UNSW
Kaldor Centre
for International
Refugee Law

POLICY BRIEF 16

A fair and fast asylum process for Australia: Lessons from Switzerland

Daniel Ghezelbash and Constantin Hruschka
September 2024

UNSW
SYDNEY

About the Authors

Associate Professor Daniel Ghezelbash is the Director of the Kaldor Centre for International Refugee Law at UNSW Sydney, and an Australian Research Council (ARC) Discovery Early Career Researcher Award (DECRA) Fellow. He is an internationally recognised scholar of international and comparative refugee and migration law. His ARC DECRA Fellowship examines comparative practices to develop recommendations for improving the fairness and efficiency of Australia's asylum procedures. He is the founder of the Kaldor Centre Data Lab, through which he has pioneered computational and data-driven approaches to studying administrative and judicial decision-making in refugee cases. He is Special Counsel at the National Justice Project and sits on the boards of a number of not-for-profit legal centres, including the Refugee Advice and Casework Service.

Dr Constantin Hruschka is a Professor of Social Law at the Protestant University of Applied Sciences in Freiburg/Breisgau (Germany) and a Senior Research Fellow at the Max Planck Institute for Social Law and Social Policy in Munich. His main research projects focus on responsibility-sharing mechanisms and reforms in the asylum context. He was deeply involved in the Swiss asylum reforms, including as part of the pilot phase evaluation team at the Swiss Center of Expertise in Human Rights at the University of Bern, and then subsequently as the Head of the Protection Department at the Swiss Refugee Council (2014–17), which served as the Single Point of Contact between non-government organisations (NGOs) providing legal representation and the Swiss asylum authority during the pilot project at the Zurich test centre**.** He worked in the Asylum Department of the Federal Administrative Court of Switzerland between May 2021 and August 2024 and was a member of the Swiss Federal Commission on Migration between 2015–18, which advises the Swiss Government and migration authorities on migration issues. He is a fully qualified lawyer and worked as a lawyer at the Office of the United Nations High Commissioner for Refugees (UNHCR) in Nuremberg and Geneva (2004–14).

Acknowledgements

The authors would like to thank Jane McAdam, Frances Voon, Lauren Martin, Hugo Storey, Sarah Dale, Mia Bridle, Keyvan Dorostkar and colleagues from UNHCR and the Refugee Council of Australia for feedback on various aspects of this policy brief, as well as the politicians, policy-makers, judges, academics, lawyers and UNHCR and NGO representatives who participated in the fieldwork interviews and shared their insights into the development and operation of the Swiss asylum reforms.

The Kaldor Centre for International Refugee Law

The Andrew & Renata Kaldor Centre for International Refugee Law at UNSW Sydney is the world's leading research centre dedicated to the study of international refugee law. The Centre was established in October 2013 to undertake rigorous research to support the development of lawful, sustainable and humane solutions for, and with, displaced people, and to contribute to public policy involving the most pressing displacement issues in Australia, the Asia-Pacific region and the world.

www.unsw.edu.au/kaldor-centre

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 this policy brief are those of the authors and do not necessarily reflect those of the Kaldor Centre for International Refugee Law. Policy briefs are available online at www.unsw.edu.au/kaldor-centre/our-resources.

ISSN: 2205-9733 (Print); ISSN: 2205-9741 (Online)

This Policy Brief was reissued on 10 October 2024 to incorporate some minor edits.

Contents

Acronyms 1
Definitions 1
Executive Summary 2
Recommendations 2
1 Introduction 5
2 The Swiss Model 6
3 Analysis and Key Lessons 8
3.1 Inclusive and Consultative Policy Design 8
3.2 Learning from Comparative Practices 9
3.3 Data and Evaluation 10
3.4 Fairness as Central to Efficiency 11
3.5 Streaming Based on Case Complexity 11
3.6 System-Wide Perspective 12
3.7 The Importance of Legal Representation 12
3.8 Ensuring Adequate and Effective Decision-Making Capacity 14
Conclusion 14
Endnotes 16

Acronyms

AAT – Administrative Appeals Tribunal
AFI – Swiss Foreign Nationals and Integration Act
ART – Administrative Review Tribunal
FDJP – Swiss Federal Department of Justice and Police
IAA – Immigration Assessment Authority
NGO – Non-Government Organisation
SCHR – Swiss Centre of Expertise in Human Rights
SEM – Swiss State Secretariat for Migration
UNHCR – United Nations High Commissioner for Refugees

