



Changes to refugee status determination

Questions and answers

Changes to Australia's refugee status determination process for irregular maritime arrivals commenced on 1 March 2011, which will ensure a more robust and efficient process for resolving asylum seekers claims.

New Protection Obligations Determination

The Protection Obligations Determination process replaces the existing Refugee Status Determination process used for irregular maritime arrivals. The changes are in response to the High Court's decision of 11 November 2010 that all irregular maritime arrivals are able to seek judicial review of a negative assessment of their claims for refugee status.

It can be expected that many asylum seekers will now seek judicial review of their assessment, which may add many months to the time taken to finally determine a case. The new Protection Obligations Determination process will ensure the timely and efficient consideration of claims for protection, in order to reduce the time asylum seekers are spending in immigration detention awaiting an outcome.

The process consists of two parts, a Protection Obligations Evaluation (POE) conducted by a departmental officer and an Independent Protection Assessment (IPA) conducted by an independent protection assessor.

The Protection Obligations Evaluation will allow for a faster initial assessment of claims by a departmental officer. Where the officer considers the person is owed protection obligations under the *United Nations 1951 Convention Relating to the Status of Refugees* and its *1967 Protocol* (the Refugees Convention) and the person meets the criteria for grant of a protection visa, a recommendation will be made to the Minister for Immigration and Citizenship to lift the bar to enable the lodgement of a protection visa application. The criteria for grant of a protection visa include satisfying health, character and security requirements.

The following are some questions and answers that may assist you in understanding these changes:

How will the new Protection Obligations Determination process work?

Protection claims will be considered by departmental officers in a Protection Obligations Evaluation. The Protection Obligations Evaluation will apply to all irregular maritime arrivals (IMAs) seeking protection who arrived by boat at an excised offshore place after

1 March 2011 and to those clients who did not have their Refugee Status Assessment interview conducted before 1 March 2011.

All irregular maritime arrivals will be assisted by a migration agent to prepare their statement of claims and any submissions. After receiving submissions and conducting an interview with the client, a departmental officer, also known as the POE officer, will make an evaluation on whether the person is owed protection obligations in line with the Refugees Convention.

If the POE officer finds that the person is owed protection, and the person meets the criteria for the grant of a protection visa, a recommendation will be made to the minister to lift the bar to enable the lodgement of a protection visa application.

If the POE officer concludes that they are not satisfied that the person is owed protection obligations, the case will be immediately referred to an independent protection assessor for an IPA.

The independent protection assessor will consider the case and make a recommendation as to whether a person is or is not owed protection obligations. The independent protection assessor will conduct a further interview, unless they are in a position to make a recommendation that the person is owed protection obligations based on the information available to them.

When will the new process apply? Which irregular maritime arrivals will be affected by the new process?

The new process was implemented on 1 March 2011 and applies to all irregular maritime arrivals who arrived at an excised offshore place from this date.

The new process also applies to existing irregular maritime arrivals who did not have a Refugee Status Assessment (RSA) interview conducted before 1 March 2011.

Irregular maritime arrivals who had their RSA interview before 1 March 2011 are not affected by the changes to the refugee status determination process and will complete their assessments in the existing process with access to Independent Merits Review for negative primary assessments.

Approximately 900 irregular maritime arrivals who did not have their RSA interview conducted before 1 March 2011 will have their claims considered under the Protection Obligations Determination process.

How does this process differ from the refugee status determination process?

The Protection Obligations Determination process removes the need for clients to lodge an application for review by giving POE officers the capacity to fast-track cases to an independent protection assessor when they conclude that protection obligations are not present.

Fast-tracking cases directly to an independent protection assessor will reduce the time it takes for these cases to be determined.

How will you ensure procedural fairness in line with the High Court's recent decision?

The department has adjusted the way refugee status assessments are conducted, to ensure that assessments are meeting procedural fairness requirements and are free from judicially reviewable error.

This includes ensuring irregular maritime arrivals are given an opportunity to respond to any information that may be adverse to their claims and that may be used in making an assessment on their case.

Steps taken have included a review of existing procedures and training, amendment of standard materials such as letters and an update of procedural guidelines for staff and training officers.

These strengthened procedures will be part of the new Protection Obligations Evaluation and IPA.

