



UNSW
SYDNEY

Australia's
Global
University

POLICY BRIEF 9

Assessing Protection Claims at Airports: Developing procedures to meet international and domestic obligations

Regina Jefferies, Daniel Ghezelbash and Asher Hirsch
September 2020



Kaldor Centre for
International
Refugee Law

About the authors

Regina Jefferies is a Scientia PhD Scholar and Affiliate at the Kaldor Centre for International Refugee Law, UNSW Sydney, and a member of the *International Journal of Refugee Law* Case Law Editorial Team. She holds a Master of Studies from the University of Oxford and a Juris Doctorate from Arizona State University. Her research focuses on street-level bureaucrats, policy implementation, technology, and legal compliance in the context of immigration and refugee law. Since 2007, Regina has worked in the fields of immigration, refugee, and international human rights law in the United States, including as a Visiting Assistant Professor at the University of Minnesota Law School, as a Visiting Scholar at the University of California Los Angeles, as a Consultant for UNHCR, and as an attorney in private practice in Arizona.

Daniel Ghezelbash is an Associate Professor at Macquarie Law School and the founder and director of the Macquarie University Social Justice Clinic. His book, *Refuge Lost: Asylum Law in an Interdependent World* (Cambridge University Press 2018) examines the diffusion of restrictive asylum seeker policies around the world. He has held visiting positions at the Refugee Studies Centre at Oxford University, Harvard Law School, Queen Mary Law School, New York Law School and Brooklyn Law School. Daniel holds a practicing certificate from the Law Society of NSW and is a registered migration agent. He is a Special Counsel at the National Justice Project and a board member and long-time volunteer at Refugee Advice and Casework Service.

Asher Hirsch is a Senior Policy Officer with the Refugee Council of Australia, the national peak body for refugees and the organisations and individuals who support them. His work involves research, policy development and advocacy on national and international issues impacting refugee communities. Asher is also a PhD Candidate and Lecturer at Monash University in public law, human rights, and refugee law. His PhD investigates Australia's extraterritorial migration control activities in Southeast Asia.

Acknowledgments

The authors wish to thank Guy S Goodwin-Gill, Jane McAdam and Frances Voon (Kaldor Centre), Mitchell Skipsey (Refugee Advice and Casework Service), Grant Hooper (University of Sydney) and UNHCR colleagues in Canberra and Geneva, who provided feedback on various aspects of the brief.

The Department of Home Affairs was given the opportunity comment on an advance copy of the brief. It responded: 'The Department acknowledges the extensive effort that has gone into the paper, however, we do not support the recommendations set out in the paper and the Department is not in a position to verify the policies, processes and procedures the paper asserts as being in place at this time.'

The Kaldor Centre for International Refugee Law

The Andrew & Renata Kaldor Centre for International Refugee Law is the world's first research centre dedicated to the study of international refugee law. Through high-quality research feeding into public policy debate and legislative reform, the Centre brings a principled, human rights-based approach to refugee law and forced migration in Australia, the Asia-Pacific region, and globally.

www.kaldorcentre.unsw.edu.au

The Policy Brief Series

The Policy Brief series showcases high quality, policy-relevant research on issues relating to forced migration and international refugee law. The views expressed in the Policy Brief represent those of the authors and not the Kaldor Centre for International Refugee Law.

Policy Briefs are available online at www.kaldorcentre.unsw.edu.au/publications.

ISSN: 2205-9733 (Print)

ISSN: 2205-9741 (Online)

Contents

Executive summary	1
1 Introduction	4
1.1 Overview of protection procedures at Australian airports	4
Case Study 1:	5
Case Study 2:	6
1.2 Entry screening.....	7
2 Australia’s international protection obligations	9
2.1 <i>Non-refoulement</i>	10
2.1.1 Procedural and substantive safeguards in the use of accelerated or simplified procedures	10
2.2 Non-penalisation for mode of entry	12
2.3 Detention	12
3 Domestic statutory basis for procedures at Australian airports.....	13
4 Ensuring Australia meets its legal obligations.....	16
4.1 A fair and robust decision-making process	17
4.2 End mandatory detention	18
4.3 Access to counsel and visa application forms.....	18
4.4 End visa cancellations for claims at airports and provide access to permanent protection	20
5 Issues of transparency and accountability	20
6 Conclusions	21
Endnotes	22

Acronyms

AAT	Administrative Appeals Tribunal
ABF	Australian Border Force
DHA	Department of Home Affairs
IAA	Immigration Assessment Authority
RSD	Refugee Status Determination
SHEV	Safe Haven Enterprise Visa
TPV	Temporary Protection Visa
UMA	Unauthorised Maritime Arrival

Definitions

Border Operations Centre	ABF operational centre that ‘works closely with the ABF’s Airline Liaison (offshore) Network, Ports Command, Commonwealth and State Agencies, international Airlines and Shipping companies as part of [DHA’s] layered approach applied across the border continuum.’ ¹
Clearance Authority	A legal term defined in the Migration Act to mean either a person, or an automated system, approved by the Minister to perform duties for the purposes of immigration clearance.
Duty Delegate	Official within the Humanitarian Program Operations Branch of DHA who decides whether a traveller should be ‘screened in’ and allowed to lodge a protection application, or ‘screened out’ and removed from Australia.
Entry Screening	Process conducted by DHA to ascertain a person’s reasons for travel to Australia and why they cannot return to their home country, in order to decide whether the traveller should be removed from Australia or be allowed to lodge a protection application.
Immigration Clearance	A legal term of art describing the zone that every traveller must pass through before being allowed to enter Australia legally. ² To be ‘immigration cleared’, a non-citizen traveller must provide evidence of identity and of a valid visa and leave the airport entirely – not only the immigration and customs zone – with the permission of a ‘clearance authority’ and not be subject to immigration detention.
Migration Act	<i>Migration Act 1958 (Cth)</i>
Migration Zone	A legal fiction, defined in section 5(1) of the Migration Act, which describes the place within Australian territory where a person without a valid visa may make a valid visa application. In the context of air arrivals, a traveller is considered to be outside the migration zone until they pass through immigration clearance.
Non-citizen	A person who is not an Australian citizen.
Non-refoulement	The principle of international law which prohibits the return or removal, including through rejection or non-admission at the border, of a person to a place where they face a real risk of persecution or other serious harm.
‘Screened in’	Decision of the Duty Delegate that a traveller’s reasons for claiming that they cannot return to their home country are sufficient to determine that Australia might owe them protection obligations and to allow the traveller to lodge a protection application.
‘Screened out’	Decision of the Duty Delegate that a traveller’s reasons for claiming that they cannot return to their home country are not sufficient to determine that Australia might owe them protection obligations and to take steps to remove the traveller from Australia.

Executive summary

The policy for assessing claims for refugee and complementary protection at Australian airports needs to be reformed to ensure that those in need of protection are identified and not returned to harm. The current procedures, called 'entry screening', set out a streamlined process for assessing refugee and complementary protection claims with no access to review. This Policy Brief argues that they prioritise visa cancellations, mandatory detention and removal over protection needs.³

This Policy Brief finds that Australia's entry screening process and treatment of travellers who seek protection at Australian airports raise significant questions regarding fairness, transparency, efficiency and compatibility with the international and domestic legal frameworks of humanitarian protection.

This Policy Brief critically analyses the legal and operational framework for handling protection claims made by people at Australian airports in light of Australia's international protection obligations. It also examines the domestic legal framework which is claimed to provide the basis for airport screening procedures and through which Australia's protection obligations are supposed to be given effect. This Policy Brief finds serious issues concerning transparency, legality and accountability, which require better Parliamentary intervention and oversight.

Key findings and recommendations

This Policy Brief recommends that the procedures for screening for asylum claims at Australian airports should be guided by international refugee and human rights law protection principles, and the legislative and international law frameworks established to give effect to those principles, as follows:

1. Consistent with the principles of non-penalisation, non-refoulement and the right to seek and enjoy asylum, visas should not be cancelled solely because a protection claim is raised in Australia. Protection claims should always be evaluated and no one should be put at risk of harm in their country of origin or a third country that poses a direct risk of harm, or lacks the capacity or legal framework to process the protection claim and ensure access to international protection.
2. Asylum screening procedures at airports should be established through legislation and should include the following safeguards:
 - Applicants should be given a complete personal interview by a competent official from the Humanitarian Program section of the Department of Home Affairs.
 - The screening should consider only whether an asylum application presents a prima facie protection claim in order for applicants to be referred to the full asylum procedure. Only applicants whose claims are determined to bear no rational relationship to the refugee definition or other grounds of protection, or are clearly fraudulent, should be excluded from referral.

- Applicants who are not referred for the full asylum procedure should be entitled to have the decision reviewed by a decision-maker independent from the Department of Home Affairs before they are removed from Australia.
- Applicants should have access to legal advice, competent interpreters and officials from UNHCR during both the preliminary decision and review stages.
- Applicants should not be removed from Australia until their protection claims have been finally determined, including any available judicial review.

