

Radical new refugee laws have now been passed by Parliament

The Parliament has now passed new legislation which radically changes refugee law in Australia. The new laws strip away fundamental legal safeguards afforded to people seeking protection from persecution in Australia. Many of these changes will have a profoundly adverse impact on asylum seekers and undermine Australia's compliance with its international obligations.

The *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* (the **Bill**) was passed by both houses of Parliament on Friday 5 December 2014 and was assented to on Monday 15 December 2014. Many of the new laws commence on Tuesday 16 December 2014. This fact sheet updates the previous fact sheet on the Bill published in October 2014 in order to take into account changes made to the Bill in the Senate.

The new laws introduce the following key changes to the *Migration Act 1958* (Cth) (the **Migration Act**):

- **Temporary protection visas (TPVs) and Safe Haven Enterprise Visa (SHEVs):** asylum seekers who arrived by boat or air without a visa will now only be eligible for a TPV or SHEV where they are found to engage Australia's protection obligations and have no pathway to permanent protection in Australia. Asylum seekers who are subject to mandatory transfer to, and resettlement in, Nauru and Manus Island will continue to have their refugee cases processed offshore.
- **Fast track assessment of claims:** asylum seekers who arrived by boat from 13 August 2012 will be subject to a fast track refugee assessment process with no access to the Refugee Review Tribunal (**RRT**). These asylum seekers will only have access to a far more limited review process under a new body, the Immigration Assessment Authority (**IAA**), and some asylum seekers will be completely excluded from any form of merits review.
- **Stronger removal power:** the new laws mandate that Australia's non-refoulement obligations are irrelevant to the compulsory removal of a person who does not have a visa;
- **Narrowing existing refugee law:** the new laws codify Australia's interpretation of its protection obligations under the Refugee Convention, rendering the Australian definition of "refugee" separate to and narrower than the currently accepted international law definition.
- **Status of newborn children:** Australian born children of asylum seekers who arrive by boat (unauthorised maritime arrivals) will now be treated in the same way as their parents, including being eligible for transfer to a regional processing country and barring them from applying for a protection visa in Australia (where this applies to their parents).
- **Cap on protection visas:** the Minister for Immigration (the **Minister**) now has the ability to place a limit on the number of protection visas that may be granted in a financial year (other than TPVs and SHEVs).

The new laws also make significant changes to the *Maritime Powers Act 2013* (Cth) (the **Maritime Powers Act**) in order to strengthen Australia's maritime enforcement framework. This includes limiting the ability of Australian courts to invalidate actions at sea where these actions do not comply with Australia's international obligations or the domestic law of other countries.

Introduction of TPVs and SHEVs

The new laws give effect to the Government's intention to introduce TPVs for asylum seekers who arrive by boat or air in an unauthorised manner and who are found to engage Australia's protection obligations. Under the new laws, these asylum seekers will have no avenue for obtaining permanent protection in Australia. The new laws create two types of TPVs that refugees can be granted – the TPV (785) and the SHEV (790).

Who do TPVs affect?

The following cohort of asylum seekers will only be eligible for TPVs or SHEVs (and not permanent protection visas) if they are found to engage Australia's protection obligations and meet other requirements, such as health, security and character checks:

- asylum seekers who arrived by boat (i.e. unauthorised maritime arrivals);
- asylum seekers who did not hold a visa or were not immigration cleared on arrival into Australia (e.g. unauthorised air arrivals); and
- asylum seekers who have previously held certain types of temporary visas (such as temporary safe haven visas or temporary (humanitarian concern) visas).

These asylum seekers will only be eligible for TPVs or SHEVs irrespective of their date of arrival in Australia and regardless of whether they have already made a valid application for a permanent protection visa. Applications for permanent protection visas already lodged by asylum seekers in this cohort will be converted into applications for TPVs (785) no matter what stage they are at in the visa application process.

Those asylum seekers who are subject to regional transfer and resettlement under the policy announced on 19 July 2013 will continue to be ineligible for any kind of visa in Australia, but the Government has indicated that some asylum seekers currently in detention in Australia pending their transfer to Nauru may instead be assessed in Australia and eligible for TPVs or SHEVs.

The introduction of TPVs will not affect asylum seekers who already hold permanent protection visas. Asylum seekers who arrive in Australia with a valid visa and are immigration cleared will continue to be able to apply for permanent protection visas.

What are the terms of TPVs and SHEVs?

