Recommendation 1

That the Department of Home Affairs introduce an instalment payment plan whereby one third of the application fee (for example, $2,500 based on the current fee of $7,715) would be paid at the time of application. Once the application was assessed as meeting all statutory requirements (including the status and identity of the sponsor and the applicant) the second instalment would be due. The third and final payment could be paid after health and police checks are completed, at the time of the decision and before a visa is granted.

[2] Applications can only be lodged online and payment can only be made by credit card

[3] Budget Measures, Budget Paper No 2, 2020-21, 28. Under the new proposed sponsorship framework Partner visa sponsors will also be subject to enforceable sponsorship obligations. These will include obligations to provide adequate accommodation, ongoing support and financial assistance to the sponsored partner.

[4] Where the visa applicant was an immediate family member of the sponsor at the time the sponsor's visa was granted, and the relationship was notified to the Department of Home Affairs at or before the grant of the sponsor's visa, the Newly Arrived Residents Waiting Period does not apply to the visa applicant and they are eligible for Centrelink on arrival. However, in this situation, most of our clients will apply under the Split Family provisions of the Act because no application fee is payable. See paragraph 5.2 For further information on the split family provisions.

3.2 Processing

3.2.1 Partner visas – processing times

The processing of partner visa applications and the granting of these visas appears to be an arbitrary process. In the experience of our solicitors, processing times are inconsistent and are not necessarily related to the date of lodgement. Whilst we acknowledge that some applications require greater scrutiny, which inevitably will impact on processing time, it nevertheless appears that the date of lodgement is not determinative of any timeframe for the timely processing of applications.

Uncertainly around the length of time it might take to process an application, and the failure to receive any meaningful updates, causes enormous stress and anxiety to people who are often separated from their partners. For those people onshore, both visa applicants and sponsors, whilst separation is not an issue, there are the financial and other stressors of years of uncertainty due to the lengthy and unpredictable processing time. In addition, for many of our clients, they are often reluctant to ask for updates about the progress of their application, fearing that this will jeopardise the application itself. As a result, they are often left waiting for many years, not only for a decision on the application, but any indication at all from the Department that the application is still on foot and being processed.

We submit that publication of guidelines explaining why some Partner visa applications appear to be subject to delayed processing would allay some of the uncertainty and frustration caused by a process that can take many years.

Case Study:

Legal Aid NSW assisted a same-sex couple apply for a Partner visa. The applicant is from Colombia but was onshore at the time of application. The couple lodged the application in August 2020 and were granted the visa in February 2021 – a short wait of approximately six months.

By contrast, Legal Aid NSW has assisted with another onshore partner visa application that was lodged in 2017. The police and medical clearance checks were requested in March 2021, after Legal Aid NSW intervened and requested an update. The application is still on foot.

3.2.2 Family visa (including partner) processing priorities

Under the Department's guidelines, the following processing priorities apply to all partner, child, parent and Other Family visa subclasses.[5]

The current processing priorities (with highest priority first) are:

1. family migration applications that have been subject to ministerial intervention
2. applications by a partner or a dependent child (except where the sponsor or proposed sponsor entered Australia as an illegal maritime arrival (**IMA**) and is the holder of a permanent visa) (and within that subcategory and for this program year only, onshore applications and applications where sponsors reside in a designated rural area)[6]
3. applications by an orphan relative (except where the sponsor or proposed sponsor entered Australia as an IMA and is the holder of a permanent visa)
4. applications by a contributory parent or a contributory aged parent (except where the sponsor or proposed sponsor entered Australia as an IMA and is the holder of a permanent visa)
5. applications by a carer (except where the sponsor or proposed sponsor entered Australia as an IMA and is the holder of a permanent visa)
6. applications by a parent, aged parent, remaining relative or aged dependant relative (except where the sponsor or proposed sponsor entered Australia as an IMA and is the holder of a permanent visa)
7. applications where the sponsor or proposed sponsor entered Australia as an IMA and is the holder of a permanent visa

According to the above list, the family of permanent protection visa holders who have arrived by boat have the lowest priority. The consequence of this is that these sponsors can wait many years—in our experience between five to seven years—to be reunited with their partner and often their children. At times this can extend even beyond that timeframe, as the case study below illustrates.

