
Independent Review into the Afghan Locally Engaged Employee Program

Dr Vivienne Thom AM

20 March 2023

Letter of transmittal

The Hon Richard Marles MP, Deputy Prime Minister, Minister for Defence
Senator the Hon Penny Wong, Minister for Foreign Affairs
The Hon Mark Dreyfus KC MP, Attorney-General
The Hon Andrew Giles MP, Minister for Immigration, Citizenship and Multicultural Affairs
Parliament House
Canberra ACT 2600

Dear Ministers

I am pleased to provide my report of the independent review I have conducted into the Afghan Locally Engaged Employee Program. The review addresses the terms of reference.

In the course of the review I met with a range of stakeholders, including from government. I take this opportunity to acknowledge their input.

I would also like to thank the members of the review secretariat for their excellent assistance with logistics, research and note-taking.

Yours sincerely



Dr Vivienne Thom AM
Independent Reviewer

20 March 2023

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Executive summary

Background

In 2012 the Australian Government introduced a program to offer resettlement in Australia to eligible locally engaged Afghan employees, and their direct family members, at risk of harm due to their employment in support of Australia's mission in Afghanistan. This Afghan locally engaged employee (LEE) program was to reflect 'Australia's view of its moral obligation to current and former employees who have provided valuable support to Australia's efforts in Afghanistan'. The policy was aimed at those Afghan LEE 'at the greatest risk of harm' as a consequence of the support they provided to Australia's mission in Afghanistan.

The LEE program was also an incentive for Afghan interpreters to work with the Australian mission and for Australia to retain loyal staff. Australia worked in a hostile environment in Afghanistan and depended on its partnership with LEE to work safely. The program was designed to ensure that Australia was trusted as a nation to take care of those who assisted its mission so that it would continue to receive such assistance in the future.

Eligibility criteria for the program include a requirement that a person be 'employed with' the Department of Foreign Affairs and Trade (DFAT), the Australian Defence Force (ADF) or the Australian Federal Police (AFP). The use of 'employed with' rather than the simpler and clearer term 'employed by' suggests that it was contemplated that the program would not be limited to locally engaged staff; however, the extent to which the program was intended to include other employment arrangements including contractors was not specified in 2012 and is still not clear.

As at 31 December 2022, 2,383 Afghan LEE and their families (653 certified LEE and 1,730 family members) had travelled to Australia.

In 2021 the Senate Foreign Affairs, Defence and Trade References Committee conducted an inquiry into Australia's engagement in Afghanistan. The inquiry received submissions critical of the design and administration of the Afghan LEE program. This Committee recommended a full and thorough review of the operation of the Afghan LEE program.

The Ministers for Foreign Affairs, Defence, and Immigration, Citizenship and Multicultural Affairs jointly announced this review on 10 November 2022.

Evacuation of Kabul

This review notes the extraordinary efforts made by Australian officials during the evacuation of Kabul but concludes that processes developed for the Afghan LEE program in a relatively stable environment did not function in this emergency situation. By the time the crisis occurred it was too late to try to identify LEE and their families and prioritise their uplift. Planning for the identification and evacuation of LEE in the event of an emergency seems to have been insufficient in Kabul.

Administration of the Afghan LEE program

The process for considering applications is conducted in two stages:

1. The employing agency – DFAT, Defence, or the AFP – assesses an application against criteria for eligibility for certification for locally engaged employees set out in a legislative instrument, currently ‘Migration Regulations 1994 - Specification of a Class of Persons - IMMI 12/127’, (the Instrument). The employing agency submits a recommendation to its relevant agency Minister (the Minister for Foreign Affairs, the Minister for Defence, or the Attorney-General) to make a decision on eligibility for certification. (At December 2022 the AFP was not assessing any applications or making recommendations to the Attorney-General.)
2. Certified LEE then submit a visa application to the Minister for Immigration, Citizenship and Multicultural Affairs which is assessed by the Department of Home Affairs.

LEE certification does not provide a guarantee that a person will get a visa. LEE certified individuals still need to meet character, health and identity criteria. Certified LEE can still be refused a visa and this has happened in practice. The converse may also occur: a person can still apply for and be granted a humanitarian visa regardless of LEE certification status.

The review considered whether departmental resourcing was sufficient to match workload. It found that current resourcing in DFAT is not adequate to assess undecided applications in a timely way. Although resourcing in Defence would appear to be adequate for the very small number of applications at hand, the use of a single officer is not adequate to ensure the ongoing consistency of assessment. Resourcing in Defence will also need to be reviewed if the recommendations in this report are accepted.

The review found that DFAT’s procedural instructions are currently appropriate to ensure processes are repeatable and scalable. The lack of documentation of the assessment process in Defence poses a high risk to the integrity of the assessment process. Neither DFAT nor Defence have adequate case management systems in place.

This review found that the current two-stage process causes delays, double handling and confusion and imposes an administrative burden on applicants. The current LEE program would likely be more efficient and easier and fairer for applicants to navigate if it had been designed as a streamlined end-to-end process with all cases managed by Home Affairs. Certification could occur as part of the visa application process, with advice sought from DFAT, Defence or the AFP.

Ministerial certification

DFAT, the AFP, and Defence provide recommendations to the relevant agency Minister about whether a person is eligible under the program. The review observed some irregularities in 3 ministerial submissions that raised serious issues about how consistently the Instrument was interpreted, the information provided to the Minister, and whether a lawful decision had been made on a number of applications for certification.

Review of certification decisions

The legislative scheme does not allow for merits review of certification decisions and does not require a statement of reasons. DFAT provides a statement of reasons upon request. Both DFAT and Defence have introduced limited re-assessment to the extent that it is

practicable under the current scheme and staffing levels, but applicants found ineligible should be provided with clearer information about the re-assessment process.

Priority processing

The review found that current overall processing times do not match with the stated program objective of providing prioritised access to humanitarian visas or ensuring the safety of LEE.

Currently the legislation does not allow for delegation of ministerial certification decisions. If criteria for eligibility are clearly defined, and with proper guidance material, decisions on the eligibility of individual LEE could be made at an appropriate departmental level. This could reduce the time taken for assessment. Amendment of the Migration Regulations 1994 should be considered to allow for authorisation by the relevant agency Minister and provide certainty in departmental decision making. Naturally, any decision whether to authorise an officer would then be made by the Minister.

This review acknowledges the difficulties faced by Home Affairs in prioritising its workloads and the complexities of assessing applications, but if the LEE program is to meet its objectives of resettling Afghan LEE because they are at risk of harm, the current overall visa processing timeframes require considerable improvement.

The relative priority for the processing of LEE visa applications is a matter of policy for the Government to decide. In the absence of additional dedicated resources, any improvement in the processing times for LEE visa applications would likely be at the expense of other, very deserving, vulnerable cohorts.

The treatment of contractors

The review found that consideration of the eligibility of contractors was not consistent across agencies and has changed with time. The review observed that the divergence of approach could result in part from the practice of each agency obtaining its own legal advice without adequate consultation.

The approach proposed by DFAT including an assessment of whether a person 'appeared to be working with or representing the Australian Government' would appear to be consistent with the original intent of providing resettlement to individuals at risk of harm due to their employment in support of Australia's mission in Afghanistan.

The review found that records in Afghanistan were not adequate for the purposes of identification of LEE, particularly contractors.

The exclusion of security guards

The review did not locate any documentary evidence that assisted in defining the scope of an exclusion in the Instrument of persons 'employed in a private security capacity'. While there are different interpretations possible, it was not unreasonable for government agencies to apply a broad scope based on the ordinary meaning of the words, and to recommend that security guards were not eligible for certification.

Although there are varying views about the threats faced by security guards, it is clear that these guards can face individual risk of harm because of their employment and association

with Australia, and that this risk increased during 2020-21. At this stage it would have been prudent for government officials to review whether the exclusion in the Instrument was arbitrary and whether it was consistent with the intent of the program.

The review proposes that a revised Instrument should be made to address the apparently arbitrary exclusions in the current Instrument that seem inconsistent with the program's original intent.

Risk of harm

The Instrument specifies that an eligible person must 'have been assessed at significant individual risk of harm as a result of their support to Australia's whole-of-government mission in Afghanistan due to their role, location, employment period and currency of employment'. This is inconsistent with the requirement set out in the Migration Regulations 1994 that a person is 'at risk of harm for a reason, or reasons, that relate to the applicant being in that class of persons'. This inconsistency should be addressed in a revised Instrument.

Closure of the Afghan LEE program

Australia closed the Australian Embassy in Kabul in May 2021. Most applicants who would be considered eligible under the current Instrument would have been expected to have already applied. If a revised Instrument is made, a further cohort could be eligible and it would be reasonable to allow a further short period of time for this cohort to apply. The review recommends that certification under the Afghan LEE program could cease by 31 May 2024. (Individuals could still apply for visas after this date.)

Learning from the lessons in Afghanistan to design LEE programs in the future

Any proposed LEE program needs to balance Australia's moral obligation to individuals who are at risk because of their service to Australia, with the aims of Australia's migration program. If the risk threshold for accessing the program is too high, Australia will not be meeting its moral obligation which could also potentially result in no individual wanting to work with Australia in the future. If the threshold is set too low, or if the program is open to extended family members, the numbers of certified LEE resettled could be at the expense of UNHCR refugees and could be damaging to Australia's reputation internationally.

The report sets out a number of scenarios where Australia might consider a LEE program but notes that it would be a matter of policy for the Government to decide having regard to the risk profile at the time, the costs, bilateral relations, and Australia's migration program.

The scenarios set out in the report would require a whole-of-government response, but this review proposes that the employing agency or agencies (currently DFAT, Defence or the AFP) would lead the policy initiative. Home Affairs should be responsible for the end-to-end processing to ensure a single interface with clients.

There can be no generic template for the design or delivery of a program: the approach would be required to be adapted for different scenarios. This review recommends design principles for future programs learning from the lessons of Afghanistan.

List of recommendations

The review makes 8 recommendations to improve the design and delivery of the current Afghan Locally Engaged Employee program, and to ensure any future program can be implemented expeditiously.

Recommendation 1

The Department of Foreign Affairs and Trade, and the Department of Defence should consider greater legal oversight of the preparation of ministerial submissions relating to certification in the Afghan Locally Engaged Employee program.

Recommendation 2

The Department of Foreign Affairs and Trade, and the Department of Defence should review previous ministerial submissions relating to certification in the Afghan Locally Engaged Employee program, to assess whether decisions relating to applicants found not eligible were properly made.

Recommendation 3

When the Department of Foreign Affairs and Trade, the Department of Defence or the Australian Federal Police notifies an applicant that they have been found ineligible for certification by the relevant agency Minister under the Afghan Locally Engaged Employee program, it should:

- inform the applicant that external merits review is not available;
- offer the applicant a statement of reasons;
- offer the applicant an opportunity to request a re-assessment, setting out any conditions that need to be satisfied, for example, requiring new information. It should be made clear that this re-assessment will be conducted by the same team and is not an independent internal review;
- advise applicants they can complain to the Office of the Commonwealth Ombudsman; and
- advise applicants that an unsuccessful application for certification does not preclude them from applying for a humanitarian visa.

Recommendation 4

The Department of Foreign Affairs and Trade, the Department of Defence, the Department of Home Affairs, and the Australian Federal Police should meet regularly to discuss the Afghan Locally Engaged Employee program to ensure their approach is consistent with the aims of the program, and any policy articulated by the Government.

Recommendation 5

The Government should:

1. Urgently consider the making of a new legislative instrument that sets out criteria for eligibility for certification for Afghan locally engaged employees to:
 - Revise the exclusion at 3(b) to ensure it does not arbitrarily exclude classes of individuals and that it is consistent with the original intent of the program.
 - Address the inconsistency with the Migration Regulations 1994 in the level of risk of harm that must be demonstrated.
2. Publish separate clear guidelines for the application of the eligibility criteria in the new instrument.

Recommendation 6

The Department of Home Affairs should seek amendment of the Migration Regulations 1994 to allow for a departmental officer to be authorised by the relevant Minister to certify an applicant according to paragraph 200.211(1A)(a) and paragraph 201.211(1A)(a) in Schedule 2 to the Migration Regulations 1994 on the Minister's behalf.

Recommendation 7

The Government could cease the certification of Afghan locally engaged employee applicants by 31 May 2024. If a new instrument is made in accordance with Recommendation 5, it should require that an individual must have sought to be certified by 30 November 2023 to allow for assessment and certification prior to 31 May 2024.

Recommendation 8

Any future program for the resettlement of locally engaged employees in Australia should be guided by the following broad principles:

1. The policy initiative should be led by the employing agency or agencies – currently the Department of Foreign Affairs and Trade, the Department of Defence, and the Australian Federal Police.
2. There should be a whole-of-government articulation of the aims of the program and how it will be delivered.
3. The Department of Home Affairs should be responsible for the end-to-end processing.
4. There must be clear consistent eligibility criteria prioritised on risk.
5. A centralised record management system is required for recording identity, contact details, employment history and the status of individuals who might be eligible for priority resettlement.
6. The application process should be streamlined with decision-making at the appropriate level.
7. The program should be as transparent as possible in the circumstances.
8. The program should be subject to regular review.
9. Proper crisis planning is essential.

Glossary and definitions

ABF	Australian Border Force
ACIAR	Australian Centre for International Agriculture Research
ADF	Australian Defence Force
AEK	Australian Embassy Kabul
AFP	Australian Federal Police
AusAID	Australian Agency for International Development. AusAID was integrated into DFAT in 2013.
certification	A decision by the responsible Minister for a LEE's employing agency that a LEE is eligible to be certified as within the class of persons specified in the Instrument and that the person is at risk of harm for a reason, or reasons, that relate to the applicant being in that class of persons
Senate Committee	Senate Foreign Affairs, Defence and Trade References Committee
DFAT	Department of Foreign Affairs and Trade
DIAC	Department of Immigration and Citizenship (now Home Affairs)
DIO	Defence Intelligence Organisation
Home Affairs	Department of Home Affairs
the Instrument	the legislative instrument that sets out criteria for eligibility for certification for locally engaged employees (currently Migration Regulations 1994 - Specification of a Class of Persons - IMMI 12/127)
LEE	a locally engaged employee who is employed with an Australian government agency (includes LES). A LEE may be eligible to be certified.
certified LEE	a LEE who has been certified as being in the class of persons defined by the Instrument
LES	locally engaged staff who have a direct employment relationship with an Australian government agency
SOP	standard operating procedure
Subclass 449 visa	Subclass 449 (Temporary Safe Haven) visa used to respond to emergency humanitarian situations to facilitate the movement of large numbers of people under imminent threat of harm. Application for this visa is made by accepting an offer from the Australian Government (usually the Minister for Immigration) for temporary stay in Australia
visa application process (for certified LEE)	process by which Home Affairs determines whether a certified LEE should be granted a permanent visa to travel to, enter and remain in Australia

Part 1: The review

BACKGROUND TO THE REVIEW

In 2021 the Senate Foreign Affairs, Defence and Trade References Committee (the Senate Committee) conducted an inquiry into Australia's engagement in Afghanistan.¹ One of the matters considered was the Afghan Locally Engaged Employee (LEE) program administered by the Departments of Foreign Affairs and Trade (DFAT), Defence and Home Affairs.²

Included in the Senate Committee's interim report (January 2022) was a recommendation that the Australian Government commission a full and thorough review of the operation of the Afghan LEE program to analyse and appropriately address concerns raised in evidence to the Senate Committee and ensure that programs of this nature are improved.³

On 15 November 2022 Dr Vivienne Thom AM was engaged to conduct an independent review of the operation of the Afghan LEE program and to report to the Ministers for Foreign Affairs, Defence, and Immigration, Citizenship and Multicultural Affairs.

SCOPE OF THE REVIEW

The terms of reference for this review are set out in full at Appendix A. In summary, the review is to:

1. Consider whether legislative instrument IMMI 12/127 is fit for the purpose of fulfilling its original intent or should be amended.
2. Determine whether the LEE application and appeals process was appropriate and implemented effectively.
3. Assess whether departmental resourcing was sufficient for processing LEE certifications and visas.
4. Consider whether record keeping relating to local nationals who provide assistance to Australia in areas of conflict and instability was appropriate.
5. Develop recommendations to ensure that in any future military engagements, the process relating to LEE is much clearer and can be implemented expeditiously.

The Senate Committee also made separate recommendations relating to:

- An independent review of the operation of the Afghanistan evacuation effort including protocols relating to the issuance of short-term humanitarian visas during crisis situations, the need for surge staffing capacity and the development for

¹ Senate Foreign Affairs, Defence and Trade References Committee, Parliament of Australia, *Australia's Engagement in Afghanistan* (2022)

² Senate Foreign Affairs, Defence and Trade References Committee, Parliament of Australia, *Australia's Engagement in Afghanistan: interim report* (2022), Chapter 6

³ Senate Foreign Affairs, Defence and Trade References Committee, Parliament of Australia, *Australia's Engagement in Afghanistan: interim report* (2022), paragraph 9.90

protocols to incorporating relevant stakeholder groups into government planning and evacuation processes.⁴

- The finalisation of certification and visa applications for LEE and their families and assisting travel to Australia.⁵
- Visa processing and communication with applicants by the Department of Home Affairs (Home Affairs).⁶

Matters relating to these other recommendations were raised with this review, particularly in relation to the general operation of Australia's evacuation effort and assisting LEE with travel to Australia. This report does not make any findings or recommendations about these additional matters, except to the extent that they are within the scope of the terms of reference for this review.

PROCESS OF THE REVIEW

This review was commenced within 10 months of the Senate Committee's interim report. The Committee's report recommended that this review address concerns raised in evidence in its inquiry. As a starting point for this review, all relevant submissions, records of public hearings, responses to questions on notice and other documents published by the Senate Committee were considered during the review. The review also requested specific classes of documents and other information from DFAT, Home Affairs and Defence.