The key terms of the TPVs and SHEVs are summarised below. There is more clarity now that the terms of the SHEVs were included in the Bill while it was in the Senate.

Area	TPV (785)	SHEV
Duration	TPVs will last for up to 3 years, but can be for a shorter period specified by the Minister. Where TPV holders apply for another TPV within 3 years after the grant of the first TPV, the current TPV will remain on foot during the application process.	SHEVs will last for 5 years. Where a SHEV holder applies for a second SHEV before their first SHEV expires, their current SHEV will remain on foot during the application process.
Family reunion & citizenship	No access to sponsoring overseas family to bring them to Australia or to Australian citizenship.	Same
Travel overseas	TPV holders can travel outside of Australia where the Minister gives written approval on the basis of compassionate or compelling circumstances justifying the travel. However, travel to the country where the person fears persecution is not permitted and could result in the TPV being cancelled. Note: this was changed in the Senate as TPV holders could previously not re-enter Australia once they left.	Same
Work, study & benefits	TPV holders will be able to work and study and will have access to Medicare, social security benefits (Centrelink), job-matching and short-term counselling	Same

	for torture or trauma. Minors (under 18 years old) should have access to school (funded by the government).	
Applying for other visas	<p>TPV holders cannot apply for permanent protection visas.</p> <p>TPV holders are also restricted from obtaining other substantive visas in Australia (such as skilled, student or partner visas). Note: This restriction can be waived by the Minister based on criteria set out in the Migration Act/Regulations.</p>	<p>SHEV holders cannot apply for permanent protection visas. SHEV holders should be permitted to apply for other substantive visas in Australia (such as skilled, student or partner visas) where for a total of 3.5 years (which does not have to be continuous) they have:</p> <ul style="list-style-type: none"> • worked in a designated regional area without receiving any social security benefits; • being enrolled in full-time study at an education institutional in a designated regional area; or • being involved in a combination of the above work and study. <p>The criteria for the substantives visas will also need to be satisfied. The regional areas and educational institutions are designated by the Minister and local government can opt in to the scheme, however this has not occurred yet.</p>
Notification of new addresses	TPV holders must notify Immigration of a change of address within 28 days.	Same

What is the application process for TPVs and SHEVs?

To be granted a TPV or SHEV, asylum seekers (who arrived in an authorised manner by boat or air as set out above) must be found to be owed protection obligations and meet other requirements, such as health, security and character checks.

The Minister has indicated that these asylum seekers will have the option to either apply for a TPV or SHEV. However, SHEVs are not currently available so only TPVs (785) can be granted at this stage. The Department of Immigration and Border Protection (**Immigration**) has indicated that any refugees who are granted a TPV will be allowed to transition to a SHEV once they become available. Asylum seekers who apply for a SHEV (once they are available) will need to indicate that they have an intention to work or study while accessing minimum social security benefits in a designated regional area. The Minister cannot cap the number of TPVs and SHEVs granted in any one financial year.

For asylum seekers who have already applied for a permanent protection visa and have had their protection visa application processed, their applications will be automatically converted into an application for a TPV (785). This mainly applies to asylum seekers who arrived by boat before 13 August 2012 and are still waiting for an outcome in relation to their protection visa application.

For asylum seekers who are waiting to be allowed to apply for protection, Immigration has indicated that the Minister will begin inviting this cohort to apply for protection from early 2015 by 'lifting the bar' and allowing valid applications for TPVs to be lodged. This mainly applies to asylum seekers who arrived by boat on or after 13 August 2012 and before 31 December 2013. Immigration has indicated that these asylum seekers will not be permitted to apply for protection all at once, but will be invited in different tranches. Immigration has indicated that they will prioritise those asylum seekers according to length of time they have been waiting and indicators of vulnerability. Immigration is intending to send letters to asylum seekers notifying them when the 'bar has been lifted' and the process for lodging an application for a TPV. It is therefore important to make sure that Immigration has up-to-date contact details.

Immigration has indicated that for refugees who are granted TPVs, they should apply for a further TPV before it expires and that they will again be assessed as to whether they are owed protection and meet other requirements, including health, security and character checks.

Will asylum seekers be able to work while applying for TPVs/SHEVs?

The Minister has indicated that asylum seekers who arrived by boat and were not granted work rights while living in the community on Bridging Visas E, will now be granted work rights. This is not part of the new laws, but was announced by the Minister who still has absolute discretion to grant work rights to asylum seekers who arrived by boat after 13 August 2012. We understand that Immigration is now granting work rights for this cohort of asylum seekers.

