Bridging the Department's Visa Blindspot

Rights Advocacy Project
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LIBERTY VICTORIA

Liberty Victoria's RIGHTS ADVOCACY PROJECT

'Bridging the Department's Visa Blondspot', published December, 2020.

About the Report
This report was written by Baneen Saberi, Emma Blakey, Isabella Farrell-Hallegraeff, Kate Vanrenen, Samudhya Jayasekara, Sione Pemberton and Zoe Brown. The authors were members of Liberty Victoria's Rights Advocacy Project (RAP).

About the Rights Advocacy Project
RAP is a community of lawyers and activists working to advance human rights in Australia across a range of issues including equality, government accountability, refugee and asylum seeker rights and criminal justice reform. RAP is part of Liberty Victoria, one of Australia's leading human rights organisations.

About Liberty Victoria
Liberty Victoria has been working to defend and extend human rights and freedoms in Victoria for over 70 years. The aims of Liberty Victoria are to:

- help foster a society based on the democratic participation of all its members and the principles of justice, openness, the right to dissent and respect for diversity;
- secure the equal rights of everyone and oppose any abuse or excessive power by the state against its people;
- influence public debate and government policy on a range of human rights issues. Liberty Victoria has policy statements on issues such as access to justice, a charter of rights and freedom of speech and privacy; and
- prepare submissions to government, support court cases defending infringements of civil liberties, issue media releases and hold events.

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Acknowledgements
The authors wish to thank their supervisors, Joel Townsend and Maria O'Sullivan, for their support, encouragement and guidance throughout the project. They also thank their team contact, Rochelle Francis, and fellow members of the RAP Steering Committee. They are also very grateful to Michael Precel for assistance with the design of the report and Rowena Lloyd for creating an animated video to launch the report.

The authors also wish to thank the following organisations for their support for the project:

- Asylum Seeker Resource Centre
- Brigidine Asylum Seekers Project
- Baptcare Sanctuary
- Tasmanian Asylum Seeker Support
- National Justice Project
- Jesuit Refugee Service
- Refugee Legal

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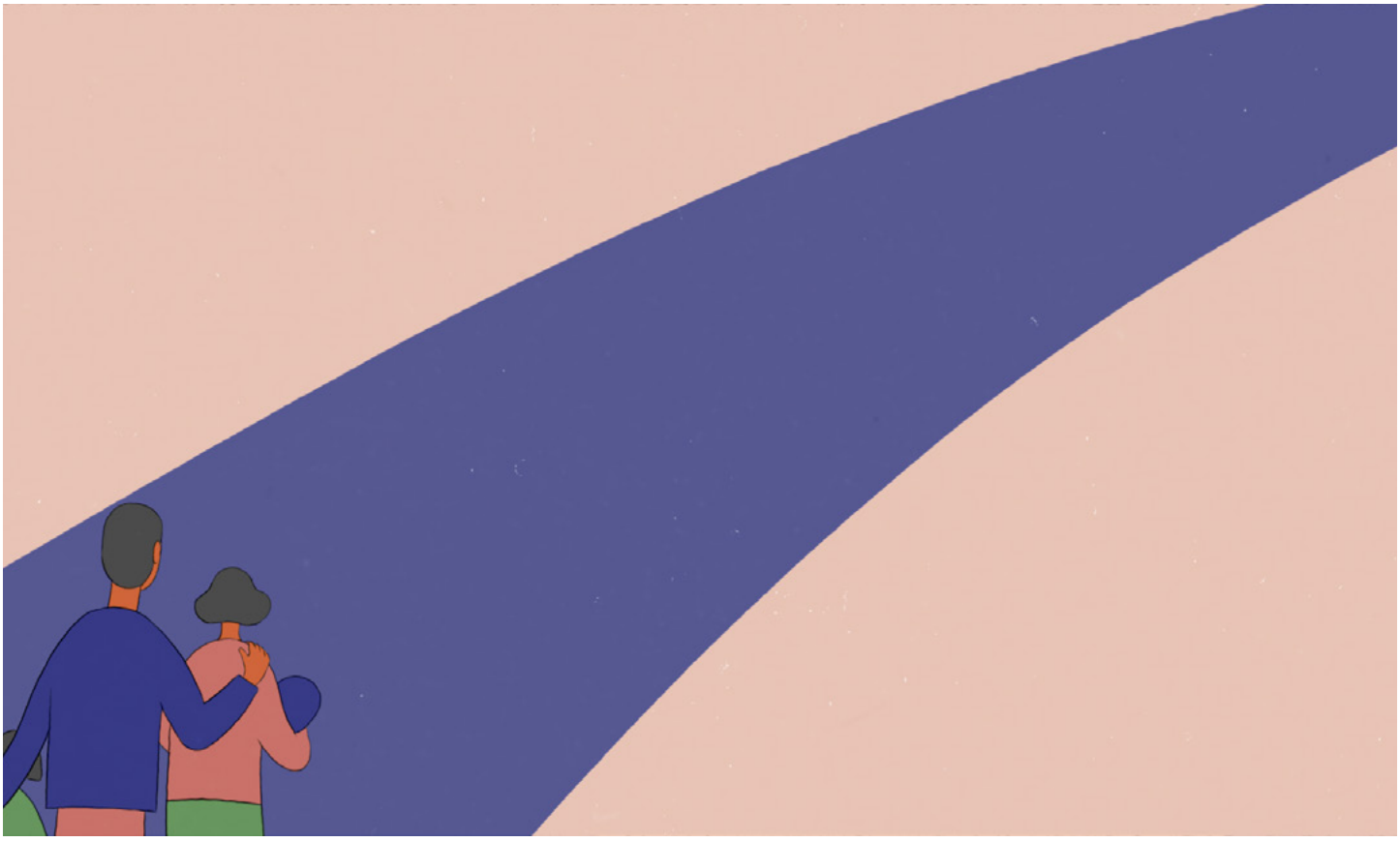
Glossary of Terms

AAT	Administrative Appeals Tribunal
AHRC	Australian Human Rights Commission
APS	Australian Public Service
ASRC	Asylum Seeker Resource Centre
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987)
CESCR	United Nations Committee on Economic, Cultural and Social Rights
Department	Department of Home Affairs
FOI	Freedom of Information
FOI Act	Freedom of Information Act 1982 (Cth)
IAA	Immigration Assessment Authority
ICCPR	International Covenant for Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976)
ICESCR	International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976)
Medevac	Home Affairs Legislation Amendment (Miscellaneous Measures) Bill 2018
Migration Act	Migration Act 1958 (Cth)
Minister	Minister for Home Affairs
PAM	Procedural Advice Manual
Public Service Act	Public Service Act 1999 (Cth)
Refugee Convention	Convention relating to the Status of Refugees, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) and Protocol relating to the Status of Refugees, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967)

Statement	Australian Government Statement of Ministerial Standards
UMA	Unauthorised Maritime Arrival
UNHCR	United Nations High Commissioner for Refugees



Foreword

Upon first reading a draft of this report I was struck by a memory from my time in the Department of Home Affairs. At a protection visa interview an applicant enquired about the status of their bridging visa, which was due to expire in the next few months. I followed up the request with one of my colleagues who asked me whether the applicant was on a positive or negative pathway. When I replied that the applicant was most likely a refusal their response was that their bridging visa most likely wouldn't be renewed as 'we wouldn't want to send the wrong message'. My reaction was to simply think 'that makes sense' and go about my work day. The question of what this would mean for the applicant never entered my mind.

The point of the above anecdote is not to demonise my former colleague, myself or Departmental staff in general. For the most part, the Department is staffed by good people genuinely trying to do their best in what can be a very challenging environment. Rather it's to highlight just how completely the rights of people seeking asylum have been reframed as privileges, to be granted or revoked on the basis of compliance goals, within the Department. The utilisation of notionally administrative processes for coercive purposes has become so normalised within the Department that it, and the damage it causes, has become almost invisible to us.

That is what makes reports such as this one so important. Whilst I am sure there is an awareness in pockets of the Department of the impact the denial of bridging visas can have on individuals, it is unlikely that these understandings are as comprehensive as the picture outlined in this report. Equally unlikely, given the lack of statistics highlighted, that the issue is being taken seriously at a high level within the Department. An issue that remains unseen cannot be resolved.

I hope that the report and its key findings, particularly the appropriate reporting of the number of people affected, are seriously considered by policy makers. This is important not just for the several thousand people seeking asylum who are awaiting a final outcome on their protection visa application, but for all future people seeking asylum. Regardless of method of transport, direct asylum seeking to Australia will continue indefinitely. It is incumbent on the government, and all of us, to ensure we understand the impact that the denial of bridging visas has on people seeking asylum and take that into account in the design of any future policy interventions in this area.

Shaun Hanns
Former Officer at the Department of Home Affairs

Executive Summary

The Minister is no stranger to scrutiny of the exercise of his ministerial powers and discretions. Under the Migration Act, the Minister has extraordinary powers and the ability to influence the lives of people seeking asylum in Australia. One of these powers is in relation to the ability to grant or deny a bridging visa to people seeking asylum.

A bridging visa is a temporary visa granted to a person to allow them to remain lawfully in the Australian community whilst their immigration status is resolved. Bridging visas are vital for people seeking asylum. They allow access to basic rights and services while individuals await determination of their claims for protection, which often takes many years. Without a valid bridging visa, a person seeking asylum is left in a precarious situation at the risk of detainment or deportation. Despite this, under sections 46A, 46B and 91K of the Migration Act, certain cohorts of people seeking asylum are barred from applying for bridging visas, or being granted them, without intervention by the Minister. The operation of these provisions and the accompanying exercise of ministerial powers has created unsustainable, dangerous and unliveable conditions for people seeking asylum in Australia.

As part of our research, we conducted interviews with a woman with lived experience of seeking asylum in Australia without a bridging visa and with community organisations providing essential services to this cohort of people. Although people living without bridging visas are impacted in many diverse ways, we identified and examined five significant areas; housing, lack of employment rights, lack of study rights, financial support and healthcare. Our report unpacks these issues and examines the detrimental impacts of the denial of bridging visas on not only people seeking asylum, but also the community at large. Moreover, while the impact of COVID-19 on ordinary Australians has received significant attention by government authorities, the situation for refugees and people seeking asylum has deteriorated with little government attention or assistance.

While this situation is alarming, it is not inevitable. Our report also outlines the principles of ministerial accountability and public service protocols which support our assertion that the current system needs to change so that people seeking asylum in Australia are able to apply for and access bridging visas on a fair, transparent and consistent basis. The Minister and his delegates have a duty to act in the public interest, and to engage in decision-making that is fair, consistent and transparent.

In light of this, we call upon the Australian government and the Department to implement a system for bridging visa applications which is fair and transparent to people seeking asylum.

Key Recommendations

To achieve such a system, we make the following recommendations:

1. **Increased transparency of government policy:** The Department should have clear and publicly available guidance on how the granting and renewal of bridging visas will be dealt with for people seeking asylum who are barred from making visa applications. This guidance should clearly set out how the Minister will consider these applications for bridging visas, including what the central considerations will be in the Minister's exercise of power. This would also be beneficial for the Minister and his delegates, as it would likely reduce the number of invalid or ineligible applications they have to consider.
2. **Fair processes:** The Department must communicate to people seeking asylum about how to request a bar lift to apply for

a bridging visa.

3. **Introduce data collection and reporting:** The Department should gather information about the number of people living in the community who are impacted by the provisions of the Migration Act discussed below. This is particularly important as the Department is under a statutory obligation to identify and detain anyone they reasonably suspect of living in the community without a valid visa.[1]
4. **Timely access to information:** The Department should take steps to ensure FOI requests regarding Ministerial interventions for bridging visas are responded to with relevant information, in a timely manner.

