Refugees and people seeking asylum in Australia should have permanent protection and a clear resettlement pathway. Our current system is overly bureaucratic, hurting the most vulnerable and preventing members of the community from rebuilding their lives.

This policy position will address urgent reforms needed concerning refugees on Temporary Protection Visas (TPV) and Safe Haven Enterprise Visas (SHEV) as well as reforming the application process as an integral step to establishing a fair refugee system.

For information on Australia's immigration detention regime and refugees' exclusion from mainstream social support, please refer to the policy positions on Freedom and Safety respectively.

Recommendations

1. All holders of Temporary Protection Visas (TPV) and Safe Haven Enterprise Visas (SHEV) should urgently be given permanent status in Australia.

2. All people subjected to the temporary protection "Fast Track" process should urgently be given permanent status in Australia.

3. Increase quotas for family reunion significantly and abolish Direction 80 to ensure people arriving by sea are not discriminated against.

Temporary Protection Visas (TPV), Safe Haven Enterprise Visas (SHEV) to permanent protection

Temporary Protection Visas (TPV) and Safe Haven Enterprise Visas (SHEV) separate families and prevent refugees from rebuilding their lives. They must be replaced with permanent visas without delay or needless bureaucracy.

Between October 2013 and December 2014 the Abbott Government amended Australia's migration processes to prevent people who sought asylum by sea from accessing permanent status in Australia.

This would affect some 31,000 people who sought asylum by sea between August 2012 and December 2013, people who sought asylum by sea before this period but did not have their applications for protection finalised and the children born to the families in this cohort. This group would come to be collectively known as the 'Legacy Caseload'.

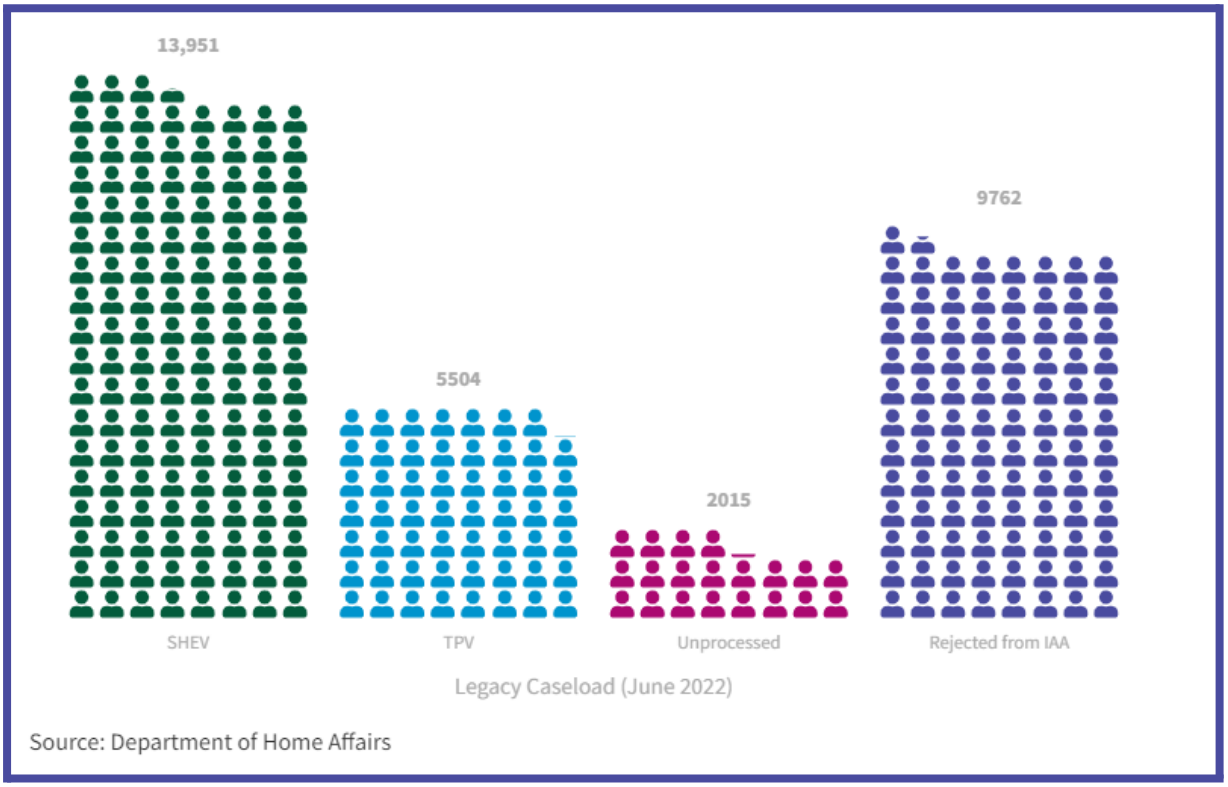
Both SHEV and TPV were introduced as part of the Abbott Government's 2014 migration amendments and last five and three years respectively, at which point they need to be renewed and the person reassessed against the visa criteria, creating uncertainty and insecurity.

