

# RULE OF LAW INSTITUTE OF AUSTRALIA

## Rule of Law, Human Rights and the Separation of Powers

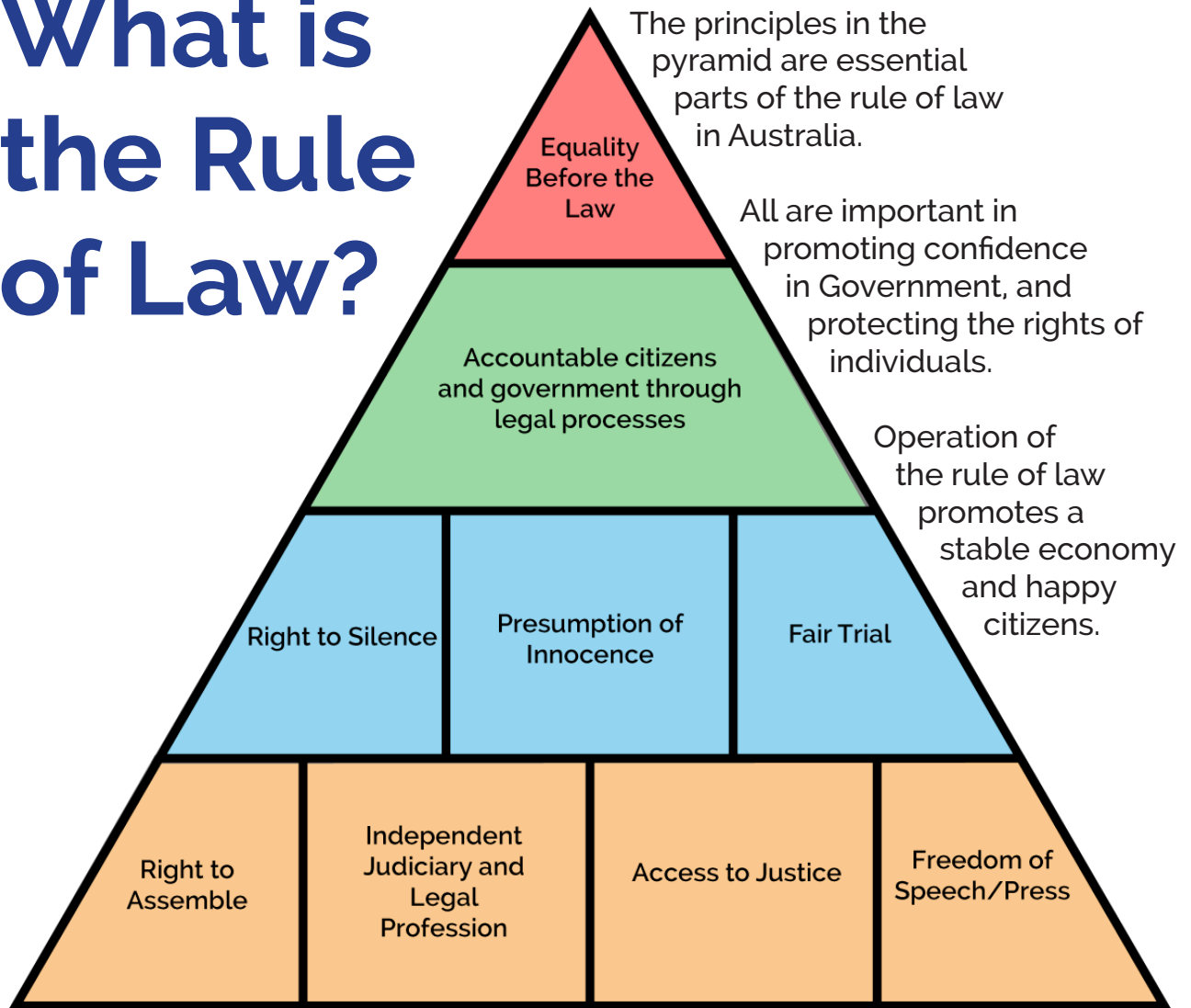
- 1) The Rule of Law Principle in Australia
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*The Rule of Law Institute of Australia is an independent, not for profit organisation which seeks to promote discussion of rule of law issues in Australia. It actively contributes feedback to Parliamentary Committees on proposed legislation, and provides access to education programmes and resources for students studying the law.*

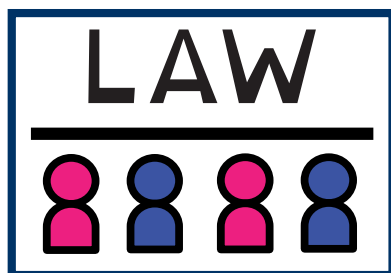
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# What is the Rule of Law?

