



Refugee Council
of Australia

MIGRATION AND MARITIME POWERS LEGISLATION AMENDMENT (RESOLVING THE ASYLUM LEGACY CASELOAD) ACT 2014: WHAT IT MEANS FOR ASYLUM SEEKERS

The *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*, passed in December 2014, has made sweeping changes to Australia's processes for managing asylum seeker claims and providing protection to refugees who arrive in Australia without visas. This briefing paper summarises the key changes and their implications for people seeking protection.

Please note that this briefing paper is intended as a general overview only. If you are seeking asylum in Australia and are concerned about how these changes may affect you, we suggest that you seek advice from a registered migration agent.¹

Expansion of maritime powers

The Minister for Immigration has new powers to detain people at sea (both within Australian waters and on the high seas) and to transfer them to any country or a vessel of another country – even if Australia does not have that country's consent to do so. These powers can be exercised without consideration of Australia's non-*refoulement* obligations (that is, without assessing whether the people affected may be persecuted or seriously harmed in the country to which they are being sent), the law of the sea or any other international obligations. The exercise of these powers is not subject to the judicial review or the rules of natural justice and certain determinations are not subject to publication under the *Legislative Instruments Act 2003*, meaning that they will not be made public or face scrutiny by Parliament.

These new powers would allow the Minister to hold asylum seekers in arbitrary, indefinite and potentially incommunicado detention at sea and forcibly transfer them to countries where they could face persecution and other forms of serious harm, without any scrutiny by the public, courts or Australian Parliament. They grant a level of authority to the Minister which is well in excess of what is considered permissible under international maritime and human rights treaties.

Reintroduction of Temporary Protection Visas

Asylum seekers who arrive in Australia without valid visas (whether by boat or by plane) or who were not immigration cleared upon their last arrival in Australia are no longer eligible for permanent Protection Visas. If they are found to be refugees, they will instead be granted a Temporary Protection Visa (TPV) which will be valid for up to three years, after which time they must reapply for protection and have their

¹ Organisations which specialise in providing advice to asylum seekers include the Refugee Advice and Casework Service (<http://www.racs.org.au>), Refugee and Immigration Legal Centre (<http://www.rilc.org.au>), Refugee and Immigration Legal Service (<http://www.rails.org.au>) and CASE for Refugees (<http://caseforrefugees.org.au>). You can also find details of migration agents in your local area through <https://www.mara.gov.au>.

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claims reassessed. Applications for permanent Protection Visas which have not yet been finally determined and which were lodged by people who are now ineligible for permanent protection will now be treated as applications for TPVs.

TPV holders do not have the same entitlements as permanent Protection Visa holders. The table below summarises the key differences between the two types of visas.

	Permanent Protection Visa	Temporary Protection Visa
Education	Same entitlements as other permanent residents at all levels	Access to primary and secondary education on the same basis as permanent residents; can access tertiary education but ineligible for Federal Government higher education loans and Commonwealth-supported places
Employment	Permission to work and access to employment support services	Permission to work and access to employment support services
English language tuition	Access to the Adult Migrant English Program and Skills for Education and Employment program	Access to the Skills for Education and Employment program but not the Adult Migrant English Program
Family reunion	Eligible to sponsor family members for resettlement (with restrictions for people who arrived by boat or without visas)	Ineligible to sponsor family members for resettlement
Freedom of movement	Freedom of movement within Australia; can leave and re-enter Australia without forfeiting visa	Freedom of movement within Australia but must notify Department of Immigration of any change of address within 28 days; can only travel overseas if there are "compassionate or compelling circumstances" necessitating travel and only with written approval from Minister for Immigration
Health care	Access to Medicare	Access to Medicare
Income support	Access to full range of social security benefits on the same basis as other permanent residents, subject to relevant eligibility requirements	Access to Special Benefit, Family Tax Benefit and a range of ancillary income support payments, subject to relevant eligibility requirements
Residency	Immediate permanent residency with opportunity to apply for citizenship after four years	Visa valid for up to three years; ineligible to apply for any kind of permanent visa or citizenship
Settlement services	Access to Humanitarian Settlement Services (unless the person lived in the Australian community prior to the visa grant) and Settlement Grants services	No access to settlement services