TPVs do not provide any pathway to permanent residency. SHEVs technically allow for permanent residency in Australia if strict visa criteria are met, but in practice, it is functionally impossible. This is for numerous reasons, including the requirements for getting a skilled or employer-sponsored visa tending to include high-level qualifications that almost all refugees are unable to obtain because of the very expensive international student fees they have to pay to study in Australia. Currently, there is only one known case of someone on a TPV/SHEV receiving a permanent visa.

> "Because of these visas my family and I are going through a mental health crisis, we are being treated as second-class citizens. I have no certainty about my future in Australia. I want to give back to the community, I want to contribute, but I feel as if Australia has disregarded me." - *Student on a SHEV* (source)

As of June 2022, there are some 31,000 people as part of the 'Legacy Caseload' subjected to this arbitrary and punitive system. Nearly 19,500 are living on temporary visas (TPV or SHEV). After nearly a decade there are still 2,015 people who are still at the review stage and 9,500 have been failed by the 'Fast Track' process. As of December 2021, 6,745 people have left Australia while 402 people have been forcibly removed. There have also been 100 people who have died in Australia still being denied a permanent home.

There is no justification for this abhorrent policy. Under international law, temporary protection should be an exceptional measure only where individual assessment is not practicable. Temporary protection leaves individuals, families and children in limbo, facing return to a country where they fear persecution and are unable to build new lives.



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All people subjected to the temporary protection "Fast Track" process should urgently be given permanent status in Australia.

People seeking asylum in Australia are currently subjected to punitive and harmful processes while applying for protection, epitomized in the so-called 'Fast Track system'. All people seeking asylum should have a clear and efficient application process with the appropriate support.

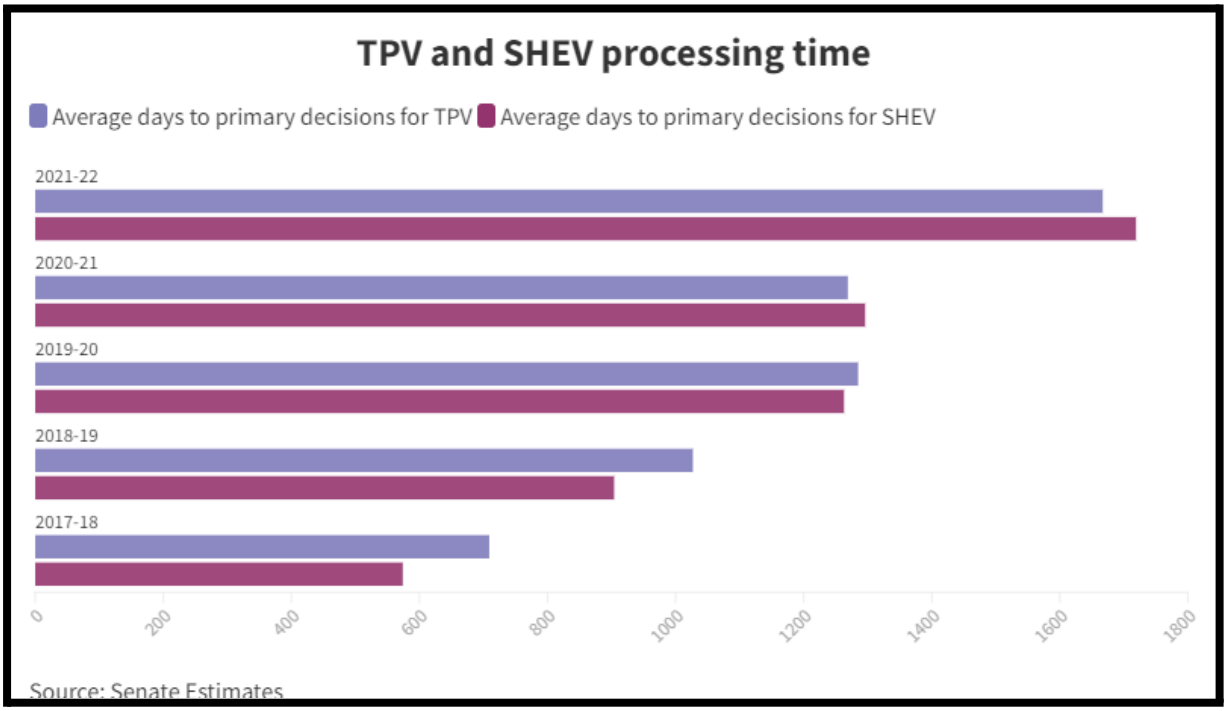
Fast Track

'Fast Track' is a misleading phrase used to describe the slow and defective refugee determination process for people who sought asylum by sea. While this determination process also affects people subjected to offshore detention who later came to Australia, it mainly impacts the 'Legacy Caseload'.

