

Legal assistance for people seeking asylum

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This factsheet describes the legal assistance available to people seeking asylum in Australia. It explains the forms of legal assistance available, the [implications of limited legal assistance entitlements](#), and [how Australia compares with other countries in providing access to legal assistance](#). The factsheet also includes a list of materials for [further reading](#). For information regarding refugee status determination in Australia, see the [relevant factsheet](#).

The legal assistance available to people seeking asylum in Australia is comprised of Federal Government funded legal aid, State Government funded legal aid, and legal assistance and representation provided by non-government organisations or community legal centres. The services which are available depend on the individual's level of vulnerability, time of arrival, geographical location, and stage of the protection application process. If these forms of assistance are unavailable to people seeking asylum, they will have to seek legal assistance at their own expense, or manoeuvre the legal system unassisted.

Federal Government funded legal assistance for people seeking asylum

People who arrived with a valid visa

Currently, people seeking asylum who have arrived in Australia on a valid visa and who meet specific eligibility criteria with respect to disadvantage are able to access legal assistance under the Federal Government funded [Immigration Advice and Application Assistance Scheme](#) (IAAAS). Assistance is delivered by IAAAS providers, who are registered migration agents or officers of legal aid commissions. Currently, funding is available for application assistance (where an IAAAS provider helps an asylum seeker complete and manage the lodgement of an application) or legal advice (where an IAAAS provider advises on visa applications in person or by telephone). The scheme only provides legal assistance for people at the initial asylum application stages, not at the stage of merits review or judicial review. Recently, the government has indicated that availability of IAAAS

will become more restricted. Eligibility for assistance will be limited to unaccompanied minors, those who are extremely vulnerable and do not have the capacity to complete an application (such as people who have mental health or other conditions affecting cognitive function), and those in immigration detention.

People who arrived without a valid visa

People seeking asylum who arrived in Australia without a valid visa were previously entitled to access the IAAAS, but this is [no longer the case](#). The funding cut was foreshadowed by the Coalition before the 2013 election and was [announced](#) by the Coalition Government in March 2014.¹

Currently, if a person who arrived without a valid visa wishes to access legal assistance for an asylum claim, they must do so at their own expense, or through other channels if available. The former Minister for Immigration [indicated](#) that limiting legal assistance to people seeking asylum who arrived without valid visas will save approximately \$100 million over four years, and deter potential boat arrivals. In place of legal assistance, the government has developed [Protection Application Information and Guides](#), which provide instructions about the asylum application and assessment process in various languages.

In addition, a small number of people who are considered most vulnerable (such as unaccompanied minors) may be eligible for government-funded assistance under the [Primary Application Information Service](#) (PAIS).² Eligibility for PAIS is determined at the discretion of the Department of Immigration and Border Protection. PAIS does not assist with merits review or judicial review, and is only available to a small percentage of people seeking asylum, who are judged by the Department as being exceptionally vulnerable.

[Guidance on PAIS eligibility and the assessment process](#) issued by the Department, indicates that a person may be eligible for PAIS assistance if they are an unaccompanied minor, or are an adult who satisfies the following criteria:

1. The non-citizen arrived in Australia after 13 August 2012; and
2. At the time of the relevant PAIS assessment, the non-citizen has not engaged a registered migration agent for assistance in relation to a protection visa application; and
3. The non-citizen has not previously had a valid protection application considered in Australia; and
4. The non-citizen is, at the time of assessment, an adult in relation to whom the department considers it to be in the best interests of government to provide assistance to ensure their claims are presented and able to be considered, in particular, noncitizens regarded as being exceptionally vulnerable.

In relation to the fourth criterion, the Department states that this will include the provision of assistance to those who are likely to find it difficult to participate in the application process and articulate their claim for protection without assistance, including those with an intellectual or cognitive disability, mental illness or other incapacitating health conditions.

The limited extent of government-funded legal assistance to people seeking asylum has led to [expressions of concern](#) by legal organisations that many asylum seekers will be left to navigate the complex process of seeking protection alone.

