Temporary Protection Visas

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This paper outlines the current law on temporary protection visas (TPVs) and discusses the profound impacts they will have upon the visa holders. Drawing on the experiences of refugees granted TPVs during 1999-2008, it highlights the damaging effects these visas will have on refugees should they remain in place.

Summary

• The Migration Amendment (Temporary Protection Visas) Regulation 2013 re-introduces TPVs as the only protection visa available to people who have arrived by boat or who otherwise arrived in Australia without a visa, where those people are found to be owed protection according to Australia’s international human rights obligations.

• The government has announced that the purpose of re-introducing TPVs is to act as a deterrent to future asylum seekers arriving by boat, as well as a penalty for those who are already in Australia but who they consider have arrived “illegally” or the “wrong way”. This raises serious issues about the ethics of this policy and is inconsistent with Australia’s international human rights obligations.

• TPVs were first introduced by the Howard Government in 1999 and were repealed by the Rudd Government in 2008.

• Based on reports and research into the experiences of previous TPV holders, current TPVs will have a profoundly negative impact on those who will be granted them, this will include men, women, families and unaccompanied minors.

• Once granted, the current TPV allows the holder to remain in Australia for a period of up to 3 years. At the end of this period, holders of the TPV can only apply for a further TPV.

• This new law does not allow TPV holders to apply for, or be granted, permanent protection. This makes the current TPV regime harsher than the previous one as the latter allowed for an application for permanent protection to be lodged near the expiry of the TPV.

• TPV holders will not be allowed to apply for their family overseas to be reunited with them in Australia, nor will it permit them to travel outside of Australia. This will cause enormous stress for TPV holders and extended hardship and distress for their families.

• TPVs are to apply to all asylum seekers who have already lodged protection visa applications that have not yet been finalised, as well as those who have not yet lodged an application and are entitled to do so.

• This means that TPVs will apply to asylum seekers who have already been waiting for long periods of time for their protection claims to be finalised. Some have been waiting for more than three years and are already enduring considerable mental health problems.

• The claim that TPVs act as an effective deterrent for other asylum seekers arriving by boat cannot be supported by evidence. In the two years following the introduction of TPVs in October 1999, numbers of asylum seekers arriving by boat to Australian increased 500% compared with the previous two years. This included an increased number of women and children.
• Evidence demonstrates TPVs have a damaging impact on the mental health of refugees due to their uncertain status, fear of being returned upon its expiry and inability to apply for family reunion.

• It is unclear what government-funded services TPV holders will be eligible to access. Previous TPV holders were denied access to many of these services and a considerable financial burden was placed on civil society groups to respond to their needs.

• TPVs will generate considerable costs to the federal government. In addition to the initial assessment of claims for protection the Department of Immigration and Border Control will have to re-assess each claim again every 3 years, apparently indefinitely into the future. There are 25,000-30,000 asylum seekers currently waiting to apply for protection and it is highly likely that by the time the first TPVs expire, the DIBP will still be processing this backlog.

The motion to disallow the *Migration Amendment (Temporary Protection Visas) Regulation 2013* to be introduced into Parliament must be supported to ensure that every effort is made to avoid the impacts outlined above.

Associate Professor Mary Anne Kenny

Director, Centre for Human Rights Education | Faculty of Humanities

Curtin University

Tel +61 8 9266 7186

Email m.kenny@curtin.edu.au

Dr Caroline Fleay

Lecturer

Email c.fleay@curtin.edu.au

Dr Lucy Fiske

Lecturer

Email l.fiske@curtin.edu.au

Dr Lisa Hartley

Lecturer

Email l.hartley@curtin.edu.au
Overview of TPV laws and its impacts on refugees

1. Current law

The *Migration Amendment (Temporary Protection Visas) Regulation 2013*\(^1\) came into effect on 18 October 2013. The new regulation re-introduces the Temporary Protection (Subclass 785 (Temporary Protection)) visas as the only protection visa\(^2\) available to people who are “unauthorised maritime arrivals” (UMAs) or who otherwise arrived in Australia without a visa. The first version of the TPV, introduced by the Howard Government, commenced on 20 October 1999 and was repealed by the Rudd Government on 9 August 2008.