We also note our concerns with the absence of progress made so far towards achieving a fair and transparent system, particularly given that we received little information through submitting FOI requests in relation to this issue. We have therefore included the following actions that could be taken by advocates and members of the public in raising the profile of this issue:

1. Write to local your Members of Parliament to raise this issue and encourage the government to change their current practices (see Appendix A for further guidance).
2. Write a complaint to the Department regarding their lack of transparency and unfair processes, and failure to collect and report data in relation to people impacted by the statutory provisions discussed (see Appendix B for further guidance).
3. If the complaint to the Department does not provide a satisfactory outcome, write a complaint to the Commonwealth Ombudsman (see Appendix B for further guidance).
4. Submit an FOI request for information on any policies (internal or external) and other criteria used by the Minister and his delegates in determining when to 'lift the bar' to allow people to apply for bridging visas (see Appendix C for further guidance).

1 See Migration Act s 189.

1. Introduction

People seeking asylum and refugees come to Australia seeking protection, security and safety. Australia's current migration law, however, prevents certain people seeking asylum who arrive in Australia from applying for and obtaining valid visas. Practically, these laws force some people seeking asylum to reside in Australia 'unlawfully' without access to basic rights and necessary services for surviving such as access to Medicare or work rights. Their 'unlawful' status also places them at risk of immigration detention and imminent deportation. This leaves them vulnerable in the community and reliant on the support from charities and community organisations who bear the cost and responsibility of providing vital care. These laws also lead to other people being unjustly held in immigration detention for protracted periods with no legal right to apply for a visa to allow their release.

The aim of this report is to examine the unjust and unfair effects of these parts of the Migration Act and inefficiencies of the system which lacks transparency and certainty and continues to hold people in limbo without legal rights in Australia. Specifically, this report focuses on provisions in the Migration Act which operate to 'bar' or prevent people seeking asylum who have arrived by boat, have been transferred to Australia for medical treatment from Manus Island or Nauru, or who have a temporary safe haven visa, from applying for a visa, including a bridging visa.

People seeking asylum and refugees are entitled to be treated with human dignity. Therefore, they should be granted basic rights and access to basic services whilst their refugee claims are being assessed. However, the effect of the provisions of the Migration Act mentioned above, as they are administered by the Minister and Department, is to deny basic rights such as access to housing, work and study rights, financial support and health care. Our findings demonstrate that denying rights, security and stability to people seeking asylum and refugees has a significant impact on the physical and mental wellbeing and safety of these persons, as well as on the communities in which they live.

In the course of our research we submitted an FOI request to the Department requesting data on the number of people who live unlawfully in the community subject to the operation of the provisions we have mentioned. The response we received from the Department confirmed that it has no knowledge of how many people are languishing in the community without bridging visas as a consequence of these provisions. This alarming fact not only reinforces the inefficiencies of the system but creates a serious public health concern, particularly in light of the COVID-19 pandemic. It is also problematic from the Department's perspective, considering they are under a statutory obligation to identify and detain anyone they reasonably suspect of living in the community without a valid visa.[2]

In many instances, the Minister, at his sole discretion, may allow a person seeking asylum to apply for a visa if he determines it is in the public interest to do so. Very little is known about the considerations which might persuade the Minister to personally grant a visa or 'lift the bar' to allow an individual to apply for a visa. It is also unclear which persons seeking asylum might be prioritised to have the 'bar' lifted to allow them to apply for a visa. It is important that this process is fair, transparent and compliant with Australia's international human rights obligations. Consistency in decision making and administrative discretion is a crucial tenet of public and administrative law and gives certainty to public policy. This legal issue therefore has broader implications for the policy of the Australian Commonwealth government.

Asylum seeker and refugee policy is a highly political topic in Australia that produces divided opinions. The aim of this report is to

2 See Migration Act s 189.

go beyond the political debate and examine the human impacts of Australia's migration policy on the basic human rights of people seeking asylum in Australia. One consequence of Australia's migration laws is that some people seeking asylum are left in limbo when their bridging visas expire, making them dependent on the Minister to grant them leave to seek renewal of their bridging visas. There is no rational policy argument for putting people seeking asylum in such circumstances, especially in the context of the uncertainties of COVID-19.

1.1 Project Outline

The realities of being unable to apply for or being refused a bridging visa are serious for a large cohort of people seeking asylum in Australia. While this issue attracts less attention than the protection visa application process, we know through our discussions with community organisations that there are many individuals who live undocumented and unlawfully in the community due to their bridging visa lapsing whether by reason of deliberate government policy, arbitrary decision-making or administrative oversight. Anecdotal evidence indicates that many asylum seekers wish to have their bridging visas renewed, but have no power to apply for a renewal. If the expiry dates of their bridging visas pass without the Minister exercising a personal power to 'lift the bar' to allow them to apply, they are left living in the community as 'unlawful non-citizens'. This, we heard from our interviews, has led to a good deal of uncertainty and hardship.
In order to ground our legal analysis in the stories of human hardship caused by the effect of the legislation, we aimed to examine its impact in relation to two different stakeholder groups:

1. Refugees and people seeking asylum who are without bridging visas and therefore lack access to social security, study rights, work rights, healthcare, housing and certainty; and
2. The Department of Home Affairs and associated agencies, to examine how the legislation affects the integrity, transparency and consistency of their decision-making process.

Furthermore, in order to understand the administrative processes of sections 46A, 46B and 91K of the Migration Act, we analysed Ministerial policies and procedures, and sought to use FOI requests to obtain departmental Ministerial briefings and submissions on behalf of people seeking asylum who have requested a bar lift in conjunction with many stakeholders. These FOI requests were lodged with the assistance of the ASRC.

The FOI requests specifically sought the following information from the Department of Home Affairs:

- a copy of the applicant's complete protection visa file, including all documents that were provided to the IAA under s 473CB of the Migration Act;
- a list of all the country information that was made available to the delegate and the IAA;
- a copy of the recording of the applicant's entry interview;
- a copy of the recording of the applicant's interview with the delegate;
- a copy of any certificates issued under s 471GA or s 473GB in relation to the applicant's case; and
- a screenshot of the applicant's screen portal.

To date, no results have been received from these applications. As no decisions were made on the requests within the statutory time limits, these applications are deemed to have been refused and notice given under the FOI Act[3], but as a practical matter our efforts to use FOI to understand Departmental processes were stymied.

In addition to the individual FOI requests lodged by the ASRC on behalf of clients, we also lodged an FOI request on 30 October 2019 requesting information with respect to the known numbers of persons living unlawfully in the community in 2013, 2014, 2015, 2016, 2017 and 2018 as well as the number of 'bar lift' requests made. We received a decision refusing access to this information under section 24A(1) of the FOI Act, on the grounds that no

3 *Freedom of Information Act 1982* (Cth) s15AC(3)(a)-(b).

documents exist.

The lack of information provided by the Department affected the conclusions we could draw from our research. This lack of information also highlighted the absence of clear guidelines and processes in this area, which has ramifications for government and ministerial accountability, as discussed below.

An important part of this report is looking at the operation of the above-mentioned provisions on people seeking asylum. This is important, as individuals can be left in precarious and vulnerable positions as a result of unfair and inconsistently applied policies and laws. Our research and engagement with community stakeholders demonstrates that the denial of bridging visas with access to basic services including housing, work and study rights, financial support and health care, has profoundly detrimental impacts on people seeking asylum who are living in our community. It also places a huge strain on the community organisations that support these people, and that bear the immense challenge of filling the legal and material aid gaps for those who are denied a bridging visa. In light of the COVID-19 pandemic, our research shows how it is now more important than ever that everyone living in our community, including people seeking asylum and refugees, have their basic needs met and their human rights respected.

Based on this information, the report makes recommendations as to what the Minister and the Department could do to ensure a more transparent and fair system of bridging visa applications for people impacted by these provisions. It also outlines further steps that can be taken by members of the community if substantive changes to this system are not made.

1.2 Seeking Asylum and the Statutory Bars

In order to understand the relevant provisions of the Migration Act and their impact on the various stakeholders, it is important to first understand the process for a person seeking asylum and protection as a refugee in Australia.

The refugee processing regime in Australia consists of an offshore resettlement and onshore protection program.[4] This report is concerned predominantly with the onshore program. The onshore program applies to those who arrive in Australia without their refugee status already being recognised. People seeking asylum onshore have their protection eligibility assessed under the Migration Act, including whether they meet Australia's statutory definition of refugee (which differs from that under the Refugee Convention), or are otherwise eligible for complementary protection (which draws on Australia's other international obligations[5]). This applies to people who arrived in Australia either by boat or by plane and have made an application for protection.[6]

A person seeking asylum who arrives in Australia needs to lodge a valid application for a protection visa. Once their application is lodged, a person seeking asylum may be granted a bridging visa, which regularises their status in Australia and allows them to live in the community and to access basic rights whilst their protection claims are being processed. If a person in the community is not granted a bridging visa, is barred from applying for a bridging visa, or has their bridging visa cancelled, they are left without the access to many support services and face the risk of being detained and removed back to their country of origin.

4 This report is not concerned with Australia's offshore program, which applies to persons who have already had their refugee status recognised outside of Australia. That is administered by the UNHCR and resettles refugees by reference to criteria and selection policies chosen by Australia.

5 Australia's international obligations for protection extend to the obligations it owes under the CAT and the ICCPR. These obligations have been imported into the Australian domestic legal framework such that a person can be granted a protection visa on the basis of complementary protection if there are substantial grounds for believing that there is a real risk the person will suffer 'significant harm' if they were removed from Australia to their home country. 'Significant harm' is defined as arbitrary deprivation of life, the death penalty, torture, cruel or inhuman treatment or punishment, or degrading treatment of punishment. See section 36(2A) Migration Act.

6 The Australian domestic legal framework under which a person is assessed for protection differs depending on the person's mode and date of arrival in Australia.

1.2.1 History of the provisions

In 2001, in response to MV Tampa, the Howard Government introduced the *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth). This Act created special laws for a new category of 'offshore entry persons,'[7] which prevented people in this category from lodging valid visa applications if they arrived at an 'excised offshore place' within the 'migration zone'.[8] These excised locations included a number of Australian territories, including Christmas Island. From 1 June 2013, the Gillard Government excised the whole of the Australian territory (including the mainland) and designated any person who arrived by boat without a visa as a UMA.[9]

Following the passage of legislation in 2014, the Coalition government established a new 'fast-track' legal process for assessing these UMAs.[10] In mid-2015, the Minister began 'lifting the bar' and allowing valid protection visa applications to be lodged by approximately 30,000 people who arrived by boat before January 2014.[11] The majority of these people had been living in the community without visas, waiting to apply for protection. As of March 2019, 70% of this cohort had been found to be owed protection and granted protection visas.[12]

The *Migration Legislation Amendment (Regional Processing Cohort) Bill 2019* is currently before the House of Representatives. This Bill, if passed, would prevent UMAs and transitory persons[13] who were at least 18 years of age and were taken to a regional processing country after 19 July 2013 (collectively, termed the 'designated regional processing cohort') from making a valid visa application while in or outside Australia.

1.2.2 Statutory bars

For people who arrived by boat without a valid visa, there is a 'statutory bar' in section 46A of the Migration Act which prevents them from applying for a visa. A person who arrives by boat must be detained according to law,[14] and will not be able to apply, as of right, for a bridging visa. People who fall into this category can only apply for a visa if the Minister personally decides to lift the bar and invites them to apply for a visa of a specified kind. In July 2015, for example, the Minister began lifting the bar for the 'fast track' cohort and invited them to apply for a Temporary Protection visa or Safe Haven

7 The category of 'offshore entry persons' was created by a new definition inserted into section 5(1) of the Migration Act of 'excised offshore place.' Offshore entry persons are those who have entered Australia at an excised offshore entry place after the excision time and become an unlawful non-citizen by that entry. Such places include Christmas Island, Ashmore and Cartier Islands, Cocos (Keeling) Islands and Australian sea and resources installations.

8 'Migration Zone' is given a specific meaning under section 5 of the Migration Act. It is taken to mean the area consisting of the State, the Territories, Australia resource installations and Australian sea installations including land that is part of a State and Territory at mean low water, sea within its the limits, port, piers, or similar structures and any part of which is connected to such land or to ground under such sea but does not include sea within the limits of a State or Territory but not in a port.

9 Section Migration Act, 5AA(1), as inserted by the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013 (Cth), which commenced on 1 June 2013.