Based on these principles, this Policy Brief makes a number of specific recommendations for refugee and complementary protection claims arising at Australian airports. These are:

1. Entry screening procedures should conform with the rules of procedural fairness as required by common law and reflected in rule of law principles of international law. In addition to the safeguards outlined above, at a minimum, applicants should be given notice of the nature of the decision being made and provided with sufficient time and facilities to prepare their case. There must be disclosure of the substance of the information on which the decision is being made, and an opportunity to respond to relevant adverse information.
2. Detention should only be used as a last resort and be based on an individual assessment. If detention is required, it should be for the shortest time necessary, proportionate and subject to regular independent review.
3. Requests to access legal counsel or immigration forms should be fulfilled, and applicants should be provided with reasonable facilities to lodge a protection application, including online access.
4. Section 256 of the Migration Act should be amended to require officers responsible for detention to inform detainees of their right to legal counsel and other facilities.
5. Applicants should not have their visa cancelled when they seek asylum while in immigration clearance, failing which such cancellations should be reviewable.
6. Applicants who apply for protection while in immigration clearance should have access to permanent protection visas.
7. Carrier sanctions should not be imposed on airlines that carry passengers who ultimately receive protection in Australia.
8. The Department of Home Affairs should assess its data collection practices with reference to the refugee and complementary protection legal frameworks in order to identify shortcomings in data collection policies and/or processes. This should include recording reasons for visa cancellations, both within and outside Australia, as well as recording outcomes of all Duty Delegate screening decisions.

9. The Department of Home Affairs should ensure that record-keeping systems account for on-the-ground realities of officials who are required to enter data. This should include establishing a method for recording all protection claims made at or before immigration clearance, whether or not referred to the Duty Delegate, recording all referrals to the Duty Delegate and recording all removals of travellers 'screened out' after making a protection claim.
10. The Department of Home Affairs should regularly publish anonymised, disaggregated data on Duty Delegate screening decisions, protection claims made at or before immigration clearance, removals of travellers 'screened out' after making a protection claim, and reasons for visa cancellations.

1 Introduction

There has been recent public attention on the number of people who have arrived by plane and sought asylum in Australia. However, a detailed and holistic review of the legal and policy framework which governs how asylum seekers are processed at Australian airports reveals a number of legal and management problems wholly unrelated to the volume of applications. Australia owes human rights obligations to people within its territory and subject to its jurisdiction and has developed an extensive and sophisticated refugee status determination framework to identify and process individuals who seek protection. However, Australia has also adopted a range of measures to control who enters Australia by plane, including visa controls and screening processes at Australian and overseas airports which serve as a barrier to close off and tightly control access to Australian territory for those seeking international protection.

Refugees must be able to leave their country in order to find protection. However, the increasing securitisation of migration, especially air travel, through the development of visas, biometrics and advanced passenger screening, has made escape by air almost impossible for those who do not have a passport and the necessary visa.⁴ The development of migration controls has enabled countries to pre-screen for potential asylum seekers – refusing visas to those likely to claim asylum, and introducing various identification requirements which many asylum seekers are unable to meet. By closing legal options for flight by air, asylum seekers are often forced to take more dangerous journeys to find protection.

This Policy Brief examines Australia's policy and practices with respect to asylum seekers at airports. It highlights the fundamental importance of a robust, transparent and accountable protection process that identifies and provides protection to those who need it, operates according to the rule of law and ensures the safety and security of the Australian community.

1.1 Overview of protection procedures at Australian airports

In the 2018–19 financial year, the Australian Border Force ('ABF') processed more than 44 million air travellers arriving in Australia.⁵ Of these, only 24,566 people applied for protection visas after arriving in Australia with a valid visa and passing through immigration clearance.⁶ In the same year, only 60 people are recorded to have sought asylum while still within immigration clearance, a slight decrease from 62 claimants in the prior year.⁷ However, that number is likely to be inaccurate because the Department of Home Affairs ('DHA') has acknowledged that it does not track the total number of protection claims made at airports.⁸ This section explores the law, policies and procedures of the screening, cancellation and removal processes at Australian airports.

Australia's visa system is the first hurdle for people seeking safety in Australia. Under Australian law, every non-citizen travelling to Australia must hold a valid visa; those who do not become liable to detention and removal.⁹ This facilitates a range of pre-arrival measures that enable the DHA to control the arrival and entry of all passengers, placing officials at a distance from those who might need protection. Since Australia does not provide a visa for the purpose of seeking asylum, potential asylum seekers must apply for and be granted another visa prior to boarding a flight to Australia,¹⁰ such as a tourist visa, a student visa or a work visa. However, doing so may place asylum seekers in breach of Australia's immigration laws. If someone travels to Australia to seek asylum, they may breach a number of visa requirements, such as the requirement for an intention to stay temporarily.¹¹ This means that a government official may cancel a person's visa if the government official believes that visa holder intends to seek asylum in Australia, thereby preventing the arrival of potential asylum seekers either before they depart on a flight to Australia or turning them around once they arrive at an Australian airport.

A visa may be cancelled at a range of points along what the ABF refers to as a 'complex continuum' (its view of the Australian border). This notion reimagines 'the border not to be a purely physical barrier separating nation States, but a complex continuum stretching offshore and onshore, including the overseas, maritime, physical border and domestic dimensions of the border.'¹²

Visa cancellations also have implications for airlines, which are subject to carrier sanctions for transporting travellers without the proper documentation.¹³ There is no exception even where a traveller is subsequently granted protection.

Case Study 1

In November 2019, the Guardian Australia reported that two gay journalists from Saudi Arabia had been detained after seeking asylum at an Australian airport.¹⁴ The men fled Saudi Arabia, where homosexuality is illegal and punishable by death, after being outed as gay by Saudi state security. According to the men's Australian lawyer, the men had already cleared passport control on valid tourist visas before ABF officials in customs inspected their bags and phones and asked if they intended to apply for asylum.¹⁵ When the men indicated that they did intend to apply for asylum, their visas were cancelled and they were detained for two months. Their release came after the extraordinary intervention of the Australian Senate, which passed a motion in their support. In an interview in TIME magazine, one of the men described his experience:

Before coming here I had read about offshore detention centers where people would be held for months and years until their asylum claims are processed. But those are people that attempted to come to Australia by boat; we came with visas ... for us to come here in handcuffs and to be put in an environment with people that are using crystal meth, it was very intimidating. Although I've been threatened, intimidated and bullied in Saudi Arabia, I was never thrown in a jail cell without charge. That didn't happen to us until we came to Australia.¹⁶

Case Study 2

In February 2019, an Australian Broadcasting Corporation (ABC) investigation found evidence that the ABF had turned back at least two young Saudi Arabian women at Sydney Airport after the women requested asylum. ABC reported that one of the women, called Amal, arrived at Sydney Airport in November 2017 when ABF officials became suspicious that she intended to request asylum. After officials informed Amal that she would not be allowed to pass through immigration clearance, Amal made clear her intention to claim asylum and the ABF apparently refused to allow her to submit a claim. Amal was then transferred to an immigration detention centre, where she was not offered a lawyer, before being removed to South Korea (where she had boarded her flight to Australia).¹⁷

Once a traveller has successfully boarded a flight to Australia, they must pass through a number of additional checks before being allowed to actually 'enter' the country under domestic law. Before arrival, DHA analyses passenger details provided by airlines, as well as information in airline reservation systems, in order to identify traveller 'risk factors'.¹⁸ These 'risk factors' include consideration of whether an individual travelling on a visitor visa is likely to make a protection claim, which could result in that person's visa being cancelled before arrival in Australia.¹⁹

Upon arrival at an Australian airport,²⁰ a traveller must provide evidence of identity and a valid visa. To be 'immigration cleared'²¹ they must leave the airport entirely – not only the immigration and customs zone – with the permission of a 'clearance authority' and not be subject to immigration detention.²² For example, the two Saudi Arabian journalists described in Case Study 1 had already cleared passport control on tourist visas before being questioned by ABF officials in the baggage claim area. ABF officials reportedly flagged the men as potential asylum seekers after inspecting the men's bags and phones. Because the men did not successfully pass through immigration clearance, they were only eligible to apply for temporary protection. Under the current legislative framework, people who apply for asylum before passing through immigration clearance may only apply for a Temporary Protection Visa ('TPV') or a Safe Haven Enterprise Visa ('SHEV').

After disembarking from the aircraft, the traveller is routed to an Immigration and Customs checkpoint and begins the immigration clearance process, where ABF officials confirm the person's identity, whether they have a valid travel document and whether they arrived on the correct visa.²³ Generally speaking, this check can occur in two ways:

1. If the traveller has an ePassport from an eligible country and meets certain age requirements, they may use the SmartGate system, which employs facial recognition technology to check the traveller's identity.²⁴ The traveller first uses a kiosk to scan their ePassport and answer several questions. If eligible, the traveller is issued a ticket to present at a SmartGate, which then completes a biometric match between the passport information and the facial scan. If matched successfully, the traveller passes through the immigration check. If the match is unsuccessful, or the traveller is found ineligible to use the SmartGate, they must be processed manually by an ABF Border Clearance Officer.²⁵

2. If the traveller requires manual processing by an ABF Border Clearance Officer, the officer accesses database information and questions the traveller to confirm their identity, that they have a valid travel document, and that their stated purpose of travel aligns with their visa. The Border Clearance Officer may also check a traveller's fingerprints to verify identity and/or conduct checks against DHA immigration data and security and law enforcement information.

Where a traveller expresses a fear about returning to their country of origin, Australia's current policies envisage three different scenarios during the immigration clearance process:

1. The traveller expresses a fear to the Border Clearance Officer, at which point the traveller is referred for another interview with an ABF Visa Determination Officer which includes a review of the protection claim;
2. The traveller does not express a fear to the Border Clearance Officer but is referred to a Visa Determination Officer because the Border Clearance Officer has questions about the traveller's identity, immigration or criminal history status. Only later does the traveller express a fear to the Visa Determination Officer, which leads to a review of the protection claim;
3. The traveller enters with their visa, successfully passes through immigration clearance, and sometime later raises an 'onshore protection' claim.

However, as discussed in further detail below, it is unclear whether travellers who express a fear of return to either the Border Clearance Officer or Visa Determination Officer always have their claims assessed.