Definitions

Asylum process	The legal and administrative process used by a country to determine whether a person is a refugee or is owed other forms of international protection. It is also known as the asylum procedure or procedures, or refugee status determination.
Canton	Member State of the Swiss Confederation
Fast-track process	A process established in Australia in 2014, whereby applications for protection are assessed by the Department of Home Affairs, and those that are refused are automatically referred to the Immigration Assessment Authority (IAA), which conducts a 'limited merits review'. The IAA review is conducted 'on the papers' rather than through a hearing, and new information may only be presented in 'exceptional circumstances'.
Home Affairs	Australian Department of Home Affairs
Non-refoulement	A principle of international law that prohibits the return or removal of a person to a place with respect to which they have a well-founded fear of being persecuted or face a real risk of being subjected to other serious harm.
Onshore protection system	The system that applies to people who arrive in Australia on a valid visa, such as a tourist or student visa, and who then apply for asylum.
Procedural rights	Rights relating to the procedures or processes that must be followed when a decision is made. They encompass the right to procedural fairness, which requires a person to be given a fair hearing before a decision is made that adversely impacts their rights and interests.
Protection visa	The visa (subclass 866) granted to applicants processed through Australia's onshore protection system who engage Australia's protection obligations and who meet all other requirements for the grant of the visa.
Provisional admission	The complementary form of protection in the Swiss asylum system for persons with protection needs, who do not qualify for asylum.
Streaming	The categorising of asylum applications based on specific criteria for the purpose of directing them to the most suitable processing pathway.
Unauthorised maritime arrival	A person entering Australia by sea without a valid visa, who becomes an unlawful non-citizen upon entry.

Executive Summary

Australia's onshore protection system is currently facing significant backlogs. The resulting delays are undermining the integrity of the asylum system, eroding public confidence and causing significant harm and distress to people seeking asylum. This policy brief examines how Australia's asylum procedures can be redesigned to be both fair and fast, drawing on lessons from Switzerland. The new Swiss asylum procedures introduced in 2019 have proved effective in significantly increasing efficiency, while maintaining fairness for applicants and ensuring that the rights and needs of asylum seekers are met. This policy brief examines the Swiss model's strengths and limitations to make recommendations for reforming Australia's asylum process.

The core lesson from the Swiss experience is that fairness enhances efficiency. Supporting applicants to adequately prepare and put forward their case contributes to faster decision-making and lower rates of appeal. A fast process is only possible if there is adequate decision-making capacity and coordination across the system. However, it is also important to ensure that this capacity is used as efficiently as possible. This can be achieved through a well-designed streaming procedure under which the default position is priority processing subject to short procedural deadlines, with an option to refer complex cases (which need more time to assess fairly) to extended procedures with more flexible timelines. However, this can only work effectively where all applicants have early access to in-depth information on the procedure as well as independent and high-quality legal assistance.

The recommendations draw on interviews carried out in Switzerland with various stakeholders involved in the design and operation of the Swiss asylum procedures, including senior politicians, policy-makers, judges, lawyers and representatives from non-government organisations and the United Nations High Commissioner for Refugees (UNHCR). The focus is on creating a more efficient, fair and transparent system that respects the rights of people seeking asylum and meets international standards.

Recommendations

This policy brief makes 12 recommendations as to the broad principles that should underpin future reforms to Australia's asylum system.

Inclusive and Consultative Policy Design

1. The Australian Government should take a long-term, inclusive and consultative approach to reforming the asylum system. Consultation needs to take place at the early design stage rather than after policies are announced. Early and ongoing consultation should be carried out with the refugee sector, refugee-led organisations reflecting a diversity of experiences, refugee lawyers, the Administrative Review Tribunal (ART) and federal courts. This will ensure that reforms are guided by a thorough understanding of diverse community needs and experiences and will enhance the quality and legitimacy of reforms.

Learning from Comparative Practices

2. The Australian Government should take a systemic and evidence-based approach to examining and learning from asylum procedures in other jurisdictions. This should extend beyond looking at the common law countries that it has traditionally considered. In assessing the lessons from potential models, the Australian Government should not limit itself to knowledge exchange with government officials abroad, but should also engage with the refugee sector, refugee-led organisations reflecting a diversity of experiences, refugee lawyers, tribunals, courts and academic experts to ensure a comprehensive view of the benefits, risks and limitations of such models.