10 This was implemented through the *Migration Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth).

11 Emily McDonald and Maria O'Sullivan, 'Protecting Vulnerable Refugees: Procedural Fairness in the Australian Fast Track Regime' (2018) 41(3) UNSW Law Journal 1003, 1005.

12 See Andrew & Renata Kaldor Centre for International Refugee Law, 'The 'Legacy' Caseload' (Factsheet, April 2019) <https://www.kaldorcentre.unsw.edu.au/sites/default/files/Factsheet_Legacy%20Caseload_final.pdf>.

13 Under section 5(1) of the Migration Act, a 'transitory person' is: a person taken to a place outside Australia under the repealed s198A; a person who was taken to a regional processing country under s198AD; a person taken to a place outside Australia under s245F(9)(b) of the Act or under a certain provisions of the *Maritime Powers Act 2013* (Cth); or a person who, while a non-citizen and during a particular period was transferred from the MV Tampa or MV Aceng to the MV Manoora and taken to another country, and disembarked in that other country. A person born to a 'transitory person' in the migration zone or a regional processing country, and who is not an Australian citizen at birth, is also a 'transitory person'.
The Migration Act s 5(1) defines a 'regional processing country' as a country designated by the Minister under subsection 198AB(1) as a regional processing country. Papua New Guinea and Nauru have been designated under this section.

14 Migration Act s 189.

Enterprise visa.

Similarly, section 46B of the Migration Act prevents persons who have been transferred to Australia for medical treatment from Nauru or Manus Island from making a valid visa application of any kind. For people who were transferred to Australia under the Medevac law passed early in 2019, until they are given a bridging visa they are effectively under government control. Without being granted a bridging visa, these people are held in Australian detention facilities or 'alternative places of detention' (often motels) under strict supervision while they are receiving treatment and can be returned offshore at any time.[15] Those transferred for medical treatment and who are given bridging visas are allowed to live in the community while receiving their treatment and a select group of these people are also permitted to work. Although all groups of people seeking asylum in Australia are entitled to access emergency medical care, access to Medicare benefits for medical treatment is dependent on having a valid bridging visa. This has broad implications for accessing basic health care; without public health benefits people must pay full price to see general practitioners and for prescription medication. While refugee health organisations in some states make care available to asylum seekers without Medicare entitlements, capacity is often very limited and people face lengthy waits. These services which operate on a charitable basis eliminate the amount of choice people have over their health care and the practitioners they see.

Section 91K of the Migration Act prevents some people who were previously granted a Temporary Safe Haven visa from making any valid visa application whilst they are onshore.[16] People seeking asylum and refugees do not typically apply for Temporary Safe Haven visas, they are instead granted to them involuntarily by the Minister without the person applying for one. Temporary Safe Haven visas were created to accommodate refugees displaced from conflict in the Kosovo region of the Republic of Yugoslavia in 1999.[17] The Australian Prime Minister at the time, John Howard, announced that those people would be given a three month stay with the possibility of extension depending on the circumstances.[18] By operation of the Migration Act, section 91K prevents many people seeking asylum in Australia who were previously holders of this visa from being able to apply for a visa, including a bridging visa.[19] It appears that in recent years, these visas have continued to be used out of context for the purpose they were originally intended.

1.2.3 Discretionary Powers

For each of these provisions, the Minister has the discretion to 'lift the bar' and allow people seeking asylum to apply for visas he or she is personally satisfied that it is in the 'public interest' to do so. Under the PAM, section 46A (Minister's s 46A(2) Guidelines), the Minister states that he will generally only consider the exercise of his public interest power in cases which are referred to him by the Department following consideration of the guidelines in the PAM.[20] Departmental employees are therefore the gatekeepers with respect to the Minister exercising his or her power to 'lift the bar' in relation to this section. Moreover, there are no specific guidelines in the PAM in relation to sections 46B or 91K.

The High Court has consistently acknowledged the wide range of subject matters that may be taken into account in making

15 Refugee Council, 'Medical transfers and Medevac', *Australia's Offshore Processing Regime: The Facts* (Blog Post, 20 May 2020) <https://www.refugeecouncil.org.au/offshore-processing-facts/8/>.

16 Note: UMAs and transitory persons are exempt from this bar under s 91J(2) but s 91K does apply to people who arrived at Ashmore reef and 'direct entry' arrivals who arrived before 1 June 2013 on the mainland or another place that was not excised.

17 The Hon John Howard MP, Transcript of Press Conference, Parliament House, 6 April 1998.

18 Ibid.

19 See, e.g., *Plaintiff M79/2012 v Minister for Immigration and Citizenship* (2013) 252 CLR 336.

20 Procedural Advice Manual ('PAM') is a set of detailed instructions for Departmental officials which shape to a substantial degree how the power conferred by the Act is to be exercised. *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634 at 644-5 concluded that decision-makers charged with the responsibility of undertaking merits review should apply ministerial policy unless the policy was unlawful or 'there are cogent reasons to the contrary'.

decisions 'in the public interest'[21] and has stated: '[w]hen we reach the area of ministerial policy giving effect to the general public interest, we enter the political field. In that field, a Minister or a Cabinet may determine general policy or the interests of the general public free of procedural constraints'.[22] The High Court has held also that 'national interest' which is largely analogous in this context with 'public interest', cannot be given a confined meaning and 'what is in the national interest is largely a political question.[23]

The Home Affairs website provides guidance and examples on the types of unique and exceptional circumstances that could be brought to the Minister's attention when requesting Ministerial Intervention.[24] The list is non-exhaustive and providing the documents listed or meeting one of the unique or exceptional circumstances stated in the list does not mean that a request to the Minister will be successful. Types of unique or exceptional circumstances listed include:

- strong compassionate circumstances that if not recognised would result in serious, ongoing and irreversible harm and continuing hardship to an Australian citizen or an Australian family unit;
- compassionate circumstances regarding your age and/or health and/or psychological state, that if not recognised would result in serious, ongoing and irreversible harm and continuing hardship;
- exceptional economic, scientific, cultural or other benefit that would result from you being permitted to remain in Australia;
- circumstances not anticipated by relevant legislation, clearly unintended consequences of legislation, or the application of relevant legislation leads to unfair or unreasonable results in your case; or
- you cannot be returned to your country/countries of citizenship or usual residence due to circumstances outside your control.

Additionally, the Minister has provided a list of the types of circumstances which are inappropriate for the Minister to consider.[25] It is stated that if a case has one or more of the below circumstances, the Department will finalise the request without referral to the Minister. Relevantly, a request will not be considered by a person who is in the community and:

- is an unlawful non-citizen and remains an unlawful non-citizen throughout the course of their Ministerial intervention request;
- does not cooperate in ensuring that a valid travel document is available (or has not satisfied the Department that they are stateless);
- who has an ongoing application for a substantive visa (either onshore or offshore) with the Department;
- who has an ongoing application for merits review of a visa decision with a relevant review tribunal;
- who has had a remittal or a set aside decision from a relevant review tribunal or a court;
- whose review tribunal decision was in relation to the refusal or cancellation of a Bridging Visa E;
- who has an ongoing ministerial intervention request under any of the powers covered by the guidelines;
- who has been issued with a Notice of intention to remove and the ministerial intervention request has not been initiated by the Department;
- who holds a Bridging Visa E with visa condition 8512 which specifies that the

21 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 502 [331]. See also *O'Sullivan v Farrer* (1989) 168 CLR 210 per Mason CJ, Brennan, Dawson and Gaudron JJ at 216–17.

22 *O'Shea* (1987) 163 CLR 378 per Brennan J at 411.

23 *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28, per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ at 46 [40].

24 Department of Home Affairs, Australian Government, 'Ministerial Intervention', *Status Resolution Service* (Web Page, 17 March 2020) <https://immi.homeaffairs.gov.au/what-we-do/status-resolution-service/ministerial-intervention>.

25 Ibid.

person must leave Australia by a specified date; or

- the request raises claims only in relation to Australia's non refoulement obligations.

Relevantly, these guidelines do not appear to recognise or take into account that there are many people living in the community whose bridging visa is expiring or expired and who are barred from applying for another visa by operation of one of the statutory bars mentioned above.

The Minister also has a personal and non-compellable power in s 195A of the Migration Act to grant a visa to any person held in immigration detention if the Minister believes it is in the 'public interest'. This power is at the Minister's sole discretion and is not reviewable. Between 1 July 2018 and 30 June 2019, 1006 persons made requests under s 195A of the Migration Act and the Minister decided to intervene in 449 cases.[26]

1.2.4 'Unlawfulness'

After lodging an onshore application for an Australian visa, including a protection visa, an applicant will usually be issued with a bridging visa. This is a temporary visa that allows an individual to remain lawful in Australia while their immigration matter remains unresolved. The rights attached to an individual's bridging visa, which may include the right to work and access to Medicare, will vary depending on which class of bridging visa they hold and the conditions attached. The class and conditions are largely determined on the basis of the visa conditions that the applicant had at the time of making their substantive visa application. An individual who makes an onshore application for protection while they hold substantive visa with work rights, for example a student visa, will usually see those rights transferred to a bridging visa A while they await the resolution of their protection application.

In summary, the rights and conditions attached to a bridging visa will effectively mirror those attached to the previous visa. Therefore, if an individual makes an application for protection when they do not hold any valid visa (i.e. they are 'unlawful'), they will usually receive a bridging visa E or bridging visa C with no work rights attached. In some cases, the conditions on the bridging visa are not final, and the Minister may have the power to remove the 'no work' and other restrictions from a person's bridging visa if the person applies for a 'change of condition' on their visa.[27]

The major difference between people with and without bridging visas is their legal status. Persons who have bridging visas (irrespective of the conditions attached), are deemed 'lawful'. In comparison, those who do not hold a bridging visa are 'unlawful'. This is complicated by the Migration Act which contains statutory bars, including (but not limited to) in sections 46A, 46B and 91K, that prevent individuals from making further valid visa applications, including bridging visa applications, despite having an unresolved substantive visa matter. The consequence, as we have noted above, is that there is a cohort of asylum seekers living in the community who see their bridging visas expire because the Minister does not act to 'lift the bar' to apply for a new bridging visa. They are powerless to prevent themselves falling into circumstances of 'unlawfulness'.

The legal ramifications of being unlawful include detention and removal from Australia 'as soon as reasonably practicable'. Under section 189 of the Migration Act, officers *must* detain any person they reasonably suspect of being unlawful and they must be kept in immigration detention until a visa is granted or they are removed.[28] When a person who does not have a substantive visa process on foot is held in immigration detention, the Migration Act generally obligates the Department to remove that person from Australia as soon as reasonably practicable and irrespective of whether Australia owes that person non-refoulement obligations.[29] When people have no choice but to remain unlawful, the possibility of being detained and removed if they are discovered living in the community has significant psychological implications.. The

26 FOI Request: FA 19/06/00486.

27 For more information on the various subclasses of bridging visa and the conditions that can be imposed on the visa, see: Department of Home Affairs, Australian Government, 'Visa List' (Web Page, 17 March 2020) <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing>.

28 Migration Act s 189.

29 Migration Act ss 198 and 197C.

fear of being forced to return to the countries they fled puts incredible strain on individuals and families. In this way, being 'unlawful' not only creates a number of practical barriers for individuals, such as accessing Medicare and work rights, it keeps them hostage — in a kind of administrative purgatory. They are without status despite legitimately awaiting an outcome of their substantive visa. The uncertainty surrounding the legal status of people seeking asylum in the community also creates substantive issues for administering effective public policy as well as making it difficult for community organisations to manage their resources and operations to assist these people.

