

Submission to review: A Migration System for Australia's Future

December 2022

I. Introduction

The Office of the United Nations High Commissioner for Refugees (UNHCR) is pleased to make a submission to Australia's Review: *A migration system for Australia's future*. We welcome the review's broad focus and note the ambition to 'shape a simpler migration system that has broad public confidence, enhances our international engagement and competitiveness and unlocks the potential of migrants to effectively contribute to Australia both economically and socially'. UNHCR's submission focuses on the component of entry and stay arising from Australia's international obligation to ensure access to asylum, and its efforts as part of the international community in offering durable solutions to refugees as a global responsibility sharing measure.

Taking into account these dual rationales for humanitarian entry and stay in Australia, UNHCR's submission will address two key points: first Australia's role in international protection and the opportunity to renew international credibility and social licence through strengthened global engagement; and second, considerations related to the visa architecture which could better anchor Australia's response to its legal obligations and efforts through resettlement and other humanitarian pathways.

While it is clear that refugees and other humanitarian entrants bring important skills and capabilities to their new countries, refugee protection, humanitarian entry and economically driven migration serve different purposes. UNHCR's submission therefore does not focus on or make a case for refugees as an economic benefit, though notes that many refugees and humanitarian entrants make important economic contributions, and in this respect, it encourages all resettlement states, including Australia, to invest in settlement programming to realise the potential of all refugee newcomers.

UNHCR offers these comments as the agency entrusted by states in the United Nations General Assembly with the responsibility for providing international protection to refugees and other persons within its mandate, and for assisting governments in seeking permanent solutions for refugees. As set forth in the *Statute of the Office of the United Nations High Commissioner for Refugees*, UNHCR fulfils its international protection mandate by, *inter alia*, '[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto'.¹ UNHCR's supervisory responsibility under its Statute is reiterated in Article 35 of the *1951 Convention relating to the Status of Refugees*,² according to which State Parties undertake to "co-operate with the Office of the United Nations High Commissioner for Refugees [...] in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the Convention." The same commitment is included in Article II of the *1967 Protocol relating to the Status of Refugees* (1967 Protocol).³

For the purposes of this paper the use of the term *resettlement* refers to those activities coordinated by UNHCR and for which it is mandated by its Statute and UN General

¹ See *Statute of the Office of the United Nations High Commissioner for Refugees*, UN General Assembly Resolution 428(V), Annex, UN Doc. A/1775, para. 1 (Statute).

² UN General Assembly, *Convention relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.

³ UN General Assembly, *Protocol relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267.

Assembly Resolutions. Resettlement is unique in that it is the only durable solution that involves the relocation of refugees from an asylum country to a third country. The use of the term *complementary pathways*⁴ refers to complementary pathways for admission, which are safe and regulated avenues for refugees that complement resettlement by providing lawful entry and stay in a third country where their international protection needs will be met. Complementary pathways include existing or new admission or migration avenues that refugees may be eligible to apply to, but which may require operational adjustments to facilitate refugee access.

Finally, Australia acceded to the *1951 Convention relating to the Status of Refugees* in 1954 and to its *1967 Protocol* in 1973 (hereinafter collectively referred to as the *Refugee Convention*). The use of the term asylum in this paper refers to the refugee status determination system established in the *Migration Act 1958 (Cth)* (Migration Act) noting that in 2014 it was regrettably amended to remove references to the Refugee Convention. This legislative change does not however alter Australia's binding, voluntarily assumed obligations under international law. While Australia also acceded to the *1954 Convention relating to the Status of Stateless Persons* and the *1961 Convention on the Reduction of Statelessness* in 1973 there remains no standalone process for consideration of statelessness for those persons who are not also refugees.

Australia's role in international protection and the opportunity to rebuild international credibility and social licence through strengthened global engagement

In 2018, United Nations member states, including Australia, endorsed the Global Compact on Refugees (GCR)⁵ as a framework for more predictable and equitable responsibility-sharing, recognizing that a sustainable solution to refugee situations cannot be achieved without international cooperation. This is particularly relevant as low and middle-income countries host 74 per cent of the world's refugees and other people in need of international protection which, taking into account those internally displaced, is now an estimated 103 million people, including 21.3 million refugees under UNHCR's mandate. Many refugees are largely dependent on humanitarian aid or informal labour, have lost fragile livelihoods and have been thrust into abject poverty with disastrous and wide-ranging impacts. The GCR provides a blueprint for governments, international organizations, and other stakeholders to ensure that host communities get the support they need and that refugees can lead productive lives. The GCR's four key objectives are to: ease the pressures on host countries; enhance refugee self-reliance; expand access to third-country solutions; and support conditions in countries of origin for return in safety and dignity.