1.2 Entry screening

Under the entry screening policy, travellers who raise a protection claim with either the Border Clearance Officer or Visa Determination Officer should go through an 'entry screening' process. The Department conducts this to understand why someone has travelled to Australia and why they cannot return to their home country, in order to decide whether the traveller should be removed from Australia or allowed to lodge a protection application.²⁶ Case Study 2 describes the case of two young Saudi Arabian women who arrived at Sydney airport and claimed asylum. However, the women were reportedly removed from Australia without a review of their protection claims. According to the entry screening policy, if the women raised a protection claim with the Border Clearance Officer or Visa Determination Officer, they should have been referred for further processing. This suggests the existence of a category of travellers, falling outside of the three scenarios outlined above, who express a fear and are not given the opportunity to have their protection claims assessed.

Once a traveller is referred to the Visa Determination Officer, the officer conducts two interviews. The first interview determines whether the traveller should be immigration cleared, or whether their visa should be cancelled. If the traveller is refused immigration clearance and has their visa cancelled, the Visa Determination Officer must detain the

traveller before conducting the second interview. The second (or 'pre-screening') interview involves the Visa Determination Officer following a pro forma 'Border Entry Interview' to explore any protection claims that the traveller has raised. During the interview, the Visa Determination Officer must allow access to a consular or UNHCR official, at the traveller's request.²⁷ Once the Visa Determination Officer completes the pre-screening interview, the Visa Determination Officer emails the traveller's information and a copy of the interview to the Duty Delegate of the Humanitarian Program Operations Branch of the DHA²⁸ to decide whether the traveller should be 'screened in' or 'screened out'.

The Duty Delegate considers the traveller's potential refugee and complementary protection claims²⁹ and decides, based on the emailed information from the pre-screening interview, whether the traveller's reasons for claiming that they cannot return to their home country are sufficient to allow them to lodge a protection application. According to Departmental policy, the screening threshold is whether 'the person makes a prima facie protection claim that is not considered "far-fetched and fanciful"'.³⁰ The traveller will be 'screened in' if the Duty Delegate decides that the traveller's claim meets this threshold. This allows the traveller to remain in Australia to lodge a temporary protection application.³¹ Otherwise, the traveller is 'screened out' and removed from the country.³²

There is no designated timeframe for the Duty Delegate to issue a screening decision. A traveller may be transferred to an Immigration Detention Facility pending the decision, but it is unclear where they might be held in the event that the Duty Delegate's decision is not issued within a reasonable period of time and the traveller has not been transferred to immigration detention. If the Duty Delegate issues a 'screened in' decision while the traveller is still in immigration clearance, the Visa Determination Officer must inform the traveller and explain that they will be transferred to immigration detention in order to lodge a protection visa application. If the traveller had already been transferred to immigration detention at the time of the 'screened in' decision, the Visa Determination Officer advises the Status Resolution Officer of the decision and transfers the case to the Compliance Status Resolution service after creating a referral to case management. Where the traveller is in immigration detention, the Visa Determination Officer is not required to advise the traveller of the screening decision, nor that they may lodge a protection visa application. As noted, people who apply for asylum while in the entry screening process are only able to access temporary protection in Australia and may only apply for a TPV or SHEV.³³

If the Duty Delegate issues a 'screened out' decision while the traveller is still in immigration clearance, the Visa Determination Officer must advise the traveller of the decision and begin the process of removing them from Australia. The traveller may still insist on lodging a protection visa application following a 'screened out' decision but is unlikely to be aware of this right. As such, a 'screened out' decision effectively prevents a person from claiming protection. Where the traveller is in immigration detention at the time of the 'screened out' decision, the Border Force Officer must ensure the traveller is advised of the decision and begin the removal process.

There appear to be no legal avenues for the traveller to seek merits review of either the decision to cancel a visa during the entry screening process, or the screening decision of the Duty Delegate. Similarly, there appears to be no meaningful mechanism for review of the decision of either a Border Clearance Officer or Visa Determination Officer to refer a traveller who has raised a potential protection claim.

The entry screening process is used to identify travellers who may intend to apply for protection and to cancel their visas. Such travellers are deemed 'Unauthorised Air Arrivals', triggering a process that disqualifies them from seeking a permanent protection visa and exposing the traveller to the possibility of removal unless they lodge an application for a TPV or SHEV.

In addition to the entry screening process at Australian airports, screening is conducted by Australian government officials and their agents at airports overseas in an attempt to identify and prevent individuals travelling to Australia to seek international protection. This narrows the pool of potential protection applicants who arrive in Australia. This is an express goal of Australia's immigration screening policies and procedures.³⁴ This means that people in need of protection, or who would clearly qualify to have their protection claims considered (in accordance with the existing Departmental entry screening processes at Australian airports), are prevented from accessing the refugee status determination process in the first place.

2 Australia's international protection obligations

Australia owes human rights obligations to 'all individuals within its territory and subject to its jurisdiction'.³⁵ While States may claim that airports are so called 'international zones' outside of Australian jurisdiction, this proposition has no basis in international law.³⁶ Refugees and asylum seekers within Australia, including in Australian airports, are clearly within Australia's territory and jurisdiction, and Australia is bound by its international obligations in its dealings with them.

A number of international human rights obligations are relevant to Australia's treatment of refugees and asylum seekers at airports (both within Australia and overseas). Australia has ratified the *Convention Relating to the Status of Refugees* ('1951 Convention'), the *Protocol relating to the Status of Refugees* ('1967 Protocol'), the *International Covenant on Civil and Political Rights* ('ICCPR'), the *Second Optional Protocol to the ICCPR* ('Second Optional Protocol'), the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ('CAT'), the *Convention on the Rights of the Child* ('CRC'), the *Convention on the Rights of Persons with Disabilities* ('CRPD'), the *Convention on the Elimination of All Forms of Discrimination against Women* ('CEDAW'), and the *International Convention on the Elimination of All Forms of Racial Discrimination*³⁷ and owes obligations both to those within its territory (including within immigration clearance) and those subject to its jurisdiction. Australia's failure to have in place a robust procedure for identifying and screening protection claims made at airports heightens the likelihood that Australia may be in breach of its obligations relating to *non-refoulement*, non-penalisation for mode of entry and safeguards against arbitrary detention.

2.1 Non-refoulement

The principle of *non-refoulement*, contained in international refugee law and human rights law, prohibits States from returning people to places where they may be at risk of persecution or other serious violations of their human rights. Australia is bound by *non-refoulement* obligations under the *1951 Convention* and *1967 Protocol*, as well as various human rights treaties.³⁸ Article 33(1) of the *1951 Convention* prohibits the expulsion or return of an asylum seeker or refugee, in any manner whatsoever, to any place ‘where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.’ International human rights treaties contain complementary *non-refoulement* obligations prohibiting return to locations where there is a real risk that the individual will face other forms of serious harm, including arbitrary deprivation of life, torture or cruel, inhuman or degrading treatment or punishment.³⁹ The prohibition of *refoulement* is part of customary international law⁴⁰ and is argued by some to be (or to be acquiring the status of) *jus cogens*.⁴¹ The obligation extends to individuals stopped in the transit area of airports.⁴²

2.1.1 Procedural and substantive safeguards in the use of accelerated or simplified procedures

States have a duty under international law to implement their obligations in good faith, in a manner that effectively identifies people who need protection and prevents their return to a place where they face a real risk of persecution or other serious harm. Good faith implementation includes *fair* and *effective* procedures for screening and identifying persons with potential protection claims and for assessing those claims.⁴³ While States have a measure of discretion in how they design their asylum procedures, minimum substantive and procedural requirements should be guided by obligations derived from international treaties, international refugee law, customary international law, UNHCR guidance, and Conclusions adopted by UNHCR’s Executive Committee, of which Australia is a long-standing member. This requires that:

1. The first-contact official (eg immigration officer or border police officer) should have clear instructions for dealing with potential international protection issues, and be required to act in accordance with the principle of *non-refoulement*, including referring such cases to a central authority responsible for asylum. In a screening process, entry officials should not have responsibility for making substantive decisions on the merits of a claim, but rather for identifying and referring asylum seekers to the competent expert authority in charge of the determination of claims where a protection application has grounds for referral.
2. Upon indicating an intention to seek asylum, the applicant should receive the necessary information as to the procedures to be followed in order to raise or lodge a protection claim, as well as avenues for review.
3. There should be a clearly identified central authority with responsibility for examining requests for refugee status and making a decision in the first instance. Enforcement officials at airports should not be responsible for assessing the substance of the claim.