As the review could access the recent relevant submissions that had been made to the Senate Committee, and was to be completed in a short timeframe to be able to influence the current LEE program, there was no general invitation for public submissions. The review approached several key stakeholders to meet and provide updates of the submissions they had made to the Senate Committee. In addition, 2 stakeholders provided the review with written information. The review also met with 2 former locally engaged staff from the Australian Embassy in Kabul (AEK) and 2 former security guards and interpreters.

The review held 40 separate discussions with public servants who had been involved with the LEE program, the operations in Afghanistan, or the evacuation of Kabul. The review did not operate with formal powers to obtain information or provide protection to witnesses, but officials were given an undertaking that comments would not be attributed to named officials in the report. The review believes that this assurance ensured a high level of cooperation and openness and enabled a wide range of sometimes conflicting views to be expressed.

A list of meetings and submissions is at Appendix C.

The review received several email approaches from individuals who requested assistance with LEE certification or visa applications. These individuals were advised that the review would not be reviewing individual cases and could not change the outcome of any decision.

⁴ Senate Foreign Affairs, Defence and Trade References Committee, Parliament of Australia, *Australia's Engagement in Afghanistan: interim report* (2022), paragraph 9.56

⁵ Senate Foreign Affairs, Defence and Trade References Committee, Parliament of Australia, *Australia's Engagement in Afghanistan: interim report* (2022), paragraph 9.89

⁶ Senate Foreign Affairs, Defence and Trade References Committee, Parliament of Australia, *Australia's Engagement in Afghanistan: final report* (2022), paragraph 7.67

The review met separately with the Hon Richard Marles MP, Deputy Prime Minister, Minister for Defence, Senator the Hon Penny Wong, Minister for Foreign Affairs, and the Hon Andrew Giles MP, Minister for Immigration, Citizenship and Multicultural Affairs.

A draft report was provided to the secretaries of Defence, Home Affairs and DFAT, and to the Commissioner of the Australian Federal Police (AFP), to enable them to identify factual errors, provide additional information, or comment on whether the recommendations are actionable.

Part 2: The Afghan LEE Program

BACKGROUND TO THE AFGHAN LEE PROGRAM

When the Afghan LEE program was announced in 2012, the original policy intent was expressed as follows:

Australia will offer resettlement to Australia to eligible locally engaged Afghan employees at risk of harm due to their employment in support of Australia's mission in Afghanistan. This reflects Australia's view of its moral obligation to current and former employees who have provided valuable support to Australia's efforts in Afghanistan.

In 2008, the Government instituted a similar policy to facilitate resettlement to Australia of locally engaged Iraqi employees and their family members who supported Australia's mission in Iraq. Consistent with this approach, the Government will offer at-risk Afghan employees, and their direct family members, the opportunity to resettle in Australia.

In fact, the Iraq program followed a similar program initiated following the Vietnam conflict. On 22 April 1975, the then Prime Minister Gough Whitlam announced that Vietnamese with long and close associations with the Australian presence in Vietnam whose life was considered to be in danger would be eligible for temporary entry into Australia. The number of applications was expected to be small, and each was to be considered by officials in Canberra on a case-by-case basis.⁷

A 1976 report from the Senate Standing Committee on Foreign Affairs and Defence, *'Australia and the Refugee Problem'*, stated that 'by being in Vietnam, Australia incurred a residual responsibility, not to mention a moral responsibility, to assist in the evacuation from Vietnam of those who had assisted our forces there and whose lives were believed to be in danger because of this assistance'.⁸

On 8 April 2008 the Australian Government announced a program to protect Iraqis who had supported Australian troops using a permanent visa program:

Iraqi employees, including translators and interpreters, who have supported Australian troops in Iraq will be able to apply for resettlement in Australia in recognition of the personal security situation they will face as Australia withdraws its combat forces from southern Iraq.

Anti-Coalition forces have deliberately targeted individuals working with Australian troops and their partners in southern Iraq.

In response, the Australian Government will adopt a new visa policy to enable the permanent resettlement in Australia of locally engaged employees (LEE) and their families at risk because of their engagement with the Australian Government.

⁷ Commonwealth, Hansard, House of Representatives, 22 April 1975, page 1497, (Gough Whitlam, Prime Minister) http://historichansard.net/hofreps/1975/19750422_reps_29_hor94/#subdebate-19-0

⁸ Senate Standing Committee on Foreign Affairs and Defence, Parliament of Australia, *Australia and the Refugee Problem* (1976) https://www.apf.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Completed_inquiries/pre1996/refugee/index

The policy will apply only to LEE and their families specifically designated by the Government as eligible for a humanitarian visa under the new policy and it is anticipated that up to 600 visas will be granted.⁹

Iraqi LEE and their families would be granted permanent humanitarian visas after undergoing strict health, character, and national security checks. The 600 places available under the Iraq program were in addition to the annual quota for the Humanitarian Program. Ultimately, slightly fewer than 600 visas were granted over 4 years.¹⁰

In Iraq, LEE applications were largely handled in-country. In 2009, a team comprising Defence staff, and immigration officers from the then Department of Immigration and Citizenship (DIAC), was deployed to Iraq. The team included policy, medical, and legal officers to assess LEE applications from interpreters. This review was advised that Defence was familiar with these individuals and had a comprehensive list of interpreters it had hired. Defence officials had a level of confidence in their identities and the expected number of applicants. At the end of the deployment, Defence arranged flights for LEE to be resettled in Australia.

INTRODUCTION OF THE AFGHAN LEE PROGRAM

On 13 December 2012 the Australian Government announced Australia would offer resettlement in Australia to eligible locally engaged Afghan employees, and their direct family members, at risk of harm due to their employment in support of Australia's mission in Afghanistan. This was to reflect 'Australia's view of its moral obligation to current and former employees who have provided valuable support to Australia's efforts in Afghanistan'. The visa policy was aimed at those locally engaged Afghan employees 'at the greatest risk of harm' as a consequence of the support they have provided to Australia's mission in Afghanistan.¹¹

The review was advised that strong advocates for the introduction of this program were ADF members who worked closely with interpreters, in response to claims by those interpreters of threats of extrajudicial killings. ADF members considered that they had a duty of care to the interpreters and lobbied hard for the program's introduction.

In addition to Australia's moral obligation, the review was advised that the LEE program was an incentive for Afghan interpreters to work with the Australian mission and for Australia to retain loyal staff. Australia worked in a hostile environment in Afghanistan and depended on its partnership with LEE to work safely. The program was designed to ensure that Australia was trusted as a nation to take care of those who assisted its mission so that it would continue to receive such assistance in the future.

One rarely mentioned aspect of the Afghan LEE program is that it could also facilitate the settlement of skilled people in Australia and have potential to contribute to Australia's

⁹ Joel Fitzgibbon, Minister for Defence and Chris Evans, Minister for Immigration and Citizenship, Joint media Release, *Protecting Iraqis who have supported Australian troops*, 8 April 2008

<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22media/pressrel/314Q6%22>

¹⁰ https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2021/August/Humanitarian_visas_for_LEE

¹¹ Chris Bowen, Minister for Immigration and Citizenship, and Stephen Smith, Minister for Defence, media release, *Visa policy for at-risk Afghan employees*, 13 December 2012

economic wellbeing. LEE had been employed in Afghanistan. Many are skilled and educated – the cohort includes policy officers, interpreters, drivers, cooks, and tradespeople, some of whom could be considered to be ‘job ready’. (The review was advised that this is very different to the usual cohort of refugees who have often experienced trauma and have potentially been in a refugee camp for many years and may have deskilled due to a lack of employment during this time.)

ELIGIBILITY CRITERIA

The Afghan LEE program was implemented through the use of Subclass 200 (Refugee) or Subclass 201 (In-country Special Humanitarian) visas. Paragraph 200.211(1A)(a) and paragraph 201.211(1A)(a) in Schedule 2 to the Migration Regulations 1994, require, as a criterion for the grant of a Subclass 200 and 201 visa respectively, as follows:

The applicant meets the requirements of this subclause if:

- (a) the Minister has specified, in an instrument in writing, one or more classes of persons for this paragraph; and
- (b) a relevant Minister has certified that the applicant is:
 - (i) in one of those classes; and
 - (ii) at risk of harm for a reason, or reasons, that relate to the applicant being in that class of persons.

The ‘relevant agency Minister’ is the Minister for Foreign Affairs for Afghans who are or were employed with DFAT (or AusAID prior to 2013), the Minister for Defence for Afghans who are or were employed with Defence and the Attorney-General for Afghans who are or were employed with the AFP.

IMMI 12/127 (the Instrument), which commenced on 1 January 2013 specifies the class of persons who were employed by Government agencies in support of Australia’s mission in Afghanistan. A copy of this instrument is at Appendix B.

The Instrument specifies as eligible persons:

3. SPECIFY that for the purpose of subclauses 200.211(1A) and 201.211(1A) a class of persons are all non-citizens employed with the Department of Foreign Affairs and Trade (DFAT), the Australian Defence Force (ADF), the Australian Agency for International Development (AusAID) or the Australian Federal Police (AFP):
 - (a) who have been assessed as being at significant individual risk of harm as a result of their support to Australia’s whole of Government mission in Afghanistan due to their role, location, employment period and currency of employment; including:
 - (i) interpreters in Uruzgan Province in positions funded by DFAT; or
 - (ii) interpreters or instructors employed with the ADF or AFP; or
 - (iii) project, facilities management and advisory staff in the Provincial Reconstruction Team in Uruzgan on behalf of AusAID and/or DFAT; or
 - (iv) a person who is able to satisfy the relevant agency Minister that exceptional circumstances exist for that Minister to certify that the non-citizen is in that class of persons; and

- (b) are not, or were not, an Afghan government or military official or employed in a private security capacity; and
 - (c) are not nationals or citizens of another country other than Afghanistan; and
4. A class of persons under paragraph 3 must have sought to be certified by the relevant agency Minister under paragraph 200.211(1A)(b) or 201.211(1A)(b):
- (i) within six months of ceasing employment; or
 - (ii) in the case of a locally engaged employee who has ceased employment on or after 1 January 2012, before 30 June 2013; or
 - (iii) where the relevant agency Minister is satisfied that exceptional circumstances exist – at any time.

The interpretation of these criteria has received significant criticism – this is discussed further in Part 5 of this report.

WHAT ARE THE ADVANTAGES OF CERTIFICATION FOR A LEE?

The certification of a LEE is not the same as a grant of a visa. A certified LEE and members of their family unit can apply for a Subclass 200 or 201 visa but do not have to satisfy a delegate that they are subject to persecution in their home country.

A certified LEE is not required to be registered with the UN High Commissioner for Refugees in a third country, and certification also allows electronic lodgement directly to Home Affairs.

LEE certification does not provide a guarantee that a person will get a visa. LEE certified individuals still need to meet character, health and identity criteria. Certified LEE can still be refused a visa and this has happened in practice. The converse may also occur: a person can still apply for and be granted a humanitarian visa regardless of LEE certification status.

Certified LEE who are granted visas are resettled under Australia's Refugee and Humanitarian Program, administered by Home Affairs. They have access to the same suite of resettlement services as any other humanitarian entrants, including accommodation support, basic assistance to set up a household, English language courses and help to access government, community, and health services.

Part 3: Events in Afghanistan – April to August 2021

The events in Afghanistan in 2021 are not the focus of this review. This summary is provided by way of background. The information in this part is derived from secondary sources, including agency submissions and briefings, as well as from interviews with officials who were present. The review has not verified this information by an inspection of primary source material.

THE CLOSURE OF THE AUSTRALIAN EMBASSY IN KABUL

On 14 April 2021, the US Administration announced the withdrawal of US troops from Afghanistan would proceed and be completed by 11 September 2021. On 15 April 2021, then Prime Minister Scott Morrison announced Australia would also withdraw troops by this time.

On 13 May 2021, following advice that all reasonable security mitigations to reduce the risk to an acceptable level had been exhausted, the Australian Government made the decision to close the Australian Embassy in Kabul (AEK). Locally engaged employees at the embassy were advised of this on 21 May 2021, the decision was publicly announced on 25 May 2021, and the embassy closed on 28 May 2021.

After the Prime Minister's announcement, potentially eligible LEE were concerned that they would not be able to depart Afghanistan before the withdrawal. The review was advised that LEE at AEK were reminded at the time of the embassy closure of the mechanism by which they could apply for the humanitarian visa program.

DFAT received a significant increase in enquiries related to the LEE program including from contractors and security guards. An email was sent by DFAT to security contractors on 26 May 2021, stating they were ineligible to apply for LEE. The review was advised that this caused significant concerns among security guards and resulted in a potential security risk to AEK staff. The Australian media also highlighted the circumstances of the security guards. On 27 May 2021, DFAT issued a revised message to make clear that contractors, including guards, could lodge an application for certification which would be assessed against the criteria on a case-to-case basis thereby retracting the contrary advice sent the previous day.

The Senate Committee report stated that DFAT advised that at AEK closure it was estimated that there were about 1,000 LEE and family members in Afghanistan including those who already had humanitarian visas, those holding a certification applying for a visa, those seeking certification, and those who might apply in future.¹²

DFAT also advised the Senate Committee that in late May 2021 the Australian Government decided to expedite the processes for certification and visa processing and to prioritise the use of commercial flights, considering other means of departure later if needed.¹³

¹² Senate Foreign Affairs, Defence and Trade References Committee, Parliament of Australia, *Australia's Engagement in Afghanistan: interim report* (2022), paragraph 6.79-6.80

¹³ Senate Foreign Affairs, Defence and Trade References Committee, Parliament of Australia, *Australia's Engagement in Afghanistan: interim report* (2022), paragraph 6.81

On 20 July 2021 the Australia Government decided to consider unsuccessful applicants to the LEE program as high priority applicants to the humanitarian visa program.

Between 1 April and 15 August 2021, 438 certified LEE and family members were enabled to travel to Australia on commercial flights.

In July 2021, as security in Afghanistan deteriorated, the Government expedited processing further. An arrival slot was set aside in Howard Springs for a Qantas charter in early September for LEE and families with another planned for 5 September 2021. These measures alongside continuing commercial flights and facilitation were expected to exhaust the known and expected LEE and family at that point in time. This orderly evacuation did not eventuate. The plan was overtaken by the evacuation in August 2021.

THE EVACUATION OF KABUL

On 15 August 2021 the Taliban captured Kabul. Australian Government agencies evacuated over 4100 people from Kabul between 18 to 26 August 2021 including Australian nationals, other foreign nationals, and visa holders at risk in Afghanistan. This included former Afghan LEE and their families.

This review received extensive briefings from government officials on the evacuation of Kabul, transit through the UAE and settlement in Australia. Further information was provided by advocates and representatives as well as first-hand accounts. The events are also canvassed thoroughly in the Senate Committee's report. Although it is not within the scope of this review to comment generally on the planning or execution of the evacuation, except where it is relevant to the LEE program, it is important to acknowledge the efforts made by Australian government agencies in achieving what they did in extraordinary circumstances.

Kabul airport was surrounded by hundreds of thousands of people. Home Affairs and Defence did not have any authority in the space outside of Kabul airport. The appearance of potential evacuees at any of the airport gates was at their own volition.

The review was told that the evacuation process in Afghanistan involved one or two Australian Border Force (ABF)/Home Affairs officers at a time, assisting ADF staff in identifying individuals at the Australian controlled gate for people who could demonstrate a connection to Australia for example a passport, visa or other correspondence with the Australian coat of arms, or, in the event of no paperwork, other indicators (for example an Australian accent). Those people were taken through the Australian security-controlled gates of the airport and then assessed by an ABF/Home Affairs officers to assess eligibility for entry to Australia. There were 2 Defence interpreters to assist where needed. The actual evacuation process lasted several days and was fraught for both potential evacuees and officials. This review was told of communications failures, inability to access records and inadequate records, allegations of inadequate and confused messaging, families being separated, and potential evacuees waiting for days in unsanitary trenches without water.

This review was informed that during the evacuation effort there was no real distinction between LEE and others with links to Australia – the focus was on the wider need of the cohort and getting people out. There was an attempt to prioritise LEE by using SMS to send situational advice on Kabul airport. GAP Veteran and Legal Services advised the review that

potential evacuees said that advice was not consistent and they had difficulties with entering the airport.

Australian government officials were confronted with many LEE including interpreters: some were certified and held visas, some only held visas, some were going through visa process and some had not started certification. There were also some suspected fraudulent claims which were difficult to verify in the conditions at that time. There was no master list of LEE and it was difficult to cross-check other sources on the ground because of low internet connectivity and phone scrambling security measures against suicide bombers. The ABF/Home Affairs did have a master list of people with visa applications, but this had thousands of names and was difficult to analyse in crisis conditions because the officers were swamped by people and were working off a picnic table at a tent in Kabul airport. Some information was only accessible if it was in hard copy. Additionally, in Canberra, list integrity was compromised via issues with a spreadsheet file being corrupted as it was used and sent between multiple agencies for action.

Evacuees were flown to the Australian base in Dubai where 41 ABF and Home Affairs officers were deployed to conduct medical and identity checks on the evacuated Afghans for visa purposes. The visa application process in Afghanistan usually requires the collection of biometrics, but this was not possible during the evacuation. Instead, Home Affairs deployed portable biometrics kits to manually capture biometrics for the evacuation cohort. The logistics associated with keeping the evacuee cohort on an Australian army base in UAE was complex, especially managing food and housing needs, and relied on the goodwill of the UAE government as numbers rose significantly beyond initial estimates.

The quarantine arrangements in Australia at the time due to COVID-19 also made travel logistics very challenging. There was limited space on flights, and entry of this cohort into Australia had to be negotiated with each state and territory. The review was advised that states and territories were all willing to work together with the Commonwealth to manage the evacuee cohort.