Embracing Data and Evaluations

3. The Department of Home Affairs (Home Affairs) should consider trialling proposed reforms to the asylum procedures using a pilot or test phase model, where innovations are tested for a defined period and then subjected to independent evaluation to inform whether they are retained, expanded or refined.
4. Home Affairs, the ART and the Federal Circuit and Family Court of Australia should collect and make publicly available detailed statistics on the efficiency, quality and consistency of decision-making across all stages of the asylum process, so as to enable ongoing internal and external evaluation of how the system is operating and to identify areas for improvement.
5. The Australian Government should periodically engage independent external experts to undertake evaluations of how the asylum process is operating and should make their reports publicly available.

Fairness as Central to Efficiency

6. Future reforms aimed at increasing the efficiency of asylum procedures should not focus on reducing the procedural rights of applicants. Efficiency gains could be made by introducing shorter procedural deadlines for appropriate caseloads, provided that sufficient support is given to applicants and decision-makers.

Streaming Based on Case Complexity

7. Home Affairs should consider developing a streaming procedure under which the default position is priority processing subject to short procedural deadlines, with an option to refer complex cases (which need more time to assess fairly) to extended procedures with more flexible timelines. To ensure the fairness of the procedures and the ability of applicants to meet the procedural deadlines, this must be accompanied by reforms ensuring that all applicants have access to representation from specialist free refugee legal advice providers.
8. Home Affairs should carry out robust consultations with the refugee sector, refugee-led organisations reflecting a diversity of experiences, refugee lawyers, the ART and federal courts to identify fair and appropriate timelines for both the prioritised and extended procedures, as well as to develop criteria for a detailed checklist to guide decision-makers in identifying cases that should be transferred to the extended procedures.

System-Wide Perspective

9. The Australian Government should ensure that any reforms aimed at increasing the efficiency of asylum procedures take a system-wide view. The ART and the Federal Circuit and Family Court will need to work collaboratively with Home Affairs to ensure that efforts to prioritise specific types of cases are reflected across the system. This must be done in a way that respects the independence of the ART and the courts.

The Importance of Legal Representation

10. The Australian Government should ensure that there is adequate funding available for specialist free refugee legal advice providers and that every applicant has access to full representation, particularly at Home Affairs. Adequate funding also needs to be made available for representation at the ART and Federal Circuit and Family Court, unless a representative determines that the case has no reasonable prospect of success.
11. The Australian Government should ensure that funding for specialist free refugee legal advice providers is provided on a long-term basis and is aimed at increasing the overall capacity of organisations (rather than being provided on a fee-per-case model). The funding agreements should include interpreting costs, where these are not covered by the relevant state or territory government.

Ensuring Adequate and Effective Decision-Making Capacity

12. The Australian Government should take a data-driven approach to calculating the decision-making capacity and legal assistance needs required for timely decision-making and for meeting target processing times at Home Affairs, the ART and the Federal Circuit and Family Court. This approach should take into account the number and complexity of existing cases and the future anticipated caseload. It should include a plan for the rapid increase of decision-making capacity across the system and for increased legal assistance to deal with potential future sudden surges in asylum claims. This should be accompanied with robust training for both new and experienced decision-makers, as well as legal representatives, so they can effectively carry out their duties and functions.

1 Introduction

Australia's onshore protection system is currently facing significant backlogs. The resulting delays are undermining the integrity of the asylum system, eroding public confidence and causing significant harm and distress to people seeking asylum. This policy brief examines how these procedures can be redesigned to be both fair and fast, drawing on lessons from the Swiss asylum procedures.