In addition to its financial aid, Australia's mature Humanitarian Program - both the resettlement stream delivered with UNHCR and the family/community sponsored stream - plays an important role globally in efforts to expand access to third country solutions. Third country solutions for refugees are a tangible demonstration of solidarity and responsibility sharing. Beyond the places provided by the Program however, is the strengthened contribution needed from Australia as a key country at the table encouraging and supporting other states to participate in resettlement and to leverage the efforts in

⁴ UN High Commissioner for Refugees *Complementary Pathways for Admission of Refugees to Third Countries: Key Considerations*, April 2019. Available at: [Refworld | Complementary Pathways for Admission of Refugees to Third Countries: Key Considerations](#)

⁵See Global Compact on Refugees, 2018. Available at [UNHCR - Global Compact on Refugees – Booklet](#)

humanitarian entry to secure better outcomes for those refugees, the absolute majority, that will stay in another first country of asylum. Resettlement that is focused on the needs of hosting states provides crucial leverage for securing outcomes for the majority of refugees that are not resettled, such as access to territory, healthcare or education.

At the 2022 Annual Tripartite Consultations on Resettlement (ATCR) held in Geneva in June, UNHCR presented the [2023 Projected Global Resettlement Needs](#) (PGRN)⁶, observing that global resettlement needs have significantly risen compared to previous years. More than two million refugees are estimated to be in need of resettlement in 2023, as compared to 1,473,156 in 2022. From January to November 2022, there were just 53,533 departures to resettlement countries of UNHCR-referred refugees. In short, the need for resettlement places far exceeds those available.

The United States, Canada and the EU have all been active in the targeted diplomatic engagement centred on resettlement and complementary pathways. The State Department leads the engagement of resettlement in United States, describing its program as ‘a vital foreign policy tool that advances U.S. interests and national security objectives, including rebuilding a system that promotes safe, orderly, and humane lawful immigration’. The State Department recognises the complementary role that resettlement plays ‘alongside robust humanitarian aid and diplomacy, resettlement helps promote stability in regions experiencing crisis, demonstrates U.S. responsibility-sharing with affected countries, and facilitates U.S. negotiations on additional humanitarian conditions with host countries’⁷.

Canada, through its lead ministry *Immigration, Refugees and Citizenship Canada*, has been actively investing its policy capacity to expand complementary labour pathways around the world. These efforts in migration diplomacy have been key to its significant reputation, impact and global standing among partner states as a lead actor in supporting and optimising humanitarian entry and stay globally. One of its high-profile initiatives has been the Global Refugee Sponsorship Initiative, focused on expanding community sponsorship models globally and it has also stepped up to assume the inaugural chair of the Global Task Force on Refugee Labour Mobility. The European Union equally has been active in building and catalysing its Member States’ efforts to respond to a series of challenges, including displacement from Ukraine, while maintaining resettlement as a demonstration of its solidarity as part of the international community.

Historically, Australia also played a critical role in internationalised efforts in resettlement engaging with, and assuming leadership roles in the international resettlement architecture and its mechanisms including the ATCR Working Group on Resettlement and Core and Contact Groups that provide for strategic and coordinated interventions amongst the key resettlement countries. Coordinated efforts by the key resettlement states have led to some very important outcomes for refugees over the last decade in which Australia has played important and catalytic roles, including for example for Bhutanese refugees in Nepal; Palestinian Iraqi refugees in the Middle East; and as part of an urgent response to stranded refugees in Shousha camp in Libya. These outcomes were achieved by states’ efforts working through structured resettlement coordination mechanisms involving, but not led

⁶ The *Projected Global Resettlement Needs* is produced annually by UNHCR and provides the needs of the following year. Available at: [UNHCR - 2023 Projected Global Resettlement Needs](#)

⁷ *Report to Congress on Proposed Refugee Admissions for Fiscal Year 2023*. September, 2022. Available at: <https://www.state.gov/report-to-congress-on-proposed-refugee-admissions-for-fiscal-year-2023/#intro>

by, UNHCR. States were able to drive progress through diplomatic interventions, information sharing, resources sharing, and supporting engagement with hosting states on issues such as access for caseworkers and exit visas.

