



Law Council
OF AUSTRALIA

Office of the President

28 May 2021

Mr Michael Pezzullo AO
Secretary
Department of Home Affairs
PO Box 25
Belconnen ACT 2616

By email: humanitarian.policy@homeaffairs.gov.au

Dear Mr Pezzullo

Discussion Paper: Australia's Humanitarian Program 2021-22

1. The Law Council of Australia appreciates the opportunity to provide written feedback on the Discussion Paper published by the Department of Home Affairs (**the Department**) in relation to Australia's Humanitarian Program in 2021-22.
2. The Law Council welcomes the statement in the Discussion Paper that 'the 2021-22 Humanitarian Program will support Australia's recovery from the impacts of COVID-19 and contribute to strong economic and social outcomes'.
3. The following comments are offered to the Department in response to the issues raised in the Discussion Paper. The Law Council is grateful for the assistance of the Law Institute of Victoria and its Federal Litigation and Dispute Resolution Section's Migration Law Committee in providing this submission.

Key recommendations

4. The Law Council makes the following key recommendations in relation to Australia's Humanitarian Program in 2021-22:
 - regarding the size of the Program:
 - in the immediate term and while recognising challenges of permitting greater cross-border mobility in the current pandemic environment every effort should be given to safely ensuring all the vulnerable cohort of those granted offshore Humanitarian visas are cleared and able to travel to Australia expeditiously;
 - in the longer term, when pandemic pressures have eased, the Government should commit to increasing the size of the Humanitarian Program to a target

of at least 20,000 consistent with the Report of the Expert Panel on Asylum Seekers;¹

- the numbers allocated to the Community Support Program (**CSP**) should be in addition to the places reserved for Humanitarian visas, not included in the ‘ceiling’ or ‘target’ of Humanitarian visa places;
- the Government’s target of 50 per cent of humanitarian entrants to be settled in a regional location by 2022:
 - should not be brought into effect by prioritising applications lodged by persons who are willing to settle in regional areas – applications should be focussed on humanitarian need;
 - the Law Council supports the recommendations in the Review into Integration, Employment and Settlement Outcomes for Refugees and Humanitarian Entrants² (**the Shergold review**) for national leadership to build sustainable capacity to enable the settlement of migrants in regional communities.

Size of the Program

5. The Law Council notes the announcement in the recent Budget that the Humanitarian Program will be maintained at the 2020-21 level of 13,750 places in 2021-22 and over the forward estimates, with the size of the program ‘a ceiling rather than a target’.³
6. The Discussion Paper indicates that in 2019-20, ‘a total of 13,171 visas were granted under the Humanitarian Program, falling short of the target of 18, 750 places due to COVID-19’.⁴
7. According to *Australia’s Offshore Humanitarian Program: 2019–20*, a paper published by the Department, the granting of all Class XB (offshore) Humanitarian visas was suspended on 19 March 2020.⁵ The Law Council understands this suspension contributed to the number of grants in 2019-20 being fewer than the target amount.⁶
8. The Law Council is aware that the granting of offshore Humanitarian visas has recommenced. In Budget Estimates on 24 May 2021, the Department indicated that:
 - as at 14 May 2020, the Department has granted 4,593 places in the Humanitarian Program, of which 2,850 are offshore;⁷
 - the Department hopes to grant between 5,500-6,000 Humanitarian visas in the 2020-21 financial year.⁸

¹ Air Chief Marshal Angus Houston AC, AFC (Ret’d), Paris Aristotle AM, Professor Michael L’Estrange AO , *Report of the Expert Panel on Asylum Seekers*, August 2012.

² Peter Shergold, Kerrin Benson and Margaret Piper, *Investing in Refugees, Investing in Australia: the findings of a Review into Integration, Employment and Settlement Outcomes for Refugees and Humanitarian Entrants in Australia*, February 2019.

³ Commonwealth, *Budget Measures Budget Paper No. 2 2021–22*, 131.

⁴ Discussion Paper, 8.

⁵ Department of Home Affairs, *Australia’s Offshore Humanitarian Program: 2019–20*, 1.

