

## **An Overview of the Current Legal Situation For People Seeking Asylum in Australia**

This factsheet sets out an overview of the current legal situation for asylum seekers who come to Australia.

### **Who is an asylum seeker?**

Asylum seekers are people who are fleeing persecution in their home country and seeking the protection of another country so they do not need to return to the country where they fear persecution. While people seeking asylum may be refugees, they have a different legal status to refugees in Australia. Refugees are people whose status as refugees has already been determined either in Australia or outside Australia before they travel to Australia, for example on a special humanitarian visa.

### **Who is owed protection by Australia?**

A person may be owed protection by Australia where they are in Australia and either a refugee, or found to be in need of complementary protection. The process of determining who is a refugee is normally done as part of assessing a visa application such as a protection visa. Immediate family members and dependents of the person applying for protection can also be considered in the visa application.

### **What is the process for determining refugee status in Australia?**

People seeking asylum in Australia generally need to apply for some type of Protection Visa. To be eligible for a Protection Visa, which allows people seeking asylum to remain in Australia where they are safe, asylum seekers must establish their legal status as a refugee or as a person in need of complementary protection.

### **What does it mean to be a refugee?**

A person is a refugee if the person is outside the country of his or her nationality (or country of habitual residence where they have no nationality) and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country. The terms of this definition have particular meanings in refugee law. See the 'Refugee Law Definitions' fact sheet for further details.

### **Complementary protection**

A person may be entitled to protection in Australia where there is a real risk that the person will suffer significant harm in their home country. Significant harm includes application of the death penalty, arbitrary deprivation of life, torture, cruel and inhumane treatment and degrading treatment. See the 'Refugee Law Definitions' fact sheet for further details.

### **Are there other criteria that Australia considers?**

Yes. In addition to satisfying the protection criteria as a refugee or under complementary protection, there are also public interest criteria that must be satisfied for a person to be granted a protection visa, including security checks, character requirements and undergoing health assessments.

## What is the process of seeking asylum?

To seek asylum in Australia, you generally need to apply for a Protection Visa. There are currently three types of Protection Visas in Australia – a Permanent Protection Visa (subclass 866), which grants permanent residence, and two temporary protection visas: a 'Temporary Protection Visa' (TPV), which lasts for three years; and a 'Safe Haven Enterprise Visa' (SHEV), which lasts for five years. Which Protection Visa people seeking asylum can apply for depends on how and when they arrived in Australia.

All people applying for Protection Visas need to complete a visa application in English. This must be done through "ImmiAccount" the Department's online platform, unless permission has been granted to use a paper form. The application asks questions like – "why did you leave your country?", "How did you get to Australia?", and "What would happen if you went back to your country?" It also requires people applying to list their previous addresses, jobs, education and international travel.

After the application is lodged, the person (or people) making the application will need to provide evidence of their identity. They may have to provide documents proving their identity or attend an appointment to provide their photograph and fingerprints. Later, they will generally be invited to an interview where an officer of the Department of Immigration will ask about their experiences and why they cannot return to their country.

While some aspects of applying for protection visas are the same, there are important differences in the processes depending on whether you came to Australia with a visa and when you arrived. These differences include what type of Protection Visa people can apply for and how decisions to refuse protection visa applications are reviewed. More information on these differences is set out below.

## How do refugees travel to Australia?

There are three main ways a person may come to Australia as a refugee:

1. As asylum seekers arriving on short-term visas (e.g., tourist, student or business visa by plane) and then seeking protection;
2. As asylum seekers arriving by boat (or sometimes by plane) without any visa for Australia and then seeking protection; or
3. As refugees, already having been assessed to be refugees while residing in another country and coming through Australia's offshore resettlement program with a permanent visa.

People coming by plane or boat and seeking asylum in Australia as (1) or (2) above, must have their case assessed in Australia to determine whether or not they are owed protection by Australia.

## What are the rules for people seeking asylum who came by plane?

People who come to Australia by plane normally come with a visa allowing them to enter Australia (for example a tourist, student or business visa). Once they have entered Australia on the visa, they can make a protection visa application at any time while they are in Australia. They will not be detained while they continue to hold a visa and will generally be granted Bridging Visas while they are waiting for their Protection Visa application to be decided. These Bridging Visas will generally have work rights while they are waiting.

People who apply for a Protection Visa after entering Australia with a visa, are eligible to be granted a Permanent Protection Visa if their application is successful. If a Permanent Protection Visa is granted, the person granted the visa is immediately a permanent resident of Australia, and can become a citizen of Australia and sponsor their family to join them in Australia. If the Department refuses their application, they can apply to the Administrative Appeals Tribunal (AAT) to review that decision.

**Note:** In some cases a person arriving by plane will not have a visa, or will have their visa cancelled at the airport before they pass through immigration controls. This might happen for example if you come on a tourist visa but tell the immigration officer you want to apply for protection in Australia. If this happens you may be detained and can only apply for a temporary protection visa such as a Temporary Protection Visa (TPV) or Safe Haven Enterprise Visa (SHEV) which must be reapplied for every three or five years. If you applied for a TPV or SHEV before 14 February 2023, you may be eligible for a permanent Resolution of Status (RoS) visa.

