IARC and Unions NSW Submission

Parliamentary Joint Standing Committee on Migration: Migration, Pathway to Nation Building

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Submission

Background

1. The Immigration Advice and Rights Centre (**IARC**), established in 1986, is a community legal centre in NSW that specialises in immigration and citizenship law. IARC is the only community legal centre that provides advice and assistance on **all** immigration and citizenship matters at all stages (i.e. at the Department, merits review and judicial review stages). IARC has a particular focus on the intersect between domestic, family and sexual violence and immigration, migrant worker exploitation, family reunion and health and migration.

2. Unions NSW is the peak body for trade unions and union members in New South Wales with 48 affiliated trade unions and Trades and Labour Councils, representing approximately 600,000 workers across New South Wales. Affiliated trade unions cover the spectrum of the workforce in both the public and private sectors. Unions NSW and its affiliated unions have a proud history of engaging in the parliamentary process to protect and represent the interests of union members. Unions NSW frequently makes submissions to inquiries involving industrial relations and other issues which may impact members. The plight of temporary migrant workers is one such issue, and one with which this organisation has a deep and ongoing engagement.

3. IARC in partnership with Unions NSW has developed a project called "Visa Assist", which is currently in its fifth year of operation. Visa Assist was created on the basis that everyone should be safe regardless of their visa status. To date, Visa Assist has provided more than 2,000 legal services to over 1,000 union members, many of whom have faced workplace exploitation while on temporary visas in Australia.

4. IARC and Unions NSW welcome this opportunity to provide a submission to the Parliamentary Joint Standing Committee on Migration's inquiry into Migration, Pathway to Nation Building. Our submissions and recommendations will focus on the Terms of Reference:

    a) The role of permanent migration in nation building, cultural diversity, and social cohesion;
    b) Immigration as a strategic enabler of vibrant economies and socially sustainable communities in our cities and regional hubs;
    c) Attraction and retention strategies for working migrants to Australia;
    d) Policy settings to strengthen skilled migrant pathways to permanent residency;
    e) Strengthening labour market participation and the economic and social contribution of migrants, including family and humanitarian migrants and the partners of working migrants;
    f) The role of settlement services and vocational training in utilising migrant experiences, knowledge, and opportunities; and
    g) Other related matters that may assist the inquiry.

5. IARC and Unions NSW welcome any opportunity to further discuss the below recommendations and submissions. We also take this opportunity to commend the Australian Government on revoking Direction 80 and commencing the process of converting TPVs and SHEVs to permanent visas.

6. Please note this submission is intended to compliment and not supersede any submission from an affiliate union of Unions NSW.

7. All case studies provided in this submission are based on actual client events. Details have been changed to protect the identity of our clients.

Summary

8. Our submission will focus on two broad themes:

   a) The need for clear and certain pathways for permanent residency in the skilled, family and humanitarian visa cohorts; and

   b) Empowering migrants in Australia to enforce their rights both through effective protections to a person's migration status and a clear and fair migration system.

9. We consider that the below recommendations would go a long way into addressing the above themes:

   <u>Skilled migration</u>

   a) Create a firewall between the Fair Work Ombudsman (**FWO**) and Department of Home Affairs (**Department**) to ensure that complaints made to the FWO are not shared with the Department so that migrant workers can speak out without fear of adverse migration outcomes.

   b) Create clear and certain permanent residency pathways for skilled temporary visa holders by ensuring permanent residency requirements are objectively achievable by visa holders, including:

      i) abolishing skilled occupation lists;

      ii) allowing migrant workers to be sponsored, provided the job pays 30 per cent above the median annual wage paid to employees within the occupation;

      iii) removing the need for employer nomination for permanent residency and instead relying on a person's work experience; and

      iv) abolishing the requirement to conduct labour market testing.

   c) Replace the current employer-sponsored visa framework with an industry sponsorship model to reduce a migrant worker's reliance on employers.

   d) Remove certain visa conditions that can and have led to migrant workers being exploited, including:

      i) Condition 8104 which restricts student visa holders to work a maximum of 40-hours a fortnight while their course is in session; and

      ii) Condition 8547 which requires working holiday makers not to remain with any one employer for more than 6 months.

e) Amend visa conditions that mean that temporary visa holders remain in exploitative employment situations, for example, amending condition 8607 to allow temporary visa holders at least 90 days to find a new sponsor.

f) Create a temporary substantive visa that is available to people with outstanding claims for workplace entitlements, including underpayments, to remain lawfully in Australia. The substantive visa should:

   i) have no visa application charge (**VAC**);

   ii) have unqualified work rights;

   iii) not limit the holder's access to permanent residency and/or subsequent temporary substantive visas;

   iv) allow family members to be included in the application as secondary applicants; and

   v) be accessible to people who may be subject to certain statutory bars and do not hold a substantive visa.

g) Provide protections against visa cancellation in cases of workplace exploitation by:

   i) Enlivening s 116(2) of the Migration Act 1958 (Cth) (**Act**) through the *Migration Regulations 1994* (Cth) (**Regulations**) that make workplace exploitation an express factor against visa cancellation;

   ii) Amending visa conditions (Schedule 8 of the Regulations) so that visa holders would not have breached a work-related condition of their visa where there is a credible claim of workplace exploitation;

   iii) Updating policies associated with visa cancellation (e.g. policy around s 116 of the Act) to ensure that workplace exploitation is an express factor against visa cancellation; and

   iv) Include workplace exploitation as a factor considered in Ministerial Intervention guidelines.

h) Amend visa eligibility requirements (i.e. Schedule 2 of the Regulations) to remove certain drivers for workplace exploitation by:

   i) allowing substantive visas to still be granted in cases of workplace exploitation (where the person would otherwise be eligible but due to, for example, loss of employment, becomes ineligible);

   ii) removing the requirement for 'farm work' for subsequent working holiday visas.

<u>Family-related migration</u>

i) Create a substantive temporary visa for all victim/survivors of family violence, to allow them to remain lawfully in Australia without risk of visa cancellation while they seek safety and plan for the future. This temporary visa should also have a pathway to a permanent visa, to create safety and certainty for those who, for example, have

significant ties to Australia or would face stigma, discrimination or other forms of hardship in their home country.

j) Extend the family violence provisions to:

   i) Any person experiencing family violence on Prospective Marriage visas (subclass 300) who does not marry their sponsor prior to relationship breakdown, and their children;

   ii) any person experiencing domestic, family and sexual violence who has applied for a substantive visa onshore as a secondary applicant, and their dependants;

   iii) any person experiencing domestic, family and sexual violence who has applied for a family visa onshore, who is awaiting a decision, and their dependants.

k) Broaden the definition of family violence in the Regulations to include abuse and violence perpetrated by a relative of the partner or relative of the victim/survivor, and to expressly cover conduct both in Australia and overseas.

l) The kinds of documents that applicants can provide to substantiate a family violence claim under the family violence provisions (see Regulation 1.5) be revised and expanded including by:

   i) allowing other common sources of support, like counsellors, case workers and multicultural community centres, to provide evidence; and

   ii) removing the requirement to have documents from two different types of professionals/organisations.

m) The Regulations and Departmental policy should be amended so that the existence of family violence should be established before an assessment of whether a relationship is genuine and continuing is made.

n) If the Department is satisfied that there has been family violence, the departmental policy should set out that the delegate should generally accept that the family violence occurred within a genuine spouse or de facto relationship without further and separate assessment of the relationship.

o) In cases where the Department does still require a separate assessment of whether the relationship was genuine and continuing, this assessment must be conducted in a trauma-informed manner and with regard to the context of family violence, given that forms of family can limit the evidence that is available.

p) That the Department be adequately resourced to allow decision ready Partner visa applications to be processed within 90 days of application in the case of temporary Partner visas and 90 days of becoming eligible for second stage processing in the case of permanent Partner visas.