State-Government funded legal assistance for people seeking asylum

In April 2016, following the Federal Government's funding cuts to legal assistance, the Victorian Government [announced](#) the Victorian Legal Aid Legacy Caseload Initiative. The program provides funding to Refugee Legal and Justice Connect, enabling them to provide legal aid and advice to up to 11,000 people seeking asylum residing in Victoria who arrived in Australia by boat between August 2012 and the end of December 2013. Certain claimants will also be provided Migration Agents from Victorian Legal Aid for judicial review proceedings. This initiative represents the most comprehensive legal assistance for people seeking asylum funded by a State Government. Some legal aid bodies in [other states](#) offer limited legal assistance to people seeking asylum, or referrals to other services.

Legal assistance available through community legal centres

Several [independent community legal centres and non-government organisations](#) operate to provide legal assistance to people seeking asylum. The services available at each centre will differ. In light of funding cuts to these services and an influx of clients who are no longer eligible for the IAAAS, these [centres may be overwhelmed](#).

What are the implications of limited government-funded legal assistance for people seeking asylum?

Australia's immigration law is complex and dynamic. Legal assistance is essential to ensuring that people with legitimate protection claims can demonstrate that they are refugees.³ Limiting the legal assistance entitlements of people seeking asylum has the immediate consequence that people will be forced to apply for protection visas on their own, due to inadequate access to financial resources and a lack of non-government services available. This is problematic for several reasons.

First, legal assistance is crucial to ensuring people seeking asylum are afforded due process. As [noted by the UNHCR](#), '[a]sylum seekers are often unable to articulate the elements relevant to an asylum claim without the assistance of a qualified counsellor because they are not familiar with the precise grounds for the recognition of refugee status and the legal system of a foreign country'. Many people seeking asylum experience vulnerability in the Australian community due to a lack of support networks, and may also [face additional language and cultural barriers in presenting their case](#). People seeking asylum may be unable to articulate their claims in a coherent way, nor build up enough trust with the decision-maker to share personal details. All these factors may compromise the quality of the decision-making process, which could result in legitimate protection claims being denied. This could in turn mean individuals are returned to countries where they face

persecution and other serious forms of harm, such as torture and death.⁴ Data from the [Australian Administrative Tribunal](#) indicate that people seeking asylum who are represented at merits review, have a much higher likelihood of achieving a successful appeal.

By limiting the legal assistance entitlements of people seeking asylum, Australia faces a greater risk of breaching its *non-refoulement* obligations arising under [the Refugee Convention](#). *Non-refoulement* refers to the obligation not to send people seeking asylum back to their country of origin until a refugee status determination has been made. Further, as [UNHCR has noted](#), '[f]air and efficient procedures are an essential element in the full and inclusive application of the [Refugee Convention]. They enable a State to identify those who should benefit from international protection under the Convention, and those who do not.'

Secondly, although the government has indicated that the current policy will result in a budget saving, the policy is more likely to increase the burden on decision-making officials and the courts. Lawyers provide an important 'triage' service that not only reduces the number of unmeritorious claims, but also ensures that applications are presented in a coherent way in accordance with evidentiary and legal requirements. As noted by the Law Council of Australia, and affirmed by the [Refugee Advice & Casework Service](#) '[t]he removal of claims assistance will place unreasonable pressure on Australian immigration officials who will be left to make decisions on the basis of poorly prepared and incomplete applications.' This may delay the decision-making process and increase the number of decisions being appealed at significant cost.

Relatedly, limited government funded legal assistance increases [the pressure on service providers and non-government organisations](#) who provide legal advice to people seeking asylum. Such organisations are often under-resourced and overwhelmed, with funding cuts and an increased client load representing additional challenges for these organisations.

Finally, government funded legal assistance helps people understand application procedures and the nature of their rights, thereby [fostering trust and cooperation](#) between applicants and authorities. The current policy, which compromises the quality, cost, and timeliness of the decision-making process, may [erode public confidence](#) in the fairness of Australia's asylum procedures.