4. The applicant should be given the necessary facilities, including prompt access to legal assistance on request and the services of a competent interpreter, for submitting their case to the authorities. Applicants should also be given the opportunity, of which they should be informed, to contact a representative of UNHCR.
5. If the applicant is recognised as a refugee, they should be informed accordingly and issued with documentation certifying their refugee status.
6. If the applicant is not recognised, they should be given information about the right of appeal, and a reasonable time to appeal to an authority different from and independent of that making the initial decision, whether administrative or judicial, according to the prevailing system.
7. The applicant should be permitted to remain in the country pending a decision on their initial request and review, as well as any judicial or administrative appeal.⁴⁴

This list, originally formulated in 1977 by UNHCR's Executive Committee (ExCom), comprised of States, has been edited to reflect the evolving understanding of minimum procedural requirements in the intervening years, particularly in reference to developments international human rights law.⁴⁵

Accelerated (or simplified) procedures may be permitted in some circumstances.⁴⁶ However, their use should be limited to dealing with manifestly unfounded or abusive applications⁴⁷ and be accompanied by the following specific procedural guarantees:

1. The applicant should be given a complete personal interview by a fully qualified official and, whenever possible, by an official of the authority competent to determine refugee status.
2. It is up to the authority normally competent to determine refugee status to determine whether an application is manifestly unfounded or abusive. The criteria for making this determination should be defined to ensure that no application will be treated as manifestly unfounded or abusive 'unless its fraudulent character or its lack of any connection with the relevant criteria is truly free from doubt.'⁴⁸
3. Where a decision-making deadline cannot be met for administrative or substantive reasons, the applicant should be admitted to the regular procedure.
4. An unsuccessful applicant should be able to have a negative decision reviewed before rejection at the frontier or forcible removal from the territory.⁴⁹

2.2 Non-penalisation for mode of entry

States parties to the *1951 Convention* and *1967 Protocol* have undertaken not to impose penalties on refugees (who meet certain conditions) on account of their 'illegal entry or presence'. Under international refugee law, the prohibition on penalties applies to both refugees and asylum seekers, because a State cannot identify whether an asylum seeker is a refugee until a full and fair refugee status determination procedure has been conducted.⁵⁰ Travellers seeking protection at Australian airports fall within the protective scope of Article 31, as long as they come from any territory where their 'life or freedom was threatened' and they have not found asylum or settled in another country.⁵¹ Asylum seekers who raise protection claims at Australian airports meet the other requirement of Article 31, as those travellers denied immigration clearance: (1) are present in Australian territory without authorisation;⁵² (2) will have raised their asylum claim without delay;⁵³ and (3) are likely to have 'good cause' for their illegal entry or presence due to their fear of persecution.⁵⁴ For example, travellers who have had their visas cancelled after raising a protection claim in immigration clearance will be present 'without authorisation' only in the technical sense that Australia has revoked their authorisation *because* an otherwise authorised traveller has indicated a desire to seek asylum. Thus, the act of the Australian government renders the traveller's presence unlawful, which in itself constitutes an impermissible penalty that is not consistent with a good faith interpretation of the *1951 Convention*.

Several aspects of the Department's procedures raise significant concerns about Australia's compliance with its obligations, including cancelling visas for the sole reason that a person is seeking asylum, the use of mandatory detention, and precluding access to permanent protection visas. An additional layer of concern is the lack of exemption from penalties in Australia's carrier sanctions regime for airlines that transport improperly documented travellers who are later granted protection.

2.3 Detention

International law places strict limits on the detention of asylum seekers, including for the purpose of carrying out screening for protection claims at airports. Article 9(1) of the *ICCPR* provides that everyone has a right to be free from arbitrary detention.⁵⁵ Detention will be arbitrary if it is inappropriate, unjust or unpredictable⁵⁶ or if it is 'not necessary in all the circumstances of the case and proportionate to the ends sought'.⁵⁷ Any detention of individuals being screened at Australian airports must be based on individual determinations of whether detention is necessary, proportionate and for a legitimate purpose.⁵⁸ In the absence of access to an effective remedy, detention will likely violate international legal safeguards.⁵⁹ The UN Human Rights Committee has repeatedly found that Australia's mandatory detention of asylum seekers constitutes unlawful and arbitrary detention on these grounds.⁶⁰ To prevent the possibility of prolonged or indefinite detention, legislation should set out the maximum period of detention for screening purposes and the applicant should be released if no decision on admission or removal has been taken before the detention period permitted by law.

3 Domestic statutory basis for procedures at Australian airports

The statutory basis for screening protection claims at Australian airports remains uncertain. Information on assessment procedures was only made available after a Freedom of Information request. Data that might shed light on how such procedures operate in practice is largely unavailable. A review of the policies and practices shows that current procedures lack a firm basis in law.

Australia's current procedures for screening for protection claims at airports do not have a clear statutory footing.⁶¹ Thus, these procedures may be unlawful under Australian law, as government policies are generally only valid to the extent they are authorised by and compatible with the enabling legislation.⁶² This also raises important questions as to whether day-to-day agency practice complies with government policy.

The entry screening process involves deciding whether to provide an individual with the opportunity and facilities to lodge an application for a protection visa. There is no basis under the Migration Act to deny a traveller the opportunity to access asylum procedures if they would like to do so, or if there are otherwise grounds to believe that the traveller may be in need of international protection.

The Entry Screening Guidelines recognise that there is 'no separate or specific statutory basis for entry screening'.⁶³ However, the Guidelines later explain that the procedures are 'undertaken to inform (among other considerations) a decision about whether to remove an unlawful non-citizen under section 198(2) of the Migration Act 1958'.⁶⁴ That section provides that an officer must remove as soon as reasonably practicable an unlawful non-citizen:

- (a) who has been detained on being refused immigration clearance;
- (b) who has not been subsequently immigration cleared; and
- (c) who either:
 - (i) has not made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; or
 - (ii) has made a valid application for a substantive visa, that can be granted when the applicant is in the migration zone, that has been finally determined.

The Guidelines suggest that the entry screening procedures inform the considerations under sub-sections 198(2)(c)(i)–(ii) as to the existence of a valid pending, or finally determined, visa application. These provisions deal with a simple question of fact: whether the person has made a valid application for a substantive visa that has not been finally determined. However, the entry screening procedures deal with another matter entirely. Entry screening informs the decision whether to provide a person with the facilities to apply for a protection visa. This is done with reference to a preliminary assessment as to the strength of a person's protection claim, which serves as a procedural and functional barrier to accessing a visa process prescribed in legislation.

The decision to provide an individual with the facilities to lodge a protection visa application is qualitatively different from the question whether a valid application has already been made. The Act and regulations include detailed instructions regarding the requirements for making a valid temporary protection visa application.⁶⁵ None of the instructions refer to a preliminary evaluation of the potential merits of the case as a prerequisite for making a valid application.⁶⁶ In fact, section 197C of the Migration Act makes it clear that, under domestic law, Australia's *non-refoulement* obligations are irrelevant to the exercise of the removal powers under section 198. Thus, it is implausible that entry screening, designed to identify and screen protection claims, could be authorised by a power that specifically excludes *non-refoulement* as being a relevant consideration. There are no provisions elsewhere in the Act that would authorise such a line of inquiry undertaken during the entry screening procedures.

The fact that individuals are in detention while the screening takes place makes the absence of a clear statutory basis for the process all the more concerning. In the *Offshore Processing Case*, the High Court was clear that a statutory power to detain a person could not permit the continuation of that detention at the unconstrained discretion of the Executive.⁶⁷ That case dealt with the procedures established by the Rudd Labor government to assess the asylum claims of 'offshore entry persons' on Christmas Island. Upon request, an 'offshore entry person' could have their protection claims assessed through the Refugee Status Assessment process and seek Independent Merits Review of negative rulings. These procedures were established outside the *Migration Act* with the government claiming that they were an exercise of the non-prerogative executive power to inquire. The government claimed that this meant there was no obligation to afford procedural fairness, and that it did not matter if those who were making the inquiry misunderstood or misapplied the law. The High Court rejected this submission, finding that the process was linked to the Minister's statutory discretion to lift the bar preventing offshore entry persons from submitting a protection visa application.⁶⁸ Key to this finding was the fact that the Migration Act required the detention of an 'offshore entry person' for the duration of the Refugee Status Assessment and Independent Merits Review processes. Such detention could not be carried out and continued at the Executive's unconstrained discretion. Thus, the assessment and review had to be construed as having a statutory footing.

The High Court's finding (that procedures which extend the duration of a person's detention need a statutory basis) has significant ramifications for the current analysis. It precludes the government from claiming, as it did in the *Offshore Processing Case*, that entry screening is being carried out pursuant to a non-statutory executive power to inquire. It also explains the attempt in the Guidelines to link the entry screening process to the statutory duty to remove a person under section 198(2). As has been demonstrated, this claim is unpersuasive. This results in a significant difference between the procedures examined in the *Offshore Processing Case* when compared to the entry screening procedures in question here. Offshore entry persons faced an explicit statutory bar to making a valid protection visa application linked to a discretionary power vested in the Minister to decide to lift that bar.⁶⁹ The High Court thus construed the Refugee Status Assessment and Independent Merits Review procedures as informing the decision of whether or not to exercise that statutory discretionary power.

The entry screening procedures rest upon a shakier statutory footing. Unlawful Air Arrivals face no statutory bar preventing them from applying for temporary protection visas. Neither the Minister, nor anyone else, possesses any statutory discretion to determine whether an individual can make a valid protection visa application or be provided with the facilities to do so. Yet this is precisely the power which the entry screening procedures appear to inform. Any assessment that extends the duration of a person's detention must have some statutory footing. This does not appear to be the case with the entry screening procedures, potentially rendering unlawful the procedures and the period of detention during which they are undertaken.

Not only is the policy and practice not authorised under the *Migration Act*, it also appears to directly conflict with some of its provisions. Section 256 applies to persons in immigration detention under the Act and requires that:

the person responsible for his or her immigration detention shall, at the request of the person in immigration detention, give to him or her application forms for a visa or afford to him or her all reasonable facilities for making a statutory declaration for the purposes of this Act or for obtaining legal advice or taking legal proceedings in relation to his or her immigration detention.

This means that regardless of the outcome of the screening process, an individual who makes a request to apply for a protection visa should be allowed to do so. The Procedural Instruction recognises this requirement, noting that, '[f]ollowing a screened out decision, and without any legal bar to prevent them from doing so, a traveller may still insist on lodging a Protection Visa (PV) application.'⁷⁰ Thus, even if the procedures have a valid statutory footing, they can only be used to screen out individuals who do not make an explicit request to apply for a protection visa or whose claims are determined to bear no rational relationship to the refugee definition or other grounds of protection, or are clearly fraudulent.

