



*International Journal of Refugee Law*, the leading journal in the field. In 2021, she was appointed an Officer of the Order of Australia (AO) ‘for distinguished service to international refugee law, particularly to climate change and the displacement of people’.

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## Acknowledgments

Written by [regina.jefferies@unsw.edu.au](mailto:regina.jefferies@unsw.edu.au) for the *International Journal of Refugee Law*. The research was supported by the Evacuations Research Hub at the Kaldor Centre for International Refugee Law, with UNSW Sydney. The research was funded by the Australian Research Council (ARC) Discovery Project (FL230100011).

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## Rationale

### 1 Emergency protection framework

**The Australian government should create an overarching decision-making framework to enable it to deliver a swift, considered, equitable, well-coordinated and effective emergency response to a conflict, disaster or other declared humanitarian crisis overseas. The framework should encompass both physical protection (evacuation and reception) and legal protection (visas and access to support). The framework would provide a ready-made plan to be activated if the government declared the existence of a ‘humanitarian emergency’ necessitating a protection response, rather than defaulting to ad hoc and hastily devised policies.**

The creation of a more predictable and equitable response framework for humanitarian emergencies would assist the Australian government to better plan for crises, anticipate resource needs and ‘stand up’ a surge workforce to support the various elements of the response. Such a framework would also



and (iii) which demands exceptional measures because current government and UNHCR capacities at country and/or regional levels are inadequate for a predictable and effective response.<sup>13</sup>

In the United States, the Secretary of Homeland Security has the discretion to provide Temporary Protected Status (TPS) to non-citizens already in the US who come from a country where at least one of the following conditions exists:

- x **ongoing armed conflict** – due to the conflict, returning people to that State poses a serious threat to their personal safety;
- x **disaster** – there has been an earthquake, flood, drought, epidemic or other environmental disaster resulting in a substantial but temporary disruption of living conditions, and as a result, the foreign State is temporarily unable to adequately handle the return of its nationals, and the foreign State has officially requested the TPS designation; or
- x **extraordinary and temporary conditions** exist in the foreign State that prevent its nationals from safely returning, unless allowing those nationals to remain temporarily in the US is contrary to US national interests.<sup>14</sup>

In the European Union, the Temporary Protection Directive provides a discretionary and pragmatic response to a mass arrival or evacuation of:

- x persons who have fled areas of **armed conflict or endemic violence**;
- x persons at serious risk of, or who have been the victims of, systematic or generalised **violations of their human rights**.<sup>15</sup>

This is not an exhaustive definition and could also apply to people fleeing the adverse effects of disasters, for instance.

While other aspects of the US and EU mechanisms are critiqued in sections below, these ‘triggers’ could be useful for determining an appropriate threshold for the Australian context, especially since the AUSRECEPLAN<sup>16</sup> and AGCMF<sup>17</sup> do not provide sufficient detail to be useful in the context of an overseas humanitarian emergency. In our view, the framework should set out a non-exhaustive set of circumstances to give the government sufficient flexibility to respond to a range of different contexts. Key elements should include: (a) the existence of urgent humanitarian need in a (b) conflict, disaster or other humanitarian crisis where (c) lives, safety or core human rights are at risk and (d) existing responses by States and UNHCR are inadequate, unpredictable or ineffective.

The details of Canada’s Crisis Response Framework are not yet known, but broadly it will aim to ‘improve decision-making by establishing a transparent and evidence-based assessment mechanism to inform when a migration response may be warranted for particular situations, based on the needs of affected populations and informed by equity considerations’.<sup>18</sup> In preparing the framework, the IRCC is closely examining its existing legal, regulatory, operational and funding approaches, including by reviewing lessons learned from responses to Afghanistan and Ukraine.<sup>19</sup>

## 2 Consultation and planning

**The framework should be developed and implemented collaboratively with relevant stakeholders from all levels of government; relevant international agencies (especially UNHCR and IOM); refugee protection and settlement services; other relevant agencies and experts (including the Australian Refugee Advisory Panel); and representatives from affected communities. The framework should include a**

**mechanism to bring these stakeholders together if the activation of the framework is being considered so that responses are tailored to the situation at hand. The mechanism should be triggered as early as possible, and certainly once a humanitarian emergency has been declared.**

