

Refugee Law Definitions

In order to be granted a temporary or permanent protection visa, the Australian government must assess your case and decide that you meet the legal definition of a refugee or that you are eligible for '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.

Definition of a 'Refugee'

Under Section 5H of the *Migration Act*, a "refugee" is defined as follows:

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.

Many of the terms used in this definition 'e.g. well-founded fear of persecution' each have their own defined meaning. This fact sheet considers these definitions and some common questions about the definition.

What is the country or countries relevant to your case?

- If you have a nationality (citizenship), it is your country of nationality.
- Do you have more than one nationality? See "Other Issues" below.
- If you are stateless, in most cases, the country relevant to your case is a country where you have lived most in the past.

What is a well-founded fear of persecution?

Convention nexus - Section 5J(1)(a)

Refugee applicants must establish that they have a 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 (s 5J(4)).

Particular Social Group - Section 5L

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, or something that distinguishes the group from other people in society.

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

Serious harm - Section 5J(5)

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.

To meet the definition of refugee, the harm must also involve conduct that is systematic and discriminatory, rather than random or accidental.

What specific harm do you fear?

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, you should describe all types 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.

Real Chance of Persecution - Section 5J(1)(b)

Refugees must show that there is a “real chance” that the harm will happen in their home country. This does not mean there is a 100% chance they will face harm. It could even be less than a 50% chance but cannot be a ‘remote’ chance that that they will face serious harm.

To work out whether you face a real chance, a decision-maker needs to decide how likely it is that the harm will happen to you in the future. They will look at how you know that it will happen to you by looking at questions like:

- 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?

Would you be safe in another location in your country?

Relocation - Section 5J(1)(c)

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.

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

State protection - Section 5J(2)

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.

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.

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

Modification of behaviour - Section 5J(3)

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.

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

Sur place claims - Section 5J(6)

If you fear harm in your country because of things that you have done in Australia, this alone may be a reason why you need Protection and can mean you are a refugee. If the Australian government thinks that you did these things only for the purpose of strengthening your claims to be a refugee, then those things may 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 a protection visa can still be granted on the basis of **complementary protection**, which is defined in Section 36(2)(aa) as follows:

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

Significant harm - Section 36(2A)

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.

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

Relocation - Section 36(2B)(a)

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.

Questions for you to answer are:

- Would you be safe in another part of the country?
- Do you know anyone in other places who could help you (support you or protect you)?
- 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.

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

State protection - Section 36(2B)(b)

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

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

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 personally.

Other Issues

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

If you have more than one nationality, or 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.

Did you destroy genuine identity documents? - Section 91WA

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

Requests for identity documents - Section 91W

If the Department of Home Affairs 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.

Family groups

A family in Australia can apply together for a Protection Visa. In Australia, a family is normally only considered to be a partner and children of the main person applying for the visa but can also include people dependent on them. 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. If one person in the family is found to be a refugee, all family members who have applied for a visa with that person can be granted a visa too.

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
Client Line	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 updated in October 2023.