Asylum Seekers
Consultation Paper
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Executive Summary

What do we know generally about this group?

In 2015, Australia received 16,117 asylum applications, constituting 0.5 per cent of the global total. The number of asylum seekers arriving in Australia by boat has decreased dramatically in recent years.

In March 2017, 36,071 bridging visas had been granted in Australia to asylum seekers who had arrived by boat. The numbers of people in closed immigration detention in Australia has reduced significantly. However, changes to visa cancellation powers have seen more people detained on this basis. With respect to offshore processing, in December 2016, 866 people lived in the Regional Processing Centre (‘RPC’) in Manus Island, Papua New Guinea (‘PNG’), 380 people at the RPC in Nauru, and around 800 people were residing in the Nauruan community after being released from its RPC.

What are the key findings regarding this group’s legal needs?

Asylum seekers face specific legal problems which relate to applying for protection, and seeking review of negative visa application decisions, as well as a range of legal problems which flow from the fact of their immigration detention, removal or transfer from Australian territory, interception at sea, or situation under regional processing arrangements. The ‘Legacy Caseload’ in Australia are currently experiencing unprecedented levels of legal need, given the complex and onerous nature of the visa application requirements and deadlines recently set within which their visa applications can be validly made. Asylum seekers in the Australian community also experience other kinds of legal problems, like other Recent Arrivals.

What are the barriers constraining this group from accessing justice?

Asylum seekers lack familiarity with Australian laws and bureaucracy and are often unable to articulate the elements relevant to their protection claims without specialist assistance, noting the complexity of the relevant Australian legal framework. Many come from non-English speaking backgrounds and face cultural and linguistic challenges in presenting their cases. Some lack literacy in any language. A large number of asylum seekers are traumatised and consequently suffer from mental health conditions. Many do not trust government authorities or lawyers owing to their previous experiences of persecution in their countries of origin. These factors also affect their ability to put forward asylum claims without appropriate support and assistance. Many asylum seekers lack financial resources and social networks, as well as the documents they need to make their claims. For asylum seekers in detention or who are subject to regional processing or turn-back policies, their geographic isolation makes accessing lawyers particularly difficult.

What are the legal capabilities of individuals within this group?

Asylum seekers’ legal capabilities are significantly undermined by the above barriers, including traumatic life events, a lack of resources or understanding of Australian legal systems, and poor health and lack of English literacy.
Are there critical gaps in services which are necessary to deliver access to justice to this group?

The withdrawal of the Immigration Advice and Application Assistance Scheme to most asylum seekers who have arrived in Australia without a valid visa has raised strong concerns that they are left to navigate complex legal systems without essential legal assistance. Critical pressures on the legal assistance and pro bono sectors have resulted from recent deadlines placed upon the Legacy Caseload’s visa applications, with fears that many will run out of time to apply. Ongoing concerns exist about the ability of people who are detained offshore and at sea to access skilled lawyers.

There are also concerns about increasing pressures on the Federal Circuit Court and Administrative Appeals Tribunal flowing from protection visa matters, having regard to the fact that many litigants are self-represented. These pressures are expected to increase given the probably large volume of review applications made by the Legacy Caseload.

For many asylum seekers in the Australian community, there are substantial difficulties accessing interpreting and broader support services. For those who are subject to regional processing arrangements, serious shortcomings in a range of basic services, including accommodation, education and health, have been identified.

Are there laws, policies and practices which exacerbate access to justice barriers for this group?

A wide range of laws, policies and practices exacerbate access to justice barriers for asylum seekers. These include: mandatory detention; offshore or regional processing; boat turn-backs and limitations on judicial review of such responses; new secrecy laws; recent legislative changes introducing fast track merits review for the Legacy Caseload, narrowing the definition of a ‘refugee’, removal of traditional merits review at the AAT (including a hearing on review) limiting or removing relevant safeguards, re-introducing temporary protection visas and placing greater burdens of proof on applicants; non-reviewable Ministerial discretions and expanded visa cancellation powers.

What are the costs and consequences if this group cannot access justice?

Without free legal assistance, asylum seekers must apply for protection visas on their own, and the quality of applications and, in turn, decision-making processes, are likely to be undermined. There is a real risk that an applicant will be unable to properly understand the legal requirements; present their claims in full; and receive a fair hearing and just outcome or decision. The risk is that individuals will be wrongly refused refugee or complementary protection and they may be returned to countries where they face persecution and other forms of serious or significant harm, including torture and death. The impacts of policies such as prolonged immigration detention and regional processing upon asylum seekers’ health and wellbeing can be severe and are also costly for the community. Sudden, unresource policy and administrative changes, such as recent Legacy Caseload deadlines, can divert justice resources away from serving broader community needs.

What measures are effective – what works and why?

**Appropriate and accessible services**

Specialist free legal assistance and representation is critically important given that asylum seekers experience formidable difficulties in negotiating a complex system and the serious
consequences of wrong decisions. Information and self-help kits, on their own, are inappropriate responses. There is clear evidence that asylum seekers who are represented achieve better outcomes within the justice system.

Certain qualities increase the effectiveness of legal assistance to asylum seekers. These include: specialist professional expertise; the quality of the relationship between lawyers and clients, which require the building of trust and face-to-face contact; and adequate time and flexibility – to build this trust, establish the facts and allow clients time to explain their protection claims. These qualities are also important considerations in tribunal and court contexts.

Helping asylum seekers to develop their legal literacy or ‘orientation’ within local legal frameworks is beneficial, and the value of, and demand for, educating trusted caseworkers has been emphasised.

**Targeted services**

Outreach to services and places frequented by asylum seekers, including to address unmet areas of legal demand (eg civil legal problems), such as through Justice Connect’s recent MOSAIC project, is important.

**Joined-up services**

The asylum sector, legal and non-legal, is particularly effective at working collaboratively, given its common commitment to client welfare, shared determination to use limited funds effectively, strong communication and referral networks, and strength in leveraging in-kind community support. However, stable, sustainable, flexible and straightforward funding and policy frameworks are necessary to support these kinds of collaborations.

**Timely services**

Timely or early legal assistance to asylum seekers is important in enabling quicker and less costly decision-making at the primary level, and preventing unmeritorious claims. The United Kingdom Solihull Early Legal Advice Pilot found that giving people early access to good legal representation resulted in faster, higher quality and more sustainable asylum decisions.

**Addressing laws, policies and practices which exacerbate access to justice barriers**

The closure of the Manus Island RPC provides the opportunity to revisit Australia’s regional role and obligations in addressing the flow of asylum-seekers into, and within, the Asia-Pacific Region. The Law Council’s forthcoming *Regional Processing Policy Statement* is intended to provide constructive assistance in future policy development on this issue.

Australia’s ratification of the *Optional Protocol to the Convention against Torture and other Cruel, inhuman or Degrading Treatment or Punishment* provides an opportunity for the review of many Australian laws, policies and practices which are harmful to asylum seekers. The Australian Law Reform Commission also recently suggested that several migration laws are not proportionate, having regard to their objective and extent to which they interfered with individual rights, and suggested that their operation be reviewed. An Independent Monitor for Migration Laws could be appointed to help progress this recommendation.
What do we know generally about this group?¹

In 2015, Australia received 16,117 asylum applications, constituting 0.5 per cent of the global total.² As noted by the Australian Human Rights Commission (‘AHRC’), the number of asylum seekers arriving in Australia by boat has decreased dramatically in recent years.³ The fall is due in large measures to policy changes that include pushback operations and the deflection of asylum seekers to Nauru and Manus Island in Papua New Guinea (PNG).⁴ In 2012, 20,587 people arrived in Australia by boat.⁵ In contrast, in 2015, around 213 people attempted to reach Australia by boat, but were intercepted by Australian authorities and returned to their point of departure without being permitted to lodge asylum claims.⁶ In March 2017, a total of 36,071 ‘bridging visas’ had been granted to asylum seekers who had arrived by boat, referred to by the Australian Government as ‘Illegal Maritime Arrivals’ or ‘IMAs’.⁷

The Australian Government’s 2014-15 Refugee and Humanitarian Program (‘the Program’) saw the grant of nearly 14,000 visas. Eighty per cent were visas granted ‘offshore’ as part of planned ‘resettlement’ processes run with the cooperation of the United Nations High Commissioner for Refugees (UNHCR).⁸ Within this component, 54.5 per cent were refugee visas, granted to individuals found by the UNHCR to meet the ‘Convention’ definition of refugee;⁹ and 45.5 per cent were special humanitarian visas, issued to persons found to be at risk of human rights abuse generally. The remaining 20 per cent of the Program accounted for asylum seekers within Australia granted protection as refugees. The Program intake increased to 17,555 visas in 2015-16, including 15,552 visas under its resettlement component issued in part to refugees from the Syrian conflict.¹⁰ The program will progressively increase to 18,750 places by 2018-19.¹¹ In contrast, Australia’s 2014-15 overall intake of permanent migrants under its Migration Program was nearly 190,000.¹²

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¹ This Paper is intended to be read in conjunction with the Introduction and Consultation Questions Paper for the Justice Project which sets out the approach taken, the methodology and overarching consultation questions, as well as how to respond.


⁵ Ibid.


¹⁰ Including 3,790 visas granted as part of the additional intake for Syrian and Iraqi refugees. In addition to the existing annual Program intake, an additional 12,000 resettlement places have been allocated for Syrian and Iraqi refugees from 2015 onwards: AHRC, above n3, 6, citing DIPB, Annual Report 2015-16 (Australian Government: 2016), 70.


Overall, the number of people in closed immigration detention in Australia has reduced significantly in recent years. On 31 December 2016, there were 1,364 people in closed detention facilities in Australia, the lowest number of people in detention in almost four years. The number of children in closed detention facilities in Australia has also declined, from 1,992 in July 2013 to just two children on 31 December 2016. Notably, however, these individuals had been held in closed detention for between four and six-and-a-half years. As discussed in The Justice Project Recent Arrivals paper, there has been a significant increase in people held in immigration detention following changes to visa cancellation powers, with 591 people detained on this basis in December 2016.

Community alternatives to detention were in use for the vast majority of people seeking asylum who were in Australia. As noted by the AHRC, a recent positive development has been the reinstatement of work rights for most asylum seekers living in the community. In August 2016, 27,005 asylum seekers who had arrived in Australia by boat were living in the community on Bridging Visas with work rights.

However, many asylum seekers currently in Australia who previously arrived by boat have experienced prolonged delays in the processing of their asylum claims. This stems from the bar prohibiting them from applying for any visa without the approval of the Minister for Immigration and Border Protection ("the Minister"). For a large number of asylum seekers who arrived after 13 August 2012 and before 1 January 2014, this bar was only progressively lifted from May 2015 onwards. By February 2017, of the 30,923 asylum seekers known as the ‘Legacy Caseload’, only 8,061 had had their applications finalised.

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14 Ibid.
16 Since 2012, 52 people have been released from detention following a recommendation from the Independent Reviewer of Adverse Security Assessments, or internal reviews by ASIO: AHRC, above n3, 17, citing information provided by the DIBP by email on 27 October 2016: Ibid, 17, citing information from the DIPB provided by email on 27 October 2016.
17 Ibid.
18 AHRC, above n3, 18, citing DIBP Statistics Summary 2016, 7.
19 Ibid, 22.
21 Migration Act 1958 (Cth) ("the Act"), s46A.
23 DIBP states that this cohort consists of Illegal Maritime Arrivals ("IMAs") comprising two major groups: the ‘non-fast track’ cohort of IMAs who arrived prior to 13 August 2012 and had not made a protection visa application that was finalised at 18 September 2013; and the ‘fast track cohort’ of IMAs who arrived on or after 13 August 2012 and are subject to the protection assessment process introduced by the Resolving the Asylum Legacy Caseload Act 2014 (Cth) (discussed further below); DIBP, IMA Legacy Caseload: Report on Status and Processing Outcomes: February 2017, 1, https://www.border.gov.au/ReportsandPublications/Documents/statistics/ima-legacy-caseload-feb-17.pdf>.
12,359 had made applications which were on hand, while 10,503 applications had not yet been lodged. Issues surrounding the Legacy Caseload are further discussed below.

As at December 2016, there were 866 people residing at the Regional Processing Centre (‘RPC’) in Manus Island, PNG and 380 people, including 45 children, residing at the RPC in Nauru. In addition, approximately 800 people were residing in the Nauruan community after being released from its RPC. On 16 May 2017, it was reported that asylum seekers on Manus Island had been informed by PNG officials that they must leave the RPC so that it could be closed. Some parts of the centre were scheduled to be closed by 30 June 2017. On 14 June 2017, it was reported that the Australian Government had agreed to compensate 1900 asylum seekers currently or formerly held at the Manus Island detention centre through a conditional settlement of $70 million plus costs, to be distributed to asylum seekers based on the length of their detention and severity of their alleged injuries.