⁶ Commonwealth, *Estimates*, Senate, 24 May 2021, 86 (Mr David Wilden, First Assistant Secretary, Refugee Humanitarian and Settlement, Immigration and Settlement Services, Department of Home Affairs).

⁷ Ibid.

⁸ Ibid.

9. However, unlike, for example, Business Innovation and Investment (Provisional) (subclass 188) visa holders, persons granted offshore Humanitarian visas are not part of the categories of persons who are automatically exempt from travel restrictions and thus would need to be granted an individual exemption to be allowed into Australia.⁹
10. The guidelines suggest that persons demonstrating compassionate circumstances may generally be considered to satisfy the requirements for exemption to inwards travel restrictions, and that the Australian Border Force Commissioner (**Commissioner**) will personally consider all requests by 'visa holders who fall within the at risk/refugee/humanitarian cohort, eg, Class XB visa holders', although there is no description of the circumstances in which such a person would or would not be granted an exemption.¹⁰
11. The Department provided evidence at Estimates on 24 May 2021 that
- up to 6,850 persons have been granted offshore Humanitarian visas who have been unable to come to Australia, including 4,000 visas granted in the 2019-2020 financial year. Of those, 383 'urgent cases' had been brought onshore, made up of people at immediate risk, for example, of refoulement, have been brought onshore following the grant of individual exemptions by the Commissioner.¹¹
12. The Department also indicated that in relation to the remaining approximately 6,500 people:¹²
- For the rest, what we're doing as part of the broader planning for reopening the border is having the same discussions or parallel discussions to what's going on, in relation to students, for example, about how we might be able to begin a more normal transition of people from offshore to Australia, recognising that we need to gradually restart that process, including with our service providers in having availability of accommodation and support services and so on.*
13. The Law Council acknowledges the critical role of the Australian Government and Department in navigating Australia's migration program during COVID-19 and the importance of border control to maintaining low numbers of infection in Australia. In particular, the Law Council is sympathetic to uncertainty around border policies and vaccination availability and uptake affecting short-term targets relating to migration intake. For this reason, the Law Council understands a short-term change from a policy of applying a 'target' humanitarian intake to a 'ceiling', while that uncertainty is resolved.
14. Nonetheless, the Law Council considers that the impact of COVID-19, in the coming forward estimates period, increases the onus on countries like Australia, receive persons recognised to be owed protection and who have satisfied any relevant security-

⁹ Department of Home Affairs and Australian Border Force, *Inwards Travel Restrictions Operation Directive V3*, [4], <<https://www.homeaffairs.gov.au/covid-19/Documents/inward-travel-restrictions-operation-directive.pdf>>, accessed on 25 May 2021. Also, see discussion of the evidence given by the Department in Estimates in [11].

¹⁰ Department of Home Affairs and Australian Border Force, *Commissioner's Guidelines: Decision making about individual exemptions from Australia's inwards travel restriction policy*, [1.2] and [1.4], <<https://www.homeaffairs.gov.au/covid-19/Documents/commissioners-guidelines.pdf>>, accessed on 25 May 2021.

¹¹ Commonwealth, *Estimates*, Senate, 24 May 2021, 87-88 (Mr David Wilden, First Assistant Secretary, Refugee Humanitarian and Settlement, Immigration and Settlement Services, Department of Home Affairs).

¹² Commonwealth, *Estimates*, Senate, 24 May 2021, 87 (Mr Andrew Kefford PSM, Deputy Secretary, Immigration and Settlement Services, Department of Home Affairs).

related criteria, when they have capacity to do so safely in light of the challenges presented by the pandemic.

