

EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Finance

Financial Framework (Supplementary Powers) Act 1997

*Financial Framework (Supplementary Powers) Amendment
(Home Affairs Measures No. 7) Regulations 2023*

The *Financial Framework (Supplementary Powers) Act 1997* (the FFSP Act) confers on the Commonwealth, in certain circumstances, powers to make arrangements under which money can be spent; or to make grants of financial assistance; and to form, or otherwise be involved in, companies. The arrangements, grants, programs and companies (or classes of arrangements or grants in relation to which the powers are conferred) are specified in the *Financial Framework (Supplementary Powers) Regulations 1997* (the Principal Regulations). The powers in the FFSP Act to make, vary or administer arrangements or grants may be exercised on behalf of the Commonwealth by Ministers and the accountable authorities of non-corporate Commonwealth entities, as defined under section 12 of the *Public Governance, Performance and Accountability Act 2013*.

The Principal Regulations are exempt from sunseting under section 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015* (item 28A). If the Principal Regulations were subject to the sunseting regime under the *Legislation Act 2003*, this would generate uncertainty about the continuing operation of existing contracts and funding agreements between the Commonwealth and third parties (particularly those extending beyond 10 years), as well as the Commonwealth's legislative authority to continue making, varying or administering arrangements, grants and programs.

Additionally, the Principal Regulations authorise a number of activities that form part of intergovernmental schemes. It would not be appropriate for the Commonwealth to unilaterally sunset an instrument that provides authority for Commonwealth funding for activities that are underpinned by an intergovernmental arrangement. To ensure that the Principal Regulations continue to reflect government priorities and remain up to date, the Principal Regulations are subject to periodic review to identify and repeal items that are redundant or no longer required.

Section 32B of the FFSP Act authorises the Commonwealth to make, vary and administer arrangements and grants specified in the Principal Regulations. Section 32B also authorises the Commonwealth to make, vary and administer arrangements for the purposes of programs specified in the Principal Regulations. Section 32D of the FFSP Act confers powers of delegation on Ministers and the accountable authorities of non-corporate Commonwealth entities, including subsection 32B(1) of the Act. Schedule 1AA and Schedule 1AB to the Principal Regulations specify the arrangements, grants and programs.

Section 65 of the FFSP Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The *Financial Framework (Supplementary Powers) Amendment (Home Affairs Measures No. 7) Regulations 2023* (the Regulations) amend Schedule 1AB to the Principal Regulations to establish legislative authority for government spending on the Immigration Advice and Application Assistance Scheme (the measure), which is administered by the Department of Home Affairs.

The measure aims to provide specialist legal assistance for primary Protection (subclass 866) visa (Protection visa) processing assistance and community outreach.

Additional funding for specialist legal assistance is integral to the successful delivery and integrity of the onshore component of Australia's Humanitarian Program. It will support a healthier asylum system overall by making free voluntary refugee legal advice more accessible for Protection visa applicants, in alignment with the United Nations High Commissioner for Refugees best practice guidance.

Specialist legal assistance will support Protection visa applicants to articulate claims, resulting in more 'decision-ready' applications that provide all the relevant evidence to support a protection claim, and will provide prospective applicants advice on the criteria for grant of a Protection visa, and on other visa options.

Funding of \$12.3 million over two years from 2023-24 is available for the measure.

Details of the Regulations are set out at [Attachment A](#). A Statement of Compatibility with Human Rights is at [Attachment B](#).

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulations commence on the day after registration on the Federal Register of Legislation.

Consultation

In accordance with section 17 of the *Legislation Act 2003*, consultation has been undertaken with the Department of Home Affairs.

A regulatory impact analysis is not required as the Regulations only apply to non-corporate Commonwealth entities and do not adversely affect the private sector.

Details of the *Financial Framework (Supplementary Powers) Amendment (Home Affairs Measures No. 7) Regulations 2023*

Section 1 – Name

This section provides that the title of the Regulations is the *Financial Framework (Supplementary Powers) Amendment (Home Affairs Measures No. 7) Regulations 2023*.

Section 2 – Commencement

This section provides that the Regulations commence on the day after registration on the Federal Register of Legislation.

Section 3 – Authority

This section provides that the Regulations are made under the *Financial Framework (Supplementary Powers) Act 1997*.

Section 4 – Schedules

This section provides that the *Financial Framework (Supplementary Powers) Regulations 1997* are amended as set out in the Schedule to the Regulations.

Schedule 1 – Amendments

Financial Framework (Supplementary Powers) Regulations 1997

Item 1 – In the appropriate position in Part 4 of Schedule 1AB (table)

This item adds a new table item to Part 4 of Schedule 1AB to establish legislative authority for government spending on an activity administered by the Department of Home Affairs (the department).