The introduction of 'Fast Track' in 2015 gives people less time to make their claims for protection as well as reduces the level of independent oversight, as a result of people being denied the right to present their case before a tribunal.

Even though 'Fast Track' is designed to reduce the time refugees can engage this does not mean the Department is similarly pressed for time. In fact, it is a grossly misleading name with the

average person waiting for a primary decision on the SHEV/TPV for four and a half years, a delay that is becoming increasingly worse.



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If a person who sought asylum by sea has their application for protection refused by the Department of Home Affairs (DHA), they will only have access to the unfair 'Fast Track' review process under the Immigration Assessment Authority (IAA).

The IAA is part of the Administrative Appeals Tribunal (AAT) and is not required to observe minimum standards of procedural fairness. This has meant that and between 2018-2021, 38% of the IAA cases reviewed by courts were either remitted or found to be unlawful.

Part of the problem is that the IAA encourages decisions to be made on papers, does not hear directly from people claiming asylum and is generally restricted to information before the DHA. This has effectively made the IAA a rubber stamp for the Department, siding with DHA decisions over 90% of the time.

People are not interviewed, are rarely allowed to put forward new information and are limited in their ability to respond to the findings or mistakes made by the DHA. The person making the review decision does not even meet the person seeking asylum and rarely asks them any questions.

Once at the IAA people seeking asylum have less than a month to provide a written submission that must be under five pages. Many people cannot write their own submissions (often due to

language barriers) and have not been able to read the decision of the DHA, which is provided in English.

This leads to a situation where people seeking asylum have three weeks to condense their case to five pages, often without the necessary English language skills and legal assistance, to oppose a Department decision they have not seen. This issue is made significantly worse by the 2014 abolishment of funded legal support for people seeking asylum.

For these reasons, there is a real concern that the errors made at the Department level are carried on throughout the process with little to no opportunity for meaningful review.

After a decade or even a lifetime in Australia, often having been exposed to harsh and distressing detention conditions, uncertainty and protracted processing, Australia needs to provide humane outcomes for people impacted by this inequitable, cruel system.

Refugee Status Determination

There is also a broader issue, of which 'Fast Track' is emblematic: the deterioration in fair and efficient refugee status determination processes.

From the moment a refugee seeks asylum in Australia there are issues that cascade through the application process, from the initial application to the Department of Home Affairs, to the AAT (AAT) and Federal Circuit and Family Court of Australia (FCFCOA) level.

These issues could be solved by all people seeking asylum in Australia being assessed under a single statutory Refugee Status Determination (RSD) process which gives access to permanent protection visa and independent and fair merits review with access to pro bono legal assistance.

People seeking asylum from the first stage of their application face lengthy delays. In 2017-2018 the average time to process a Permanent Protection Visa was 231 days at the Department of Home Affairs, by 2019-20 this had more than quadrupled to 1,018 days. In the experience of lawyers at ASRC, it can take 1-3 years to be invited to an interview and when it is found a person needs protection it can take another year for the visa to be granted. These delays are indicative of the entire application process, which causes significant stress to people seeking asylum, denying them the ability to rebuild their lives and sometimes causing mental health issues that impact their ability to properly make their claims.