Negative implications of TPVs and SHEVs

RACS supports durable solutions for those found to engage Australia's protection obligations. TPVs and SHEVs do not constitute a durable solution. The new laws lock refugees who hold TPVs into a cycle of applying for TPV after TPV with no avenue for permanent protection. As noted in our previous fact sheet, there is extensive evidence that the uncertainty created by temporary visas and the limitations on rights of family reunion reduce the ability of those found to be refugees to rebuild their lives and have profoundly negative psychological implications. TPVs are also highly inefficient as they create the need to reassess a refugee's protection claims on a recurring basis.

Further, SHEVs are not a substitute for permanent protection. At this stage, it is unclear how many areas will be designated as regional areas for the purposes of the SHEV scheme and the availability of jobs in these areas. It is foreseeable that many refugees will not be able to meet the requirements for working and studying in a regional area for 3.5 years, particularly those refugees who are suffering from trauma or are not physically healthy or able-bodied and single-parent households. Refugees who do manage to work or study in a designated regional area for 3.5 years and are permitted to apply for another type of visa in Australia, will still need to satisfy the criteria for that visa (e.g. skilled, student or partner visas), including any professional, language and educational requirements. These barriers are likely to result in a vast number of refugees being locked into cycle of TPV after TPV with no prospect of permanency in Australia and long periods of separation from their family overseas.

Australia's protection program should focus on providing sustainable solutions based on humanitarian principles as envisaged by the Refugee Convention for all those found to be refugees in Australia. Pathways to permanency in Australia should not be dependent on the capacity of a refugee to meet the requirements for skilled visas.

New fast track assessment process

The new laws establish a fast track process for assessing the claims of asylum seekers who arrived by boat on or after 13 August 2012 (referred to as **'fast track applicants'**). This fast track process does not apply to asylum seekers who arrived by boat on or after 1 January 2014 or those asylum seekers who have been taken to a regional processing country (i.e. Nauru or Manus Island). The Minister may expand the fast track process to other groups of asylum seekers in the future, such as unauthorised air arrivals. However, following amendments in the Senate, this can be disallowed by either house of Parliament. The RRT will continue to be available at the merits review stage for asylum seekers who do not fall into the above category.

Under this new system, fast track applicants will be assessed by Immigration at the primary stage and we expect will be interviewed by Immigration for this purpose. Where Immigration's decision is negative, there will be no avenue for review by the RRT. Instead the Bill establishes the IAA, a statutory body that will provide a far more limited merits review process than the RRT.

The IAA is independent from Immigration and is established as a separate office within the RRT. However, we understand it will not be staffed by RRT members. Under the new laws, the IAA's objective is to provide a mechanism of limited review that is essentially efficient, quick and free of bias. This is in stark contrast to the RRT, whose existing statutory objectives also requires it to provide a process that is fair and just. Unlike the RRT which provides for a full de-novo review of an applicant's protection claims, the IAA process strips away important procedural fairness safeguards highlighted below.

Not all applicants have a right to review

Unlike the RRT process, fast track applicants will not have an automatic right of review, but are referred to the IAA by the Minister. Broad classes of fast track applicants will have no right to any form of merits review, including those who:

- are considered to have made manifestly unfounded claims which includes protection claims that have no plausible or credible basis, are not able to be substantiated by any objective evidence or are made for the sole purpose of delaying or frustrating removal from Australia (these examples were added in the Senate);
- have provided a document in support of their application that is suspected to be non-genuine or counterfeit, without a reasonable explanation; and
- have previously been refused protection in Australia, in another country or by the UNHCR.

The Minister may specify other classes of fast track applicants who will be excluded from IAA merits review. However, following amendments in the Senate, this is subject to disallowance by either house of Parliament. The Minister may also issue a conclusive certificate excluding IAA merits review on the basis of national interest.

No hearings and no new information

Unlike the RRT, which has hearings and allows applicants to comment on adverse information raised at the primary stage or relied on by the RRT, the IAA will generally:

- not hold hearings;
- not allow a fast track applicant to respond or correct adverse information raised at the Immigration stage; and
- not consider new information provided by the fast track applicant.