What are the key findings regarding this group’s legal needs?

The LAW Survey conducted in 2008 by the Law and Justice Foundation of New South Wales did not incorporate a focus on the legal needs of asylum seekers. The Refugee Advice & Casework Service (‘RACS’) has emphasised that this survey is not representative of asylum seekers. For example, many asylum seekers were residing in detention centres at the time of the survey and would not have had access to the telephone. RACS also noted that the majority of asylum seekers were not proficient in English, further limiting their ability to participate.

Asylum seekers face a range of significant legal obstacles. Most acutely, these relate to their ability to apply for protection under Australian law, including the review of negative decisions of their protection visa applications. Second, asylum seekers experience other legal problems which are specifically related to, eg, their immigration detention, removal or transfer from Australian territory, interception at sea, or situation under regional processing arrangements. These have been pursued under international and domestic law and

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24 Of the 12,359 applications on foot, 11,058 were ‘fast track’ applicants, and 1,301 were ‘non-fast track applicants (as further discussed below): Ibid, 2.


26 Ibid, 38.


include challenges regarding their ongoing detention, their access to health care (including following physical and sexual assault), and their poor living conditions and lack of safety, concerns which have been domestically and internationally recognised.\textsuperscript{33}

In 2013, RACS described the levels of demand amongst asylum seekers for legal services as representing ‘a current significant area of unmet legal need in Australia’.\textsuperscript{34} Such concerns have exacerbated subsequently, as discussed further below (‘Service Gaps’). The acute demand amongst asylum seekers for legal assistance services was recently acknowledged in the Victorian Access to Justice Review.\textsuperscript{35}

A critical area of legal need is currently being experienced by the ‘Legacy Caseload’ cohort. As discussed above, this cohort remained in ‘legal limbo’\textsuperscript{36} for many years, without the ability to apply for a protection visa, until the bar on their applications was finally lifted.\textsuperscript{37} As discussed below, much of this cohort is subject to a limited ‘fast-track’ merits review process, instead of normal Administrative Appeals Tribunal (AAT) merits review.

In February 2017, the DIPB sent letters to many Legacy Caseload applicants who had not yet made an application for refugee status, warning them that they would lose their welfare payments, Medicare, bridging visas and the right to seek asylum unless they urgently submitted applications.\textsuperscript{38} Recipients were given 60 days to apply, including all necessary documentation. On 23 May 2017, the Australian Government set an immoveable deadline for all Legacy Caseload asylum seekers to make applications by 1 October 2017.\textsuperscript{39} As discussed below, these developments have reportedly caused tremendous concern to relevant asylum seekers, and created extreme pressures upon the legal assistance sector.\textsuperscript{40}


\textsuperscript{34}RACS, Access to Justice Arrangements: Submission by the Refugee Advice & Casework Service (Aust) Inc., 4 November 2013, 3.


In addition to the above legal problems, asylum seekers living in the Australian community form a subset of the ‘Recent Arrivals’ group (separately discussed), and experience similar legal problems. For example, a 2014 review of a Justice Connect outreach project in Marrickville, New South Wales\(^1\) signalled that there is demand for help with civil matters amongst this group, including for fines and infringements, consumer complaints and contracts, credit and debt issues (such as mobile phone debts), social security entitlements, tenancy, employment, insurance, torts and probate and wills.\(^2\)

How do people in this group respond to their legal problems?

Unlike other groups canvassed in this literature review, there is little available information regarding asylum seekers’ response to their legal problems. However, indications of the levels of demand upon specialist legal assistance services suggest that many asylum seekers identify that they need legal advice to resolve their legal problems, at least with respect to seeking asylum, challenging negative protection visa decisions, and resolving problems associated with their detention.

What are the barriers constraining such groups from accessing justice?

Limited knowledge

In general, asylum seekers lack familiarity with the Australian legal and bureaucratic systems.\(^3\) More specifically, the UNHCR notes that asylum 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.\(^4\) Ardalan adds that many asylum seekers do not understand which information is relevant to their claim.\(^5\) For example, one client of the Harvard Immigration and Refugee Clinical Program did not mention that his brother was killed for political reasons until right before the Clinic filed his claim, as he did not realise that this helped to substantiate his own fear of return to his own country.\(^6\) The difficulties experienced by asylum seekers are exemplified in the following case study:

> Claude Muco is a student from the Democratic Republic of the Congo who came to Australia in 2014. He was afraid to return home because of ongoing ethnic violence in his homeland.

> “Our people do not have any security, so most of the families have fled to Rwanda to seek protection.”

> Depressed about his situation, Claude wanted to apply for asylum in Australia but he says that he had neither the knowledge nor the financial means to do so.

> “I couldn’t afford myself to pay for legal services. I didn’t have any money on me.”

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\(^1\) The Migrant Outreach Services: Advice, Information and Community Education (MOSAIC) project: Justice Connect, Final grant report: Pro bono legal assistance to recently arrived migrants: pilot study (Law and Justice Foundation of New South Wales: 2014), 5.

\(^2\) Ibid, 6.

\(^3\) Ibid, 12.


\(^6\) Ibid.
In his despair, Claude visited an asylum seeker centre in the Sydney suburb of Newtown where he was told to apply for legal aid. Claude says this was the breakthrough he had hoped for.

“What actually Legal Aid helped me with, is filling in the forms, writing statements and assists me during the interviews. They worked towards my migration on my behalf. Even though I speak English, it can be a bit hard to understand what they are asking for. So through all this process, I have been helped by Legal Aid.”

In some cases, asylum seekers are unaware that they can seek legal advice. McAdam and Chong cite instances in which Sri Lankan asylum seekers subjected to ‘enhanced screening’ processes on arrival (see discussion below), were not told by Australian authorities that they could seek legal advice unless specifically asked. The Kaldor Centre for International Refugee Law (‘the Kaldor Centre’) also states that individuals may not always be given the opportunity to seek asylum, eg people who are ‘turned back’ to Indonesia.

Communication barriers

In 2013, RACS explained to the Productivity Commission Inquiry that many of its asylum seeker clients can neither read nor write. Most come from non-English speaking backgrounds and therefore face cultural and linguistic challenges in presenting their cases. Several are illiterate in any language.

Trauma, mental health and distrust

‘The first time Mohammad came to our office for help, he was so traumatised he could barely speak. He was one of the 35 survivors of a boat that had sunk in Australian waters.’

A large number of asylum seekers have been subjected to trauma, violence, torture or sexual assault. Those who have suffered persecution by their own governments are often fearful of government authorities and lawyers. RACS describes its clients as ‘severely traumatised’. They:

...find disclosing details of their persecution difficult – they either clam up or spend much of the time with their lawyers crying as it is often the first time they have disclosed their horrific stories.

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48 Jane McAdam and Fiona Chong, Why seeking asylum is legal and Australia’s policies are not (UNSW Press: 2014), 162-163; also AHRC, above n3, 26-27.
49 Renata Kaldor Centre for International Refugee Law (‘Kaldor Centre’), Factsheet: Turning back boats (UNSW: May 2017), 5.
50 RACS, above n34, 2.
51 Ibid; Justice Connect, above n41, 12; McAdam and Chong, above n48, 165.
52 Ibid, 4.
54 Ibid, 165
56 RACS, above n34, 2.
57 Ibid.
Asylum seekers often suffer from mental health conditions.\textsuperscript{58} According to one recent United States (US) study, over 80 per cent of asylum seekers suffer from post-traumatic stress disorder, and 96 per cent suffer from some depressive disorder.\textsuperscript{58} As a result, they may find it difficult to share sensitive information with a decision-maker in the context of a short interview, as it takes time to build up trust and share personal details.\textsuperscript{60}

Further, asylum seekers may be unable to recount their experiences lucidly due to trauma.\textsuperscript{51} Avoiding painful topics is common among trauma survivors, and when asylum seekers do open up, their memories can flood together. They may conflate events, forgetting details like the frequency or length of being detained and tortured.\textsuperscript{62} Traumatic memories are also stored differently to 'normal' autobiographical memories, which have a 'beginning, middle and end' and are often recorded as "sensory snapshots".\textsuperscript{63}

This is particularly problematic with respect to asylum applications.\textsuperscript{64} A real US case study demonstrates these difficulties:

\textit{Abducted, beaten and tortured by government forces that accused him of supporting an opposition group, 'Matthew' (not his real name) fled to the US with the help of his church pastor. The pastor put Matthew in touch with an acquaintance in Boston, who gave him a place to stay for a short time and encouraged him to apply for asylum. He told Matthew to be as specific and detailed as possible. He instructed Matthew to write down the exact dates and times he was abducted, the number of guards who tortured him, what they were wearing, and the exact length of each prison detention.}

\textit{Highly traumatised, and still reeling from the effects of brutal blows to his head, Matthew could not remember the details asked of him. The acquaintance insisted, however, that Matthew write specifics down, regardless of how certain he was of the exact times, dates and other information.}

\textit{When Matthew went to his Asylum Office interview, the officer questioned him about his abduction, detention and torture. Matthew tried to explain what had happened, but he became distraught as the officer forced him to relive his horrific experiences in detention. Since his arrival, Matthew had tried to block out the memories of his past in an effort to move forward with his life. As Matthew attempted to answer the officer's questions, the circumstances of each abduction, detention and torture session blurred together. Terrified he would be forced to return to a country where he would likely be killed, Matthew's fears overwhelmed him. He could not recall the details the asylum officer asked him about, such as the circumstances leading up to each detention and the length}

\textsuperscript{58} Ardalan, above n45, 1004, 1022-1023; Centre for Advocacy, Support and Education for Refugees ('CASE'), Submission to the Productivity Commission: Inquiry into Justice Arrangements – Response to Draft Report (2014), 2; Justice Connect, above n41, 12;

\textsuperscript{59} Ardalan, above n45, 1020, citing Lin Piwowarczyk et al, ‘Secondary Trauma in Asylum Lawyers’ (2009) 14 Bender’s Immigration Bulletin 1, 2.

\textsuperscript{60} Ibid, 1117.

\textsuperscript{61} RACS, above n34, 4.


\textsuperscript{64} Ibid.
of time detained. Citing material inconsistencies between Matthew’s asylum application and his testimony at the interview, the asylum officer rejected Matthew’s claim.65

Trauma may also prevent asylum seekers from applying for asylum when they first arrive in the country in which they intend to seek protection.66

Lack of financial resources or social supports

RACS reports that its clients have often ‘lost everything’,67 including their homes and their jobs. As such, asylum seekers ‘often lack the financial resources to pay for legal advice and representation’.68 Their welfare assistance in Australia entitles them to 89 per cent of the lowest income support provided by Centrelink.69 Some asylum seekers are homeless.70

Asylum seekers are also considered ‘uniquely vulnerable’ because they ordinarily lack family or other social support structures in Australia, and are reliant on non-government organisations for material and psychological support.71 They can experience difficulties in obtaining work, due to a lack of work history, language skills and certainty regarding their ongoing availability.72 Often asylum seekers cannot focus on their cases because they desperately need medical and mental health services.73 The Special Rapporteur on the Human Rights of Migrants (‘the Special Rapporteur’) recently emphasised both asylum seekers’ lack of financial means, and social isolation as critical barriers.74

Physical barriers

For asylum seekers in detention, their geographic isolation makes accessing lawyers particularly difficult, a concern reiterated recently by the Special Rapporteur.75 McAdam and Chong comment that beyond the fact that many detention centres are in remote locations, other obstacles exist. For example, access to communication facilities may be limited, and lawyers have reported being granted permission to meet with a client, only to have the meeting abruptly cancelled or the asylum seeker transferred to another detention centre without notice.76 In an open letter to the Prime Minister regarding offshore detention in 2016 coordinated by the Law Institute of Victoria (‘LIV’), Maurice Blackburn and the Human Rights Law Centre, 49 signatories from the legal profession cited strong concerns that people in offshore detention centres were being denied access to justice. In particular, they highlighted difficulties for Australian lawyers to visit asylum seekers and refugees on Nauru.