## **What are the rules for people seeking asylum who came by boat?**

Most people who come to Australia by boat and seek asylum come without an Australian visa and this information applies to them. Entry without a visa is legal under international law but under Australian law it means that you are treated differently to people who entered with a visa. The process for people who arrive in Australia by boat, depends on the date they arrived and where they arrived in Australia.

**Transitory persons** – People seeking asylum who arrived in Australia **after 1 January 2014** were transferred offshore to either Nauru or PNG to have their claims assessed by those countries. Some of these people have been moved to Australia for medical treatment but cannot apply for visas in Australia without the permission of the Minister for Immigration. If they can apply for visas, they can generally only apply for Bridging Visas, not a Permanent Protection Visa, TPV or SHEV. If they have been recognised as a refugee in either Nauru or PNG, they may be eligible for resettlement to the US, Canada or New Zealand.

**Unauthorised maritime arrivals** – People who arrived by boat to seek asylum **before 1 January 2014**, who were not granted permanent visas were only eligible for certain temporary protection visas – TPVs or SHEVs. Most of these people who were granted TPVs or SHEVs have now received Resolution of Status (RoS) visas or are being assessed for these visas.

**Fast-Track processing** – In addition, most people who arrived by boat **between 13 August 2012 and 31 December 2013** and who were eligible for TPVs or SHEVs are subject to Fast-Track processing. This means that if their application is refused by the Department of Immigration, they cannot appeal to the Administrative Appeals Tribunal (AAT) but their claims for protection are considered by the Immigration Assessment Authority (IAA), which gives them fewer rights.

**Direct entry persons** – Some people who directly entered certain parts of Australia such as Darwin or Ashmore Reef before 1 June 2013 may not be subject to Fast-Track processing and should seek legal advice about this to see whether they are affected and how it affects them. See the 'People who arrived in Australia via Ashore Reef' fact sheet for further details.

## **Rights as an asylum seeker**

As an asylum seeker, your rights to study, work and apply for Medicare will generally depend on the conditions on your Bridging Visa. If your Bridging Visa has conditions preventing you from studying or working, you may be able to apply to change them. See the 'How to apply for permission to work in Australia' fact sheet for further details.

If you have applied for a Protection Visa and you have work rights, you can apply for Medicare. See the 'How to apply for Medicare' fact sheet for further details.

You may be eligible to travel in limited circumstances, but seek legal advice before travelling. You are not eligible for Centrelink or to sponsor family members.

## Rights on a protection visa

As a Protection visa holder, you will have the right to study and work in Australia on a permanent basis.

You may also be eligible to attend English Language classes for free. To check your eligibility please contact an [Adult Migrant English Program \(AMEP\) provider](#).

You will be entitled to government services including Medicare, Centrelink, and the National Disability Insurance Scheme.

You will be eligible to travel for 5 years, but there will be restrictions on where you can travel and the documents that you should use. Seek legal advice before travelling.

You may be eligible to sponsor family members. We recommend you seek legal advice before making any applications. See our fact sheets, or contact RACS Family Reunion Service.

You may also be eligible to apply for Australian citizenship. See our fact sheet 'How to apply for Australian citizenship', or contact RACS as per the below.

## Unaccompanied asylum seeker children

Asylum seekers under 18 years old who are in Australia without their parents or a legal guardian, are often accommodated in 'community detention' where they live in a house with other children who are also asylum seekers. They still have to follow rules like not going out after a certain time and not staying overnight anywhere else.

## Cancellation

Even after a visa is granted, it can still be cancelled. The normal basis for cancellation is a breach of a visa condition or if a person has been convicted of crimes or is seen as a risk to the community. There are a number of powers the Minister and the Department can use to cancel visas and there has been a considerable increase in the use of these powers in recent years. Any decision about whether or not to cancel a visa needs to be weighed up against the impact of the decision on the visa holder and people in the Australian community affected by the cancellation. This is a complex area and often needs an urgent response. You should seek urgent advice if you receive a notice of intention to cancel a visa.

## What work does RACS do with asylum seekers?

RACS's core work is to advise and represent asylum seekers in their onshore applications for protection visas, and appeals to the Immigration Assessment Authority (IAA) and the Administrative Appeals Tribunal (AAT). We can also refer people to get legal assistance at courts. We advise and sometimes represent people who hold permanent protection visas with applications to bring their family members here. Initial inquiries may be made by any person who accesses RACS telephone advice or drop in advice services.

RACS has limited resources and has absolute discretion as to whether we will represent a client on an ongoing basis, and to establish the nature and extent of the assistance we will provide. RACS's decision to assist will depend on its capacity to do so, the merits of the case and a person's ability to represent themselves or find alternative assistance.

## Getting help from RACS

RACS is entirely independent of the Department of Home Affairs. All assistance is free.

If you would like advice or assistance, RACS offers the following service options:

Service	Day	Time	Address/Number
Telephone Advice	Monday to Friday	11AM to 1PM and 2PM to 4PM	(02) 8355 7227 or admin@racs.org.au
Auburn Drop-in	Wednesday	Register in person from 10 AM to 12 PM	Visit 44A Macquarie Road, Auburn

**Please note:** This fact sheet contains general information only. It does not constitute legal or migration advice. RACS is independent of the Department of Home Affairs. All assistance is free. This factsheet was prepared in October 2023.