THE USE OF THE SUBCLASS 449 (TEMPORARY SAFE HAVEN) VISA

On 18 August 2021, in response to the deteriorating situation in Afghanistan, the then Minister for Immigration, Alex Hawke, announced that a minimum of 3,000 places in the annual humanitarian refugee visa program would be allocated to Afghans. A Subclass 449 (Temporary Safe Haven) visa (Subclass 449 visa) was made available to facilitate evacuations from Afghanistan for those with a strong association with Australia and others facing serious threats to their safety, including certified LEE and other priority Afghan nationals. Once in Australia, the Subclass 449 visa holders are assessed against the criteria for a permanent humanitarian visa. Management of the Subclass 449 visa lies with the Home Affairs.

On 22 August 2021, the Government decided that access to the Subclass 449 visas would also be given to all those that had applied for the LEE program but had not been certified, including security guards. On 23 August 2021 DFAT provided Home Affairs with a list of 279 individuals who had recently been advised their applications for LEE certification were unsuccessful, to be granted Subclass 449 visas. On the same date Defence contacted 473 applicants advising them that their contact details had been forwarded to Home Affairs and their case would be prioritised under the Humanitarian visa program.

By 25 August 2021, 2,279 Subclass 449 visas had been granted for Afghan nationals. This number rose rapidly to 5,061 by 20 September 2021.

The use of the Subclass 449 visas for LEE and their families allowed the Government to provide a large number of people with temporary protection, with a permanent pathway only available if the individuals met the requirements for a permanent humanitarian visa. At the time of evacuation, Defence and DFAT prioritised recommending LEE for Subclass 449 visas rather than processing applications for LEE certification. The review was advised that if a person got a Subclass 449 visa there was little point in their continuing to pursue LEE certification. Individuals that held a Subclass 449 visas were also provided legal assistance to help with their permanent visa application once onshore.

The circumstances of the evacuation of Kabul called for a particular emergency response and the use of Subclass 449 visas had many benefits, but the grant of Subclass 449 visas to LEE who would not have been eligible for certification at that time, including security guards, has caused some confusion about the basis of the claims by these individuals for permanent settlement in Australia, resulting in claims of inconsistency. This is discussed further in Part 5 of this report.

On 21 January 2022, Minister Hawke announced an additional 15,000 places over 4 years would be provided to Afghan nationals through the Humanitarian and Family Visa programs. Afghans who have links with Australia, persecuted minorities, women, and children, would be prioritised.

Throughout the latter part of 2021 and beginning of 2022, Australian government agencies focused on getting as many Afghans as possible out of Afghanistan via facilitated commercial flights and charters. Afghans who were able to depart Afghanistan into a third country were assisted to travel to Australia via facilitated commercial flights and charters. Since the conclusion of the evacuation operations (18-26 August 2021), the Australian Government assisted the arrival of a further 2,914 Afghans to Australia on 45 organised flights.

Currently DFAT advice to certified LEE is to travel to a neighbouring country, when it is safe to do so, to finalise their Australian visa application. When their Australian visa is approved they are assisted to travel on to Australia.

LESSONS LEARNED

A senior Defence official told the review that they could not overemphasise the importance of the deep and personal significance the evacuation of Kabul had for the ADF and veterans. It served as an important closure to a 20-year operation. The official said that the fate of any LEE had an impact on those who had served alongside them. This is also demonstrated by the active advocacy of many veterans for the LEE with whom they worked and underscores the strong support of ADF members for the moral obligation owed to employees who provided valuable support to Australia's efforts in Afghanistan.

Notwithstanding the number of individuals evacuated by Australia, submissions to the Senate Committee and the information received by this review give credible information that there are Afghans who assisted Australia, and who are at risk of harm because of that assistance, who remain in Afghanistan. LEE advocates and representatives described interpreters who supported Australia in Uruzgan as being 'left behind'. Other LEE have had

difficulty with travel documentation to cross borders given the difficulty of obtaining Afghan passports. Further, the review was advised that there have been Afghans in Islamabad or Tehran who have been struggling for 10 months with daily living costs while waiting for visa applications to be processed.

The Senate Committee recommended that:

... the Australian Government extend all available effort to finalising certifications and visa applications for Afghan Locally Engaged Employees (LEE) and their families as quickly as possible, and extending assistance to those still eligible in Afghanistan to make their way to Australia.¹⁴

This review supports this Senate Committee recommendation.

The terms of reference for this review include developing recommendations to ensure that in any future military engagements the process relating to LEE is much clearer and can be implemented expeditiously. A key lesson for this review from the evacuation of Kabul is that by the time a crisis occurs it is simply too late to try to identify LEE and their families and prioritise their uplift. The processes developed for the Afghan LEE program in a relatively stable environment did not function in an emergency situation.

Although it is unlikely that any future crisis will resemble the evacuation of Kabul, future crisis planning should incorporate explicit planning for LEE. There should be a clear plan to identify LEE, communicate with them, extract them, and prioritise their safety. The Senate Committee was advised that detailed planning was undertaken by Home Affairs to ensure that Australia was well placed to facilitate the visa grant and departure of LEE and their family members ahead of withdrawal. Meetings were held between Home Affairs, the Department of the Prime Minister and Cabinet, the Department of Health, Defence and DFAT to identify timeframes and processes that were required.¹⁵ In the event, this planning seems to have been insufficient in the emergency evacuation of Kabul. Planning for a range of future scenarios is discussed further in Part 7 of this report.

¹⁴ Senate Foreign Affairs, Defence and Trade References Committee, Parliament of Australia, *Australia's Engagement in Afghanistan: interim report* (2022), paragraph 9.89

¹⁵ Senate Foreign Affairs, Defence and Trade References Committee, Parliament of Australia, *Australia's Engagement in Afghanistan*, Department of Home Affairs and Australian Border Force Joint Submission, October 2021

Part 4: Administration of the Afghan LEE Program

OVERALL PROCESS

When announced in 2012, the administration of the program was described as follows:

Under this policy, locally engaged Afghan employees interested in resettling in Australia will firstly need to be assessed by their employing Australian agency against specific threat criteria. This will consider the level of direct support the applicant has provided to Australia's mission in Afghanistan as well as its public profile, location and the period of employment.

Relevant Australian agencies include Defence, the Department of Foreign Affairs and Trade, AusAID and the Australian Federal Police. These agencies have employed locally engaged Afghan employees in a range of roles including interpreters and drivers.

If certified as eligible by the relevant Australian agency, the locally engaged Afghan employees will then be able to make an application for a visa under Australia's Humanitarian Program. They will be required to meet the standard visa criteria including health, character and security requirements.¹⁶

The AFP advised the review in December 2022 that it did not currently conduct assessments or recommend certification by the Attorney-General. (This situation might change in the future.) AusAID was integrated into DFAT in 2013. DFAT and Defence are the only agencies that are currently assessing applications for certification.

Although the words of the media release indicate that it was originally contemplated that the certification would be carried out by a departmental officer, the agency provides a recommendation for certification to the relevant agency Minister who is the decision maker.

To initiate the assessment and certification process, a LEE submits an application form, in English, to an Afghan LEE email inbox at DFAT or Defence providing details including their employee relationship with Australia, any specific threats, and personal identifying information (for example, their Afghan Taskira ID numbers). DFAT or Defence officers assess the application and provide a recommendation to the relevant Minister, usually in batches.

If a person is successful in their application for certification, they are notified and advised to apply to Home Affairs for a visa. If they then apply for a visa Home Affairs receives the application for a visa, assesses the application and, if successful, a Home Affairs officer grants a visa. Although Home Affairs is notified by DFAT or Defence of successful LEE certifications, the applicant is required to lodge a separate application for a visa with further documentation.

Although the overall process is usually described as a two-stage process, the review was advised that there is nothing preventing a person making a visa application offshore first and then applying for certification at the same time or later; however, the visa application would only be prioritised after certification.

¹⁶ Chris Bowen, Minister for Immigration and Citizenship, and Stephen Smith, Minister for Defence, media release, *Visa policy for at-risk Afghan employees*, 13 December 2012

ASSESSMENT OF APPLICATIONS FOR CERTIFICATION

Workload and resourcing

DFAT

From the commencement of the Afghan LEE program to 3 February 2023, DFAT received 1,414 applications for certification. Of these only 93 were received prior to May 2021 with workload peaking in late 2021. Following the closure of the embassy, DFAT also received a significant increase in enquiries about the LEE program including thousands of emails. (The Afghanistan Visa Enquiries and LEE mailboxes also received around 50,000 enquiries for assistance in the period August to October 2021 and more via consular channels.)

After the peak in 2021 the number of applications decreased throughout 2022. In the last quarter of calendar year 2022 DFAT received 27 applications.

At 3 February 2023, DFAT had 284 applicants under assessment including 142 that had been considered by the Minister for Foreign Affairs and returned to DFAT for re-assessment in June 2022.

In the absence of any further changes to policy, or amendment of the Instrument (as contemplated in Part 6 below), it would be expected that the number of new applications to DFAT should decrease and DFAT's efforts would be focussed on the reassessment of undecided cases.

The location of the team processing the applications has shifted over the program:

- Until February 2022 the processing was conducted in the relevant geostrategic policy and political divisions.
- From March to May 2022 the section was a standalone team in International Security, Legal and Consular Group as the processes were reformed.
- From May to 31 August 2022 the team was in the International Security Division.
- Since 31 August 2022 the team has been located in the Regulatory and Legal Policy Division.

The staffing used for the LEE program has varied corresponding with the change in the number of applications. The numbers below include staff who performed other functions in support of Afghan LEE as well as staff dedicated to processing LEE applications:

- Until June 2021 applications were handled by a single staff member.
- By August to September 2021 this had surged to 5, with around 11 shift workers rotating 24/7 to deal with mailbox enquiries.
- By 16 September 2021 24 staff were in the team.
- During the reform period March to May 2022 there were approximately 12 staff including a dedicated First Assistant Secretary. This reduced to 3 by September 2022.
- In February 2023 the team comprises 6.5 fulltime equivalent staff working on the Afghan LEE program.

DFAT officers advised, and this review agrees, that the assessment of LEE applications work does not fit well with DFAT's existing functions and structures. During 2021 the relevant divisions were focused on policy not service delivery. The review was advised that when the workload increased, and the resources needed to increase, there was not only a shortage of capacity but also of capability. A senior executive told the review that by late August 2021 it was clear that the team lacked the right skillset to process the applications for certification. This was also the view of external stakeholders. The review was advised by GAP Veteran and Legal Services that 'DFAT staff seemed unable to handle, appreciate or anticipate the volume of work before them'.

Skilled staff were also not readily available to be seconded from the broader Australian Public Service as many employees with experience in assessing applications and with administrative decision-making skills and experience had been redeployed to Services Australia as part of the Government's workforce response to COVID-19.

This review is concerned that the current staffing numbers in DFAT are inadequate to assess undecided applications in a timely way, but also recognises the ongoing problem in attracting and retaining skilled staff, especially in a policy department where there is no surge capacity. Ongoing resourcing of the function will be dependent on the future of the LEE program and is discussed in Part 6 of this report.

Defence

Defence's workload trend has been quite different to DFAT's.

From the commencement of the Afghan LEE program until 31 January 2023, Defence had received 1,651 applications from Afghan nationals (including 356 applications which were closed when applicants declined to continue the process). Whereas most of DFAT's application were received after May 2021, Defence application workload has been steadily decreasing with 527 applications in 2013, falling to 150 by 2017, and 92 in 2021.

Defence advised the Senate Committee that in the immediate period before and during the evacuation in August 2021, it received over 15,000 emails in approximately 10 days to its email address set up to deal with LEE enquiries. Defence supplemented its team to manage the increased volume of emails, including across shift work.¹⁷

In 2022 Defence received approximately 10 applications of which 7 were received in the period January to March 2022. Only one application was received in the period July to December 2022. At February 2023 Defence had 8 cases undergoing assessment

Defence provided the following information about workload and resources:

- Initial stages conducted in Afghanistan from 2013 were conducted by a team of 10, mixed civilian and military, headed by an executive level 2 officer.
- Between 2016 and late 2020, the processing was being done by 2 to 3 staff. In 2020 this became 2 part time staff (full time employees, with other responsibilities) from the International Policy Division Afghanistan Section

¹⁷ Senate Foreign Affairs, Defence and Trade References Committee, Parliament of Australia, *Australia's Engagement in Afghanistan: interim report* (2022), paragraph 6.95

- A dedicated Afghan LEE team was disbanded in late 2020 due to record low numbers of applications (only 28 new applications in 2020). It was believed that all eligible LEE cases had been assessed; however, Defence continued to receive applications, largely from non-interpreters.
- The responsibilities of the LEE team were passed on to the Afghanistan policy team as an additional function. This work was dissimilar to the other work of the team and the applications were processed as time permitted.
- In 2021, International Policy Division established a surge team of approximately 7 personnel dedicated to the LEE program during the Kabul evacuations.
- During the evacuation this surged to 3 full time APS, 3 ADF reservists working full time hours for several weeks and 2 APS part time.
- After about 6 months it dropped back to 2 part-time APS and 2 reservists doing part time hours. The reservists were not replaced at the end of the 2021-22 financial year.
- Currently the applications are assessed by one policy officer who has other policy duties.

It would seem that a single policy officer would be adequate to manage the 8 applications at hand. The review does not doubt the diligence and commitment of current and recent policy officers but is concerned that without sound governance, case management and quality assurance processes (discussed further later in this part) there is a high risk when a function is allocated to a single officer. Although there are currently very few applications at hand, ongoing resourcing of the function will be dependent on the future of the LEE program and is discussed further in Part 6 of this report.

Procedures and documentation

Good public administration requires that processes and procedures must be documented to ensure processes are repeatable and scalable and to ensure the same result is produced independently of who performs them. Processes and procedures should cover the entire process lifecycle from enquiries through to assessments, decisions, notifications, and reviews of decisions.

Where legislative timeframes are not stipulated as in this process, timeframes should still be built into all decision-making processes with systems, supplemented by formal procedures for reviewing and escalating cases that breach those timeframes.

The review requested the following documents from DFAT and Defence:

- all versions of standard operating procedures (SOPs) dating from 2013 over the life of the program
- any other relevant documents, minutes, or instructions, particularly relating to the following matters over the life of the program:
 - How you assess whether a person is 'employed with' the agency – this includes how contractors are treated.
 - How you assess whether an individual is at risk of harm. What information you should access, how much you should follow up with applicant, what is the standard, and how the approach has varied with time.

- How you assess 'role, location, employment period and currency of employment', and how this has varied over the life of the program.
- How you assess letters of reference or commendation from current or former Defence or DFAT personnel in support of LEE applications.
- When you should give an applicant an opportunity to clarify a matter or to provide additional information.
- What is meant by 'private security capacity'.
- Copies of proforma emails
- Guidance on internal reviews: are they offered or do they have to be specifically requested? Who conducts them? How this has changed over the life of the program.
- What factors are considered in deciding whether 'exceptional circumstances' exist both in 3(a)(iv) and, separately, in 4(iii).
- Timeframes or service standards, for responding to applications, emails, and targets for finalising consideration of applications.

DFAT

DFAT provided the following documentation:

1. **AusAID's Draft SOPs Afghanistan LEE Policy** dated 8 May 2013: this document set out the criteria in the Instrument, the steps in assessing certification and the required documents.
2. **DFAT SOPs Afghanistan LEE Policy**, dated 2017. These SOPs appear to be based on the AusAID 2013 SOPs and contain similar guidance. The review did not receive any information that indicated that these SOPs were maintained or reviewed from 2017 to 2022.
3. **Afghanistan Locally Engaged Employee Program Assessment and Review SOP**, dated 11 April 2022, version 5 September 2022, approved at First Assistant Secretary level. DFAT continues to revise these SOPs.

The current DFAT SOPs are available electronically to each assessor and the review saw evidence that the SOPs are actively maintained and updated when there is a change in procedure or approach.

This review was informed that DFAT conducted a complete review of its LEE assessment process in early 2022 which resulted in the April 2022 SOPs. Since that time DFAT has sought detailed legal advice from the Australian Government Solicitor on the necessary procedures required to ensure Government compliance with administrative and privacy law obligations. DFAT has included additional due process steps, including writing to applicants and providing them with the opportunity to supply additional information in support of their application. DFAT advised it has developed a new suite of legally robust foundational documents including updated task cards and assessment sheets and template letters.

This review concludes that the DFAT SOPs are now appropriate to ensure processes are repeatable and scalable.

Defence

Defence provided the following documentation:

1. ***Afghanistan LEE Program SOPs (February 2013)***: Defence could not initially locate any SOPs that dealt with the assessment of applications. This review was separately provided with classified documents relating to a 2015 Defence review of a LEE application including a copy of undated SOPs that were said in the Defence review to have applied in 2013. This review drew these SOPs to Defence's attention and asked whether they had been revised in the 10 years since they were issued. Defence responded that the 2013 SOPs had remained the extant SOPs since that time and had not been revised as the process has remained largely the same since then.
2. ***Admin Officer SOPs (January 2014)***: this document provided the instructions on the management of emails, new applications, database population, and preparing documentation for the then Department of Immigration and Border Protection.
3. ***Task Group Afghanistan SOPs (August 2018)***: this document notes that the LEE program had gained significant interest among local nationals in Afghanistan and Defence continued to receive a large number of applications for certification. The aim of the SOP was to promote awareness of the LEE resettlement policy and provide guidance to Task Group Afghanistan personnel on handling approaches or enquiries by LEE in theatre.
4. ***Process diagram (2021)***: the process diagram sets out the process that is followed for assessment for application for certification and a yes/no decision tree but does not provide any guidance about what information should be considered when making any of the decisions.
5. ***'Recent legal feedback' (undated but likely pre-2020)***: a two-page document with no author or other identifiable information. This document contains clear and relevant guidance about reasons for recommendations, duty to inquire, procedural fairness, correct application of criteria in the instrument and the 'What if I'm wrong test'.