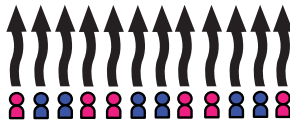


The rule of law is a legal concept which requires the use of power to be controlled by the law to ensure equality before the law.

Maintaining the rule of law is often noted as being the best way to preserve human rights.



LAW  
GOVERNMENT

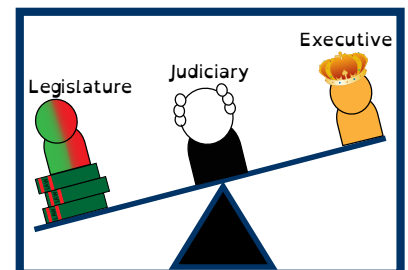


If people believe the law is unjust, they may not want to follow it. Ideally people should feel the law is just and want to follow it.

The process of changing the law through democratic processes ensures that the law remains up to date with the needs of society.

The separation of powers in Australia ensures that power is balanced between the three arms of government and that there are checks on their use of power.

The Judiciary is especially important in ensuring the integrity of the Australian Constitution and that the Legislature and Executive act according to the law.



# WHAT IS THE RULE OF LAW?

The main principle of the rule of law is that **no one is above the law** and that a person cannot be punished, or have their rights taken away except by the law.

Some key principles of the rule of law which are commonly expressed as rights are:

- the right to be brought before a court (*habeas corpus*)
- the use of power should be defined by laws and done
- the decisions of government should be transparent so they can be questioned (accountability)
- the presumption of innocence