UNHCR has welcomed the commitments of the Albanese Government to strengthen the focus on protection needs to deliver a non-discriminatory humanitarian program underpinned by a strong referrals partnership with UNHCR for the refugee stream. In the face of growing needs globally, this renewed collaboration is important and timely. At the same time, Australia has an opportunity to reinstate and reinvigorate its role as a leader in refugee resettlement and invest in initiatives to expand resettlement and leverage this commitment for better outcomes for those left behind. The initial positive response to chairing ATCR in 2023 and its membership of the *Global Task Force on Refugee Labor Mobility* are welcomed developments to re-establish Australia's standing internationally in its efforts to help achieve the goals established by the Global Compact on Refugees and articulated in the [Third Country Solutions for Refugees: RoadMap 2030](#)⁸.

Visa architecture and framework considerations to better anchor Australia's response to its legal obligation and efforts through resettlement and other humanitarian pathways

UNHCR notes that the visa architecture of the Humanitarian Program which currently provides both for Australia's response to its international obligations and its commitment to other humanitarian entry, will be considered in this Review as part of the broader examination of the legislative and policy framework that underpins Australia's migration system. The following observations are relevant to that focus but also may warrant consideration in a future targeted review of the Humanitarian Program.

Reinstating references to the Refugee Convention

Of particular importance and priority, UNHCR is encouraged by the Labor Party's commitment in its platform to re-introduce appropriate references to the Refugee Convention into the Migration Act and encourages early action to progress this. As part of such reform efforts, UNHCR also encourages the Government to address other amendments that were made to the Migration Act that are not consistent with existing State practice and a proper interpretation of Australia's obligations under the Refugee Convention; or fundamentally altered the obligations owed to refugees by Australia.⁹

The need to delink the onshore component of the program and remove the capping power under Section 85

UNHCR notes the globally unique arrangement whereby Australia counts the permanent Protection Visas granted onshore (i.e., in response to its international obligations) under its Humanitarian Program. While it could be argued there is a thematic relationship between the two, the coupling of two distinct concepts in refugee protection is problematic. Asylum or onshore protection responds to Australia's international legal obligations, while resettlement

⁸ The *Third Country Solutions for Refugees Roadmap, June 2022* is the next phase of the Three Year strategy for Resettlement and Complementary Pathways set out in the GCR. Available at: [Third Country Solutions for Refugees: RoadMap 2030](#)⁸.

⁹UNHCR's submission made at the time sets these out in full. Available at: [UNHCR - Submission to the Senate Legal and Constitutional Affairs Legislation Committee: Migration and Maritime Powers Legislation Amendment \(Resolving the Asylum Legacy Caseload\) Bill 2014](#), October 2014

and complementary pathways are a voluntary demonstration of responsibility-sharing as part of the international community to the challenges of global displacement. UNHCR has previously expressed its concerns that the linking of the two distinct responses may constrain grants, or impact processing timelines for those seeking asylum in Australia.

Problematically, with the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*, [section 85 of the Migration Act](#) was amended to enable the Minister to cap the number of protection visas that could be granted in the financial year. International law is clear on the right to access asylum and hence onshore protection should be considered, in the Australian migration parlance, a 'demand-driven' program. Constraining grants to conform to program management directions is inconsistent with Australia's obligations as it limits the timely access to the important rights established by the Convention. As such, a capping tool and program management approach that limits visa grants is inappropriate for responding to those that Australia owes protection.

The question of status determination and the relationship to a visa

An important principle to recall is that all persons who meet the refugee criteria under international law are refugees for the purposes of international law, whether or not they have been formally recognized as such. That is to say, a person is a refugee within the meaning of the Refugee Convention as soon as they fulfil the criteria contained in the definition. This would necessarily occur prior to the time at which their refugee status is formally determined. Recognition of refugee status does not therefore make a person a refugee but declares them to be one.

Determination of refugee status normally involves the individual assessment of each claim for international protection on its own merits according to the criteria set out in the Refugee Convention. While the Refugee Convention does not dictate the procedures to be followed for determining refugee status, in Australia, the legislative and policy framework has established the determination of refugee status only as part of an integrated visa determination process – that is one must make an application for a protection visa to trigger a refugee status determination.

However, it is not uncommon for a person to be determined to be in need of international protection and thereby at a minimum engage Australia's *non-refoulement* obligations, but not satisfy other applicable visa criteria and thus be determined ineligible for visa grant. Consequently, such refugees will not have access to the rights to which their status entitles them under the Refugee Convention and international human rights law.

Similarly, a person found to be in need of international protection may have their Australian visa cancelled and therefore instantaneously lose access to the rights to which they are entitled. Significantly, the Refugee Convention recognises that refugee status ends under certain clearly defined conditions, such as the cessation clauses. The grounds identified in the Refugee Convention are exhaustive and no additional grounds would justify a conclusion that international protection is no longer required.