The screening procedures appear to rely on the absence of an explicit duty on border officers to advise travellers of their right to apply for asylum. Section 193 of the Act specifically states that the government has no obligation to provide any advice or legal guidance to persons who have been refused immigration clearance (except those who have express requests under section 256). The entry screening procedures are based on this omission and are used to determine whether a person is provided with an opportunity to apply for a protection visa where they have not made an explicit request for the relevant visa forms.

Entry screening appears to be an attempt to use policy to mitigate the conflicting effects of statutory provisions which operate to prioritise visa cancellation and removal without regard to Australia's *non-refoulement* obligations, despite the existence of section 256 of the Migration Act and the right of those in need of protection to apply for it.

On the basis of the above review, this Policy Brief considers that there are better ways to ensure the protection of those at risk, which are more consistent with the principle of legality and with Australia's international obligations; an approach based on the following considerations would come closer to meeting these objectives.

Recommendations

Screening procedures for asylum claims in Australian airports should be guided by international refugee and human rights law protection principles, and the legislative and international law frameworks established to give effect to those principles, as follows:

1. Consistent with the principles of non-penalisation, *non-refoulement*, and the right to seek and enjoy asylum, visas should not be cancelled solely because a protection claim is raised in Australia. Protection claims should always be evaluated and no one should be put at risk of harm in their country of origin or a third country that poses a direct risk of harm, or lacks the capacity or legal framework to process the protection claim and ensure access to international protection.
2. Asylum screening procedures at airports should be established through legislation and should include the following safeguards:
 - Applicants should be given a complete personal interview by a competent official from the Humanitarian Program section of the Department of Home Affairs.
 - The screening should consider only whether an asylum application presents a prima facie protection claim in order to refer the applicant for the full asylum procedure. Only applicants whose claims are determined to bear no rational relationship to the refugee definition or other grounds of protection, or are clearly fraudulent, should be excluded from referral.
 - Applicants who are not referred for the full asylum procedure should be entitled to have the decision reviewed by a decision-maker independent from the Department of Home Affairs before they are removed from Australia.
 - Applicants should have access to legal advice, competent interpreters and officials from UNHCR during both the preliminary decision and review stages.
 - Applicants should not be removed from Australia until their protection claims have been finally determined, including any available judicial review.

4 Ensuring Australia meets its legal obligations

The current practice at Australian airports likely conflicts with Australia's international and domestic legal obligations. Though States have a choice of means in developing and implementing asylum procedures, the implementation must be in good faith and in accordance with their obligations under international law. Screening and referral mechanisms can take a variety of forms, but should not constitute de facto status determination or admissibility procedures. They may help to identify the immediate and longer-term needs of new arrivals, allow for the provision of relevant information to people seeking protection, and refer individuals in need to the appropriate response mechanism. The core elements of pre-screening procedures should include the provision of information to arrivals (including available legal options), information-gathering and establishment of preliminary profiles of individual arrivals, and counselling and referral of individuals to the appropriate procedures (eg procedures to determine eligibility for international protection, support for trafficked persons, etc).⁷¹

4.1 A fair and robust decision-making process

Developing a fair and robust decision-making process for handling protection claims is critical to identifying people in need of protection and ensuring that Australia meets its domestic and international legal obligations. Procedural safeguards to ensure refugees have a chance to put their case, be heard and seek review of such decisions minimise the likelihood that someone in need of protection will be returned to a place where they fear persecution or other serious harm. International obligations often reflect common law standards, which in Australia also include procedural safeguards that ensure natural justice.

Assuming the current airport screening procedures are valid and have some statutory basis, the procedures must be carried out in a way that adheres to the rules of procedural fairness. Where a statute confers power to 'destroy, defeat or prejudice a person's rights or interests', principles of natural justice generally apply.⁷² In the *Offshore Processing Case*, the High Court made clear that screening procedures that prolonged the detention of persons subject to them affected their rights and interests in ways which entitled them to be afforded procedural fairness.⁷³ The airport screening procedures prolong the detention of people subject to them in the same manner. The rules of procedural fairness therefore apply, unless they have been excluded by statutory words of necessary intendment.⁷⁴

The Migration Act contains a number of provisions expressly limiting the scope of natural justice to certain decisions made under the Act. These provisions cover decisions to grant or refuse visas,⁷⁵ cancel visas⁷⁶ and the conduct of merits review.⁷⁷ However, no such provisions exist in relation to decisions to allow a person to lodge a visa application, nor do any provisions cover a decision about whether to remove an unlawful non-citizen under section 198(2), which the government claims the entry screening process informs. As there is no legislative provision clearly excluding natural justice, common law rules of procedural fairness apply to entry screening procedures. Though 'procedural fairness' does not have a fixed meaning, the 'essential elements' include 'fairness and detachment.'⁷⁸ Aspects of procedural fairness with particular resonance in the context of entry screening include that a person be afforded prior notice, that the government disclose certain information and allow the person to respond, and that the person have a reasonable opportunity to present their case.⁷⁹ These requirements are addressed in relation to the entry screening process below.

First, people subject to screening should be given notice that a decision will be made and they should be provided sufficient time to prepare their case. The amount of notice required will vary depending on the circumstances. However, the Guidelines and Procedural Instruction provide little notice or time to travellers who raise protection claims and are likely in contravention of international law and common law principles of procedural fairness. This is particularly so given that notice requirements are applied more strictly where liberty is at stake.⁸⁰ Second, the decision-maker must disclose the substance of the information on which the decision is being made and provide an opportunity to respond to the information. In particular, 'an opportunity should be given to deal with adverse information that is credible, relevant and significant to the decision to be made'.⁸¹ This would extend, as it did in the *Offshore Processing Case*, to a requirement to give claimants an opportunity to respond to adverse country information.⁸² Finally, the individual must be given a real opportunity to place relevant information before a decision-maker.⁸³ The procedures set out in the Guidelines and Procedural Instruction do not appear to meet any of these

requirements and likely do not provide the necessary degree of fairness and detachment required by the principles of natural justice required to be afforded to individuals subject to the entry screening process.

Recommendations

- Entry screening procedures for asylum claims at Australian airports should conform with the rules of procedural fairness as required by common law and reflected in rule of law principles of international law.
- In addition to the procedural safeguards identified in section 3, at a minimum, applicants should be given notice of the nature of the decision being made and provided with sufficient time and facilities to prepare their case. There must be disclosure of the substance of the information on which the decision is being made, and an opportunity to respond to relevant adverse information.

4.2 End mandatory detention

As discussed above, Australia's current practice of mandatory detention violates its international legal obligations. Entry screening currently prioritises the cancellation of a traveller's visa in immigration clearance over examining the request for protection, which results in the traveller's mandatory detention without regard to the traveller's individual circumstances. Such a practice may also violate Article 31 of the *1951 Convention* in some cases, which prohibits penalisation for mode of entry and unnecessary liberty restrictions.

Recommendation

- Detention of asylum seekers and refugees should only be used as a last resort, and should be based on an individual assessment and according to procedures prescribed by law. If detention is required, it should be for the shortest time necessary, proportionate and subject to regular independent review.⁸⁴

4.3 Access to counsel and visa application forms

Providing access to counsel and the means to lodge an application for protection form a critical part of a fair and effective status determination procedure. Quality legal assistance that enables asylum seekers to articulate and lodge often complex claims strengthens the ability of States to ensure the timely and accurate identification of people in need of protection and compliance with the principle of *non-refoulement*. A similar (although less robust) requirement of access to counsel and visa application forms is also found in section 256 of the Migration Act, which provides that:

Where a person is in immigration detention under this Act, the person responsible for his or her immigration detention shall, at the request of the person in immigration detention, give to him or her application forms for a visa or afford to him or her all reasonable facilities for making a statutory declaration for the purposes of this Act or for obtaining legal advice or taking legal proceedings in relation to his or her immigration detention.

The Migration Act does require detention,⁸⁵ placing it at odds with international law, as discussed above. However, once detained, a person who asks for legal advice must be given access to it, and the means to submit an application. The provision confers a statutory 'right' or 'entitlement' to be given 'reasonable facilities' for obtaining legal advice, for taking legal proceedings and accessing visa application forms. It is a private right which arises when an individual has requested access to assistance in preparing and lodging a claim. Where a request is not satisfied, this gives standing to the individual to seek injunctive relief or mandamus.

Section 256 reflects, in part, Principle 17.1 of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* ('*Body of Principles*'),⁸⁶ which provides that:

A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after his arrest and shall be provided with reasonable facilities for exercising it.

In *NAFC v MIMIA*, Beaumont J found it legitimate to construe section 256 with reference to the *Body of Principles*, 'giving effect to the phrase as would be done in the international context.'⁸⁷ The discussion above in relation to the obligations under international law to provide access to counsel is therefore relevant to interpreting the scope to the provision, even though the positive right in the *Body of Principles* for a detainee to be informed of their right to access legal counsel does not appear in section 256. This absence of a positive right to be informed, as discussed above, has had major ramifications for the functioning of the airport screening procedures.

A key element of section 256 is the concept of 'reasonable facilities'. Beaumont J defined 'facility' as 'something that makes possible the easier performance of any action', and 'reasonable' as being 'not excessive'; or 'not greatly more or less than might be thought likely appropriate'.⁸⁸ In an analogous context, the High Court considered that the question of 'reasonable facilities' 'requires no more than making of a value judgement in light of all the facts'.⁸⁹ In the context of section 256, reasonable facilities should include the ability to lodge a visa application. The right to access visa forms is meaningless unless coupled with a right to lodge them.

Recommendations

- A traveller's request to access legal counsel or immigration forms should be fulfilled and they should be provided with reasonable facilities to lodge a protection application, including online access.
- Section 256 of the Migration Act should be amended to require officers responsible for detention to inform detainees of their right to legal counsel and other facilities, in line with Principle 17.1 of the *Body of Principles*.