TPVs were previously in place in Australia between 1999 and 2007. During this time, the combined effects of family separation, lack of access to adequate support services and prolonged uncertainty and insecurity stemming from temporary status had serious negative impacts on the health, wellbeing and settlement outcomes of TPV holders. A 2006 study by mental health experts, for example, found that refugees on TPVs experienced higher levels of anxiety, depression and post-traumatic stress disorder

than refugees on permanent Protection visas, even though both groups of refugees had experienced similar levels of past trauma and persecution in their home countries.²

It is expected that similar negative impacts will be seen amongst TPV holders under the new visa regime. This is of particular concern given that, in contrast to the previous TPV regime, there is no clear pathway to permanent residency under the new regime. As such, TPV holders who are in ongoing need of protection may find themselves trapped in a state of being “permanently temporary”, never having the opportunity to enjoy the security of permanent residency, fully re-establish their lives and reach their potential.

Introduction of Safe Haven Enterprise Visas

The Safe Haven Enterprise Visas (SHEV) is a new visa subclass which is designed “to provide protection and to encourage enterprise through earning and learning while strengthening regional Australia”. SHEVs will be valid for up to five years, during which time the visa holder must work or study in a specified regional area. Asylum seekers who arrive in Australia without valid visas (whether by boat or by plane), who were not immigration cleared upon their last arrival in Australia and/or who previously held a TPV, a Temporary Humanitarian Concern Visa or a Temporary Safe Haven Visa are eligible to apply for a SHEV.

If a SHEV holder does not receive any social security benefits for a period totalling 42 months (which need not be continuous) and/or is engaged in employment or full-time study in the specified regional area, they may be eligible to apply for a range of general migration visas, such as family, skilled or student visas (but not humanitarian visas). SHEVs thus have the potential to provide a pathway to permanent residency for refugees who are ineligible for permanent Protection Visas. However, it is unlikely that the vast majority of these refugees will be able to satisfy the strict eligibility criteria attached to most general migration visas. Indeed, the previous Minister for Immigration stated that SHEVs would offer “a very limited opportunity” for permanent residency and that there would be “a very high bar to clear” for SHEV holders attempting to apply for permanent visas.³

Introduction of fast-track assessment process

Asylum seekers who arrived in Australia by boat between 13 August 2012 and 1 January 2014 and have not been transferred offshore will now have their cases assessed through a “fast-track” process. Asylum seekers whose claims are rejected by the Department of Immigration will no longer be able to appeal to the Refugee Review Tribunal. Instead, their claims may be referred to a new body called the Immigration Assessment Authority. The differences between the two bodies are summarised below.

	Refugee Review Tribunal (RRT)	Immigration Assessment Authority (IAA)
Purpose	To provide a mechanism of review that is fair, just, economical, informal and quick	To provide a mechanism of limited review that is efficient, quick, free of bias and consistent with the IAA’s rules of conduct
Independence	Independent of the Department	Independent of the Department
Application process	Asylum seekers apply directly to RRT	Cases referred to IAA by the Department; asylum seekers cannot apply directly

² Momartin, S., Steel, Z., Coello, M., Aroche, J., Silove, D.M. & Brooks, R. (October 2006). 'A comparison of the mental health of refugees with temporary versus permanent protection visas', Medical Journal of Australia, vol. 185, no. 7, pp. 357-361, available at <https://www.mja.com.au/journal/2006/185/7/comparison-mental-health-refugees-temporary-versus-permanent-protection-visas>

³ Minister for Immigration and Border Protection Scott Morrison, press conference at Parliament House, Canberra, 25 September 2014 <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F3414551%22>