Once granted the visa is for a period of up to 3 years and has a 'no further stay' (8503) condition which means the person is unable to apply for any visa other than a protection visa. However, amendments in this regulation mean that a person who currently holds or has ever held a TPV (subclass 785) cannot validly apply for a permanent protection visa (subclass 866).\(^3\) Thus holders of the TPV cannot be granted any permanent protection visa. They will only be eligible to apply for a further TPV at the expiry of their visa.\(^4\) This will require a new application for protection and a fresh examination of their case as to whether they continue to be a person in respect of whom Australia owes protection obligations. If they are refused a subsequent visa the Department of Immigration and Border Protection states “[y]ou are expected to leave Australia if you are found not to need Australia's protection after this reassessment”.\(^5\)

1.1 Who will the new laws apply to?

TPVs apply to asylum seekers who have already lodged protection visa applications that had not been finalised before 18 October 2013\(^6\) (regardless of when they arrived in Australia or when they lodged the application), as well as asylum seekers who have not yet lodged a protection visa application.

This means the new laws apply to asylum seekers who have been waiting lengthy periods of time for their protection claims to be finalised.

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2. A visa that may be provided to people in Australia in respect of whom Australia owes protection obligations.
3. See 1401(3) Schedule 1 and cl 866.222.
4. Technically speaking the person may be able to apply for a permanent visa if they are able to obtain a “waiver” of the 8503 condition, this requires the person to demonstrate that there has been that circumstances have developed since the visa was granted and which represent a major change in the visa holder’s personal circumstances. In addition, the change in circumstances must have *been beyond their control* and be compelling and compassionate in nature. While in opposition the Coalition policy stated that a Permanent PV may not be provided to a TPV holder within 5 years of the TPV holder first receiving a TPV, this restriction may be set aside through a non-compellable intervention power of the Minister (*The Coalition’s Policy to Clear Labor’s 30,000 Border Failure Backlog*, August 2013, [http://lpaweb-static.s3.amazonaws.com/Policies/ClearLabor30000BorderFailureBacklog.pdf](http://lpaweb-static.s3.amazonaws.com/Policies/ClearLabor30000BorderFailureBacklog.pdf)). The amending regulations do not provide for this at this stage.
6. This will include those who have lodged a protection visa (Subclass 866) application and is awaiting a protection assessment interview with the DIBP; has had their protection assessment interview with the DIBP and is awaiting a decision; has had their protection visa application refused by the DIBP and have applied, or will apply, to the Refugee Review Tribunal (RRT); or has been recognised as being owed protection obligations in Australia but is still awaiting security clearance.
For example:

‘Ali’, who was accepted as a refugee back in 2011 but has been waiting for a security check since then, only gets a TPV. He is now married to an Australian and they have a child, but the 8503 condition on his TPV prevents him from making a partner visa application in Australia.

‘Ahmed’s’ first Refugee Review Tribunal (RRT) was conceded by the Government to be legally flawed and is awaiting his second RRT; if he is successful he will only get a TPV. Part of his case involves the ongoing threats against his family, including his wife — from whom he will now be separated for years.7

Some asylum seekers have been waiting for more than three years for their protection claims to be finalised. They are already experiencing considerable mental distress given their ongoing uncertainty, in addition to the mental health impacts that many of them endured during long periods in detention.

1.2 How is this TPV different from the previous TPV?

This TPV regime is harsher in that there is no ability to apply for a permanent visa. Individuals will only be eligible for another TPV.

1.3 What is the purpose of introducing a TPV?

The Explanatory Statement to the regulation states that the purpose of re-introducing the TPV is one of deterrence, that is, “to discourage people from making dangerous voyages to Australia.” However, it is government policy that all UMAs arriving after 19 July 2013 are not permitted to apply for protection in Australia. Instead they will be detained and removed to an offshore processing centre in Nauru or Manus Island. It is policy that all such UMAs will not be eligible for resettlement in Australia.