q) Remove capping and queuing from family visas, including, all Parent, Aged Parent and Carer visas to ensure that Australian citizens and permanent residents can be reunited with family members and receive appropriate and dignified care.

r) Allocate sufficient resources to the processing of Carer visas to ensure that decision ready applications are assessed within 90 days of application.

s) Update Departmental policy for Carer visas so that NDIS and MyAgedCare assessments are accepted as conclusive evidence of the availability of care throughout the community.

t) That the Department's policy be updated to require decision makers to consider publicly available information about the state of the disability and aged care sector before requesting evidence from the visa applicant.

u) Amend the Regulations so that onshore Carer visas (subclass 836) may be granted in the event that a person in need of care dies and the applicant has been providing the required care for a reasonable period of time.

v) Reduce the VAC for family visas for those experiencing financial hardship, including Partner and Parent visas, so that more people can access permanent family reunion.

w) Amend the Migration Regulations so that a non-citizen parent who has sole or shared parental responsibility for an Australian citizen (minor) is able to make an onshore Parent visa application (with an associated Bridging visa) without the need for a sponsor.

x) Amend the Migration Regulations so that decision makers consider the nature of the relationship between the parent and their children when assessing whether the applicant has close ties to Australia for Parent visas (rather than relying solely on the balance of family test).

y) Amend the Migration Regulations so that a Child visa may be granted to an applicant over 18 years of age who does not meet dependency or study requirements where there are compelling or compassionate circumstances.

z) Ensure that assessments of relationships for Partner visas are culturally appropriate and require decision makers to consider why there may be inadequate evidence to demonstrate the four factors to establish a genuine and continuing relationship (under Regulations 1.09A(3) and 1.15A(3)).

aa) Ensure that decision makers receive appropriate and regular training on family violence that includes the perspective of people with lived experience.

<u>Refugee and Humanitarian related migration</u>

bb) That the overall number of visas granted under the Refugee and Humanitarian program be substantially increased with a greater number allocated for visas under the Special Humanitarian program.

cc) Regularly publish information about the Government’s settlement priorities and the process through which these are decided.

dd) Introduce a concessional visa application charge for family visas sponsored by refugees on low incomes whose Special Humanitarian applications are refused on the basis of Australia’s capacity to settle them.

Other recommendations

ee) Remove non-waivable health criteria from the Regulations (i.e. PIC 4005) and remove the requirement for non-migrating family members to satisfy health criteria.

ff) Significantly decrease/waive merits review fees of all visa and visa related decision at the Administrative Appeals Tribunal for people experiencing vulnerability.

gg) Provide government funding to specialist community legal services, including IARC and the Visa Assist service, to ensure that migrant workers experiencing vulnerability have access to independent expertise that can inform them about their rights and visa obligations.

Skilled migration

10. The vulnerability to exploitation faced by migrant workers is a direct result of the current visa system. The current system makes migrant workers overly reliant on their employers due to the precarious nature of their visa status. In its current form the Act, Regulations and general immigration system facilitates exploitation by creating an additional dependency by the employee on the employer, where the employee is practically reliant on their employer to maintain their lawful status in Australia.

11. In our experience, employers frequently use the threat of reporting visa holders to the Department and consequential visa cancellation or ineligibility for future visas to ensure that their own unscrupulous treatment of the employee is not reported. Only an overhaul of this system in line with the recommendations set out above would begin to adequately address the constructed detrimental dependency of migrant workers on employers.

12. It is only through the development of a regime that promotes compliance by enabling and empowering migrants to report exploitation by employers without consequences to their visa status will migrant workers be effectively protected from workplace exploitation.

Safeguards for migrant workers' visas

13. We believe migrant workers' visa status needs to be protected in order to ensure that migrant worker exploitation can be properly addressed. By safeguarding a migrant worker's visa this will ensure that they are secure in the knowledge that if they report unscrupulous employers their visa will not be cancelled or refused. This, in turn, enables Government agencies to be more effective in taking enforcement action and penalties against employers engaging in illegal practices to deter such conduct.

14. The Act in its current form results in migrant workers risking their own lawful status in Australia by reporting workplace exploitation to the Department. This is due to the fact that the reporting of an unscrupulous employer by a visa holder may also alert the Department to:

    i) A visa holder breaching a condition of their visa, which can lead to visa cancellation; and

ii) a visa applicant being unable to meet the requirements of a subsequent visa leading to the refusal of their visa application.

15. If their visa is cancelled or refused it may also mean they are unable to lodge further substantive visa applications to remain in Australia.

Visa conditions

16. Most temporary visas are subject to certain conditions the visa holder must comply with during the term of their visa. If a visa holder does not comply with their visa conditions the visa holder is liable to have their visa cancelled under s 116 of the Act. It is a discretionary power where the Minister "may" cancel someone's visa. While Departmental policy provides guidance to decision makers regarding factors that may be considered when contemplating cancelling a person's visa, we note workplace exploitation and unscrupulous employers do not expressly form part of that same consideration.

17. In Unions NSW and IARC experience, in situations where a visa holder is being exploited in their workplace, it is likely the visa holder will also be breaching a condition of their visa. For example:

a) Condition 8607(6) – imposed on Temporary Skill Shortage (**TSS**) visas subclass 482. This condition imposes a requirement for a visa holder to remain employed with their employer in their nominated occupation or to find a new sponsor within 60 days of losing their employment. TSS visa holders will often refrain from reporting unscrupulous employers for fear of losing their employment and ultimately their visa. TSS visa holders who lose their employment due to unscrupulous practices often find it difficult to find a new sponsor as a result of the tight 60-day requirement.

b) Condition 8105 – imposed primarily on Student visa (subclass 500). This condition imposes a limitation of 40-hour work fortnights on students while their course is in session. However, students often work in excess of the 40-hours imposed by this condition due to severe underpayments by employers. Employers then threaten to report students' non-compliance and possible visas cancellation if the student reports their experience of workplace exploitation.

Cindy – TSS - breach of visa condition

Cindy arrived in Australia with her husband and two young children on a TSS visa to work as a registered nurse in a local medical practice. For the first few months she seemed to get on with her employer and things were going well. However, soon after this, her employer started acting differently towards her. He would get angry at her for no reason and was constantly late paying her. He would also threaten her physically at work. Things started escalating when she was receiving death threats at her home and one time discovered her tyre had been punctured with a knife. She called the police but that didn't seem to go anywhere. She didn't feel safe at home and at work.

She approached HR at the medical practice and was told they would investigate - but nothing happened. Eventually, she left her employer as she couldn't take it anymore. She tried to find another employer but could barely leave her home due to the past trauma.

She received a notice of intention to cancel her visa from the Department of Home Affairs as she was no longer with her sponsor and had not found another sponsor in time. She wrote to them telling them about what had happened to her. The Department proceeded to cancel her visa as she could not provide "sufficient evidence" to support her claim and her employer "denied all allegations".

Recommendations:

- Create a firewall between the Fair Work Ombudsman (**FWO**) and Department of Home Affairs (**DHA**) to ensure that complaints made to the FWO are not shared with DHA so that migrant workers can speak out without fear of adverse migration outcomes.

- Remove certain visa conditions that can and have led to migrant workers being exploited, including:

    - Condition 8104 which restricts student visa holders to work a maximum of 40-hours a fortnight while their course is in session; and

    - Condition 8547 which requires working holiday makers not to remain with any one employer for more than 6 months.

- Amend visa conditions that mean that temporary visa holders remain in exploitative employment situations, for example, amending condition 8607 to allow temporary visa holders at least 90 days to find a new sponsor.