	Refugee Review Tribunal (RRT)	Immigration Assessment Authority (IAA)
Eligibility for review	Protection Visa applicants who have been refused by the Department and Protection Visa holders whose visas have been cancelled by the Department	Asylum seekers subject to the fast-track assessment process whose applications for protection have been refused by the Department, excluding people who, in the opinion of the Minister, have made “manifestly unfounded” claims (e.g. claims that have no plausible or credible basis, cannot be substantiated by objective evidence or are made for the sole purpose of delaying or frustrating removal from Australia), provided a false document in support of their application without a reasonable explanation or previously had their claims rejected in Australia, by another country or by UNHCR
Hearings	Standard practice is to hold hearings which provide asylum seekers with the opportunity to give evidence and present arguments	Does not hold hearings but may invite asylum seekers to provide or comment on new information at an interview or in writing
Consideration of new information	Can consider new information which was not provided to the departmental decision-maker	Required to review decisions “on the papers”, meaning that it can only consider information that was used by the departmental decision-maker and cannot consider new information other than in exceptional circumstances; can only consider new information if it was not and could not have been provided to the departmental decision-maker, or if it is credible personal information which was not previously known and, had it been known, may have affected the consideration of the person’s claims

While fast-track processing currently applies only to the asylum seekers in the “legacy caseload”, the *Legacy Caseload Act* allows for fast-track processing to be extended to other groups of asylum seekers (such as people who arrive by plane without visas) through a legislative instrument which can be disallowed by either house of Parliament.

Through denying asylum seekers the opportunity to put forward or respond to information relevant to their claims and, in some cases, blocking access to review altogether, the fast-track process will create a much higher risk of inaccuracy in decision-making. This in turn increases the danger of asylum seekers being erroneously returned to situations where they could face persecution or other forms of serious harm.

Erosion of safeguards against *refoulement*

Under Section 198 of the *Migration Act*, which sets out the circumstances in which non-citizens who do not have valid visas are subject to mandatory removal from Australia, people can now be deported irrespective of whether Australia has non-*refoulement* obligations towards them. As such, even if an assessment has been conducted which indicates that a person would face a real risk of persecution or other forms of serious harm if deported, they must be removed from Australia if they fall into one of the categories set out in Section 198.

The erosion of safeguards against non-*refoulement* is of particular concern in light of the introduction of fast-track processing and the new statutory assessment process for asylum claims (see below). As a result of these changes, Australia's processes for assessing asylum claims are now far less robust and inaccurate decision-making far more likely, which in turn increases the risk of asylum seekers being erroneously returned to danger. Through allowing Australia's non-*refoulement* obligations to be disregarded, the changes to Section 198 remove yet another critical safeguard which may otherwise have prevented people from being returned to persecution or serious harm.

Redefinition of international obligations

Most references to the United Nations Convention Relating to the Status of Refugees (the Refugee Convention) have been removed from the *Migration Act 1958* and replaced with the Government's own interpretation of Australia's international obligations towards refugees. All people seeking asylum in Australia, regardless of how they arrived or whether they held valid visas on arrival, will now have to satisfy these redefined criteria in order to be eligible for refugee status.

While some of the reinterpretations are broadly consistent with Australia's obligations under the Refugee Convention, several are out of step with the Convention and international guidelines on the assessment of refugee claims. Of particular concern are new requirements which set unreasonably high thresholds for the grant of refugee status, as they will make it far more difficult for people to secure protection in Australia even if they have genuine and compelling claims. The most significant changes are summarised below.

Internal relocation

Under the Refugee Convention, a person is entitled to refugee status if they have a "well-founded fear of being persecuted" in their country of origin and are "unable or, owing to such a fear, unwilling to avail [themselves] of the protection of that country". The Refugee Convention does not require that this fear of persecution extend to the whole territory of their country of origin, nor does it require people to exhaust all options for finding protection in their own country before they can seek asylum elsewhere.⁴

Nonetheless, many countries (including Australia) apply an "internal relocation" test when assessing applications for refugee status, which considers whether a person could avoid persecution by relocating to another part of their country of origin. Under Australia's previous refugee status determination system, the internal relocation requirement only applied if it was reasonable to expect a person to relocate, that is, they would be able to relocate without placing themselves in danger or experiencing significant hardship. For example, it would not be considered reasonable for an asylum seeker to relocate to an area which is uninhabited, where they could not legally own land or property or where they would have no means of supporting themselves.