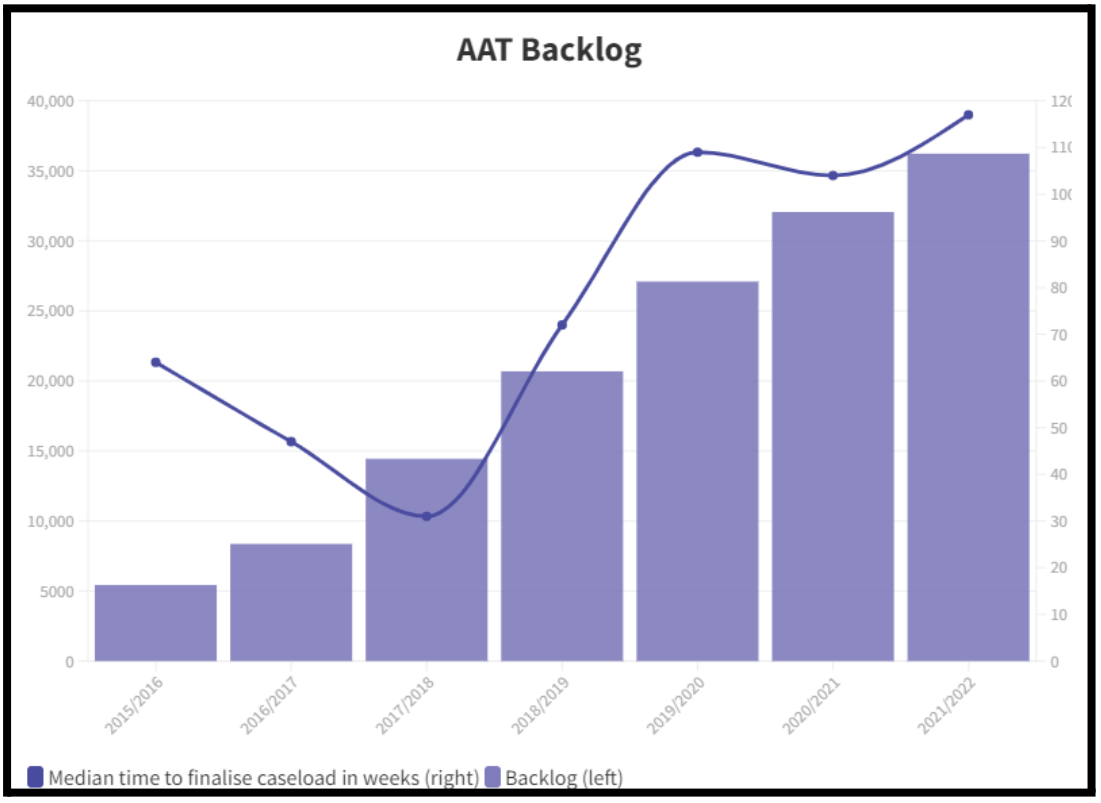
The AAT stage of the process is in a particular crisis. The AAT is responsible for an independent review of administrative decisions made by the Australian Government, including the applications of people seeking asylum.

However, successive governments have undermined the credibility and functionality of the AAT through a lack of funding and non-merit-based appointments. This has left people seeking asylum the victims of an overly complex system that precludes fair process and where the integrity of outcomes is in serious question.

While the AAT deals with a variety of administrative cases, the Migration and Refugee Division (MRD) make up 86% of the AAT's workload. This complex and highly specific workload is unfortunately not reflected in the AAT members as appointments are not merit-based with 158 members of the AAT lacking a legal qualification and 119 being political appointments according to a 2022 report.

The lack of appropriate legal representation following the Abbott Government's defunding of pro bono assistance in 2014 has compounded the lack of expertise. Currently, people seeking asylum are six and seven times more likely to have a positive outcome at the FCFCOA and AAT, respectively, if they are represented by a migration lawyer.

The lack of expertise, systemic delays and funding restraints have led to a backlog of over 36,700 refugee cases, up from 5,434 in 2015 the year the Migration Review Tribunal and Refugee Review Tribunal (MRT-RRT) was merged into the AAT. This drastic increase in the backlog of cases has seen a parallel rise in the current median waiting time, which is currently 116 weeks.



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For the many thousands of refugees who are stuck in limbo at the AAT waiting for an outcome, there is a lack of mainstream social support and basic rights, for more information refer to the policy position on Safety. The problems with the AAT flow into issues at the judicial review too.

The FCFCOA's jurisdiction is limited and can only consider whether the AAT or IAA decision was unlawful, as opposed to wrong in fact. This means that the FCFCOA cannot consider the substance or any new evidence about protection claims and cannot make a decision about whether you are owed protection in Australia.

Migration cases at the FCFCOA also increased over the last decade with a nearly threefold increase from 1,981 in 2012-13 jumping to 5,236 in 2020-21. This has resulted in further strain on the already overextended court system.

Quotas for family reunion are increased significantly and the abolition of Direction 80 to ensure people arriving by sea are not discriminated against in this process.

People seeking asylum are purposefully kept from reuniting with their families and loved ones in one of the most punitive and needlessly cruel policies enacted by successive governments.

The current immigration regime deliberately separates families and prevents reunification. This is explicitly the case under Ministerial Direction 80, which effectively prevents people who sought asylum by sea from reuniting with family. This is achieved through deprioritising the family visa applications of people who sought asylum by sea.