The onshore protection system applies to people who arrive in Australia on a valid visa, such as a tourist or student visa, and then apply for asylum. As of May 2024, there were 32,446 Protection visa applicants waiting for an initial decision to be made on their asylum claim by the Department of Home Affairs (Home Affairs).[1] Those whose claims are refused by Home Affairs can appeal to the Administrative Appeals Tribunal (AAT), which will be replaced by the new Administrative Review Tribunal (ART) in October 2024. There were 40,683 Protection visa cases on hand at the AAT as of 31 May 2024, and the new tribunal will inherit this backlog.[2] If an applicant is unsuccessful at the tribunal and believes there has been a legal error in the decision, they can seek judicial review in the federal courts. As of February 2022, 4,660 people were waiting for courts to review their cases.[3]

The latest available data shows that the median processing time for an initial application to the Department was two years and three months.[4] At the AAT, 50 per cent of Protection visa cases are finalised within five years and two months,[5] and the average time from filing to finalisation of migration matters at the Federal Circuit and Family Court of Australia is more than two years and six months.[6] Putting aside the additional time that it would take to pursue further judicial review in the Federal Court of Australia and the High Court of Australia, many applicants who have their initial claims refused and seek review at the AAT and in the Federal Circuit and Family Court appear to be waiting more than 10 years to have their cases finalised.[7]

A fast and fair asylum process is in the best interests of people seeking asylum and the government. Speeding up asylum processing improves the integration of asylum seekers into their host communities, leading to improved employment and economic outcomes.[8] Conversely, delays in processing asylum claims result in significant financial burdens for the government, including the direct costs of processing claims and adjudicating appeals, as well as the indirect costs of supporting asylum seekers while they await a final determination of their claims. The devastating impact of delays in processing on the physical and mental health of asylum seekers is also well documented.[9]

Inefficient processing also undermines the integrity of the asylum system. Christine Nixon's 2023 *Rapid Review into the Exploitation of Australia's Visa System* found that delays in processing were 'motivating bad actors to take advantage by lodging increasing numbers of non-genuine applications for protection'.[10] This is because delays create an incentive for those who may not have legitimate claims to lodge asylum applications, since they can stay in Australia until their case makes its way through the system. Protracted backlogs can also erode public confidence in the institution of asylum.[11]

At the same time, efficiency measures need not and should not undermine the fairness of procedures. The stakes for applicants going through the asylum process could not be higher. Where a decision fails to identify that a person qualifies for protection, the person can be removed from Australia to a place where they may face persecution, other forms of serious harm or even death, in breach of Australia's *non-refoulement* obligations.[12]

The view of successive Australian Governments has been that fairness is in tension with efficiency. As such, reform efforts have focused on reducing the procedural rights of applicants in a bid to increase efficiency.[13] This approach has been ineffective, as evidenced by the persistent backlogs and delays across the system. The failure of the Immigration Assessment Authority (IAA) and the fast-track process for unauthorised maritime arrivals demonstrates the false economies of this approach. Applicants before the IAA generally did not have the right to be interviewed or put forward new information. This undermined the quality of decision-making and resulted in a very high

proportion of cases being overturned by the courts. Between 2016–23, 37 per cent of judicial review applications of IAA decisions were successful, and, as a result, were remitted back to the IAA for redetermination.[14]

This policy brief calls for a new approach that recognises that fairness contributes to – rather than detracts from – efficiency. Drawing on the success of Switzerland's asylum procedure reforms, it argues that the most effective way to increase efficiency is to front-load resources into ensuring that applicants can adequately put forward their case at the departmental level. This will, in turn, reduce the number of cases being appealed and overturned on review, as well as associated delays. If Protection visa applications are considered in a well-resourced, prompt and orderly system, the incentives for those who are not eligible for asylum to lodge an asylum application will be significantly reduced.

In this regard, we welcome recent reforms by the Australian Government that would contribute to this goal – in particular, the $160 million investment announced in October 2023 to implement a faster and fairer onshore protection system.[15] This has increased decision-making capacity across each stage of the asylum process, with $54 million allocated to the initial processing of claims by Home Affairs, $58 million to the appointment of 10 additional members to the AAT and 10 additional judges to the Federal Circuit and Family Court and $48 million to free refugee legal advice services to support people through the complex asylum application process. This additional capacity has already had a significant positive impact. February 2024 was the first month in recent years where the number of cases finalised at Home Affairs outstripped the number of lodgements.[16] The recent passage of reforms that will abolish the AAT and IAA and replace them with the ART are also welcome.[17] The new merits-based process for selecting ART members, as well as increased flexibility in the procedures and powers given to members reviewing migration and Protection visa matters, will all contribute to increasing the efficiency of merits review of Protection visa decisions.[18] The increase in funding for decision-making capacity across the board is very welcome, but attention now needs to turn to how those additional resources can be put to best use. The recommendations set out in this policy brief are designed to build on these promising developments and chart a way forward.