To be appropriately focused, resourced and implemented, the creation of the framework – and, importantly, its utilisation in a humanitarian emergency – must be a collective endeavour involving all relevant stakeholders.<sup>20</sup> This approach was endorsed by the Senate inquiry into Afghanistan, which recommended that formalised protocols be developed ‘for incorporating relevant stakeholder groups into government planning and evacuation processes (for example, legal and advocacy groups working with affected groups and individuals in country)’.<sup>21</sup> This is essential if assistance is





Much of the complexity stems from the multiple visa categories Australia has within the Refugee and Humanitarian Program, divided into offshore and onshore categories – that is, visas available to people outside the country, and a different set available to people within it. In addition, these visa categories have widely varying criteria and benefits, leaving people in similar circumstances very differently situated in terms of access to protection and support.

While the use of different visas has provided the Australian government with flexibility, it has led to ad hoc and inconsistent approaches. It has also added to challenges and inefficiencies within the visa processing system.<sup>46</sup>

The table below shows how divergent Australia’s responses have been over time. The Annex at the end of the document provides details of comparative international practices. is.addipos 532.B-8288.3256 9.8c1741

Burmese in Thailand (subclass 213) (repealed 2000) Cambodian (subclass 214)	<b>Burma</b>	<b>Yes</b>	<b>Medicare Centrelink Work rights</b>	<b>Yes</b>
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While this Policy Brief does not go into the details of each visa listed above, key shortcomings relevant to recent humanitarian emergencies are discussed below.

#### 4.1.1 Permanent visas

For people overseas, Australia currently has four types of permanent humanitarian visas that can be granted to those in need of international protection.<sup>55</sup> The **Emergency Rescue Visa (subclass 203)** is the only one of these that envisages *emergency* protection for people who are still within the country of risk (cf subclass 201), or who have left it but require urgent protection. Although the visa envisages 'urgent and accelerated processing of people who are subject to persecution in their home country and who face an immediate threat to their life or freedom',<sup>56</sup> processing can be slow.<sup>57</sup> People must generally be referred by UNHCR, and the pre-set number of visas is taken from the existing annual resettlement quota. In addition to considering the 'degree of persecution' faced, consideration is also given to the 'extent of the applicant's connection with Australia', whether there is any other suitable country that could protect them, the capacity of the Australian community to provide for permanent settlement,<sup>58</sup> and whether it is 'consistent with the regional and global priorities of the Commonwealth in relation to the permanent settlement of persons in Australia on humanitarian grounds'.<sup>59</sup> The subclass 203 visa is also not well-suited to emergency responses for groups of people beyond a small number of individuals in immediate danger.

Australia has a long history of creating special resettlement schemes for **locally engaged employees** (LEEs) who have assisted Australia abroad, including in Vietnam,<sup>60</sup> Iraq and Afghanistan, reflecting 'Australia's view of its moral obligation to current and former employees who have provided valuable support to Australia's efforts.'<sup>61</sup> In some cases, this has included an evacuation component. While an admirable idea in theory, many concerns have been raised about the practical operation of LEE schemes,<sup>62</sup> including 'inefficiencies, a lack of situational awareness, inordinate delays, and a lack of understanding of the processes involved on the part of respective departments'.<sup>63</sup> Furthermore, registration in the Afghan LEE programme did not automatically give rise to a visa; rather, people had to apply for a humanitarian visa separately but were among a number of priority categories;<sup>64</sup> many did not get out. This bifurcated approach could significantly undermine Australia's operational capacity in future conflicts, as locals may be unwilling to assist if they are not assured of protection in the event of a humanitarian emergency.