- Provide protections against visa cancellation in cases of workplace exploitation by:

    - Enlivening s 116(2) of the Act through regulations that make workplace exploitation an express factor against visa cancellation;

    - Amending visa conditions (Schedule 8 of the Regulations) so that visa holders would not have breached a work-related condition of their visa where there is a credible claim of workplace exploitation;

    - Updating policies associated with visa cancellation (e.g. policy around s 116 of the Act) to ensure that workplace exploitation is an express factor against visa cancellation; and

    - Including workplace exploitation as a factor considered in Ministerial Intervention guidelines.

Eligibility for future visas

18. If a migrant worker on a temporary visa reports their employer for unscrupulous conduct, they may also limit their options for future visa opportunities and even permanent residency. For example:

    a) holders of TSS visas may need their current employer to nominate them for permanent residency (e.g. under the Temporary Residence Transition stream for the subclass 186 Employer Nomination Scheme visa);

    b) in order for Working Holiday visa (WHV) holders to obtain subsequent WHVs they need to have completed a certain amount of regional work which is suitably evidenced;

    c) if a visa is refused, people may not be able to apply for further visas while they remain in Australia (i.e. due to the operation of s 48 of the Act).

19. In the experience of Unions NSW and IARC, TSS visa holders endure severe workplace exploitation due to the promise of the employer nominating them for permanent residency (which often doesn't come into fruition). We have also experienced employers withholding documents required to complete subsequent visa applications (i.e. payslips for subsequent WHV applications) for no valid/lawful reason.

20. Further, the migration system as it currently stands does not provide clear and objectively achievable pathways to permanent residency. This is partly due to the fact that:

    a) Skilled occupation lists (which dictate which occupations may or may not be eligible for particular visas, including permanent residency) are subject to change without notice and are out of step with roles that exist in many industries;

    b) The current employer-sponsored visa framework is overly complicated and intensifies workers' dependency on their employer. Currently, to sponsor a worker, the occupation must be on the relevant skilled occupation list, the employer must pay the Skilling Australians Fund (SAF) levy, conduct Labour Market Testing (LMT), the job salary must satisfy an income threshold, and workers must maintain their employment relationship to stay in the country;

    c) Certain skilled pathways to permanency either require an employer to nominate them or to be invited by the Government to apply (i.e. points-based visas).

21. The skilled work visa framework needs to be streamlined. The skilled list system should be removed over time and the migration system should allow migrant workers to be sponsored, provided the job pays 30 per cent above the median annual wage paid to employees within the occupation, removing the requirement to conduct labour market testing. Additionally, a new regime must de-link visas from employers, creating an industry sponsorship model, which is likely to provide a more effective option to fulfil skill shortages and prevent migrant worker exploitation.

22. By creating objectively achievable permanent visa pathways, this would allow visa holders to make informed decision about their migration early and also begin to level the power imbalance between employers and migrant workers, which often leads to workplace exploitation. It would also create a more positive experience for people migrating to Australia and assist with both nation building and social cohesion.

Massage therapists – 457 visas - ineligibility for permanent residency

In 2014, 7 women were sponsored on subclass 457 visas from Thailand as massage therapists. When they arrived in Australia, they were subject to severe exploitation by their employer including:

- being forced to sleep on the floor in the sponsor's accommodation (all in the same room);
- working 6 days a week for over 12 hours each day;
- restricted in leaving the home, what they could eat and drink and forming any relationships; and
- being significantly underpaid and being forced to pay back certain "costs" to their employer from their already low wage.

If they breached any rules set by their sponsor, they were threatened with their visas being cancelled and they would be removed from Australia and their families killed.

They were eventually sponsored for permanent residency by their employer. After which, they managed to escape and seek help from the Salvation Army and eventually a union.

The employer then had its nomination of the women refused by the Department (in part due to the treatment of the women). This in turn meant that the women's permanent residency applications were also refused at the Department stage and on appeal at the Administrative Appeals Tribunal. This refusal meant that the 7 women were unable to apply for almost all other visas while in Australia.

Sunil – Training visa – Student visa refusal

Sunil arrived in Australia on a Training visa. He came to Australia to follow his lifelong passion to be a chef and to learn about the culinary diversity of Australia. He started working at a hotel as part of his training and felt welcomed by his colleagues. However, when he received his first pay he realised substantial deductions were being taken from his pay which he never agreed to. The deductions were for:

- accommodation, which was a tiny room in the Hotel with a shared bathroom; and
- meals, which included leftovers from the hotel’s breakfast buffet (if there were any) and a lunch and dinner he or his colleagues would make themselves.

After lodging a complaint about his treatment, he was terminated from his traineeship, evicted from his accommodation, and forced to live in a hostel. His employer also reported him to the Department who wrote to him about cancelling his Training visa.

Sunil then applied for a Student visa in an attempt to continue his culinary training in Australia. That Student Visa was refused by the Department as they did not believe he was a "genuine student" given the pending cancellation of his Training visa (which they later decided not to cancel) and the inference "if he was serious about becoming a chef, he would have stayed with his employer on his Training visa". The Department also called all of his allegations regarding his former employer "hearsay" and refused to give any weight to them.

Li - Working Holiday visa – ineligibility for next visa

Li arrived in Sydney, Australia on a Working Holiday visa. He wanted to extend his stay and to do so he would need to work regionally for 88 days. He arranged his farm work through a phone number he got on a Working Holiday visa group on Facebook. He was told the employer could arrange accommodation, food and equipment and pay him a fair wage. The employer told him he had many Working Holiday visa holders before.

Unfortunately, when he arrived at the farm his experience was very different. He was told he would be paid based on the amount of fruit he picked, piece rates. He would also have to pay for his own bucket to put the fruit in and his accommodation and food would come out of his pay.

By the end of the 88 days the farmer told Li he owed him money and he would not sign anything or give him any payslips until he paid him back. Li was concerned he would have to go through this all again so he paid the employer the money. He is still waiting on the payslips he was promised and is unable to apply for another Working Holiday visa.

Recommendations:

- Create clear and certain permanent residency pathways for skilled temporary visa holders by ensuring permanent residency requirements are objectively achievable by visa holders, including:
    - Abolishing skilled occupation lists;
    - Allowing migrant workers to be sponsored, provided the job pays 30 per cent above the median annual wage paid to employees within the occupation;
    - Removing the need for employer nomination for permanent residency and instead relying on a person’s work experience; and
    - Abolishing the requirement to conduct labour market testing.
- Replace the current employer-sponsored visa framework with an industry sponsorship model to reduce a migrant worker’s reliance on employers.

- Create a temporary substantive visa that is available to people with outstanding claims for workplace entitlements, including underpayments, to remain lawfully in Australia. The substantive visa should:
    - have no visa application charge (**VAC**);
    - have unqualified work rights;
    - not limit the holder's access to permanent residency and/or subsequent temporary substantive visas;
    - allow family members to be included in the application as secondary applicants; and
    - be accessible to people who may be subject to certain statutory bars and do not hold a substantive visa.
- Amend visa eligibility requirements (i.e. Schedule 2 of the Regulations) to remove certain drivers for workplace exploitation by:
    - allowing substantive visas to still be granted in cases of workplace exploitation (where the person would otherwise be eligible but due to, for example, loss of employment, becomes ineligible); and
    - removing the requirement for 'farm work' for subsequent working holiday visas.
- Provide government funding to specialist community legal services, including IARC and the Visa Assist service, to ensure that migrant workers experiencing vulnerability have access to independent expertise that can inform them about their rights and visa obligations.

Family-related migration

23. The family visa program makes it difficult for family members of Australian citizens and permanent residents to migrate and settle in Australia. It also makes it difficult for people who have experienced domestic, family and sexual violence find safety and even stay connected to their Australian born children. IARC sees the impact of these policies on some of the most disadvantaged members of our community, including victim-survivors of domestic, family and sexual violence and people who have been separated from family for years with little prospect of being reunited.

24. Processing times have blown out to the point that some visa applicants will not see the visa granted in their lifetime and the VAC for many family visas are now prohibitively unaffordable.