In practice, it can also mean that applications made by the partner and children of a sponsor who arrived by boat never reach the top of the queue because there are always new applications being made, which take priority. Once the number of visas available for that program year is reached, these applications effectively go to the end of the queue for the next program year.

[5] Carer, remaining relative, orphan relative, aged dependent relative.

[6] Budget Measures, Budget Paper No 2, 2020-21, 28. Under the new proposed sponsorship framework Partner visa sponsors will also be subject to enforceable sponsorship obligations. These will include obligations to provide adequate accommodation, ongoing support and financial assistance to the sponsored partner.

Implicit in our acceptance that a person requires permanent protection in Australia is an acknowledgement of the refugee experience and the concomitant trauma caused by ongoing separation from family.[7] This could be attenuated by the implementation of a scheme whereby refugee visa holders are not discriminated against in terms of priority for partner visas. We also note, relevantly, that sponsors who arrived by boat and also holders of Subclass 866 Protection visas are unable to make applications under the split family provisions of the Act. This is addressed later in this submission.

Further, in many cases, immediate family members themselves are also at risk of harm in their country of origin as a result of the accepted protection claims of the sponsor who has been granted protection.

To deny these members of our community reunification with their family inflicts unnecessary suffering on them and is simply punitive.[8]

[7] In this submission the term refugee visa will be used to describe refugee, humanitarian or PV visa holders (Subclass 200, 201, 202, 203, 204 or 866 visas), unless otherwise stated and where a distinction is necessary.

[8] Where the holders of a permanent protection visa who entered by boat on or after August 2012 seeks to sponsor **any family member** for any visa subclass (including partner, parent, child, carer) that application will always be given lowest priority.

Case Study:

Our client is from Afghanistan and is Hazara. He arrived by boat. He was granted a Protection Visa and in 2012 applied for a partner visa for his wife and seven children who were still living in Afghanistan. He had not seen them for many years. The partner visa was granted to his wife and six of their children in 2017, but his adopted son was refused a visa on the basis that there were no formal documents evidencing his adoption. His son was 13 years of age at the time and was left in Afghanistan with distant relatives whilst our client's wife and their other six children migrated to Australia.

Although our client had the right to appeal the refusal of his child's visa, he was unable to afford the Administrative Appeals Tribunal (**AAT**) application fee within the time it was required to be lodged. By the time he obtained legal advice, he was well out of time to lodge an appeal in any event, and his only option was to lodge a Child application for his remaining (adopted) son, with the prospect of a further refusal and then a possible appeal to the AAT.

Because of the processing priorities the Child visa application will have the lowest priority, despite the fact that it concerned a child who was living in Afghanistan as a minor without any real family support.

Apart from the financial implications of the above, both the client and his wife have suffered deep distress at the separation from their son and the consequences for him living as a young Hazara man in Afghanistan.

Recommendation 2

- Partner visa applications should be processed, and visas granted, in order of lodgement, unless there are exceptional circumstances that justify expedition of a particular application. This could include where a person is relying on the family violence provisions for the grant of a permanent visa. These applications should always be granted priority processing.
- Partner visa applications made where the sponsor is the holder of a refugee or humanitarian visa should be processed in a non-discriminatory way and there should be no distinction based only on that person's mode of arrival in the processing priorities.
- The Department of Home Affairs should provide information that is publicly and easily available regarding processing times applicable to major countries of origin of partner visa applications.

- There should be greater transparency in the way in which applications are processed and guidance as to whether processing is based on country of origin of the visa applicant (for example, whether police and other checks take longer from some countries, the age of applicants and the length of relationship).
- The composition of the migration program should be published each year, as was formerly the case. Details of the number of visas available for each subclass of visa that is queued and capped should be publicly available so that people can make informed choices about their options. For example, a holder of a humanitarian visa who has a family member and who is also eligible for a humanitarian or refugee visa may decide to apply for a visa attracting a Visa Application Charge, if aware that the Departmental priorities in terms of composition of the humanitarian visa does not prioritise people from a particular country of origin.

3.2.3 Processing times for domestic and family violence provision matters

Victims of domestic and family violence are advised they can apply for a visa under the family violence provisions in the migration legislation. However, if they choose to leave the violent relationship, they are alone, often homeless, and without access to any immediate financial support or accommodation.[9] Although they may be eligible for Special Benefit where they already hold their temporary partner visa, it often takes Services Australia many weeks to process the application, during which time they are destitute. Those who have not had their temporary partner visa processed yet are not eligible for any support from Centrelink. It takes up to two years to process the permanent visa application during which time they are ineligible, as bridging visa holders, for most support services. In the experience of our solicitors, many of these victims choose to stay in violent relationships, particularly when they have children to support.