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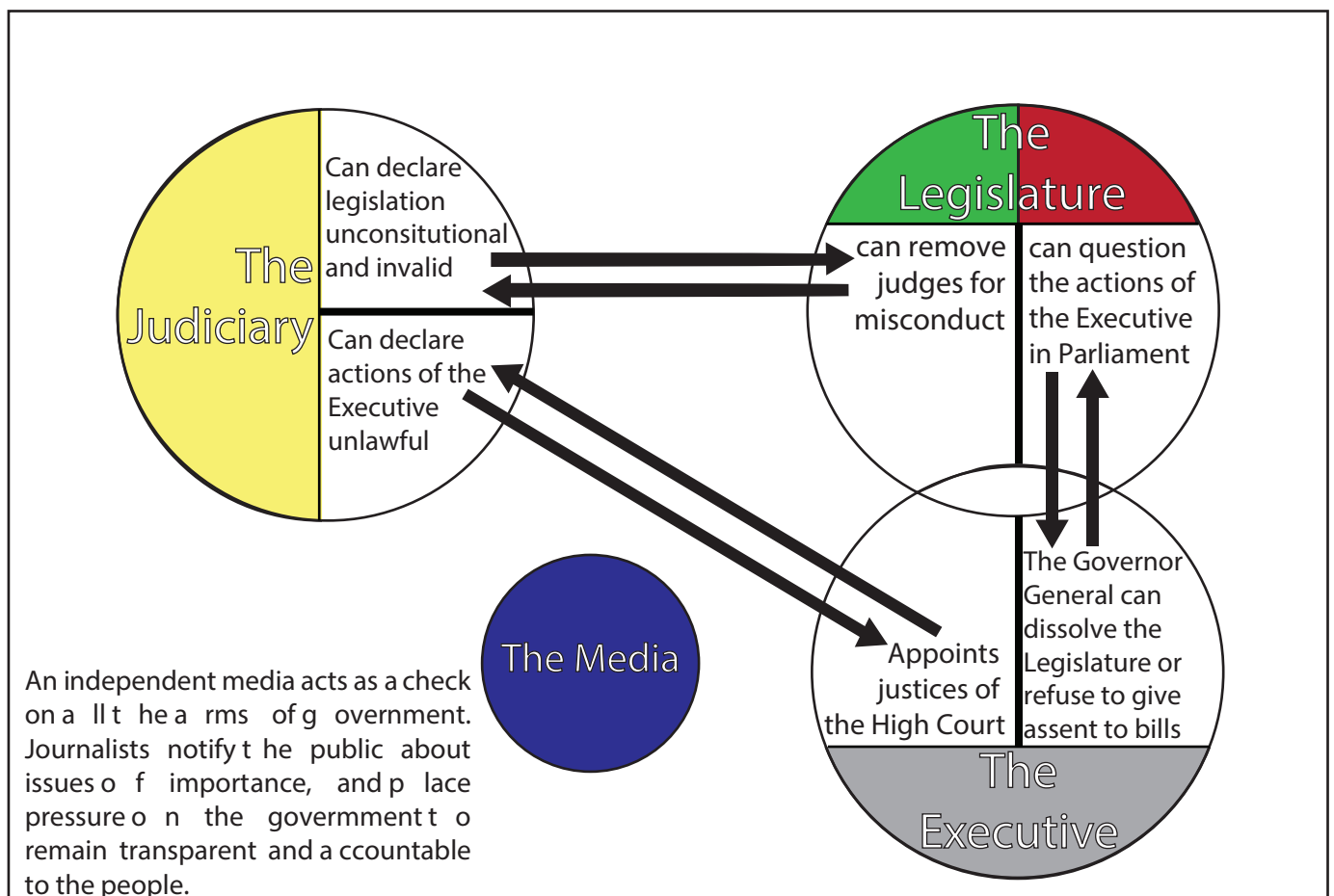
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## THE SEPARATION OF POWERS - CHECKS AND BALANCES ON GOVERNMENT



# RIGHTS AND RESPONSIBILITIES

The rule of law provides the best way for rights to be protected. All rights come with responsibilities, which means following the law.

Formal processes exist to deal with situations where the law is broken. It is one of the most important aspects of the legal system in Australia that a person **should not** be punished unless they have been found guilty of breaking the law.

## **A simple example of this is:**

A person has the right to do what they want, as long as they do not break the law. If they are found guilty of breaking the law their freedoms can be taken away.

International agreements such as the Universal Declaration of Human Rights (UDHR) promote human rights standards. The UDHR suggests that the rule of law and legal processes are the best way to protect human rights.

The purpose of human rights is to promote laws and legal processes which enforce rights and responsibilities that prevent suffering, ensure people are treated with fairness, and maintain a just society.

*‘Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,’*

*- Preamble to the Universal Declaration of Human Rights (1948)*



*“The UN was not created to take mankind to heaven, but to save humanity from hell.”*

*- Dag Hammarskjöld, UN Secretary-General from 1953 to 1961*

# Legal Protections of Human Rights in Australia

## 1 The Universal Declaration of Human Rights (1948) - UDHR

### SOFT LAW

Laws which are not legally binding but promote protection of human rights.

*Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law...*

- Preamble to the UDHR (1948)

The UDHR was written in 1948 as a response to the horrors of the Second World War.

Australia signed the UDHR in 1948 to promote the importance of human rights.

While it is a soft law, it is widely recognised as a cornerstone of human rights law.



### HARD LAW

Laws which are legally binding on sovereign states and aim to enforce protection of rights.

## 2 The International Covenant on Civil and Political Rights (1966) - ICCPR

Signed by Australia in 1972, ratified in 1980.

How do international agreements become law in Australia?

When an international agreement is ratified by Australia, it does not immediately become law. Australia has a **dualist system** which means the Parliament of Australia pass it as a statute before it has effect in Australian law.

How is the ICCPR legally binding on Australia?

Australia must report to the United Nations Human Rights Committee every four years on how the rights in the ICCPR are being implemented under Australian law.

