

Human
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**Submission to the Australian National
Audit Office performance audit of
family reunion and partner visas**

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Human Rights Law Centre

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Human Rights Law Centre

The Human Rights Law Centre uses strategic legal action, policy solutions and advocacy to support people and communities to eliminate inequality and injustice and build a fairer, more compassionate Australia. We work in coalition with key partners, including community organisations, law firms and barristers, academics and experts, and international and domestic human rights organisations.

The Human Rights Law Centre acknowledges the people of the Kulin and Eora Nations and the Larrakia people, the traditional owners of the unceded land on which our offices sit, and the ongoing work of Aboriginal and Torres Strait Islander peoples, communities and organisations to unravel the injustices imposed on First Nations people since colonisation. We support the self-determination of Aboriginal and Torres Strait Islander peoples.

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1. Summary

- 1.1. The Human Rights Law Centre (**HRLC**) welcomes the opportunity to provide input into the Australian National Audit Office's performance audit regarding the effectiveness of the Department of Home Affairs' (**Department**) management of family reunion and partner related visas. The mechanisms for people in Australia to reunite with their loved ones through the migration program are broken and require urgent redress. The changes needed include drastic reforms to planning levels and addressing dysfunctional processing systems which often cause unlawful delays. In addition, unfair prioritisation procedures and practical barriers to applying, or meeting, visa criteria are preventing people from reuniting with their family, especially those with refugee backgrounds.
- 1.2. In March 2022, the Senate Legal and Constitutional Affairs Committee's inquiry into the efficacy, fairness, timeliness and costs of the processing and granting of visa classes which provide for family and partner reunions, uncovered an array of issues with current policy. The Committee made unanimous recommendations that the Department improve its visa processing system to increase efficiency and reduce wait times, as well as ensure it is adequately resourced to undertake this work. This submission outlines the key changes required to implement the Committee's recommendations regarding the Department's visa processing issues (and does not seek to address the broader policy reforms required).
- 1.3. Family migration is beneficial for Australia both economically and socially; families are at the heart of our country's growth. Family structures provide people with emotional support, financial security and safety, and allowing families to live together is especially important in attracting and keeping skilled migrants. Prolonged family separation also takes an extreme emotional and physical toll on children and parents, partners, and brothers and sisters. Yet the inefficiencies in Australia's migration system are keeping thousands of people separated from their loved ones, especially those who have sought safety in Australia.

Recommendations

1	Invest resources to clear the existing family visa backlog, and then permanently increase the planning levels of the family migration program.
2	Establish a dedicated humanitarian family reunion stream for those whose temporary protection visas have been converted to permanent visas, and others from refugee and humanitarian backgrounds, with additional places beyond existing planning levels in the family migration program.
3	Provide free legal assistance to applicants within the humanitarian family reunion stream.
4	Reduce and standardise visa application charges for visas within the family migration program.
5	Introduce fee waivers and fee reductions for family visa applicants who are experiencing financial hardship.
6	Amend the <i>Migration Regulations 1994</i> (Cth) to allow discretionary waivers for certain visa criteria that cannot be completed by people overseas (e.g. providing identity documents or penal clearances).
7	Permit applicants to complete health checks in Australia where it is not possible for these checks to be completed overseas.
8	Abolish Direction 80 and replace it with a direction which does not create indefinite wait times for people who travelled to Australia by boat, and gives primary priority to existing applications which have been with the Department for longer than two years.
9	Amend the Procedural Instructions relating to the order of priority for processing applications under the Special Humanitarian Program so that people who travelled to Australia to seek asylum through any means are not disadvantaged.
10	Introduce, monitor and publicly report on performance standards to ensure all visa applications are processed within a reasonable time.
11	Immediately prioritise the processing of applications which have been on hand for longer than two years.
12	Develop a method for visa applicants to track the progress of their application in real time, including a list of outstanding requirements, an estimated processing time, and an indication of where in the processing 'queue' their application is located.
13	Introduce an effective mechanism for escalating inquiries or complaints where visa applicants do not receive adequate responses to their enquiries.