How does Australia compare with other countries?

New Zealand

In New Zealand, eligible people seeking asylum are entitled to [government-funded legal assistance](#) for most stages of the visa application process – from the initial claim to proceedings before the Immigration and Protection Tribunal, and any subsequent appeals. Under ss 7, 10 and 11 of the [Legal Services Act 2011](#), a person's eligibility for legal aid is assessed by reference to factors such as levels of income and disposable capital, and their prospects of success.

European Union

The European Union's [Asylum Procedures Directive](#) requires Member States to provide people seeking asylum with free legal and procedural information in relation to their initial application for protection.⁵ In the event of a negative decision, applicants are entitled to free legal assistance and representation for appeal proceedings.⁶ Member States may condition legal aid on various factors, such as the applicant's sufficiency of resources and the likelihood of success. Legal assistance may also be limited to appeals at first instance.⁷ Finally, Member States can impose monetary and/or time limits on the provision of legal aid, and provide that people seeking asylum are not to be treated more favourably than nationals in matters relating to legal aid.⁸

United Kingdom

In the UK, eligible people seeking asylum are entitled to government-funded legal assistance in respect of their claim for a protection visa, as established in Schedule 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.⁹ Factors such as the person's financial circumstances and prospects of success will be assessed to determine eligibility for legal aid.¹⁰ Unlike Australia, legal aid is available for judicial review proceedings, except in immigration cases where the same, or substantially the same, issue was the subject of an adverse judicial review or appeal outcome in the last 12 months.¹¹ Since 2011, cuts to legal aid funding have triggered the closure of two major legal aid providers for people seeking asylum, [Refugee and Migrant Justice](#) and [Immigration Advisory Service](#), which went into administration following the funding cuts.¹²

What is international best practice?

Although the [Refugee Convention](#) and the [1967 Protocol relating to the Status of Refugees](#) establish key principles such as *non-refoulement*, international refugee law does not establish procedures for refugee status determination. However, it is a generally recognised principle that fair and efficient asylum procedures are [essential to giving full effect to the Refugee Convention](#). Thus, [UNHCR](#) have recommended that Member States should provide free legal advice and representation at all stages of asylum procedure, including at first instance and in appellate proceedings.

In 2010, the European Council on Refugees and Exiles (ECRE) developed a list of [recommendations](#) for governments in relation to legal aid for people seeking asylum. These include:

- Providing sufficient public funding to ensure that legal aid providers can effectively assist and represent people seeking asylum;
- Ensuring that legal aid is available at all stages of the asylum procedure. Lawyers should be able to assist in preparing the asylum application, accompanying applicants to the preliminary interview and assisting with any subsequent appeals;
- Where people seeking asylum are means-tested for legal aid, there should be a presumption that they lack sufficient resources unless there is clear evidence to the contrary;

- States should only apply a merits test for legal aid after a full examination of the asylum application. Further, if a merits test is applied, it should not be so stringent as to practically deny people an effective remedy;
- The right to *legal assistance* should not be subject to a merits test;
- States should provide a formal mechanism for people seeking asylum to lodge a complaint against their lawyer. Legal aid services should also be monitored by an independent body to ensure the quality of legal assistance and representation; and
- States should ensure that lawyers for people seeking asylum have access to all information in relation to their client's case.¹³

Conclusion

Australia's current policy in relation to legal assistance for people seeking asylum falls short of other comparable nations' standards and international best practice. Specifically, the removal of publicly-funded legal assistance for appeals and the denial of legal aid to the majority of people seeking asylum who arrive without a valid visa undermine the principle of equality before the law, and significantly inhibit access to justice for those who are most vulnerable and cannot afford legal representation. Without legal assistance, people seeking asylum cannot properly present their claims for refugee status determination or challenge erroneous decisions. Cutting legal assistance funding also compromises the quality, cost-effectiveness and efficiency of the asylum application process.