Under the new assessment process, asylum seekers will only be eligible for protection in Australia if their fear of persecution extends to the entire territory of their country of origin. While decision-makers will still be required to consider whether a person can safely and legally relocate to another area of their country of origin, they will not be required to consider whether it is reasonable to expect the person to relocate. As such, even if an asylum seeker could only avoid persecution by moving to an area where they have no means of subsistence or would experience significant hardship, they will still be denied protection in Australia.

Effective protection

Previously, a person was not entitled to refugee status in Australia if the government in their country of origin was able to provide them with effective protection. Under the new assessment process, a person will not be entitled to refugee status in Australia if the government or another party or organisation

⁴ United Nations High Commissioner for Refugees, *Guidelines on International Protection: Internal Flight or Relocation Alternative*, <http://www.unhcr.org/3f28d5cd4.html>

(including an international organisation) that controls the country or a substantial part of the country can provide them with effective protection. In order for this provision to apply, the government, party or organisation must be willing to offer protection, the person must be able to access it and the protection must be durable. Protection provided by a government should consist of an appropriate criminal law, a reasonably effective police force and an impartial judicial system.

These new “effective protection” requirements do not allow for a realistic consideration of a person’s protection needs in all circumstances. While non-government groups do provide protection and assistance to refugees in many countries, they cannot provide the same forms of protection as a government. They cannot, for example, grant a person legal status or a visa, provide permission to access government services or prevent deportation against the wishes of a government. Furthermore, non-government groups are not bound by international treaties in the same way as governments, meaning that they do not have the same legal responsibilities nor are they subject to the same accountability mechanisms as governments.

Additionally, the mere existence of appropriate criminal law, a reasonably effective police force and an impartial judicial system in a particular country does not necessarily mean that the country can provide effective protection from persecution. For example, a police force may be “reasonably effective” in most cases but may fail to provide effective protection from certain crimes (such as rape or domestic violence), to certain individuals (such as women, people who are same-sex attracted or members of a minority religious or ethnic group) or in certain circumstances (such as in a conflict situation).

Modification of behaviour

According to the new definitions, a person will not be entitled to refugee status in Australia if they could take reasonable steps to modify their behaviour so as to avoid persecution. However, they will not be required to modify their behaviour if doing so would conflict with a characteristic that is fundamental to their identity or conscience, or require them to: conceal an innate or immutable characteristic; alter or conceal their religious or political beliefs; conceal their true race, ethnicity, nationality or country of origin; conceal a physical, psychological or intellectual disability; enter into a forced marriage or accept the forced marriage of a child; or alter or conceal their sexual orientation, gender identity or intersex status.

While the new “modification of behaviour” requirement includes significant exemptions, it provides no specific examples of situations in which a person *would* be expected to modify their behaviour so as to avoid persecution. It is not clear, for instance, whether expressions of an individual’s personality would be considered fundamental to their identity and conscience. There is a risk that this new requirement could result in the denial of refugee status to people who are at significant risk of harm or face undue restrictions on their freedom which, if based on other grounds, would entitle them to refugee status.

Definition of social group

Under the Refugee Convention, a person is entitled to refugee status if they have a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion”. The fourth and broadest category, “membership of a particular social group”, has been redefined. To be considered a member of a “social group”, a person must have (or be perceived to have) a characteristic which is shared by each member of that group. This characteristic must be either: innate or immutable; so fundamental to a person’s identity or conscience that they should not be forced to renounce it; or something that distinguishes the group from society. The characteristic cannot be a fear of persecution.

This definition is broadly consistent with the United Nations High Commissioner for Refugees’ guidelines on the applicability of the “social group” category⁵ and existing case law in Australia.

⁵ United Nations High Commissioner for Refugees, *Guidelines on International Protection: Membership of a particular social group*, <http://www.unhcr.org/3d58de2da.html>

Depending on how this definition is interpreted, however, it could potentially exclude some groups at risk of persecution. It is unclear, for example, whether being a member of a particular profession (such as journalism) would be considered a characteristic which is fundamental to a person's identity or conscience or something that distinguishes a person from the rest of society.