2. Inadequate planning

2.1. Planning levels

- 2.1.1. Much of the inefficiency plaguing the family migration system is inherently linked to the planning levels set for the program each year. The extended waiting times for visa processing, and the seemingly intractable backlog of applications, are the result of a supply that does not meet demand.
- 2.1.2. Visa processing times do not reflect the actual time cost to the Department. Delays do not arise simply because the Department is lacking resources. The backlog and wait times are a result of the former Government's decision over several years, prior to the pandemic, to reduce the number of family visas available each year.
- 2.1.3. In 2012-13, 60,185 family visas were granted. In 2019-20, only 41,961 family visas were granted. This trend was demonstrated in particular in the reduction of Partner visas, which dropped from a high of 47,825 in 2016-17 to 37,118 in 2019-20.
- 2.1.4. The former Government refused to grant more family visas in line with demand, despite the fact that s 87 of the *Migration Act 1958* (Cth) (the **Act**) makes it unlawful to impose a cap on the number of Partner or Child visas to be granted each year. The planning levels set each year, which were frequently referred to by Department and political representatives as a 'ceiling',¹ operated as a de-facto cap on visas in apparent contravention of s 87 of the Act.
- 2.1.5. The trend of reducing family migration planning levels was only interrupted by the COVID-19 pandemic, during which the former Government chose to offset shortfalls in the skilled migration stream by an increase in Partner visa places. Those additional Partner visas were issued almost exclusively to applicants who were already in Australia on temporary visas.² This did not assist visa applicants offshore, who were separated from their immediate family members.
- 2.1.6. The Department recently announced that, from FY2022-23, Partner visas will be granted on a 'demand driven basis' (as Child visas currently are), but that 'for planning purposes' 40,500 Partner visas are estimated.³ Whether the shift to demand-driven planning adequately deals with the questions around compliance with s 87 of the Act will depend on what practical changes are made within the Department to respond to and accommodate actual demand. It should be noted that despite Child visas already being 'demand driven', processing times for this class of visa are as long as processing times for Partner visas.
- 2.1.7. Despite higher demand, there has been no increase in the planning level of the migration program as a whole (160,000) since 2019-20. In September 2022, the Government announced that it would increase the migration program planning level to 195,000 in 2022-23 and provide \$31.6 million to accelerate visa processing and resolve visa backlogs.⁴ However, the additional places and funding are targeted at addressing skills shortages, and no commitment has been made to increase visa allocations or expedite processing within the family migration stream.

¹ The Guardian, *Turnbull says ministers, not cabinet, discussed migration numbers*, 12 April 2018, <https://www.theguardian.com/australia-news/2018/apr/12/turnbull-says-ministers-not-cabinet-discussed-migration-numbers>.

² The Hon Alex Hawke MP, Former Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, *Government delivers largest Partner Program in over 25 years*, 21 September 2021, <https://minister.homeaffairs.gov.au/AlexHawke/Pages/government-delivers-largest-partner-program-in-over-25-years.aspx>.

³ Department of Home Affairs, *Migration Program Planning Levels*, 16 August 2022, <https://immi.homeaffairs.gov.au/what-we-do/migration-program-planning-levels#:~:text=From%202022%2D23%2C%20Partner%20visas,not%20subject%20to%20a%20ceiling>.

⁴ Australian Government – The Treasury, *Jobs + Skills Summit Outcomes*, 1-2 September 2022, <https://treasury.gov.au/sites/default/files/inline-files/Jobs-and-Skills-Summit-Outcomes-Document.pdf>.

To genuinely improve the effectiveness of the family migration program, it will be necessary to:

- (a) establish a taskforce to clear the existing backlog within one financial year, to ‘reset’ the congested system; and
- (b) plan for and commit to delivering a number of places in the family migration program which reflects demand. This will involve either a further increase to the planning level of the migration program as a whole, or shifting the distribution between skilled and family visas to a more even split.

2.2. Conversion of temporary protection visas to permanent visas

- 2.2.1. The Australian Government has committed to converting Temporary Protection Visas (**TPVs**) and Safe Haven Enterprise Visas (**SHEVs**) to permanent visas.⁵ At 1 August 2022, there were 19,491 TPV and SHEV holders and 1,043 people waiting for their TPV/SHEV applications to be processed.⁶ Therefore, approximately 20,000 additional people can be expected to hold permanent visas in the next 1-2 years.
- 2.2.2. The vast majority of temporary protection visa holders have been separated from their families for over a decade. Family reunion is a priority for most, and they will likely seek to sponsor their family members as soon as they obtain permanent residency. The Department should begin planning now (if it has not already) to accommodate these additional family visa applications to avoid exacerbating the existing backlog and processing delays. A logical solution would be to establish a dedicated humanitarian family reunion stream, with separate and additional planning levels, to accommodate both former TPV/SHEV holders and other applicants from refugee and humanitarian backgrounds. Visa application charges should not be applied to this stream.
- 2.2.3. The pathway for people who previously held TPVs or SHEVs to sponsor their families should be easy to navigate to ensure efficiency and avoid processing delays. Given people in this situation have already faced protracted delays, uncertainty and ongoing separation from their families since arriving in Australia a decade ago, a fair process should afford those family visa applications high priority.