## 3 Human Rights and Australian Statute Law

**Human Rights vs Anti-Discrimination Laws**  
Anti-discrimination laws provide a legal process for seeking compensation if an individual feels they have been treated unfairly because of their sex, race, age or disability.

Definitions of what constitutes discrimination are narrow. This limits the situations in which they can be used. Discrimination laws concerned with racial vilification have come into conflict with the right to 'free speech'.

Enforcement and protection of a right occurs when a person brings a complaint.

Sex Discrimination Act 1974 (Cth)

Racial Discrimination Act 1975 (Cth)

Disability Discrimination Act 1992(Cth)

Age Discrimination Act 2004 (Cth)

## 4 Australian Human Rights Commission (AHRC)



**Australian Human Rights Commission**  
*everyone, everywhere, everyday*

Under the *Human Right Commission Act 1986 (Cth)* the AHRC is the first place a person must take their discrimination complaint. If the AHRC cannot resolve a complaint made under one of the discrimination acts then a person can pursue their complaint in the Courts.

**Federal Court of Australia**

In the Federal Court a judge can hear anti-discrimination cases and award damages if a complaint is successfully proven.

## Developing Recognition of Human Rights in International Law

Year = when the instrument was adopted by the UN

- 1948 - The Universal Declaration of Human Rights
- 1966 - International Covenant on Civil and Political Rights
- 1966 - International Covenant on Economic, Social and Cultural Rights
- 1969 - International Convention on the Elimination of All Forms of Racial Discrimination
- 1979 - Convention on the Elimination of All Forms of Discrimination Against Women
- 1984 - UN Convention Against Torture
- 1989 - Convention on the Rights of the Child
- 1975 - Declaration on the Rights of Disabled Persons
- 2007 - Convention with Disabilities

## 6 Rule of Law, Human Rights and the Separation of Powers

## PURPOSE



# LEGAL PROCESSES

## WHAT HAPPENS TO ASYLUM SEEKERS WHO ARRIVE BY BOAT IN AUSTRALIA?

- *The Migration Act 1958 (Cth)* defines certain islands off the coast of Australia as 'excised offshore places'
- People who arrive in these places without a visa are deemed '**irregular maritime arrivals**' and are declared '**unlawful non-citizens**'.
- They are subject to mandatory detention in Australia or in a Regional Processing Centre (RPC) until they are granted a protection visa **OR** are found not to be a refugee and are returned to their country of origin
- Australia or the country hosting the RPC conducts a **refugee status determination process** to decide whether a person is a refugee or not

### GLOSSARY

**Asylum seeker** - a person who has fled their country seeking refugee status

**Irregular Maritime Arrivals** - people who arrive in Australia via boat who do not have a visa

**Unlawful non-citizens** - a person who in Australia who is not a citizen and does not have a valid visa

**Offshore entry person** - a person who enters Australia at an excised offshore place and becomes an unlawful non-citizen.

**Refugee** - a person who holds a protection visa

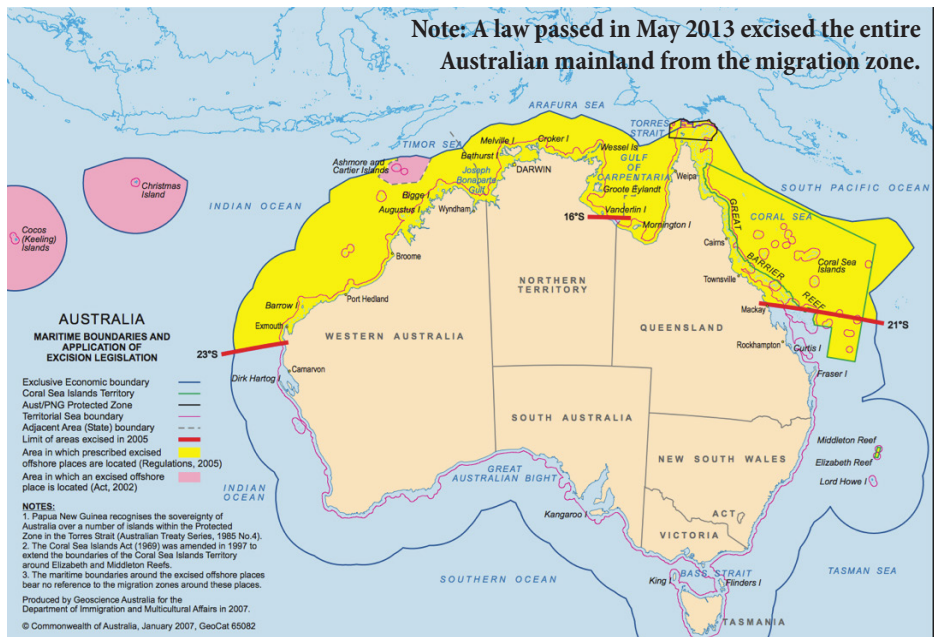
**Boat people** - asylum seekers who arrive by boat in Australia, not a legal term.