25. In our view, family migration should not be about balancing economic and/or social policy. The appropriate approach must be about recognising and giving full effect to the understanding that family is the fundamental unit of society and should be respected and protected by the Government.

Family violence provisions

26. The Regulations make certain provisions which determine whether, for the purpose of Australian immigration law, family violence is taken to have occurred. These provisions, known as the "family violence provisions", are set out in Division 1.5 of the Regulations.

27. The family violence provisions provide that where family violence is taken to have occurred, certain visa applicants may continue with their visa application not withstanding that their relationship with their sponsor has ended. The provisions exist to ensure that visa applicants do not feel compelled to remain in abusive and violent relationships in order to obtain a visa.

28. However, the family violence provisions only apply to certain visa subclasses and do not apply to all temporary visa holders.

29. Presently, the family violence provisions apply only to:

    - Partner (subclass 820/801) visas;
    - Partner (subclass 100) visas if the applicant is in Australia as the holder of a Temporary Partner (subclass 309) visa (unless COVID concessions apply);
    - Prospective Marriage (subclass 300) visas where the applicant is in Australia and has married their partner;
    - Distinguished Talent (subclass 858) visas; and
    - Dependent Child (subclass 445) visas.

30. People on all other temporary visa subclasses are not eligible to access the family violence provisions, leaving them at risk of visa refusal or cancellation with few options to remain in Australia should their relationship with the perpetrator end.

31. While the family violence provisions are an established mechanism to enable some visa applicants to continue with their application for permanent residency, the ability to protect victim/survivors on temporary visas experiencing family violence is limited by:

    a) the lack of similar provisions for holders of other temporary visas and limited alternative permanent visa pathways; and

    b) the practical application of the family violence provisions being incompatible with the reality faced by many victim/survivors of family violence.

32. The following identified issues and recommendations are in line with the *Blueprint for Reform: Removing barriers to safety for victim/survivors of domestic and family violence who are on temporary visas (2022)*, prepared by the National Advocacy Group on Women on Temporary Visas Experiencing Violence and annexed to this submission.

Gaps in safety for victim/survivors of domestic and family violence

33. The omission of the family violence provisions from most permanent visa pathways means that many victim/survivors in abusive relationships often feel compelled to remain in those relationships in order to protect their visa status. As such, the migration system itself allows perpetrators to use a victim/survivor's visa status to control their actions and prevent them from seeking safety.

34. This is particularly the case where refusal or cancellation of the victim/survivor's visa may result in separation from their children due to a lack of other available visa options. This separation can arise for many reasons, including court orders preventing the mother from removing the child from Australia, the violent partner controlling access to passports and finances, or the mother's concerns for her ability to provide for the child's needs in her home country. In many cases, these children are minors and are also Australian citizens.

35. The number of women impacted by this issue is significant. IARC assists at least 200 women a year who have experienced family violence and who are not able to rely on the family violence provisions.

Constance – Student visa - family violence

Constance came to Australia in 2015 as a student. In June 2016, she met Mark – an Australian citizen – and they moved in together in December of that year. They have lived together as a couple since and in December 2018 Constance gave birth to their first child, Jessica. Mark and Constance have been saving money for a Partner visa but have been in no hurry to do so because Constance's student visa does not expire until the end of 2020.

Mark and Constance have also struggled to save the money needed for the Partner visa as Mark has been gambling online, a problem that has gotten worse since he lost his job due to COVID-19.

Mark has always had a temper but he has recently become physically violent and drinking more. Constance is fearful for hers and Jessica's safety but if she ends the relationship, she will have to leave Australia when her student visa expires (as she will have no further visa options).

As Jessica is an Australian citizen, she is unable to become a citizen of Constance's home country under the laws of that country and the government there will not give Jessica a visa without Mark's consent. Consequently, there is no practical option for Constance to take Jessica home with her.

36. To fully realise the objective of protecting people on temporary visas from family and domestic violence, the Act and Regulations must be amended to address the clear and obvious gaps that exist for victim/survivors who are not presently able to access the family violence provisions.

37. The below recommendations will ensure that victim/survivors of family and domestic violence on a pathway to permanent residency or who have Australian citizen children have an opportunity to remain in Australia, while giving victim/survivors on other temporary visas the opportunity to access the support necessary to safely leave their relationship.

Recommendations:

- Extend the family violence provisions to:
    - Any person experiencing family violence on Prospective Marriage visas (subclass 300) who does not marry their sponsor prior to relationship breakdown, and their children;
    - any person experiencing domestic, family and sexual violence who has applied for a substantive visa onshore as a secondary applicant, and their dependants; and
    - any person experiencing domestic, family and sexual violence who has applied for a family visa onshore, who is awaiting a decision, and their dependants.
- Create a substantive temporary visa for all victim/survivors of family violence, to allow them to remain lawfully in Australia without risk of visa cancellation while they seek safety and plan for the future. This temporary visa should also have a pathway to a permanent visa, to create safety and certainty for those who, for example, have significant ties to Australia or would face stigma, discrimination or other forms of hardship in their home country.
- Amend the Migration Regulations so that a non-citizen parent who has sole or shared parental responsibility for an Australian citizen (minor) is able to make an onshore Parent visa application (with an associated Bridging visa) without the need for a sponsor.

Practical applications of family violence provisions

38. While the family violence provisions offer a pathway to safety for certain visa applicants, the practical application of the provisions still do not operate in a manner that is consistent with an understanding of the nature of family violence.

39. Under Departmental policy, before the Department considers whether family violence has occurred, it must first assess whether there was a spouse or de facto relationship between the visa applicant and their sponsor. If the Department is not satisfied that there was such a relationship based on the evidence provided, the visa may be refused without considering the claims of family violence.

40. In considering the relationship, the decision maker must have regard to under Regulation 1.09A(3) or 1.15A(3):

a) the financial aspects of the relationship;

b) the nature of the household;

c) the social aspects of the relationship; and

d) the nature of the persons' commitment to each other.

41. This process requires the applicant to produce evidence of their relationship such as evidence of joint assets and liabilities, the sharing of day-to-day household expenses and responsibilities, the undertaking of joint social activities, the opinion of friends and family about the nature of the relationship and the degree of companionship and emotional support the couple give each other.

42. In IARC's experience, family violence rarely encompasses physical violence alone and may not involve physical violence at all. Most of our clients report non-physical forms of family violence such as controlling behaviour and financial abuse. Examples of the sorts of abuse IARC encounters daily include denying independent access to bank accounts and/or the freedom to earn an income and restrictions on contact with people outside the perpetrator's family. Such abuse inevitably means there is great difficulty producing the necessary evidence to satisfy the requirement that the relationship was genuine.

43. As a consequence of the above, victim/survivors of family violence often have their partner visa refused on the basis that the Department was not satisfied that there was a spouse or de facto relationship, without considering the nature of the family violence.

44. Expectations surrounding satisfactory evidence of a relationship where an applicant is relying on the family violence provisions need to take into account the nature of a violent relationship to ensure that eligible victim/survivors can access the family violence provisions in practice.

Diana - Partner visa – family violence

Diana met Mitchell in 2017 when they were both working on the same farm in rural NSW. They spent a year travelling around Australia together and decided that Diana move in with Mitchell and apply for a Partner visa so they could start a family. While Diana was keen to work to contribute to the couple's finances, Mitchell told her he earned enough to support both of them and he wanted her to focus on starting a family. Diana wanted a baby too so agreed that she would not look for a job for the time being.

When they were travelling Mitchell was social and outgoing but he was very different after Diana moved in. He didn't want to go out and socialise and they mostly stayed home. Mitchell wasn't close to his family and he told Diana that they were against their relationship and he didn't want to take her to family celebrations as it would be awkward.

Mitchell gave Diana an ATM card linked to his account but kept making excuses when she asked him about opening a joint account in her name too. He told her that he couldn't put

her name on the utility bills or rent agreement because she wasn't working and wasn't a permanent resident. The ATM card was often declined when Diana tried to buy food for the home but as she didn't have access to the account she couldn't see why.