15. The United Nations High Commissioner for Refugees (**UNHCR**) has stated that it recognises that 'states have the right to manage their territories and borders, and during a pandemic it is understandable they will take extra measures to limit the spread of the virus'.¹³ However, it has indicated that the risk of the wrongful return of refugees and asylum-seekers to dangerous situations is 'significantly higher where countries close their borders and do not make exceptions for asylum'.¹⁴ According to the UNHCR, the number of refugees resettled last year is the lowest in almost two decades.¹⁵

16. Further, refugees and displaced persons are extremely vulnerable to COVID-19 given their sub-standard living conditions, and lack of access to adequate medical treatment. Médecins Sans Frontières report:¹⁶

The conditions for people living in displacement camps are typically overcrowded and unsanitary: an ideal environment for infectious disease to spread very quickly. People who have fled war, violence, disaster or precarious situations have also often faced barriers to getting medical care while on the move and again in the country where they are seeking safety. This means they may have other inadequately treated health conditions like diabetes or HIV, which can put them at greater risk of developing serious illness or dying if they contract coronavirus

17. In the immediate term and while recognising challenges of permitting greater cross-border mobility in the current pandemic environment, the Law Council considers that every effort should be given to safely ensuring all the vulnerable cohort of those granted offshore Humanitarian visas are cleared and able to travel to Australia expeditiously. That is, in the process of 'broader planning for reopening the border', that priority be given to facilitating the arrival and settlement onshore of granted permanent offshore Humanitarian visas above other visa classes, including temporary visa classes, which are currently subject to the same regime for granting individual exemptions.

18. Measures which would help to achieve this include ensuring that all of those granted permanent offshore Humanitarian visas are cleared to travel to Australia expeditiously, rather than relying on individual exemptions.

19. In the longer term, the Law Council strongly encourages the Department to ensure that a temporary dip in the Humanitarian Program caused by COVID-19 remains temporary rather than an entrenched step down. The suggestion in the recent Budget papers that the 'ceiling' of 13,750 places will be maintained 'over the forward estimates' suggests the possibility of this. The Government's announcement comes at a time when some

¹³ UNHCR, *COVID-19 and Refugees*

<<https://storymaps.arcgis.com/stories/95cc3b65d9264cf3b80ffef0daa0358>>, accessed on 25 May 2021.

¹⁴ Ibid.

¹⁵ UNHCR, *Global COVID-19 Emergency Response*, 17 February 2021,

<https://reporting.unhcr.org/sites/default/files/UNHCR%20Global%20COVID-19%20Emergency%20Response%2017%20February%202021.pdf>,

accessed on 25 May 2021.

¹⁶ Médecins Sans Frontières/Doctors Without Borders, *How is the coronavirus pandemic affecting refugees?*, 8 September 2020, <<https://msf.org.au/article/project-news/how-coronavirus-pandemic-affecting-refugees>>, accessed on 25 May 2021.

other Five-Eyes countries such as Canada¹⁷ and the United States¹⁸ have increased their planned intake of refugees over coming years.

20. The Law Council considers that the intake should ultimately be increased to at the 20,000 places per annum recommended by the Report of the Expert Panel on Asylum Seekers in 2012.¹⁹

Community Support Program

21. The Law Council continues to support the CSP.

22. However, consistent with previous submissions,²⁰ the Law Council considers that the numbers allocated to the CSP should be in addition to the places reserved for Humanitarian visas, not included in the number of humanitarian visas granted.

23. As the Department would be aware, the Shergold review also found that the inclusion of refugees under the CSP in the existing ceiling for the Humanitarian Program means that it is 'often perceived more as a cost-shifting measure than as a means of expanding the number of humanitarian entrants accepted',²¹ which has affected community engagement with the Program.

24. The Law Council also notes that the Shergold review recorded that concerns have been expressed that the cost of the program are too high, which has resulted in the program in effect becoming 'a refugee family reunification stream'.

25. The Law Council notes the announcement by the Hon Alex Hawke MP, Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs on 10 May 2021, that he had received the findings of the Review of the CSP conducted by the Commonwealth Coordinator-General for Migrant Services, Alison Larkins.

26. The Law Council welcomes the reaffirmation by the Minister in that announcement that he is a strong supporter of the CSP and looks forward to receiving further information from the Government on next steps following that report, including in relation to the issues described above.

Regional settlement

27. The Discussion Paper records that priority is given to applicants for the:

- CSP who are willing to live and work in regional Australia;
- Special Humanitarian Program (**SHP**) category visa with proposers residing in regional areas.