New **table item 642** establishes legislative authority for government spending on the Immigration Advice and Application Assistance Scheme (the measure) to provide specialist legal assistance for primary Protection (subclass 866) visa (Protection visa) processing assistance and community outreach in relation to Australia's Protection visa system.

The measure forms part of the Government's \$160.0 million package of reforms to restore integrity to Australia's refugee protection system, including funding of \$12.3 million over two years from 2023-24 to boost essential legal assistance services to support applications through the application process. The media release is available at <https://minister.homeaffairs.gov.au/ClareONeil/Pages/restoring-integrity-protection-system.aspx>.

Currently, as part of the Government's existing support, funding for professionally-qualified application assistance to help all onshore asylum seekers in immigration detention and disadvantaged Protection visa applicants in the community is supported by item 417.009 of Schedule 1AA of the *Financial Framework (Supplementary Powers) Regulations 1997*. With

the *Migration Amendment (Regulation of Migration Agents) Act 2020* having removed legal practitioners from the scheme governing registered migration agents, legal practitioners who hold a valid practising certificate no longer register through the Office of Migration Agents Registration Authority to provide immigration assistance.

This measure therefore seeks to expand the scope of legal services available to Protection visa applicants by providing funding to legal service providers, registered migration agents, and providers of interpretation services to assist applicants for Australian visas to prepare their visa applications and to participate in the visa application process, including by attending interviews with applicants.

Additional funding for specialist legal assistance is integral to the successful delivery and integrity of the Protection visa program. Australia's Protection visa program is the onshore component of Australia's Humanitarian Program for people who arrive lawfully in Australia and engage Australia's protection obligations because they are either found to be a refugee or meet the complementary protection criteria under the *Migration Act 1958* (the Migration Act).

Protection visa applications are individually assessed in accordance with the Migration Act. The relevant provisions in the Migration Act are based upon Australia's interpretation of its *non-refoulement* obligations (obligation not to return) in the 1951 *Convention relating to the status of Refugees* and its 1967 Protocol (the Refugee Convention), the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, and the 1966 *International Covenant on Civil and Political Rights*.

Additional funding for specialist legal assistance will support a healthier asylum system overall by making free voluntary refugee legal advice more accessible for Protection visa applicants, in alignment with the United Nations High Commissioner for Refugees best practice guidance.

Specialist legal assistance at the primary processing stage will support Protection visa applicants to articulate claims, resulting in more 'decision-ready' applications that provide all the relevant evidence to support a protection claim, and will provide applicants advice on the criteria for grant of a Protection visa, and on other visa options. The specialist assistance will include interpreting services, where required. For example, prospective Protection visa applicants who have access to legal assistance will be able to discuss with service providers their individual circumstances and receive advice on the criteria for a Protection visa, the evidence they must provide to support their claims and their prospects of being granted a Protection visa.

This additional funding will also support community outreach activities which will be conducted by service providers, for example by providing awareness-raising information sessions on Australia's Protection visa program and the criteria for a Protection visa. This will assist prospective applicants to assess their personal situation appropriately and whether making a Protection visa application would be appropriate given their circumstances. Awareness-raising sessions will also ensure those seeking to engage Australia's protection obligations understand the processes required to apply for a Protection visa, the implications of being refused, and the process required to engage the services of legal providers to assist with the making of an application. Ensuring legal assistance is freely available to Protection visa applicants may also help reduce the risk of exploitation of vulnerable migrants.

The department will deliver the specialist legal assistance as a closed non-competitive grant selection process which allows eligible organisations to apply for grants up to a predetermined maximum per annum for up to two years. The grant will be administered in accordance with the Commonwealth resource management framework, including the *Public Governance, Performance and Accountability Act 2013* (the PGPA Act) and the *Commonwealth Grants Rules and Guidelines 2017* (the CGRGs).

Grant opportunity guidelines will be developed and together with information about the grant, including information about decisions relating to awarding grants to successful organisations, will be made available on the GrantConnect website (www.grants.gov.au). The grant will be administered by the Community Grants Hub, which is part of the Department of Social Services.

A delegate of the Secretary of the department under the *Financial Framework (Supplementary Powers) Act 1997* will be responsible for approving Commonwealth funding provided to successful applicants. Final spending decisions will be made by the Assistant Secretary, Humanitarian and Child Wellbeing Policy and Capability. In addition, the Assistant Secretary is authorised to approve commitment of relevant money for goods and/or services under the PGPA Act.

Independent merits review would not be appropriate for this measure because decisions made with respect to the grants relate to the allocation of a finite resource and an allocation that has already been made to another party would be affected by overturning the original decision. Decisions will be made in accordance with the CGRGs and the PGPA Act. The Administrative Review Council has recognised that it is justifiable to exclude merits review in relation to decisions of this nature (see paragraphs 4.11 to 4.19 of the guide, *What decisions should be subject to merit review?*).