1.3 Australia's Obligations under International Law

The reality of the immigration system in Australia is that it often takes many years for a person's claims for protection to be processed. While the government processes a person's claim for protection, Australia has obligations towards that person. In particular, under its international human rights obligations, Australia is required to consider alternative arrangements for people seeking asylum before resorting to placing them in detention facilities. People should be permitted to live in the community while their refugee claims are assessed, unless they pose an unacceptable risk to the Australian community and that risk cannot be met in a less restrictive way.[30]

Australia is a party to the ICESCR.[31] It therefore has obligations under international law to take concrete and targeted steps to promote and protect the economic, social and cultural rights of all people in Australia. These rights include the right to work, the right to social security, the right to an adequate standard of living, and the right to physical and mental health.[32]

The right to work under ICESCR is not an absolute and unconditional right to obtain employment.[33] However, at a minimum Australia is obliged to ensure 'the right of access to employment, especially for disadvantaged and marginalized individuals and groups'.[34] In addition, the CESCR has emphasised that the rights under ICESCR 'apply to everyone including non-nationals, such as refugees, asylum seekers, stateless persons... regardless of legal status and documentation'.[35] By denying people seeking asylum access to the labour market through denial of a visa with work rights, especially if this is done for such periods of time as to force people into poverty, Australia may be in breach of its obligations under ICESCR.[36] For a person seeking asylum, the right to work is also essential in order to enjoy other fundamental rights. If people seeking asylum are denied the right to work, this is likely to lead to breaches of their right to an adequate standard of living and, consequently, breaches of their right to physical and mental health.[37]

People seeking asylum in Australia who are denied the right to apply for or be granted a bridging visa are also denied access to the rights that can be attached to a visa, including the rights to work or study, to access government support, and to access health services. This means in practice the Australian government is forcing these people into a situation of destitution in which they are unable to exercise their basic rights as guaranteed under the ICESCR, in breach of Australia's obligations

30 United Nations High Commissioner for Refugees, *Detention Guidelines - Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012) <https://www.refworld.org/docid/503489533b8.html>.

31 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('ICESCR').

32 *ICESCR*, art 6, art 9, art 11, art 12.

33 United Nations Committee on Economic, Social and Cultural Rights, *General Comment No 18: The Right To Work (art 6 of the International Covenant on Economic, Social and Cultural Rights)* E/C.12/GC/18 (6 February 2006) [6].

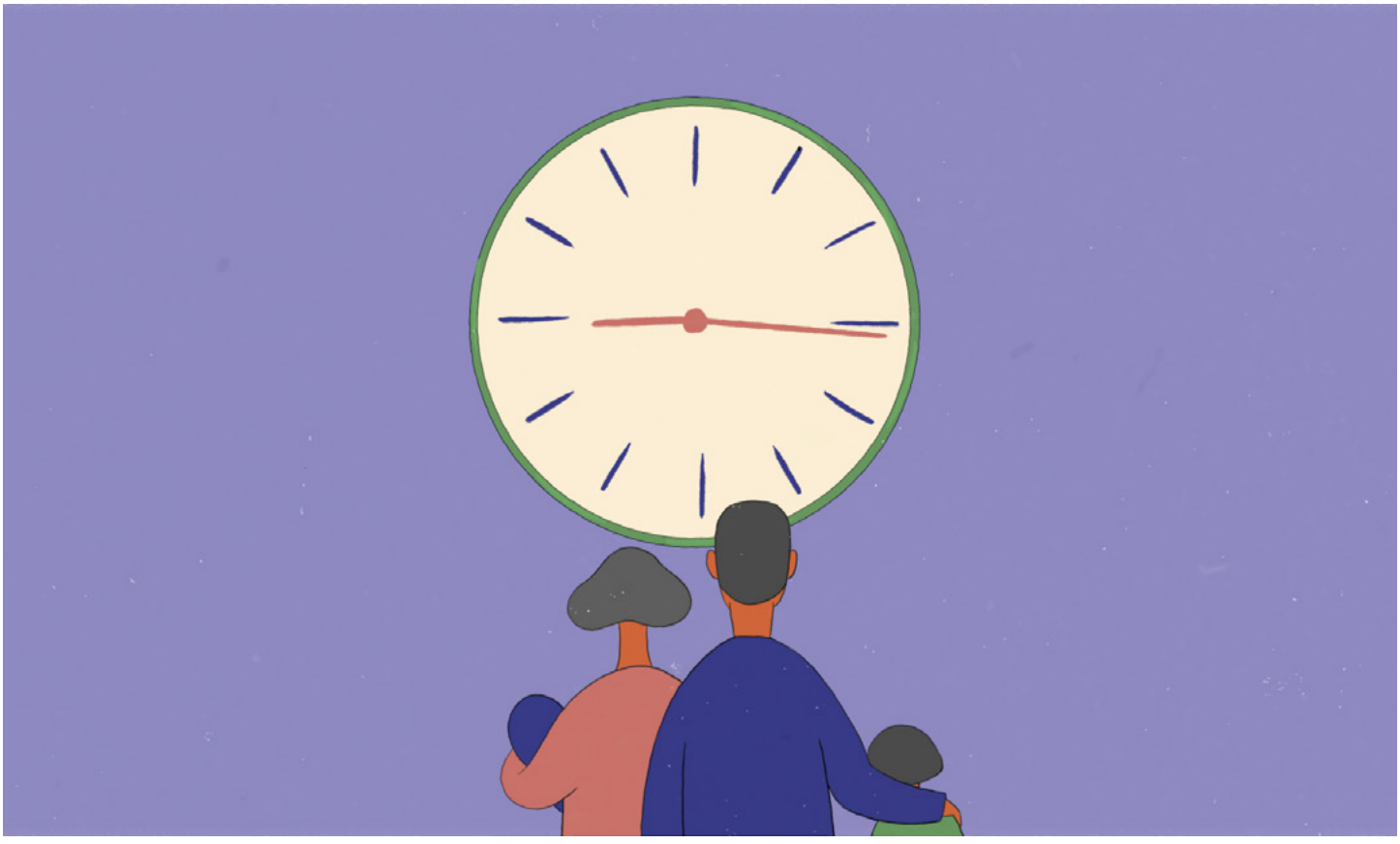
34 Ibid [31].

35 United Nations Committee on Economic, Social and Cultural Rights, *General Comment No 20: Non-discrimination in Economic, Social and Cultural Rights (art 2, para 2, of the International Covenant on Economic, Social and Cultural Rights)* E/C.12/GC/20 (2 July 2009) [30].

36 See Penelope Mathew, *Reworking the Relationship between Asylum and Employment* (Routledge, 2012) 117.

37 Australian Human Rights Commission, *Tell Me About: Bridging Visas for Asylum Seekers* (Report, April 2013).

under international law. The impact of this denial of basic rights will be discussed further below.



2. Impact of Denial of Bridging Visas

The effects of the statutory bars imposed under sections 46A, 46B and 91K of the Migration Act 1958, are twofold. They have a direct impact on people seeking asylum themselves, but also on the community organisations that support them throughout their substantive visa application process.

Several years may pass from the time a person seeking asylum first lodges their protection visa application with the Department until they receive a decision on their application. Several more years may pass before that person's judicial review process is finalised. While the Department does not officially publish processing times, applicants often wait between two to five years for a decision from the Department.[38] This waiting period will be even longer where an applicant lodges an application for merits review of an initial decision[39] or judicial review.[40] Bridging visas, which aim to bridge the legal gap throughout the protection visa process, can expire while an individual's refugee status is still undetermined. If an individual's bridging visa expires or they are denied from re-applying for a bridging visa, either by a deliberate government decision or by administrative fault, the common experience is that they are left in the community with limited access to support services, feeling the constant risk of being detained as an unlawful or non-citizen. Transitory persons who have been transferred to Australia for medical treatment are also commonly left without a valid visa to stay in Australia once their treatment is complete. For people seeking asylum who are barred from applying for substantive visas, bridging visas or have their bridging visa taken away during this time, meeting basic survival needs becomes extraordinarily difficult.

As discussed above, some bridging visa holders are able to access support services including public health and housing and the legal right to study and work, but this is not always the case. It is common for bridging visas to be granted with conditions attached prohibiting rights to employment and education. Moreover, as explored in RAP's *States of Refuge* report, the right of people seeking asylum to access services such as health, housing and education also varies greatly across different Australian states and territories.[41] While this is a problematic issue in itself, the focus of our discussion below is on the substantial impacts for people seeking asylum as a consequence of being left without any bridging visa (and without a right to seek one).

It is important to understand the impact of these provisions at a grassroots level when considering the need for transparency in the decision-making processes. Our aim is to link the legal issues with the real practical difficulties faced by people seeking asylum in the community, and the community members and organisations upon whom they rely for assistance. Understanding the real impact of these provisions:

- reminds us that government decisions impact humans in a real way;
- highlights the significant implications of policies on people seeking asylum; and
- affirms why transparency surrounding these decisions is necessary.

38 Danielle Munro and Niamh Joyce, 'An asylum seeker's access to Medicare and associated health services while awaiting determination of a Protection Visa application in Australia' (2019) 1(13) *UNSW Law Society Court of Conscience* 51.

39 This is a re-hearing of the case by the Administrative Appeals Tribunal.

40 This is a review by a court of the legality of the relevant decision.

41 Rights Advocacy Project, *States of Refuge* (Report, July 2018) <http://libertyvic.rightsadvocacy.org.au/wp-content/uploads/2018/07/RAP_RefTeam_StatesofRefuge_18.07.02_leafs.pdf>.

2.1 Existing research on impact

There is little specific research on the effects that living without a bridging visa has on the wellbeing of people seeking asylum. However, research on the experiences of bridging visa holders shows that the level of uncertainty (and limitation of rights) they experience is profoundly harmful.[42] In this report, we recognise the strong correlation between the lived experiences of people without any bridging visa and people who have a bridging visa with conditions attached prohibiting work or study and access to Medicare. The major themes explored by literature – the impact on housing, financial security, work and study rights, physical and mental health, education and self-actualisation – are evidently relevant to people who are barred from applying for bridging visas by sections 46A, 46B and 91K of the Migration Act.

The UNHCR reports that, in most cases, people live in a state of destitution while they await Department outcomes.[43] Without the opportunity to access basic community services and engage in stable employment this 'has led to an overwhelming reliance on community organisations (specifically, material aid [organisations]) for food, clothing and furniture'.[44] The AHRC has expressed deep concern that some of the federal government's policies regarding bridging visas leave people seeking asylum in the community without any source of income, and that 'many people living in the community...are unable to meet their basic needs, and in some cases face severe hardship'.[45] Consequently, the AHRC has noted that people seeking asylum are forced to rely on support from non-governmental organisations and community groups who have limited means to support the increasing numbers of people who require assistance. The AHRC has said 'these organisations...have limited capacity, as they typically do not receive Government funding and rely largely on donations, philanthropic contributions and the support of volunteers...despite their best efforts...these service providers [are] not able to assist all people...who [are] facing financial hardship'.[46] The AHRC also noted that where people seeking asylum living in the community are stripped of the ability to financially support themselves, severe pressure is placed upon the wider community (particularly the extended refugee community) to assist them.[47]

Significantly, research has also indicated that extended periods without access to Medicare can have long-term physical and psychological health consequences. The AHRC found that '[p]eople from refugee backgrounds experience significantly higher rates of poor health, including mental health'.[48] These rates are attributed, in part, to a lack of access to health services once in Australia. Research shows that '...if applicants are unable to engage with medical services during the application process then they will be in a worse physical and psychological condition than when they first made the application and...may require more health services than what they may have needed at the onset of their visa application'.[49]

Exclusion from meaningful involvement in society during the protection visa application process and long processing times create a climate of anxiety that has the potential to drastically exacerbate physical and mental health concerns. Without the ability to

42 See, e.g., United Nations High Commissioner for Refugees, *Asylum-seekers on bridging visas in Australia: Protection Gaps UNHCR Consultation* (Consultation paper, 16 December 2013).

43 Ibid

44 Ibid.

45 Australian Human Rights Commission, *Lives on Hold: Refugees and asylum seekers in the 'Legacy Caseload'* (Report, 2019) 50.

46 Ibid, 52.

47 Ibid.

48 Australian Medical Association, Health Care Issues of Asylum Seekers and Refugees (Position Statement, 23 December 2015) <https://ama.com.au/position-statement/health-care-asylum-seekers-and-refugees-2011-revised-2015>; Peta Masters et al, 'Health Issues of Refugees Attending an Infectious Disease Refugee Health Clinic in a Regional Australian Hospital' (2018) 47(5) *Australian Journal of General Practice*, 305; Kevin Pottie, 'Prevalence of Selected Preventable and Treatable Diseases among Government- Assisted Refugees: Implications for Primary Care Providers' (2007) 53(11) *Canadian Family Physician*, 1928.