### EXCISED PLACES FROM THE MIGRATION ZONE

1. Find Christmas Island and circle it. What role does it have in the processing of asylum seekers?

2. What are the pink and yellow zones on the map?

3. Why does the yellow zone end at the 23's on the west coast and 21's on the east coast?



Map of Australia's Excised Offshore places from

<http://www.immi.gov.au/media/fact-sheets/81-excision-places-map.pdf>

**Outline** the process of dealing with asylum seekers when they arrive by boat in the excised zone.

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# WHAT IS A REFUGEE UNDER INTERNATIONAL LAW?

Definition of refugee:

*'A person who owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his/her nationality and is unable or, owing to such a fear, is unwilling to avail himself of the protection of that country.'*

- Convention Relating to the Status of Refugees

**Key human rights protections in the Refugee Convention:**

- fair process to assess their claim for refugee status
- non-refoulement: a refugee cannot be sent back to their country of origin.
- no penalties for seeking refuge
- countries must cooperate with the United Nations High Commissioner for Refugees (UNHCR)

## HOW DOES AUSTRALIA COMPLY WITH THE REFUGEE CONVENTION?

### REFUGEE STATUS DETERMINATION PROCESS

1

Asylum seeker arrives by boat in the excised zone and requests asylum

2

Department of Immigration and Citizenship makes an assessment whether Aust. has protection obligations

3

If found to be a refugee they are allowed to apply for a permanent protection visa, if not →

4

They are removed from Australia, back to their country of origin, as soon as possible



# CASE 1: HIGH COURT SAYS ASYLUM SEEKERS MUST RECEIVE PROCEDURAL FAIRNESS

**PLAINTIFF M 61/2010E v COMMONWEALTH;  
PLAINTIFF M 69 OF 2010 v COMMONWEALTH (2010) HCA 41**

## BACKGROUND

In M61 / M69 v Commonwealth (2010) two Sri Lankan asylum seekers had their applications to 'lift the bar' rejected. Prior to this decision rejected applicants were only entitled to have an independent merits review if the department refused their application, but had no access to appeal the decision in the courts.

An independent merits review was conducted by a private company, Wizard People Pty Ltd, who made a recommendation to the Minister for Immigration and Citizenship about whether Australia had 'protection obligations' under the Refugee Convention toward the plaintiff. If Wizard People Pty Ltd rejected their application they were to be removed from Australia as soon as possible.

## WHAT DID THE HIGH COURT DECIDE?

In *M61 / M69 v Commonwealth [2010]* the High Court's decision stated that asylum seekers were entitled to procedural fairness when their applications are assessed.

If an asylum seeker is found to not be a refugee they are entitled to judicial review of their application.

This shows the High Court of Australia acting as a check on the power of the Executive.