Moreover, when other prescribed visa criteria, such as the section 501 'character test', exceed the basis for exclusion under the Refugee Convention, a refugee may have their visa application refused or visa cancelled but still remain a refugee under international law. When such 'non-citizens' are placed in immigration detention, they are likely to remain detained for

a protracted if not indefinite period because they are unable to return to their country of origin because they have a well-founded fear of persecution there and are in need of international protection. As a detention monitoring agency, UNHCR sees first-hand the harmful effects of such problematic interpretation in Australia's legal framework that loss of visa equates to loss of recognition of refugee status under international law.

The same situation arises when no statelessness determination procedure has been implemented to identify non-refugee stateless persons, and there is no statelessness visa in place for this purpose, as is the case in Australia. As a result, a stateless person is effectively denied the opportunity to enliven access to the rights to which they are entitled under the 1954 Stateless Convention.

Accordingly, some States maintain a statutory architecture that distinguishes processes for determining refugee status, statelessness and other international protection needs to that of a domestic mechanism for regularizing stay – that is, the status determination is separate to the permit/visa process. Hence, there is greater clarity and significance given to that standalone recognition. Consideration of an alternative architecture for refugee status and statelessness determination processing (e.g. separate body) and statutory models globally, could identify an approach to ensure Australia does not lose sight of the specific obligations owed to refugees under international law and in turn, give appropriate recognition to ensuring refugee and statelessness status are of paramount importance and are not inadvertently or effectively eroded.

The effectiveness of the asylum system

Asylum systems globally are under pressure from increasingly high applications and are at risk of overwhelm. As this Review considers how best to meet the economic interest of Australia, including the realities of its labour market needs, UNHCR recommends a close examination of the use and ways to reduce potential misuse of the system of asylum in Australia. Protracted processing times for asylum claims, leading to asylum-seekers waiting multiple years for a final outcome of their claim, can irreparably damage already fragile asylum systems. Delays in the processing of asylum applications can also erode public confidence in these systems and make it more difficult to repatriate or find other solutions for those found not to be in need of international protection. Of relevance is UNHCR's 2022 [guidance](#)¹⁰, which draws on examples of system resilience and adaptability for backlog reduction and effective processing while maintaining procedural fairness and integrity of processing.

Multi-year planning for resettlement

The current annual approach to planning may not best meet the realities of case processing for humanitarian entry. In particular, it limits effective resource allocation, including the Department and UNHCR's resettlement capacity in the field/at operational level. Moving forward, recognising the continuity of Australia's longstanding commitment to refugee resettlement, UNHCR would encourage multi-year program planning for resettlement, with appropriate flexibility to respond to new situations through the already close partnership in refugee case referrals management between UNHCR and the Department. In reality, our shared delivery of refugee resettlement necessarily transcends the annual budget-linked settings process but working with for instance, a three-year plan, would better support

¹⁰ *Effective processing of asylum applications: Practical considerations and Practices*, UNHCR, 2022. Available at: [Refworld | Effective processing of asylum applications: Practical considerations and practices](#)

planning and prioritisation, the positioning of resources, as well as effective coordination with the group of resettlement countries where joined-up efforts might be needed.

Policy differentiation of streams under the Humanitarian Program

In addition to UNHCR-referred refugees and members of immediate families who have been split, the Humanitarian Program attempts to respond to a broad range of needs and interests. It is characterised by a very high application rate to grant ratio according to the Department's statistics which is administratively burdensome but also can lead to negative outcomes for individuals who believe they will be granted a visa when realistically this is unlikely – indeed it can inadvertently lead to protection risks.

The Special Humanitarian Program component is a valuable complementary pathway that addresses certain family reunification needs and responds to the needs and aspirations of Australia's refugee diaspora to be reunited with their communities. It is also often used effectively to provide a pathway for those with international protection needs that may be outside of UNHCR's mandate or practical scope to assist for a third country solution. That being said, in the face of incredible demand on the Humanitarian Program, the absorption of new initiatives including the Community Refugee Integration and Settlement Pilot, it would be timely to review the size of the program and refine and differentiate the policy intent of its different components.

As part of reflections on Australia's recent responses to humanitarian entry from Afghanistan and Ukraine, consideration could also be given to the adequacy and effectiveness of the existing legal and policy framework for responding to accelerated evacuation and temporary forms of humanitarian protection. As noted above, the delinking of the onshore asylum component of the program should also be a key consideration in looking at the components and their objectives that make up the Humanitarian Program.

UNHCR hopes that this submission is of value to the Review and remains available to discuss any aspect of this submission with the panel of experts and officials.

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