The IAA is only required to review decisions based on the material provided when decisions are referred to it from Immigration (e.g., the Immigration decision, evidence before Immigration and other relevant information at the Immigration stage). New information can only be considered by the IAA where there are 'exceptional circumstances' to justify this. In cases where fast track applicants put forward new information, they must also satisfy the IAA that:

- they could not have provided this information at the Immigration stage; or
- it is credible personal information which was not previously known and may have affected the consideration of the fast track applicant's protection claims (this aspect was added in the Senate).

The IAA is bound by very limited rules of natural justice. The IAA is only required to invite a fast track applicant to comment either in writing or orally where in exceptional circumstances the IAA considers new information which could be used as a reason for refusing the fast track applicant.

The fast track system increases the risk that Australia will return asylum seekers to countries where there is a real chance of persecution (i.e., refoulement) due to the inadequacy of the merits review process. This is particularly problematic given the complexity of Australia's immigration laws and the limited access to legal assistance for financially disadvantaged asylum seekers who are often

survivors of torture and trauma. Further, this system discriminates against asylum seekers on the basis of their mode of arrival in Australia in contravention of Article 31 of the Refugee Convention and undermines equal access to justice for all asylum seekers.

Australia's non-refoulement obligations are irrelevant when removing people

The new laws establish that in exercising the power to remove a non-citizen from Australia, it is irrelevant whether Australia has non-refoulement obligations in relation to that person. This includes non-refoulement obligations that arise from the Refugee Convention, Convention against Torture (**CAT**) and the International Covenant on Civil and Political Rights (**ICCPR**).

In general terms, the removal power under section 198 of the Migration Act provides for circumstances in which a person who does not have a visa is subject to mandatory removal from Australia as soon as practicable. According to the explanatory memorandum to the Bill (**EM**), the proposed changes are intended to overcome Australian jurisprudence which provides that the removal power is to be read in light of, and subject to, Australia's obligations in the Refugee Convention, CAT and ICCPR. This interpretation has allowed courts to prevent the removal of an asylum seeker who has not had their protection claims assessed in compliance with Australian law.

The EM states that Australia will continue to meet its non-refoulement obligations through other mechanisms. However, this new law explicitly authorises violations of Australia's international obligations as it requires removal even where Australia's non-refoulement obligations have not been considered. Further, according to the EM, it will not be open to the person to challenge their removal on the basis that there has been no assessment of protection obligations according to law or procedural fairness. This new law appears to be an attempt by the Government to make its handling of asylum seekers immune to the oversight of the Australian courts.

Narrowing existing refugee law in Australia

The new laws reshape the criteria for gaining protection as a refugee in Australia. The new laws remove most references to the Refugee Convention in the Migration Act and replace them with the Government's narrower interpretation of its international protection obligations under the Refugee Convention. These changes apply to all asylum seekers regardless of their mode of arrival in Australia. Applications for a protection visa made by asylum seekers after the commencement of this section of the Bill will be assessed on the basis of these new refugee laws. However, it appears that protection visa applications lodged before this will be considered in line with existing law.

RACS does not support the codification of Australia's obligations under the Refugee Convention and the narrowing of existing law in this area. Some of these elements were amended in the Senate. However, even in its amended form, the proposed statutory framework attempts to disconnect the Migration Act from Australian and international jurisprudence in key respects. Some of the key changes are set out below.

Article 1A – meaning of refugee

The new laws codify the meaning of "refugee" based on Article 1A of the Refugee Convention, that is, a person who is outside their country of nationality or former habitual residence and owing to a well-founded fear of persecution is unable or unwilling to return to it for a Refugee Convention reason (ie race, religion, nationality, membership of a particular social group or political opinion). The new laws codify existing case law that a well-founded fear of persecution is based on whether there is a 'real chance' of persecution.

Internal relocation

Existing law provides that where a person's well-founded fear of persecution is localised to a particular area in the country, they are still owed protection if it would be unreasonable to expect them to relocate to another area in that country. Under the new laws, asylum seekers will need to demonstrate that they face a real chance of persecution *in all areas of the country*. According to the EM, this change is intended to replace an assessment of the reasonableness of internal relocation with a more limited assessment of whether the person can safely and legally access the new area. However, the text of this new law is not in line with the more generous interpretation of this provision in the EM.

Effective protection

Existing law provides that a person is not considered to have a well-founded fear of persecution where there is an adequate standard of state protection in the asylum seeker's home country. The standard of state protection is codified under the new laws and relates both to State and non-State sources of protection. This was amended in the Senate.