**Describe** how the High Court protected human rights in *M61/M69 v Commonwealth [2010] HCA 41*.

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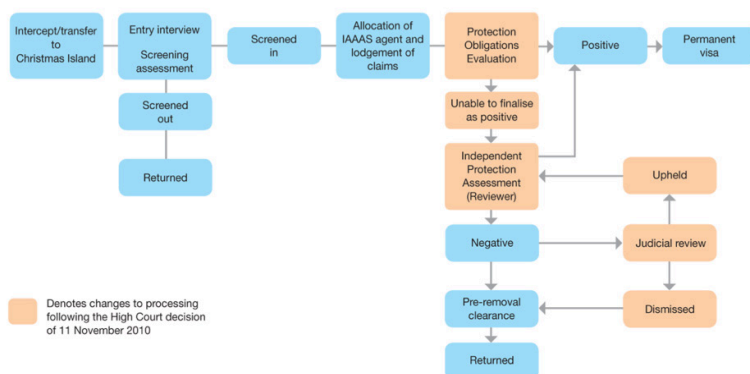
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### New Protection Obligations Determination Process



Health, security, character and identity checks - no visas granted until all checks completed and cleared.

## Migration Act 1958 - s198A (Prior to August 2012)

‘(3) The Minister may:

(a) declare in writing that a specified country:

(i) provides access, for persons seeking asylum, to effective procedures for assessing their need for protection; and

(ii) provides protection for persons seeking asylum, pending determination of their refugee status; and

(iii) provides protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country; and

(iv) meets relevant human rights standards in providing that protection; and

## CASE 2: THE MALAYSIA PEOPLE SWAP DEAL

**PLAINTIFF M70/2011 v MINISTER FOR IMMIGRATION AND CITIZENSHIP [2011] HCA 32**

### BACKGROUND

The Minister for Immigration and Citizenship’s organised an agreement with the Malaysian Government for them to accept 800 asylum seekers who arrived in Australia by boat. In exchange Australia was to receive 4000 refugees from Malaysia who had already been processed by the UNHCR.

### WHAT DID THE HIGH COURT DECIDE?

A 6-1 majority in the High Court found the Minister could not send asylum seekers to Malaysia because Malaysia was not a signatory of the Refugee Convention, that no protection for refugees existed under Malaysian law, and that assurances that it would protect the rights of refugees were not sufficient to satisfy the test in s198A of the Migration Act 1958 (Cth) - see s198A above.

This again shows the High Court acting as a check on the power of the Executive.

**Describe** how the High Court protected human rights in *Plaintiff M70/2011 v Minister for Immigration and Citizenship [2011] HCA*.

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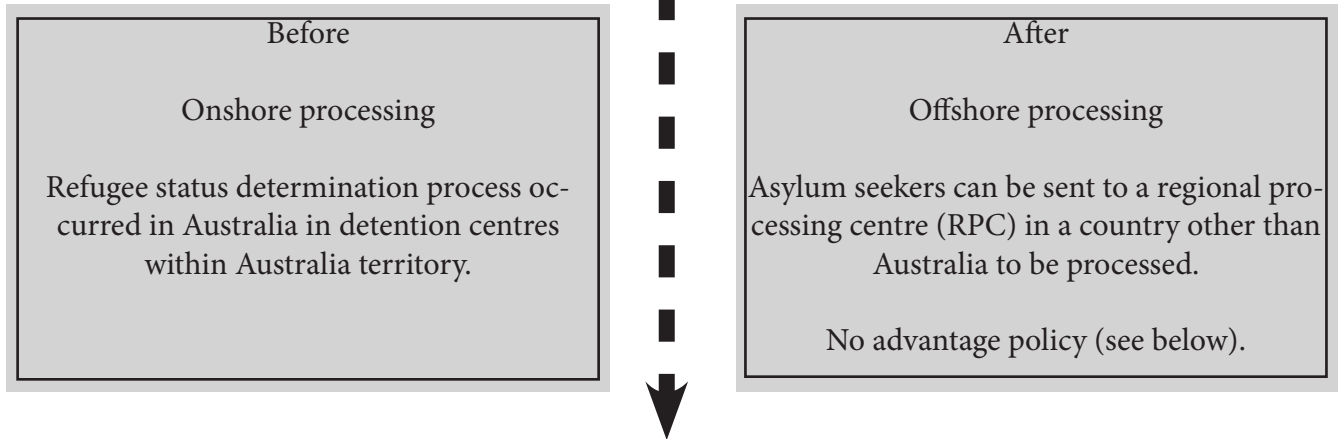
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# OFFSHORE PROCESSING POST-AUGUST 2012

In August 2012, the Migration Act 1958 (Cth) was amended to allow irregular maritime arrivals to be sent to a regional processing centre. This marked a shift in Government policy from onshore processing to offshore processing.