The review spoke to current Defence staff about what guidance that they use when assessing applications. The extant 2013 SOPs are not used, and it seems from the Defence ministerial submission considered below that the 'legal feedback' document may also not be routinely considered. Training is given on the job and new assessors use the Instrument itself as guidance, previous ministerial submissions, and seek advice from senior officers for more complex matters. Quality assurance is provided by clearance of the brief by an SES policy officer. Until 2020, Defence Legal had been regularly consulted on certification ministerial submissions but, in response to the significant backlog, this process was streamlined after 2020 and Defence Legal consultation was no longer required.

Defence does not currently have any specified timeframes or service standards for responding to enquires or considering applications, and does not measure or report on the time taken for these steps.

The review acknowledges that at present very few applications are processed and at times only one person has conducted assessments including at the current time. It is also important to note that the lack of a documented process with guidance on criteria is not a

reflection on the diligence or integrity of individual Defence officials who conduct assessments. This review was told by policy officers that staff turn-over in Defence and loss of corporate knowledge had been problematic. The assessments are also conducted in a policy area with limited experience of case management and administrative decision making. This would seem to provide a good case to ensure that any assessment process would have a sound governance structure.

The lack of documentation of the assessment process in Defence, and the use of a single assessor, poses a high risk to the integrity of the assessment process.

Given the current very low number of applications and questions about the future of the process, this review does not recommend the development of comprehensive SOPs in Defence, but suggests that, as a minimum, the 2013 SOP should be reviewed and any briefs, submissions or legal advices related to the assessment process should be collated, reviewed for currency, and used for reference and when inducting new assessors. Recommendation 1 (below) also recommends that Defence review the level of legal oversight of the process.

If there is any likely workload increases or changes made to the LEE program (see Part 6 of this report), Defence should review its documented operating procedures.

Case management

Administrative processes should be supported by an appropriate data base and case management systems designed up front with data structures agreed. Systems should support efficient workload management, work processing and the tracking and reporting of cases.

The review was advised that DFAT did not use a case management system but used a single mailbox and spreadsheets before 2021. Usually only one staff member handled the applications and corporate knowledge resided with these individuals. While this system coped with a small number of applications, its reliance on the knowledge of individuals and lack of adequate governance and controls did not facilitate scaling up when enquiries and applications increased. The review was informed that there were some errors in correspondence and the identification of applications in DFAT in 2021 due to these systems.

A Defence official advised the review that in their view records were poorly kept over the program's 10-year existence. Early records were likely kept in hard copy form. Defence's International Policy Division recorded applicant emails, application forms, and LEE evidence on the Defence networks. The review was advised that some of these records appear to be missing. Applications were now stored in case files in Defence's electronic document management system and tracked on a spreadsheet, but this was corrupted in 2022 due to its size. The management of applications currently relies upon an individual officer manually monitoring the cases.

The current systems for managing cases in both Defence and DFAT are not satisfactory and do not support the management, tracking and reporting of cases; however, the relatively low number of cases for assessment makes it unlikely that a cost-benefit analysis would support a bespoke case management system for either Defence or DFAT.

This review does not make any recommendation about case management in DFAT or Defence but suggests this is reviewed if there is any significant workload increases or changes made to the LEE program (see Part 6 of this report).

CERTIFICATION BY THE RELEVANT AGENCY MINISTER

As noted in Part 2 of this report, certification requires a decision by the responsible Minister for a LEE's employing agency that a LEE is eligible to be certified as within the class of persons specified in the Instrument and that the person is at risk of harm for a reason, or reasons, that relate to the applicant being in that class of persons

Between 1 January 2013 and 3 February 2023:

- 159 applicants have been certified as eligible by Ministers for Foreign Affairs, and 971 as ineligible;
- 747 applications have been certified eligible by Ministers for Defence, and 540 as ineligible; and
- 6 applications have been certified eligible by the Attorney-General, and 2 as ineligible.

The certification power is required to be exercised by the Minister personally.¹⁸ Any recommendation by a departmental officer that an individual is eligible or ineligible for certification should provide clear and rationally explained reasoning, supported by evidence to enable the minister to make a reasonable decision.

This review examined most of the DFAT and Defence ministerial submissions containing recommendations about certification that were submitted to the agency Ministers in the period 2013 to 2022. While this did not amount to an audit of all DFAT or Defence ministerial submissions or any assessment on whether the submissions fairly reflected the available evidence, the review did observe some irregularities in 3 submissions that raise serious issues about consistently in how the Instrument was interpreted, the information provided to the Minister, and whether a lawful decision had been made on some applications.

1. **DFAT ministerial submission dated September 2021:** In this submission 19 individuals were recommended as eligible and detailed reasons were provided. The Minister agreed with this recommendation. In the same submission, the Minister was recommended to *note* that 'DFAT has assessed a further 256 applications listed in Part Two of Attachment A but has not recommended these for certification or ministerial discretion and has forwarded the applications to Home Affairs for consideration under the general Humanitarian visa program'. The Minister noted this information. Part Two of Attachment A contains a list of names but no further information. The body of the submission states that 'More than 250 applications were assessed but not recommended for certification or ministerial discretion due to a number of reasons pertinent to consideration within the ascribed [sic] legal framework.' No further reasons are given.

¹⁸ Regulation 1.16 of the Migration Regulations 1994 allows for the delegation of powers under the Regulations by 'the Minister'. Section 19 of the *Acts Interpretation Act 1901* would seem to indicate that 'the Minister' should be read as the Minister administering the *Migration Act 1958*. It seems that the 'relevant agency Minister' may have no power to delegate the power to certify.

This September 2021 submission raises a number of questions:

- Was a ministerial decision ever made on any of these applications?
- What advice was given to the applicants about the outcome of their applications?
- Even if the Minister for Foreign Affairs had been given a recommendation to find these individuals ineligible, was the Minister provided with sufficient information to make a reasonable decision for each individual applicant?

2. **DFAT ministerial submission dated November 2021:** This submission similarly requests the Minister to ‘note’ that DFAT had assessed 173 applicants but did not recommend them for certification. The submission does not provide any details of these applicants apart from their names.

This submission also recommends, for the Minister’s discretion, a person who had worked as an Afghan government official and who would ordinarily be excluded by clause 3(b). The Minister was recommended to ‘exercise discretion’ in this applicant’s case, but this review questions whether the ordinary meaning of the Instrument allows the Minister to apply discretion in such cases.

(The review is aware that a number of security guards have also been recommended and certified using similar reasoning.)

3. **Defence ministerial submission dated September 2022:** This submission recommends that the Minister finds 11 applicants eligible and 13 as ineligible. The background in the brief states:

The legislative instrument, IMMI 12/127 ([Attachment E](#)), sets the criteria to assess LEE. To be eligible, applicants must seek certification within six months of ceasing employment. If applying more than six months after ceasing employment, they must demonstrate an ‘employee-like’ relationship existed with Defence, or establish that their employment in support of Australia’s mission has placed them at risk of harm. The Department does not have the legal delegation to reject an individual, they must be certified “ineligible” by the relevant Minister.

There is no further advice about how Defence has interpreted the Instrument or how it was assessing ‘risk of harm’. Many of the case summaries for applicants provided in the submission apply a test of ‘employee-like’ relationship. There is no advice about why the application of this test is appropriate when making a decision in accordance with the Instrument about whether an individual has been ‘employed with’ Defence. The case studies are largely silent on ‘the risk of harm’. For example, one case study provides the following information:

We recommend you find [name redacted] ineligible as he does not meet the requirements of the Legislative Instrument. [name redacted] worked as a kitchen worker, and has not demonstrated exceptional circumstance nor that he had an employee-like relationship with the ADF.

This Defence ministerial submission also raises a number of questions:

- Was sufficient information provided to the Minister for Defence to make a reasonable decision for each individual applicant?

- The advice paraphrases the criteria in the Instrument in an apparent attempt to simplify them but also introduces inaccuracies. Could the Minister have applied the criteria in the Instrument properly based only on the information in the brief?

These 3 ministerial submissions illustrate the complexity of the Instrument, and the risks of administrative decision making without strong governance arrangements including quality assurance and oversight. The DFAT ministerial submissions also highlights the apparent practical difficulties when a power can only be exercised by a minister personally and over a hundred applications require individual consideration.

The review noted that the 2 DFAT ministerial submissions were prepared before DFAT conducted a review of its processes and procedures but, given the ongoing complexities of the issues faced, oversight by DFAT legal advisers should be considered.

The review was advised that Defence submissions were subject to legal oversight prior to 2020. The September 2022 ministerial submission suggests that such oversight may still be required.

Recommendation 1

The Department of Foreign Affairs and Trade, and the Department of Defence should consider greater legal oversight of the preparation of ministerial submissions relating to certification in the Afghan Locally Engaged Employee program.

In response to a draft of this report DFAT advised that:

To strengthen the department's administration of the Afghan LEE Program and the legal rigour of decisions taken under it, responsibility within DFAT for the program was transferred to the new Regulatory and Legal Policy Division in August 2022. In consultation with stakeholders and based on advice from the Australian Government Solicitor (AGS), the Department will shortly finalise new standard operating procedures and a suite of foundational template documents to ensure criteria are being considered and applied uniformly, and that processes are legally defensible. The legal advice underpinning the revised arrangements was shared with the Departments of Home Affairs and Defence in December 2022.

The review also recommends DFAT should review the outcome of the 429 Afghan LEE applications in the two submissions that might not have been properly decided. Defence should similarly review previous ministerial submissions relating to certification in the Afghan LEE program, to assess whether decisions relating to applicants found not eligible were properly made.

Recommendation 2

The Department of Foreign Affairs and Trade, and the Department of Defence should review previous ministerial submissions relating to certification in the Afghan Locally Engaged Employee program, to assess whether decisions relating to applicants found not eligible were properly made.

In response to a draft of this report DFAT advised that:

DFAT has commenced work in response to Foreign Minister Wong's request in November 2022 that we provide her with assurances that applications for certification have been properly considered in line with the original policy intent and that we explore options to review applications where appropriate. This exercise will include a review of the two DFAT Ministerial Submissions listed in your draft report.

REVIEW OF CERTIFICATION DECISIONS

The terms of reference require this review to look at whether the 'appeals process' is appropriate and implemented effectively. The program's review processes have been subject to criticism. For example, GAP Veteran and Legal Services advised the review that 'The Afghan LEE programs have denied applicants any pretext of procedural fairness including the fact that a number of rejection letters have not even included advice as to avenues of redress against the decisions'.¹⁹

In a written submission to the review Dr Claire Higgins suggested that 'While noting the need for an expeditious process in any future LEE program, the ability of unsuccessful applicants to know the reason for their rejection, to appeal and, if their circumstances change, to apply again is an important protection safeguard'.²⁰

An agency Minister's certification decision is not subject to merits review by the Administrative Appeals Tribunal. The decision is also excluded for review and the requirement to provide reasons under the *Administrative Decisions (Judicial Review) Act 1977*. (This absence of statutory merits review is in line with other decisions relating to visas in the migration legislation.)

As there is only one possible decision maker available (the Minister) it is also not possible to conduct an arms-length independent internal review with a decision made by another person.²¹

In the absence of any statutory review right, or ability to refer the matter to another decision maker, both DFAT and Defence have introduced what is called a 're-assessment' process and can make a fresh recommendation to the Minister. The Minister can then substitute a new decision based on new information or changed circumstances.

DFAT has SOPs relating to re-assessments. The process can be initiated by an applicant requesting a review. If an applicant requests reasons for the decision after they are notified they are ineligible, they are to be sent a statement of reasons. The applicant may provide further information.

Defence does not provide reasons for decisions and does not routinely offer re-assessments but applicants can request them. Defence will re-assess an application if new information is provided.

¹⁹ GAP Veteran and Legal Services, unpublished Briefing Paper, 21 July 2021

²⁰ Dr Claire Higgins, 20 January 2023, unpublished submission

²¹ The Attorney-General's Department's *Australian Administrative Law Policy Guide* (2011) advises that 'Internal review processes will not usually be appropriate where decisions are made by high level officers or by Ministers'.

A Defence assessor advised this review that ineligible applicants kept providing further information. Such correspondence still needed to be appraised for any new information concerning the former applicant's employment or risk of harm so further action could be considered and taken. The more the applicant's casefile grew, the more time was required for appraisal at the expense of fresh assessments. This type of scenario shows the need to have some rigorous criteria for re-assessment so that the process does not compromise assessment of fresh applications. Requests for re-assessment in DFAT are approved at the Senior Executive level.

Both DFAT and Defence also initiated re-assessment of applications in 2021 following the changed circumstances in Afghanistan, and both agencies have re-assessed applications at the direction of the relevant agency Minister.

DFAT have had 97 requests for re-assessment: 3 have been certified following the review; 73 not certified, and 21 still pending. (Defence did not provide data relating to re-assessments.)

In practice, the re-assessments are often conducted by a different official and cleared by a different Senior Executive but this seems to be a result of staff changes rather than a deliberate strategy. Although better practice would be that re-assessment should be conducted independently, how that would be possible in such small teams is not clear.

In summary, the legislation does not allow for external review of certification decisions and does not require a statement of reasons. DFAT provides a statement of reasons upon request. Both DFAT and Defence have introduced limited re-assessment to the extent that it is practicable under the current scheme and staffing levels.

Given the long lead time for legislative amendment, and existing arrangements for review of other visa decisions, this review does not think that it is sensible to recommend the introduction of any statutory review rights for certification in the current Afghan LEE program; however, the issue of review rights is not currently well understood by applicants and their representatives. Also, although not a legal requirement, the provision of a statement of reasons by Defence would enable unsuccessful applicants to make better informed decisions about requesting a re-assessment.

Unsuccessful applicants should also be notified that they can also complain to the Office of the Commonwealth Ombudsman – that Office investigated 2 such complaints in mid-2022.

Recommendation 3

When the Department of Foreign Affairs and Trade, the Department of Defence or the Australian Federal Police notifies an applicant that they have been found ineligible for certification by the relevant agency Minister under the Afghan Locally Engaged Employee program, it should:

- inform the applicant that external merits review is not available;
- offer the applicant a statement of reasons;
- offer the applicant an opportunity to request a re-assessment, setting out any conditions that need to be satisfied, for example, requiring new information. It should be made clear that this re-assessment will be conducted by the same team and is not an independent internal review;
- advise applicants they can complain to the Office of the Commonwealth Ombudsman; and
- advise applicants that an unsuccessful application for certification does not preclude them from applying for a humanitarian visa.

In response to a draft of this report DFAT advised that:

DFAT agrees in principle with this recommendation and is in the process of developing notification template letters to ineligible applicants that are consistent with this recommendation as part of the legal review of our standard operating procedures.

THE GRANT OF A VISA

Defence and DFAT provide the certification and biographical details of all certified LEE to Home Affairs.²² This does not initiate the visa application process – the certified LEE is required to apply for a visa. Home Affairs validates certification letters provided by applicants with the certifying agency.

Between 1 July 2013 and 31 December 2022 3,572 Afghan LEE and their families (786 LEE and 2,786 family members) lodged a Class XB (Refugee and Humanitarian) visa application. Of these, at 31 December 2022:

- 2,358 Afghan LEE and their family members (641 LEE and 1717 family members) had been granted Class XB visas.
- 477 visa applications (77 LEE and 400 family members) were currently before the Department.
- The remaining 737 visa applications had been either withdrawn by the applicant or refused (including applicants who arrived in Australia on a Subclass-449 visa and were granted a Class XB visa on a different application).

²² Currently, the details of non-certified LEE are provided as well.

At 31 December 2022, the average processing time for Afghan LEE applicants to be granted a Class XB visa was 40.9 weeks.

Home Affairs reported that at 30 June 2022 21,100 applications representing 95,100 applicants lodged by Afghan citizens in 2021-22 were still to be registered on the department's systems. This figure had been reduced to 435 by 31 December 2022.

These workload figures and processing times should be considered against the backdrop of the extraordinary increase in visa applications from Afghan citizens in 2021. Between 2017-18 to 2020-21 the number of Subclass 201 In-country Special Humanitarian visa application varied between 261 and 555. In 2021 the number rose to 117,040 before dropping to 9892 for the first half of 2022-23.

COULD THE APPLICATION PROCESS BE STREAMLINED END-TO-END?

The legislative requirement is that the certification decision is made by the relevant agency Minister. There is no requirement for the certification processing to be conducted in any particular government department.

This report has already commented on the lack of relevant capability in administrative decisions making and case management in DFAT and Defence, particularly when the assessment function was located in policy areas. The assessment workload never reached the critical mass needed to invest properly in processes and systems. This two-stage process also means that there are 2 separate case files for each applicant containing different but overlapping information.

The current system is also very difficult for applicants to navigate – particularly in times of conflict. Both departmental officials and advocates are aware of cases when a certified applicant did not understand that they are required to lodge a separate visa application, despite receiving notification to that effect. GAP Veteran and Legal Services advised this review that they were aware of 'people have been certified but have not moved onto the second part (filling in the visa application) because they have been confused and believed that the certification was an approval, and they would wait for their visa. Some have been waiting for 2 years, without starting the second process.' The two-stage process was described as 'convoluted, voluminous in terms of paperwork and process, and demands the collation of paperwork which has proven very difficult for Afghans to obtain by themselves.'

A departmental official involved in the evacuation of Kabul also said that there were many people trying to use their LEE certification letters to get on a plane.

This review asked departmental officials whether the process and individual cases could be managed end-to-end by Home Affairs providing a single interface to clients, seeking input from Defence and DFAT perhaps using seconded officers. (Currently Home Affairs obtains advice from a number of other agencies including ASIO and the AFP for certain visa applications.)