49 Danielle Munro and Niamh Joyce, 'An asylum seeker's access to Medicare and associated health services while awaiting determination of a Protection Visa application in Australia' (2019) 1(13) *UNSW Law Society Court of Conscience* 51, 54.

engage with formal employment, people without bridging visas have little choice but to rely heavily on the support of community organisations. Doing so strips individuals of the agency in how they live their lives, and can result in feelings of shame and demoralisation.

2.2 Our Research: Impact on People Seeking Asylum

In order to ascertain a deeper, current understanding of the practical implications of sections 46A, 46B and 91K of the Migration Act, we conducted a number of face-to-face interviews with individuals who have personal insight into the impact being felt by people seeking asylum. Three of these interviews were conducted with representatives of community organisations who are currently providing essential services to persons affected by the above provisions. A fourth interview was conducted with a Burmese woman, who has a lived experience of seeking asylum in Australia and is presently impacted by these provisions. We have stayed in touch with her throughout the course of our project and have shared much of her story and experience through this section of the report. Her experiences are broadly representative of a whole group of people experiencing similar issues.

The information and knowledge we have collected from these interviews has provided us with important primary information and presented a number of key themes, which are discussed in detail below. Due to confidentiality reasons, we have excluded most names and names of organisations from our report.

2.2.1 Housing

A primary issue facing people without valid bridging visas and the associated rights that can be afforded is their inability to sign and maintain lease agreements. A lack of affordable and flexible housing means that people resort to living at friends' houses, on couches, on floors, in hostels or at religious centres or are often wholly dependent on charities and pro bono support services for a place to live.

The lack of affordable housing in Australia means that refugees and people seeking asylum predominantly reside in properties that are in poor condition and are often cramped and overcrowded. Many refugees and people seeking asylum have never had a lease in their name and are at risk of experiencing homelessness. Baptcare Sanctuary runs two centres in Preston and Brunswick and provides housing to individuals and families involved in the refugee application process. Besides accommodation, they provide casework support, referrals to legal services, offer employment assistance as well as foster social and spiritual care. Their capacity is approximately 130 persons at any given time, and they are reliant on donations and internal distribution for funding. One caseworker told us that 'rent is always subsidised and for people who don't have a substantial source of income when they have no income rent becomes free'. Baptcare workers support people without bridging visas but note that it becomes very difficult when this is the case.

Language barriers are another practical hurdle for people trying to enter housing and accommodation arrangements. Language barriers can mean that people often struggle to negotiate with real estate agents and landlords. They are also likely to have limited to no knowledge of the Australian tenancy laws and rental market, leaving them open to exploitation or being easily beaten by rental competitors. Furthermore, people who have limited time frames on their bridging visas can struggle signing up to rental agreements that are for fixed term periods as they cannot guarantee their legal status for the duration of their lease.

People often lack the essential furniture and whitegoods they need to move into rental houses or temporary accommodation. This includes items that are basic necessities such as a bed and washing machine which are difficult to own, as people cannot afford them or move around too frequently to own such items. The UNHCR reports that community organisations are commonly required to fill this material gap which can cause a huge strain on financial and material resources.[50]

Finally, moving around so frequently is a stressful process and contributes to individuals feeling very unsettled and in a constant state of suspension. The lack of a stable base also strains their general capability in other aspects

50 United Nations High Commissioner for Refugees, *Asylum-seekers on bridging visas in Australia: Protection Gaps UNHCR Consultation* (Consultation paper, 16 December 2013) 5.

of their life, such as finding employment or completing administrative tasks required for their legal matter.

> *"I did not live with her [cousin] for long because her husband was being so kind to me because of mine and my son's situation and she didn't like that. My cousin said it was not okay for all of us to live together so I moved out. So, I came to ASRC, I told them what happened and they gave me a place to live. I had to move from one place to another. So many places I moved around to. Then I came to live with Baptcare." [person seeking asylum]*

2.2.2 Work Rights

The lack of work rights is one of the most significant issues facing people seeking asylum who have been refused or are barred from re-applying for a bridging visa. The right to employment gives people dignity, the agency to provide for themselves and forms part of a person's identity. Regular employment also provides a daily structure and social base for individuals. For many, not having the right to work and support themselves and their families is a big contributor to the feeling of hopelessness and surrender.

> *"I'm looking at a family right at the moment that's falling apart because he's been desperate to work...he asked to get out of community detention so that he could work and they didn't allow him...and he's gone from a very confident 'oh it'll all work out in time' and 'we'll make it' and so on...to just desperate." [Employee - community organisation]*

People in desperation will find any work they can through informal employment arrangements in construction sites, as trade subcontractors, in hospitality and cleaning, on farms and in regional areas. In these circumstances, they have limited labour rights and often work in unsafe conditions and for little to no pay. Many community organisations raised the issue of individuals being exploited in these informal positions. One caseworker noted that people are so desperate to work that when work conditions are poor, or they are being underpaid, they feel as though they have no redress if they speak out. This, in effect, becomes a real source of social exclusion and self-sabotage.

Under the Migration Act, it is a criminal offence for a person to work while 'unlawful' or to work while 'lawful' but where no work rights have been afforded.[51] The commission of these criminal offences can be relied on by decision makers for refusing to grant the person a visa. Significant civil and criminal penalties also apply to persons who employ or assist such persons to work.[52]

Informal work arrangements also mean that individuals often have no access to workplace injury insurance or superannuation which creates long term financial difficulties. Language barriers make it very difficult for people seeking asylum to speak out to employers and many people live in fear that if they do speak out they may be discovered and detained by immigration officers as they do not have work rights and are effectively breaking the law by doing so. This issue is challenging for community organisations and caseworkers who become aware of informal work arrangements and exploitation and should report situations but do not want to risk triggering any action of an individual being found out.

> *"We certainly advise people that if they are in breach of their visas they need to consider the implications if they don't abide by the conditions, but we also have to respect the fact that they need to exist." [Employee – community organisation]*

For people who do have work rights, the unpredictable nature of bridging visa entitlements and cancellations makes it challenging to either find work or to hold a stable job. The Burmese woman we interviewed reported that with legal help from the Salvation Army, she was able to get a six-month bridging visa and start looking for a job. Finding the right job, however, was very difficult for her as she was a single mother and her son was at school. She therefore had to find a job with hours that worked around her son's school times, as she was not entitled to any child care benefits. Devastatingly, when she did eventually find a job that suited her as well as her son's school, she was only able to work for three days before her bridging visa expired. The Minister did not invite her to re-apply.

51 Migration Act, s 235.

52 Migration Act, Subdivision C, Division 12, Part 2.

The lack of transparency surrounding the bridging visa process makes it very challenging for people in similar situations. It becomes impossible for people to present as a reliable employee when they do not know what their legal status will be in the next month. It is also not uncommon for people to be granted a valid bridging visa without work rights. One caseworker identified that this is often the case for people who have been rejected at the Administrative Appeals Tribunal merits review stage. The caseworker noted that this type of bridging visa is a particularly cruel form of isolation as people are allowed to live legally in the community but have no rights to work, study or access health care benefits. They also have to live with the fear of not knowing the repercussions for a breach of their visa.

> *"So...while you can't have work rights if you haven't got a bridging visa...you can have a bridging visa and no work rights." [community organisation]*

> *"I don't have Medicare or work rights. All I ask for is work rights, study rights and Medicare. No Centrelink don't give me that as well,' She laughs, 'I'm okay I just want work rights so I can do something. Because all I want to do is support myself and my son." [person seeking asylum]*

> *"Yes, it is almost like the Tattslotto board, it spins around and you say ah look this visa will have work rights on it or this visa will have no study rights and so on." [Employee – community organisation]*

2.2.3 Study Rights

Education opportunities are also limited for people seeking asylum and, in some cases, TAFE and university study is not allowed without a bridging visa. Also, in many cases bridging visa holders are prohibited from undertaking study due to a condition attached to their visas. Like employment opportunities, being able to study and learn provides people with a sense of wellbeing, purpose and social network while they live in the Australian community.

Many community organisations assist families in putting children in school who are under the age of 18. Such organisations assist with the material side of school as well. For example, the Brigidine Asylum Seekers Project states that 'we do a fair bit of helping with books, computers and providing things for school that they don't have'. While children under the age of 18 have the right to be in school, adults and young adults over 18 who do not have a bridging visa, are unable to attend university, TAFE or other vocational courses. This also negatively impacts individuals whose skills and qualifications are not recognised in Australia and need to complete 'refresher' courses or further study in order for their qualifications to be recognised.

Moreover, without consistent assistance with learning English, people seeking asylum and refugees from non-English speaking countries experience real barriers in being able to meaningfully engage in the community. Some organisations provide informal education to residents and members. However, these are often run by volunteers and classes often have limited places. The cost of ongoing English classes or private lessons are often an expense that individuals are unable to afford and tend to disadvantage women who are the sole carers of children and are unable to put their children in childcare centres.

2.2.4 Financial Support

People without a bridging visa are unable to access any government financial support. For those who do have a bridging visa, only a small number are eligible for Status Resolution Support Service (SRSS) payments, which equate to approximately $250 per week. However, the government has made huge cuts to this program over the past couple of years and the majority of people previously eligible for this payment no longer meet the criteria.[53]

People who hold a bridging visa with work rights are generally ineligible for SRSS.[54] Many asylum seekers residing in the community on bridging visas without work rights are desperate to get permission to work so they can support

53 See, e.g., Luke Michael, 'SRSS cuts leaving people homeless' (Pro Bono Australia, 23 April 2019) <https://probonoaustralia.com.au/news/2019/04/srss-cuts-leaving-people-homeless/> (accessed 18 October 2020).

54 Department of Home Affairs, Status Resolution Support Services (SRSS) Operational Procedures Manual.

themselves and for a sense of belonging. However, for those few receiving SRSS payments, if they are subsequently granted work rights they are in-turn made ineligible for further financial support. If they are then unable to secure paid work in a timely manner they can be left destitute.

Refugees and people seeking asylum who have had their protection visas refused and are challenging those decisions in the courts are generally ineligible for SRSS payments.[55] This is significant given those judicial review processes more often than not take a number of years to be completed.

Without income sources or income support, many people seeking asylum and refugees are left destitute. 'They borrow money from friends, community members or sometimes, family back home,' said one community worker. Some community organisations are able to provide some basic financial support or subsidised rent for those with no income. However, as such organisations wholly rely on donations or internal redistribution, there is only a limited number of people they are able to support. Individuals without income from support payments or employment rely heavily on material aid from community organisations or the good will of volunteers and community members.

> *"If you are abiding by the [visa] condition and not working you haven't got any money at all unless somebody gives it to you...you've got nothing to do so it's extraordinarily boring... work defines people's identity [so] that they lose confidence in themselves...why can't I work..."* *[Case worker - community organisation]*

> *"[M]y current lawyer tried to apply for ministerial intervention but they refused. The tribunal didn't say anything yet so I don't have anything for now. That was since last December or January. And I'm not receiving any legal help now. I have a lawyer but I don't have any income so I can't afford to pay her."* *[person seeking asylum]*

2.2.5 Health Care

Refugees and people seeking asylum without valid bridging visas are not easily able to access healthcare, as they are not entitled to Medicare. To fill the gap, many community organisations refer clients to pro bono health services such as Cabrini Hub in Brunswick, Monash Health – Refugee Health & Wellbeing and the ASRC medical clinic, however, the wait times to see general practitioners can be anywhere up to one to two weeks. This is of particular concern when medical conditions require urgent attention. One community organisation employee stated that 'sometimes people just give up and don't go'.