Reclassification of children of asylum seekers who arrived by boat

Children born in Australia or a "regional processing country" (Nauru or Papua New Guinea) whose parents arrived as asylum seekers by boat are now considered to be "transitory persons" and "unauthorised maritime arrivals" under the *Migration Act 1958*. As such, they are now subject to the same policies and restrictions which apply to asylum seekers who arrived by boat, including offshore processing and denial of access to permanent protection in Australia. This change applies retrospectively, meaning that it applies to children who were born before the *Legacy Caseload Act* came into effect. However, a number of the children affected by this change who would otherwise have been subject to offshore processing will have their claims processed in Australia (see below). There has been no change to citizenship eligibility criteria for stateless children who were born in Australia (including those whose parents arrived in Australia by boat).

Introduction of Ministerial powers to cap permanent Protection Visas

The Minister for Immigration now has the power to place a statutory limit on the number of permanent Protection Visas which can be granted in a specified financial year and to suspend the processing of Protection Visa applications at any time. These new powers could result in asylum seekers being forced to remain in limbo for extended periods if processing of their claims is suspended or if they are recognised as refugees after the visa cap is reached. The Minister will not have the power to place a statutory limit on the number of TPVs or SHEVs which can be granted in a particular financial year.

The Minister also has the power to specify the minimum number of permanent Protection Visas and offshore Refugee and Humanitarian visas which are to be granted in a specified financial year, through a legislative instrument which can be disallowed by either house of Parliament. The Minister is required to take all reasonably practicable measures to ensure that the minimum number of visas is granted.

In addition, the 90-day timeframe for deciding Protection Visa applications has been removed. The Department of Immigration and the Refugee Review Tribunal are no longer required to report on whether decisions on Protection Visa applications were made within a specific timeframe.

Other policy changes

In seeking to secure the passage of the *Legacy Caseload Act*, the Australian Government undertook to implement a number of other policy changes which were not stipulated in the *Act* itself. While one of these changes (the increase in the size of the Refugee and Humanitarian Program) has been implemented by way of a legislative instrument using new powers introduced by the *Legacy Caseload Act*, all could have been implemented under existing legislation without the *Act* having been passed. The key changes pledged by the Government are summarised below.

Release of children from detention: The children and families detained indefinitely on Christmas Island who had arrived by boat after 19 July 2013 (and were thus liable to be transferred offshore for processing of their claims) are to be released from detention and will have their claims processed in Australia. They were moved from Christmas Island to the Bladin detention facility in Darwin in December 2014. The Government has pledged that all children will be released from detention by the early months of 2015.

Some children born in Australia to remain: Thirty-one children born in Australia whose parents arrived as asylum seekers by boat and whose status was redefined by the *Legacy Caseload Act* will be permitted to remain in Australia and have their claims processed here rather than being transferred offshore.

Extension of work rights to asylum seekers: Asylum seekers who arrived in Australia by boat, were subsequently released from detention into the community on Bridging Visas, are awaiting an assessment of their protection claim and do not currently have the right to work may now be eligible for the grant of a new Bridging Visa with work rights.⁶ As permission to work cannot be extended to these asylum seekers without the Minister's personal intervention,⁷ it is expected to take some time before the all of the people affected by this policy change will be able to work.

Refugee and Humanitarian Program increase: A legislative instrument has been passed by Parliament which stipulates the minimum number of visas to be made available under the Refugee and Humanitarian Program up until the 2018-19 financial year. The Program will remain static at 13,750 places for the 2015-16 and 2016-17 financial years before increasing to 16,250 places in 2017-18 and finally 18,750 places in 2018-19.⁸

⁶ <http://www.immi.gov.au/FAQs/Pages/i-am-an-illegal-maritime-arrival-on-a-bridging-visa-e-am-i-eligible-for-work-rights.aspx>

⁷ <http://www.immi.gov.au/FAQs/Pages/i-am-an-illegal-maritime-arrival-on-a-bridging-visa-e-when-will-i-be-allowed-to-work.aspx>

⁸ Department of Immigration and Citizenship (2014). *Australia's Humanitarian Programme 2015-16 and Beyond*, <http://www.immi.gov.au/pub-res/Documents/discussion-papers/humanitarian-programme-2015-to-2016.pdf>, p. 4