People seeking asylum are consequently exposed to a greater risk of being returned to their home country where they face persecution. Restricting access to legal assistance has resulted in Australia facing an even greater risk of breaching its *non-refoulement* obligation. Whilst state government initiatives, and independent legal centres, have had a small impact on improving the access that people seeking asylum have to legal assistance, increased funding from the Federal Government is crucial for creating fair and efficient asylum procedures, maintaining public confidence in the legal system, and ensuring that Australia meets its international obligations.

Further reading

Australian Government, [2014-15 Budget Paper No. 2, Expense Measures, Department of Immigration and Border Protection](#)

Department of Immigration and Border Protection, [Fact Sheet – Immigration Advice and Application Assistance Scheme \(IAAAS\)](#)

European Council on Refugees and Exiles, [Survey on Legal Aid for Asylum Seekers in Europe \(October 2010\)](#)

Jane McAdam and Fiona Chong, *Refugees: Why Seeking Asylum is Legal and Australia's Policies Are Not* (NewSouth Publishing, 2014).

Law Council of Australia, [‘Legal Assistance Critical for Fair Asylum Outcomes’](#) (Media Release, 3 September 2013)

Law Council of Australia, [‘Law Council Concerned by Removal of IAAAS Funding’](#) (Media Release, 2 April 2014)

Refugee Council of Australia, [‘2015-16 Federal Budget in Brief’](#)

Refugee Council of Australia, [‘Restricting Legal Assistance to Asylum Seekers Increases Dangers’](#) (Media Release, 31 March 2014)

Mike Secombe, [‘Stalling the lawyers who aid asylum seekers’](#), The Saturday Paper, 20 June 2015

UNHCR, [Fair and Efficient Asylum Procedures: A Non-Exhaustive Overview of Applicable International Standards](#) (2 September 2005)

UNHCR, [Global Consultations on International Protection: Asylum Processes \(Fair and Efficient Asylum Procedures\)](#), EC/GC/01/12, 31 May 2001

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Endnotes

¹ See also [‘Oppn to End Free Legal Aid for Boat People’](#), SBS, 13 September 2013; Jonathan Swan, [‘Coalition Denies Asylum Seekers Government Help to Navigate Migration Process’](#), The Age, 31 August 2013.

² See also [Explanatory Memorandum](#), Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014.

³ In this factsheet, ‘legal representation’ refers to where a legal aid provider acts on behalf of an asylum seeker, whereas ‘legal advice’ refers to where a legal aid provider provides only legal advice to an asylum seeker, but does not act on his or her behalf. ‘Legal assistance’ more broadly, refers to both services. These definitions are based on those found in European Council on Refugees and Exiles (ECRE), [Survey on Legal Aid for Asylum Seekers in Europe](#) (October 2010), 9–11.

⁴ Jane McAdam and Fiona Chong, *Refugees: Why Seeking Asylum is Legal and Australia’s Policies Are Not* (NewSouth Publishing, 2014) 168.

⁵ Council Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) OJ L 180/60, art 19.

⁶ *Ibid* Article 20.

⁷ *Ibid* Article 21(2).

⁸ *Ibid* Article 21(4).

⁹ [Legal Aid, Sentencing and Punishment of Offenders Act 2012](#) (UK) Schedule 1, Part 1, para 30.

¹⁰ *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (UK) ss 11, 21; Immigration Law Practitioners’ Association, [New Legal Aid Proposals](#) (Information Sheet, 2 May 2013).

¹¹ *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (UK) Schedule 1, Part 1, cl 19.

¹² See John Baron, '[Migrants Charity Goes Into Administration](#)', *The Guardian*, 19 June 2010; Owen Bowcott, '[Tens of Thousands Lose Support as Immigration Advisory Service Closes](#)', *The Guardian*, 12 July 2011; Patrick Barkham, '[The Asylum Seekers Facing a Kafkaesque Legal Nightmare](#)', *The Guardian*, 5 August 2011.

¹³ European Council on Refugees and Exiles (ECRE), '[Survey on Legal Aid for Asylum Seekers in Europe \(October 2010\)](#)', 160 -2.