Switzerland's asylum model has been held up as an exemplar of international best practice when it comes to designing fair and fast asylum procedures.[19] To the authors' knowledge, its accelerated asylum procedures are the only ones in the world to have been endorsed by the local United Nations High Commissioner for Refugees (UNHCR) office and leading refugee sector non-government organisations (NGOs) in the country, as well as a large majority of the local population.[20] While certain elements of the procedures have been the subject of criticism,[21] the principles that inform the design of the procedures offer valuable lessons for Australia.

The Australian Government has often looked to countries such as Canada, New Zealand, the United Kingdom and the United States for policy inspiration in the refugee and broader migration space. Our intention is to extend that gaze to examine international best practice.

This policy brief draws on interviews carried out in Switzerland in October 2023 with senior politicians, policy-makers and experts from the Swiss State Secretariat for Migration (SEM), judges, academics, representatives from NGOs and UNHCR, and lawyers representing asylum seekers.[22]

2 The Swiss Model

Switzerland rolled out its new accelerated asylum procedure in March 2019. The aim was to increase the efficiency of asylum processing and reduce asylum backlogs, while ensuring the rights and needs of asylum seekers were appropriately considered. The reforms were the culmination of a nine-year policy-making process that included widespread consultations, pilot testing and independent expert evaluations, as well as parliamentary debates resulting in several legislative acts amending and fine-tuning the legal framework.

States around the world have adopted various approaches to allocating cases into accelerated or fast-track processes. The most common approaches have been to focus on manifestly unfounded cases, or applicants who are from – or who have access to protection in – countries which are deemed to be safe.[23] More recently, some states, such as Canada, have used fast-track procedures that aim to ensure that vulnerable individuals, or those with very strong (manifestly well-founded) claims, receive a positive asylum decision very quickly. Under these models, applications generally start in the ordinary procedures and are subsequently redirected into the accelerated procedures.

The Swiss approach is unique in that the default position for all applicants is the accelerated procedures, with strict procedural timelines for each step and a target processing time of 140 days.[24] Early in the process, a decision-maker assesses whether it will be possible to fairly assess the case within the short procedural timeframes of the accelerated procedures. Complex cases are allocated to the extended procedures, which have more flexible procedural timelines. Importantly, to balance the accelerated nature of the procedure, asylum seekers are provided with independent legal representation funded by the state.

The asylum process in Switzerland is divided up into the following steps.[25]

1. Upon lodgement of a formal asylum application, applicants are fingerprinted, given information about the procedures by an independent service provider (often an NGO) and informed about the availability of free legal representation. Applicants who do not waive the right to legal representation are assigned a lawyer. The assigned lawyer is present at all interviews conducted by the authorities.
2. Application filing is followed by a preparatory phase that lasts up to 21 days. In this period, the SEM conducts an initial (recorded) interview, which is retranslated back to the asylum seeker for verification. The purpose of this is to screen for vulnerabilities and gather information about the identity, age and country of origin of the applicant and the route taken to reach Switzerland.[26] At this stage, the *first triage* takes place, with the SEM deciding whether the application should proceed, be cancelled or be found inadmissible.[27]
3. Provided that the application is not cancelled or found to be inadmissible, the accelerated procedure begins immediately after the preparatory phase. It starts with the SEM conducting a second hearing on the applicant's reasons for flight, after which the *second triage* takes place, with a determination made as to whether the decision can be made within eight working days under the accelerated procedures, or whether it should be transferred to the extended procedures for further investigation.[28]
4. Where a decision is made under the accelerated procedures, the legal representative is provided with a draft decision and 24 hours in which to provide feedback.[29] The SEM is required to take this feedback into account before issuing the final decision.
5. Where an application is transferred to the extended procedures, the timelines are more flexible, but the general target is to have cases finalised within one year. The extended procedures can include an additional interview, as well as investigations into the identity and country of origin of the applicant, medical examinations, consideration of further evidence and credibility assessments.
6. Applicants who are refused at any stage may submit an appeal to the Federal Administrative Court, which is generally the only review mechanism available for asylum matters. The court has the power to review both the merits of the application as well as errors of law made by the SEM. Applicants in the accelerated procedures must apply for review within seven working days,[30] while the deadline for lodging reviews for applicants in the extended procedures is 30 days.[31]