4.4 End visa cancellations for claims at airports and provide access to permanent protection

If a person makes a claim for protection within immigration clearance, it is standard practice for the Department to cancel the traveller's visa, rendering them an 'unlawful air arrival' and restricting their visa option to only temporary protection. By contrast, air arrivals who clear immigration and then apply protection in the community are not considered unlawful and are able to apply for permanent protection. This result is precisely the opposite of what was intended by the drafters of the *1951 Convention*, which was to provide an incentive for asylum seekers to 'approach the authorities of the State of refuge without delay.'⁹⁰

No reason appears to be given for the discriminatory and unlawful treatment; such arbitrary distinctions serve as a disincentive to apply for protection at the first available means (eg at immigration clearance) and instead encourages later applications.⁹¹ The incoherence and inconsistency created by the legislative framework also places people with legitimate protection claims at risk of removal before being allowed to lodge a claim, which further disincentivises early claims. The distinction may also run contrary to Article 31(1) of the *1951 Convention* which prohibits the imposition of penalties in cases of irregular entry or presence as well as principles of non-discrimination in international human rights law.

Visa cancellations in immigration clearance also impact airline carriers which may be subject to penalties under Australia's carrier sanctions regime for transporting improperly documented passengers. Imposing carrier sanctions for the transport of travellers who are later granted protection incentivises air carriers to prevent the travel of otherwise properly documented passengers who may raise a protection claim on arrival in Australia.

Recommendations

- Applicants should not have their visa cancelled when they seek asylum while in immigration clearance, failing which such cases should be reviewable.
- Applicants who apply for protection while in immigration clearance should have access to permanent protection visas.
- Carrier sanctions should not be imposed on airlines that carry passengers who receive protection in Australia.

5 Issues of transparency and accountability

Entry screening raises questions regarding transparency and accountability and implicates Parliament's oversight functions. The DHA does not appear to collect key data about the operation of the entry screening procedures. This is particularly concerning given that the Department seeks to rely on big data and other technological tools to inform and assist officials in making decisions in the protection space and beyond. The issues include:

1. The failure to keep accurate data as to the total number of individuals raising protection claims at Australian airports.⁹²

2. The failure to record the reason for visa cancellation for travellers who have had their visas cancelled either at an airport abroad, or in immigration clearance.⁹³ Without this information, DHA cannot accurately track whether it is complying with the obligation to provide an individual whose visa has been cancelled at the airport with the opportunity to lodge a protection application.

The development and implementation of evidence-based policy and sound decision-making requires quality data that reflects the context of the relevant rules-based framework. Without knowing how many travellers have sought protection at Australian airports, or how many travellers have had their visas cancelled due to raising a protection claim, the extent to which Australia has failed to comply with its domestic and international legal obligations is unclear.

Recommendations

- The Department of Home Affairs should assess its data collection practices with reference to the refugee and complementary protection legal frameworks in order to identify shortcomings in data collection policies and/or processes. This should include recording reasons for visa cancellations, both within and outside Australia, as well as recording outcomes of all Duty Delegate screening decisions.
- The Department of Home Affairs should ensure that record keeping systems account for on-the-ground realities of officials who are required to enter data. This should include establishing a method for recording all protection claims made at or before immigration clearance, whether or not referred to the Duty Delegate, recording all referrals to the Duty Delegate, and recording all removals of travellers 'screened out' after making a protection claim.
- The Department of Home Affairs should regularly publish anonymised, disaggregated data on Duty Delegate screening decisions, protection claims made at or before immigration clearance, removals of travellers 'screened out' after making a protection claim, and reasons for visa cancellations.

6 Conclusions

This Policy Brief has set out the ways in which current Australian practices may breach domestic and international law. It has also proposed recommendations to address these violations. If adopted, these recommendations would ensure that Australia adheres to its legal obligations, while still retaining control over its ability to screen and assess asylum claims for people who arrive by air.

Australia played a central role in drafting the *1951 Convention* and other human rights treaties designed to protect people fleeing persecution and other serious harms, and it has voluntarily committed to abide by them. A renewed commitment to these principles would improve Australia's international reputation as a leader in human rights and provide a stronger basis for cooperation between Australia and other countries on international protection issues.⁹⁴

Endnotes

¹ Department of Home Affairs, 'Protection claims at the border' (Procedural Instruction, 21 November 2018) 6 ('Procedural Instruction').

² *Migration Act 1958* (Cth) ss 166, 172.

³ In 2018–19, DHA reported that only 60 travellers requested protection upon arrival at an international airport in Australia. Evidence to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Canberra, 21 October 2019, 69 (Michael Outram, ABF Commissioner). For prior years' information, see also Evidence to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Canberra, 23 October 2017 (DIBP), Question on notice No 231.

⁴ UNHCR, *Global Trends: Forced Displacement in 2018* (June 2019) 4 (Global Trends); Claire Higgins, 'Safe Journeys and Sound Policy: Expanding protected entry for refugees' (November 2019) Kaldor Centre Policy Brief 8. See also Andrew Brouwer and Judith Kumin, 'Interception and Asylum: When Migration Control and Human Rights Collide' (2003) 21(4) *Refugee* 6.

⁵ Department of Home Affairs, 'Annual Report 2018–2019' (2019) 22.

⁶ Department of Home Affairs, 'Onshore Humanitarian Program 2018–2019: Delivery and Outcomes for Non-Illegal Maritime arrival (Non-IMA) as at 30 June 2019' (2019).

⁷ Evidence to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Canberra, 21 October 2019, 69 (Michael Outram, ABF Commissioner). For prior year information, see also Evidence to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Canberra, 23 October 2017 (DIBP), Question on notice No 231.

⁸ Department of Home Affairs, 'Number of Protection Claims Before or at Immigration Clearance' (FOI Decision on Internal Review, 27 May 2019) (copy on file with the authors) 3.

⁹ *Migration Act 1958* (Cth) s 4(2): 'To advance its object, this Act provides for visas permitting non-citizens to enter or remain in Australia and the Parliament intends that this Act be the only source of the right of non-citizens to so enter or remain.'

¹⁰ Section 42(1) of Australia's *Migration Act 1958* provides that 'a non-citizen must not travel to Australia without a visa that is in effect.'

¹¹ See, eg, *Migration Regulation 1994* (Cth) sch 2 cl 600.211.

¹² Australian Border Force, 'Who We Are' (8 March 2016) <<https://www.border.gov.au/australian-border-force-abf/who-we-are>>.

¹³ Australia's 'carrier sanctions' legislation includes criminal and financial penalties. *Migration Act 1958* (Cth) ss 228B(2), 229.

¹⁴ Helen Davidson, 'Two gay Saudi journalists 'treated like criminals' in Australia after seeking asylum', *The Guardian Australia* (online, 16 Nov 2019)

<<https://www.theguardian.com/australia-news/2019/nov/16/two-gay-saudi-journalists-treated-like-criminals-in-australia-after-seeking-asylum>>.

¹⁵ 'Gay Saudi journalists in Australian detention after seeking asylum', *The Sydney Morning Herald* (online, Nov 19 2019) <<https://www.smh.com.au/world/middle-east/gay-saudi-journalists-in-australian-detention-after-seeking-asylum-20191119-p53bv.html>>.

¹⁶ Joseph Hinks, "'I Never Wanted to Be a Dissident": A Gay Saudi Journalist Seeking Asylum in Australia Speaks Out After Being Detained', *TIME* (online, 17 Dec 2019) <<https://time.com/5751229/saudi-arabia-gay-journalists-australia/>>.

¹⁷ Sophie McNeill, Sharon O'Neill, and Mary Fallon, 'Australian Border Force accused of targeting women suspected of fleeing Saudi Arabia', *ABC News* (online, 5 Feb 2019)

<<https://www.abc.net.au/news/2019-02-04/border-force-accused-of-targeting-saudi-women-traveling-alone/10768036>>.

¹⁸ Australian Border Force, *Crossing the Border* (Web Page) <<https://www.abf.gov.au/entering-and-leaving-australia/crossing-the-border/at-the-border>>.

¹⁹ Senate Estimates, Legal and Constitutional Affairs Legislation Committee (21 Oct 2019) 68–69: ‘The airline liaison officers in questioning people are trying to ascertain: is the intent for travel the reason that’s stated on the visa?’.

²⁰ Senate Estimates, Legal and Constitutional Affairs Legislation Committee (21 Oct 2019) 56: Passport, identity and visa checks are completed on international passengers arriving on both commercial and charter flights.

²¹ *Migration Act 1958* (Cth) ss 166, 172.

²² *Migration Act 1958* (Cth) s 172(1); *Cujba v Minister for Immigration & Multicultural Affairs* [2001] FCA 146.

²³ This includes database checks, in addition to a physical check of the person and travel documents.

²⁴ The SmartGate procedure at Canberra Airport follows a slightly different process.

²⁵ ‘ABF officer who has delegated authority to undertake primary Customs, Immigration and Biosecurity clearance.’ Department of Home Affairs, ‘Procedural Instruction’ (n 1) 5–6 (emphasis added).

²⁶ Department of Immigration and Citizenship, ‘Entry Screening Guidelines’ (August 2013) 3. All ‘unauthorised maritime arrivals’ (UMAs) are also subject to entry screening. *Ibid*.

²⁷ Department of Home Affairs, ‘Procedural Instruction’ (n 1) 14. DHA also has specific procedures for unaccompanied minors who are refused immigration clearance at an airport, which include that an independent observer be present for the interview. Department of Immigration and Citizenship, ‘Entry Screening Guidelines’ (n 26) 10.