65 Names and identifying details were changed to protect client confidentiality: Ardalan, above n45, 1001-1002.
66 Ibid, 1020.
67 RACS, above n34, 7-8.
68 Ibid, 3.
69 Ibid, 7.
70 CASE, above n58, 2.
71 RACS, above n34, 7; McAdam and Chong, above n48, 165.
73 Ibid.
74 OHCHR, above n33.
or Manus Island to provide advice and representation, as well as a lack of local lawyers able to assist asylum seekers in legal matters.\textsuperscript{77}

**Complexity**

The UNHCR has emphasised that the legal framework and procedures for determining recognition of international protection in Australia is complex, especially in light of asylum seekers’ vulnerabilities and barriers.\textsuperscript{78} The complexity of this legal framework has been raised, noting that relevant legislation and case law change frequently.\textsuperscript{79}

Beyond the law itself, the process of applying for asylum is complex, involving a form of over 60 pages with 115 questions, to be completed in English.\textsuperscript{80} This has been a particularly critical barrier for the Legacy Caseload, given the time limits imposed on their applications. A key issue is ready access to legal assistance.

**Lack of documents**

Asylum seekers often lack the documents they need to apply for protection.\textsuperscript{81} The UNHCR states that asylum seekers can be compelled to have recourse to false or fraudulent documentation when leaving a country, if they fear for their safety or freedom and cannot obtain their identity documents, or dispose of their documentation (in fear of being returned and particularly if instructed to do so by smugglers).\textsuperscript{82}

**What are the legal capabilities of individuals within this group?**

Pleasence et al have emphasised that legal capability – the knowledge, skills and psychological readiness to act in the fact of legal problems – can be limited amongst members of disadvantaged groups.\textsuperscript{83} Factors undermining legal capability include experiences of traumatic life events, lack of financial and human capital resources, illiteracy, poor health, and lack of legal knowledge and skills.\textsuperscript{84} The barriers described above suggest that asylum seekers’ legal capabilities can often be very limited.


\textsuperscript{79} Ibid; RACS, above n34, 6.


\textsuperscript{81} McAdam and Chong, above n48, 165.

\textsuperscript{82} UNHCR, Inquiry into the Migration Amendment (Protection and Other Measures) Bill 2014: Senate Legal and Constitutional Affairs Legislation Committee: Submission by the Office of the United Nations High Commissioner for Refugees, 12 August 2014, 9; UNHCR, Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures), 31 May 2001, EC/GC/01/12, 8-9 \url{http://www.refworld.org/docid/3b36f2fca.html}; Ardalan, above n45, 1005.

\textsuperscript{83} Pascoe Pleasence, Christine Coumarelos, Suzie Forell and Hugh M. McDonald, Reshaping legal assistance services: building on the evidence base, A discussion paper (Law and Justice Foundation of New South Wales: 2014), 32.

\textsuperscript{84} Ibid, 125-131
Are there critical gaps in services which are necessary to deliver access to justice to this group?

Legal assistance

Legal assistance available to people seeking asylum in Australia consists of Commonwealth Government funded legal aid, State Government funded legal aid and legal assistance and representation provided by non-government organisations or community legal centres.

People seeking asylum in Australia who have arrived on a valid visa and who meet eligibility criteria can access the Commonwealth funded Immigration Advice and Application Assistance Scheme (IAAAS), which provides legal assistance for people at the initial asylum application stages, not at merits review or judicial review. However, the Australian Government has reportedly indicated that it intends to restrict IAAAS eligibility to those who are extremely vulnerable and do not have the capacity to complete applications (eg for mental health reasons), and those in immigration detention.85

While IAAAS was formerly available to people seeking asylum in Australia without a valid visa, the Commonwealth Government removed them from eligibility in 2014. Instead, the Australian Government developed Protection Application Information and Guides, which provide instructions about the asylum application and assessment process in various languages.86

The withdrawal of IAAAS to most asylum seekers in Australia who have arrived without a valid visa has raised strong concerns that they are left to navigate complex legal systems alone and without essential legal assistance.87 While the most vulnerable (eg unaccompanied minors or ‘exceptionally vulnerable’ adults)88 may be eligible for the free Primary Application Information Service, only a small minority of asylum seekers (around 20 per cent) fall into this category.89

The IAAAS cuts have acute implications for the Legacy Caseload. The Victorian Government has provided legal aid funding for this group in Victoria, and some other limited state legal aid for asylum seekers is provided.90 However, there are critical shortfalls in the level of public legal assistance services available, with specialist community legal centres and non-government organisations reportedly ‘overwhelmed’ with demand.91 The Asylum Seeker Resource Centre indicated that specialist legal services were bracing for an

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88 Ibid, 2-3.
90 In April 2016, the Victorian Government announced a Victorian Legal Aid Legacy Caseload initiative, to enable Refugee Legal and Justice Connect to provide legal aid and advice to up to 11,000 asylum seekers in Victoria: Kaldor Centre, above n85, 3.
expected 300 per cent increase in the legal services required to meet the needs of people seeking urgent support and advice.\(^\text{92}\) In February 2017, RACS reported having 1,200 people on its wait list.\(^\text{93}\) Even more critical pressures have been created by the October 2017 deadline, which reportedly ‘came without warning’ to the sector.\(^\text{94}\) When these were announced in June 2017, it was reported that most legal centres offering free assistance had waiting lists of more than one year and that asylum seekers were presenting to them ‘terrified and panicked’ that they faced deportation without having had a chance to make a claim.\(^\text{95}\) Refugee Legal reported having more than 2,000 asylum seekers on its waiting list in June 2017.\(^\text{96}\)

A further consequence is that there is ‘immense pressure on immigration lawyers to undertake more pro bono work, conscious that clients cannot afford the fees and will otherwise be left with no legal assistance.’\(^\text{97}\) Recently, the Australian Pro Bono Centre reported substantial increases in pro bono legal work undertaken by Australian lawyers during 2015-16.\(^\text{98}\) A key driver of the growth was ‘the increased, and increasing, unmet legal need in work for asylum seekers and refugees.’\(^\text{99}\) However, the legal profession has raised concerns that ‘pro bono is a limited resource,’\(^\text{100}\) and that the sector is facing capacity constraints. The Victorian legal profession has noted that ‘while it has always prioritised providing pro bono assistance to vulnerable individuals, the withdrawal of this funding has led to an unreasonable burden on the Australian legal community, and the levels of need in this area exceed the resources available.’\(^\text{101}\)

As previously discussed, ongoing concerns also exist about the gaps in access to lawyers amongst asylum seekers who are detained, including offshore and at sea. For offshore detainees, this includes gaps in local skilled lawyers and obstacles to accessing Australian lawyers.\(^\text{102}\) These concerns have been recognised by the United Nations.\(^\text{103}\) The Special

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\(^{94}\) Koziol, above n40.

\(^{95}\) Doherty, above n40.

\(^{96}\) Ibid.


\(^{98}\) The average hours of pro bono legal work undertaken by full-time equivalent lawyers in respondent firms had increased by almost 10 per cent from the previous year. Extraordinary growth was recorded amongst firms of 201-499 lawyers (almost 40 per cent), and firms of 50 to 200 lawyers (26 per cent): Australian Pro Bono Centre, Report on the Fifth National Law Firm Pro Bono Survey: Australian firms with fifty or more lawyers (University of New South Wales: March 2017), 5.

\(^{99}\) Immigration work had moved up to third place in the list of areas of law in which the most pro bono work was done, from 12th place in 2014: Ibid.


\(^{102}\) Justice Connect, above n77, 1.
Rapporteur has recently drawn attention to the insufficiency of explanations given to asylum seekers by case managers under contract from the Department of Immigration and Border Protection, given that such persons represent the primary decision-maker on protection visa applications.\footnote{104}

Courts and tribunals

The Federal Circuit Court has indicated that it expects significant increases in its migration workload given probable review applications by the Legacy Caseload.\footnote{105} Over the five years to 2015-16, it stated that the number of migration filings in the court grew nearly three-fold.\footnote{106} This increase, it stated, ‘has placed pressure on the Court’ and its ability to meet its benchmarks.\footnote{107} Without additional judicial resources, the court considered that delays were inevitable.\footnote{108} It noted that:

> Migration work presents additional demands on the Court and its administration that do not arise in other areas of the Court’s jurisdiction. As many litigants in migration matters are self-represented, particularly those seeking review of protection visa decisions, there is a greater need for pro bono representation or other legal representation, particularly as legal aid is not available to protection visa applicants who are in migration detention.\footnote{109}

The Federal Court has indicated that the majority of the 563 people who commenced proceedings in the Court in 2015-16 as self-represented litigants were appellants in migration appeals. Migration appeals constituted 90 per cent of appeals commenced by self-represented litigants.\footnote{110}

In the AAT, almost 46 per cent of lodgements during 2015-16 were in the Migration and Refugee Division (‘MRD’). Refugee cases took significantly longer to finalise than migration cases.\footnote{111} Applications for review of protection visa decisions were 12 per cent higher in 2015-16 than in 2014-15.\footnote{112} The AAT MRD drew attention to the particular pressures, including on volume and timeliness, caused by having 16 fewer full time members available to deal with cases in 2015-16 compared to the previous financial year. It emphasised that:

> ‘…protection visa cases are generally the most complicated and time-consuming cases given the nature of the claims made, and the difficulties in assessing claims about persecution and the risk of harm emanating from the applicant’s country of origin’.\footnote{113}

Support services

With respect to asylum seekers living in the Australian community, the LIV has highlighted that a major implication of the IAAAS cuts is that interpreting services are no longer paid

\footnote{104} Crépeau, above n75, 17.}
\footnote{105} Federal Circuit Court, Annual Report 2015-16, 67-68.}
\footnote{106} Ibid, 68.}
\footnote{107} Ibid.}
\footnote{108} Ibid.}
\footnote{109} Ibid.}
\footnote{110} Federal Court, Annual Report 2015-16 (Commonwealth: 2016), 38-39.}
\footnote{111} 64 weeks, compared to 36 weeks: AAT, Annual Report 2015-16, 24, 28.}
\footnote{112} Not including fast tracked applicants, whose decisions are reviewed by the Immigration Assessment Authority: Ibid, 29.}
\footnote{113} Ibid, 31.}
The AHRC has drawn attention to the lack of broader support services available to support this group including limited access to English language tuition and other key services (such as employment support services).

With respect to asylum seekers in offshore processing, the AHRC also refers to numerous reports and inquiries documenting 'serious shortcomings' in living conditions. These include substandard accommodation, inadequate basic services (including hygiene), and education and health services. There has been 'limited improvement' in these conditions over time.

Are there laws, policies, and practices which exacerbate access to justice barriers for this group?

Noone has observed that demand upon legal assistance services and the broader justice system is directly related to shifts in government policy, including immigration policy. This is exemplified by the extended delay on lifting the bar on visa applications, and subsequent deadlines imposed upon the Legacy Caseload, discussed above.

A comprehensive review of all laws, policies, practices and systems which exacerbate the barriers for asylum seekers from accessing justice in Australia is beyond the scope of this literature review. Some key concerns, however, have been identified below, noting that the Law Council’s approach to this section is guided by its Asylum Seeker Policy, which highlights relevant rule of law and international human rights law principles applying to Australia’s response to asylum seekers. The Asylum Seeker Policy highlights that:

- every person has the right to seek and enjoy asylum from persecution, serious human rights violations and other serious harm;
- Australia’s non-refoulement obligation prohibits it from ‘expelling or returnng a refugee in any manner whatsoever to the frontiers of territories where his life or

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116 AHRC, above n3, 35-36 (full page list of citations at 65).