The new procedures have significantly increased the efficiency of the asylum process. In 2010, at the outset of the reform process, the average time from application to finalisation of the case (including review and potential return) took more than three years and 10 months on average. In 2022, under the new system, this had decreased to 106 days.[32]

Importantly, this has not come at the cost of fairness. The robust safeguards – and, in particular, access to legal representation – have facilitated faster decision-making without impacting recognition rates. Recognition rates have been high in Switzerland since 2015 when Afghanistan, Eritrea and Syria became the main source countries of asylum seekers. Since the new system became operational in 2019, 59 per cent of applicants have been granted some form of protection, with 31.6 per cent being recognised as refugees and a further 27.4 per cent receiving provisional admission.[33] This is largely consistent with the outcomes under the old system. For example, the overall recognition rate was 57.5 per cent in 2017 and 60.8 per cent in 2018.[34]

While the 2019 reforms have significantly improved efficiency and reduced the backlog of cases, recent increases in the number of applications have put significant strain on the system. This has occurred in the context of a substantial rise in asylum cases across Europe.[35] There were 30,223 applications for asylum lodged in Switzerland in 2023, which represented a 23.3 per cent increase on the previous year.[36] The SEM was able to significantly increase the number of cases finalised, deciding 26,667 cases in 2023 as compared to 17,599 in 2022. Nonetheless, the backlog increased for the first time since the implementation of the new system.[37]

Under the new procedures, applicants are required to reside in a Federal Asylum Centre for up to 140 days while the accelerated procedures are being undertaken. The rigidity of these arrangements caused considerable difficulties in the context of the increase in applications, including overcrowding of the Federal Asylum Centres, and raised concerns about the conditions in the centres.[38] In light of this, the practice of housing asylum seekers in centralised asylum centres is one element of the Swiss model that we do not recommend be emulated in Australia. Moreover, as we discuss below, the ongoing success of any similar accelerated procedures in Australia will require an ongoing commitment from the Australian Government to invest in decision-making capacity and to prepare for any potential increases in asylum claims.

3 Analysis and Key Lessons

This part of the brief examines the operation and design of the Swiss model in more detail to draw out a series of recommendations for reforming Australia's asylum procedures. Given the dangers of copying and pasting specific laws or policies from abroad, without considering different legal and social contexts,[39] the recommendations draw on broad principles from the Swiss experience that could be adapted to the Australian context. As noted in the first recommendation below, it is imperative that the specific contents of the reforms are co-developed through a robust consultation process with the refugee sector, applicants, refugee-led organisations reflecting a diversity of experiences, refugee lawyers, the ART and federal courts.

3.1 Inclusive and Consultative Policy Design

A key lesson from the Swiss model is that asylum procedure reform can only succeed with the broad involvement of all stakeholders. Through extensive consultations, representatives from all levels of government, the Federal Administrative Court, UNHCR, NGOs and lawyers were able to identify and agree on essential parameters, including acceleration, efficiency, fairness and the rule of law. The results of the consultative processes provided the basis for the law-making process. The participation of a wide range of actors in the policy development process, as well as the willingness of all state and non-state actors to compromise, built trust and gave the policy-making process a high degree of credibility. This approach generated widespread support for the new procedures. This is especially remarkable as responsibilities in the highly debated asylum area are split between the Confederation (responsible for asylum decisions) and the Cantons (responsible for all other aspects of the stay in Switzerland).

The legislative and implementation process in Switzerland went beyond the regular constitutionally mandated consultation procedures.[40] It included two national asylum conferences attended by

representatives from the Confederation, the Cantons, and local cities and communities in 2013 and 2014.[41] It also included regular consultations with civil society in different formats and a public campaign for the new asylum procedure in the context of the national referendum on the new law in 2016.[42] The referendum was initiated by the populist Swiss People's Party, which has dominated the migration discourse for more than a decade in Switzerland. In June 2016, 66.8 per cent of participating Swiss voters favoured the new asylum model.[43] This large-scale political and societal agreement was a major success and served as a solid basis for the roll-out of the new procedure. After the approval of the legislative basis, the broad consultation process continued for the preparatory and initial implementation phase. This included the design of the necessary changes to the ordinances related to the revised *Asylum Act 1998* (Switzerland), the identification of suitable facilities for accommodation and procedures and the determination of the exact division of competencies in the new system.