Frustrated with never having money to buy things she needed, Diana decided to start looking for a part time job. One evening she received a call from a man inviting her to a job interview. Mitchell demanded to know who the caller was. He accused Diana of having an affair and when she told him she had applied for a job he told her she made him feel inadequate as a partner. When Diana tried to calm him down, he punched her.

A neighbour called the police and Mitchell was arrested and charged with assault. A few days later Diana found out she was pregnant. Diana made an application under the family violence provisions but when she was asked to provide evidence of the couple's shared finances and social life since the time of application, she was unable to find any documents.

Her partner visa application was subsequently refused as the Department did not consider that she was in a genuine and continuing relationship.

Recommendations:

- The Regulations and Departmental policy should be amended so that the existence of family violence should be established before an assessment of whether a relationship is genuine and continuing is made.
- If the Department is satisfied that there has been family violence, the departmental policy should set out that the delegate should generally accept that the family violence occurred within a genuine spouse or de facto relationship without further and separate assessment of the relationship.
- In cases where the Department does still require a separate assessment of whether the relationship was genuine, this assessment must be conducted in a trauma-informed manner and with regard to the context of family violence, given that forms of family can limit the evidence that is available.
- Ensure that decision makers receive appropriate and regular training on family violence that includes the perspectives of people with lived experiences.

45. A further limitation of the family violence provisions is that abuse or violence from a sponsor's family will generally not be sufficient to satisfy the definition of family violence. This means that many women subject to physical and non-physical forms of family violence such as dowry abuse by people other than their partner may be compelled to stay in those relationships when it is not safe to do so.

Maya – Partner visa – violence perpetrated by other family members

Maya and Paul were married in 2017 as part of a culturally arranged marriage organised by their families. In 2019, Maya was granted her Temporary Partner visa and moved to Australia to live with Paul, his parents, his brother and his brother's wife. Maya was excited to settle into a new life in Australia and start a family with Paul.

Before she moved to Australia, they spoke several times a day on Skype about their future plans. They wanted to buy a house and have three children. Paul was romantic and Maya felt lucky to have him in her life.

Life in Australia was not what Maya expected. Paul told Maya she had to get pregnant right away and became cold and distant when that didn't happen. His mother was cruel and made Maya cook and clean for hours every day and wouldn't let her go out other than with the family. If she wasn't happy with the work Maya did she would slap and verbally abuse her.

One night, Paul's father came into Maya's room while Paul was at work. He told Maya he wanted to have sex with her. When she refused, he slapped her in the face. Maya told Paul what happened and begged him to stop his parents from hurting her but he told her that it was their house and that they can do what they like. He told Maya that if she was able to get pregnant, they might treat her better.

A few days later, Paul's mother threw a pot of hot food at Maya as she wasn't happy with the way it was cooked. Maya was burnt and ran outside screaming for help. A neighbour called the police and arranged for Maya to be taken to hospital and then a refuge. Maya made an application under the family violence provisions but her visa was refused because the violence she experienced was perpetrated by Paul's parents and not Paul.

Recommendation:

- The definition of family violence should be broadened to include abuse and violence perpetrated by a relative of the partner or relative of the victim/survivor, and to cover conduct both in Australia and overseas.

46. Another practical difficulty that victim/survivors of family violence face when relying on the family violence provisions is providing evidence that meets the requirements within the Division 1.5 of the Regulations. In IARC's experience, victim/survivors often struggle to provide the required evidence for a variety of reasons. These include:

    a) reluctance to report the details of their experiences, particularly to the police, for various reasons including fear of further harm from the perpetrator, fear of the court process and having to retell their story, or fear of the consequences to their visa status;

    b) having to wait for long periods, for example, to get appointments with psychologists or qualified social workers, or for court dates to hear Apprehended Domestic Violence

Orders (ADVO) or criminal matters;

c) already be receiving appropriate support, but the support person or organisation does not fit within the narrow list of those identified as being able to provide non-judicial evidence to support that family violence has occurred.

Recommendation:

- The kinds of documents that applicants can provide to substantiate a family violence claim be revised and expanded including by:
    - allowing other common sources of support, like counsellors, case workers and multicultural community centres, to provide evidence; and
    - removing the requirement to have documents from two different types of professionals/organisations.

Partner visas

47. Australian citizens, permanent residents and eligible New Zealand citizens may be eligible to sponsor their spouse or de facto partner to migrate to or permanently settle in Australia through a Partner visa. There are four subclasses of Partner visas (not including the Prospective Marriage visa):

    a) Subclass 820 and 801 Partner visas (Onshore Partner visas)

    b) Subclass 309 and 100 Partner visas (Offshore Partner visas).

48. Partner visas are processed in two stages. In most cases, a visa applicant who meets the criteria for a Partner visa is first granted a temporary Partner visa. It is at this stage that an offshore applicant (that is an applicant who applied from outside Australia) may travel to Australia to live as a temporary resident while their permanent visa is finalised. The applicant is usually eligible to be granted a permanent Partner visa two years after their application is made.

49. Partner visa applicants face significant wait times for the grant of their visa. According to the Department's website[1], current processing times are:

	Onshore	Offshore
Temporary (820/309)	Up to 37 months	Up to 30 months
Permanent (801/100)	Up to 25 months (from date of eligibility)	Up to 31 months (from date of eligibility)

50. These processing times mean that an offshore applicant will often be waiting more than two years for a temporary visa that will allow them to reunite with their partner in Australia and an overall wait time of more than four years before they become a permanent resident.

51. Partner visas also have a significant cost. The VAC for a permanent Partner visa is currently $8,085 for the primary applicant with additional charges applying if there are dependents included in the application. In our experience, the excessive wait time at each stage of the process and the high cost of applying for the Partner visa places undue strain on visa applicants and their Australian partners.

Hugo: Partner visa – processing times and VAC

Hugo met his wife Ingrid in 2016 while she was on a working holiday visa in Australia. Their relationship became serious when Hugo and Ingrid spent 6 months travelling together around rural Australia. Hugo and Ingrid were married in 2017 but shortly after, Ingrid returned to her home country as her visa was due to expire and they could not afford the cost of a Partner visa.

Hugo and Ingrid visited each other when they could and tried to save the money for a Partner visa which they finally managed to do in October 2019. Shortly after they applied for the visa, Ingrid discovered she was pregnant.

Hugo and Ingrid's first child was born in July 2020. Hugo could not be there for the birth as he could now not afford to pay for the flights and the borders were closed. Ingrid has been struggling to look after their child on her own and Hugo lost his job in hospitality during the pandemic.

Ingrid is frustrated that Hugo isn't doing more to speed up the visa process. Their relationship is strained and Ingrid has told Hugo that she's not sure if she should continue with the visa process. Hugo misses his wife and is devastated that he has still not met his daughter.

[1] Department of Home Affairs, Partner visas, https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/partner-onshore; https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/partner-offshore (accessed 13 February 2023).

52. Hugo and Ingrid's story is typical of many clients who approach IARC for help. Many cannot afford to pay the upfront VAC that will take four years or more to be finalised. This issue may, in part, be addressed if the Regulations allowed for a significantly reduced VAC for applicants who can demonstrate financial hardship.

Recommendations:

- Reduce the VAC for family visas for those experiencing financial hardship, including Partner and Parent visas, so that more people can access permanent family reunion.

- That the Department be adequately resourced to allow decision ready Partner visa applications to be processed within 90 days of application in the case of temporary Partner visas and 90 days of becoming eligible for second stage processing in the case of permanent Partner visas.

53. To be granted a Partner visa, the visa applicant must demonstrate that they are the spouse or de facto partner of their Australian sponsor. The terms 'spouse' and 'de facto partner' are defined in the Act and the Regulations.