#### 4.1.2 Temporary visas

Australia has used the **Humanitarian Stay (Temporary) Visa (subclass 449)** to respond to humanitarian emergencies where people have been displaced, or face a 'strong likelihood' of being displaced, and are 'in grave fear of [their] personal safety' because of the circumstances surrounding such displacement.<sup>65</sup> These visas were first introduced in 1999 for the evacuation of nearly 4,000 Kosovars from the Former Yugoslav Republic of Macedonia and 2,000 East Timorese from East Timor, and were subsequently used to evacuate people from Afghanistan in 2021.<sup>66</sup> In the case of Afghanistan, they allowed people to leave on a temporary basis, and – if so invited once in Australia, through the Minister 'lifting the bar' – to apply for a permanent humanitarian visa.<sup>67</sup> Importantly, visa holders were 'eligible for certain payments and concession cards, including Special Benefit, Family Tax Benefit, Dad and Partner Pay, and Parental Leave Pay, and the Health Care Card'.<sup>68</sup> However, shortcomings include the fact that the visa is wholly discretionary<sup>69</sup> and people must be invited to apply fogrof







settlement services that [sic] normally available to onshore applicants'.<sup>90</sup> In the case of those who fled Afghanistan, it 'aligned to a practicable extent, visa outcomes for this group with what they would likely have received through the Humanitarian Program, if they did not need urgent evacuation from Afghanistan'.<sup>91</sup> While this was welcome, the fact that it is wholly discretionary makes it uncertain, inefficient and unsustainable as a model.

Leaving visa options open facilitates other potential long-term solutions, particularly where a person has family ties to Australia or skills needed by Australian employers. Australia's Ukraine visa support programme enabled exactly this: Ukrainians and their families in Australia could access standard visa pathways.<sup>92</sup> The US TPS programme similarly does not restrict people from applying for any other type of visa for which they may qualify, nor does Canada's Temporary Resident Visa scheme or the EU Temporary Protection Directive. Allowing people to apply for other visa types facilitates a variety of solutions that do not depend solely on the humanitarian programme. However, neither the Ukraine visa support programme, nor TPS, directly provide for durable solutions, leaving many people in limbo.

### **4.2.3 Entitlements**

Emergency visas should provide immediate access to services, including Medicare and Centrelink,

The Senate Committee criticised Australia's initial response, stating that:

Australia should match its coalition partners in committing to a substantial intake of Afghan refugees. In the committee's view, this would be a commensurate response to the crisis and Australia's international standing as a country with a significant permanent humanitarian resettlement program. ... The committee also believes that Australia should play a global















permanent nature offering continued cooperation to 23 countries of Central America, the Caribbean and México before a disaster occurs'.<sup>175</sup> The programme provides an initial stay of three years and beneficiaries can subsequently apply for permanent residence. The visa is open to internally displaced persons as well as persons displaced across an international border and is not contingent on a person having a regular migration status in the country where they reside. The visa programme is coordinated through a Working Group of the Environmental Humanitarian Visa Program, involving the National Directorate of Migrations, General Directorate of Consular Affairs of the Ministry of Foreign Affairs, IOM, UNHCR, the International Committee of the Red Cross, the Argentine support network for community refugee sponsorship and the Episcopal Commission for the Pastoral Care of Migrants and Itinerants.<sup>176</sup>





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<sup>25</sup> Department of Foreign Affairs and Trade (DFAT), 'Australia's Humanitarian Assistance' (last accessed 14 August 2024)









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<sup>80</sup> Barry York, *Australia and Refugees, 1901–2002: An Annotated Chronology Based on Official Sources* (Commonwealth of Australia, 2003) 45. As York explains at 16–17, in 1975, Australia assisted around 2,000 spouses and children of Vietnamese students already in Australia; spouses and children (under 21 years) of Australian citizens; and Vietnamese people with a long and close association with Australia’s presence in Vietnam whose lives were considered to be in danger. In 1976, Australia granted visas to displaced Lebanese and Palestinian relatives of Australian residents who had suffered extreme hardship as a result of the war in Lebanon.

<sup>81</sup> *Immigration and Refugee Protection Act* (SC 2001, c 27) s 25.2(1). The Minister may also grant a ‘foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected’: s 25.1(1).

<sup>82</sup> Canadian Council for Refugees (n 2) 4.

<sup>83</sup> *Ibid*, 5.