On 8 November 2013, the Minister for Immigration and Border Protection, Scott Morrison, stated that the purpose of the re-introduction of TPVs went beyond deterrence to punishment:

“It was always our view that people who’d arrived illegally to Australia by boat should not be provided permanent residency, and that those places shut not take up the places of those who have sought to come to Australia the right way or made an offshore application for our protection...the Coalition does not believe that people who have turned up the wrong way should get permanent residency in Australia.”8

2. Punishment and deterrence

The government has attempted to justify this policy as part of its campaign against people smuggling. But it also argues that it is a legitimate means of dealing with refugees involved in ‘secondary movement’ and who bypass or forsake existing protection.

The policy relies upon an interpretation of international obligations under Article 31 of the Convention relating to the Status of Refugees. Article 31 prohibits states from imposing penalties on

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refugees coming “directly” from a country of persecution from being punished on account of their “illegal entry”. States are not permitted to discriminate against refugees on the basis of the mode of arrival provided they present themselves without delay to the authorities and show good cause for their illegal entry.

However, the United Nations High Commissioner for Refugees (UNHCR) advises that “the expression ‘coming directly’ in Article 31(1) covers the situation of a person who enters the country in which asylum is sought directly from the country of origin, or from another country where his protection, safety and security could not be assured." In addition, the claim that TPVs act as “an effective deterrent against illegal arrival” cannot be supported by evidence. In the two years after the policy’s introduction in October 1999, 10,217 asylum seekers entered Australia by boat, a 500% increase on the number (1,953 arrivals) who arrived in the two years prior. This included an increase in the number of women and children.

Even if one accepts that TPVs have some deterrent effect, moral questions remain unanswered. Is it ethical to punish one group of people to deter another, particularly given that this group of people have not broken any law and are a vulnerable group within society?

3. The impact of TPVs

It is clear from the experiences of the TPV regime that was introduced in 1999 that TPVs have profound negative effects on the lives of those refugees who hold them.  

3.1 Family Reunion

Unless a person holds a permanent visa they are not entitled to apply for their family to be reunited with them in Australia, nor does it permit the holder the right of re-entry to Australia. This means that a TPV holder cannot leave Australia, travel to a safe third country to meet their family and return to Australia.

The “Statement of Compatibility with Human Rights” prepared for the amendment notes that international human rights law recognises that the family is the fundamental unit of society entitled to protection by society and the State.  

“A UMA and UAA becomes separated from their family when they choose to travel to Australia without their family, Australia has not caused that separation. To this end, Australia does not consider that Articles 17 and 23 are engaged by this Legislative Instrument. To the extent that this might amount to interference with the family, Australia maintains that any interference is not arbitrary and Australia considers that this is a

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10 Statistics from Department of Immigration and Citizenship in response to question on notice from Budget Estimates Hearing, 21-22 May 2012 (BE12/0265)
11 Previously TPVs were issued to around 9000 individuals. The overwhelming majority being issued between 1999 and 2002 to Afghan and Iraqi refugees, and a smaller number of Iranian refugees.
12 International Covenant on Civil and Political Rights (ICCPR), Article 17 states that no one shall be subjected to arbitrary or unlawful interference with his family and that everyone has the right to protection of the law against such interference. Article 23 states that the family is the natural and fundamental group unit of society and is entitled to protection by society and the state.
necessary, reasonable and proportionate measure to achieve the legitimate aim of preventing UMAAs from making the dangerous journey to Australia by boat.”

These statements should be disputed:

1. It is common for refugee families to be separated. This is not always a matter of “choice” as referred to in the Statement of Compatibility. Refugees often have to leave their homes in a hurry without proper planning; some have to leave covertly without drawing attention to their actions; others cannot afford the travel costs of the whole family and so send the person most at risk of persecution or who is the strongest to travel. Family reunification is a fundamental aspect of bringing normality back to the lives of persons who have fled persecution or serious harm and have lost family during forced displacement and flight.

2. Indefinite denial of family reunion is not a “necessary, reasonable and proportionate measure”. As stated above TPVs should not be used either as a deterrent nor punishment. In addition enforced separation is likely to have the following impacts:
   a. cause significant psychological distress to the family;
   b. result in impoverishment in Australia as any money that is earned will be sent to support family overseas; and
   c. extend the period during which families may be danger. Women and dependent children without male support are especially vulnerable.