In contrast, recent reforms to Australia's asylum procedures have been made without meaningful opportunities for engagement, consultation or consensus-building with the refugee sector and other stakeholders. This includes the recent reforms to the onshore protection system.[44] While it is noted that these reforms did reflect various proposals and concerns raised by the refugee sector, no public or sector-wide consultations were carried out in relation to the details of the changes prior to their announcement.

Recommendation

1. The Australian Government should take a long-term, inclusive and consultative approach to reforming the asylum system. Consultation needs to take place at the early design stage rather than after policies are announced. Early and ongoing consultation should be carried out with the refugee sector, refugee-led organisations reflecting a diversity of experiences, refugee lawyers, the Administrative Review Tribunal (ART) and federal courts. This will ensure that reforms are guided by a thorough understanding of diverse community needs and experiences and will enhance the quality and legitimacy of reforms.

3.2 Learning from Comparative Practices

A hallmark of the Swiss asylum reform was the deep engagement with comparative practices and learning from the experiences of a wide range of jurisdictions. Early in the policy-making process, there was a concerted effort to canvass and systematically study asylum systems from around the world.[45]

This led to the identification of the Dutch model as a starting point, with extensive reflection and consultation around how it could be best adapted and improved for the Swiss context.[46]

The Australian Government has traditionally looked to a narrow subset of common law countries for policy inspiration in the migration context. While it makes sense to focus on countries with similar legal systems, a broader approach to canvassing international practice can open up further opportunities for learning from new and innovative best practice approaches.

Recommendation

2. The Australian Government should take a systemic and evidence-based approach to examining and learning from asylum procedures in other jurisdictions. This should extend beyond looking at the common law countries that it has traditionally considered. In assessing the lessons from potential models, the Australian Government should not limit itself to knowledge exchange with government officials abroad, but should also engage with the refugee sector, refugee-led organisations reflecting a diversity of experiences, refugee lawyers, tribunals, courts and academic experts to ensure a comprehensive view of the benefits, risks and limitations of such models.

3.3 Data and Evaluation

The Australian Government could also draw lessons from Switzerland in terms of data collection, transparency and robust evaluations in informing the design of the asylum system and ongoing reform.

The Swiss reforms introduced in 2019 were preceded by two test phases. The first test phase was launched in Zurich on 6 January 2014. The test phase was subject to an evaluation mandated by the Federal Department of Justice and Police. The first interim report was published in February 2015.[47] The evaluation found that the new procedures were economical, faster and qualitatively better and that they enjoyed greater acceptance among participants. This was followed by a second pilot in the French-speaking part of Switzerland in 2018, split across the Cantons of Neuchatel and Fribourg to gain insights on inter-cantonal cooperation in the new system.

Recommendation

3. Home Affairs should consider trialling proposed reforms to the asylum procedures using a pilot or test phase model, where innovations are tested for a defined period and then subjected to independent evaluation to inform whether they are retained, expanded or refined.

The SEM issues monthly asylum statistics about decision-making and provides data on returns, numbers of people in the system and cooperation between the Federation and the Cantons. It also publishes a yearly report with detailed asylum statistics, which explains the main figures and puts the numbers into context. Statistics are also collected and published in relation to a variety of indicators reflecting the quality and consistency of decision-making, including the number and outcome of review applications.[48] This is complemented by ongoing internal data collection and reporting related to the key features of the new procedures.

Developing robust data collection and transparency is essential to the success of any asylum reforms in Australia and would build public confidence in how the asylum process is operating. Public access to detailed data is required to facilitate ongoing evaluation of the quality and efficiency of decision-making, to provide an evidence base to evaluate the effectiveness of any new reforms and to identify areas in need of improvement or reform. This data collection would also allow Home Affairs, the ART and the Federal Circuit and Family Court to anticipate and address increases in workload and identify areas in need of additional resources. It is essential that data is collected at a systemic level, tracking and connecting the life cycle of cases through each stage of the asylum process. At a minimum, the key data points that should be made available include the median time taken to finalise Protection visa cases at each stage of the process, broken down by case characteristics such as country of origin, claim type and whether the applicant was represented by a migration agent or lawyer. Data should also be provided on the number and proportion of Protection visa applications set aside or remitted by the ART, and remitted by the Federal Circuit and Family Court, again broken down using the same case characteristics as above.