[9] On 8 April 2021 the Australian Government announced a pilot program to provide additional support nationally to women on temporary visas who are experiencing domestic and family violence. Eligible visa holders will be able to access up to $3,000 through the Australia Red Cross to pay for expenses including accommodation and medical care when leaving a violent relationship (see Red Cross media release here)

Case Study:

Our client is from Iraq. She has three children to her sponsor who were born overseas and are included in the partner visa application. Her sponsor was violent and a final Apprehended Domestic Violence Order (**ADVO**) was made for her protection and the children's protection. The sponsor left the home to live with his mother to comply with the ADVO. Our client remained in the home for six months, but then was unable to pay rent on the property. She was evicted from the property, was unable to secure housing for herself and the children, and is currently sleeping in her car with the three children.

Our ongoing requests for expedited processing with the Department have gone unanswered. The application has been with the Department for processing since 2017 and the Department have had all necessary information to process the family violence exemption / child of the relationship exemption since December 2020.

We appreciate the need for delegates to scrutinise applications closely and to ensure appropriate evidence has been submitted by the visa applicant. However, given the very dire consequences of any delay in processing applications for victims of domestic and family violence, we submit that these applications should be given particular priority.

Recommendation 3

That the Department of Home Affairs give the highest processing priority to Partner visa applications where the family violence provisions have been invoked.

3.3 Partner visas –domestic and family violence provisions

Legal Aid NSW's Immigration team works with our Domestic Violence Unit in assisting applicants for ADVOs who have Partner visa applications on foot, to inform the Department about the cessation of their relationship with the sponsor, and to provide evidence about the domestic and family violence they have experienced. We also receive referrals from other teams within Legal Aid NSW, as well as community organisations, for assistance to women experiencing domestic and family violence, for example, the Women's Domestic Violence Court Advocacy Services, refuges, women's health centres, hospitals, migrant resource centres, and the Red Cross. We have significant experience dealing with these applications.

We understand that certain provisions of the *Migration Amendment (Family Violence and Other Measures) Act 2018* relating to Partner visa applications will commence in late 2021. Legal Aid NSW supports the objectives of the Act to prevent sponsorship approval for sponsors with a history of domestic and family violence.

However, we are concerned that there may be unintended consequences in separating the sponsorship process from the application process. One significant consequence may be preventing access to the family violence exemption provisions for many of our clients[10].

Under the prior approval of sponsorship process, some of our existing clients would not be able to access the family violence exemption where their sponsor perpetrates violence against them **after** they have lodged their application for a partner visa, but before the grant of a permanent visa.

Recommendation 4

That the *Migration Regulations 1994* (Cth) be amended to specify that approval of family sponsorship is no longer required after a claim of family violence or child of the relationship exemption is made and accepted.

3.4 English language requirement

A further impediment to permanent residence for partner visa applicants and temporary partner visa holders, is the planned introduction, in November 2021, of a functional English language requirement for permanent resident sponsors and partner visa applicants.[11] This will have a particularly detrimental impact on sponsors from refugee backgrounds.

[10] We note that no regulations have been made under the *Migration Amendment (Family Violence and Other Measures) Act 2018* and the details of the pre-approval sponsorship scheme are not yet available.

[11] Australian Government Department of Home Affairs, *Public consultation on the English language requirement and the new sponsorship framework for the Partner visa program* (December 2020) < https://www.homeaffairs.gov.au/how-to-engage-us-subsite/files/consultation-paper.pdf>

The functional English test requires a person to either achieve a score of at least 4.5 on the IELTS scale, or satisfy the Department of Home Affairs that they have undertaken 500 hours of English language tuition through the Adult Migrant English Program (**AMEP**). If the latter applies to the visa applicant, they must balance their English language education with employment in order to support themselves because they are ineligible for Centrelink support. If they have children, this makes it even more difficult for them to simultaneously work, care for their children, and undertake English lessons.