117 Ibid.

118 Mary Anne Noone, ‘Challenges facing Australian Legal Aid’, in Asher Flynn and Jacqueline Hodgson, Access to Justice and Legal Aid: Comparative Perspectives on Unmet Legal Need (Bloomsbury: 2017), 30.


freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion;¹²¹

- Australia's non-refoulement and other relevant obligations apply to all people seeking asylum in Australia regardless of their mode or time of arrival. These obligations require Australia to respect the right to seek asylum, by providing durable protection outcomes for those found to invoke Australia's protection obligations;¹²²

- Australia is required to enact robust safeguards to protect against refoulement, including:
  - a clear legal process for determining whether a person invokes any of Australia's protection obligations, that does not discriminate against applicants based on where they come from or how they arrive;
  - practical access to independent legal or migration advice for all people seeking Australia's protection;¹²³
  - access to merits review of all administrative decisions concerning protection status;¹²⁴
  - ensuring that asylum seekers who enter Australia are not penalised for doing so without a valid visa, or for their mode of arrival, provided they present themselves to the authorities without delay and show good cause for their entry or presence.¹²⁵

- protection determination processes must include procedural fairness guarantees, such as the right to present and challenge evidence, and be accompanied by the provision of independent legal advice;¹²⁶

- the detention of asylum seekers should only occur as a measure of last resort, while no asylum seekers should be subject to arbitrary or mandatory detention.¹²⁷ Decisions to detain should be subject to procedural safeguards, including that asylum seekers should be able to challenge the lawfulness of their detention before a court, and have full access to legal advice to establish and defend their rights.¹²⁸ Conditions of immigration detention must be humane and dignified;¹²⁹

- where offshore processing arrangements are entered into between Australia and other States for the purpose of determining asylum seeker protection claims, such arrangements must adhere to Australia’s international human rights obligations.¹³⁰ These obligations cannot be transferred to other States.¹³¹

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¹²¹ Ibid 5, citing the Refugee Convention, art 33; and certain non-refoulement obligations under the CAT (art 3), the ICCPR and the CROC.
¹²² Ibid, 5.
¹²³ Ibid 5, 6.
¹²⁴ Ibid, 5, citing the Refugee Convention, art 16 and the ICCPR, arts 9 and 14.
¹²⁵ Ibid, 5.
¹²⁶ Ibid, 6.
¹²⁷ Ibid, 7.
¹²⁸ Ibid, 7.
¹²⁹ Ibid, 9, citing the ICCPR, art 10.1; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, GA res 43/173 (1998), Principle 1; and Office of the UNHCR, Detention Guidelines: guidelines on the applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention (2012), Guideline 8.
¹³⁰ Ibid, 8.
Australia remains responsible for ensuring that appropriate processes are established for determining whether protection is owed to individuals who seek asylum in Australia, and for ensuring that such people are treated in accordance with its international obligations;\(^{132}\) and

- Persons rescued or intercepted at sea have a right to access effective procedures for the determination of their refugee or complementary protection claims. It is not lawful to transfer at sea a person claiming protection to the authorities of a state from which the person fears harm, without processing his or claim in accordance with minimum international standards regarding determination of refugee status.\(^{133}\)

The Law Council’s policy position is that Australia should comply with its international obligations, as well as its responsibilities arising under its common law duty of care to asylum seekers,\(^{134}\) in determining and implementing its laws and policies regarding asylum seekers.

The Law Council also recognises that many of the following laws and policies have bipartisan support and are underpinned by a desire to avoid asylum seeker deaths at sea and people-smuggling.\(^{135}\) However, it remains concerned about their cumulative impact on asylum seekers’ effective access to justice.

**Mandatory detention**

Under the *Migration Act 1958* (Cth) (‘the Act’), immigration detention is mandatory for all unlawful non-citizens regardless of circumstances. Once detained, unlawful non-citizens must remain in detention until they are either granted a visa or removed from Australia.\(^{136}\)

All unlawful non-citizens must be detained, regardless of whether they pose any risk to the community. They cannot seek judicial review of whether their detention is arbitrary, and there is no time limit on how long a person can be detained. This policy breaches international rights against arbitrary detention\(^ {137}\) given its automatic, lengthy and potentially

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131 Ibid, 8, citing UNHCR, Protection Policy Paper - Maritime interception operations and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing (November 2010), Part B.

132 Ibid, 8, citing G Goodwin-Gill and J McAdam, *The Refugee in International Law* (3rd ed, 2007), 408-411; Human Rights Committee, *Munaf v Romania*, Communication No 1539/2006, UN Doc CCPR/C/96/D/1539/2006 (2009) [14.2]. This case provides that the relevant question to determine whether the State’s obligations apply extraterritorially is whether the State has ‘power over or effective control’ over an individual to whom the State has obligations to respect and ensure that person’s rights.

133 Ibid, 10-11, citing the Refugee Convention; the ICCPR; the Second Optional Protocol to the ICCPR; the CROC and the CAT.


136 The Act, ss 189, 196.

137 ICCPR, art 9(1); CRC, art 37(b).
People reside in Nauru (as detailed below and in the Justice Project’s paper on Children and Young People).

Offshore processing

In 2012, offshore processing was re-introduced, with asylum seekers arriving by boat transferred to Nauru and PNG for processing. This removed their access to Australian territory, refugee status determination procedures and courts. The UN has previously found that this regime constituted ‘widespread and systematic violation of international law’ and violated prohibitions on torture or cruel, inhuman or degrading treatment. Offshore detention has been recognised as causing ‘serious physical and mental pain and suffering.’ Australia’s joint responsibility has been affirmed given its effective control of offshore centres. The UNHCR has also emphasised the refoulement risks of transferring individuals offshore.

Incidents of violence have included assault of asylum seekers by PNG police, security guards and other local staff, with Iranian asylum seeker Reza Berati beaten to death, and multiple incidents of physical and sexual assault of asylum seekers residing in Nauru. Particular concerns exist regarding the safety and wellbeing of asylum seeker children who reside in Nauru (as detailed below and in the Justice Project’s paper on Children and Young People).


139 The High Court of Australia has upheld the constitutional validity of Australia’s domestic statutory provisions supporting the regime for detention of asylum seekers in Nauru: Plaintiff M68/2015 v Minister for Immigration and Border Protection & Ors (2016) 327 ALR 369; [2016] HCA 1. However, the decision does not affect Australia’s obligations under international human rights law: Law Council of Australia, above n134, 8.

140 Working Group on Arbitrary Detention, above n103, [48].

141 Mendez, above n103, [16]-[18].

142 Committee against Torture, Concluding Observations: Australia, UN Doc CAT/C/AUS/CO/4-5 (23 December 2015), [17].


144 Eg, UN Manus Island Mission, 8-11.

145 AHRC, above n3, 36, citing Robert Cornell, Review into the events of 16-18 February 2014 at the Manus Regional Processing Centre (CIBP, 23 May 2014) 6-7, 62-69.

While positive reforms have included a transition to ‘open centre arrangements’, and steps taken towards resettling recognised refugees in the US, ongoing concerns have remained regarding the living conditions and safety concerns on Manus Island and Nauru, the effects on individuals’ and particularly children’s health, and insufficient status determination frameworks. In addition, many amongst the legal profession have remained concerned that the current regime generally undermines a fundamental legal right – access to justice.

As discussed, recent reports state that asylum seekers have been informed by PNG officials that they must leave the Manus Island RPC so that it may be closed, with closure of some parts scheduled by 30 June 2017. Recognised refugees have reportedly been told that they have the option of temporarily relocating to a PNG transit centre, settling in the PNG community, or returning to their countries of origin. People whose claims had been rejected have been told that they should agree to return to their countries of origin promptly before cash incentives were withdrawn. At the timing of writing, it was unclear how many Manus Island refugees will be accepted for resettlement in the United States, or whether individuals have access to independent advice regarding these decisions. As discussed, on 14 June 2017, it was reported that the Australian Government had agreed to compensate 1900 asylum seekers currently or formerly held at the Manus Island detention centre through a conditional settlement of $70 million plus costs.

**Boat turn-backs**

Since early 2014, Australia has detained and towed back boats in international waters, without undertaking full protection claim assessments. In some cases it has conducted brief ‘enhanced screening’ processes at sea. It has also legislated to prevent judicial review of such actions on international law or natural justice grounds, exacerbating rule of law concerns. These actions risk *refoulement* and arbitrary detention and have been censured by the UN.

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147 AHRC, above n3, 39. Other resettlement arrangements have been made with the Cambodian and Papua New Guinean Governments. However, the AHRC questions whether these will provide genuine durable solutions for refugees: above n3, 38-39.

148 Crépeau, above n75, 14-15; AHRC, above n3, 35-36, citing a broad range of UN and Commonwealth Parliament reports.

149 Crépeau, above n75, 14-15.

150 Law Council of Australia, above n138 (UPR), 5.

151 Justice Connect, above 77.

152 Tlozek, above n27.

153 Ibid.

154 Koziol, above n28.

155 AHRC, above n3, 26-27.

156 Ibid.


159 Eg Crépeau, above n75, 9; UNHCR, Submission to Senate Legal and Constitutional Affairs Committee: Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload Bill) 2014, 31 October 2014 (‘UNHCR Caseload Submission’), [82]-[90].
Secrecy laws

New secrecy laws also create new offences for Australian immigration employees and contractors to disclose information obtained in such capacity, punishable by up to two years imprisonment. Very limited exceptions apply. This makes it difficult to corroborate unverified reports from asylum seekers and refugees in RPCs. The Law Council of Australia has recommended that a public interest disclosure exception to the secrecy provisions be included which provides that, for an offence to be committed, the unauthorised disclosure caused, or was likely or intended to cause, harm to an identified essential public interest.

Fast track merits review

Under the new fast track’ merits review process, the Legacy Caseload’s automatic access to full AAT merits review, including a hearing on review, has been removed. Instead, fast-tracked applicants who receive a negative decision may be referred by the Minister to the Immigration Assessment Authority (‘IAA’), which incorporates a more limited form of review, generally without an interview and ‘on the papers’, with no new information allowed. An exhaustive statement of the natural justice hearing rule excludes the obligation to invite an applicant to a hearing before a negative decision can be made, and confines the nature of IAA review to the same material that was before the primary decision-maker.

This diluted form of merits review ‘heightens the risk that people seeking asylum will not receive a fair or thorough assessment of their claims’. The process is particularly concerning given the withdrawal of IAAAS, long waitlists for legal assistance, and the stringent application time limits imposed.

162 For example, one exemption applies to records or disclosures which are required by an order or direction of a court or tribunal, and another applies where it is necessary to prevent or lessen a serious threat to life or health: ss 42(2)(d) and 48. Health practitioners are exempt: DIBP, Determination of Immigration and Border Protection Workers: Australia Border Force Act 2015, 29 June 2015.
164 Law Council of Australia, above n134, 6; 20-22.
165 Imposed under the Caseload Act.
166 The Act, ss 473CB(1), 473DB, 473DD. In addition, some people seeking asylum are not eligible for any form of merits review under the fast track process, including people who, in the opinion of the Minister, have had their claims rejected, or have provided ‘bogus documents’ without reasonable explanation, or make ‘manifestly unfounded’ claims: the Act, s5(1). For a discussion of this regime, see Mary Crock and Kate Bones, ‘Australian Exceptionalism: Temporary Protection and the Rights of Refugees’ (2015) 16 Melbourne Journal of International Law 522.
167 The Act, s 473DA.
168 Unless there are ‘exceptional circumstances’: s473DD.
Further, 'excluded fast track applicants' will not have access any form of merits review, and will only have access to judicial review, which is more limited. This group includes applicants who have provided, 'without reasonable explanation,' 'bogus documents', or have made, in the Minister's opinion, 'manifestly unfounded' claims. The Minister can expand the category of 'excluded fast track applicants' by legislative instrument. More generally, the Minister also has a broad power to issue conclusive certificates preventing individual decisions from being changed or reviewed, which could be used to prohibit merits review of all decisions refusing to grant a protection visa.

Refugee definition and safeguard amendments

Legislative amendments have recently removed most references to the Refugee Convention from the Act, replacing them with a narrower interpretation of Australia’s protection obligations. Officers are also now obliged to remove unlawful non-citizens under s 198 of the Act, regardless of whether there has been an assessment of either Australia’s non-refoulement obligations towards them, or whether Australia has any such obligations towards them. The Special Rapporteur has stated recently that ‘this law is a violation of the international principle of non-refoulement’.

Burden of proof amendments

Recent amendments provide that it is the applicant’s responsibility to specify all claim particulars and provide sufficient evidence, and that the Minister is under no obligation to assist. Further, if a person provides ‘bogus documents’ or destroys their documents without ‘reasonable explanation’, the AAT must draw unfavourable inferences about their claims’ credibility. These changes have increased fears that people with genuine claims may be denied protection.

Discrimination based on mode of arrival

Australian policies discriminate against asylum seekers based on their mode of arrival in Australia. Unlike those who arrive by plane with visas, those who arrive by boat without a visa are not permitted to apply for permanent Protection Visas, which, if granted, permits immediate permanent residency. Instead, they must apply for Temporary Protection Visas.