Will asylum seekers still be interviewed?

All irregular maritime arrivals will be interviewed by departmental officers as part of the Protection Obligations Evaluation, and as indicated in the circumstances above, by the independent protection assessors.

The interview process is an important component of the Protection Obligations Evaluation, as it provides an opportunity for the client to put forward their claims and respond to any information that may be adverse to their case, as identified by the POE officer.

Who will conduct the IPA?

Independent protection assessors trained and experienced in determining protection obligations under the Refugee Convention will conduct the IPA.

There are approximately 100 independent protection assessors, drawn from existing Independent Merits Reviewers and from current recruitment exercises. They are not employees of the department.

How will the IPA differ from the Independent Merits Review?

The IPA continues to be an assessment, conducted by an independent protection assessor, as to whether someone is owed protection obligations under the Refugee Convention.

An important difference is that the independent protection assessor will be able to commence an assessment sooner, due to the new, streamlined referral process.

The independent protection assessor will benefit from a comprehensive presentation of the claimant's refugee claims at the Protection Obligations Evaluation interview and written/oral submissions from the migration agent representing the claimant.

The independent protection assessor will consider the POE officer's assessment and referral papers and then conduct their own assessment, which will include consideration of any new claims and additional evidence and information and updated country of origin information.

An interview will be conducted with all refugee claimants, except where the assessor considers 'on the papers' that the refugee claimant is owed protection.

The IPA will comply with natural justice requirements. Irregular maritime arrivals will be assisted by migration agents in the IPA process.

Will the new Protection Obligations Determination process be used for onshore protection visa applicants?

No. The new Protection Obligations Determination process will only apply to offshore entry persons who arrive at an excised offshore place.

Will irregular maritime arrivals be given assistance to make their claims for protection?

Irregular maritime arrivals will be able to access migration agents through the publicly funded Immigration Advice and Application Assistance Scheme (IAAAS).

IAAAS agents will meet with their clients soon after arrival to start preparing a thorough statement of claims.

The department is working closely with migration agents to determine how best to assist irregular maritime arrivals to prepare claims comprehensively ahead of the Protection Obligations Evaluation.

What guidance will be developed for POE officers?

New guidance materials and training have been developed and rolled out to POE officers.

What will happen to irregular maritime arrivals during the process?

Irregular maritime arrivals will remain in immigration detention while their claims are assessed and any checks such as health, character and security are undertaken.

Failed asylum seekers will remain in immigration detention if they seek judicial review of a negative assessment.

If a person does not seek judicial review of their negative decision, they will be expected to return to their country of origin or former habitual residence.

Australia will not forcibly return a person to a country where they may be killed, tortured or suffer cruel, inhuman or degrading treatment or punishment.

Persons who chose to return voluntarily can be offered reintegration assistance packages to assist with return to their country of residence through income-generation schemes involving small business start-up, skills training or job placement.

Will the new process mean processing of existing clients will take longer?

Processing of irregular maritime arrivals who have had their refugee status assessment interview, or are waiting for an independent merits review interview or outcome, will continue as quickly as possible.

Protection Obligation Evaluation interviews will be scheduled broadly in order of boat arrival, with priority given to vulnerable clients.

The government has increased the number of POE officers and reviewers/independent protection assessors to ensure cases are progressed as quickly as possible.

What is the estimated length of time for an irregular maritime arrival to go through the Protection Obligations Determination process and judicial review?

With a full complement of trained staff and a stable number of arrivals the new Protection Obligations Determination process is expected to reduce the time taken to process the claims of asylum seekers.

The Protection Obligations Evaluation conducted by the department is expected to take around seven weeks from the time the POE interview is conducted to the time when either a positive finding or a referral to an independent protection assessor takes place.

The IPA is expected to take around three to four months.

Current processing times, which have been impacted by volume and the need to have sufficient reviewers, can take up to 12 months from arrival to review finalisation, with the RSA stage taking around three to four months.

Regarding judicial review timeframes, this is currently being examined by Professor John McMillan AO. Professor McMillan's review on the processes will focus on possible options to address the time taken for judicial review.

At present judicial review of protection visa decisions can take some months if all levels of appeals are exercised.

Will irregular maritime arrivals receive legal support from their IAAAS agent at judicial review?