Legal Aid NSW opposes the imposition of this further criteria for vulnerable sponsors and applicants (including sponsors who are the holders of a refugee, special humanitarian or Protection Visa). We reiterate the recommendations of the Legal Aid NSW submission to the Public Consultation on the English language requirement.[12]

Recommendation 5

If the English language requirement is to be introduced, the following persons should be exempt from needing to meet the requirement:

- Sponsors and visa applicants who have one or a combination of the following factors:
  - advanced age
  - low literacy levels (even in their own language)
  - those with a permanent or enduring physical or mental incapacity
  - those with hearing, speech, or sight impairments
  - visa applicants who, under the current regime, would have obtained a partner visa on the basis of the domestic and family violence exemptions in the *Migration Act 1958* and Migration Regulations 1994
  - visa applicants who have the care of a young child/children
  - visa applicants whose sponsoring partner has died prior to the grant of a partner visa and are experiencing grief following the death of a sponsor
  - sponsors who are refugee and humanitarian visa holders and their visa applicant partners.

[12] Legal Aid NSW, *Submission to the Department of Home Affairs Public Consultation on the English language requirement and the new sponsorship framework for the Partner visa program* (March 2021) < https://www.legalaid.nsw.gov.au/__data/assets/pdf_file/0020/43481/210329-LANSW-submisison-public-consultation-partner-visas-and-English-language-test.pdf>

4. Parent visas

There are currently two categories of permanent (or leading to permanent) Parent visas, split into six visa subclasses:

Category one – Parent

- Parent (Class AX) (subclass 103) an offshore visa
- Aged Parent (Class BP) subclass 804) an onshore visa

Category two – Contributory Parent

- Contributory Parent (Temporary) (Class UT) (subclass 173) an offshore visa which can lead to a Contributory Parent (Class CA) (subclass 143) an offshore visa
- Contributory Aged Parent (Temporary) (Class UU) (subclass 884) an onshore visa which can lead to a Contributory Aged Parent (Class DG) (subclass 864) an onshore visa

In addition, there is the Sponsored Parent (Temporary) (Subclass 870) visa, valid for either three years or five years.

In the experience of our solicitors, the prospect of an Australian permanent resident being reunited with parents under the migration scheme for parents is not attainable for many people. This is due to the prohibitive costs and associated expenses, as well as prolonged processing times for parent visa applications, which means they are completely out of reach for all but a small minority of sponsors. For refugee families there is simply little prospect of ever being reunited with a parent in Australia. These issues are discussed further below.

4.1 Costs

4.1.1 Contributory Parent visas

The following table sets out the Visa Application Charges for the temporary and then permanent Contributory Parent Visa, the most expensive of the Parent visas.

In summary, for two parents to apply for the permanent visa the cost is $106,755. For the temporary and then permanent visa the cost for two parents is $115,850.

Neither amount includes the cost of medical checks, police clearances or travel.

SUBCLASS 173 Contributory Parent (temporary) followed by SC 143 Permanent Visa		
	Main Applicant (parent 1)	Additional Applicant (parent 2)

Initial application fee (173)	$2,800	$1,400
Second instalment (payable shortly before visa grant)	$29,130	$29,130
Initial application fee for subclass 143 visa lodged within 2 years of arrival in Australia as holder of SC 173 visa	$365	$185
Second instalment (payable shortly before SC 143 visa grant)	$19,420	$19,420
Bond (refundable after 10 years) (part of the AOS)	$10,000	$4,000
Total	$61,715	$54,135
Total cost for two parents = **$115,850**		

SUBCLASS 143 Contributory Parent (permanent visa)		
	Main applicant	Additional applicant
Initial application fee	$4,155	$1,400
Second instalment (payable shortly before visa grant)	$43,600	$43,600
Bond (refundable after 10 years)	$10,000	$4,000
Total	$57,755	$49,000
Total cost for two parents = $106,755		

We note that the application fee for the Permanent Contributory Parent visa is less than applying for the Temporary visa before moving onto the Permanent visa. The benefit in applying under the two-stage process is that the parent(s) will be able to live in Australia on a temporary visa and apply onshore for the permanent visa. If they choose to apply for the Permanent visa, they will have to remain offshore until it is granted (subject of course to them being granted another type of temporary visa, like a visitor visa).