## AUGUST 2012



1. According to this poster, where are the regional processing centres located?

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2. What is the purpose of the 'no advantage' policy?

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3. How does it discourage asylum seekers for getting on boats?

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# CREATING REGIONAL PROCESSING CENTRES

## WHAT IS A REGIONAL PROCESSING CENTRE?

A place where an asylum seeker can be taken when they land in an excised place (see map on p.3). They are processed and their claim for refugee status is assessed. Not all asylum seekers will go to a RPC, many will end up in immigration detention centres in Australia.

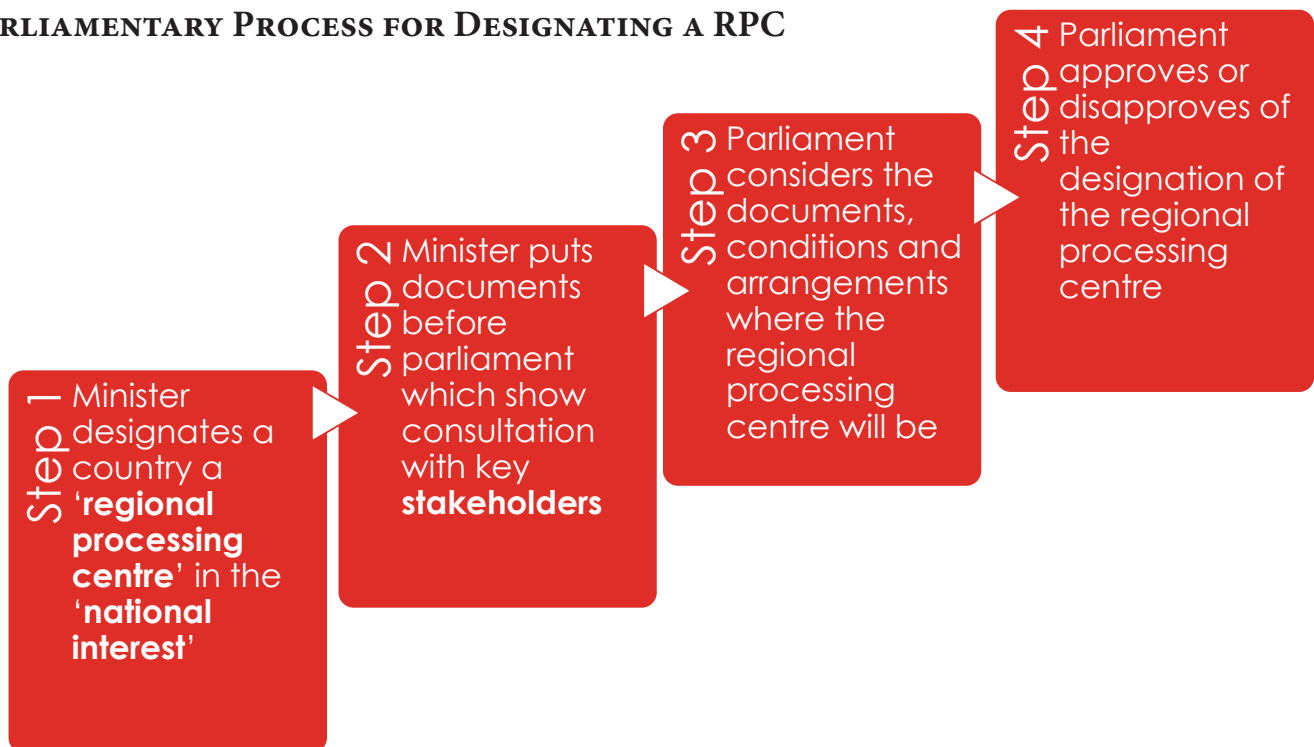
## THE PROCESS OF 'DESIGNATING' A REGIONAL PROCESSING CENTRE

Designating – to name something

Regional – the Asia-Pacific region, Australia, New Zealand,

Processing Centre – a place where health and security checks are carried out, and where checks are made as to whether asylum seekers are genuine refugees

## PARLIAMENTARY PROCESS FOR DESIGNATING A RPC



Who are the stakeholders?