¹⁷ Immigration, Refugees and Citizenship Canada, 2020 Annual Report to Parliament on Immigration, 24, <<https://www.canada.ca/content/dam/ircc/migration/ircc/english/pdf/pub/annual-report-2020-en.pdf>>, accessed on 25 May 2021.

¹⁸ U.S. President Joe Biden, Statement by President Joe Biden on Refugee Admissions <<https://www.whitehouse.gov/briefing-room/statements-releases/2021/05/03/statement-by-president-joe-biden-on-refugee-admissions/>>, accessed on 25 May 2021.

¹⁹ Air Chief Marshal Angus Houston AC, AFC (Ret'd), Paris Aristotle AM, Professor Michael L'Estrange AO (n 1), [3.3]-[3.8].

²⁰ Law Council of Australia, Submission to Discussion Paper: Australia's Humanitarian Program 2018-19, 29 May 2018.

²¹ Peter Shergold, Kerrin Benson and Margaret Piper, (n 2), p 62.

28. The Discussion Paper also notes that Australian Government has a target of 50 per cent of humanitarian entrants to be settled in a regional location by 2022.
29. The positive contribution that migrants make to regional communities is chronicled in the Background section of the Report of the Inquiry into Migration in Regional Australia (**Migration in Regional Australia Report**) published by the Joint Standing Committee on Migration in June 2020²² and in the Shergold review.²³ The Law Council's Justice Project, which included a chapter on Recent Arrivals, also recognised the increasingly significant role of international migration into non-metropolitan Australia into the future, and made recommendations as to how recent arrivals may be supported to overcome frequent barriers to successful settlement into these areas.²⁴
30. However, consistent with its previous submission to the Department regarding the 'Discussion Paper: Australia's Humanitarian Program 2018-19',²⁵ the Law Council maintains that increased regional settlement should not be facilitated by giving priority to applicants with proposers in regional areas or who are willing to live in work in regional Australia.
31. The Law Council considers that the processing of applications for the Humanitarian visas should be primarily based on the circumstances of the applicant in their home country or put another way, as set out as the first principle of the Shergold review, based on 'humanitarian need'.²⁶
32. It also cautions against any future placement of restrictions or conditions on humanitarian entrants to require them to live in regional areas to seek to give effect to this target.
33. The Shergold review also detailed that the experience of several regional organisations was that there was 'no coordinated approach to the settlement of refugees in regional communities'.²⁷ The Migration in Regional Australia Report also detailed the difficulty that many new migrants have in accessing 'employment, transport, English language tuition and other settlement services'.²⁸
34. The Law Council would welcome the opportunity to assist the Government in any efforts to develop comprehensive strategies for encouraging, attracting and facilitating migrant settlement in regional areas as detailed in recommendation 5 of the Shergold review, as preferable to a policy of prioritising applicants for Humanitarian visas willing to live in regional areas.

²² Joint Standing Committee on Migration, Commonwealth Parliament, Inquiry into migration in regional Australia, June 2020.

²³ Peter Shergold, Kerrin Benson and Margaret Piper, (n 2), p 54-56.

²⁴ See Law Council of Australia, Justice Project Final Report (2018), available here: <<https://www.lawcouncil.asn.au/justice-project/final-report>>, Recent Arrivals and Regional, Rural and Remote (RRR) Australians chapters.

²⁵ Law Council of Australia, (n 20), [14].

²⁶ Peter Shergold, Kerrin Benson and Margaret Piper, (n 2), 5.

²⁷ Ibid, 55.

²⁸ Joint Standing Committee on Migration, (n 22), [2.48].

35. Thank you for the opportunity to respond to this inquiry. If the Law Council may be of any further assistance, please contact Mr Matthew Wood, Senior Policy Lawyer, on 02 6246 3755 or matthew.wood@lawcouncil.asn.au.

Yours sincerely

A handwritten signature in blue ink, appearing to read "Jacoba Brasch QC".

Dr Jacoba Brasch QC
President