4.1.2 Aged Parent and Parent visas

Despite a processing time of more than 30 years, the Visa Application Charges that must be paid at the time of application for both visas are $4,350 (for one parent) and $6,525 (for two parents). The second instalment, payable shortly before the visa grant is $2,065 for each parent. In addition, the Sponsor must provide an Assurance of Support. For those applications subject to a four-year Assurance of Support, the amount is $5,000 for one parent and $7,000 for two parents. This must also be lodged before the visa is granted.

The total cost for two parents is currently $17,655, with an initial Visa Application Charge of $6,525 paid some 30 years before the visa is granted and an Assurance of Support lodged immediately prior to grant.

In addition to the Visa Application Charges are the costs of health checks, police clearances and travel. Further, holders of Parent and Aged Parent visas are not eligible for any Centrelink or government support for a period of four years from the date of grant of the Permanent visa, with the result that sponsors must financially support their parents for at least the first four years of their residence.

4.1.3 Sponsored Parent (Temporary) (Subclass 870)

There is also the Sponsored Parent (Temporary) (Subclass 870) visa, valid for either three years (cost of $5,000) or five years (costs $10,000). For these visas, although the balance of family test does not apply, the sponsor must have a household income of approximately $88,000 and must be able to support their parent/s for the duration of the visa, including the provision of private health insurance. We understand that the cost of private health insurance for a couple 65 years or over, with no underlying health conditions, is approximately $400 a month. For two parents with private health insurance for three years, the cost is approximately $14,400. In our view, this will be prohibitive for most sponsors.

4.2 Processing times

4.2.1 Parent (SC 103) and Aged Parent (SC 804)

Both the Parent and Aged Parent visas are effectively obsolete based on the current processing time of more than 30 years. Whilst we acknowledge that the processing times for these visas are reasonably and prominently displayed on the Department of Home Affairs website, our experience is that many sponsors and applicants nonetheless do not interrogate this statistic and often will lodge an application, in the misplaced hope that the visa will be granted well ahead of the stated processing time. A processing time of more than 30 years is simply nonsensical to sponsors and they often disregard it.

The fact that visa applications can be lodged for these visa subclasses firmly implies that they are in fact available to be granted. A processing time of more than 30 years, when the youngest an applicant can be to apply for an Aged Parent visa is currently 65 (actual age is dependent on eligibility for the aged pension in Australia) means the prospect of successfully applying is, in practice, not achievable. For Parent visas, there is no age requirement, but again, the reality of a processing period of 30 years effectively means the visa, even if granted, will not have the desired benefit to either the sponsor or the parent – which is reunification.

4.2.2 Contributory Parent

The subclass with the shortest processing time appears to be the Subclass 143 Contributory Visa. The Department of Home Affairs states that they do not provide processing times for Contributory Parent, Parent, Contributory Aged Parent and Aged Parent visas because they are subject to capping and queuing. However, as at 19 February 2021, the Department states that Contributory Parent visas will be released for final processing in 58 months, or four years and 8 months.

4.3 Capping and queueing

All Parent, Aged Parent and Other Family visas are capped and queued. The process of queueing and then releasing from the queue for processing visas is confusing to most applicants and sponsors.

Recommendation 6

- That the number of Parent and Aged Parent visas available in each program year be increased to a level which significantly decreases the 30 + years waiting time.
- That the household income requirement for temporary parent visas not apply to sponsors who arrived in Australia on a refugee or humanitarian visa, subject to the following:
    - sponsors satisfy the Department of Home Affairs that they are able to support their parents through means other than the provision of household income statements

- sponsors satisfy the Department of Home Affairs that they will obtain private health insurance, and retain it for the duration of the visa.

- That the published data on processing times, whereby by applicants are told when they are queued (criteria met) and when they are processed (visa granted), be consolidated so that there is one period of time given to applicants.

5. Family reunion and Refugee visa holders

Reunification with immediate family members—which across many cultures includes parents and adult siblings—is undoubtedly the primary focus for newly arrived refugees. It remains a focus for many years, with the consequence that families will make many applications for reunification under the refugee and humanitarian program by way of sponsoring an applicant for a Subclass 202 visa.

Whilst we acknowledge the disparity between visas available and applications made, with only approximately one out of six applications resulting in a visa grant, we consider that it would provide some level of comfort and acceptance of outcomes if sponsors were better informed about the reasons for refusal.