²⁸ The Duty Delegate, also called the ‘screening officer’, is ‘generally an executive-level officer reporting to the Global Manager, Refugee and Humanitarian Visas.’ Department of Immigration and Citizenship, ‘Entry Screening Guidelines’ (n 26) 4.

²⁹ Complementary protection obligations may arise when a non-citizen does not meet the definition of ‘refugee’ but would suffer significant harm that would engage Australia’s *non-refoulement* obligations stemming from another international instrument to which Australia is a party. *Migration Amendment (Complementary Protection) Act 2011* (Cth).

³⁰ Department of Home Affairs, ‘The Protection Visa Processing Guidelines’ (Procedural Instruction, 12 August 2018) Annexure 2: Unauthorised arrival entry screening guidelines, s 4.119.1 (‘The Protection Visa Processing Guidelines’).

³¹ Department of Home Affairs, ‘Procedural Instruction’ (n 1) 16; Department of Home Affairs, ‘The Protection Visa Processing Guidelines’ (n 30).

³² Department of Home Affairs, ‘The Protection Visa Processing Guidelines’ (n 30); Department of Home Affairs, ‘Procedural Instruction’ (n 1) 16.

³³ The Temporary Protection Visa (TPV) (Class XD) provides protection for three years, while the Safe Haven Enterprise Visa (SHEV) (Class XE) provides protection for five years. SHEV applicants must intend to work or study in a part of ‘regional Australia’ for three and a half years. If an applicant does so, they may be able to apply for certain migration visas.

³⁴ See discussion in Senate Estimates, Legal and Constitutional Affairs Legislation Committee (21 Oct 2019) 68–69: ‘Senator ROBERTS: What arrangements are in place with airlines to deny [asylum seekers] boarding flights? Ms Golightly: There are actually quite a number of things we do offshore, before people come to Australia, and – I think as the secretary mentioned earlier – this starts right at the application stage, which is way before someone even arriving at an airport to

board a plane. At the application stage, we have officers all around the world that have a look at the application, and we have systems that have risk parameters programmed into them Many are refused at that point, and, indeed, our refusal rates have been increasing significantly year on year.’

³⁵ *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171 (entered into force 23 March 1976) (‘ICCPR’) art 2; Committee against Torture, *Conclusions and Recommendations of the Committee against Torture: United States of America*, 36th sess, UN Doc CAT/C/USA/CO/2 (25 July 2006) [14]. The accepted interpretation is that either ‘territory’ or ‘jurisdiction’ is sufficient.

³⁶ *Amuur v. France*, (European Court of Human Rights, Grand Chamber, Application No 19776/92, 25 June 1996): the French Government claimed that Syrian asylum seekers detained ‘in a so-called international zone at the airport’ were ‘not yet on French territory and the French authorities are therefore not under a legal obligation to examine the request as they would be if a request was made by someone already on French territory.’ In a scenario analogous to Australia’s practices, the asylum seekers were denied access to lawyers, detained for twenty days, and subsequently returned to Syria without due consideration of their asylum claim. The Court held that ‘even though the applicants were not in France within the meaning of the Ordinance of 2 November 1945, holding them in the international zone of Paris-Orly Airport made them subject to French law. Despite its name, the international zone does not have extraterritorial status.’

³⁷ *Convention Relating to the Status of Refugees*, 189 U.N.T.S. 150, 28 Jul. 1951 (entered into force 22 April 1954) (‘1951 Convention’); *Protocol relating to the Status of Refugees*, 606 U.N.T.S. 267 (entered into force 4 October 1967) (‘1967 Protocol’); *International Covenant on Civil and Political Rights* 999 U.N.T.S. 171 (entered into force 23 March 1976) (‘ICCPR’); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1465 U.N.T.S. 85 (entered into force 26 June 1987) (‘CAT’) art 3; *ICCPR* (n 35) art 7; *Convention on the Rights of the Child*, 1577 U.N.T.S. 3 (entered into force 2 September 1990) (‘CRC’) arts 6, 37; *Convention on the Rights of Persons with Disabilities*, 2515 U.N.T.S. 3 (entered into force 3 May 2008) (‘CRPD’) art 15; *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty*, 999 U.N.T.S. 414 (entered into force 11 July 1991) (‘Second Optional Protocol’); *Convention on the Elimination of All Forms of Discrimination against Women* 1249 U.N.T.S. 13 (entered into force 3 September 1981) (‘CEDAW’); *International Convention on the Elimination of All Forms of Racial Discrimination* 660 U.N.T.S. 195 (entered into force 4 January 1969) (‘CERD’).

³⁸ *1951 Convention*, art 33(1); *ICCPR* arts 6–7; *CAT*, art 3(1); *CRC*, arts 6, 37; *Second Optional Protocol*. See UN Human Rights Committee, General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), 44th sess, UN doc HRI/GEN/1/Rev.7 (10 March 1992) para 9; UN Human Rights Committee, General Comment No 31 on the Nature of the General Legal Obligation on States Parties to the Covenant, 80th sess, UN doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) (General Comment No 31) para 12; Committee on the Rights of the Child, General Comment No 6 (2005): Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, 39th sess, UN doc CRC/GC/2005/6 (1 September 2005) para 27; Jane McAdam and Fiona Chong, *Refugee Rights and Policy Wrongs: A Frank, Up-to-Date Guide by Experts* (UNSW Press, 2019) ch 1.

³⁹ *CAT* (n 37) art 3; *ICCPR* (n 35) art 7; *CRC* (n 37) art 37; *CRPD* (n 37) art 15. See also Guy S Goodwin-Gill, ‘Non-Refoulement, Temporary Refuge, and the “New” Asylum Seekers’ in David J Cantor and Jean-François Durieux (eds), *Refuge from Inhumanity? War Refugees and International Humanitarian Law* (Brill Nijhoff, 2014) 457–59.

⁴⁰ UNHCR, ‘Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol’ (26 January 2007) 7 [15] <<https://www.refworld.org/docid/45f17a1a4.html>>; Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 2007) 345–54.

⁴¹ Cathryn Costello and Michelle Foster, ‘Non-Refoulement as Custom and *Jus Cogens*? Putting the Prohibition to the Test’ (2016) 46 *Netherlands Yearbook of International Law* 273.

⁴² UNHCR, ‘Legal considerations on state responsibilities for persons seeking international

protection in transit areas or “international” zones at airports’ (17 January 2019)
<<https://www.refworld.org/docid/5c4730a44.html>> [6].

⁴³ Relevant conclusions adopted by UNHCR’s Executive Committee are published in UNHCR, *Conclusions on the International Protection of Refugees adopted by the Executive Committee of the UNHCR Program 1975– 2017 (Conclusion No 1 – 114)* (October 2017): UNHCR ExCom, *Conclusion No 81: General Conclusion on International Protection* (1997) 184[h]; UNHCR ExCom, *Conclusion No 82: Conclusion on Safeguarding Asylum* (1997) 187[d](iii); UNHCR ExCom, *Conclusion No 85: Conclusion on International Protection* (1998) 197– 198[q]; UNHCR ExCom, *Conclusion No 93: Conclusions Adopted by the Executive Committee on Reception of Asylum-seekers in the Context of Individual Asylum Systems* (2002) 221–222[a]; UNHCR ExCom, *Conclusion No 99: Conclusions Adopted by the Executive Committee on the International Protection of Refugees* (2004) 249[i]; UNHCR ExCom, *Conclusion No 103: Conclusions Adopted by the Executive Committee on the Provision on International Protection Including Through Complementary Forms of Protection* (2005) 277[r]; UNHCR ExCom, *Conclusion No 110: Conclusions Adopted by the Executive Committee on Refugees with Disabilities and Other Persons with Disabilities Protected and Assisted by UNHCR*, (2010) 323[j].

⁴⁴ UNHCR ExCom, *Conclusion No 8: Conclusions Adopted by the Executive Committee on the Determination of Refugee Status* (1977) 20–21[e]; UNHCR, *Asylum Processes (Fair and Efficient Asylum Procedures): Global Consultations on International Protection*, Doc. EC/GC/01/12 (31 May 2001) para 2 (‘Asylum Processes (Fair and Efficient Asylum Procedures)’) para 43; *Hirsi Jamaa* (2012) ECtHR Application No 27765/09 65, 72 (Judge Albuquerque); *Kaldor Centre Principles for Australian Refugee Policy* (Kaldor Centre for International Refugee Law, UNSW, 2019) 9–10; Madeline Gleeson, *Where to from here? Report from the Expert Roundtable on regional cooperation and refugee protection in the Asia-Pacific* (Kaldor Centre for International Refugee Law, UNSW, 2016) 18–19; and *Parliament and Council Directive 2013/32/EU of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (Recast)* [2013] OJ L 180/60, arts 6–30.

⁴⁵ UNHCR, *Asylum Processes (Fair and Efficient Asylum Procedures)* (n 44) para 43; *Hirsi Jamaa* (2012) ECtHR Application No 27765/09 65, 72 (Judge Albuquerque); and Gleeson, *Where to from here? Report from the Expert Roundtable on regional cooperation and refugee protection in the Asia-Pacific* (n 44) 18–19. See also *Parliament and Council Directive 2013/32/EU of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (Recast)* [2013] OJ L 180/60.

⁴⁶ UNHCR now distinguishes between ‘accelerated’ procedures, which relates solely to timeframe and where usual (not reduced) procedural safeguards apply, and ‘simplified’ procedures in which usual procedural safeguards apply but, in appropriate cases, some aspects of the process may be streamlined. See eg UNHCR, *Aide-Memoire & Glossary of case processing modalities, terms and concepts applicable to RSD under UNHCR’s Mandate*, 2017 <<https://www.refworld.org/docid/5a2657e44.html>>; UNHCR, *Fair and Fast: UNHCR Discussion Paper on Accelerated and Simplified Procedures in the European Union* (25 July 2018) <<https://www.refworld.org/docid/5b589eef4.html>> (‘Fair and Fast’).