170 The Act, s 5(1).
171 The Act, s 5(1).
172 The Act, s 5(1).
173 The Act, ss 411(2)-(3), 473BD.
174 For example, asylum seekers will no longer be considered refugees if: their persecution does not extend to ‘all areas’ of their country of origin, or they could take ‘reasonable steps’ to modify their behaviour, subject to certain exceptions: the Act, ss 5J(1)(c) and 5J(3). Further, the definition of a ‘particular social group’ was narrowed: s5L. See Law Council of Australia, above n158, 33-38.
176 Crépeau, above n75, 9.
177 Under the Migration Amendment (Protection and Other Measures) Act 2015 (Cth).
178 The Act, s5AAA.
179 The Act, ss 91W, 91WA, 423A.
180 AHRC, above n3, 29.
181 The Special Rapporteur has raised particular concerns with respect to this issue: Crépeau, above n75, 9-12.
(TPVs, which are issued for up to three years) and Safe Haven Enterprise Visas (‘SHEVs’, \(^{182}\) which are issued for up to five years).\(^{183}\)

When TPVs expire, holders can only apply for another TPV or SHEV. SHEV holders may be eligible to apply for certain temporary and permanent immigration visas if they meet certain pathway requirements (eg, employment or studying in regional areas).\(^{184}\) However, concerns exist that SHEV pathways are unviable options for most asylum seekers given their barriers including English, health and literacy.\(^{185}\)

Further, TPVs and SHEVs do not entitle visa holders to the same support services, such as settlement services, as refugees on permanent humanitarian visas.\(^{186}\) Unlike permanent Protection visa holders, TPV and SHEV holders cannot propose relatives for resettlement under the Refugee and Humanitarian Programme,\(^{187}\) and cannot travel overseas to visit family, except in limited circumstances.\(^{188}\)

**Judicial review**

Attempts to oust the judicial review jurisdiction of the courts for certain migration decisions through the privative clause at s474 of the *Act* have been unsuccessful.\(^{189}\) However, other judicial review limitations apply. Under s494AA of the *Act*, judicial review is excluded (except under *the Australian Constitution*) of matters relating to the entry, processing and detention of asylum seekers arriving by boat, who landed at an ‘excised offshore place. In 2013, the bar on legal proceedings under s494AA was extended to any asylum seeker who arrived by boat at any place on or after 1 June 2013.

Similar restrictions apply in relation to transitory persons.\(^{190}\) Additionally, such a person cannot challenge, other than under the *Constitution*, any actions taken to bring them to Australia,\(^{191}\) including the safety of vessels used for such transportation, or the use of reasonable and necessary force.\(^{192}\) The Australian Law Reform Commission has commented that ‘while these provisions explicitly do not seek to affect the constitutionally entrenched judicial review, they are drafted in a manner that appear to exclude a wide range of decisions under the *Act* from review’.\(^{193}\)

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182  SHEVs.
186  AHRC, above n3, 43-45.
187  Nor can people who arrived in Australia by boat on or after 13 August 2012: DIBP, Proposing an immediate family member (Split family) (undated), <https://www.border.gov.au/Trav/Refu/Offs/Proposing-an-immediate-family-member-(split-family).
188  They must have written approval and ‘compassionate and compelling circumstances’ must exist: DIPB, ‘Request for approval to travel under visa condition 8570 (Restricted travel), <www.ima.border.gov.au/en/After-your-application-is.../Travel-condition-8570>.
189  The High Court has read s474 so that it does not apply to any decision involving jurisdictional error: Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476; Re Refugee Tribunal; Ex parte Aala (2000) 204 CLR 82, [163].
190  The Act, s494AB.
191  Ibid.
192  The Act, s198B(2).
In addition, the Act contains wide-ranging ministerial powers of discretion, which are non-compellable and largely non-reviewable. These discretions relate to matters which are fundamentally important to asylum seekers, as their exercise can result in asylum seekers being detained indefinitely, being deported or being denied the opportunity to apply for protection.\textsuperscript{194} They can also be exercised in a manner which prevents asylum seekers from enjoying other fundamental rights, such as the right to work.\textsuperscript{195}

**Code of Behaviour**

The Australian Government has introduced a Code of Behaviour (the Code) which applies to adult applicants for Bridging E visas (usually granted to asylum seekers in Australia who arrived by boat).\textsuperscript{196} Applicants must sign the Code or they will be ineligible for the visa. The Code provides that signatories must: not disobey Australian laws, comply with lawful police government instructions; refrain from prohibited sexual contact or criminal behaviour; not deliberately damage property or threaten peaceful enjoyment of the community; not harass, intimidate or bully others or engage in anti-social or disruptive activities; and comply with any official health undertakings. Further, they must cooperate with all reasonable official requests regarding their status resolution.\textsuperscript{197}

Breach of the Code may result in cancellation and immigration detention, and other actions including income support suspension.\textsuperscript{198} The Code has been criticised on the basis that it is unnecessary given existing laws, and extends to behaviours with which lawmakers should not interfere, such as ‘anti-social’ or ‘disruptive’ activities.\textsuperscript{199} Further, it imposes serious consequences including in circumstances in which people would otherwise be eligible for protection visas.

**Character test visa cancellation power**

As discussed in The Justice Project Recent Arrivals paper, under s 501 of the Act, the Minister or a delegate can refuse or cancel a visa on the basis that the person does not pass the ‘character test’.\textsuperscript{200} This affects both migrants generally, and asylum seekers in Australia on bridging visas.

The recently expanded test under s501 has raised significant concerns given the breadth of the expanded cancellation powers, low cancellation thresholds, and insufficient safeguards.\textsuperscript{201} People who have visas refused or cancelled on character grounds have limited access to independent review. If this decision was made by the Minister, the person

\begin{footnotesize}
\begin{enumerate}
\item Eg, the Act, ss 48B(1) and (6), 195A(2) and (4), 500-502.
\item For example, even if the Minister does exercise the discretion to grant a visa, there might be conditions imposed on the visa, such as not being allowed to work, which are also unreviewable, and which also significantly impact the rights and livelihood of asylum seekers.
\item Ibid.
\item Ibid.
\item The Act, s501.
\item Eg, Crépeau, above n75, 9-10; Law Council of Australia, Submission to the Joint Standing Committee on Migration - Inquiry into Migrant Settlement Outcomes, 17 February 2017, 5-6; Legal Aid NSW, Submission to the Joint Standing Committee on Migration – Inquiry into Migration Settlement Outcomes, February 2017, 17.
\end{enumerate}
\end{footnotesize}
cannot appeal to the AAT. The Minister can also set aside decisions made by delegates and the AAT in relation to character matters.\textsuperscript{202}

Subsequently, there has been a significant increase in visa refusals and cancellations on character grounds, with 423 refusals and 983 cancellations during 2015-16.\textsuperscript{203} As discussed, the number of people in detention due to visa cancellation has also increased significantly.\textsuperscript{204} Legal Aid NSW has recorded ‘close to a doubling of advice and minor assistance in this area’.\textsuperscript{205}

Unaccompanied minors and children in detention

As outlined in the Justice Project paper on Children and Young People, there have been longstanding concerns regarding the position of unaccompanied minors who are asylum seekers. The Law Council has consistently called for further protections for this group.\textsuperscript{206} Under current arrangements, the Minister for Immigration and Border Protection is the legal guardian for unaccompanied minors who arrive in Australia. However, the Law Council and others have called for an independent guardian to be appointed given that the Minister’s role is necessarily political and interferes with decisions which are in the best interests of the child.\textsuperscript{207} The Special Rapporteur has echoed these calls, finding that ‘child protection is more important than border protection’.\textsuperscript{208}

As discussed, strong concerns exist regarding the health and wellbeing of children residing in Nauru under regional processing arrangements. A group of paediatricians who visited Nauru in 2015 concluded that ‘Nauru is an inappropriate place for asylum seeking children to live, either in the detention centre or the community’\textsuperscript{209} and that under no circumstances should children be detained there. Similar concerns have been raised by the Special Rapporteur.\textsuperscript{210}

What are the costs and consequences if this group cannot access justice?

Without free legal assistance, asylum seekers are forced to apply for protection visas on their own, due to a lack of financial resources, and the quality of applications and, in turn, decision-making processes are likely to be undermined. Without adequate legal assistance, there is a real risk that an applicant will be unable to properly understand the legal requirements; present their claims in full; and receive a fair hearing and just outcome or decision. As the UNHCR notes, ‘asylum seekers are often unable to articulate the elements relevant to an asylum claim without the assistance of a qualified counsellor because they are

\begin{thebibliography}{99}

\bibitem{202} The Act, ss 500, 501A, 501B, 501BA.
\bibitem{204} AHRC, above n3, 18, DIBP, Immigration Detention and Community Statistics Summary (31 December 2016), 4.
\bibitem{205} Legal Aid NSW, Annual Report 2015-16, 42.
\bibitem{206} Law Council of Australia, above n134, 12-13.
\bibitem{207} Ibid; Law Council of Australia, above n138, 4; AHRC, above n3, 15.
\bibitem{208} Crépeau, above n75, 10.
\bibitem{209} AHRC, above n3, 38.
\bibitem{210} Crépeau, above n75, 13-15.
\end{thebibliography}
not familiar with the precise grounds for the recognition of refugee status and the legal system of a foreign country’.  

The Kaldor Centre states that given their experiences of trauma, a lack of support networks, poor health, language and cultural barriers, asylum seekers are not likely to articulate their claims in a coherent way, nor to build up enough trust with decision-makers to share personal details. As such, the quality of the decision-making and review process is likely to be undermined. Data indicates that people seeking asylum who are represented at merits review, have a much higher likelihood of achieving a successful appeal. Poor decision-making and review processes could mean that individuals will be wrongly refused refugee or complementary protection and that they may be returned to countries where they face persecution and other forms of serious or significant harm, such as torture and death.

Delays in resolving protection claims and the associated uncertainty also affects asylum seekers’ health. The UNHCR has emphasised that delays, combined with the prohibition on family reunification, have resulted in a significant deterioration of the Legacy Caseload’s mental health and general wellbeing. Studies have found that granting temporary protection visas undermines refugees’ mental health. The impacts of prolonged immigration detention and offshore processing include mental health conditions ranging from depression, anxiety and sleep disorders, to post-traumatic stress disorder, suicidal ideation and self-harm.

A lack of legal assistance for asylum seekers has ramifications beyond individual asylum seekers. The community’s costs of providing such assistance are shifted to increased burdens on decision-making officials and the courts. Decision-makers must make decisions on the basis of poorly prepared and incomplete applications, which delays decision-making processes and increases the risk of appeals. The lack of early advice preventing unmeritorious claims and consequential rise in self-represented litigants results in additional pressures on the court and tribunal system, through increased workloads and delays.

The LIV has emphasised its concerns that due to the particular pressures on the legal sector to meet the Legacy Caseload’s urgent legal needs, the general community’s access to justice has suffered. In this way, ‘a policy change that may appear at first instance to

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212 Kaldor Centre, above n85, 3-4.  
213 The former Migration Review Tribunal (‘MRT’) and Refugee Review Tribunal (‘RRT’), now amalgamated into the AAT, reported in 2014-15 that the set aside rate in the RRT was 27 per cent for represented applicants and nine per cent for unrepresented applicants: Migration Review Tribunal and Refugee Review Tribunal Annual Report 2014-15 (Commonwealth: 2015), 22.  
214 McAdam and Chong, above n48, 164, 168.  
216 Kaldor Centre, above n182, 6.  
218 Ibid, 165.  
220 Kaldor Centre, above n85, 4.  
221 LIV, above n114, 129.
concern only the Commonwealth jurisdiction, has in fact had an adverse impact on Victorians’ access to justice’. 222

With respect to the financial costs of existing policies, the Australian National Audit Office (‘ANAO’) refers to the per person per annum cost of holding a person in the offshore processing centres in Nauru and on Manus Island, was estimated at $573,111 in December 2015.223 By comparison, the annual cost of holding one IMA in onshore detention was estimated at $239,000 in 2013-14.224 Holding people in community detention was significantly cheaper, at under $100,000 per year, and keeping a person on bridging visas was cheaper again (around $40,000).225

What measures are effective – what works and why?

For this group in particular, there are difficulties in outlining ‘what’s working’ in the Australian justice system. This is due to pressures caused by the withdrawal of IAAAS, the operation of multiple policies, laws and practices which impede access to justice, and the reality that scarce funding and resources are being directed towards meeting extreme frontline demand, rather than evaluating or reporting on initiatives.

In many cases, effective responses in Australia are currently due to the goodwill of the legal sector – as demonstrated by the workloads being undertaken by legal assistance bodies, and the recent increases in pro bono work aiming to meet the Legacy Caseload’s needs.

Given the reality of a system under pressure, much of the following material relies upon an identification of best practice responses, as identified by personnel who work with asylum seekers, and international research, rather than formal evaluations of Australian initiatives.

Further, there are many measures which will be effective in addressing asylum seekers’ barriers in accessing justice. Exploring all of these is beyond the scope of this literature review. The following section focuses primarily on the right to legal representation as a critical safeguard in a much broader platform of necessary measures. The Law Council has advocated consistently for comprehensive change in this regard.226

Appropriate and accessible services

Pleasence et al suggest that more disadvantaged clients require appropriate and accessible services, which match client legal need and capability. These are tailored and personalised in mode and form for the person who requires help.227

In particular, they argue that the concept of legal capability – the knowledge, skills and confidence necessary to resolve legal problems – is essential to determining what level of services will most effectively respond to individuals’ needs and behaviours.228

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222 Ibid.
226 A range of relevant policy submissions are included at <https://www.lawcouncil.asn.au/tags/submissions>.
227 Pleasence et al, above n83, 141.
Legal representation

The UNHCR has emphasised that in view of the nature of the risks involved and the grave consequences of an erroneous determination for asylum seekers, it is essential that asylum seekers be afforded full procedural safeguards and guarantees at all stages of refugee status determination. It further states that asylum seekers are often unable to articulate the elements relevant to their claims without qualified assistance due to limited familiarity with local laws and requirements, the right to legal assistance and representation is an essential safeguard. Free legal assistance should be guaranteed by States in first instance procedures and against negative decisions. The UNHCR has also recently reinforced that government-funded legal representation is critical for the Legacy Caseload, given the ‘inadequate procedural safeguards’ which are inherent in the fast-tracking process.