Currently, all applications for both refugee visas (where is there is no sponsor) and Subclass 202 visas (where there is a sponsor) receive a standard, proforma letter that lacks any meaningful information, is vague and lacks coherency. Refusals are said to be based on 'the capacity of the Australian community' to support a person. Sponsors, by virtue of their sponsorship, have undertaken to support the person on arrival should the visa be granted and are often confused by this outcome.

Decisions made by the Department of Home Affairs are therefore perceived as arbitrary and as a result, people continue to make application after application for family reunion under the refugee and special humanitarian program (**RSHP**) hoping eventually to be successful. The fact that the community perceives the success or otherwise of a visa application as a matter of luck undermines the efficacy and integrity of the program.

The success or otherwise of an application under the RHSP appears arbitrary. We have assisted with Subclass 202 applications that have been refused multiple times, only to be resubmitted (without any additional information or change in circumstances) and then be granted. This, again, damages the integrity of the program. It also has an impact on the sponsors who have family member applicants with seemingly more compelling claims refused. In our experience, the gap that is left by the lack of proper reasons for the decision provided to unsuccessful applicants is filled with uninformed pseudo-legal information which circulates in the community and causes distrust and suspicion in both the process of migration and the rules that they are told underpin it.

Adopting a process whereby refusal decisions include meaningful information would appropriately discourage sponsors from continuing to make applications for family under the RHSP, where there is little hope of success. It would also have the benefit to the Department in that fewer administrative resources would be required to process multiple applications from the same applicants and sponsors, containing the same information.

5.1 Community Support Program

We understand that the Community Support Program (**CSP**) is currently suspended but under review. The following comments are based on the assumption that the CSP is to be reintroduced.

Visas granted under the CSP are taken from the offshore RSHP. Unlike visas under the RHSP, there are costs associated with the CSP including the visa application charge, airfares and medical screening. The organisation or individual sponsor must also provide an Assurance of Support which will be engaged if the visa holder is unable to find work on entry.

Communities that are entrenched, well-developed and well-connected are best placed to advocate for their communities (for example, the Assyrian community), whilst other, newer, less established communities, for example, those from the African sub-continent, Tibetans, Burmese, are less able to do so. The consequence is that it is only communities able to advocate for themselves, who are relatively wealthy, are able to access visas under the CSP.

Recommendation 7

- That refusal letters contain meaningful reasons explaining why an application has been unsuccessful, and evidence engagement with the information provided in the application itself.
- That humanitarian visas granted as part of the Community Support Program be taken from a separate allocation of visas and not from the offshore component of the RSHP visa program.
- That the composition of the migration program, including the humanitarian and refugee program, be made publicly available each financial year with details on the number of visas available and, in the case of the humanitarian and refugee program, priority countries of origin and regions in that program year.

5.2 Split Family applications

5.2.1 Processing

We submit that split family visa applications should not be processed as part of the RHSP program (albeit with highest priority processing) but as family stream applications and visas granted under this scheme should be taken from the Family Program. Currently, visas for this category are taken from the offshore humanitarian component of the migration program. For this program year that number has been reduced from 17,000 to 12,000. In addition, that number is now said to be a ceiling, not a target.

For split family applications, applicants do not need to establish claims under the refugee convention or complementary protection regime and they do not have to engage Australia's protection obligations. Rather, eligibility is based simply on an established relationship with the sponsor, notified to the Department before the grant of the sponsor's visa.

Categorising split family visa applications as part of the humanitarian program not only impacts on the number of visas available for those people who are assessed as requiring protection, but also impacts on waiting times for those visas.

5.2.2. Costs

The split family provisions are only available to sponsors who notified the Department of the details of the immediate family members at the time of their own application for protection, or at least before the grant of the visa.

For those sponsors who have arrived in Australia on refugee visas, they can only apply for a Partner visa if they wish to sponsor their husband or wife. They are not eligible to apply under the split family provisions. As set out above, this requires them to raise approximately $10,000, an amount that is out of reach for many newly arrived refugees, most of whom are Centrelink recipients for the first years of settlement, as they devote time to learning English.[13]

If it is necessary to sponsor a partner, they should be eligible to apply under a program equivalent to the split family provisions. The difference would be that the family member wishing to be sponsored would not need to have been identified in the application of the sponsoring party, as is required under the split family provisions. There could be a time limit on this—for example, an application for a Partner visa would have to be made within three years of settlement.