The review and audit process undertaken by the Australian National Audit Office also provides a mechanism to review Government spending decisions and report any concerns to Parliament. Judicial review may also be available under section 39B of the *Judiciary Act 1903* and section 75(v) of the Australian Constitution. In administering the measure, administrative accountability will be achieved by ensuring that:

- the process of allocating funds is fair;
- the criteria for funding are made clear; and
- decisions are made objectively.

Following the Government announcement, consultation with state and territory governments and key sector stakeholders was undertaken to inform them of the proposed approach to funding specialist, not for profit, legal providers. The department is also consulting with the Community Grants Hub and Department of Finance to inform the design and development of eligibility criteria for the specialist legal assistance.

Funding of \$12.3 million over two years from 2023-24 is included in the 2023-24 Mid-Year Economic and Fiscal Outlook and the Portfolio Additional Estimates Statements for the Home Affairs portfolio. Funding will come from Program 2.3: Refugee, Humanitarian Settlement and Migrant Services, which is part of Outcome 2.

Noting that it is not a comprehensive statement of relevant constitutional considerations, the objective of the item references the following powers of the Constitution:

- the aliens power (section 51(xix));
- the immigration and emigration power (section 51(xxvii)); and
- the external affairs power (section 51(xxix)).

Aliens power

Section 51(xix) of the Constitution empowers the Parliament to make laws with respect to 'naturalization and aliens'.

This funding will make specialist legal assistance more readily available to visa applicants.

Immigration and emigration power

Section 51(xxvii) empowers the Parliament to make laws with respect to 'immigration and emigration'.

Specialist legal assistance will support visa applicants to articulate claims, resulting in more 'decision-ready' applications that provide all the relevant evidence to support protection claims, and will provide applicants advice on the requirements for a Protection visa and other options.

External affairs power

Section 51(xxix) of the Constitution empowers the Parliament to make laws with respect to 'external affairs'. The external affairs power supports legislation with respect to matters or things outside the geographical limits of Australia.

Granting visas relates to the movement of people to and from Australia.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

Financial Framework (Supplementary Powers) Amendment (Home Affairs Measures No. 7) Regulations 2023

This disallowable legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the legislative instrument

Section 32B of the *Financial Framework (Supplementary Powers) Act 1997* (the FFSP Act) authorises the Commonwealth to make, vary and administer arrangements and grants specified in the *Financial Framework (Supplementary Powers) Regulations 1997* (the FFSP Regulations) and to make, vary and administer arrangements and grants for the purposes of programs specified in the Regulations. Schedule 1AA and Schedule 1AB to the FFSP Regulations specify the arrangements, grants and programs. The powers in the FFSP Act to make, vary or administer arrangements or grants may be exercised on behalf of the Commonwealth by Ministers and the accountable authorities of non-corporate Commonwealth entities, as defined under section 12 of the *Public Governance, Performance and Accountability Act 2013*.

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The measure aims to provide specialist legal assistance for primary Protection (subclass 866) visa (Protection visa) processing assistance and community outreach.

Additional funding for specialist legal assistance is integral to the successful delivery and integrity of the onshore component of the Australia's Humanitarian Program. The measure will support a healthier asylum system overall by making free voluntary refugee legal advice more accessible for Protection visa applicants, in alignment with the United Nations High Commissioner for Refugees best practice guidance.

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Human rights implications

This disallowable legislative instrument engages the following right:

- the right not to be refouled – Article 3 of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT), and Articles 6 and 7 of the *International Covenant on Civil and Political Rights* (ICCPR).

Article 3 of the CAT provides that a State shall not expel, return (“*refouler*”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. For the purposes of determining such grounds, the competent authorities shall take into account all relevant considerations.

Article 6 of the ICCPR provides that every human being has the inherent right to life. Article 7 of the ICCPR provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Both these articles give rise to an implied right that a State will not expel, return or extradite a person to another State where there are substantial grounds for believing that a person’s life would be at risk, or they would be in danger of being subjected to torture or to cruel, inhuman or degrading treatment or punishment.

The disallowable legislative instrument promotes Australia’s *non-refoulement* obligations by funding legal providers to assist Protection visa applicants to lodge an application that clearly articulates the protection claims being made by the applicant. This ensures that the department is able to assess the engagement of *non-refoulement* obligations on the best evidence that the applicant is able to provide.

Conclusion

This disallowable legislative instrument is compatible with human rights because it promotes the protection of human rights.

**Senator the Hon Katy Gallagher
Minister for Finance**