

Fact Sheet: Legal definitions of “refugee” and “complementary protection”

This fact sheet explains some parts of the law about who is a refugee and what is “complementary protection”. This fact sheet does not explain all parts of the law. This fact sheet explains the law that applies to visa applications made on or after 16 December 2014.

New definition of a ‘refugee’

The Migration Amendment (Resolving the Asylum Legacy Caseload) Act created new sections 5H-5M which define the terms ‘refugee’ and ‘well-founded fear of persecution’. Some of these provisions codify existing case law and some provisions change existing law.

Section 5H – Definition of ‘refugee’

A refugee is a person who has a well-founded fear of persecution in their country of nationality or, if they are stateless, their country of former habitual residence.

What is the country or countries relevant to your case?

- If you have a nationality, it is your country of nationality.
- Do you have two nationalities? Get advice from a migration agent.
- If you are stateless, in most cases, it is a country where you have lived in the past.

Sections 91N-91Q – Dual nationality

A person who is a national of two or more countries cannot make a valid application for a visa unless the Minister thinks it is in the public interest to do so, including if the Minister thinks the person would not be able to access effective protection in the countries.

What is a well-founded fear of persecution?

Section 5J(1)(a) – Convention nexus

Subjective fear of being persecuted for one of 5 reasons:

- Nationality
- Ethnicity
- Religion
- Political opinion
- Membership of a ‘particular social group’.

The reason must be ‘the essential and significant reason’ for the persecution (s5J(4))

Section 5L – Particular social group

A ‘particular social group’ is defined as a group where each member of the group has a shared characteristic, and that characteristic is innate or immutable (something that can’t be changed), or something that is fundamental to their identity or conscience that they should

not be forced to renounce it, or something that distinguishes the group from other people in society.

Section 5J(5) – Serious harm

The persecution must involve ‘serious harm’. Serious harm may include:

- Significant physical harm or physical harassment
- Threats to your life or freedom
- Your capacity to subsist is threatened because of significant economic hardship, or denial of access to basic services, or denial of the ability to earn a livelihood of any kind
- Serious psychological harm.

The persecution must involve ‘systematic and discriminatory conduct’ (s5J(4))

What do you fear will happen to you if you go back to that country in the future?

It is important to describe every different type of harm that could happen to you in the future, who would do it do you, and what would be the reason for the harm.

Often it is difficult to know what will happen in the future, but it is important that you give as many details as possible about what you think might happen and why.

If you fear more than one type of harm and you should describe all types of harm.

Family groups – If you are applying as a family, you should describe all the different types of harm that could happen to each individual family member, including children. Different family members can have different fears of harm.

Who will harm you?

Give specific details of all the people who you think will harm you. For example, if you fear harm from the government, specify which sections of the government. If you fear harm from a militant or religious group, specify the name of the group. If you fear harm from individual people, specify their names.

Section 5J(1)(b) - Objective factors

There is a real chance that the persecution would happen.

Is there a ‘real chance’ that the harm will happen to you?

There must be good reasons for believing that the harm will happen to you in the future.

How likely is it that the harm will happen to you in the future? How do you know that it will happen to you?

- Has it happened to you in the past?
- Have you seen or heard of it happening to someone else like you?
- Do you have any evidence that it will happen to you?
- Are there any news or research reports which support what you say?
- Was there a period of time that you lived at home and weren’t harmed? If so, why weren’t you harmed during that time?

Section 5J(1)(c) - Relocation

The real chance relates to all areas of a receiving country.

Would you be safe in any other part of your country?

The definition of a refugee says that the risk of harm must exist in all parts of your country, not just your home area or areas where you lived before coming to Australia. If there is another part of your country that you could safely move to where you would not be harmed, then you may not be eligible for protection.

Section 5J(2) – State protection

A person does not have a well-founded fear if effective protection measures are available in a receiving country.

‘Effective protection measures’ are available if the State or a party or organisation, including an international organisation, that controls the State or a substantial part of the State, is willing and able to offer effective protection.

A State, party or organisation is taken to be able to offer protection if:

- (a) The person can access protection
- (b) The protection is durable
- (c) There is an appropriate criminal law, a reasonably effective police force and an impartial judicial system.

Can anyone in your country protect you against this harm? If not, why not?

If the authorities in your home country, or another organisation or group, could provide you with protection against harm, then you may not be eligible for protection.

Section 5J(3) – Modification of behaviour

Is there something that you could do or change to avoid harm?

If you could take reasonable steps to modify your behaviour to avoid persecution, then you may not be eligible for protection. You are not expected to change things that are fundamental to your identity or conscience, such as your religious or political beliefs, or to stop practicing your religion, or to hide your sexual orientation.

Section 5J(6) – Sur place claims

Do you fear harm because of something you’ve done in Australia?

If you fear harm in your country because of things that you have done in Australia, and the Australian government thinks that you did these things for the purpose of strengthening your claims to be a refugee, then those things that you have done will be disregarded or ignored in your application for protection.

Definition of ‘complementary protection’

If the Australian government decides that you do not meet the legal definition of a refugee, then they will assess whether you meet the definition of complementary protection.

Section 36(2)(aa) – Definition of complementary protection

Are there substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm?

Section 36(2A) – Significant harm

Significant harm includes:

- the death penalty
- being killed or murdered
- torture
- cruel and inhuman treatment or punishment
- degrading treatment or punishment.

The reasons for harm under ‘complementary protection’ can be different to the reasons under the refugee definition.

Section 36(2B)(a) – Relocation

There is taken not to be a real risk that a person would suffer significant harm if it would be reasonable for the person to relocate to an area of the country where they would not face significant harm.

Could you move to another part of your country to avoid this harm?

- Would you be safe?
- Do you know anyone in other places?
- Could you get a job?
- Could you find somewhere to live?

If it is reasonable for you to move to another part of your country, then you may not be eligible for protection.

Section 36(2B)(b) – State protection

There is taken not to be a real risk that a person would suffer significant harm if the person could obtain from an authority of the country protection such that there would not be a real risk of harm.

Could the authorities in your country protect you against this harm?

If the government authorities in your country could protect you, then you may not be eligible for protection.

Section 36(2B)(c) – Personalised risk of harm

There is taken not to be a real risk that a person would suffer significant harm if the risk is one faced by the population of the country generally, and is not faced by the non-citizen generally.

Other issues

Do you have a right to visit or stay in another country? Would you face any risk of harm in that country?

If you have a right to visit another country, you may not be entitled to protection in Australia unless you can show that you would also meet the definition of refugee or complementary protection in relation to that country. The Australian government may contact other countries to find out whether you have a right to go there or whether you have previously applied for visas to go there.

Section 91WA – Destroying documents

Did you destroy genuine identity documents?

If you have destroyed or disposed of genuine identity documents, then the Department of Immigration must refuse your visa application unless you have a reasonable explanation and you obtain or take reasonable steps to obtain documents.

Section 91W - Request for identity documents

If the Department of Immigration asks you to produce identity documents, and you fail to comply with the request, or you provide a bogus document, then they must refuse your visa application unless you have a reasonable explanation and you obtain or take reasonable steps to obtain documents.