These principles have been echoed by the Special Rapporteur with respect to Australia’s position on asylum seekers, stating that:

> Administrative law is so complicated and migrants already face many barriers, including language, lack of legal information and information about their rights, social isolation, absence of financial means, and, for those who are in detention, physical separation. There can be no effective access without effective support from competent judges, adequate legal representation and sufficient legal aid funding.

In a detailed report on legal aid for asylum seekers in Europe, the European Council on Refugees and Exiles made several recommendations, including that legal aid should be available to asylum seekers who lack resources at all stages of the process, with a presumption applying that asylum seekers lack sufficient resources unless there is clear evidence to the contrary. Further, tests regarding a claim’s merit should not be so stringent as to practically deny asylum seekers an effective remedy.

With respect to Australia, McAdam and Chong have reinforced that legal assistance is:

> ‘…a central element of a fair and efficient justice system founded on the rule of law. It helps to eliminate the barriers that impair access to justice for those otherwise unable to afford legal representation. It helps to ensure fairness and public confidence in the way that justice is administered. In the case of asylum seekers, it may mean the difference between life and death’.

A key theme in identified ‘best practice’, therefore, is that given that asylum seekers experience such serious barriers, have low legal capability, and face such serious consequences when wrong decisions are made, intensive legal help is critical. These points have been reinforced in the Australian context. For example, RACS has emphasised that asylum seekers’ limited knowledge, experiences of trauma and distrust, combined with the complexity of a constantly changing legal landscape, require appropriate legal help.

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228 Ibid, 130-131.
229 UNHCR, above n44.
230 Ibid, 3.
231 Ibid; UNHCR, above n82, 12.
232 UNHCR, above n78.
233 Crépeau, above n75, 17.
234 European Council on Refugees and Exiles (‘ECRE’), Survey on Legal Aid for Asylum Seekers in Europe (European Legal Network on Asylum: 2010), 160-162.
236 McAdam and Chong, above n48, 164.
representation and advice. Providing information kits in lieu of such advice, it argues, is ‘vastly inadequate’. The LIV agrees, highlighting that ‘self-representation is not an appropriate option for asylum seekers’, as the particular vulnerabilities of asylum seekers and the difficulties associated with making an asylum claim make self-representation especially inefficient and ineffective. Justice Connect’s recent evaluation found that that its asylum seeker clients clearly required more than one-off advice – they needed advocates throughout to resolve their problems.

A case study from Refugee Legal below outlines the intensive, ongoing help which is needed to help asylum seekers navigate a complex system:

In 2009, Fatema, then aged 13, applied with her siblings, her mother and stepmother, for visas to join her father in Australia. They are Hazara Shias who had been forced to flee from Afghanistan to Pakistan to avoid persecution by the Taliban. Fatema’s father had originally arrived in Australia by boat and had been granted a permanent protection visa. There were long delays in processing the family’s visa applications and, after two years, Refugee Legal was asked by the migration agent who had been representing the family to take over the case as it had become too complicated. Eventually all the family, bar Fatema and her mother, were granted visas to Australia. The Department did not believe that Fatema was her father’s child. DNA testing proved that Fatema was her father’s child but, by this time, Ministerial policy required that visa applications proposed by people who had originally arrived by boat be treated as lowest priority no matter how compelling the cases.

We assisted Fatema’s father to apply for Australian citizenship, which was granted. This meant that processing of his daughter’s application recommenced. Unfortunately, Fatema’s mother was then diagnosed with a life-threatening illness, which meant that she no longer satisfied the health requirements for the visa. We prepared further information and submissions in support of both Fatema and her mother, given the fact that they had been living in a situation of extreme danger as two females on their own, without male protection, for many years and that this danger would only increase as Fatema reached her late teens.

Both Fatema and her mother were granted visas and were finally able to reunite with their family in Australia late last year.

Evidence supports claims that legal representation is necessary and effective in meeting asylum seekers’ legal needs. For instance, recent Australian data indicates that people seeking asylum who are represented at merits review have a much higher likelihood of achieving a successful appeal. The former Migration Review Tribunal and Refugee Review Tribunal (‘RRT’), now amalgamated into the AAT, reported in 2014-15 that the set aside rate in the RRT was 27 per cent for represented applicants and nine per cent for unrepresented applicants.

237 RACS, above n34, 4.
238 LIV, above n114, 141, 143.
239 Justice Connect, above n41, 12.
241 Ibid.
242 The MRT and RRT commented that ‘unrepresented applicants may not have sought advice on their prospects of success before applying for review or may have applied despite obtaining advice that the prospects of success were low’. Migration Review Tribunal and Refugee Review Tribunal Annual Report 2014-15 (Commonwealth: 2015), 22.
Internationally, a recent national study of access to counsel in US immigration courts, drawing on data from over 1.2 million deportation cases decided between 2007 and 2012, found that immigrants with attorneys fared far better. Among similarly situated removal respondents, the odds were fifteen times greater that represented immigrants sought relief, compared to non-represented immigrants. The odds were five and a half times greater that they sought relief from removal. The authors of this study also concluded that represented respondents brought fewer unmeritorious claims, were more likely to be released from custody, and once released, were more likely to appear at their future deportation hearings.

Further, in 2009, Banki and Katz examined effective and just mechanisms for resolving non-citizens’ status through a literature review and comparative analysis of immigration status resolution in six countries. These authors identified consistent evidence that legal assistance improved the quality of the status resolution process and outcomes for asylum seekers. Those with legal representation were far more likely to be granted asylum than those without. Particular elements of success for legal programs included offering intensive assistance, coordinating effectively with governments, using visual aids, early intervention and providing materials in other languages.

With respect to Australia’s position on free legal assistance vis à vis other comparable nations, the Kaldor Centre has highlighted that:

- in New Zealand, eligible people seeking asylum are entitled to government-funded legal assistance for most stages of the visa application process;
- in the European Union, Member States are required to provide free legal and procedural information in relation to their initial application, and free legal assistance and representation for appeal proceedings; and
- in the United Kingdom (‘UK’), eligible people seeking asylum are entitled to government-funded legal assistance in respect of their claim for a protection

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244 Ibid, 2, 9.

245 Ibid.

246 Ibid, 66-73.


248 Canada, New Zealand, Sweden, the United Kingdom, the United States and Australia: Banki and Katz II, Ibid.

249 Banki and Katz I, above n247, 7, 28-29.


251 Banki and Katz II, above n247, 5, 7.

252 From the initial claim to proceedings before the Immigration and Protection Tribunal and any subsequent appeals. An eligibility test applies regarding the client’s financial resources and prospects of success: Kaldor Centre, above n85, 4.

253 Under the European Union’s Asylum Procedures Directive. Member States may apply eligibility tests (based on eg financial resources and likelihood of success). Legal assistance may also be limited to appeals at first instance and Member States can impose monetary/time limits on the provision of legal aid, and provide that people seeking asylum are not to be treated more favourably than nations in legal aid matters: Kaldor Centre, above n85, 5.
Unlike Australia, legal aid is available for judicial review proceedings. However, since 2011, cuts to legal aid funding have triggered the closure of two major legal aid providers for people seeking asylum, which went into administration following the funding cuts.

Specialist, professional, quality advice

Beyond the fact of legal assistance itself, there are certain qualities which increase its effectiveness. In 2010, Trude and Gibbs published a UK-focused literature review seeking to identify the key elements of high quality legal representation in asylum work. They identified three main elements, of which the first was the need for professional expertise. This included the ability to identify, gather and place all relevant evidence and argument in a timely manner, and present those to decision-makers effectively. This expertise reduced cost through the identification of legal and evidential issues, and avoiding delays in preparation and dissatisfaction leading to client non-cooperation. Asylum advocacy was, therefore, ‘not a matter that can be wholly assigned to entry-level case workers’. Beyond expert lawyers, the need for professionalism and expertise in a range of professions, from paralegals to country and medical experts, was emphasised. Hughes-Roberts points to the need for quality representation to be properly recognised, for instance through peer review, to enable its encouragement through funding models.

Miller, Keith and Holmes’ recent US research reiterated that high quality legal representation is critically important for asylum seekers. These authors reviewed a dataset of all US asylum merits decisions from 1990 to 2010 and found that high-capability legal counsel evened the odds significantly between ‘one-shot’, or ‘underdog’, asylum seekers and the ‘repeat player’ federal government. ‘What most stands out’, they found, ‘…is the extent to which good attorneys help their clients.’ The benefits of specialist lawyers were discussed as follows:

A specialist might be better able to establish core components of the case, such as the credibility of their client’s testimony with respect to the potential for persecution on return to a sending country. An immigration specialist might be more capable of making a new and nuanced application of emerging jurisprudence, such as that around domestic violence or female genital mutilation. Or such a specialist may be more aware of the

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254 Subject to eligibility tests based on financial resources and prospects of success: Ibid.
255 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: Ibid.
256 Ibid.
257 Adeline Trude and Julie Gibbs, Review of quality issues in legal advice: measuring and costing quality in asylum work (ICAR, City University London: 2010).
258 Ibid, 1, 56.
259 Ibid, 57.
260 Ibid, 56.
261 Ibid.
262 Ibid.
265 Ibid, 210, 229-230.
266 Ibid, 229.
Practising for an NGO was a significant predictor of the likelihood of relief. This may be linked to the consolidated resources and expertise of NGOs, and general agreement among the immigration community that non-profit agencies provide high-quality representation and work effectively with judges and other legal professionals.

In fact, Miller et al found that not being represented by legal counsel was better than being represented by a poor lawyer. However, this is not necessarily the case in Australia: a key distinction is that immigration lawyers are thought to be under-regulated in the US, while in Australia, they are considered over-regulated.

The UNHCR reinforces that specialised skills and knowledge of refugee and asylum matters is important amongst all staff involved in refugee status determinations. This includes familiarity with the use of interpreters and appropriate cross-cultural interviewing techniques, as well as appropriate training in the treatment of applications by particularly vulnerable applicants. This may involve arming decision-makers with a conceptual basis for making fair and prompt decisions. For example, this would promote an understanding of why asylum seekers may arrived on forged passports, or may fail to claim asylum immediately on trial.

Beyond lawyers, the need for specialist expertise amongst judges and tribunal members, and primary decision-makers, has also been emphasised. A recent US study found that less experienced judges in refugee asylum courts were more likely to demonstrate negative autocorrelation in decision-making that was unrelated to the merits of the case.

Relevantly, in Australia, concerns were raised when several experienced decision-makers were not reappointed following the amalgamation of the Migration Review Tribunal and Refugee Tribunal into the MRD of the AAT in 2014.

Building trust

The second of three key elements of high quality legal representation identified by Trude and Gibbs was the quality of the one-on-one relationships between the legal representative and client. This helped to establish the client’s trust and confidence in the representative and encourage early disclosure of the full facts of the case. They noted that clients who were

267 Ibid, 215
269 Ibid, 219. The crucial role played by NGOs in the provision of legal aid to asylum seekers was also recognised by ECRE: above n234, 7-8.
270 Ibid, 230.
271 Ibid, 212; Ardalan, above n45, 1018-1019.
273 UNHCR, above n44.
274 Banki and Katz II, above n247, 57.
275 Banki and Katz I, above n247.
278 Ibid, 1, 57.
more confident that the best case had been put forward, were more likely to be confident in the outcome of the case. The development of a good rapport could ‘transform the case both for the wellbeing of the client and the ultimate quality outcome.’ Lawyers are also acknowledged as playing an important role in establishing relationships founded on trust between an asylum seeker and the authorities. For example, they are able to discuss traumatic and difficult experiences with the assurance of client confidentiality and with the support of experts trained in assisting vulnerable people.

Building trust takes time and patience. It also takes strong communication skills, attitude – ‘an organisational culture that encourages working with immigrants, rather than against them’, accessibility, willingness to keep in touch and to involve the client in the case. The last point is crucial for the client’s well-being, as it helps to overcome a debilitating lack of agency felt by many asylum seekers. Good access by clients to lawyers, including through regular correspondence and telephone and email contact, is also important. This last point underlines the need to ensure good access by lawyers to asylum seekers in detention.