As the backlog of applications greatly exceeds the applications granted, it is effectively impossible for someone who sought asylum by sea to ever have a successful application, devoid of need.

The origins of Directive 80 begins in 2013 when then Minister for Immigration Scott Morrison introduced Ministerial Direction 62, which listed the priority order for family visa applications, relegating people who sought asylum by sea to the last priority. This policy was challenged by the Australian Human Rights Commission which said it was inconsistent with the International Covenant on Civil and Political Rights.

An interpreter from Afghanistan who assisted US-led forces in the country also challenged Ministerial Direction 62 at the High Court in 2016. Before the judge ruled on the case the then Minister for Immigration Peter Dutton introduced Ministerial Direction 72, which undercut the case while maintaining the discrimination against people who sought asylum by sea.

Under Minister for Immigration David Coleman in December 2018 the final version of the policy was introduced under Direction 80, which removed the requirement against unreasonable delays.

Case Study
Mehdi is a Hazara male from Afghanistan. Mehdi arrived in Australia by boat in 2012. He lodged his application for a SHEV in 2017 after the statutory bar was lifted, and is waiting for his interview with the Department of Home Affairs.

Mehdi has a wife and three children in Pakistan who he has been separated from since 2012. Mehdi has not seen his wife and children in 9 years. As he is on a Bridging Visa E, he cannot leave Australia as he will lose the opportunity to be granted the SHEV. Mehdi's mental health has declined due to the protracted processing times which have meant lengthy separation from his family. Mehdi has been diagnosed with major depressive disorder by his psychologist.

Even if Mehdi is granted a SHEV, he must seek permission from the Australian Government to leave Australia and visit his wife and children in Pakistan. He will not be able to sponsor his wife and children to come to Australia so that they are reunited as a family. The requirements for the SHEV pathway are very difficult and it is unlikely Mehdi will be able to transition to a permanent visa under the current SHEV pathway arrangements. While Mehdi can be given permission to travel and to visit his family overseas, it is unlikely Mehdi will ever be able to permanently live in safety with his family. - source

There are also other ways the government separates families of people seeking asylum. For example, people who are part of the 'Fast Track' process often have partners, spouses and children who are Australian citizens. However, people who sought asylum by sea cannot ask the Minister to allow them to stay with their families if they are unsuccessful under 'Fast Track'. The inability to seek intervention effectively means that families will be indefinitely separated.

Refugees on temporary visas, including TPV/SHEV, also need written permission from the Minister before they are allowed to travel. This permission will only be approved if there are "compassionate or compelling circumstances". However, this phrasing is ambiguous and what constitutes "compassionate or compelling" for the Minister is often extremely limited. There is no way to challenge the Minister's decision and failure to comply will lead to visa cancellation. This requirement leads to frequent, often arbitrary negative outcomes, which cause families extreme distress.

The definition of family is also restrictive and does not properly take into account LGBTQI+ people seeking asylum.

How to achieve change

The following are recommendations on how ASRC's policy recommendations could be enacted by the current government. However, there are many ways to achieve justice and any pathway to achieve humane and moral treatment of people seeking asylum should be embraced.

People seeking asylum as part of the Legacy Caseload have been denied justice and the ability to rebuild their lives for a decade. During this time mechanisms to ensure permanent protection have been presented, including the Kaldor Centre's "Temporary Protection in Australia: A reform proposal."

Thankfully there are existing systems in place to provide refugees in the Legacy Caseload with permanent visas, with only minor amendments. When the Rudd Government last abolished TPV a new permanent visa was created, the Resolution of Status (Class CD) Visa (RoSV). This RoSV still exists and offers a clear way to rectify the years of harm.

For those who hold a TPV/SHEV, an amendment to Migration Regulations 1994 (Cth) r 2.07AQ(3) 45AA and a bar lift would allow TPV/SHEV to be taken as automatic applications for RoSV.

For those still in the application process amending regulation 45AA would allow them to have their application converted to bean RoSV or PPV application.

For people failed by Fast Track, the government could lift the bar to permit them to apply for RoSV or PPVs.

Outside of the 'Legacy Caseload', there is an urgent need for systemic reforms of the refugee determination process. These include but are not limited to legislative change to ensure legal representation, removal of discriminatory policies as well as timeframes on decision marking and responses to applications.

There is also an urgent need to abolish the IAA and substantially reform or reconstitute the AAT to ensure merit-based appointments and efficient processing.

The Minister of Home Affairs can also replace Direction no. 80, ensuring that people seeking asylum can reunite with their families.