> *"It is difficult with my son. Sometimes we need to see the doctor immediately but instead we have to wait for an appointment for maybe one week or two weeks. It takes time here [ASRC] as well. So if he is sick we just have to wait for a really long time. Me as well I have been bleeding. Period bleeding for a long time non-stop. Everyday. I have been treated in the Royal Women's hospital. I have had surgery there two times."* *[person seeking asylum]*

While access to medical care is difficult in itself, one particular issue which was raised by a number of organisations was the lack of continuity in care. Some people in the system will never see the same practitioner twice, let alone have a practitioner who is of the same gender or speaks the language as the client. A lack of consistent care leaves people feeling vulnerable and fearful. One caseworker commented that for some individuals this can be a trigger of their experiences in immigration detention and 'witnessing random people coming in and reading their notes.'

Even when refugees and people seeking asylum are able to access healthcare, it can be difficult for individuals to trust the system. Many choose not to receive help from a doctor for the fear of their unlawful status being disclosed to the Department. It is also apparent that people do not fully disclose information due to a lack of understanding of how the system works. These issues are particularly prevalent in mental health care, where receiving help involves talking to people about their experiences in Australia or in immigration detention centres.

Failing to disclose symptoms might lead to bigger issues down the track. The same case worker commented that, in his experience, he was seeing a growing issue around sexually

55 Ibid.

transmitted infections with male clients. This is because some males will feel 'culturally embarrassed or afraid to discuss their symptoms with anyone', but 'by not receiving help straight away, symptoms of sexually transmitted infections can lead to kidney issues and other major health issues.'

In Victoria, people seeking asylum who are ineligible for Medicare have free access to public hospitals.[56] However, another major issue identified by a caseworker was that when people who don't have a bridging visa present at emergency departments, they have no way of showing they are an asylum seeker and are therefore charged the full amount for a doctor to see them. He noted that people end up with large accumulations of bills from medical services which they have no way of paying and often need emergency financial help from family or friends or community organisations.

> *"The choice is taken away from you, we shop around to find the right GP and maybe someone who is your gender or speaks your language. When you go to Cabrini or ASRC you don't have a choice, you just see who is there." [Employee – community organisation]*

2.3 Impact on Community Organisations and Support Services

The volatile nature of the bridging visa process not only negatively impacts people seeking asylum, but also the community organisations, caseworkers, advocates and health workers who support them. For service providers who are materially assisting people throughout the duration of the refugee determination process, the lack of transparency in the system makes it very difficult to predict or deduce patterns about how long people will be with them for and what entitlements they have on their bridging visa. The unpredictable nature of the bridging visa process means that over a length of stay with a community organisation, a person's visa situation can be very dynamic, as they move in and out of periods of having work rights and study rights. This can have adverse effects on how community organisations model their operations and organise resources.

Community organisations are on the front line when dealing with the issues mentioned above and fill in the gaps for those who are left in destitution. 'The stuff is enough to drive even people like us mad, let alone the poor people themselves', said a community organisation representative, commenting on the arbitrary nature of the bridging visa system. This response was similar to that of many individuals who worked in community organisations who commented that there appeared to be no 'pattern' of how particular cohorts of people were treated and given visa rights. No one working in this space seemed to understand the inconsistency of treatment or the rationale behind who was granted a bridging visa and who was not, and what rights were attached to each visa.

> *"It is very disruptive to the cohort because they can perceive inequality. They will see one person have something and they think why don't I have this? As service providers you think.. this is not a good system." [Community organisation]*

> *"It is a part of the system's design and the effect it has on both the target group of people seeking asylum and the service providers is disruptive, burdensome and difficult and makes life harder for everyone." [Employee - community organisation]*

> *"I have people who are waiting for an outcome of judicial review which could take years and years, or I also have a client who had a six-month visa, then he wasn't re-invited to apply. His visa just elapsed. It's hard to know what situation your client will be in when you get into work." [Employee - community organisation]*

2.4 COVID-19: Individual and Public Health Concerns

The COVID-19 situation has greatly exacerbated the precarious situation of those who, by reason of the statutory bars, are forced to live unlawfully in the Australian community. It is perhaps unsurprising that this cohort has been further marginalised due to the Commonwealth

56 Victoria State Government, *Medicare Ineligible Asylum Seekers* (Information Sheet, 14 October 2008) <https://www2.health.vic.gov.au/about/news-and-events/hospitalcirculars/circ2908>.

government failing to provide visa status clarity or support directly to people without a bridging visa, or to the organisations that support them. This compounds the housing, health and food instability they already faced before the pandemic.

A significant amount of public money has rightfully been spent in providing additional and increased social security payments and a job subsidy to cushion the financial burden of this health crisis. However, this safety net has not been applied to persons seeking asylum who are unable to access Centrelink or receive JobKeeper payments. Instead, many people seeking asylum are weathering this crisis without the stability of affordable shelter, material aid and accessible medical care. The Migrant Worker Justice Initiative published a report in September 2020 including a survey of people in the Australian community on temporary visas during the COVID-19 pandemic.[57] The report confirmed that of the people seeking asylum and refugees they surveyed, 63% were unable to afford rent, 53% were unable to pay for meals or food, 38% were unable to pay to see a doctor, and 47% were unable to pay for essential medicine.[58] The people included in the survey were people seeking asylum and refugees on bridging visas and temporary protection visas, so these statistics are likely to be much worse for those forced to live without a bridging visa.

This situation has implications both for those individual people seeking asylum but also for public health more broadly. Unable to afford appropriate private accommodation, many people are forced to live in cramped environments either in overcrowded private rentals, hostels or social housing and are therefore unable to adhere to physical distancing and self-isolation requirements. These environments further increase the risk of contracting and spreading the virus. Additionally, many people have an elevated risk of complications and worsened outcomes should they contract COVID-19. People seeking asylum have often been exposed to conditions which weaken their immune systems, such as pre-existing health issues in their countries of origin, poor nutrition, lower rates of immunisation and mental health conditions. Such factors make this group particularly vulnerable to emerging public health threats like COVID-19.[59]

Limited access to healthcare for people seeking asylum is of great concern during this crisis. If a person seeking asylum does not have access to Medicare, the extent to which they can access public health services varies state to state. While some states have committed to providing accessible health services others have fallen behind in their policy.[60] RAP's *States of Refuge* report found that even when states commit to access to healthcare policy, it is often created under quasi-legislation and can be unclear for both health care providers and individuals.[61] In many cases such policy enables healthcare providers to simply waive fees rather than promoting and guaranteeing access to healthcare as a right.[62] Additionally, if individuals were previously accessing medical care through non-government organisations or community centres, many of these services have been forced to close or have limited their provision of services during the pandemic.

Temporary visa holders, as well as those forced to live unlawfully in the community, have also been at the coalface of the economic crisis. With little employment opportunities available, many people in this cohort work in informal employment and in industries hit hardest by the economic downturn, including hospitality and retail.[63] Further, having been excluded from the extensive government support, including JobKeeper and JobSeeker, many have now been

57 Laurie Berg and Bassina Farbenblum, *As if we weren't humans: The abandonment of temporary migrants in Australia during COVID-19* (MWJI, 2020).

58 Ibid, 36.

59 Kerry Murphy, UNSW, 'COVID-19: Some issues for asylum seekers and refugees in Australia', *Kaldor Centre for International Refugee Law* (Blog Post, 17 April 2020) <https://www.kaldorcentre.unsw.edu.au/publication/covid-19-some-issues-asylum-seekers-and-refugees-australia>.

60 Rights Advocacy Project, *States of Refuge* (Report, July 2018) 55 <http://libertyvic.rightsadvocacy.org.au/wp-content/uploads/2018/07/RAP_RefTeam_StatesofRefuge_18.07.02_leafs.pdf>.

61 Ibid.

62 Ibid.

63 See, e.g., Laurie Berg and Bassina Farbenblum, *As if we weren't humans: The abandonment of temporary migrants in Australia during COVID-19* (MWJI, 2020) 31-35.

left without any source of income or support. A cessation in employment and lack of stable income compounds the uncertainty and anxiety associated with the lengthy protection visa process. Lawyers have raised concern that physical distancing restrictions and increased police presence may heighten the risk of detention for people who are living unlawfully in the community.[64] As a consequence, individuals may be afraid to get tested for COVID-19 in case their visa status is discovered by authorities, thereby triggering a duty to detain.

With many people now left without a stable source of income, charities and non-government organisations have become one of their only avenues for support. These organisations, who were already stretched for resources before, are now overwhelmed by the demand. The Refugee Council of Australia noted that charities and community organisations 'have to work even harder to maintain frontline services because of the spread of COVID-19'.[65] This has created additional financial strain for organisations that were already struggling to source funding, following the cancellation of a number of key fundraising activities due to restrictions.

COVID-19 has heightened the immediacy of the need for the Minister to lift the statutory bars and allow people to apply for bridging visas. Doing so may enable their access to financial support and Medicare, creating a better chance of housing, financial and health stability for people currently in limbo. During the pandemic, this stability would increase their safety and the safety of the rest of the community. In order to do this, the Minister must also create greater transparency and clarity in how these bar lift decisions are made.

64 Kerry Murphy, UNSW, 'COVID-19: Some issues for asylum seekers and refugees in Australia', *Kaldor Centre for International Refugee Law* (Blog Post, 17 April 2020) <https://www.kaldorcentre.unsw.edu.au/publication/covid-19-some-issues-asylum-seekers-and-refugees-australia>.

65 Refugee Council of Australia, 'Leaving no-one behind: Ensuring people seeking asylum and refugees are included in the COVID-19 strategies' (Blog Post, 28 April 2020) <https://www.refugeecouncil.org.au/priorities-covid-19/>.

3. Governmental and Ministerial Accountability

There is no transparency or clarity around when and why the Minister uses his discretion to 'lift the bar' to allow people to apply for a bridging visa. Many of the problems discussed above could be addressed through clearer, more transparent decision-making in respect of sections 46A, 46B and 91K of the Migration Act. More transparent decision-making by the Minister and their delegates in this regard would afford people seeking asylum procedural fairness while ensuring consistency through governmental decisions being subject to public scrutiny and requiring explanation.

3.1 What is meant by ministerial 'discretion'?

The powers at the centre of this report, which effectively prevent vulnerable people from applying for bridging visas, are subject to ministerial 'discretion' pursuant to sections 46A, 46B and 91K of the Migration Act. As discussed above, some refugees and asylum seekers are 'barred' by statute from making a valid visa application. These people seeking asylum are reliant on the Minister using their personal power to lift the bar and let the person apply for a visa, if the Minister thinks it is in the public interest to do so.66 This power is 'non-compellable', meaning that the Minister does not have a duty to exercise these powers, and cannot be forced to consider allowing the person to apply for a visa.[67] These powers are also 'non-delegable' meaning that the Minister must perform them personally.

It is worth repeating that these extensive powers allow the Minister to 'play God' with people's lives. As explored in the previous RAP report, '*Playing God: The Immigration Minister's Unrestrained Powers*', these 'God-like' powers are not subject to the rules of natural justice, and there are no checks or balances to ensure that the Minister's decisions are made in a manner which is fair and reasonable.[68] We have therefore examined some of the principles of accountability that exist in relation to the exercise of these important powers which directly impact the rights and lives of refugees and people seeking asylum.

3.2 Ministerial Responsibility

Ministerial responsibility is an important principle of Australian democracy and remains a key constitutional convention in Australia.[69] In short, ministerial responsibility requires ministers to answer for the actions of departments and resign in the case of failure.[70] In recognition of this, successive governments have instituted codes of ministerial standards. Former Prime Minister John Howard was the first Australian prime minister to introduce a publicly available ministerial code of conduct titled '*A Guide on Key Elements of Ministerial Responsibility*'.[71] Subsequent governments have continued the practice, with each Prime Minister revising the code and each new version

66 Migration Act ss 46A(2), 46B(2) and 91L.

67 Migration Act ss 46A(7), B(7).

68 Rights Advocacy Project, 'Playing God: The Immigration Minister's Unrestrained Powers' (Report, 2017) <http://libertyvic.rightsadvocacy.org.au/wp-content/uploads/2017/05/YLLR_PlayingGod_Report2017_FINAL2.1-1.pdf>.