<sup>84</sup> Senate Interim Report (n 21) para 7.57, referring to Medical Association for the Prevention of War (Australia), *Submission 40*, 2; Australian Muslim Women’s Centre for Human Rights, *Submission 44*



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<https://www.refugeecouncil.org.au/wp-content/uploads/2022/03/2022-23-Budget-summary-1.pdf>. See also Senate Interim Report (n 21) paras 7.59ff. For a detailed analysis of how this operated with respect to applicants from Afghanistan, and a breakdown of numbers and visa classes, see Senate Interim Report (n 21) ch 7.

<sup>105</sup> Senate Interim Report (n 21) para 9.101.

<sup>106</sup> See *ibid*, para 7.39.

<sup>107</sup> According to UNHCR, whereas evacuations are commonplace in disasters, in armed conflicts they are 'strictly a measure of last resort' when other live-saving protection and assistance measures are unattainable: UNHCR, 'Guidance Note 9: Humanitarian Evacuations' in *Handbook for the Protection of Internally Displaced Persons* (UNHCR 2007) 137. At times, International Humanitarian Transfer or Evacuation Programmes have been used for 'individuals or groups of persons at particular risk of imminent attack or serious human rights violations into another country': *ibid*, 138.

<sup>108</sup> At that time, 'Operation Safe Haven' constituted Australia's largest single humanitarian evacuation (around 4,000 people) and marked the first time that Australia had evacuated refugees to the country for temporary respite rather than resettlement. See further Margaret Piper, 'Operation Safe Haven: A New Era in Temporary Protection' (1999) 75 *Australian Law Reform Commission Reform Journal* 33, 33.

<sup>109</sup> Senate Interim Report (n 21) para 5.69, referring to Home Affairs, *Submission 19*, 16.

<sup>110</sup> *Ibid*, para 5.58.

<sup>111</sup> *Ibid*, para 5.41, citing Defence, Answers to Questions on Notice from Public Hearing held 11 October 2021, Canberra (received 26 October 2021), Question No 12. It was noted that the ADF 'engage[s] closely, particularly in defence circles, with the United States and the UK on what we would call non-combatant evacuation operations on a regular basis': para 5.52, citing Committee Hansard (15 November 2021) 36. See also Field (n 76).

<sup>112</sup> Field (n 76).

<sup>113</sup> *Ibid*.

<sup>114</sup> US Transportation Command, 'Afghanistan Evacuation Support' (no date) <https://www.ustranscom.mil/cmd/neo.cfm>. During the Vietnam War, the US similarly evacuated thousands of Cambodian and South Vietnamese refugees to US military facilities in the western Pacific and within the US where they were afforded temporary care and were processed for resettlement either in the US or a country of their choice: Comptroller General of the US, *Evacuation and Temporary Care Afforded Indochinese Refugees – Operation New Life* (Report to Congress, 1 June 1976) 2.

<sup>115</sup> Field (n 76).

<sup>116</sup> Senate Interim Report (n 21) para 6.17, citing Mr David Wilden, First Assistant Secretary, Refugee, Humanitarian and Settlement Division, Department of Home Affairs, Senate Legal and Constitutional Affairs Legislation Committee, Estimates Hansard (25 October 2021) 95.

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<sup>117</sup> Canadian Council for Refugees (n 2) 3.

<sup>118</sup> Senate Interim Report (n 21

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Commonwealth of Australia regarding the Exchange of Information (6 September 2016);

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<sup>141</sup> Camilo Montoya Galvez et al, 'US Housing 20,000 Afghan Evacuees in 5 States, with Another 40,000 Overseas' (CBS News, 1 September 2021) <https://www.cbsnews.com/news/afghanistan-evacuees-us-housing-17000-in-5-states-40000-overseas/>.

<sup>142</sup> Refugee Council of Australia 2000 (n 6) 19 (fns omitted).

<sup>143</sup> Ibid, 21.

<sup>144</sup> Ibid, 19.

<sup>145</sup> Stigter and Morris (n 126) para 19.

<sup>146</sup> Refugee Council of Australia 2024 (n 3) 5. For recommendations in the US context, based on the experiences of Afghan evacuees, see Alexandria J Nysten et al, 'Then, We Lost Everything: Afghan Evacuee Experiences of Operation Allies Refuge and Operation Allies Welcome' (Center for Human Rights and Humanitarian Studies and the Refugee Dream Center, April 2023).