54. The Regulations require that all the circumstances of the relationship must be considered when assessing the relationship but specify that the decision maker consider the following aspects of the relationship:

    a) financial;

    b) nature of the household;

    c) social; and

    d) nature of persons' commitment to each other.

55. While these considerations are generally consistent with other jurisdictions, in our experience, decision makers tend to treat them as an exhaustive checklist without giving meaningful consideration to other aspects of the relationship or to cultural/social reasons which may explain why adequate evidence about these four matters cannot be produced.

56. Despite the multicultural and diverse configuration of relationships within Australia, the Migration Regulations and the Department's policy focuses predominantly on a western, heteronormative concept of a ‘genuine relationship’ with policy offering little guidance to decision makers to allow them to make a realistic finding about whether two people have genuine commitment to shared life together.

Sam – genuine and continuing relationships

Felicia met Sam in 2016 when she was travelling overseas. Over time their relationship blossomed into a romance for the ages. If they were not by each other's side, they would be calling or texting. Felicia would visit Sam once a year for a surprise adventure before Felicia

would return to Australia. Not many of Felicia's friends in Australia had met Sam as she lived overseas.

In July 2019, Felicia and Sam had a small wedding attended by Sam's family. After the wedding, Felicia returned to Australia and Sam submitted a Partner visa application.

Sam and Felicia do not live together so cannot provide evidence about the nature of their household. Felicia works as a lawyer and Sam's scholarship to complete a PhD is enough to support a humble lifestyle in Sydney. They do not have a shared bank account and Felicia's family and friends have not met Sam yet and cannot provide a reference in support for their application. Felicia and Sam are worried that they cannot meet the evidentiary requirements for the visa.

Recommendations:

- Ensure that assessments of relationships for Partner visas are culturally appropriate and require decision makers to consider why there may be inadequate evidence to demonstrate the four factors to establish a genuine and continuing relationship (under Regulations 1.09A(3) and 1.15A(3)).

Carers

57. Carer visas allow a person to permanently settle in Australia in order to care for a family member who has a long-term medical condition or disability. Carer visa applicants must satisfy the decision maker that they have an Australian relative who:

    a) has a long-term medical condition causing physical, intellectual, or sensory impairment affecting their ability to manage daily activities such as showering, dressing, going to the toilet and preparing meals;

    b) has been assessed as having a rating under the Social Security Impairment Tables of at least 30 points;

    c) has no other relative in Australia who can reasonably provide the care; and

    d) is unable to reasonably obtain the care from welfare, hospital, nursing or community services in Australia.

58. There are only a small number of Carer visa grants each year with 345 visas granted in the 2020-2021 financial year.

59. The small number of Carer visas granted each year is the result of the government's cap and queue approach to family visas since 2013/14. This has resulted in an overall wait time of more than 7 years for the grant of a Carer visa.

60. At the time of application for the carer visa those with a serious illness or disability must show that they need help but then face a queue-time of years for a visa to be granted to their carer. This delay is causing significant distress and hardship to people with a disability or serious illness and their families who are desperate for help and fearful for the future.

Mary – Carer visa – queue times

Mary is 16 years old and has a number of serious medical conditions including a rare genetic condition, autism spectrum disorder and developmental delay. Mary has trouble communicating and needs help with daily activities such as bathing, going to the toilet and getting dressed. Mary also requires a special diet and is fed with a feeding tube. Mary needs 24-hour care and is looked after at home by her mother. Her father died in a car accident when she was 4.

This has put increasing pressure on Mary's mum who is her primary carer. Mary receives 3 hours daily personal care through NDIS and occasional weekend respite for her mother. Mary's mother is doing her best but as Mary gets older it is becoming harder and harder to care for her alone. Mary's mother is also worried about what will happen to Mary when she is no longer there to care for her. The family sponsored Mary's cousin in Colombia for a Carer visa in 2020 and are still waiting for a decision.

61. In our view, the Australian Government can alleviate some of this suffering by removing the cap on the number of Carer visas that may be granted each year. This would enable more Australians with a serious illness or disability to be cared for at home by a loved one and contribute to reducing the pressure on the aged care and disability system. This is a simple change that can be implemented immediately by legislative instrument.

Recommendation:

- That the Minister removes the cap on the number of Carer visas that may be granted each year.

62. Capping and queuing is only part of the story. In IARC's experience, Carer visa applicants face years of waiting just to have their application assessed and added to the queue.

63. The wait times that Carer visa applicants face can be significantly reduced by ensuring that sufficient resources are allocated to the prompt processing of Carer visa applications. Faster resolution of applications will also reduce the workload on both the Department and the client because due to current processing times, decision makers often require updated information on the person in need of care's circumstances before the visa can be finalised. This forces applicants to go through the process of collecting evidence all over again, compounding the difficulties they experience.

Recommendation:

- That the Department allocates sufficient resources to the processing of Carer visas to ensure that decision ready applications are assessed within 90 days of application.

64. Carer visa applicants and their families face significant challenges in satisfying decision makers that they meet the requirements for a Carer visa. Demonstrating that care is not available in Australia (either from another relative or an institution) is particularly difficult, with the person in need of care essentially required to show that the non-citizen family member is their last possible resort to get the help that they need.

65. In practice, this means spending hours on the phone contacting nursing homes, private care providers and community organisations to obtain information about their services, collecting extensive supporting documents such as financial records and quotes and preparing statutory declarations outlining why no appropriate services are available. This approach also denies the person in need of care the agency and dignity to decide how they want to live their life.

66. Under the Regulations and current policy settings, the preference of a person with disability to be cared for at home by a family member is irrelevant to the determination of the visa application. If institutional care can reasonably be obtained, the visa must be refused.

Elizabeth – Carer visa – access to care

Elizabeth is a 45-year-old woman who became paraplegic following a car accident 5 years ago. She lives in a regional town in New South Wales. Elizabeth needs help with all aspects of daily life including showering, dressing, going to the toilet and administering her medication. Elizabeth's husband is her primary carer while working two jobs to support the family. She also receives a few hours assistance for some personal care through NDIS.

Elizabeth has sponsored her sister for a Carer visa and has received a request for further information from the Department which is 8 pages long. The letter has asked her to provide evidence that no support is available in the community. A social worker has told her that there is a bed for her at a local aged care facility. She is only 45 and does not want to live in an aged care facility away from her children but doesn't know what she needs to do to satisfy the Department of Home Affairs why she needs her sister to care for her.

Elizabeth tried to get help from a private migration lawyer but it was going to cost $10,000 which the family can't afford.

67. In our experience, many Carer visa applicants or their sponsors simply do not have the capability to manage the visa application on their own. This may be because of language, lack of understanding of Australia's disability and aged care systems and the additional barriers that they may face because of their disability. Many also lack the resources to engage private immigration assistance. As a result, many applicants do not provide

sufficient evidence with their initial application to satisfy decision makers and receive invitations to provide additional evidence before a decision is made. It is usually at this point that applicants or sponsors contact IARC for assistance, often at a loss as to what they need to do.

68. Improved access to immigration legal assistance will go some way to addressing these challenges, improving the quality of initial applications, reducing processing times by avoiding the need to request further information during processing and ensuring that prospective applicants have had advice about whether a Carer visa is suitable and that they can meet the criteria for the visa.

69. In many cases, the reasons why people in need of care are unable to access it in the community are obvious. The high costs of private care, the barriers to accessing care (particularly culturally appropriate care) in regional areas and the lack of suitable facilities for young people with disability are well established.

Recommendation:

- That the Department's policy be updated to require decision makers to consider publicly available information about the state of the disability and aged care sector before requesting evidence from the visa applicant

70. For NDIS and MyAgedCare recipients, assessments have already been made as to what support the community, through the Australian Government, is able to provide. It is often the case that support through those programs as substantially less than the level of care that the person in need of care has been assessed to require. In such circumstances, we believe it is unnecessary for applicants and their sponsors to be forced to go through the time-consuming task of calling service providers to obtain evidence that they are not able to assist.