69 Richard Mulgan 'Assessing Ministerial Responsibility in Australia' in Keith Dowding and Chris Lewis (eds) *Ministerial Careers and Accountability in the Australian Commonwealth Government* (ANU Press, 2012) 177.

70 Ibid, 178. See also Tony Wright, 'Ministerial responsibility in Canberra appears to have all but decayed to no responsibility', <No intersecting link> (online, 20 February 2019) <https://www.smh.com.au/politics/federal/ministerial-responsibility-in-canberra-appears-to-have-all-but-decayed-to-no-responsibility-20190219-p50yul.html>.

71 Scott Brenton, 'Ministerial Accountability for Departmental Actions' (2015) 73 Australian Journal of Public Administration 467, 473.

less extensive.[72]

The latest incarnation of the code is Prime Minister Scott Morrison's Statement.[73] The Statement recognises that Ministers are entrusted with considerable privilege and wide discretionary power.[74] Accordingly, Ministers are required to act with due regard for integrity, fairness, accountability, responsibility and the public interest.[75]

Ministers are to adhere to the following principles when making decisions, such as those to be made under sections 46A, 46B and 91K of the Migration Act:[76]

- Ministers must observe fairness when making official decisions. That requires them to act honestly and reasonably; with appropriate consultation; take proper account of the merits of the matter; give due consideration to the rights and interests of the persons involved; and give due consideration to the interests of Australia.
- Ministers must accept accountability for the exercise of the powers and functions of their office. They must ensure that their conduct, representations and decisions as Ministers, and the conduct, representations and decisions of those who act as their delegates or on their behalf, *are open to public scrutiny and explanation.*[77]
- Ministers must accept the full implications of the principle of ministerial responsibility and answer for the consequences of their decisions and actions. They must ensure that their conduct in office is in accordance with the Statement; promote the observance of the Statement by leadership and example in the public bodies for which they are responsible; and make decisions to advance the public interest.

The Statement provides that in order to observe fairness in making official decisions, Ministers must be able to demonstrate that they have taken all reasonable steps to observe relevant standards of procedural fairness and good decision-making. In particular, Ministers are required to ensure that official decisions made by them as Ministers are unaffected by bias or irrelevant consideration, such as considerations of private advantage or disadvantage.[78]

Of relevance to our report is that Ministers are expected to conduct all official business on the basis that they may be expected to demonstrate publicly that their actions and decisions in conducting public business were taken with the sole objective of advancing the public interest.[79]

In contrast to the principles outlined in the Statement, our research has found that the powers under sections 46A, 46B and 91K of the Migration Act are exercised by the Minister absent public oversight. This was shown through the difficulty we experienced in obtaining any documents about how the Minister makes decisions in relation to these statutory bars through the FOI regime, both generally and in individual cases. This lack of clarity, transparency and consequential public oversight is incredibly concerning, given ministerial intervention is the only way people subject to these statutory bars can be granted a bridging visa.

Ministerial responsibility, however, has recently been criticised as being a weak accountability mechanism.[80] We have therefore examined further public law mechanisms for accountability in this context, including the Australian Public Service Protocols.

3.3 Australian Public Service Protocols

As public servants, the conduct of the Minister's delegates is also governed by the Public Service

72 Ibid.

73 Australian Government, 'Statement of Ministerial Standards' (30 August 2018).

74 Ibid, 4.

75 Ibid.

76 Australian Government, 'Statement of Ministerial Standards' (30 August 2018).

77 Emphasis added.

78 Australian Government, 'Statement of Ministerial Standards' (30 August 2018) 9.

79 Ibid, 10.

80 See Richard Mulgan, 'Assessing Ministerial Responsibility in Australia' in Keith Dowding and Chris Lewis (eds) *Ministerial Careers and Accountability in the Australian Commonwealth Government* (ANU Press, 2012).

Act. The Public Service Act recognises that the government and its employees determine the public interest in terms of policies and program priorities, and public servants, within the requirements of the legal framework, advise on and implement their decisions.[81] The public service therefore has a particular responsibility in upholding the law and ensuring due process in the public interest.[82] The APS is required to be apolitical and professional, merit based, ethical, accountable within the framework of ministerial responsibility and responsive to government.[83]

APS Agency heads and employees are required to comply with the APS values, set out at section 10 of the Public Service Act. The *Australian Public Service Commissioner's Directions 2013* determine the scope and application of the values. The APS values relevantly include a duty to be open and accountable to the Australian community under the law and within the framework of Ministerial responsibility, and to respect all people, including their rights.[84]

These principles should be applied to how the Minister considers applications to lift bars imposed by sections 46A, 46B and 91K of the Migration Act. As outlined under the Department's PAM, the Minister relies on their delegates to determine applications for bar lifts. These public servants must use processes that are in the public interest in determining bar lift decisions, including transparency, procedural fairness, consistency and decision-making that is open to public scrutiny and explanation.

3.4 Consistency in Decision-Making

Consistency in decision-making is crucial in refugee law determination.[85] This extends to allowing people to be granted a bridging visa whilst their case is determined, given the protracted nature of the refugee status determination process in Australia.

The principle of consistency is fundamental to the rule of law.[86] It requires that laws be applied equally and follow precedent (absent a justifiable reason).[87] The principle of consistency is also central to the idea of administrative justice, as it allows people to order their affairs and helps to prevent government decision-makers abusing their power.[88] The Federal Court has stated that inconsistent decision-making is 'not merely inelegant; it brings the process of deciding into disrepute, suggesting an arbitrariness which is incompatible with commonly accepted notions of justice'.[89] Inconsistent decision-making can also lead to a loss of confidence in the integrity of the decision-making process and government decision-makers.[90]

Consistency in decision-making in Australia should be treated as a fundamental element of fair and just decision making where 'like cases should be treated alike', granting a level of transparency and trust in the authoritative powers.[91] The denial of bridging visas to certain cohorts of people seeking asylum without clear legislative reasoning or explanation highlights a fundamental inconsistency in the administrative decision-making process which undermines the rule of law and is in direct contradiction to the legal principles articulated above.

In light of this, it is crucial that the Minister and his delegates promote a fair and transparent process for considering applications for bridging visas from those who are impacted by these statutory bars. However, our experience in trying to gather information

81 Australian Public Service Commission, *The Australian Experience of Public Sector Reform* (Occasional Paper No 2, 2003) 37.

82 Ibid.

83 *Public Service Act 1999* (Cth) s 101.

84 Ibid, s10.

85 See, e.g., Hugo Storey, 'Consistency in Refugee Decision-Making: A Judicial Perspective' (2013) 32(4) *Refugee Survey Quarterly* 112.

86 Karen Steyn, 'Consistency – A Principle of Public Law?' (1997) 2 Judicial Review 22, 22.

87 Ibid.

88 Emily Johnson, 'Should 'Inconsistency' of Administrative Decisions Give Rise to Judicial Review?', AIAL Forum No. 72, http://classic.austlii.edu.au/au/journals/AIAdminLawF/2013/6.pdf [accessed 7 September 2019].

89 *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634, 639.

90 The Asylum Seeker Resource Centre, 'Position Paper on the Legal Process of Seeking Asylum in Australia' (Position Paper, 2011) 4 <https://www.asrc.org.au/pdf/case-justice.pdf> [accessed 7 September 2019].

91 Hugo Storey, 'Consistency in Refugee Decision-Making: A Judicial Perspective' (2013) 32(4) *Refugee Survey Quarterly* 112, 114.

from the Department through FOI requests as part of our research suggests that the process is currently far from consistent and transparent.

4. Freedom of Information

The FOI laws in Australia exist to give the general public access to data and information held by government departments. The FOI process therefore plays a critical role in upholding transparency and consistency in ministerial decision-making by allowing the public to maintain a check on the consistency and effectiveness of ministerial powers. For people impacted by discretionary powers and the organisations supporting them, sourcing information on the Minister's decision-making process is crucial to understand the decision-making process and policy reasoning behind it.

We are concerned that the unreliability of the FOI system creates a lack of transparency and accountability. This makes it difficult to judge whether the discretionary ministerial powers discussed above are being used fairly. Furthermore, this lack of transparency is evidence of a clear failure by the Department to comply with the information publication scheme under the FOI Act, which requires the publication of operational information such as decision-making processes and guidelines for the exercise of the Department's powers.[92]

We raise these concerns particularly with regard to the decision-making exercised for refugee determination in Australia. Consistency in these decisions is particularly indispensable as they determine the livelihood and lawfulness of the people seeking asylum, and may interfere with Australia's human rights obligations both domestically and internationally.

4.1 Discussion of FOI Results

Over a period of several months we worked with the ASRC to lodge FOI applications on behalf of existing and previous clients who were statutorily barred from applying for bridging visas under the Migration Act.

The purpose of lodging these applications was to acquire information from the Department outlining how the Minister had decided to exercise or not exercise his power to 'lift the bar' in specific cases. The applications specifically requested the following information:

- A copy of the applicant's complete protection visa file, including all documents that were provided to the IAA under s 473CB of the Migration Act;
- A list of all the country information that was made available to the delegate and the IAA;
- A copy of the recording of the applicant's entry interview;
- A copy of the recording of the applicant's interview with the delegate;
- A copy of any certificates issued under s 471GA or s 473GB in relation to the applicant's case; and
- A screenshot of the applicant's screen portal.

Upon receiving this information, we had originally intended to analyse the results in-depth in order to determine what factors the Department takes into consideration and preferences when deciding to lift the statutory bars. Additionally, we intended to identify and report on any trends we observed in the Minister's decision-making and exercise of their power, including whether or not it was adhering to the guidelines provided in the PAM and on its website, as outlined above. This analysis was intended to culminate in the production of a template 'bar lift request' to the Minister, which could be easily utilised by organisations and individuals intended to make a request to the Minister.

Under the FOI Act, the standard timeframe to process a request is 30 days.[93]

92 FOI Act, Part II, s 8(2)(c).

93 FOI Act s 15.

The Department may seek an extension to this time limit, either from the applicant themselves or the Office of the Australian Information Commissioner. However, in the vast majority of cases the Department has simply allowed the request to lapse, 'leading to an automatic, or deemed, refusal to provide documents'.[94] In these cases, notice is taken to have been given to the applicant and the applicant can subsequently apply for review through the Information Commissioner.[95]

In the latter half of 2019, the ASRC lodged approximately two dozen FOI applications on behalf of former and existing clients. To date, they have not received the results of these applications. As no decisions were made on the requests within the statutory time limits, these applications are deemed to have been refused and notice given to the ASRC.

We are deeply concerned that the Department's failure to respond to our applications altogether indicates that the FOI regime, particularly as it relates to the transparency of decisions made by the Minister, is failing to fulfil its purpose of increasing public access to information and enhancing transparency in policy making.[96]

Within the context of visa applications, access to information through the FOI Act is crucial. Information obtained through this process can be critical to determining what material the Minister relied upon in making their decision. For example, in *Carrascalao v Minister for Immigration and Border Protection* [2017] FCAFC 107, the Full Court of the Federal Court reviewed a ministerial discretion to cancel two visas held by Mr Carrascalao and Mr Taulahi. In doing so, the Minister was given 370 and 330 pages respectively regarding their application, and made the decision to cancel each person's visa in approximately 40 minutes. The court found that there was insufficient time for the Minister to engage in the requisite active intellectual process.[97] Non-compliance with the FOI Act in this context increases both the practical and psychological pressure on applicants, who may not have the time or resources to consult with agencies or challenge FOI decisions.