2.3. Additional places for nationals of Afghanistan

- 2.3.1. In March 2022, the Australian Government announced that it would grant an additional 5,000 places to nationals of Afghanistan under the Family stream of the migration program over the next four years,⁷ equating to an average of 1,250 per year.
- 2.3.2. Analysis conducted by the Refugee Council of Australia shows that this is in fact less than the number of family visas granted to nationals of Afghanistan in any of the past seven years and

⁵ ABC News, *Thousands of asylum seekers crave certainty after Albanese vow to abolish temporary visas*, 9 July 2022, <https://www.abc.net.au/news/2022-07-09/thousands-of-asylum-seekers-live-in-limbo-on-temporary-visas/101148018#:~:text=While%20the%20new%20Labor%20government,refugees%20onto%20permanent%20visa%20arrangements%22>.

⁶ Refugee Council of Australia, *Fast tracking and ‘Legacy Caseload’ statistics*, 1 August 2022, <https://www.refugeecouncil.org.au/fast-tracking-statistics/2/>.

⁷ The Hon Alex Hawke MP, Former Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, *Commitment to Afghanistan Increased*, 21 January 2022, <https://minister.homeaffairs.gov.au/AlexHawke/Pages/commitment-to-afghanistan-increased.aspx>; Department of Home Affairs, *Afghanistan update*, 19 August 2022, <https://www.homeaffairs.gov.au/help-and-support/afghanistan-update>.

well below the seven-year average of 1,840 places per year.⁸ There is therefore no guarantee that these are ‘additional’ places at all. A greater commitment is required.

- 2.3.3. As at 31 January 2022, there were over 7,000 people from Afghanistan currently waiting for their family visas to be processed.⁹ Nearly 5,000 of those people have been waiting longer than two years for a decision on their family visa application.¹⁰
- 2.3.4. Whilst the commitment to provide specific places in the family migration program to nationals of Afghanistan is welcomed, those places must be increased and there must be a drastic reduction in processing times for that commitment to have any meaningful impact on people’s lives.
- 2.3.5. Although the Government has made public representations that family visa applications from nationals of Afghanistan are a priority, there has been no legal direction to delegates to afford those applications higher priority.¹¹
- 2.3.6. Further, people who came to Australia by sea and are classified as unauthorised maritime arrivals under the Migration Act are effectively barred from successfully sponsoring their family members under Direction 80, which requires their applications to be the ‘lowest processing priority’ (see section 4.1 below). There has been no change to Direction 80 to allow greater prioritisation of applications from nationals of Afghanistan.¹² Therefore, many people will be excluded from any benefit of the 5,000 specified family visa places for nationals of Afghanistan.

Recommendations:

- Invest resources to clear the existing family visa backlog, and then permanently increase the planning levels of the family migration program.
- Establish a dedicated humanitarian family reunion stream for applicants whose temporary protection visas have been converted to permanent visas, and others from refugee and humanitarian backgrounds, with additional places beyond existing planning levels in the family migration program.
- Provide free legal assistance to applicants to sponsor family members through the dedicated humanitarian family reunion stream (further justification for this recommendation is below at section 3.3).

3. The application process

3.1. Financial barriers

- 3.1.1. Financial barriers for people to reunite with loved ones significantly impact on the efficacy of the family migration program. The recent Senate inquiry regarding family reunion and partner

⁸ Refugee Council of Australia, *15,000 places for Afghan nationals over 4 years: Why Australians are disappointed*, February 2022, <https://www.refugeecouncil.org.au/wp-content/uploads/2022/02/15000-Afghan-visas-220214-002.pdf>.

⁹ Senate Standing Committee on Legal and Constitutional Affairs Additional Budget Estimates, *Portfolio question number: AE22-079*, 14 February 2022, <https://www.aph.gov.au/api/qon/downloadestimatesquestions/EstimatesQuestion-CommitteeId6-EstimatesRoundId13-PortfolioId20-QuestionNumber79>.

