

Factsheet

DO PEOPLE SEEKING ASYLUM RECEIVE LEGAL ASSISTANCE?

Last update: May 2020

Fair asylum procedures ensure public confidence in the legal system and compliance with our international obligations, but Australia's current restrictions on who can access legal assistance falls short of comparable nations' standards and international best practice.

What is international best practice regarding legal assistance for people seeking asylum?

Although the Refugee Convention and its 1967 Protocol do not establish procedures for refugee status determination, fair and efficient asylum procedures are [essential to giving full effect to the Refugee Convention](#). Thus, the [UN High Commissioner for Refugees](#) (UNHCR) recommends that countries who have signed the Refugee Convention should provide free legal advice and representation at all stages of the asylum procedure, including at first instance and in appeal proceedings.

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

- Providing sufficient public funding to ensure legal aid providers can effectively assist and represent people seeking asylum;
- Where countries apply a means test this should be based on the presumption that asylum seekers do not have sufficient resources to afford paid legal aid, unless there is clear evidence to the contrary; and
- Ensuring legal aid is available at all stages of the asylum procedure so that lawyers are able to assist in preparing the asylum application, accompany applicants to the preliminary interview and assist with any subsequent appeals.

In 2017, the European Council on Refugees and Exiles published a [Review of the National Practices](#) of European countries in relation to access to legal aid for asylum applicants, noting that the Parliamentary Assembly of the Council of Europe has acknowledged the necessity of providing legal aid for asylum applicants in Europe,

particularly in accelerated asylum procedures and for those at border zones and in detention facilities.

What legal assistance is available to people seeking asylum in Australia?

Asylum seekers who arrive in Australia with a valid visa

Only a small proportion of people seeking asylum have access to funded legal assistance in Australia. Those who arrive in Australia on a valid visa and who meet specific criteria of disadvantage are eligible for limited legal assistance under the Federal Government funded [Immigration Advice and Application Assistance Scheme](#) (IAAAS). However, access to IAAAS is strictly limited to unaccompanied minors for whom the Minister of Immigration is guardian under the *Immigration (Guardianship of Children) Act 1946* (Cth), and those who are extremely vulnerable and do not have the capacity to complete an application (such as people who have mental health concerns or other conditions affecting cognitive function).

Access to legal assistance through IAAAS is available to unaccompanied minors at the initial application and merits review stage (review of the decision by the Department). IAAAS is not available to anyone else at merits review. IAAAS is not available for judicial review (court challenges to administrative decisions) or ministerial intervention.

Most asylum seekers who arrive in Australia with a valid visa must attempt to secure access to pro bono legal support (there are extremely limited pro bono legal services available) or pay for access to a migration agent or lawyer.

Asylum seekers who arrive in Australia without a valid visa

In 2014, the Government abolished publicly funded legal assistance for asylum seekers who arrive in Australia without a valid visa, except for very vulnerable persons.

If a person arrives in Australia without a valid visa and wishes to access legal assistance for an asylum claim, they must attempt to secure access to pro bono legal support (there are extremely limited pro bono legal services available) or pay for a migration agent or lawyer.

A small number of people who are considered [exceptionally vulnerable](#) (such as unaccompanied minors) are eligible for government-funded legal assistance under the [Primary Application Information Service](#) (PAIS). Access to legal assistance through PAIS is available to unaccompanied minors at the initial application and merits review stage (review of the decision by the Department). PAIS is not available to anyone else at merits review. PAIS is not available for judicial review (court challenges to administrative decisions).

Eligibility for PAIS is at the discretion of the Department of Home Affairs and for asylum seekers other than unaccompanied children, at the time of assessment the Department must consider the asylum seeker to be exceptionally vulnerable and also consider that it is in the best interests of Government to provide assistance to ensure his or her asylum

claims are presented and able to be considered. For more information on the challenges that this has created for people seeking asylum, see our [factsheet on the 'Legacy Caseload'](#).

Further information about legal services for people seeking asylum can be found [here](#).

How does Australia compare with other countries?

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 later appeals. Under sections 7, 10 and 11 of the [Legal Services Act 2011](#), a person's eligibility for legal aid is influenced by factors such as their income and disposable capital, and their prospects of success.

In the UK, eligible asylum seekers are entitled to government-funded legal assistance with their claim for a protection visa (via Schedule 1 of the [Legal Aid, Sentencing and Punishment of Offenders Act 2012](#) or LASPO). Factors such as the person's financial circumstances and prospects of success will be assessed to determine eligibility for legal aid. Unlike in Australia, legal aid is available for appeal 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 past 12 months. In February 2019, the UK Ministry of Justice published its [post-implementation review of LASPO](#). Prior to LASPO, advice and assistance was available for asylum matters at the application stage, including for matters involving humanitarian protection and Article 3 of the ECHR (prohibition on torture and inhumane treatment), as well as the Refugee Convention. LASPO was further amended by the [Modern Slavery Act 2015](#), to increase the scope to include legal aid for applications for leave to enter, or to remain, in the UK, where the individual is a victim of slavery, servitude or forced or compulsory labour, or there are reasonable grounds to believe that the individual is such a victim. Since 2011, cuts to legal aid funding in the UK 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 after the [funding cuts](#).

In Canada, individuals can access legal aid, subject to meeting eligibility criteria relating to financial need and the merits of the individual's case, when making an asylum claim, including at the Refugee Protection Division, for appeals to the Refugee Appeal Division of the Immigration and Refugee Board and for judicial review applications in the Federal Court of Canada. In August 2019, the [Prime Minister of Canada](#) announced a large pool of funding would be made available to ensure ongoing access to legal aid for asylum seekers, following a significant decline in provincial funding for such services.

What does Australia's current policy mean for people seeking asylum?

The [Law Council of Australia](#) has stated that all people seeking Australia's protection should be provided with the services necessary to ensure that their basic needs are met, including publicly funded legal and migration advice.

Australia's current policy concerning legal assistance for people seeking asylum falls short of comparable nations' standards and international best practice. Legal assistance is crucial to ensuring that people seeking asylum are afforded due process, enabling them to navigate a complex legal system, properly present their protection claims, and challenge erroneous decisions. This is particularly important because people seeking asylum may experience language and cultural barriers, trauma and vulnerability in the community.

Legal assistance helps to ensure that applications are presented in a coherent way in accordance with evidentiary and legal requirements, thereby reducing the burden on decision-making officials and the courts. Cutting legal assistance funding compromises the quality, cost-effectiveness and efficiency of the asylum application process, and may erode public confidence in the fairness of Australia's asylum procedures. Lack of access to legal assistance means people seeking asylum are exposed to a greater risk of being returned to their home country where they face persecution, which would place Australia in [breach of its international legal obligations](#).