The OAIC has previously found that the Department had repeatedly failed to process FOI requests in the legal timeframes and had only met the legally-imposed time frames in 35% of cases.[98] Our experience reflects this finding. A three-month long investigation conducted by *The Guardian* into the use of FOI in Australia has also found that delays are a tactic, 'used deliberately to take the sting out of sensitive documents'.[99]

In addition to the individual FOI requests lodged by the ASRC on behalf of clients, we also lodged an FOI request for the following information on 30 October 2019:

1. *How many people were living in the community unlawfully who were subject to a bar pursuant to sections 46A, 46B or 91K of the Migration Act (which prevents those people from applying for a visa) in 2013, 2014, 2015, 2017 and 2018, with the numbers broken down by year and month?*
2. *How many requests for Ministerial Intervention were made under sections 46A and 46B of the Migration Act in 2013, 2014, 2015, 2016, 2017 and 2018, with the numbers broken down by year and month? Of the number of requests made, how many were referred to the Minister for his personal consideration, with the numbers broken down by year and month?*
3. *How many people were living in the community*

94 Christopher Knaus, 'Home Affairs accused of "simply ignoring its obligations in law" over FOI', *The Guardian* (online, 25 September 2019) <https://www.theguardian.com/australia-news/2019/sep/25/home-affairs-accused-of-simply-ignoring-its-obligations-in-law-over-foi>.

95 FOI Act s 15AC(3).

96 FOI Act s 3.

97 *Carrascalao v Minister for Immigration and Border Protection* [2017] FCAFC 107, [128].

98 Christopher Knaus, 'Prime Minister's department broke the law delaying FOI request, watchdog finds', *The Guardian* (online, 27 February 2020) <https://www.theguardian.com/australia-news/2020/feb/27/prime-ministers-department-broke-the-law-delaying-foi-request-watchdog-finds>.

99 Christopher Knaus and Jessica Bassano, 'How a flawed freedom-of-information regime keeps Australians in the dark' (online, 2 January 2019) <https://www.theguardian.com/australia-news/2019/jan/02/how-a-flawed-freedom-of-information-regime-keeps-australians-in-the-dark>.

unlawfully while they waited for a request for Ministerial Intervention pursuant to sections 46A and 46B of the Migration Act to be decided in 2013, 2014, 2015, 2016, 2017 and 2018, with the numbers broken down by year and month?

On 28 May 2020, we received a decision refusing access to this information under section 24A(1) of the FOI Act, on the grounds that no documents exist. Under section 24(1), the Department may refuse access to a request if the decision maker is satisfied that all reasonable steps have been taken to find the requested document but that the document does not exist. The following was noted:

> *"Advice received noted that generally, processes relating to s46A and s46B bar lifts are initiated by the Department without a formal request from an individual. As there is no formal process in which a person requests a bar lift, the Department is unable to provide the number of requests for ministerial intervention or how many were referred to the Minister for his personal consideration. In addition, Departmental systems do not allow for the reporting of the number of unlawful non-citizens awaiting ministerial intervention requests on a month to month basis. Please note that the Department is continuing to work to improve its data reporting capability, in order to derive fulsome historical records relating to ministerial intervention requests and outcomes."*

This response indicates to us not only that the system by which the bar is 'lifted' lacks transparency, but that the Department has little to no insight into how many people are languishing in the community as a direct consequence of the statutory bars we have described. The kind of serious disadvantage we have described in earlier sections is a hidden adverse consequence of this system. The Department's response only serves to reinforce this point.

5. Recommendations

Our research has shown that there is a clear need for greater transparency and consistency in the way bridging visa requests are processed by the Minister and his delegates. This report has outlined why it is so crucial for people seeking asylum to be granted bridging visas while they are awaiting a decision on their substantive protection visa. It has also discussed the obligations that the Minister and his delegates have to act fairly and consistently in the exercise of their powers as governmental agents and public service employees.

In light of this, we recommend that the Australian government introduce a more transparent and fair system for 'lifting the bar' to allow people seeking asylum impacted by these provisions to apply for a bridging visa. This should include the following:

1. **Increased transparency of government policy:** The Department should have clear and publicly available guidance on how the granting and renewal of bridging visas will be dealt with for people seeking asylum who are barred from making visa applications. This guidance should clearly set out how the Minister will consider these applications for bridging visas, including what the central considerations will be in the Minister's exercise of power. This would also be beneficial for the Minister and his delegates, as it would likely reduce the number of invalid or ineligible applications they have to consider.
2. **Fair processes:** The Department must communicate to people seeking asylum about how to request a bar lift to apply for a bridging visa.
3. **Introduce data collection and reporting:** The Department should gather information about the number of people living in the community who are impacted by the provisions of the Migration Act. This is particularly important as the Department is under a statutory obligation to identify and detain anyone they reasonably suspect of living in the community without a valid visa.[100]
4. **Timely access to information:** The Department should take steps to ensure FOI requests regarding Ministerial interventions for bridging visas are responded to with relevant information, in a timely manner.

This report has also shown the ways in which the Minister and Department officials have failed to meet their obligations towards people seeking asylum, and the serious consequences this has had for people living in our community. Our hope is that this report will provide a helpful summary and the necessary information to hold these government officials to account. The following are some examples of ways in which this could be achieved:

1. Write to local your Members of Parliament to raise this issue and encourage the government to change their current practices (see Appendix A for further guidance).
2. Write a complaint to the Department regarding their lack of transparency and unfair processes, and failure to collect and report data in relation to people impacted by the statutory provisions discussed (see Appendix B for further guidance).
3. If the complaint to the Department does not provide a satisfactory outcome, write a complaint to the Commonwealth Ombudsman (see Appendix B for further guidance).
4. Submit an FOI request for information on any policies (internal or external) and other criteria used by the Minister and

100 See Migration Act s 189.

his delegates in determining when to 'lift the bar' to allow people to apply for bridging visas (see Appendix C for further guidance).

6. Conclusion

The refugee status determination system in Australia has serious problems and weaknesses, including the growing backlog in the processing of protection visa applications. Against this background, bridging visas are vital in allowing people awaiting a determination to access their basic rights under international law, including access to housing, health and other basic services. The problems we have identified in the bridging visa system in Australia are therefore very significant ones for people seeking asylum and the Australian community more broadly.

By failing to provide housing support, work rights, study rights, financial support, and health care to people seeking asylum, Australia is breaching its international obligations as a party to the ICESCR. It is also placing an undue burden on the community and non-government organisations that are forced to fill these gaps instead. Moreover, the government was unable to respond to our FOI request as to how many people are living in the community unlawfully subject to a statutory bar under section 46A, 46B or the 91K. This shows a clear lack of accountability for this vulnerable cohort of people, and a failure of governmental and ministerial responsibilities and duties.

Additionally, the 2020 COVID-19 pandemic has brought to the forefront the issue of people without valid visas in relation to a public health crisis. Without medical support services or adequate accommodation to protect themselves from the coronavirus, it is extraordinarily difficult for individuals to adhere to government health requirements, which increases the risk that they will contract and spread the virus in the community. This in turn increases the risk that these individuals will come to the attention of authorities through increased policing measures, and risk being subject to police fines that they are unable to pay, or being detained. Responding to a pandemic evidently requires a collective community effort to follow rules and guidelines and through this it has highlighted that refugees and people seeking asylum are part of our community while they are in Australia. If we are to work together to address crises like this, everyone in the community must be supported at a basic level.

Appendix A: Guidance for writing to Member of Parliament

How can I contact my local MP or Senator?

You can find out who your local Member of Parliament is by entering your postcode on the Australian Parliament's Members' page.[101] You will find their contact details on the 'Office details' or 'Connect' sections of their personal page.

What should I say in my letter or email?

1. **Introduce yourself.** Your local MP will be far more receptive if they know you are a constituent. Tell them a bit about yourself, for example: what suburb you live in, what you do, and why this issue matters to you.
2. **Tell them why you think we need better decision-making processes for bridging visas.** Some points you may wish to raise include:
    - People seeking asylum face long waiting periods in Australia to have their refugee claims reviewed, most waiting many years for an outcome. While they are living in Australia, people should be able to access basic services including housing and health services.
    - Without a bridging visa, people seeking asylum are unable to access many basic services, often leaving them homeless and destitute.
    - During the COVID-19 pandemic, it is more important than ever that everyone in our community has access to a safe place to live and to health services, in order to protect not only themselves but the rest of the community.
    - Read the quotes from the people interviewed in the report and tell your MP how they made you feel.
3. **Demand your MP or Senator take action.** It is important that your message includes a firm ask. Make it clear that you believe that people seeking asylum should be granted bridging visas while they are living in the Australian community, and that the Minister for Home Affairs should make it clear how and when people who are currently barred can apply for bridging visas. Tell your MP or Senator that you think that they should advocate in their party discussions for the rights of people seeking asylum to have a bridging visa and access to basic services. You can also include a reference or link to our report so they can read further.

101 See <https://www.aph.gov.au/senators_and_members/members>.

Appendix B: Guidance for making a complaint

Making a complaint to the Department or Ombudsman

If you are not satisfied with the Department's policies, service delivery or how your application has been handled, you are entitled to make a complaint or pass on feedback about your experience. Ensure that you ask for your complaint reference number and record the date on which you lodged the complaint as this may be required by the Ombudsman.

The Commonwealth Ombudsman has the power to assess complaints regarding the actions of Australian Government agencies such as the Department, and specific private sector organisations that are overseen by the Ombudsman. The Ombudsman will consider your complaint if it is wrong, unjust, unlawful, discriminatory or unfair.

How can I make a complaint to the Department or Ombudsman?

A complaint to the Department can be made through their online form or by post sent to:

Department of Home Affairs
GPO Box 241
MELBOURNE VIC 3001
AUSTRALIA

A complaint can only be made to the Ombudsman if a formal complaint with the Department has been lodged. If you are not satisfied with the outcome from the Department, or the way your complaint was handled, you need to discuss this with the Department first. If your complaint with the Department remains unresolved, then you can contact the Ombudsman.

You can make a complaint yourself, or get a representative to make a complaint for you. You will need to fill out the 'Permission to another person to act on my behalf' form and send it to ombudsman@ombudsman.gov.au, or by GPO Box 442 Canberra ACT 2601.

What should I say in my complaint?

Your complaint could highlight some of the issues raised in our report regarding the Department's procedures and processes, including (but not limited to) the following:

- The lack of transparency and clarity in the criteria for 'lifting the bar' and the process for making a bridging visa application for those impacted by sections 46A, 46B and 91K of the Migration Act;
- The lack of data and information available on people living in the community without bridging visas.

Timeframes

Complaints to the Department should be acknowledged within two working days and your complaint should be responded to within 15 working days of acknowledgement. Most complaints to the Ombudsman will be dealt with quickly, though some complaints can take months to investigate.

Appendix C: Guidance for submitting an FOI request

Everyone in Australia has a legal right to access government documents under the *Freedom of Information Act 1982 (Cth)* ('FOI Act'). Under the FOI Act, individuals have the right to see manuals, rules and guidelines that are used by the Department of Home Affairs in administering decisions under the *Migration Act 1958* (Cth). This includes accessing information about administrative decision-making, policy-making or service delivery. Gaining access to government documents through FOI helps hold decision makers accountable and promotes a system of transparency.

How can I submit an FOI request?

The process of making an FOI request is simple. All you need to do is ask for the documents in writing from the relevant government department or body. You won't be charged a fee if you are accessing personal information, however for other information there may be a small fee. The government can choose to waive the fee if the access is in the public interest or for situations of hardship. Two things you must remember:

1. Provide detail of the documents you are seeking access to.
2. Refer that you are asking to access the information under the *Freedom of Information Act 1982* (Cth).

To make a FOI request to the Department of Home Affairs, you can either:

- ↳ Complete the online form
- ↳ Email foi@homeaffairs.gov.au
- ↳ Post to:
  Freedom of Information Section
  Department of Home Affairs
  PO Box 25
  Belconnen ACT 2616
  Australia

What should I say in my FOI request?

To access information from the Department regarding how the Minister decides to exercise or not exercise his power to 'lift the bar', you could make a request along the following lines:

> *I request information on any policies (internal or external) and any other criteria used by the Minister and his delegates in determining when to 'lift the bar' to allow people to apply for bridging visas who are currently barred under sections 46A, 46B and 91K of the Migration Act 1958 (Cth).*

Timeframes

A FOI request should be acknowledged within 14 calendar days and decided within 30 days with reasons. 60 days is permitted if someone else needs to be consulted. Review can be sought by the Australian Information Commissioner, if the government does not meet these deadlines.

LIBERTY VICTORIA

Liberty Victoria's RIGHTS ADVOCACY PROJECT

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