While there was wide support for the suggestion the following concerns were raised:

- Some Home Affairs officials suggested there could be possible technical and legal issues to be addressed about what constitutes a valid visa application.
- An increase in resourcing and workload for Home Affairs: as with any transfer of functions, there would need to be a corresponding transfer of resources

This review concludes that the current LEE program would be more efficient and easier and fairer for applicants to navigate if it had been designed as a streamlined end-to-end process with cases managed by Home Affairs. With the current number of undecided cases, it is not appropriate to recommend a change at this time, but if numbers increase because of changes to policy of the Instrument this proposal could be revisited. This is discussed further in Part 6 of this report.

DO THE CURRENT PROCESSES ENSURE LEE ARE GIVEN PRIORITY ACCESS TO HUMANITARIAN VISAS?

Community expectations

The terms of reference for this review have the following opening statement:

Under legislative instrument IMMI 12/127, Australia offers prioritised access to humanitarian visas to eligible Locally Engaged Employees (LEE) at risk of harm due to their employment in support of Australia's mission in Afghanistan.

The original policy intent was to:

... offer resettlement to Australia to eligible locally engaged Afghan employees at risk of harm due to their employment in support of Australia's mission in Afghanistan.

The program achieves this by offering Afghan LEE a path to a humanitarian visa that would not be available to other applicants and removes the requirement for a certified LEE to demonstrate that they are subject to persecution in their home country.

The legislation and Instrument do not provide:

- that certified LEE are given priority allocation to Humanitarian visas, or
- priority or expedited processing of visa applications made by certified LEE.

These are matters of policy that require clear government decisions and proper resources to be implemented.

Submissions to the Senate Committee and input to the review demonstrate concern about the time taken to process an end-to-end LEE application. The current times do not meet community expectations.

This review already observes in the previous section that current DFAT resources are inadequate to assess applications in a timely way. Defence resources will need monitoring to respond to any future changes in workload.

Ministerial certification process

GAP Veteran and Legal Services advised the review in November 2022:

Since the change of government, only four individuals have been certified as LEE by DFAT and a slightly larger number by Defence, yet all of our people have been waiting for decisions from DFAT or Defence for very protracted periods.

Significant time is taken for ministerial certification as part of the overall process. There were extended periods of time in both departments where no ministerial decisions were made. This was apparently due, in part, to concerns by ministers about the underlying

policy, as well as questions about how the criteria in the Instrument were interpreted by the relevant department. This report has already noted the impracticality of having decisions being made at the ministerial level for large volume decision making. The Attorney-General's Department's *Australian Administrative Law Policy Guide* (2011) advises that decisions taking into account issues affecting the national interest should generally be made by the relevant Minister. In the *Migration Act 1958* ministerial decisions are typically only required in exceptional circumstances such as where an individual has exhausted all other options, and where circumstances may be in the national or public interest.

Generally, other visa or citizenship decisions are delegated to departmental officers who make decisions guided by appropriate governance arrangements. If criteria for eligibility are clearly defined, and with proper guidance material, decisions on the eligibility of individual LEE could be appropriately made at a departmental level if authorisation was allowed. This could reduce the time taken for assessment and allow for proper internal review. This is discussed further in Part 6 of this report.)

Processing and priority in Home Affairs

At 31 December 2022, the average processing time for Afghan LEE applicants to be granted a Class XB visa was 40.9 weeks. (This does not include the time taken for certification.) This review acknowledges that the current workload is high, and the application process is complex and requires an officer to obtain and assess further information from a number of sources including applicants. Processing times can vary according to the particular circumstances of the applicant, their location (be it inside or outside their home country), and their ability to travel, provide documents or access to Australian government officials; however, current timeframes do not meet the expectation of stakeholders when they are told that that LEE applications receive priority processing.

By way of example, 2 former LEE provided background about the handling of their visa applications to this review:

- Mr X said that his dealings with the Australian Embassy in Amman, Jordan (Home Affairs section) was frustrating, difficult, and unnecessarily protracted. He said that after 2 months, Amman requested a police background check from countries he had previously visited. He said administrative matters like these should have been established at the outset of his visa application.
- Mr Y said had encountered problems when his application was processed by the Australian Embassy in Amman. They had misspelt his name on the passport and national ID. Further they were seeking police background checks in countries which he previously visited. Mr Y said in future the program should include one processing team which reviews visa information. The team should consolidate follow up questions on the original LEE application and send to the applicant in one go.

An AEK official also said that the delays for applicants in receiving advice on consideration of their application caused significant psychological and emotional concern for some individuals.

An August 2021 LEE fact sheet provided by Home Affairs states that:

The Department of Home Affairs is working in partnership with the Department of Foreign Affairs and Trade and Defence to ensure that Afghan citizens who are eligible for Australia's protection are processed and resettled as a priority

The Australian Government is rapidly processing applications from Afghan LEE. These applications are being given the highest priority.

It is not clear from the information provided to this review how visa applications from Afghan LEE are being given the *highest priority* in the context of the overall humanitarian visa caseload. The information on the Home Affairs website accessed on 10 February 2023 states that:

Within the 26,500 places under the Humanitarian Program, priority will be given to:

- former Locally Engaged Employees (LEE) and their immediate family members;
- Subclass 449 Humanitarian Stay (Temporary) visa holders (current and former) and their immediate family members;
- those with enduring links to Australia, such as Afghans who were employed by Australian non-government organisations or worked on Australian Government funded projects, and Coalition partner LEE and their immediate family; and
- women and girls, ethnic minorities, and LGBTQI+ and other identified minority groups.

This information confirms that certified LEE are given priority for a place in the Humanitarian Program quota but provides no commitment whether LEE applications are expedited within that broader group.

This review does not underestimate the difficulties faced by Home Affairs in prioritising its workloads and the complexities of assessing applications, but if the LEE program is to meet its objectives of resettling Afghan LEE because they are at risk of harm, the current overall processing timeframes require considerable improvement.

This review acknowledges that in the absence of additional dedicated resources, any improvement in the processing times for LEE visa applications would likely be at the expense of other, very deserving, vulnerable cohorts. The relative priority for the processing of LEE visa applications is a matter of policy for the Government to decide.

Part 5: Concerns about the program

CONTRACTORS AND AID WORKERS

The Instrument requires that a person be ‘employed with’ DFAT, the ADF or the AFP. A range of LES (locally engaged staff) at the Australian embassy in Kabul supported political, economic, defence and administrative teams. These staff were *employed by* DFAT and their employment status has not been disputed.

The use of ‘employed with’ rather than the simpler and clearer term ‘employed by’ suggests that it was contemplated that the Instrument would not be limited to LES; however, the extent to which the instrument was intended to include other employment arrangements including contractors is not clear. This review could not locate any contemporaneous ministerial submission, departmental briefing, drafting instruction or other record that clearly explained the scope contemplated by the words ‘employed with’ when the instrument was drafted.

Evidence considered by the Senate Committee and provided to this review claimed that DFAT rejected LEE applicants based on their employment status despite clients demonstrating significant risks of harm including through the provision of night letters and evidence of physical assaults. For example, GAP Veteran and Legal Services advised this review:

As we said prior to and during the Senate inquiry, the Taliban do not make such distinctions between employee and contractor when they hunt and kill Afghans who worked for Australian agencies. The reality is, very few Afghans would be eligible for LEE certification based on this strict employment status interpretation. We have seen cases of cleaners and cooks being certified as LEE because they were purportedly directly locally employed, notwithstanding the threat they face is minimal compared to interpreters and guards who are in the face of the enemy but are, purportedly, ‘only’ contractors.²³

(In fact, security guards were likely excluded for a different reason, as discussed later in this Part of the report.)

The 2013 draft AusAID SOP (see Part 4 of this report) provided the following guidance for assessing whether a person is ‘employed with’ AusAID:

Crucial questions in assessing the existence of an employment-type relationship with AusAID having regard to the definition of LEE above will include: the degree of integration between AusAID and the applicant, whether AusAID has exclusive control of the applicant’s duties, the types of duties performed by the applicant in providing services to or on behalf of AusAID or carrying out the implementation of AusAID programs, whether the applicant worked primarily for AusAID and whether the applicant could be perceived to have been employed with AusAID by a reasonable observer. The level of support provided to AusAID’s mission in Afghanistan and the nature of the role performed by the applicant will also be important factors to the decision. Information relating to the nature of visible association between the LEE and AusAID may also be relevant.

²³ Glenn Kolomeitz, unpublished email to review, 1 December 2022

The primary onus of establishing employment is on the LEE seeking certification. LEE should be encouraged, where reasonable, to provide copies or produce originals of payslips, employment contracts or similar evidence of their employment.

The review was advised by a long-term DFAT officer that initially in 2013 contractors were counselled against applying. If contractors did apply, they were rejected. While this might have been the officer's understanding at the time, later advice from DFAT indicates that in the period 2013 to 2020 approximately 25 per cent of DFAT certified LEE were contractors.

The 2017 DFAT SOPs provide the following definition of 'employed with':

The definition of 'employed with' DFAT can encompass an applicant in a direct employment relationship with a third party, but only in circumstances when s/he relevantly appears/appeared to be in an employment relationship with DFAT because he or she is/was fully integrated with DFAT and is providing services to, or on behalf of, DFAT, or carrying out the implementation of DFAT programs. The relationship between the applicant and DFAT must be greater than an association due to engagement on an DFAT-funded program.

Until May 2021, ministerial submissions confirm that DFAT assessors interpreted 'employed with' as requiring a person be 'fully integrated' with DFAT. (The consideration on employment grounds did not include any assessment about individual risk of harm.)

DFAT advised the review that from September 2022, DFAT's assessment was changed to a consideration of the level of direct support the applicant had provided to Australia's mission in Afghanistan as well as their public profile, location, and the period of employment 'better reflecting the original intent of the program'. DFAT advised the review that as eligibility was broadened to non-direct employees there were risks in DFAT's ability to verify an applicant's employment history and their risk of harm.

The review has seen evidence that demonstrates that DFAT assessors contacted former AEK staff at times to try to establish the actual working arrangements of contractors, including cleaners and kitchen staff, at the time. Former embassy staff provided information related to individuals as well as relating to general working arrangements.

Despite the broadening in DFAT's approach there is still some ambiguity and uncertainty about whether aid workers working on a project partially or completely funded by the Australian Government can be certified.

The Australian Centre for International Agriculture Research (ACIAR) expressed concerns to this review about the treatment of aid workers. ACIAR supports agricultural research in partner countries to promote collaboration between Australia and international partner researchers including in project management. Senior ACIAR executives advised the review that the connection with Australia had put workers at risk – the Taliban was seeking out locals who supported foreigners. ACIAR LEE had worked in various roles but the application process was unclear to them and to ACIAR executives. ACIAR helped local staff by providing employment documentation and information on the application process but expressed concerns about the eligibility criteria as well as the complexity of the process. ACIAR officials advised the review that they provided DFAT and Home Affairs with a spreadsheet of 50-60 staff details including individual certificates with names, dates of birth and project titles but it was unclear to them how departments used this information: if the list was used in a prioritisation process or if it was incorporated into the broader humanitarian visa program. ACIAR officials did not believe that DFAT properly cross-referenced their data with the LEE inbox.

DFAT confirmed receipt of a list of 79 Afghans working on ACIAR-related programs from a senior ACIAR official in October 2021 which contained details of individuals' names, date of birth, dates of employment with their primary employer and job function. Approximately 28 applicants had already been assessed by DFAT prior to the receipt of the list. DFAT cannot progress certification applications for individuals who have not applied for the DFAT Afghan LEE program. The review understands that this issue is still under active consideration but urges DFAT to finalise consideration of these cases and notify ACIAR of the outcome.

Defence advised that its interpretation of the 'employed with' criterion was that applicants who exhibited an 'employee-like relationship' could be found eligible. This could include subcontractors and those otherwise not employed directly by Australia. A senior Defence official advised the review that it was the nature of the service provided, not the form of employment that mattered. For example, a cleaner employed on a Coalition base to clean Australian facilities would have had a similar contractual relationship to Australia as many interpreters who had often been sub-contractors; however, interpreters were more easily associated with Australians since they had patrolled together. Further, a cleaner who had worked on a Coalition base was likely not associated with Australia any more than the other countries in the coalition. For this reason, the Defence approach was that a cleaner would not generally be eligible. This was seen as consistent with the original intent of the program which was explained to the review as 'to assist interpreters'.

A senior Defence official advised the review that as security in Afghanistan deteriorated, Defence had taken a more liberal approach than DFAT in its interpretation of the 'employed with' criterion.

There is also provision for the AFP to assess LEE applicants. Correspondence between DFAT and the AFP seems to demonstrate that the AFP currently takes a restrictive approach to the Instrument, requiring direct employment and a high level of verification effectively excluding contractors. This may explain why the AFP has not made any recommendations to the relevant Minister since 2016. An email sent from the AFP to DFAT dated 23 August 2021, responding to a request for information by DFAT reads:

Thank you for meeting and the opportunity to discuss the AFP position on Afghan nationals seeking entry to Australia on a special protection visas issued under the Migration Regulations 1994.

As discussed, the AFP has assessed the recent applications against the relevant legislation and in particular the eligibility criteria set out in Migration Regulations 1994 (Cth) [Class of Persons -Instrument, IMMI 12/127] ('the legislative instrument').

The critical assessment criteria is the 'employment with' the AFP. As we discussed, the AFP did not employ Locally Engaged Employees (LEE) in Afghanistan. Any LEE utilised by the AFP were drawn from a pool of staff contracted by either Defence or DFAT.

While noting the significant risks faced by individual applicants and the relative merits of their respective claims, the AFP is and remains unable to corroborate claims that any of the applicants meet the threshold criteria of having been "...interpreters or instructors employed with the ADF or AFP..." as required under subparagraph 3(a)(ii) of the legislative instrument due to the absence of employment records. Acknowledging the uncorroborated referee reports and a letter from a former member of the AFP it is impossible for the AFP to verify and validate the applications claim of working with the AFP as required under the legislative instrument.

It is our view that DFAT or Defence are better placed to validate the employment history and identification of applicants, being the departments that managed the contractual arrangements under which Afghan personnel were employed or contracted as locally engaged employees.

Additionally, we understand DFAT and Defence may be applying an expanded interpretation of the legislative instrument via policy developed in an Inter-Departmental Committee (IDC) but as the AFP has not been a participant in developing the revised policy we are not in a position to state if we share the same interpretation of the legislation, nor are we in a position to confirm whether adopting a different approach to interpretation would lead to a different result from the perspective of the AFP.

As a result the AFP is not in a position to assess the employment status of any of the Afghan LEE applications. Given the harm ongoing delays in the application process may cause we request that any future humanitarian visa applications sent to the AFP include confirmation of the applicant's employment history with DFAT or the ADF, or else expressly demonstrate how the circumstances of the applicant relate to the activities of the AFP in Afghanistan.

AFP staff advised the review that the AFP found the Instrument difficult to apply because of the definitions and requirements around employment. For example, in Tarin Kot, the AFP worked with interpreters who were employed by NATO International Security Assistance Force or the NATO Training Mission-Afghanistan. The AFP concluded that such individuals could not be 'employed with' the AFP and would not be included in the LEE scheme (as confirmed by the AFP official in the email above). This review questions whether such a decision is open for the AFP to make: it seems from the legislative scheme that any decision on eligibility including whether an individual was 'employed with' the AFP should be made by the Attorney-General as the relevant agency Minister and not by AFP officials.

In response to a draft of this report the AFP advised that 'The AFP does not consider itself as having made decisions related to the eligibility for certification. The AFP assessed all applications received and made recommendations to the Attorney General for determination'. Following receipt of this response, this review requested access to the relevant AFP ministerial submissions. Inspections of these submissions confirmed that all were made in the period 2014-2016. No submissions were provided to this review where recommendations had been made to the Attorney-General in respect of more recent applications for certification including those referred to in the email above.

As noted above, the question of the eligibility of aid workers is still to be resolved across agencies. It has been suggested to the review that an appropriate test would be 'appeared to be working with or representing' the Australian Government. If the approach was adopted across all relevant agencies it could increase applicants for Defence and cause the AFP to re-assess whether it had eligible applicants. Broadening of the test would also likely increase visa applications by certified LEE and places in the Humanitarian visa quota at the expense of other vulnerable cohorts. This is a matter of policy for the Government to decide. (The question of common guidance on the interpretation of the Instrument is discussed further in Part 6 of this report.)

In summary, as the Instrument does not clearly define the employment relationship that is required, the approaches taken initially by DFAT and Defence were not inconsistent with the instrument. This approach was, however, inconsistent with the overall intent of the program but the current approach taken by DFAT seems more aligned with the original intent of

providing resettlement to individuals at risk of harm due to their employment in support of Australia's mission in Afghanistan.

INCONSISTENCY OF APPROACH

The approach to the question of contractors, and the AFP email quoted above, highlights the lack of consistency in approach to the interpretation of the Instrument taken by DFAT, Defence and the AFP.

Documents dating from 2013-14 showed that an interdepartmental committee met regularly over the early years of the program including representatives from the AFP, DFAT, Defence and Home Affairs. Minutes show that the committee discussed complex case studies, meanings of definitions 'employed with', 'extraordinary circumstances', the use of reference letter and other common issues. There was an active effort to ensure consistency of approach where appropriate. As the caseloads decreased, that committee fell into abeyance and approaches apparently diverged. It would be appropriate to revive regular meetings.

Departmental records relating to this subject also raise the issue of departmental legal advice on the interpretation of the Instrument. The records show that, at times, each agency was obtaining its own legal advice on matters of general interpretation of the Instrument (not just its application to a particular set of facts) that might be common across agencies, and also not always consulting Home Affairs as the administering entity. This approach does not encourage consistency. This review also questions whether this practice is consistent with Section 10 of the Legal Service Direction 2017.

In response to a draft of this report, DFAT advised the review:

All legal advice (including historical advice) was shared with Home Affairs and Defence in December 2022. The legal advice will also be shared with the AFP. We will continue to work closely with relevant agencies in seeking and sharing legal advice.