Face-to-face assistance is important in building client trust. It is also important that asylum seekers are physically present before decision-makers, eg courts and tribunals. While the use of video-conferencing has emerged internationally, eg to overcome distance between decision-makers and remote detention centres, this appears to reduce the quality of the status resolution process. For example, video-conferencing has been criticised as depersonalising the claimant, hindering the credibility of the case, and undermining due process. One comprehensive statistical analysis of immigration decisions in the US found that asylum applicants who had in-person hearings were granted asylum at double the rate of those who had video-conference hearings.

Justice Connect’s MOSAIC evaluation also emphasises that developing a culturally safe space for clients helps build relationships of trust and confidence. This requires that lawyers are mindful of cultural norms. Adequate training for lawyers is essential.

Adequate time

Trude and Gibbs have identified that a third key element of quality legal representation is that sufficient time is needed – to build trust and communication with asylum seeker clients, to understand the facts, explore reasonable avenues and gather the evidence. For example, the results of the UK Solihull Early Legal Advice Pilot (further discussed below)
indicated that representatives who spent more time preparing a case achieved better results at the primary decision-making process – adding value both in terms of achieving justice, but also in terms of financial savings.\footnote{Ibid.}

Miller et al’s findings also support the need for sufficient time in responding to asylum seekers’ legal problems. Their US review demonstrated that as the caseloads of immigration attorney increased, the likelihood of relief for clients decreased.\footnote{Miller et al, above n26, 228.}

The need for adequate time for the client to explain their protection claims has been identified as critically important by Australian practitioners.\footnote{Eg, RACS, above n34, 6.} The UNHCR further underlines the need for flexibility in time in allowing asylum applications, highlighting that an applicant’s failure to submit an asylum claim within prescribed time limits should not lead to claims being excluded.\footnote{UNHCR, above n44, 3.}

This highlights inherent problems posed by Australia’s current enhanced screening processes at sea, and its ‘fast tracking’ of the Legacy Caseload (including their very short application deadlines). With respect to a UK fast-track appeal process for review of asylum applications, the UK Parliament’s Joint Committee on Human Rights found that it was clear that some asylum seekers, particularly those who had experienced torture or sexual abuse, would be unlikely to reveal the full extent of their experiences to the authorities within the period of time allowed, and these revelations would be especially difficult where they were not able to access legal advice and representation.\footnote{Joint Committee on Human Rights, Joint Committee on Human Rights – Tenth Report (2007) [226]-[228]; https://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/81/8102.htm>}

In 2015, the England and Wales Court of Appeal found this process was ‘structurally unfair and unjust’.\footnote{Lord Chancellor v Detention Action [2015] EWCA Civ 840 [45].} Lord Dyson stated that:

> In view of (i) the complex and difficult nature of the issues that are often raised; (ii) the problems faced by legal representatives of obtaining instructions from individuals who are in detention; and (iii) the considerable number of tasks that they have to perform … the timetable for the conduct of these appeals is so tight that it is inevitable that a significant number of appellants will be denied a fair opportunity to present their cases under the [Fast Track Rules] regime.\footnote{Ibid [38].}

### Interpreters

The UNHCR has also endorsed access to qualified and impartial interpreters as a necessary component of a fair and efficient asylum process.\footnote{UNHCR, above n44, 2; <http://www.refworld.org/pdfid/432ae9204.pdf>; UNHCR, above n82, 12.} This finding was recently echoed by the European Council on Refugees and Exiles.\footnote{ECRE, above n234, 160.}

### Building legal capacity

In The Justice Project Recent Arrivals paper, an important strategy identified involves helping recent arrivals to increase their ‘legal literacy’, or awareness of understanding of Australia’s legal and justice system, through targeted community education programs. Such
programs are often more effectively delivered in partnership with migrant resource centres or settlement services. They are considered particularly effective when delivered as a stepping stone to seeking legal assistance, given clients’ generally low capability levels. Some form of legal capacity building or legal orientation would also appear to be important for asylum seekers, which form a subset of the ‘recent arrivals’ group, given that they often have extremely limited knowledge of Australian law, including migration law, and the justice system.

In this light, Banki and Katz have cited a study by the US-based Vera Institute of Justice regarding a Legal Orientation program offered to people in immigration detention. A significant finding was that participants had shorter average case times in immigration courts than comparison cases. One reason offered was that even basic legal advice helped participants to better determine whether they have legitimate protection claims, as those who realised that their claims lacked merit accepted voluntary removal or deportation. An important conclusion is that legal orientation is beneficial from a speed, compliance and cost-effectiveness point of view for immigrant detainees as well as protection claimants.

The value of educating trusted caseworkers, as well as communities, has also been emphasised with respect to the asylum sector. For example, Refugee Legal delivers a national training program to non-legal professionals working with people seeking asylum to enhance interagency knowledge, collaboration and holistic approaches across the refugee sector.

**Targeted services**

Proactive outreach to services and places frequented by disadvantaged clients can be an important access to justice strategy. One relevant example is Justice Connect’s MOSAIC project, involving a free weekly outreach service, which was located at the Metro Migrant Resource Centre in Marrickville, New South Wales.

An important strategy involved intensively promoting the project prior to its establishment, through contact with over 60 caseworkers, local service organisations, politicians and legal service providers. Establishing strong relationships with caseworkers was prioritised, with tailored training delivered to over 60 caseworkers. This strategy was valuable to the project, given caseworkers’ strong relationships with their clients, and ability to act as intermediaries with clients. A strong demand for training among caseworkers was identified, with many having a limited understanding of referral pathways. The initial project evaluation

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301 Hugh M McDonald, Suzie Forell, Zhigang Wei and Sarah A Williams, Reaching in by joining up: Evaluation of the legal assistance partnership between Legal Aid NSW and Settlement Services International (Law and Justice Foundation of NSW: 2014), viii.


304 Banki and Katz I, above n247, 30.

305 Ibid, 31-32.

306 McDonald et al, above n302, 7; Hughes-Roberts, above n263, 13.

307 Refugee Legal, above n240.

308 Pleasence et al, above n83, 32-37.

309 Justice Connect, above n41.

310 Ibid, 5.

311 Ibid.
suggested that it was successful in reaching untapped areas of legal demand amongst asylum seekers, and building caseworker capacity to help clients to identify legal problems and obtain appropriate advice.312

In the UK context, Hughes-Roberts has drawn attention to the need for any funding arrangements to properly recognise outreach work undertaken to assist vulnerable asylum seekers.313

**Joined-up services**

There is support in the asylum seeker context for the 'joined up', or integrated approach to service delivery. This approach has been identified as an effective strategy for disadvantaged clients generally, given their multiple legal and non-legal needs.314

Drawing on the experience of the US Harvard Immigration and Refugee Clinical Program, Ardalan has strongly recommended a multi-disciplinary response to advocating on behalf of asylum seekers, and meeting their legal and non-legal needs.315 This involves collaboration between lawyers, psychological and medical professionals and human rights experts to ensure high-quality legal representation and fully articulated claims.316

For example, Ardalan states that medical and mental health professionals can stabilise clients’ situations, support them during the process of discussing past trauma, and offer invaluable expert testimony – for instance, regarding the adverse impacts of trauma on clients’ testimony and their ability to file protection claims within set timeframes.317 Country experts can fill in gaps with testimony regarding country conditions, including factors which are unknown to asylum seekers themselves, explain cross-cultural differences and dispel concerns about fraud.318

Ardalan acknowledges that barriers exist to multi-disciplinary collaboration, such as varying professional perspectives and ethical obligations. For example, lawyers have roles as client advocates, while others including doctors may consider themselves more objective experts. Further, while health professionals are mandatory reporters, who have certain duties to disclose abuse or neglect, attorneys are bound by client confidentiality.319 However, she considers that these barriers can be overcome, calling for both additional investment in high-quality, multi-disciplinary representation for all asylum seekers, and for lawyers to educate themselves about the benefits of holistic representation.320 Ardalan cites as another US example the Bronx Defenders, an organisation in New York City representing detained immigrants in removal proceedings. She notes that four pillars have underpinned the success of this model: seamless access to services which meet legal and social support needs; dynamic, interdisciplinary communication; an interdisciplinary skill set; and a robust understanding of, and connection to, the community served.321
In 2009, Banki and Katz’s review identified Sweden’s holistic programs as important to its success in effectively responding to asylum seekers. They also cited evidence suggesting that non-legal material assistance – whether income support, medical care, housing, education or otherwise – helps integration, and serves as an incentive for individuals to comply with their immigration regulations. They also found promising indications that community-based case management was an appropriate mechanism for status resolution. Such models all included some combination of material, social, legal and psychosocial assistance, and relied upon community organisations and networks to create ties with the community. The Australian Community Care Pilot, and its successor, the Community Assistance Support Program, which case-managed clients in the community while their immigration status was being resolved, were also cited as positive examples in this regard. These models were considered inclusive and supportive mechanisms which prepared and empowered those awaiting immigration outcomes to make informed decisions. They assisted individuals in feeling that they had had a fair hearing, and if refused, supported them to make their own departure arrangements with dignity.

Hughes-Roberts has recently suggested a range of collaborative partnership options in the UK between legal assistance providers and NGOs. These include: outreach models; bulk purchase of services by the NGO; supported referral models in which NGOs have guaranteed referral links with specialist solicitors; embedding advisers in NGOs as part of a one-stop service; NGOs assisting in the collection of documentation and evidence; and leveraging the expertise of commercial firms (e.g. in information technology).

In Australia, a range of services provide joined-up legal and non-legal responses to asylum seekers. For example, the Asylum Seeker Resource Centre (‘ASRC’) in Melbourne, Victoria, provides support services for asylum seekers and refugees including food, legal advice, health services, finding employment, English tutoring and detention rights advocacy. A 2012 evaluation of a joined-up initiative in Victoria, involving the ASRC working with several other key organisations in delivering a range of holistic services to asylum seekers, suggests that the asylum sector is particularly effective at working collaboratively.

Factors identified as supporting sector-wide collaboration in this evaluation included a common commitment to client welfare across the sector, a shared determination to use limited funds effectively, and significant sector strength in leveraging in-kind support from the community. Agencies were also in frequent contact and provided informal feedback on an ongoing basis. They recognised the value of having multiple service providers with a variety of strengths, and developing a robust community of practice to avoid over-burdening any

322 Banki and Katz II, above n247, 3.
323 Ibid, 40.
324 Banki and Katz I, above n247, 3.
325 Ibid.
326 Ibid, 97-98.
327 Banki and Katz II, above n247, 99.
328 Hughes-Roberts, above n263, 14-16.
330 Office of Multicultural Affairs and Citizenship, above n72.
331 Ibid, 21.
one agency. The program was also underpinned by initial planning to identify shared goals, and systems of evidence collection allowing progress to be assessed.

However, a range of barriers to delivering more collaborative services were identified. These included policy changes which greatly increased demand on already-stretched services, such as the federal government’s decision to release many detainees into the community. Fragmentation between Commonwealth and state and territory policy and program responsibilities was also flagged in this regard, as well as ongoing funding uncertainty. Complex and changing policy frameworks surrounding asylum seekers were also problematic: for example, different entitlements to services according to visa type acted as a disincentive for mainstream health and housing services to meet the needs of this group.

The evaluation made several pertinent recommendations. These included:

- providing long term funding, to provide greater certainty in a rapidly-changing environment;
- ensuring flexibility through funding arrangements based around sector wide outcomes rather than specific deliverables;
- considering how future funding could strengthen collaboration and reduce the potentially harmful nature of competitive tendering;
- ensuring an open dialogue between government and funded agencies, and exploring a joint agenda for change in relation to federal government policy; and
- investing in strategic sector-wide quantitative data analysis and monitoring tools and techniques.

These points may be helpful in informing future sector-wide collaboration to meet asylum seekers’ legal and non-legal needs on a broader scale. They also convey important messages regarding the need for simplicity and stability in overarching policy and funding frameworks regarding asylum seekers.

**Timely services**

As discussed by Pleasence et al, ‘timely’ services – incorporating early, less intensive help, but also responding to key points when clients are ready to act, and anticipating key events which trigger legal problems – form an important overarching strategy for groups experiencing disadvantage.