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What protections does this process provide?

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# EVALUATING THE ACT

## MIGRATION ACT 1958 (CTH) - s198AB (3)

‘(a) must have regard to whether or not the country has given Australia any assurances to the effect that:

(i) the country will not expel or return a person taken to the country under section 198AD to another country where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion; and

(ii) the country will make an assessment, or permit an assessment to be made, of whether or not a person taken to the country under that section is covered by the definition of refugee in Article 1A of the Refugees Convention as amended by the Refugees Protocol; and...’

***Protections the Act provides when an asylum seeker is in an RPC:***

Non-Refoulment - the right not to be returned to a country where they will face discrimination.

The right to a refugee status assessment

## TRANSPARENCY AS A PROTECTION

The fact that Parliament must approve or disapprove of the designation of a regional processing centre adds transparency to the process. As Parliament is open to the public and media any designation will attract scrutiny. The influence of the media and the public on such issues may or may not be taken into account by politicians.

If the Minister was able to exercise this power without the check provided by the Parliament, this would limit the accountability of the Minister in ensuring that a regional processing centre will provide protections for refugees (see next section).

## REMOVING THE RIGHT TO CHALLENGE ACTIONS OF THE EXECUTIVE?

### *Migration Act 1958 (Cth)*

s198AB:

‘(7) The rules of natural justice do not apply to the exercise of the power under subsection (1) or (6).’

s198AD:

‘(9) The rules of natural justice do not apply to the performance of the duty under subsection (5).’

These sections mean that an asylum seeker cannot challenge the actions of the Minister for Immigration and Citizenship when making a decision about:

→ creating a RPC (s198AB)

or

→ the power to send an asylum seeker to a RPC (s198AD)

Regardless of these sections, the High Court still has the power to hear a challenge to the application of these sections in particular cases. Whether it will allow challenges is up to the justices of the High Court, and whether they believe there is a point of law to be made in a specific case.

**Key Question:** Discuss the effectiveness of the High Court in protecting the rights of asylum seekers.

## HUMAN RIGHTS CONCERNS WITH s198AB AND 198AC IN THE MIGRATION ACT

### *Migration Act 1958 (Cth)*

s198AB

‘(4) The assurances referred to in paragraph (3)(a) need not be legally binding.’

s198AB (4) means the country where the RPC will only need to provide assurances that refugees will receive rights under the Refugee Convention.

s198AC

‘(5) A failure to comply with this section does not affect the validity of the designation.’

s198AC (5) means that even if the Minister for Immigration and Citizenship does not provide evidence of consultation with UNHCR and the country in which the RPC is, that the designation can still go ahead.

The role of the High Court in intervening in the process of dealing with asylum seekers who arrive by boat has been reduced since amendments to the *Migration Act 1958 (Cth)* in August 2012. However, even though the ‘rule of natural justice do not apply’ to the use of powers under s198AB and s198AD the High Court still has the power under the Constitution to interpret the law and the validity of the Minister’s actions.

The checks and balances present will protect human rights to a certain extent, they are not explicit protections, and are limited if Parliament or the High Court chooses not to act:

- The Parliament acts as a check on where and in which countries RPCs are created
- The High Court has ultimate authority to hear challenges to legislation and the actions of the Executive

Although many have objections to offshore processing, there are attempts within the Migration Act to ensure that the process of creating a RPC is transparent and accountable. This satisfies the rule of law, but has been criticised by human rights advocates.

While the High Court has upheld the rights of asylum seekers in the past, there is no way of knowing whether it will do so in the future. Ultimate responsibility for laws to do with asylum seekers is with the Parliament and Executive.

The process of public participation in the process of law reform is as important as ever!

### ***Practice Questions***

- 1) Identify one international agreement which protects human rights.
- 2) Outline the refugee status assessment process.
- 3) Outline the process of designating a regional processing centre.
- 4) Evaluate the effectiveness of checks and balances on the power of the Parliament and Executive in protecting human rights in Australia.





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