Recommendation 4

The Department of Foreign Affairs and Trade, the Department of Defence, the Department of Home Affairs, and the Australian Federal Police should meet regularly to discuss the Afghan Locally Engaged Employee program to ensure their approach is consistent with the aims of the program, and any policy articulated by the Government.

RECORDS OF AFGHAN LEE

The Senate Committee and this review received conflicting advice about what records relating to LEE were available during the evacuation of Kabul.

Mr Jason Scanes of Forsaken Fighters said there had been a decade of neglect on this program by Defence with no records maintained on who worked with Australia in Afghanistan. Mr Scanes suggested such a list would be available through the US Department of Defense. GAP Veteran and Legal Services also advised the review that they had lists of individuals that were not used effectively by Australian government officials.

In response to a draft of this report, DFAT advised the review:

We confirm receipt of two lists from GAP Veteran and Legal Services in August 2021 (205 names) and February 2022 (214 names) which contained details of individuals' names, date of birth, identity documents and contact details. A number of names from the August 2021 list were repeated in the February 2022 list. Only the February 2022 list contained individuals' connection to Australia. A large number of names provided by GAP Veteran and Legal Services had not applied for DFAT LEE certification. DFAT is unable to progress certification applications for individuals who have not applied for the DFAT Afghan LEE program.

Whatever the reason, there seems little doubt that a significant problem in the evacuation of Kabul was the absence of a verified record of Afghan LEE. Defence advised the Senate Committee that there was no master list of interpreters available or of others who might be eligible for resettlement in Australia under the LEE program. What records were available could not readily be used on the ground to verify the identification of those who sought access to Australian evacuation flights.

A Home Affairs official advised the review that the only list they had during the evacuation was a list of visa clients. The people that were on this list had gone through multiple checks by ADF and Home Affairs to identify if they were previous visa holders or had been invited to apply for a visa or held a Subclass 449 visa. This list changed daily based on additional information from or documents presented by the clients. However, this list did not identify who was a LEE.

The problem of inadequate recordkeeping was exacerbated in Afghanistan by the difficulty of establishing identity for Afghans. Afghanistan does not have reliable identification cards, nor were birth dates well recorded. The review was advised by all departments that a key risk in the certification and visa application process is the difficulty of verifying Afghan LEE claims of their identity and employment, with a high risk of fraud.

The terms of reference for this review require it to 'consider whether record keeping relating to local nationals who provide assistance to Australia in areas of conflict and instability was appropriate'.

What was 'appropriate' must be considered in the context of what was appropriate at the time – not with the benefit of hindsight.

A Defence official told the review that theatre had tactical relationships with LEE but there had been no need for strategic commands to maintain these types of records. Defence advised the Senate it would not be feasible to maintain a master list of interpreters.

Defence records accessed by this review show that in 2013 the Joint Taskforce Command was instructed to 'establish and maintain a database to record and track LEE employed by, or closely associated with the ADF in Afghanistan, including biographical details and composition of family and household'.

Defence's advice that it was not feasible to retain records also appears to be in conflict with its *Task Group Afghanistan SOPs (August 2018) SOPs*: (see Part 4 of this report) that require ADF supervisors to conduct LEE Audits in which ADF supervisors were to update the names and key details of their Afghan LEE in a six-monthly Afghan LEE audit update. The Afghan LEE audit was described as 'a comprehensive stocktake of all known Afghan LEE employed in theatre'.

Adherence to this policy seemed to be patchy and short-lived. This review was advised that Joint Operational Command managed a LEE database at one stage and that some deployed personnel, for example, LEE managers and Defence Policy Advisors, managed their own in-country LEE databases. There was no central database in Afghanistan or Australia.

If this policy had been followed more rigorously there should have been better records of Defence LEE.

DFAT advised the review that it had records of LES but had no requirement to keep records of contractors. DFAT LES Human Resources Manual requires that LES must be recorded in the department's Overseas Staff Profile (OSP) database. Posts are required to confirm the number of staff at a post is correct each month and reports must be signed by the head of each partner agency. Posts are required to maintain accurate records in the OSP. Changes to staff profiles should be made as they occur to ensure records are accurate and current at all times.

Both Defence and DFAT had regard to letters of reference provided by former ADF members of DFAT officials to LEE, but the documented approaches to the issuing of these letters differed.

The 2017 DFAT SOPs (see Part 4 of this report) allow officials to provide statements of service and reference letter but not in an official capacity. This is explained as follows:

DFAT officials may provide reference letters for Afghans they come into contact within their work. These letters can only be provided in a personal capacity and not on a DFAT or Australian Government letterhead. Staff should remain conscious of operational sensitivities and be cautious about the information they provide in such letters.

This advice was repeated in March 2022 in a document titled *Managing requests for visa assistance from the AADT*. This document advises:

If you receive an approach seeking your endorsement or a reference, please note that if you choose to respond you should make it clear that the reference is being given in a private capacity. The reference should not be provided on a DFAT or Australian Government letter head or from a departmental email address. You should not indicate any DFAT endorsement for any certification or visa application.

Although an individual official should be careful about implying any support for any certification or visa application, this review does not agree with the DFAT approach: it is difficult to see how a DFAT employee could be providing a reference letter in anything other than an official capacity. Such letters should be purely factual and not provide endorsement. DFAT reported that some letters of support purportedly from DFAT staff and contractors confirming an applicant's employment relationship to DFAT were fraudulent. This review suggests that letters of reference should only be provided by an authorised officer designated for this role, and a record of any letter of reference should be retained to be able to verify any documentation provided by a LEE during the assessment process.

The value of such recordkeeping was demonstrated in an example provided to the review by DFAT assessors. A DFAT senior administrative officer at the AEK had provided reference letters to individuals who had been contracted to provide support including cleaning or cooking at the AEK. The DFAT officer had kept a list of letters which was later used to assess the veracity of some claims.

The Defence's *2018 Task Group Afghanistan SOPs* prescribes what this review considers to be proper advice about reference letters using a template and providing a copy to Defence:

Reference letters: If ADF interpreter managers/ supervisors wished to submit reference letter in support of Afghan LEE they were instructed to use a template. The reference letter should confirm the applicant's name, role, period of employment and visibility of their association with the ADF. A copy of the signed letter was to be provided to both the Afghan LEE applicant to submitted to the Afghan LEE email address to verify that the ADF member did write and sign the letter.

It seems that this advice was not followed in practice. The review heard of many examples of reference letters being provided by ADF members that were not kept on a central register. It was difficult for assessors in some case to verify the letter with the author which caused delays, and there were cases of fraudulent copies.

The information that this review has considered, leads to findings that:

- Defence records likely did not comply with extant instructions;
- DFAT records of Afghan LEE were inadequate for the purposes of an evacuation; and
- The utility of letters of reference is limited by the lack of a central register.

The review did not receive any information to indicate that LEE were considered in crisis or emergency planning for Kabul. If that had occurred it should have been apparent that records were inadequate. It is too late for this review to make any recommendations about recordkeeping in Afghanistan, but this matter is considered further in looking at future LEE programs in Part 7 of this report.

THE EXCLUSION FOR AFGHAN GOVERNMENT OR MILITARY OFFICIALS OR INDIVIDUALS EMPLOYED IN A PRIVATE SECURITY CAPACITY

The Instrument excludes persons who are or were 'an Afghan government or military official or employed in a private security capacity'. There is no provision in the Instrument for discretion to certify these individuals even if exceptional circumstances apply.

The review was advised that the embassy security in Kabul worked in layers. The outer layer had checkpoints manned by Afghan security contractors. Internal security at the embassy was staffed by Australian and other Five Eyes nationals.

Contracted security guards who had worked on the outer perimeter security were considered to be 'employed in a private security capacity' by DFAT assessors and not recommended for certification based on the exclusion. Although this approach has been the subject of criticism, in the absence of any explanatory material or policy directive that supported a different interpretation at the time, this review considers that it was reasonable for government officials conducting assessments, and making recommendations, to adopt this position based on the ordinary meaning of the words in the Instrument.

The refusal of certification for security guards at checkpoints and embassy entry points was the matter of extensive lobbying by advocates and veterans. It was argued that many of these individuals have been the subject of individual risk and actual harm because of their association with the Australian mission. This criticism of DFAT in particular was grounded in looking at the intent of the program, rather than the drafting of the instrument. Several stakeholders suggested that the exclusion should have been given a narrow scope and that

DFAT had abrogated responsibility towards contracted security guards compared to public servants in Afghanistan. In fact, this review considers that it was not open to individual DFAT officers to change their interpretation of the ordinary meaning of the Instrument based on assumptions about the underlying policy.

Similar questions and concerns have been raised about the exclusion of individuals who had worked with Australian government agencies, but who had formerly worked as Afghan government officials in fields such as education or health.

To better understand the original basis and scope of the exclusion, the review requested Home Affairs, as the department with administrative responsibility for the migration legislation, to provide any contemporaneous ministerial submission, departmental briefing, drafting instruction or other record that explained why the exclusion was included in the 2012 instrument. No records directly on this point were located in Home Affairs. DFAT and Defence were both involved in the policy development, but neither department had records addressing this question.

The review considers the most likely explanation for the exclusion was provided by a senior Defence official who was present in Afghanistan, and had involvement in the development of the policy. They advised the review that there was a strong view in 2012 that ‘mercenaries’ were to be excluded from the LEE program. This referred to relatively well-paid guards providing close personal protection (CPP) under high-value contracts with Western companies. The value of these contracts assumed that a service provider was aware of the risks, managed the risks, and was adequately compensated for the risks. While CPP guards at the time were generally not Afghan nationals, the review was advised that there was concern that any Afghan nationals who provided CPP services in the future should be clearly excluded from the LEE program.

The same senior official also suggested that, in 2012, the environment in Kabul was such that the level of risk to other static security guards was such that they likely would not have been contemplated as being eligible in the LEE program as they would not have been able to demonstrate that they were ‘at significant risk of individual harm’. The official did not think that the exclusion in the Instrument was intended to explicitly exclude these static security guards on employment grounds.

A number of other suggestions about the exclusion of security guards were made to the review including the following:

- **Static security guards wore face covering and the embassy worked to ensure they were otherwise unidentifiable. As their identities were not known they were not at personal risk or obvious targets.** While this might have been the situation at times in Kabul, the review also heard from several Australian officials and other stakeholders that static security guards were readily identifiable and could be a target. Former security guards advised the review that when they applied for employment guarding foreign embassies in Afghanistan, they were required to get an Afghanistan police check through the Ministry of the Interior. The records of this were still available to the Taliban regime in Afghanistan which made these former security guards readily identifiable and at significant risk.
- **The security guards did not work only for Australia and were not associated with the Australian mission.** This suggestion was not widely supported by many

Australian officials and stakeholders who said that the patterns of work could result in risk to security guards because of their association with the *Australian* mission. For example, one official said that everyone in the green zone knew what checkpoint was administered by Australia and it had been under surveillance by the Taliban. Internal DFAT advice was that while there was no ostensible indication that these checkpoints were related to Australia (no insignia or flag poles), there was a common understanding (including among Afghan government officials) that these checkpoints were managed by the Australian Embassy.

- **The large number of individuals involved would overwhelm the humanitarian program.** This explanation implies that prioritisation should not be based on the level of individual risk. This consideration is inconsistent with the program's original intent. In any event, the number of potential LEE applicants contemplated when the Instrument was drafted in 2012 was small.

Whatever the situation was in 2012-13, by 2020-21 there was sufficient evidence to conclude that at least some of these security guards were at risk of harm because of their employment with Australia. Although it was not open to Australian government officials to recommend these individuals as eligible for certification, it was open to them, or to other senior officials advising the Minister, to raise the question of whether the exclusions in the Instrument were arbitrary, and whether the exclusion was consistent with the policy intent or whether it should be reviewed.

There were also concerns about the apparent inconsistent treatment of applications from security guards. The review was advised that, in total, 12 security guards had been certified including 5 from situational security awareness teams and 7 certified in error. In August 2021 security guards were also eligible for Subclass 449 visas that did not require certification.

There is also a level of confusion in stakeholders as to whether LEE program applications for security guards were rejected on the grounds that guards were contractors and not 'employed with' the embassy. The documents examined by this review confirms that this was not generally the case: security guards were not certified because of the explicit 'private security guard' exclusion.

In summary, the review did not locate any documentary evidence that assists in defining the scope of the exclusion of persons 'employed in a private security capacity'. While there are different interpretations possible, it was not unreasonable for government agencies to apply a broad scope based on the ordinary meaning of the words, and to recommend that security guards were not eligible for certification. Although there are varying views about the threats faced by security guards, it is clear that these guards can face individual risk of harm because of their employment and association with Australia, and that this risk increased during 2020-21. At this stage it would have been prudent for government officials to review whether the exclusion in the Instrument was arbitrary, and whether it was consistent with the intent of the program.

In the current circumstances this review considers that there are 3 options open to the Government:

1. Do nothing

Continue to exclude all individuals who were employed as an Afghan government or military official or employed in a private security capacity. This would continue to exclude at-risk security guards, and other individuals who had been employed with Australian Government but who had previously been employed as, for example, Afghan government teachers or health workers.

This option ensures consistency of approach and would not require re-assessment of previously rejected applications; however, this review considers that this option is not consistent with the intent to 'offer resettlement to Australia to eligible locally engaged Afghan employees at risk of harm due to their employment in support of Australia's mission in Afghanistan'.

2. Implement an administrative solution

Continue to assess these excluded individuals as ineligible but require Home Affairs to provide priority places and processing for individuals who would have been eligible if not for the exclusion. This would still require an assessment of applications. In practice, this option would be difficult to administer and monitor given the many competing priorities in the Humanitarian cohort. It is also unfair because it would provide an advantage to ineligible applicants compared to others who might not have applied based on sound legal advice.

3. Review the Instrument and revise the exclusion to ensure it does not arbitrarily exclude individuals and that it is consistent with the original intent of the program

This would provide certainty, ensure consistency, and not discriminate on arbitrary grounds. It could increase the number of certified LEE but would be consistent with the intent of the policy. Applicants would still be assessed on an individual basis against the other criteria.

In response to a draft of this report DFAT noted that if the Instrument was amended the relevant agencies would need to 'manage the risks associated with amending the instrument, which is likely to see the total number of applicants to the Afghan LEE program increase, exacerbating existing program fraud and integrity risks'.

Defence advised 'contacting previous applicants who had been considered ineligible and inviting new applications, would be difficult and resource intensive. It may also raise procedural fairness questions for those previously deemed ineligible. Beyond the logistical challenges, a key issue is likely to be whether a potentially large number of new applicants could be accommodated into the humanitarian visa program.'

While acknowledging that any change to the exclusion might lead to an increase in applications, the review prefers option 3 on transparency and equity grounds, and in line with the policy intent. Revision of the Instrument is discussed further in Part 6 of this report.

LEVEL OF RISK

The Instrument specifies as a criterion that the person must 'have been assessed at significant individual risk of harm as a result of their support to Australia's whole-of-government mission in Afghanistan due to their role, location, employment period and currency of employment'. This is inconsistent with the requirement set out in the Migration

Regulations 1994 that a person is 'at risk of harm for a reason, or reasons, that relate to the applicant being in that class of persons'.

This review could not locate any contemporaneous ministerial submission, departmental briefing, drafting instruction or other record that explained why the word 'significant' was included in the 2012 instrument. The intent seems to be an attempt to narrow the criterion set out in the regulations; however, stakeholders expressed some doubt to the review as to its legal effect. Current DFAT instructions and Defence practice is that, given the inconsistency in the regulations and Instrument, the level of risk that should be applied is 'risk of harm'.

This anomaly should be addressed by amendment of the Instrument (see Part 6 of this report).

SIX-MONTH TIMEFRAME FOR APPLICATION

The Instrument requires applicants to apply within six months of ceasing employment unless the relevant agency Minister is satisfied that exceptional circumstances exist. Defence officials advised the review that the six-month had been specified because threats diminished the longer applicants were no longer associated with Australia. This is supported by advice given in early certification ministerial submissions. It was also suggested that it would be more difficult to provide assurance about employment claims after a longer period.

The six-month period does not allow for changes in circumstances after an individual leaves employment (unless extraordinary circumstances apply). The review spoke to 2 former locally engaged staff. One was a development officer who told the review that at the time he commenced employment in 2020 he had no intention to leave Afghanistan; however, when the embassy was due to close in May 2021 he prepared to apply for the LEE program. Another LES said that even when he applied for certification in June 2021, he did not intend to leave Afghanistan, particularly if his mother and sister could not travel with him, but he reluctantly changed his mind some months later. While these 2 individuals would not have fallen foul of the six-month rule, they do show how individual circumstances can change with time.

The ministerial discretion to extend the six-month timeframe has been applied generally since December 2021 but there is concern that the extension of this six-month time period relies on a discretion which may not always be exercised in the future. This review observes that the fall of Kabul created exceptional circumstances that are likely to endure into the future.

SECURITY ASSESSMENTS

The process for the assessment for certification by Defence and DFAT does not include a security assessment of an applicant. Home Affairs assesses certified eligible applicants against the visa criteria, which includes health, identity, and security checks.

It was suggested to the Senate Committee and to this review that interpreters and security guards would already have undergone rigorous character and security tests both for employment processes and during the certification process. It was submitted that the visa

application process could be truncated, and the employment screening and certification process relied upon.

Section 501 of the *Migration Act 1958* defines the character test and sets out a broad range of grounds when a person might not pass the test, including having a substantial criminal record, representing a danger to the Australian community, and being the subject of an adverse security assessment by ASIO.

The review does not agree that the in-country employment checks, or the certification assessment conducted by DFAT and Defence, are equivalent to character or security checks conducted by Home Affairs.

Mr Scanes also raised security background checks as a subject of concern. He said that background checks on interpreters relied on data holdings and he believed that Home Affairs staff did not understand the sources of information which informed the security report. He was concerned that the security checks conducted as part of the visa process were flawed.