Recommendation:

- That the Department's policy is updated so that NDIS and MyAgedCare assessments are accepted as conclusive evidence of the availability of care through the community.

71. It is important to recognise that many Carer visa applicants are already in Australia providing care to their loved ones while they await the outcome of their application. Many carers have made significant sacrifices and commitments to ensure that their family member has the support they need to live a fulfilling life. In some cases, the person in need of care may pass away before the visa is granted. This is particularly the case given the long processing times for the grant of the visa.

72. When this happens, the visa must be refused and the carer will likely have no options of remaining in Australia. We believe that carers have made a significant contribution to our

community by taking on the unpaid and undervalued work of caring for a family member with disability or serious illness. They have done so with no certainty that they will be able to remain in Australia. Their contribution should be recognised and greater certainty should be provided to those willing to do this important work.

Recommendation:

- That the Migration Regulations be amended so that onshore Carer visas (subclass 836) may be granted in the event of the person in need of care dies and the applicant has been providing the required care for a reasonable period of time.

Health criteria

73. Most people are required to satisfy a health requirement before a visa can be granted to them. This is usually through the requirement to satisfy Public Interest Criteria (**PIC**) 4005 or 4007. For some visas, these health requirements are also imposed on members of the applicant's family unit (including those not applying for the visa). To satisfy PIC 4005 an applicant must:

    a) comply with a request to undertake a medical assessment;

    b) be free from tuberculosis;

    c) be free from any disease or condition that is, or may result in them being, a threat to public health or a danger to the Australian community;

    d) not have a disease or condition that:

        i) 'during the period of the applicant's proposed stay in Australia' would be likely to require health care or community services or which would meet the medical criteria for the provision of a community service; or

        ii) would result in significant cost to the Australian community in the areas of health care and community services (the policy threshold for the level of cost regarded as significant is currently $51,000) or prejudice the access of Australians to such resources; and

    e) have provided a signed health undertaking if asked by a Medical Officer of the Commonwealth.

74. The above criteria apply regardless of an applicant's intention to access the health care or community services. There is no waiver available for PIC 4005. The requirements for PIC 4007 are identical to PIC 4005 except that PIC 4007 provides a discretion for the requirements to be waived in some circumstances.

75. The main concern about the operation of PIC 4005 is that it does not allow for consideration to be given to the contribution the visa applicant would make to social,

cultural and economic life in Australia or the contribution the person would make to meeting the costs associated with their disability (or whether they would actually access any services). It also does not allow the decision maker to consider the best interests of the child and arguably amounts to a breach of Article 18 of the Convention on the Rights of Persons with Disabilities.

76. The requirement that a visa can be refused on the basis that a family member not included in the application fails the health criteria makes the operation of PIC 4005 even more problematic.

Recommendations:

- Remove non-waivable heath criteria from the Regulations (i.e. PIC 4005) and remove the requirement for non-migrating family members to satisfy health criteria.

Parents

77. There are four subclasses of visas that permit a non-citizen to remain in Australia permanently based on their relationship with an Australian citizen child:

    - Parent (subclass 103);
    - Contributory Parent (subclass 143);
    - Aged Parent (subclass 804); and
    - Contributory Aged Parent (subclass 864)

78. All permanent parent visas are subject to capping and queuing.

79. The consequence of the capping and queuing of parent visas has been extremely long processing times, particularly for Parent and Aged Parent visas.

80. In our experience, the capping and queuing of Parent visas, high costs and other requirements of Parent visas mean that few (if any) of the people who engage our service will have any prospect of seeing a Parent visa granted. The Parent visa system results in the separation of families and is fundamentally unfair because it favours the wealthy who can afford the nearly $50,000 application fee for a Contributory Parent visa.

81. We regularly see firsthand the distress that the lack of realistic visa options causes for Australian citizens or permanent residents and their parents. Our clients include Australian children seeking migration options for widowed mothers left alone following the death of their spouse, children of elderly parents who need care during their final years and single parents who need the support of family caring for children.

Recommendation:

- The cap on Parent and Aged Parent visas should be removed.

The balance of family test

82. The majority of applicants for permanent parent visas must pass the 'balance of family test'. Essentially, this test requires that the parent has at least half their children living permanently in Australia (or more children living permanently in Australia than any other single country). The rationale behind this requirement, according to Departmental policy, is to ensure that only those with close ties to Australia are eligible for the limited number of parent visas available.

83. However, the rigid numerical approach of counting children by location to determine whether a parent has close ties to Australia is problematic. It does not account for situations where a parent is estranged from a child. Under the current balance of family test, if the whereabouts of a child are unknown, the child is taken to be living in the last known country of residence. Accordingly, even where a parent has lost contact with children who were last living outside Australia, those children still factor into the balance of family test. The only children who are not factored into the test are children that the parent no longer has custody by order of a court, children who are refugees or resident in a country where they suffer persecution or abuse of human rights. The numerical approach to assessing a parent's ties to Australia also fails to consider how strong the relationship between the parent is to their child, and possibly grandchildren, in Australia.

Recommendation:

- Amend the Migration Regulations so that decision makers consider the nature of the relationship between the parent and their children when assessing whether the applicant has close ties to Australia for Parent visas (rather than relying solely on the balance of family test).

<u>Children</u>

84. Child visas (subclasses 101 and 802) are permanent visas available to children of Australian citizens, permanent residents, and eligible New Zealand citizens. Child visas are limited to children under 25 years of age unless the child is incapacitated for work due to the total or partial loss their bodily or mental functions.

85. Children aged 18 to 24 must meet specific requirements related to financial dependency, work, and study, and must not be engaged to marry or have ever had spouse or de facto partner. In our experience, these requirements can have harsh outcomes causing significant distress to families who are separated with no realistic prospect of being reunited.

Kira – Child visa – dependency

Peggy migrated to Australia in 2013 after she was granted a Refugee visa. She had previously been living in a refugee camp for many years after fleeing from persecution. When she fled, she left her 5-year-old daughter, Kira, with her grandparents because it was unsafe for her to take her with her. Kira is now 19 years old.

Peggy has sent Kira all the money she can. However, she had to rely on relatives to provide most of the money to meet Kira's basic needs. As a result, Kira would not meet the requirements for a Child visa because Kira is not wholly or substantially dependent on her mother. Kira previously unsuccessfully applied for a humanitarian visa.

86. Children aged 18 to 24 must also show that they have been undertaking a full-time course of study since turning 18, or within six months or a reasonable time after completing the equivalent of year 12. The purpose of the work and study requirement is to exclude independent adult children from the Child visa pathway. Departmental policy states that generally children are considered independent once they turn 18 unless they progress to further studies after finishing high school.

87. We believe that this inflexible eligibility criteria based on employment and education status unfairly favours wealthy families who can afford to support their children through tertiary education. This socio-economic distinction is demonstrated in Departmental policy which makes an exception for children undertaking a 'gap year' between finishing high school and starting university but not for those taking time out of studies or studying part time due to financial pressures.

88. It is overly simplistic to look at family relationships simply through the lens of whether or not a child is enrolled in full-time study. Our clients include people whose children have been unable to finish high school or undertake tertiary education for financial reasons; because they have carer responsibilities for a family member; because they have learning disabilities; and because they are afraid to go to the school where they have been harassed on account of their sexuality or gender identity. None of these children would meet the criteria for a child visa.

Michelle – Child visa – Study requirement

Michelle migrated to Australia as a Partner visa holder. A few years after she arrived Michelle was subjected to violent abuse by her now ex-husband. Michelle has two sons from a previous marriage who remained in her home country when she moved to Australia. She would like one or both of them to be with her in Australia to support her as she recovers from the trauma she experienced.