The government will continue to fund migration agents through the IAAAS to assist irregular maritime arrivals in presenting their claims for refugee status to the department and the independent protection assessors.

Consistent with existing practices in relation to onshore asylum seekers, the government will not be funding the provision of IAAAS legal assistance for irregular maritime arrivals to seek judicial review.

As part of his review, Professor McMillan is considering options for the provision of guidance to appellants so as to contribute to the efficient operation of courts.

What does Professor John McMillan's review involve?

As announced by the minister on 7 January 2011, and in response to the High Court's decision on 11 November 2010, Professor John McMillan AO was asked to consider possible options for enhancing efficiency and minimising the duration of the judicial review process, including:

- the introduction of legislation to direct the Court to seek to resolve Offshore Entry Persons (OEP) Refugee Status Determination (RSD) matters as expeditiously as is reasonable
- the removal in OEP RSD matters, of the right of appeal from the Federal Magistrates Court to the Federal Court
- the provision of guidance to appellants so as to contribute to the efficient operation of courts.

Once Professor McMillan considers the different options available, he will report his recommendations to government.

Professor McMillan has extensive experience in administrative law, has served in a number administrative review positions and has been a consultant to a number of government and parliamentary enquiries on aspects of public law. Professor McMillan is an Emeritus Professor at the Australian National University, was formerly the Commonwealth Ombudsman and is currently the Australian Information Commissioner.

How will the government seek to minimise court appeals following implementation of the new Protection Obligations Determination?

Improved assessment processes, particularly around procedural fairness, are being put in place by the department to seek to avoid legal errors occurring, to the greatest extent possible.

As discussed above, Professor McMillan will be reporting to government as to the most appropriate approach to enhance the efficiency and minimise the duration of the judicial review process for irregular maritime arrivals cases.

Does the McMillan review reflect a lack of confidence in the way the courts manage judicial review of migration cases?

Not at all. The federal courts have already put in place measures to expedite migration matters and manage them efficiently.

The government wants to ensure that the judicial review process contributes to the timely and efficient processing of asylum claims. It is important to minimise the length of time that an irregular maritime arrival who has received a negative assessment spends in detention while awaiting review of their case.

As discussed above, the government has asked Professor McMillan to conduct a review of judicial review processes for irregular maritime arrival cases and consider options to enhance the efficiency and minimise the duration of judicial review.

The review reflects the importance of examining all options, including a fresh look at current court processes, to reduce timeframes for the final determination of claims.

Will Professor McMillan's review be made publicly available?

Yes. Professor McMillan's recommendations to government will be publicly released.

What will happen if a judicial review is upheld (for example, the asylum seeker wins)?

Where a failed irregular maritime arrival asylum seeker has their judicial review upheld their case will be returned to a different independent protection assessor for reconsideration.

What will happen if an appeal for judicial review is not upheld (for example, the asylum seeker loses)?

Where the courts do not uphold the appeal by a failed irregular maritime arrival asylum seeker, plans will be made to remove the person from Australia, subject to consideration of any other international obligations.

Will asylum seekers be removed from Australia while waiting for their judicial review outcome?

In line with existing policy, asylum seekers will not be involuntarily removed from Australia while they are awaiting the outcome of any judicial review that relates to their protection claims.

In view of increasing numbers of irregular maritime arrivals going to judicial review are you providing any additional court resources? How much will this cost?

The government intends to appoint two additional federal magistrates to assist with an expected increase in applications for judicial review in the Federal Magistrates Court.

The cost of the additional federal magistrates is being finalised as part of the budget process. The government will continue to monitor the workload of the federal courts.

How will Professor McMillan balance this new role with his position as Information Services Commissioner?

During the short duration of his inquiry, Professor McMillan will divide his time equally between conducting the inquiry and discharging his functions as Australian Information Commissioner.

In the commissioner role Professor McMillan is supported by the Freedom of Information (FOI) Commissioner and the Privacy Commissioner. The three commissioners will be able to fully discharge the various functions and commitments of the office.

The FOI review functions of the office apply only to FOI applications lodged after 1 November 2010 and will principally continue to be undertaken by the FOI Commissioner. The number of review applications lodged with the office is small at this stage.