[13] According to Departmental data, 77% of refugees were unemployed 12 months after arrival, and after three years that remained at 33.%. Many, approximately 60% of humanitarian entrants said that their lack of English was a barrier to employment.

Recommendation 8

- Split family visas granted to the partners and dependent of refugee visa holders should be deducted from the Family program of visas, not the Refugee and Special Humanitarian Program.
- That the Department of Home Affairs introduce a visa subclass for the holders of refugee or humanitarian visas to sponsor their partners and/or their dependent children. This subclass should form part of the Family Visa component of the migration program, and not the Refugee and Special Humanitarian Program. Successful applicants should be granted a refugee or humanitarian visa (so that they retain the benefits on arrival of those visa subclasses, such as Centrelink eligibility) but the visas should not be taken from the offshore refugee visa program. They should be a separate and additional allocation in the Family Visa component for partner visas under the split family provision.

6. Other family visas

The types of other family visas include remaining relative, aged dependent relative and carer visa applications.

Whilst applications for these visas lodged variously in the period August 2011 (Remaining Relatives) to October 2017 (Carer) have been released from the queue for final processing, once released they are still subject to a processing time. Currently, the processing time for Remaining Relative and Aged Dependent Relative applications that meet the criteria to be queued is approximately 50 years. For Carer visas, applications that meet the criteria to be queued are taking approximately five years to be released for final processing.

Given that the eligibility criteria for these visas must remain static from the time of application to the time of decision—approximately 50 years—the prospects of a successful application seem notional. For example, in the case of a Remaining Relative applicant they cannot change their status by, say, getting married.

Carer visas are of particular concern. A Carer visa is available to relatives of an Australian permanent resident or Australian citizen where that person has a long-term medical condition that requires substantial and continuing care that cannot be provided by welfare, hospital or nursing community services in Australia. They are now effectively out of reach for most visa applicants based on the processing times—an applicant must show that no one else can provide the care which is required, and then the person requiring care must wait five years without any care being provided by anyone before a decision is made. This is because it takes approximately five years to process the application. If in that time the person does in fact access some level of care, even if that care is not optimal, they will likely be disentitled from sponsoring a person to be their care if the evidence is that they have received some, even sub-optimal, care.

7. International Obligations

Under international law, the Australian Government is obliged to implement provisions of conventions which it has ratified. Relevantly, those include the *International Covenant on Civil and Political Rights* (**ICCPR**) which enshrines a right to family,[14] and the *Convention on the Rights of the Child* (**CRC)**.[15] We further note that the Australian Government has committed to, at the very least, consider the impact of its laws on the right to respect for the family.[16] It is our submission that our migration program often infringes on these rights.

Under articles 17(1) and 23(1) of the ICCPR, every person has the right not to be subjected to an arbitrary interference with their family and to the protection of the family. We consider that these articles may have been breached where a person is separated from their family because of that person's detention and if this is affecting their ability to maintain their family relationships.

The CRC also enshrines the right of each child to the support of their parents. This includes the right to be reunified. Where a child is the primary applicant for a Child visa, waiting times are reasonable. As at February 2021 the waiting time for full processing of the visa is between 16 and 21 months. Notably, there is no cap and queue system for Child visas.

The separation of a family unit has been held to be a consideration of major significance in the making of migration decisions: *Teoh v Minister of State for Immigration, Local Government and Ethnic Affairs* [1994] FCA 1017; (1994) 32 ALD 420 at [8] per Black CJ. Section 60B(1) of the *Family Law Act 1975* (Cth) recognises that the best interests of children are generally met by ensuring that they have the benefit of both parents having a meaningful involvement in their lives, to the maximum extent consistent with their best interests. This principle has been a mandatory consideration for courts exercising family law jurisdiction in making parenting orders, including orders for children to spend time with a parent.[17]

[14] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

[15] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

[16] Attorney-General's Department, 'Right to respect for the family – Public Sector guidance sheet', accessed on 19 April 2021 https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/right-respect-family

[17] *Goode and Goode* [2006] FamCA 1346 at [110].

In recognition of the importance of family, the same rules ought to apply when a child is a secondary family member where the primary applicant is the child's mother or father, and they are being sponsored by the child's other parent.

Recommendation 9

Where a partner visa application is lodged, no matter the mode of entry or status or place of residence of the sponsor, and there is a child of the relationship included as a secondary applicant, that application should be accorded the highest processing priority, (after family violence provisions applicants).