¹⁰ Senate Standing Committee on Legal and Constitutional Affairs Additional Budget Estimates, *Portfolio question number: AE22-080*, 14 February 2022, <https://www.aph.gov.au/api/qon/downloadestimatesquestions/EstimatesQuestion-CommitteeId6-EstimatesRoundId13-PortfolioId20-QuestionNumber80>.

¹¹ Commonwealth of Australia 2022, *Senate Legal and Constitutional Affairs Legislation Committee – Estimates: official Hansard*, 14 February 2022,

https://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/25615/toc_pdf/Legal%20and%20Constitutional%20Affairs%20Legislation%20Committee%202022%2002%2014%20Official.pdf;fileType=application%2Fpdf#search=%22legal%22, p.67.

¹² Ibid.

related visas highlighted concerns regarding the prohibitive costs of visa applications.¹³ Visa application fees have significantly increased over the past 10 years and family reunion and partner related visas are no longer accessible to people on low incomes.¹⁴ The current visa application system also unfairly disadvantages certain communities including refugees, young people and people with disabilities.¹⁵

- 3.1.2. For example, in July 2012 the Partner visa application fee was \$2,060. In 2022, the partner visa fee is \$8,085 for the primary applicant and an additional fee of \$2,025 or \$4,045 per dependent child (depending on whether they are under or over 18 years of age).¹⁶ People are required to spend thousands in visa fees to reunite with their families. Given the protracted delays in visa processing, there is no logical justification for such high fees, particularly when compared to other visa categories which are less expensive such as skilled visas.¹⁷
- 3.1.3. As with other parts of our migration program, the Australian Government has implemented a two-tier system that favours those who can pay extra. A regular Parent visa, for example, costs \$6,625 but will generally not be processed for over 20 years, making the application process effectively futile.¹⁸ A Contributory Parent visa, however, can be processed in 6 years, but costs \$47,955 (per person).¹⁹ Reuniting with parents is therefore an option available only to significantly wealthy families.
- 3.1.4. In addition to visa application charges, there are many ancillary costs including fees for a migration agent or lawyer (which are essential due to the complexity of Australian migration law), completing medical checks, obtaining police checks and translations of documents, travel to complete the required checks, and DNA testing. Sometimes police and health checks need to be completed several times due to the protracted delays in visa processing.²⁰ Also, people from culturally and linguistically diverse backgrounds often incur expenses for interpreter fees when they engage a lawyer or migration agent. Further, if an application is unsuccessful, applicants often have additional expenses to seek review of the Department decision before the Administrative Appeals Tribunal or the courts.

3.2. Impractical criteria

- 3.2.1. The rigidity of certain visa criteria renders it impossible for some applicants to progress their otherwise valid visa applications. For example, since the fall of Kabul to the Taliban in August 2021, it is no longer possible for people in Afghanistan to complete the required health checks and obtain identity documents, which has indefinitely stalled their visa applications. This was a foreseeable barrier for visa applicants, however to date the Australian Government has taken no action to remedy this issue.

¹³ The Senate Legal and Constitutional Affairs References Committee, *The efficacy, fairness, timeliness and costs of the processing and granting of visa classes which provide for or allow for family and partner reunions*, March 2022, https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024683/toc_pdf/Theefficacy.fairness.timelinessandcostsoftheprocessingandgrantingofvisaclasseswhichprovidefororallowforfamilyandpartnerreunions.pdf;fileType=application%2Fpdf, 4.47 - 4.68.

¹⁴ Ibid, 4.48.

¹⁵ Ibid, 4.50-4.52.

¹⁶ Department of Home Affairs, *Fees and charges for visas*, July 2022, <https://immi.homeaffairs.gov.au/visas/getting-a-visa/fees-and-charges/current-visa-pricing/live>.

¹⁷ Above n13, 4.53, 4.68.

¹⁸ Department of Home Affairs, *Subclass 103 - Parent visa*, 2 August 2022, <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/parent-103>; Department of Home Affairs, *Parent visas - queue release dates and processing times*, 6 September 2022, <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-processing-times/family-visa-processing-priorities/parent-visas-queue-release-dates>.

¹⁹ Ibid; Department of Home Affairs, *Subclass 143 - Contributory Parent visa*, 1 July 2022, <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/contributory-parent-143>.

²⁰ Above n13, 4.58.