With respect to the US case study of ‘Matthew’, discussed above, it is worth noting that ultimately his refugee status was recognised when he was able to get free legal assistance from a clinic working together with medical and psychological experts, and a country expert. However, as the LIV has identified, if Matthew had obtained this assistance from the beginning, he would likely have been able to give the relevant details in the appropriate

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332 Ibid.
333 Ibid, 10.
335 Ibid, 29.
338 Pleasence et al, above n83, 107-108.
339 Ardalan, above n45, 1002.
manner and avoided the need to go through the courts and the additional trauma incurred through his initial claim rejection.\textsuperscript{340}

The value of providing early legal assistance to asylum seekers has been recognised.\textsuperscript{341} RACS argues that legal representation enables quicker and less costly decision-making at the primary level. It emphasises that if primary decisions are not made correctly, the costs of assisting a client to document their claims for protection and completing an application for protection rise significantly upon appeal.\textsuperscript{342} McAdam argues that better decisions are made when asylum seekers have early access to properly resourced legal services by specialist lawyers. Refugee lawyers, she states, ‘provide an important ‘triage’ service and help to prevent the courts from being flooded with unmeritorious claims.\textsuperscript{343} These conclusions appear to be supported by Eagly and Shafer’s recent US findings discussed above, that represented asylum seeker litigants bring fewer unmeritorious claims.\textsuperscript{344} Banki and Katz have also linked early intervention strategies in the UK, US and Sweden to more effective asylum seeker responses.\textsuperscript{345}

A relevant initiative is the Solihull Early Legal Advice Pilot, which was evaluated in 2008. This pilot was commissioned by the UK Government to test the proposition that giving people early access to good legal representation would improve the quality of decisions taken by the Home Office.\textsuperscript{346} Where the pilot procedure was followed, it resulted in faster, higher quality and more sustainable asylum decisions.\textsuperscript{347} Forty-four per cent of participants concluded their cases within six months, compared to 36 per cent of non-participants.\textsuperscript{348} There was also a low rate of absconding.\textsuperscript{349} Qualitative benefits from the pilot included applicants being more engaged with, and having better knowledge of, their claims.\textsuperscript{350} While direct cost comparisons were difficult, the evaluator identified the potential of early intervention for longer-term savings.\textsuperscript{351}

A further example of a timely response to asylum seekers’ needs is the Victorian legal sector’s response to the needs of the Legacy Caseload. Given shared concerns across the public and private legal sector regarding the potential for serious and unjust consequences posed by the fast-tracking process and withdrawal of IAAAS, it formed the Legacy Caseload Working Group in 2014. Under the auspices of the LIV, a joint approach was devised, including Justice Connect’s brokerage of pro bono and low cost assistance, Refugee Legal lawyers leading and supervising volunteers through an asylum seeker clinic, and Victoria Legal Aid specialist migration lawyers supporting clinics and running judicial review.

\begin{thebibliography}{99}
\bibitem{340} LIV, above n114, 142.
\bibitem{341} ECRE, above n234, 6.
\bibitem{342} RACS, above n34, 6.
\bibitem{344} Eagly and Shafer, above n243, 2, 66-73.
\bibitem{345} Banki and Katz II, above n247, 3, 5, 52.
\bibitem{346} Ibid, 33-37.
\bibitem{347} Trude and Gibbs, above n257, 34.
\bibitem{348} However, this data had not controlled for selection bias: For example, clients were not randomly assigned to legal representation: Banki and Katz I, above n247,32.
\bibitem{349} Trude and Gibbs, above n257, 34.
\bibitem{350} Ibid, 35.
\bibitem{351} Ibid.
\end{thebibliography}
The Victorian Government provided funding for two years to assist this coordinated response.\textsuperscript{353}

Notwithstanding this example, the need for both timeliness, and adequate time to respond, to asylum seekers’ needs underscores concerns regarding delays in processing asylum seekers’ claims, and regarding the migration workload pressures and associated delays in the Federal Circuit Court and AAT. As discussed by CASE, ‘extended delays can have life-altering consequences when they cause children to be separated from parents, or significantly extend the period of time that a visa applicant resides in a situation of conflict or extreme poverty.’\textsuperscript{354}

Addressing laws, policies and practices which exacerbate access to justice barriers

A full analysis of ‘what’s working’ might include a comparative analysis of policies and laws and their outcomes with respect to asylum seekers, between Australia and similar nations.

A full exploration of this important question is beyond the scope of this literature review, although it could form a future piece of research work. However, some brief points are discussed below.

Strategic litigation and policy

In the UK context, Hughes-Roberts recommends specialist strategic litigation and policy units as the best way to advance the interests of particular asylum seeker groups. This includes influencing law and policy through strategic litigation and associated policy initiatives, disseminating learning across broad legal and non-legal networks, and helping grass-roots groups resolve issues through effective, well-informed negotiation.\textsuperscript{355} She notes that this model requires good lawyers who excel in their area of expertise, are strategically aware and possess very good policy and influencing skills, or work effectively with good policy people.

In Australia, several organisations work effectively in this field. For example, Refugee Legal notes that it has had 100 per cent success in ‘test case’ litigation, with nine cases won in the High Court of Australia having flow-on benefits for thousands of asylum seekers and refugees.\textsuperscript{356}

Removing dual regulation

Removing dual regulation of migration lawyers in Australia has been identified as a potentially effective strategy in responding to asylum seekers’ legal needs. Currently, lawyers who wish to practise in this area are required to complete continuing professional development and are subject to fees as migration agents, in addition to the legal profession’s requirements. A 2014 independent report recommended that lawyers be removed from the regulatory scheme that governs migration agents, but government commitments to address


\textsuperscript{353} Ibid.

\textsuperscript{354} CASE, above n58, 3-4.

\textsuperscript{355} Hughes-Roberts, above n263, 21.

\textsuperscript{356} Refugee Legal, above n240.
this issue have stalled. The LIV and CASE have noted that scrapping dual regulation would assist in enabling more lawyers to provide pro bono assistance.

Alternatives to limiting judicial review

In its recent *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* inquiry, the ALRC discussed existing limitations on judicial review in the migration context. It stated that ‘one of the key rationales advanced for seeking to restrict access to the courts is that the volume and cost of litigation in the migration context is too high, and litigants seek to abuse the system to delay their removal from Australia’. However, the ALRC noted that the Administrative Review Council had considered this issue in 2012 and concluded that case management measures and assistance to applicants are more appropriate than excluding judicial review to reduce the volume and cost of litigation in the context of migration proceedings. Similar findings had been made by the Legal and Constitutional Affairs Committee in 1998. The ALRC concluded that the Australian Government should consider alternative solutions which do not restrict access to the courts, and are more targeted and effective in addressing the underlying policy issue.

Going forward

While not strictly ‘what’s working’ initiatives, a number of recent developments present opportunities for considered review of Australia’s laws, policies and practices regarding asylum seekers. Bipartisan agreement and leadership may be necessary to progress positive change in this area.

Regional processing

The closure of the Manus Island RPC provides the opportunity to revisit Australia’s regional role and obligations in addressing the flow of asylum seekers into, and within, the Asia-Pacific Region.

In this regard, the Law Council has recently adopted its *Regional Processing Policy Statement* (‘the Statement’), which has been prepared by its National Human Rights Committee, following consultation with a number of external organisations. The Statement is intended to provide constructive assistance in the development of Australian Government policy on this issue, proposing principles and mechanisms to guide short and long-term responses.

The Statement proposes that the Australian Government work with its regional partners to establish a cooperative and transparent regional solution to the flow of asylum seekers into the Asia-Pacific region. It recommends that any regional response must comply with

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358 CASE, above n58, 3-4.
359 ALRC, above n193.
362 Ibid.
363 Ibid, [15.48], [15.65].
Australia’s international obligations, and must be developed in consultation with the UNHCR and the International Organisation for Migration, having regard to their mandates and expertise.

The Statement will be released by the Law Council shortly.

**Independent review**

In its *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* report, the ALRC recently identified significant concerns that a number of migration laws are not proportionate, and suggested that their operation be reviewed. A structured proportionality analysis involves considering whether a given law that limits important rights has a legitimate objective and is suitable and necessary to meet that objective, and whether—on balance—the public interest pursued by the law outweighs the harm done to the individual right. The ALRC identified that several laws would benefit from further review to consider whether they unjustifiably encroached upon certain traditional rights and freedoms. Laws identified in this regard by the ALRC included:

- secrecy offences;
- the character test in s 501 of the Act, including mandatory cancellation provisions;
- provisions retrospectively converting applications for permanent protection visas into temporary protection visas;
- the fast track review process for decisions to refuse protection visas; and
- privative clauses in Commonwealth laws.

It is noted that the ALRC’s inquiry terms of reference did not permit it to review all relevant laws – for example, they did not include the traditional protection against deprivation of liberty found in doctrines such as habeas corpus.

The Law Council submitted that the ALRC should consider recommending the appointment of an Independent Monitor for Migration Laws. The Monitor’s role should include reviewing immigration legislation, its implementation and administration (both onshore and offshore) with a view to assessing their proportionality and recommending necessary changes. This suggestion was recognised by the ALRC in its overall recommendation regarding the review of migration laws.

As highlighted in the Law Council’s submission, Australia’s ratification of the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT) provides a further important opportunity to review its migration laws and practices. OPCAT requires that States designate a ‘national preventive mechanism’ to carry out visits to places of detention, to monitor the treatment of and

365 ALRC, above n193, 23.
366 Ibid, 45.
367 The Act, s 45AA; Migration Regulations 1994 (Cth), reg 2.08F.
368 ALRC, above n193, 23, 126, 188, 389, 428.
370 ALRC, above n193, 23.
371 Law Council of Australia, above n369, 31-32.
372 Opened for signature 18 December 2002, 2375 UNTS 237.
conditions for detainees and to make recommendations regarding the prevention of ill-treatment. These visits should lead to reports and recommendations to improve the protection of persons deprived of liberty. NPMs can also make comments on laws, regulations and propose reforms. On 9 February 2017 the Australian Government announced its intention to ratify OPCAT by December 2017. 373

What are the knowledge gaps?

As noted above, the LAW Survey did not incorporate a focus on the legal needs of asylum seekers. There appears to be a critical gap in empirical research regarding this groups’ needs and responses to legal problems in Australia. Further, little evaluation of the relative effectiveness of different approaches undertaken by the justice sector in response to asylum seekers’ legal needs appears to have been undertaken. This is probably due to a desire not to divert limited funding away from frontline services in the face of extreme demand.

Banki and Katz have previously recommended that a number of research programs should be undertaken, including rigorous evaluations of legal assistance and its benefits, comparison of different interventions, comprehensive longitudinal studies of different cohorts of non-citizens and more in-depth international comparisons. 374 They have also noted that the existing literature is limited in that it tends to emerge from only two sources: studies which are either funded by governments or NGOs. 375 While not suggesting that this results in poor quality, they note that ‘it does locate the literature in a particular political context’. 376 Thus, more independent studies may be needed. Beyond legal assistance interventions, this would include more research into the comparative effectiveness of different status resolution programs and policies. 377

Possible priorities for discussion

- As an overarching principle, laws, policies, practices and services regarding asylum seekers should be framed in light of their vulnerability and formidable barriers faced in negotiating a highly complex Australian legal landscape, and the potential for severe harm when the wrong decisions are taken about their protection claims.

- Given their barriers, asylum seekers need early access to free legal advice and representation before lodging protection applications, and throughout any departmental or review proceedings. Such assistance also promotes more efficient and sustainable decision-making at the initial departmental level, as well as by courts and tribunals.

- Specialist, professional expertise – amongst lawyers, court and tribunal personnel - is important in responding appropriately to asylum seekers’ needs, along with adequate time and flexibility to build relationships and trust, establish facts and allow clients time to explain their protection claims.


374 Ibid, 4, 60.

375 Ibid, 14.

376 Ibid.

• Reinstating IAAAS funding for asylum seekers in Australia, regardless of their mode of arrival, would help ensure that progress is being made towards these objectives.

• Stable, sustainable, flexible and straightforward funding and policy frameworks across both the legal and non-legal sectors are needed to enable holistic and collaborative services for asylum seekers, given their multiple needs and barriers.

• A wide range of laws, policies and practices currently exacerbate access to justice barriers for asylum seekers. Important opportunities exist to revisit these laws, policies and practices. For instance, the closure of the Manus Island RPC provides an opportunity to revisit Australia’s regional role and obligations with respect to the flow of asylum seekers into and within the Asia-Pacific region, informed by the Law Council’s Regional Processing Policy Statement. Its ratification of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment provides another opportunity to reassess its approach, along with recent ALRC recommendations to revisit many migration laws. An Independent Monitor for Migration Laws could be appointed to help progress these recommendations.

• Australia’s relevant international human rights and rule of law obligations, as set out in its Asylum Seeker Policy, provide essential parameters in reframing its approach to asylum seekers. One of many relevant principles is that decisions which affect the fundamental rights of asylum seekers, including their liberty, possible removal and right to make protection claims, should be made according to principles laid down by parliament, and should not be subject to the unconstrained and unreviewable discretion of the relevant decision-maker.