<sup>147</sup> Senate Interim Report (n 21) para 7.114: this was offered to all who were evacuated from Afghanistan.

<sup>148</sup> Ibid, para 7.115, citing Home Affairs, *Submission 19*, 17.

<sup>149</sup> Ibid, para 7.114; see also para 7.120, citing Refugee Council of Australia, *Submission 59*, 3.

<sup>150</sup> Note that the government did extend work rights and Medicare access to some visa holders from Gaza in August 2024, suggesting its acknowledgment of the challenges faced by people without such entitlements: Middleton (n 73).

<sup>151</sup> Senate Interim Report (n 21) para 7.116, citing Home Affairs, *Submission 19*, 17.

<sup>152</sup> Ibid, para 7.117, citing Home Affairs, *Submission 19*, 17.

<sup>153</sup> Refugee Council of Australia 2000 (n 6) 18 (fn omitted): 'There is a irony in the fact that much store was placed on cultural briefing for those working with the Kosovars but efforts to reciprocate came very late and never reached fruition'.

<sup>154</sup> Ibid, 20.

<sup>155</sup> Ibid, 18.

<sup>156</sup> Note the cessation clauses in the Convention relating to the Status of Refugees, 189 UNTS 137 (adopted 28 July 1951, entered into force 22 April 1954) art 1C(5)–(6).

<sup>157</sup> Mary Anne Kenny, Nicholas Procter and Carol Grech, *Temporary Protection Visas in Australia: A Reform Proposal* (Kaldor Centre Policy Brief 13, June 2022) 1. See also citations there in endnote 1: Elizabeth Newnham et al, 'The Mental Health Effects of Visa Insecurity for Refugees and People Seeking Asylum: A Latent Class Analysis' (2019) 64 *International Journal of Public Health* 763; Procter et al (n 93); Mary Anne Kenny, Carol Grech and Nicholas Procter, 'A Trauma Informed Response to COVID-19 and the Deteriorating Mental Health of Refugees and Asylum Seekers with Insecure Status in Australia' (2022) 31 *International Journal of Mental Health Nursing* 62; Anna Ziersch et al, 'Temporary Refugee and Migration Visas in Australia: An Occupational Health and Safety Hazard' (2021) 51 *International Journal of Health Services* 531.

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<sup>158</sup> See Kaldor Centre for International Refugee Law, *Kaldor Centre Principles for Australian Refugee Policy: Summary and Key Priorities* (revised March 2022) 11.

<sup>159</sup> Refugee Council of Australia 2000 (n 6) Recommendation 20.

<sup>160</sup> Refugee Council of Australia 2024 (n 3) 6.

<sup>161</sup> Ibid.

<sup>162</sup> See further Claire Higgins, *Safe Journeys and Sound Policy: Expanding Protected Entry for Refugees* (Kaldor Centre Policy Brief 8, November 2019) 10: ‘Applicants’ claims for protection may be fully assessed before departure or, alternatively, applicants may undergo pre-screening and then receive permission to move to a transit country where they complete the assessment process, or to travel directly to the destination country as an asylum seeker who must lodge their claim for protection on arrival’. See also European Parliament, *Report with Recommendations to the Commission on Humanitarian Visas* (2018/2271(INL)), A8-0423/2018, 4 December 2018); *Humanitarian Visas: European Added Value Assessment Accompanying the European Parliament’s Legislative Own-Initiative Report (Rapporteur: Juan Fernando López Aguilar)* (European Parliamentary Research Service, October 2018).

<sup>163</sup> Moreno-Lax (n 77) 57. See further Recommendation 5.

<sup>164</sup> Higgins (n 162) 6.

<sup>165</sup> US Citizenship and Immigration Services, ‘Frequently Asked Questions About the Processes for Cubans, Haitians, Nicaraguans, and Venezuelans’ (last updated 11 October 2023) <https://www.uscis.gov/humanitarian/frequently-asked-questions-about-the-processes-for-cubans-haitians-nicaraguans-and-venezuelans>.

<sup>166</sup> Wood and Higgins (n 98) 10ff. For details of emergency resettlement in practice, including to Australia, see Moreno-Lax (n 77) 69ff.

<sup>167</sup>