- 3.2.2. At December 2021 there were over 7,000 Partner (subclass 309) and Prospective Marriage (subclass 300) visa applications by nationals of Afghanistan pending;²¹ over 900 people had lodged their applications before June 2014.²² In March 2022, the Department acknowledged that “the current situation in Afghanistan is creating additional processing complexities, including a lack of access to required visa medical and biometrics services in the country”, but proffered no solution.²³
- 3.2.3. Refraining from refusing these visa applications is an insufficient response, particularly as the Government purports to be prioritising assistance to people fleeing Afghanistan. The Department must have discretion to adapt visa criteria and policies to address systemic barriers that are impeding the effective management of visa application processing and implement common sense solutions.

3.3. Lack of legal assistance

- 3.3.1. People applying for family reunion and partner related visas require legal advice to navigate the complexities of Australian migration law. The difficulties in engaging with the migration system are compounded when applicants are from culturally and linguistically diverse backgrounds, which makes it even more crucial that legal advice is sought. Without legal advice, applicants are more likely to make errors in their applications or not provide the required documentation, leading to delays in visa processing and an additional strain on Departmental resources to address these issues. However, there is a significant financial expense to engage a migration agent or lawyer, which prevents people from seeking legal advice. Also, there are very few community legal centres providing free family migration assistance (as opposed to refugee related assistance).
- 3.3.2. The provision of free legal assistance to certain applicants will ease pressure points in processing and improve efficiency, as more comprehensive applications will be submitted. We consider this to be particularly important for applicants within the humanitarian family reunion stream due to the financial and language barriers they face, as well as the difficult and often dangerous circumstances that their families are seeking to flee.

Recommendations:

- Reduce and standardise visa application charges for visas within the family migration program.
- Introduce fee waivers and fee reductions for family visa applicants who are experiencing financial hardship.
- Amend the *Migration Regulations* 1994 (Cth) to allow discretionary waivers for certain visa criteria that cannot be completed by people overseas (e.g. providing identity documents or penal clearances).
- Permit applicants to complete health checks in Australia where it is not possible for these checks to be completed overseas.
- Provide free legal assistance to applicants within the humanitarian family stream.

²¹ Refugee Council of Australia, *What we have learnt from the responses to 2021-22 Additional Senate Estimates Questions on Notice - Processing on hand partner visa applications from Afghan nationals*, 26 April 2022, <https://www.refugeecouncil.org.au/what-we-have-learnt-from-the-responses-to-2021-22-additional-senate-estimates-questions-on-notice/>.

²² *Ibid*, *Number of Afghan nationals who lodged their partner visas at various points in time (starting with prior to 2014) and their applications remain on hand*.

²³ Senate Standing Committee on Legal and Constitutional Affairs Additional Budget Estimates, *Portfolio question number: AE22-081*, 14 February 2022, <https://www.aph.gov.au/api/qon/downloadestimatesquestions/EstimatesQuestion-CommitteeId6-EstimatesRoundId13-PortfolioId20-QuestionNumber81>.

4. Visa processing

4.1. Indefinite wait times due to Direction 80

- 4.1.1. Like other permanent residents, people who hold permanent protection visas can apply to bring immediate family members to Australia through the family migration program. However, Ministerial Direction 80,²⁴ issued pursuant to s 499 of the Act, directs delegates to follow a particular order of priority in considering and disposing of family visa applications. All visa applications for family members of permanent residents who arrived in Australia by boat are to be given lowest processing priority.
- 4.1.2. Demand for family visas constantly exceeds the number of places available under the Department's planning levels, meaning those lowest priority applications will likely never be considered.
- 4.1.3. The effect of the Direction is that thousands of permanent Australian residents, who happen to be from refugee backgrounds, are prevented from ever successfully bringing family members to reunite with them in Australia. Despite paying the application fees and satisfying the criteria for the visa, their applications are never processed. We are aware of many families who have been waiting for their applications to be processed since the policy was introduced in 2013. For example, Yusuf was an interpreter with Australian troops in Afghanistan and has been waiting for more than seven years for his wife and child's partner visa application to be finalised.²⁵
- 4.1.4. There is an exception to the order of priority in 'compassionate' circumstances, where there are 'compelling reasons' to depart from the rule. However, the Direction provides no guidance on when this exception applies, and migration lawyers who act for clients in this area report that the Australian Government requires applicants to show extreme circumstances in order for the exception to apply.
- 4.1.5. In 2015, the Australian Human Rights Commission found that the previous version of the Direction (Ministerial Direction 62) constituted an arbitrary and unlawful interference with family, in violation of articles 17 and 23 of the International Covenant on Civil and Political Rights.²⁶ When the legality of that Direction was challenged in the High Court of Australia, the Minister withdrew Direction 62 and replaced it with one which allowed an exception to the order of priority where an application would otherwise be unreasonably delayed (Ministerial Direction 72). But in 2018, that position was reversed, and today applications continue to be deprioritised despite delays commonly in excess of five years.
- 4.1.6. The Minister has no power to issue directions under s 499 of the Act that are inconsistent with the Act itself. Direction 80 is inconsistent with the Act in several ways, including that:
 - (a) it impermissibly fetters the discretion of delegates who exercise the power under s 51(1) of the Act to consider and dispose of visa applications in such order as those delegates consider appropriate;