The security checks conducted as part of the visa application process are not unique to LEE and Mr Scanes' concerns cannot reasonably be explored in this unclassified report. Concerns about security checks and assessments can be raised with the appropriate oversight body (the Commonwealth Ombudsman for Home Affairs, or the Inspector-General of Intelligence and Security for ASIO).

DEFINITION OF FAMILY

The LEE certification process assesses only the employee, but a visa application can include the members of their family unit. LEE applicants are advised that they can generally include the following members of their family unit in their visa application:

- Their spouse (one only)
- Their dependent children (who are not married or engaged)
- Relatives who normally live in their household and who are dependent on them or their spouse (who do not have a spouse or partner).

The family unit generally does not include siblings or other family members.

The review was advised that Australia's definition of the family unit used in the visa process was incompatible with Afghanistan's concept of family, where there was often a strong cultural obligation to support siblings or extended family members. The former Afghan LEE that met with the review expressed concerns about this restricted definition. They explained that the oldest son in an Afghan family was required to take care of their parents and sisters. They also expressed concerns about the safety of siblings and other family members who remained in Afghanistan. This caused continued distress to them in Australia.

The review was advised that at times very large numbers of individuals formed part of some visa applications. If a visa application made by a LEE includes an extended family member that does not meet the definition of members of a family unit, the applicant is advised that the individual does not meet the visa criteria and the applicant is invited to remove the extended family member from the application. These individuals could potentially be

proposed for a Subclass 202 (Special Humanitarian) visa when the LEE and family arrived in Australia.

The 2012 policy announcement announced Australia would offer resettlement to Australia to eligible locally engaged Afghan employees, *and their direct family members*, and the review was advised that the current family unit definition is more generous than the 'immediate family' definition that is used for some visa classes. Although the number of LEE visas is currently uncapped, the numbers of individuals granted visas cannot be considered in isolation apart from the rest of the Humanitarian cohort. The current practice in respect of the definition of family appears to be in line with the original policy intent.

Part 6: The future of the Afghan LEE program

HOW WAS THE PROGRAM DESIGNED?

Part 2 of this report sets out the broad policy objectives but the review also examined records, mainly from Home Affairs and Defence, to explore how the program was designed and assess whether the program achieved its objectives. (These are largely records of interdepartmental discussion and may not completely reflect advice to ministers at the time.)

In 2012, the main principles of the design of the Afghan LEE program were stated as to support those at greatest risk of harm because of ongoing or former association with Australian officials, provide for flexibility in the program, and learn from the perceived shortcomings of the Iraq program.

The following objectives were proposed in 2012 to address the lessons learned from the Iraq program:

- The program should have clear consistent eligibility criteria to ensure that only LEE who are at risk of harm were eligible for resettlement.
- The program would require a centralised record management system for determining employment history and the status of LEE in Afghanistan.
- There was to be clear definitions of agency roles and responsibilities using a memorandum of understanding (MoU).
- There was to be a documented robust and agreed to end-to-end priority processing for the management of LEE applications.
- There should be arrangements in place to manage the expectations of LEE.

The records also noted the need to strike a balance between protecting LEE and ensuring that Australia was not seen as to be removing qualified and educated local nationals.

Home Affairs departmental records from 2012 include an unsigned MoU drafted for execution by the relevant agency heads. The unsigned MoU sets out the roles and responsibilities of the relevant agencies and contemplates the possibility of emergency mass evacuation including as a result of withdrawal of Australian troops or closure of the AEK. (There is not record of the MoU being executed and, even if it was, it seems that it was not used or referred to in the ensuing years.)

The records show that concerns were raised in October 2012 that the draft eligibility definitions might exclude individuals at risk of harm. The cohorts had been based on risk assessments conducted by the Defence Intelligence Organisation (DIO). The response was that cohort definitions should be restrictive to target LEE in need of resettlement and to provide a fiscally responsible solution that met Australia's obligations to LEE and was in line with approaches by the other International Security Assistance Force partners. An 'exceptional circumstances' clause was proposed to deal with unintended or unforeseen circumstances and for flexibility.

There were also reassurances that the scheme would be flexible: there would be an ability to extend or redefine the cohort during the life of the program as the situation or changed risk assessment dictated. This review notes that there was no mechanism to ensure that happened and in fact the Instrument was never revised.

In the 2012 records, the then DIAC officials suggested an alternative approach to accommodate exceptional cases and allow flexibility to grant a humanitarian visa would be to consider the cases under the general criteria for the grant of a humanitarian visa. Although LEE could not usually demonstrate they were subject to persecution, DIAC advised it could agree to consider a small number against these provisions. The review did not see evidence of this option being considered again until late 2022.

DID THE PROGRAM MEET ITS OBJECTIVES?

The program did achieve its primary objective in resettling a large number of at-risk Afghan LEE and family members in Australia. As at 31 December 2022, 2,383 Afghan LEE and their families (653 LEE and 1,730 family members) have travelled to Australia. (This figure includes applicants who travelled to Australia on a Subclass 449 visa and were subsequently granted a Class XB visa.)

Despite this achievement this review has found that:

- The assessment criteria were not clear and, over time, did not necessarily support those at greatest risk of harm. They were not consistently applied.
- There was little flexibility shown as circumstances in Afghanistan changed over 10 years. The eligibility criteria in the Instrument were not reviewed.
- There was no centralised record management system for determining employment history and the status of LEE in Afghanistan.
- The program design did not support priority end-to-end processing. The processes were not documented and robust and were confusing to LEE applicants.
- The program implementation did not include adequate planning for an emergency mass evacuation even though this was contemplated as early as 2012. The systems in place did not cope.
- The speed of processing of applications end-to-end did not meet community expectations of providing priority processing or ensure safety for at-risk LEE.

SHOULD A REVISED INSTRUMENT BE MADE?

The terms of reference require this review to 'Consider whether legislative instrument IMMI 12/127 is fit for the purpose of fulfilling its original intent or should be amended'.

Amendment is achieved in practice by the making of a fresh Instrument.²⁴ The Minister for Immigration is required to consult with the Prime Minister and other relevant government ministers before making such an instrument – in practice this would usually be achieved by the exchange of letters and, if there is agreement, the process need not be lengthy.

²⁴ The current Instrument is due to expire under sunset provisions in April 2023. The review has been informed that Home Affairs is seeking to defer the date by 12 month.

This report has highlighted serious concerns as to whether the current exclusion of ‘Afghan government or military official or employed in a private security capacity’ at 3(b) of the instrument is consistent with the original intent of the program. While other options are possible, it is recommended that these deficiencies are best addressed by urgent amendment of the Instrument. While the current exclusion for at-risk security guards, and other individuals who had been employed with the Australian Government but who had previously been employed, for example, as Afghan government teachers or health workers, could be considered arbitrary; the review does not recommend that the exclusion be removed entirely. For example, the Government might consider that former Afghan military officials and other classes of individuals should continue to be ineligible under the program, whereas certain categories of security guards should be eligible.

In response to a draft of this report the AFP advised that it had trained over 3,000 Afghan government employees and questioned how they would be considered in any new Instrument. The concerns about apparently arbitrary exclusion of Afghan government employees raised with this review were about individuals who could have been had eligible for certification because they had been employed with Australian agencies, but who were ineligible because of previous service as an Afghan government employees. It has not been suggested to this review that Afghan government employees whose association with Australia was by way of training, rather than employment, should be eligible for certification.

This review cannot be prescriptive in defining precisely which classes of individuals should be included or excluded. This is a matter of policy for Government to decide taking into account such factors as: the support provided to Australia’s efforts; the groups of individuals at greatest risk of harm because of that support; the number of potential applicants; the economic cost of any increases in numbers, and the effect on Australia’s humanitarian migration program.

This review has also noted (see Part 5) that the current test of ‘significant risk of harm’ is inconsistent with the Migration Regulations 1994 and that this should be addressed.

Recommendation 5

The Government should:

1. Urgently consider the making of a new legislative instrument that sets out criteria for eligibility for certification for Afghan locally engaged employees to:
 - Revise the exclusion at 3(b) to ensure it does not arbitrarily exclude classes of individuals and that it is consistent with the original intent of the program.
 - Address the inconsistency with the Migration Regulations 1994 in the level of risk of harm that must be demonstrated.
2. Publish separate clear guidelines for the application of the eligibility criteria in the new instrument.

Any amendment of the Instrument should be accompanied by clear published guidelines about its application to ensure consistency. The guidance already prepared by DFAT could form the basis of this.

Further, in Part 4 of this report, it was noted that if criteria for eligibility are clearly defined in the Instrument, and with proper guidance material, decisions on the eligibility of individual LEE could be made at a departmental level. With the expected increase in numbers, the capacity for a departmental officer to make decisions could greatly reduce the time taken for assessment and allow for proper internal review.

Regulation 1.16 of the Migration Regulations 1994 allows for the delegation of powers under the Regulations by 'the Minister'. Section 19 of the Acts Interpretation Act 1901 would seem to indicate that 'the Minister' should be read as the Minister administering the Migration Act 1958. It seems that the 'relevant agency Minister' may currently have no power to delegate the power to certify.

Home Affairs advised the review that, if certification at a departmental level is considered necessary and appropriate, it may be possible to amend the definition listing the 'relevant Ministers' in Subclass 201 to provide that 'relevant Minister' also includes a person in the relevant Department who is authorised by the respective Minister to provide the certification on the Minister's behalf. Naturally, any decision whether to authorise an officer would then be made by the Minister.

Recommendation 6

The Department of Home Affairs should seek amendment of the Migration Regulations 1994 to allow for a departmental officer to be authorised by the relevant Minister to certify an applicant according to paragraph 200.211(1A)(a) and paragraph 201.211(1A)(a) in Schedule 2 to the Migration Regulations 1994 on the Minister's behalf.

In Part 3 of this report, the review made a number of observations about deficiencies in the current administration of the program but noted that with the current low number of applications there might not be a business case for change. This report has noted that Defence receives very few applicants and also has few on hand. DFAT has some hundreds at hand but decreasing numbers of fresh applications. This position could change with any change to the approach taken to aid workers and contractors, or if the Instrument is amended. The AFP could also receive applications which it would be required to assess. This review does not make any recommendations relating to the administration of the program except to ensure that resourcing and capability matches workload. If the implementation of recommendation 5 is predicted to cause a significant increase in applications, or if the end date for the program is extended for applications beyond the end of 2023, DFAT, Defence and the AFP should closely monitor the following matters identified as risks in this report:

- matching resourcing with workload;
- the adequacy of current case management systems and procedural instructions; and
- whether transitioning to streamlined end-to-end processing by Home Affairs could be justified.

CLOSURE OF THE AFGHAN LEE PROGRAM

This review also notes that the program is drawing to a close. Australia closed AEK in May 2021 and most applicants who would be considered eligible under the current Instrument would have been expected to have already applied. This review considers that 31 May 2024 could provide a reasonable date by which to conclude certification under the program. This would be the date by which all certifications must be finalised; however, individuals who had been certified would be given more time to apply for visas given the many processing issues associated with in-country applications.

If a new Instrument is made in accordance with Recommendation 5, a further cohort would be eligible. It would be reasonable to allow a further period of time, say 6 months, for this cohort to apply. A further period of 6 months should be allowed for agencies to process these applications by no later than 31 May 2024.

The following indicative timeframe is suggested:

No later than 31 May 2023	Revised Instrument made with clear guidance about its application. New Instrument requires all applications for certification to be made within 6 months of issue. Government announces publicly that the Afghan LEE program will end within 12 months (no later than 31 May 2024) and that all applications for certification must be received within 6 months (no later than 30 November 2023) to allow time for assessment and certification. AFP, DFAT and Defence establish capacity based on predicted number of applications to assess all applications promptly.
Within 6 months	Final date for new applications for certification.
Within 12 months	All applications assessed and certification decisions made (guided by clear eligibility requirements and proper guidance material).

The review notes that, even after the program is closed, LEE would be able to apply for visas using other migration pathways to Australia depending on their circumstances. This information should be included in any announcement about the closure of the program.

Recommendation 7

The Government could cease the certification of Afghan locally engaged employee applicants by 31 May 2024. If a new instrument is made in accordance with Recommendation 5, it should require that an individual must have sought to be certified by 30 November 2023 to allow for assessment and certification prior to 31 May 2024.

Part 7: Learning from the lessons in Afghanistan to design LEE programs in the future

THE PLACE OF A FUTURE LEE PROGRAM IN AUSTRALIA'S MIGRATION SYSTEM

The review held discussions with senior Home Affairs officials about how any future LEE program might fit in with Australia's migration policy and the Humanitarian Program.

The Government caps migration numbers to manage population growth and ensure stability in the economy. The review was informed that Treasury currently considers an ideal migration target range of between 0.8% and 1% taking into account the capacity of infrastructure to grow to meet increased population driven by migration. There is separate allocation for the Humanitarian Program, and then the rest of the permanent program is split two thirds for skilled migration and one third for family migration. Because the permanent program is capped, the creation of any new places displaces other potential migrants.²⁵

The review was advised that the current goal of the Humanitarian Program is that around 60 percent of places should go towards UNHCR referrals. If large numbers of visas are granted to LEE as part of the Humanitarian Program this reduces the number of places available to, for example, refugees who are referred by the UNHCR as part of Australia's international responsibilities and distorts the balance of the program.

Afghan citizens are currently prioritised in the Humanitarian Program, with 5,326 visas (46.1 per cent of all offshore visas) granted to Afghan nationals in 2021–22.²⁶ This has reduced Australia's ability to resettle refugees from other parts of the world.

It was suggested to the Senate Committee and to this review that places for LEE should be provided in addition to the current Humanitarian Program cap. For example, in a submission to the review, Dr Claire Higgins suggest that places under any future LEE program should be additional to the annual ceiling or quota set for Australia's humanitarian program.²⁷

While this proposal is attractive, it is not without negative impacts. These additional places for LEE will still need to be found from elsewhere within the migration cap. For example, there might need to decrease the number of places for skilled migration, who provide a strong positive net effect of Australia's economy, or decrease the number of places or family migration which is a basic human right.²⁸ The main cost within the Humanitarian Program is government support associated with health and welfare supports. These extra places will also need to be funded – most humanitarian entrants requiring access to welfare and other services for a longer period than other migrants. The review was advised for the additional allocation for the Afghan cohort, \$656.3m was allocated over 4 years to support 16,500 places. This equates to approximately \$165m per year to support 4,125 places.

²⁵ Department of Home Affairs, unpublished briefing, December 2022

²⁶ Department of Home Affairs, Australia's Offshore Humanitarian Program: 2021-22

²⁷ Dr Claire Higgins, 20 January 2023, unpublished submission

²⁸ Department of Home Affairs, unpublished briefing, December 2022

Any proposed LEE program needs to balance Australia's moral obligation to individuals who are at risk because of their service to Australia, with the aims of Australia's migration program. The consequences of not getting this right are far reaching. If the risk threshold for accessing the program is too high, Australia will not be meeting its moral obligation which could also potentially result in no LEE wanting to work for Australia in the future. If the threshold is set too low, or if the program is open to extended family members, the numbers of LEE resettled could be at the expense of UNHCR refugees and could be damaging to Australia's reputation internationally.

Balancing the risk thresholds and numbers of eligible LEE in any future LEE program with Australia's moral obligations, its international reputation, the impact on other parts of Australia's migration program, and the cost to the economy is a matter of policy for the Government to decide. Robust decisions will also depend on accurate data forecasting the number of likely LEE applicants and their families, as well as their skill profiles. This will require better recordkeeping and forecasting than was apparent in Afghanistan.

WHERE MIGHT AUSTRALIA CONSIDER A LEE PROGRAM?

The terms of reference for this review require the review to:

Develop recommendations to ensure that in any future military engagements, the process relating to LEE is much clearer and can be implemented expeditiously.

Although this refers to 'future military engagements' it became apparent in discussions with senior officials that there would be a range of circumstances where Australia might conclude it had a moral responsibility to offer resettlement to at-risk individuals who had supported our mission. It is unlikely that any of these will involve extended ground conflict as in Afghanistan.

Not every crisis requires resettlement of LEE. The first response should be to support LEE in their own country. LEE programs would also likely not be contemplated where a LEE is at risk of harm because of security levels in a country unrelated to their employment, or in situations of natural disaster.

The following scenarios have been suggested as examples where Australia might consider offering resettlement to LEE who are at risk because of their assistance to Australia's mission:

- where there are changes in government and where new regimes are hostile to Australia
- where a country might be subject to hostile invasion
- where there are active insurgencies, hostile to the host government and Australia
- where Australia is engaged in armed conflict
- where local individuals are involved in supporting AFP operations in extreme high-risk environments
- where Australia has conducted aid or development programs relating to political participation, gender equity or human rights, where such programs are counter to the host government's ideology.

One or more of the agencies currently included in the instrument – DFAT, Defence or the AFP – could be an employing agency that would lead such a policy initiative.

Although responses by senior officials to the question, ‘Where *exactly* could this happen?’ varied a little, there was a high level of consistency and overlap in the responses with fewer than 10 discrete countries or regions readily identified. (It is not appropriate to name these countries in this unclassified report.)

DESIGN PRINCIPLES FOR A FUTURE LEE PROGRAM

The discussion above sets out a range of scenarios where a program *might be considered*. This review does not make any recommendations about when or where a LEE program *should be implemented*. That would be a matter of policy for the Australian Government to decide, having regard to the risk profile at the time, the costs, bilateral relations, and Australia’s migration program.

The review has concluded that the current system of assessment, certification, visa application and grant can only work in an effective way in a reasonable stable environment. Although the current system uses an instrument to define eligibility, it was clear from discussion with Home Affairs officials that other models may be appropriate depending upon the circumstances including administrative or legislative solutions.