Modification of behaviour to avoid persecution

The new laws define that a person does not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour so as to avoid a real chance of persecution in their home country. A modification that would be in conflict with a characteristic that is fundamental to the person's identity or conscience is excluded, as are modifications that would require the person to conceal an innate or immutable characteristic. The section sets out conduct or attributes that a person would not be expected to modify, including religious beliefs, race, ethnicity, nationality, political beliefs, disability, sexual orientation or gender identity (these examples were added in the Senate).

Membership of a particular social group

The new laws seek to limit the definition of a membership of a particular social group, which is one of the grounds for persecution recognised by the Refugee Convention. The definition was further amended in the Senate. Even in its amended form, the new definition seeks to narrow the interpretation adopted by Australian courts over many years.

Children born to asylum seekers in Australia or a regional processing country

Under the new laws, children born in Australia or in a regional processing country to parents who arrived by boat are deemed 'unauthorised maritime arrivals'. The new laws make clear that these children have the same status as their parents, including:

- being eligible for transfer to a regional processing country where their parents arrived on or after 13 August 2012; and
- being barred from lodging a protection visa application where their parents are barred.

This applies retrospectively to these children.

New Ministerial power to cap numbers of protection visas

Under the new laws, the Minister now has the power to place a cap on the number of permanent protection visas granted in a financial year. According to the EM, this change seeks to overcome the outcome in *Plaintiff S297/2013 v MIBP [2014] HCA 24* whereby the majority of the High Court considered that the power to cap visas under section 85 of the Migration Act did not apply to protection visas. However, following amendments to the Bill in the Senate, the Minister will not have any power to cap TPVs or SHEVs.

Following amendments in the Senate, the Minister may determine a minimum number of onshore permanent protection visas and offshore humanitarian visas that may be granted for any one financial year. This is subject to parliamentary oversight and either house of Parliament can disallow the minimum total number set by the Minister. In particular, this will mean that either house of Parliament can veto subsequent increases or decreases to the total minimum number set by the Minister. The Minister must also take all reasonably practicable measures to ensure that the total minimum numbers of visas are granted in the financial year.

Fewer limits on maritime powers

The new laws make significant changes to the Maritime Powers Act. The new laws give the Minister responsible for this legislation sweeping powers to detain people at sea and transfer them to another country. The new laws allow for boats to be taken to a place outside of Australia irrespective of whether Australia has an agreement with that country. Further, the new laws reduce the scope for judicial scrutiny of Government actions at sea by removing the right to natural justice and the ability of the Courts to declare certain actions invalid where those actions are not authorised by existing Australian law, international obligations or the domestic law of other countries.

Summary of changes to the Migration Act

Change	Who the change applies to and start dates
Introduction of TPVs and SHEVs	<p>Unauthorised arrivals by boat and air (including those who have been through the application process for a permanent protection visa (but have not been granted a permanent protection visa). This does not apply to asylum seekers who are subject to regional processing on Nauru or Manus Island.</p> <p>The new laws relating to TPVs commence on 16 December 2014. SHEVs will commence on a day fixed by Proclamation, but no later than 6 months after assent (i.e., by mid-June 2015).</p>
Fast track assessment process	<p>Asylum seekers who arrived by boat on or after 13 August 2012, but before 1 January 2014 and who have not been taken to a regional processing country. This can be extended to other groups in the future, such as unauthorised air arrivals, but is subject to Parliamentary disallowance.</p> <p>These laws will commence on a day fixed by Proclamation, but no later than 6 months after assent (i.e., by mid-June 2015).</p>
Stronger removal power	All unlawful non-citizens from commencement of this section of the Bill (i.e., 16 December 2014).
Narrowing existing refugee law	All asylum seekers regardless of mode of arrival who lodge applications for protection on or after 16 December 2014. The definitions will commence on a day fixed by Proclamation, and failing Proclamation on 15 June 2015.
Australian-born children deemed unauthorised maritime arrivals	Children born in Australia or a regional processing country whose parents arrived by boat. Applies retrospectively.
Minister's ability to cap protection visas	Permanent protection visas from the commencement of this section of the Bill (i.e., 16 December 2014), but does not apply to TPVs or SHEVs.

Please note: This factsheet contains general information only. It does not constitute legal or migration advice. If you need legal or migration advice about your specific situation, please contact RACS. RACS gives telephone advice on Tuesdays and Thursdays from 10am to 11.30am. RACS is entirely independent of the Department of Immigration and Border Protection. All assistance is free. This factsheet was prepared in February 2015.