²⁴ David Coleman, Minister for Immigration, Citizenship and Multicultural Affairs, *Ministerial Direction 80 – Order for Considering and Disposing of Family Visa Applications*, issued 21 December 2018. Before Direction 80 was issued, similar policies were in place – see *Ministerial Direction 62 – Order for considering and disposing of Family Stream visa applications*, issued 19 December 2013, and *Ministerial Direction 72 - order for considering and disposing of Family visa applications*, issued 13 September 2016.

²⁵ Asylum Seeker Resource Centre, *Submissions to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry - The efficacy, fairness, timeliness and costs of the processing and granting of visa classes which provide for or allow for family and partner reunions*, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/FamilyandPartnerVisas/Submissions, p 24.

²⁶ *CM v Commonwealth of Australia (Department of Immigration and Border Protection)* [2015] AusHRC 99, p.5.

- (b) it causes unreasonable delays in the processing of certain visa applications, in particular family visa applications for which the sponsor arrived in Australia as an unauthorised maritime arrival;
 - (c) it qualifies or removes a right provided by the Act, namely the right to have a visa application considered and determined within a reasonable time; and
 - (d) it prevents delegates from having regard to all relevant circumstances of each case when deciding whether or not an application needs to be processed in order to comply with the obligation to consider and determine the application within a reasonable time.
- 4.1.7. Directions that are inconsistent with the Act are invalid and have no lawful operation.
- 4.1.8. In FY2020-21, in response to the significant reduction in immigration resulting from the COVID-19 pandemic, the Australian Government increased the planning level for Partner visas to 72,300 places (up from 39,799 the previous year)²⁷ - the first increase in over five years. The vast majority of those places were delivered to applicants who were already in Australia.²⁸ This increase in places, combined with a decrease in new lodgements, had the effect of reducing the number of Partner visa applications on hand at 30 June 2021 to 64,111 (down from 96,361 at the conclusion of FY2019-20).
- 4.1.9. The Department has relied on this reduction in the number of on-hand applications to claim that Direction 80 will have a “more limited” effect than it has had in previous years, and that the Department is “in a position now to be able to start dealing with this case load, although it remains the lowest priority in terms of processing priority directions.”²⁹
- 4.1.10. Outcomes of the migration program for FY2021-22 are yet to be published. However, considering the remaining backlog and presuming that application lodgements continued at a similar rate to the previous year (44,325 Partner lodgements), it is difficult to see how a planning level of 72,300 for the entire Family stream would permit delegates to begin processing the lowest priority visa applications.
- 4.1.11. People whose applications are affected by Direction 80 are unable to obtain any estimate of how long they will be forced to wait until their application is processed. There is no transparency as to where in the ‘queue’ their application is sitting. The wait is indefinite. The Department claims to have established a specialised team to consider cases impacted by Direction 80,³⁰ but there is no transparency as to the function of this group or the delegates’ ability to depart from the order of priority dictated by the Direction.
- 4.1.12. People who hold permanent humanitarian or refugee visas are alternatively able to apply to bring immediate family members to Australia under the Special Humanitarian Program, which provides a limited number of visas each year, as set by the Minister. However, Government policy, long delays and the huge demand for these visas make family reunion through the Special Humanitarian Program a similarly unattainable option for most people, and effectively impossible for those who arrived by boat. As with Direction 80, Government policy dictates that applications under the Special Humanitarian Program are to be processed according to a set order of priority. Applications proposed by people who travelled to Australia to seek asylum, either by boat or by plane, are the lowest processing priority.³¹ In both FY2019-

²⁷ Department of Home Affairs, *2020-21 Migration Program Report*, 30 June 2021, <https://www.homeaffairs.gov.au/research-and-stats/files/report-migration-program-2020-21.pdf>.