The design of any LEE program would also necessarily depend on whether it was planned as an ongoing program in a relatively stable environment which could be addressed with orderly applications and processing (as in Afghanistan between 2013 and 2020) or whether it was a response to a crisis or emergency (as in Afghanistan in 2021).

This review does not attempt to re-design visa products and processes for LEE, but sets out below some of the design principles for programs learning for the lessons of Afghanistan. There can be no generic template: the approach would be required to be adapted for different scenarios.

1. The policy initiative should be led by the employing agency or agencies – DFAT, Defence or the AFP.

The scenarios set out above would require a whole-of-government response but this review proposes that the employing agency (currently DFAT, Defence or the AFP) would lead the policy initiative.

2. There should be a whole-of-government articulation of the aims of the program and how it will be delivered

This review has observed that there has not been a common interpretation of the aim of providing ‘priority processing’ for Afghan LEE applicants. This requirement has not been codified into processes and currently relies on goodwill. In a program involving multiple agencies, expectations of each agency should be clearly set out by Government.

3. Home Affairs should be responsible for the end-to-end processing

The current two-stage process causes delays, double handling and confusion and imposes an administrative burden on applicants. Although this review suggests that the employing

agency or agencies should lead the policy initiative, Home Affairs, as the Department with responsibility for the migration program and policy (and the agency with expertise in administrative decision-making and case management) should 'own' the end-to-end process in any future programs and be the single point of contact with the client.

Employing agencies including Defence, DFAT and the AFP should provide information and advice as required under arrangements set out in an MoU. The roles and responsibilities of each agency would need to be clear and reflected either in the Migration Regulations 1994 or an MoU.

This arrangement would require additional resources for Home Affairs but should be at no net additional cost to government.

4. There must be clear consistent eligibility criteria prioritised on risk

The risk threshold for considering resettlement is a policy decision for the Government. The eligibility criteria for a program should be based on that threshold. If the criteria are set out in an Instrument there should be guidelines as to its application. The criteria must be consistently applied.

5. A centralised record management system is required for recording identity, contact details, employment history and the status of individuals who might be eligible for priority resettlement

There should be a whole-of-government approach to keeping records of potentially at-risk locally engaged employees. It would be preferable if the administration of the system was the responsibility of one agency, with input from employing agencies. (As Home Affairs would be the principal user of the data, it might be appropriate for it to manage the records.) Any system would require strong protocols surrounding the collection, transfer, and storage of the information. Any references or letter of support provide to an individual should be provided only by a designated officer authorised for this role, follow a set template, and be registered centrally.

(In Afghanistan the inadequacy of identity documents and lack of biometric data collection facilities was problematic. Although the options of collecting biometric data on a voluntary basis, or pre-registering identities with Home Affairs were canvassed in discussions in this review, these processes could raise expectations of a resettlement program that might not eventuate, and would require very careful navigation of the host country's privacy laws. Although not recommended by this review, this could be considered on a case-by-case basis.)

6. The application process should be streamlined with decision-making at the appropriate level

Applicants should not have to complete multiple forms or provide the same information repeatedly. They should be given sufficient advice to provide as much information as possible with their initial application.

Decision making should be at departmental level to streamline the process and allow for proper internal review. Decision making at a local level is especially important in crisis situations.

7. The program should be as transparent as possible in the circumstances

The public announcement of a LEE program could send a signal to a host country about Australia's perceptions of its internal security situation. While a public statement of policy is preferable, there may be situations where LEE programs need to be conducted covertly to ensure that individuals can be removed to Australia in safety.

As a general rule, the following information should be available (in English and translated into local languages):

- Who is eligible.
- How individuals can apply.
- What documentation will be required.
- How long the process takes.
- What the possible outcomes are.
- What avenues of review are available.
- What other pathways to re-settlement in Australia are available.

8. The program should be subject to regular review

Any program should be reviewed to ensure it keeps pace and is 'fit for purpose' with the changing political and security environment in-country and subsequent demands for resettlement. Eligibility definitions should reflect any change in risk.

9. Proper crisis planning is essential

As noted above there is a small number of identifiable countries where a LEE program might be contemplated. This review suggests that existing bodies that are already tasked with crisis planning in these locations should include the safety of LEE who are at risk because of their support to Australia in their planning.

The review was advised that DFAT, Defence and other agencies complete Crisis Preparedness Assurance Team (CPAT) visits to assist Australia's overseas missions where there is an identified high risk, and preparedness assurance is required to ensure that Australia can respond appropriately to a crisis. The CPAT's focus is on crisis command, control, coordination, and it makes a range of recommendations to Post and Canberra to better prepare for crises in the identified country.

The review was advised that each Post has a Crisis Action Plan which is prepared in consultation with Canberra. These Crisis Action Plans are renewed each year and the safety of staff is paramount. The Crisis Action Plan is a living document and can be tailored as required – each plan is bespoke to the country.

The Inter-departmental Emergency Taskforce is a whole-of-government body usually chaired by DFAT which makes recommendations to the Government on a crisis response.

In addition to logistics, planning should include:

- Understanding the composition of the at-risk cohort
- Identification of individual LEE – requires good recordkeeping
- Current information about how to communicate with LEE
- Identification by Home Affairs of the relevant visa pathway and application processing requirements
- Ensuring biometric and visa screening capability is available if required
- Information translated into local languages
- Providing Australian staff with clear scripts and guidance
- Considering relevant intermediaries and what assistance and information they might provide.²⁹

Recommendation 8

Any future program for the resettlement of locally engaged employees in Australia should be guided by the following broad principles:

1. The policy initiative should be led by the employing agency or agencies – currently the Department of Foreign Affairs and Trade, the Department of Defence, and the Australian Federal Police.
2. There should be a whole-of-government articulation of the aims of the program and how it will be delivered.
3. The Department of Home Affairs should be responsible for the end-to-end processing.
4. There must be clear consistent eligibility criteria prioritised on risk.
5. A centralised record management system is required for recording identity, contact details, employment history and the status of individuals who might be eligible for priority resettlement.
6. The application process should be streamlined with decision-making at the appropriate level.
7. The program should be as transparent as possible in the circumstances.
8. The program should be subject to regular review.
9. Proper crisis planning is essential.

²⁹ GAP Veteran and Legal Services also suggested that intermediaries with migration law skills and local knowledge and information should be better utilised in future crises.

Appendix A: Terms of reference

Independent Review into the Afghanistan Locally Engaged Employee (LEE) Program Terms of Reference

Background

Under legislative instrument IMMI 12/127, Australia offers prioritised access to humanitarian visas to eligible Locally Engaged Employees (LEE) at risk of harm due to their employment in support of Australia's mission in Afghanistan.

The Department of Foreign Affairs and Trade (DFAT) manages the process for the certification of Afghan nationals who were employed with DFAT and the Department of Defence manages the process for those who were employed with Defence. Those certified as eligible are provided facilitated lodgement of visa applications via email and priority processing of their humanitarian claims while in their country of origin by the Department of Home Affairs.

On 21 January 2022, the Senate Foreign Affairs, Defence and Trade References Committee's interim report on Australia's Engagement in Afghanistan recommended a full and thorough review of the operation of the Afghan LEE program to analyse and appropriately address concerns raised in evidence to the committee and ensure that programs of this nature are improved.

Objective

The Ministers for Defence, Foreign Affairs and Immigration and Citizenship and Multicultural Affairs will jointly appoint an independent reviewer to:

1. Consider whether legislative instrument IMMI 12/127 is fit for the purpose of fulfilling its original intent or should be amended.
2. Determine whether the LEE application and appeals process was appropriate and implemented effectively.
3. Assess whether departmental resourcing was sufficient for processing LEE certifications and visas.
4. Consider whether record keeping relating to local nationals who provide assistance to Australia in areas of conflict and instability was appropriate.
5. Develop recommendations to ensure that in any future military engagements, the process relating to LEE is much clearer and can be implemented expeditiously.

Note that the original intent as outlined in 2012 read:

Australia will offer resettlement to Australia to eligible locally engaged Afghan employees at risk of harm due to their employment in support of Australia's mission in Afghanistan. This reflects Australia's view of its moral obligation to current and former employees who have provided valuable support to Australia's efforts in Afghanistan.

In 2008, the Government instituted a similar policy to facilitate resettlement to Australia of locally engaged Iraqi employees and their family members who supported Australia's mission in Iraq. Consistent with this approach, the Government will offer at-risk Afghan employees, and their direct family members, the opportunity to resettle in Australia.

Process

The independent reviewer will undertake appropriate consultation and consider all relevant material necessary to inform the findings of the review.

The independent reviewer will provide a report to the Ministers for Defence, Foreign Affairs and Immigration and Citizenship and Multicultural Affairs in early 2023. The report will outline the findings of the review and provide sequenced, actionable recommendations for reform.

DFAT will provide a secretariat function to support the review.

Appendix B: Legislative instrument IMMI 12/127

Migration Regulations 1994

CLASS OF PERSONS

(Paragraphs 200.211(1A)(a) and 201.211(1A)(a))

I, *CHRIS BOWEN*, Minister for Immigration and Citizenship, acting under paragraphs 200.211(1A)(a) and 201.211(1A)(a) of Schedule 2 to the *Migration Regulations 1994* ('the Regulations'), having consulted as required under subclauses 200.211(1B) and 201.211(1B):

1. REVOKE Instrument Number IMMI 09/027 signed on 8 May 2009, specifying classes of persons for paragraphs 200.211(1A)(a) and 201.211(1A)(a) of Schedule 2 to the Regulations; AND
2. SPECIFY all non-citizens who have been assessed to be at significant risk of harm as a result of their employment with:
 - (a) the Department of Foreign Affairs and Trade (DFAT) in the Australian Embassy in Baghdad in Iraq since 1 May 2003; or
 - (b) between 17 March 2003 and 15 May 2009:
 - (i) were employed in a private civilian capacity by the Australian Defence Force (ADF) in Iraq; or
 - (ii) were employed or worked collaboratively in a private civilian capacity with the Australian Defence Force in Iraq with the:
 - (i) Overwatch Battle Group (West); or
 - (ii) Australian Army Training Teamand who have:
 - (iii) ceased employment with, or who have ceased working collaboratively with, the Australian Defence Force; and
 - (iv) sought certification from the Minister of Defence on or before 15 May 2009; and
 - (v) who have applied for a class XB (Refugee and Humanitarian) visa on or before 31 December 2009; or who
 - (c) any time after 15 May 2009 have been employed in a private civilian capacity in the Australian Defence Force in Iraqas a class of persons for the purposes of subclauses 200.211(1A) and 201.211(1A).

3. SPECIFY that for the purpose of subclauses 200.211(1A) and 201.211(1A) a class of persons are all non-citizens employed with the Department of Foreign Affairs and Trade (DFAT), the Australian Defence Force (ADF), the Australian Agency for International Development (AusAID) or the Australian Federal Police (AFP):
- (a) who have been assessed as being at significant individual risk of harm as a result of their support to Australia's whole of Government mission in Afghanistan due to their role, location, employment period and currency of employment; including:
 - (i) interpreters in Uruzgan Province in positions funded by DFAT; or
 - (ii) interpreters or instructors employed with the ADF or AFP; or
 - (iii) project, facilities management and advisory staff in the Provincial Reconstruction Team in Uruzgan on behalf of AusAID and/or DFAT; or
 - (iv) a person who is able to satisfy the relevant agency Minister that exceptional circumstances exist for that Minister to certify that the non-citizen is in that class of persons; and
 - (b) are not, or were not, an Afghan government or military official or employed in a private security capacity; and
 - (c) are not nationals or citizens of another country other than Afghanistan; and
4. A class of persons under paragraph 3 must have sought to be certified by the relevant agency Minister under paragraph 200.211(1A)(b) or 201.211(1A)(b):
- (i) within six months of ceasing employment; or
 - (ii) in the case of a locally engaged employee who has ceased employment on or after 1 January 2012, before 30 June 2013; or
 - (iii) where the relevant agency Minister is satisfied that exceptional circumstances exist – at any time.

This instrument, IMMI 12/127, commences on 1 January 2013.

Dated 14 December 2012

CHRIS BOWEN

Minister for Immigration and Citizenship

Appendix C: Consultation

Meetings were held with the following individuals and organisations, some of whom also provided further information in writing.

MINISTERS

1. The Hon Richard Marles MP, Deputy Prime Minister, Minister for Defence
2. Senator the Hon Penny Wong, Minister for Foreign Affairs
3. The Hon Andrew Giles MP, Minister for Immigration, Citizenship and Multicultural Affairs

EXTERNAL STAKEHOLDERS

4. Ms Carina Ford and Mr Matthew Wood, Law Council of Australia
5. Mr Jason Scanes, Forsaken Fighters
6. Dr Kay Danes OAM and Mr Glenn Kolomeitz, GAP Veteran and Legal Services
7. [REDACTED] former Kabul security guard and interpreter
8. [REDACTED] former Kabul security guard and interpreter
9. Name withheld, former contracted facilities manager at the Australian Embassy in Kabul

CURRENT AND FORMER AUSTRALIAN GOVERNMENT OFFICIALS

DFAT

10. Mr Andrew Walter First Assistant Secretary Regulatory and Legal Division
11. Mr Gary Cowan, First Assistant Secretary North and South Asia Division
12. Mr Marc Innes-Brown, First Assistant Secretary Middle East, Africa and Afghanistan Division, and Mr Steven Barraclough, Assistant Secretary Afghanistan Branch
13. Ms Ciara Spencer, First Assistant Secretary International Security Division
14. [REDACTED] former First Assistant Secretary, Afghanistan Assisted Departures Team
15. Mr Ian Biggs, Ambassador for Arms Control and Counter-Proliferation and former Special Representative for Afghanistan and Pakistan (2020-21), Assistant Secretary, Pakistan, Afghanistan and Central Asia Branch (2019-21) and Afghanistan and Regional Branch (2021), and A/g First Assistant Secretary, South and West Asia Division (2019-20)
16. Mr Geoff Tooth, former Australian Ambassador to Afghanistan and former Assistant Secretary Afghanistan Branch
17. Ms Lynn Bell, Assistant Secretary [REDACTED] Director, and [REDACTED] Crisis Preparedness and Management Branch

18. [REDACTED] former Australian Ambassador to Afghanistan and former Assistant Secretary, Afghanistan Assisted Departures Team
19. [REDACTED] A/Assistant Secretary Public Interest Law Branch
20. [REDACTED] former Acting Deputy Head of Mission, Australian Embassy Kabul
21. [REDACTED] A/Assistant Secretary, and [REDACTED], Director, People Policy Branch
22. [REDACTED] Afghanistan Assisted Departures Team
23. [REDACTED] former Australian Embassy official in Kabul (2020-21) and DFAT Political Officer in Tarin Kot (2009-10, 2013)
24. [REDACTED] former development officer employed at the Australian Embassy in Kabul
25. Name withheld, former development officer employed at the Australian Embassy in Kabul

Defence

26. Mr Hugh Jeffrey, A/Deputy Secretary Strategic Policy and International, and Mr Tom Menadue, Assistant Secretary Global Partners
27. Major General Greg Bilton AO, Chief of Joint Operations
28. Mr Steven Moore, First Assistant Secretary Defence Industry
29. Ms Alex Kelton, First Assistant Secretary International Policy and Agreements
30. Commodore Air Vice Marshal Stephen Chappell, Head Military Strategic Commitments, and Mr Don Dezentje, Director-General Military Strategic Commitments
31. Ms Anna Rudziejewski, General Counsel, [REDACTED] Director Legal Advice, and [REDACTED] former legal desk officer, Defence Legal Division
32. [REDACTED] Director, and [REDACTED] Assistant Director, Afghanistan, Africa, Middle East and Peacekeeping Section
33. [REDACTED] former Director Afghanistan, and [REDACTED] former Afghan LEE policy officer, International Policy Division

Home Affairs

34. Ms Stephanie Foster PSM, Associate Secretary Immigration and Mr Andrew Kiley A/First Assistant Secretary Refugee, Humanitarian and Settlement Division
35. Mr Andrew Kefford PSM, Deputy Secretary Social Cohesion and Citizenship
36. Ms Alison Larkins PSM, Head, Migration Reform Taskforce
37. Mr Adam Meyer, First Assistant Secretary Intelligence Division
38. Mr David Arnold, Assistant Secretary Settlement Program Operations
39. Mr Michael Willard, First Assistant Secretary Immigration Programs

40. Ms Sally Hill, Assistant Secretary Legislation, [REDACTED] Principal Legal Officer, Migration and Citizenship Regulations, and [REDACTED] A/Principal Legal Officer, Instruments Drafting
41. Mr David Gavin Assistant Secretary Compliance and Community Protection
42. Ms Sally Pfeiffer, Assistant Secretary Countering Foreign Interference Partnerships Branch (former Assistant Secretary Humanitarian Program Operations Branch)
43. Ms Jill Ogden, Assistant Secretary Humanitarian Program Operations
44. Ms Kavita Kewal, Assistant Secretary, [REDACTED] Senior Director, and Assistant Director [REDACTED] Identity and Biometrics Policy and Strategy Branch
45. Mr Neil Horne, Chief Superintendent Australian Border Force International Operation and Coordination
46. [REDACTED] former Director Offshore Humanitarian Program
47. [REDACTED] Regional Director Mekong

Other Australian Government agencies

48. Professor Andrew Campbell, Chief Executive Officer, and [REDACTED] Research Program Manager, Australian Centre for International Agriculture Research
49. Ms Catherine Burn, Acting Director-General, Australian Secret Intelligence Service
50. Ms Emma Cotterill, Senior Assistant Ombudsman, Investigations Branch, Office of the Commonwealth Ombudsman
51. [REDACTED] Australian Federal Police

WRITTEN SUBMISSIONS

52. [REDACTED] Kaldor Centre for International Refugee Law, University of New South Wales.
53. [REDACTED] Department of Politics, University of York, United Kingdom.