Michelle's oldest son is 26 so is too old for a Child visa. Her younger son is 18 and started a marketing degree supported by his mother but he left university so that he could travel to

Australia to be with her while she recovered from her injuries. He applied for a Child visa but as he is no longer enrolled in full-time study the visa was refused.

89. While there may be valid policy reasons for excluding adult children, we believe that there is a need to reform the Child visa system to ensure that outcomes are not dictated by socio-economic status and to enable decision makers to take into account individual circumstances in all cases.

Recommendation:

- Amend the Migration Regulations so that a Child visa may be granted to an applicant over 18 years of age who does not meet dependency or study requirements where there are compelling or compassionate circumstances.

Other family

90. Two final visas of note are the Aged Dependent and Remaining Relative visas.

91. The Aged Dependent Relative visa is for relatives that are financially dependent on their Australian citizen, permanent resident or eligible New Zealand citizen relatives. They must be financially dependent for a reasonable period (under policy this is three or more years). To qualify, the applicant must be at least 65 years of age (men) and between 60-65 for women, depending on when they were born.

92. The Remaining Relative visa is for applicants who are the remaining relative of an Australian citizen, permanent resident or eligible New Zealand citizen. An applicant cannot have any near relatives other than those who are usually resident in Australia. If they have a spouse or de facto partner, they must also have no near relatives other than those in Australia.

93. The extremely low cap numbers for these visas means that current processing times for both visas is approximately 24 years.[2]

Sabrina - Remaining relative visa – long wait times

Sabrina is the 54 year old sister of an Australian citizen. Sabrina lives in Iran, and until a few years ago, she was the sole carer of her mother and father, who had dementia and eventually passed away. Sabrina never married because she was caring for her parents. Sabrina's only near relative is her brother, who is an Australian citizen.

[2] Department of Home Affairs, 'Visa processing times' https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-processing-times/family-visa-processing-priorities/other-family-visas-queue-release-dates#:~:text=Current%20estimated%20processing%20time%20for,queued%20is%20approximately%2024%20years (accessed 13 February 2023)

She lodged a Remaining Relative visa in January 2023. She completes the requested health check, and then is advised her application has progressed to the queue. Current processing time for applications that meet the criteria to be queued is approximately 24 years. Sabrina would be 78 years old by the time her application progressed to consideration for grant.

94. The first stage application fee for the main applicant for Aged Dependent Relative and Remaining Relative visas is currently $4,560. Additional charges apply for secondary applicants. This must be paid at the time of application. In our view, it is unconscionable that a visa application charge of this magnitude is payable for a visa that will not be granted for 24 years, if at all.

Recommendations:

- That the cap on Aged Dependant and Remaining Relative visas is abolished so that visas are processed within a reasonable time.

Refugee and Humanitarian related migration

95. Family reunion is often cited by our clients and settlement workers as the most pressing issue for refugees who have settled in Australia. Separation from family, particularly in the context of the traumatic experiences that forced them to leave their home country, is an ongoing source of distress and anguish.

96. While refugees who have settled in Australia and wish to reunite with family in Australia may propose or sponsor their relative for a Global Special Humanitarian visa or a visa in the Family stream, the reality is that few will be able to achieve the outcome they desire. Family visas are often out of reach due to the long processing times and high costs which have already been discussed throughout this submission, while the demand for Special Humanitarian visas far exceeds the number of visas granted and the visas are subject to opaque 'settlement priorities'.

97. Applicants under Special Humanitarian visas must show they have a link to Australia. That may involve spouse or de facto partners or dependent children and their parents ('split-families'), other family members, friends or community organisations. Except in cases of split-family applications, the visa applicant must be outside their home country and prior to leaving, were subject to substantial discrimination amounting to a gross violation of their human rights.

98. Processing times for Special Humanitarian visas are not available but the Department's website states that they may take 'many months or even years'.[3]

[3] Department of Home Affairs, Global Special Humanitarian, https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/global-special-humanitarian-202 (accessed 13 February 2023)

99. Split-family applicants must also show that there are 'compelling reasons for giving special consideration to granting the application having regard to the extent of the applicant's connection to Australia'.

100. Non-split family applicants must generally show there are compelling reasons having regard to the degree of discrimination, the extent of the connection to Australia, whether there is a suitable third country that the applicant may go to and the capacity of the Australian community to provide for permanent settlement. The overwhelming majority of Special Humanitarian visas are refused.[4]

101. Applications are processed in three stages, with the first being an initial assessment on the basis of the Government settlement priorities and visa criteria. In our experience, most applicants receive a pro forma refusal notice acknowledging that the applicant has been subject to the gross violation of their human rights in their home country, has a sufficient link to Australia and no suitable third country option, but nonetheless refusing the visa on the basis that Australia lacks the capacity to help them. This suggests that Special Humanitarian visas are being refused primarily on the basis of settlement priorities and without a detailed examination of the applicant's individual circumstances.

Nami – Capacity to settle – Special Humanitarian visa

Nami was 15 years old when her village was attacked in the middle of the night. She was badly injured but escaped the family home into the jungle, losing sight of her parents and brother while they ran. Nami travelled by foot for 3 days to a refugee camp. She could not locate her family at the refugee camp. Nami lived in the refugee camp for two years before she was granted a Refugee visa and travelled to Australia.

Nami is now 20 and recently discovered that her brother survived the attack and is now living in a different refugee camp. A Remaining Relative visa has a 24 year wait to be processed so she proposed her brother for a Special Humanitarian visa. Nami recently received a notification that the visa was refused because Australia does not have the capacity to settle her brother.

102. Our clients often speak of the distress caused by the lack of clarity on Australia's 'settlement priorities', the long processing times, the lack of responses to enquiries and the use of pro forma decisions. The use of pro forma decisions is particularly concerning as they raise questions about the extent to which decision makers have considered the other relevant compelling circumstances in the case and the process by which the considerations were weighted. Given that Special Humanitarian applications are not subject to merits review, we believe that there is a need for greater transparency around the decision-making process in relation to Special Humanitarian visas.

[4] FOI Request FA 21/10/00652 https://www.homeaffairs.gov.au/foi/files/2021/fa-211000652-document-released.PDF (accessed 13 February 2023)

Recommendations:

- That the overall number of visas granted under the Refugee and Humanitarian program be increased with a greater number allocated for visas under the Special Humanitarian program.
- Regularly publish information about the Government's settlement priorities and the process through which these are decided.
- Introduce a concessional visa application charge for Family visas sponsored by refugees on low incomes whose Special Humanitarian applications are refused on the basis of Australia's capacity to settle them.

Prohibitive merits review fees

103. In 2021, the Australian Government increased the fee for lodging reviews at the AAT from $1764 to $3000. This marks an increase of around 70%. The current fee for lodging a review is $3,153. Applicants can only request a fee reduction of 50% (not a complete waiver) where paying the fee would cause them severe financial hardship.

104. At IARC, we have witnessed clients struggle to pay the reduced fee and place themselves in extremely vulnerable situations. IARC has had clients sell their motor vehicle (which they were using for a home), pawn family heirlooms and other personal items and enter into loan arrangements with friends/family that they have no realistic chance of repaying, in order to access merits review.

Recommendation:

- Significantly decrease/waive merits review fees of all visa and visa related decision at the Administrative Appeals Tribunal for people experiencing vulnerability.

- Annexure A: "Wage Theft: The Shadow Market Empowering Migrant Workers to Enforce Their Rights".
- Annexure B: "IARC and Unions NSW Submission: Migration Amendment (Protecting Migrant Workers) Bill 2021)".
- Annexure C: "National Advocacy Group on Women on Temporary Visas experiencing violence, Blueprint for Reform: removing barriers to safety for victims/survivors of domestic and family violence who are on temporary visas"
- Annexure D: "IARC and Unions NSW submission: A migration system for Australia's future"