²⁸ Above n2.

²⁹ Commonwealth of Australia 2022, *Senate Legal and Constitutional Affairs Legislation Committee – Estimates: official Hansard*, 25 October 2021, <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=COMMITTEES;id=committees%2Festimate%2F25201%2F0008;query=Id%3A%22committees%2Festimate%2F25201%2F0001%22>.

³⁰ Ibid.

³¹ Department of Home Affairs, *Procedural Instruction: Offshore Humanitarian Program Management and Class XB (Refugee and Humanitarian) visa processing* (reissued 10 December 2019), s 3.3.

20 and FY2020-21, zero visas in the Special Humanitarian program were granted to applicants proposed by a family member who arrived in Australia by boat. In the same time period, fewer than five visas were granted to applicants proposed by a family member who held a protection visa of any kind.³²

4.2. Visa processing delays

- 4.2.1. At the time of writing, the ‘Global Processing Times’ published by the Department indicate that 50% of provisional Partner (subclass 309) visa applications are processed within 11 months, 75% are processed within 17 months, and 90% are processed within 36 months.³³ For permanent Partner (subclass 100) visas, 50% of applications are processed within 14 months, 75% are processed within 24 months, and 90% are processed within 39 months.³⁴ However, the processing times for permanent Partner visas are said to *start from the date of eligibility* – being two years after a combined application for a 309/100 visa is lodged. This means those people whose applications are processed in 39 months may have in fact been waiting 63 months.
- 4.2.2. Many people who have been waiting the longest for their applications to be processed are impacted by Direction 80 (discussed above). However, some others who are not deprioritised by Direction 80 are still experiencing unexplained and likely unlawful delays in processing.
- 4.2.3. There is a clear discrepancy in the average processing times of family visa applications depending on the applicant’s country of origin or the location of their processing office. Data released by the Department showed a pattern of significantly greater processing times for applicants from non-English speaking backgrounds, particularly from Afghanistan and certain countries in Africa and the Middle East,³⁵ and similarly that average processing times at certain processing offices were far beyond global averages.³⁶
- 4.2.4. The HRLC has been advised by numerous lawyers practising in family migration law of clients who had received an exemption from the priority order of processing under Direction 80 on the grounds of compassionate and compelling circumstances, who nevertheless have seen no progress on their visa applications for extended periods of time. This is in spite of the clear acknowledgement from the Department of circumstances requiring more urgent processing.
- 4.2.5. The HRLC recently acted for a client who had submitted a partner visa application for herself and her children in 2017 and received an exemption from Direction 80 in 2018. The grounds for the exemption included that her sponsor husband in Australia was legally blind, and that one of the couple’s children had been killed in Afghanistan by a Taliban missile attack and another was seriously injured and required corrective surgery. Despite this, and despite providing all documents and information requested in support of the application, by early 2022 they had still not received a decision on their visa application. Freedom of Information requests revealed that, excluding the periods of time in which the Department was waiting to receive documents or information from the visa applicants, there were periods of delay amounting to over 40 months during which the Department did not appear to have taken any substantive action on the application.

³² Senate Standing Committee on Legal and Constitutional Affairs Additional Budget Estimates, *Portfolio question number: AE21-389*, 22 March 2022, <https://www.aph.gov.au/api/qon/downloadattachment?attachmentId=6cb6dd30-85f4-4431-9c0a-0506a960fd17>.

³³ Department of Home Affairs, *Global Visa Processing Times*, 26 August 2022, <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-processing-times/global-visa-processing-times>.

³⁴ Ibid.

³⁵ Department of Home Affairs, *FOI request FA 21/04/00110*, 2021, <https://www.homeaffairs.gov.au/foi/files/2021/fa-210400110-document-released.PDF>.

³⁶ Department of Home Affairs, *FOI request FA 21/01/00319*, 2021, <https://www.homeaffairs.gov.au/foi/files/2021/fa-210100319-document-released.PDF>.