3.2 Psychological Harm

Several reports and studies\textsuperscript{13} conducted in Australia in the 7 years of the previous TPV regime had a profound deleterious effect on people’s mental health and well-being. This was caused by a combination of factors:

- the uncertainty and insecurity of their status with a fear of being returned at the expiry of their visa;
- concerns for the uncertain situation of family members overseas;
- fear of being returned to immigration detention centres in Australia; and
- the struggle to come to terms with their limited entitlements.

One man on a previous TPV described his feelings of shame given his visa’s temporary status.

“I feel like I am not normal like others here in the community. Sometimes I try and hide my identity as a TPV because I feel ashamed.”\textsuperscript{14}

A 2006 study reported in the Medical Journal of Australia found that while refugees on permanent and temporary visas experienced similar levels of past trauma and persecution, holders of TPVs reported higher scores on three psychiatric symptom measures (anxiety, depression and particularly post-traumatic stress disorder). For TPV holders, experiences of past stresses in detention in Australia and ongoing living difficulties after their release contributed to adverse psychiatric outcomes.

3.3 Unaccompanied minors and children

The Australian Human Rights Commission’s report into children in immigration detention A last resort? found that TPVs had a particularly detrimental impact on refugee children. Evidence provided to the inquiry was that issuing TPVs to children compounded their experiences of uncertainty and mental health problems.

A 15-year-old unaccompanied child TPV holder told the inquiry:

“We’ve been in a continuous uncertainty, instability and ongoing trauma ... First of all we went through the hell to be separated from our family, took a long, long journey and then we went through the hell of the detention centre experience there. Now after we released we feel that we will be better off somehow we are here but ever since they give us this Temporary Protection Visa and on top of us this uncertain news and even now and then we are hearing, it’s like some sort of ongoing torture for us. Because if I just close my eyes I remember that I will be sent back to Afghanistan...I am losing my mind and losing my concentration. Really psychologically we are losing our minds, we are getting crazy. They are just killing us piece by piece. They are leaving us in a limbo situation. If they just send us and say go today, we would just go today we would face death and would be finished, but now we are uncertain day to day.”

The uncertainty of the TPVs leads also to a disinclination to continue with education or form meaningful relationships which will certainly have detrimental effects on the long-term development and integration of children.

“This is the very major problem...Because you cannot make decision what to do. To go to work or to study. If you are deciding to study you cannot concentrate and then when you go work then you think my future is not good.”

4.3 Financial Impacts

The TPV regime has significant financial impacts, not just for the individuals involved but also for civil society groups and government. There are between 25,000 – 30,000 individuals waiting to apply for protection. It is likely to take some years for DIBP to process their claims for protection. The government has announced that it will not be funding legal advice and representation for this group and this will place additional administrative burdens on decision makers in determining claims.

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Those granted the first TPVs will have their visas expire and need their protection needs re-assessed at the end of 36 months. It is highly likely that at that time DIBP will still be processing of the backlog. This will add considerable administrative burdens and costs to the federal government.

It is not yet clear what services will be offered under the new TPV regime. Previously TPV holders were not able to access services usually provided, or funded, by the Federal Government such as legal assistance, English language classes, migrant resource centre settlement services, and Job Network assistance. This shifted the cost burden for these essential services to civil society (particularly church organisations) and to state governments. The WA Government for example, opened up state funded places at TAFE colleges for TPV holders wanting to learn English – an essential skill for social, cultural and economic participation in Australian society. TPV holders also reported that holding a temporary visa was an obstacle to finding permanent work, particularly positions that offered development and growth for the employee, thus many TPV holders were relegated to casual, seasonal and unskilled work.

5. Conclusions

Given that the granting of TPVs to refugees during the previous regime clearly led to profound levels of distress and mental health problems, it can only be concluded that this will happen again. The TPV regulation currently before Parliament will damage those who are granted temporary visas. It is also contrary to Australia’s international legal obligations.

The motion to disallow the Migration Amendment (Temporary Protection Visas) Regulation 2013 to be introduced into Parliament must be supported to ensure that every effort is made to avoid these impacts.