⁴⁷ UNHCR accepts the use of accelerated procedures for manifestly *well-founded* claims, which ‘on their face, clearly indicate that the individual meets the definition of a refugee under the 1951 Convention Relating to the Status of Refugees or subsidiary protection’. See UNHCR, *Fair and Fast* (n 46) 5.

⁴⁸ UNHCR, *Follow-up on Earlier Conclusions of the Sub-Committee on the Determination of Refugee Status with Regard to the Problem of Manifestly Unfounded or Abusive Applications*, UN Doc EC/SCP/29 (26 August 1983) para 19.

⁴⁹ UNHCR, *Conclusions on the International Protection of Refugees adopted by the Executive Committee of the UNHCR Program 1975–2017 (Conclusion No 1 – 114)* (October 2017): UNHCR ExCom, *Conclusion No 30: Conclusions Adopted by the Executive Committee on the Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum* (1983) 63–64[e]; *Asylum Processes (Fair and Efficient Asylum Procedures)* (n 44) para 22.

⁵⁰A ‘person is a refugee ... as soon as [they] fulfil[] the criteria contained in the definition.’ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, UN Doc. HCR/1P/4/ENG/REV. 4 (February 2019) 17 para 28. See also Guy S Goodwin-Gill, ‘Article 31 of the 1951 Convention relating to the Status of Refugees: Non-Penalization, Detention and Protection’ for UNHCR Global Consultations (October 2001) 8 para 27: ‘[T]his provision would be devoid of all effect unless it also extended, at least over a certain time, to asylum seekers or, in the words of the court in *Adimi* ... to “presumptive refugees”’.

⁵¹ Cathryn Costello, Yulia Ioffe, and Teresa Büchsel, UNHCR Legal and Protection Policy Research Series, ‘Article 31 of the 1951 Convention Relating to the Status of Refugees’ (July 2017) 20.

⁵² Costello et al (n 51) 23.

⁵³ Summary Conclusions, UNHCR ‘Roundtable on Non-Penalization for Illegal Entry or Presence: Interpreting and Applying Article 31 of the 1951 Refugee Convention’ (15 March 2017) 6, para 16.

⁵⁴ Costello et al (n 51) 30.

⁵⁵ See also *1951 Convention*, art 31(2).

⁵⁶ Human Rights Committee, *Views: Communication No 305/1988*, UN Doc CCPR/C/39/D/305/1988 (15 August 1990) [5.8] (*Van Alphen v The Netherlands*).

⁵⁷ Human Rights Committee, *Views: Communication No 1324/2004*, 89th sess, UN Doc CCPR/C/88/D/1324/2004 (13 November 2006) [7.2] (*Shafiq v Australia*). See also Human Rights Committee, *Views: Communication No 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (30 April 1997) [9.2] (*A v Australia*).

⁵⁸ UNHCR, *Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012) (*Detention Guidelines*) <<https://www.refworld.org/docid/503489533b8.html>> 15–16.

⁵⁹ *Ibid* 15; ICCPR (n 35) art 9; *Kaldor Centre Principles for Australian Refugee Policy* (n 44) 6–8.

⁶⁰ See for example *A v Australia* (n 57); Human Rights Committee, *Views: Communication No 900/1999*, 76th sess, UN Doc CCPR/C/76/D/900/1999 (28 October 2002) (*C v Australia*); Human Rights Committee, *Views: Communication No 1014/2001*, 78th sess, UN Doc CCPR/C/78/D/1014/2001 (12 August 2003) (*Baban v Australia*); Human Rights Committee, *Views: Communication No 1069/2002*, 79th sess, UN Doc CCPR/C/79/D/1069/2002 (29 October 2003) (*Bakhtiyari v Australia*); Human Rights Committee, *Views: Communication No 1050/2002*, 87th sess, UN Doc CCPR/C/87/D/1050/2002 (11 July 2006) (*D & E v Australia*); *Shafiq v Australia* (n 57); Human Rights Committee, *Views: Communication No 1255, 1256, 1259, 1260, 1266, 1268, 1270 & 1288/2004*, 90th sess, UN Doc CCPR/C/90/D/1255 (11 September 2007) (*Shams v Australia*); Human Rights Committee, *Views: Communication No 1442/2005*, 97th sess, UN Doc CCPR/C/97/D/1442/2005 (23 November 2009) (*Kwok v Australia*).

⁶¹ The lack of statutory basis extends to the legal standard of whether a traveller ‘makes a prima facie protection claim that is not considered “far-fetched and fanciful”’. Department of Home Affairs, ‘The Protection Visa Processing Guidelines’ (n 30) Annexure 2: Unauthorised arrival entry screening guidelines, s 4.119.1.

⁶² *Ruddock v Vardalis* (2001) 110 FCR 491.

⁶³ Department of Immigration and Citizenship, ‘Entry Screening Guidelines’ (n 26) 3–4.

⁶⁴ *Ibid*.

⁶⁵ *Migration Act 1958* (Cth) s 36; *Migration Regulations 1994* (Cth) reg 2.07; Schedule 1, Item 1404; Schedule 2, sc 785 and sc 790; Migration (LIN 18/029: Arrangements for Protection, Refugee and Humanitarian Visas) Instrument 2018.

⁶⁶ *Plaintiff M61/2010E v Commonwealth; Plaintiff M69 of 2010 v Commonwealth* (2010) 243 CLR 319, 328 (*Offshore Processing Case*).

⁶⁷ *Ibid*, 348.

-
- ⁶⁸ These discretions were found in s 46A(2) and s 195A(2) of the *Migration Act 1958* (Cth).
- ⁶⁹ *Migration Act 1958* (Cth) s 46A(1), (2).
- ⁷⁰ Department of Home Affairs, 'Procedural Instruction' (n 1).
- ⁷¹ UNHCR, 'The 10-Point Plan in Action' (2016) 118–19.
- ⁷² *Annetts v McCann* (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh JJ).
- ⁷³ *Offshore Processing Case* (2010) 243 CLR 319, 353 [76].
- ⁷⁴ *Commissioner of Police v Tanos* (158) 98 CLR 383, 396.
- ⁷⁵ *Migration Act 1958* (Cth) ss 51A–64.
- ⁷⁶ *Migration Act 1958* (Cth) ss 97A, 118A, 127A.
- ⁷⁷ *Migration Act 1958* (Cth) ss 422B–429A (AAT Review of protection visa decisions), ss 357A–367 (AAT review of other visa decisions), s 473DA (review of fast-track decisions).
- ⁷⁸ *S157/2002 v Commonwealth* (2003) 211 CLR 476, [25] (Gleeson CJ).
- ⁷⁹ *R v Small Claims Tribunal; Ex parte Cameron* [1976] VR 427, Anderson J at 432; *Kioa v West* (1985) 159 CLR 550; *SAAP v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 228 CLR 294, McHugh J at [66]; *Kasupene v Minister for Immigration & Citizenship* (2008) 49 AAR 77, Flick J at [15]–[17].
- ⁸⁰ For example, in *Sales v Minister for Immigration and Multicultural Affairs* [2006] FCA 1807 it was held that 14 days was inadequate to enable a person to respond to a notice to cancel a permanent visa. See also *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180; [2016] HCA 29 at [75].
- ⁸¹ *Kioa v West* (1985) 159 CLR 550, 629 (Brennan J). This requirement is further elaborated in *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88.
- ⁸² Note that the exhaustive statement of natural justice in the *Migration Act 1958* (Cth) excludes this requirement for decisions to grant or refuse a visa application: ss 51A, 57. However, as discussed above, these limitations do not extend to the decision being made here.
- ⁸³ *Sullivan v Department of Transport* (1978) 20 ALR 323 (FCAFC), Deane J at 343–344.
- ⁸⁴ See, also, *Kaldor Centre Principles for Australian Refugee Policy* (n 44) 6–8.
- ⁸⁵ *Migration Act 1958* (Cth) s 189.
- ⁸⁶ *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, GA Res 43/173, UN Doc A/RES/43/173 (9 December 1988).
- ⁸⁷ *NAFC v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 126 FCR 99.
- ⁸⁸ *NAFC v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 126 FCR 99 [47].
- ⁸⁹ *Slivak v Lurgi (Australia) Pty Ltd* (2001) 177 ALR 585 [53].
- ⁹⁰ Costello et al (n 51) 10.
- ⁹¹ It should be noted, however, that asylum seekers may have legitimate reasons for not raising a claim at the earliest opportunity. For example, it is widely recognized that asylum seekers with claims based upon sexual orientation and/or gender identity may face a number of serious challenges to presenting claims fully and without fear which render accelerated or summary procedures unsuitable. See eg UNHCR, *Guidelines on International Protection No 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the status of Refugees*, UN Doc. HCR/GIP/12/01 (23 October 2012) [59]–[60].

⁹² Department of Home Affairs, 'Number of Protection Claims Before or at Immigration Clearance' (FOI Decision on Internal Review, 27 May 2019) (copy on file with author) 3.

⁹³ Evidence to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Canberra, 22 May 2018, 167 (Christine Dacey). This is from a DHA response to Question on Notice No 54, Portfolio Question No BE18/100.

⁹⁴ *Kaldor Centre Principles for Australian Refugee Policy* (n 44) 2; Daniel Ghezelbash, *Refuge Lost: Asylum Law in an Interdependent World* (Cambridge University Press, 2018) 184–86.