- 4.2.6. The Minister and the Minister’s delegates are required to consider and determine valid applications for visas within a reasonable time.³⁷ Australian courts have held that delays which have not been justified or satisfactorily explained may be regarded as unreasonable, including long periods of inactivity.³⁸ There is an expectation that decisions whether to grant or refuse to grant a visa will be made promptly.³⁹
- 4.2.7. In February 2022, the HRLC filed proceedings in the Federal Circuit Court on behalf of those clients, arguing that the Minister had unreasonably delayed the consideration and determination of the visa application. In July 2022 the Minister conceded the court application, and the clients’ visas were issued shortly thereafter.⁴⁰ Our clients’ situation was not unique. It is not only inefficient, but wholly inappropriate that the only way they were able to compel the Minister’s compliance with his responsibility to determine applications within a reasonable time was through court proceedings, which is an option unavailable to most families in this situation.
- 4.2.8. While delays are harmful for all family visa applicants, they have particularly adverse impacts on dependent applicants who were minors but who subsequently turn 18 before the application is processed. While those dependents would have met the visa criteria at the time of application, they may no longer be eligible if they cannot meet the different criteria applicable to dependents over the age of 18. This leads to situations where entire families except for one child are granted visas.

4.3. Difficulties in dealing with the Department during visa processing

- 4.3.1. Through our clients and consultations with other migration lawyers, we are aware of a number of issues which are impeding the efficiency of processing valid visa applications after they are lodged. A primary issue is the inability of visa applicants to receive meaningful or transparent communication from the Department. As there is no way that visa applicants are able to independently check on the progress of their visa application, the expected next steps or anticipated waiting times, people frequently contact the Department to make inquiries on these matters. Such inquiries almost never elicit a response other than a pro forma or automated response, including when those inquiries are sent by migration agents or lawyers. The lack of communication creates frustration, confusion and usually generates further correspondence from the visa applicant.
- 4.3.2. There is no effective mechanism for escalating inquiries or raising complaints where no adequate response is received. The only option available is to submit a complaint to the Department’s Global Feedback Unit. Responses to such complaints are also slow and rarely result in more efficient visa processing.
- 4.3.3. Often, the pro forma or automated replies to inquiries are blatantly false. For example, the clients for whom the HRLC recently acted (see above at 4.2) received several automated “reassurance notifications” which stated that “your application for a Partner (Provisional) visa is in progress. Your application takes time to process as we complete a number of thorough checks.” However, as discovered through review of the Departmental records relating to the visa application, no such checks and no substantive action towards processing were in fact taking place at the time.
- 4.3.4. It also appears that the process of requesting additional information from visa applicants is not always managed in an efficient manner. For example, it was discovered during litigation

³⁷ *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2014) 255 CLR 179 at [37].

³⁸ *BMF16 v Minister for Immigration and Border Protection* [2016] FCA 1530 at [27].

³⁹ *Shahi v Minister for Immigration and Citizenship* (2011) 246 CLR 163 at [28].

⁴⁰ ABC News, *Family who fled Afghanistan reunited in Adelaide after a decade apart, after legal challenge against Australian government*, 14 August 2022, <https://www.abc.net.au/news/2022-08-14/family-who-fled-afghanistan-reunited-a-decade-later/101330862>.

that our clients did not receive a request for information which the Department had previously sent to an incorrect email address and had never followed up. During the course of the litigation, the clients then received four separate requests for further information within a three-month period, including requests for forms to be completed which were of no relevance to their visa application.

- 4.3.5. We also understand that clients impacted by processing delays are also frequently required to provide the same type of information twice – for example, health checks which are paid for by the applicant and provided to the Department but which are no longer valid by the time that processing continues and must be undertaken again; travel documents which are provided to the Department but then expire and must be renewed before a decision is made; or evidence of a genuine relationship which then must be supplemented by additional evidence to cover the years during which no action was taken to process the visa application.

Recommendations:

- Abolish Direction 80 and replace it with a direction which does not create indefinite wait times for people who travelled to Australia by boat, and gives primary priority to existing applications which have been with the Department for longer than two years.
- Amend the Procedural Instructions relating to the order of priority for processing applications under the Special Humanitarian Program so that people who travelled to Australia to seek asylum through any means are not disadvantaged.
- Introduce, monitor and publicly report on performance standards to ensure all visa applications are processed within a reasonable time.
- Immediately direct additional resources to processing applications which have been on-hand for longer than two years.
- Develop a method for visa applicants to track the progress of their application in real time, including a list of outstanding requirements, an estimated processing time, and an indication of where in the processing ‘queue’ their application is located.
- Introduce an effective mechanism for escalating inquiries or complaints where visa applicants do not receive adequate responses to their enquiries.