Recommendation

4. Home Affairs, the ART and the Federal Circuit and Family Court should collect and make publicly available detailed statistics on the efficiency, quality and consistency of decision-making across all stages of the asylum process, so as to enable ongoing internal and external evaluation of how the system is operating and to identify areas for improvement.

In addition to the evaluation of the pilot procedures, the Swiss Government commissioned multiple external evaluations of the new procedures, resulting in further amendments and changes. The evaluation of the pilot phase in Zurich included a quantitative analysis of decision-making outcomes, as well as qualitive assessments of the operational processes, administrative procedures and legal assistance services.[49] The subsequent evaluation of the new system included sub-projects examining processes as well as legal remedies and the quality of decisions.[50] The studies were

conducted by specialised external actors and were published by the respective ministry and the SEM on their websites.

Recommendation

5. The Australian Government should periodically engage independent external experts to undertake evaluations of how the asylum process is operating and should make their reports publicly available.

3.4 Fairness as Central to Efficiency

Fairness and efficiency have often been framed as being in tension.[51] The Swiss experience demonstrates that the opposite is true and that fairness contributes to the efficiency of procedures. Reforms that reduce the procedural rights of applicants, such as the right to an interview or the ability to submit new evidence, ultimately lead to longer delays due to higher levels of success at merits or judicial review.[52] Moreover, if applications are refused, but applicants feel their claims were fairly and thoroughly assessed, they are less likely to lodge appeals. In this regard, it is concerning that under Australia's current approach of 'real-time priority processing' (discussed further below), many applicants are being refused without an interview or opportunity to put forward further information about their case. The Swiss experience shows that, with adequate safeguards and support, short procedural deadlines can be used for certain types of cases to increase efficiency without unduly compromising the ability of applicants to adequately put forward their cases.

Recommendation

6. Future reforms aimed at increasing the efficiency of asylum procedures should not focus on limiting the procedural rights of applicants. Efficiency gains could be made by introducing shorter procedural deadlines for appropriate caseloads, provided that sufficient support is given to applicants and decision-makers.

3.5 Streaming Based on Case Complexity

Fair and fast processing of asylum claims requires that limited decision-making capacity be used as efficiently as possible. A well thought-out and adaptable mechanism to stream cases into different procedures is one way to achieve this. The Swiss approach is unique in that the accelerated procedures are the default position, with an off-ramp for more complex cases. The benefit of such an approach is that all applicants are treated equally, and the decision about the procedures to which they are allocated is based on an individual assessment of the complexity of their case. Moreover, it prioritises efficient processing for all applicants, to the extent it is possible to do this fairly.

In October 2023, the Australian Government announced that it would be adopting a new streaming approach known as 'real-time priority processing'.[53] This involves shifting to a 'last in, first out' system which prioritises new asylum applications for rapid processing. The rationale behind this move is that finalising new applications expeditiously will reduce the incentive for the lodgement of unmeritorious Protection visa applications. While this may be appropriate as a temporary stop-gap measure to address the backlog, it is not appropriate as a longer-term streaming policy. It leads to substantial unfairness for applicants who lodged their claims before the introduction of the rule, who may face long delays in having their claims processed. In the longer term, Home Affairs needs to develop an approach to streaming that ensures that all cases are finalised as quickly as possible.

Recommendation

7. Home Affairs should consider developing a streaming procedure under which the default position is priority processing subject to short procedural deadlines, with an option to refer complex cases (which need more time to assess fairly) to extended procedures with more flexible timelines. To ensure the fairness of the procedures and the ability of applicants to meet the procedural

deadlines, this must be accompanied by reforms ensuring that all applicants have access to full legal representation from specialist free refugee legal advice providers.

Timelines and procedural deadlines need to be developed in consultation with the Australian refugee sector, applicants, legal service providers, refugee-led organisations reflecting a diversity of experiences, the ART and federal courts. The very short timelines in Switzerland have been criticised as being overly onerous, and reflect the efficiency gains that come from housing applicants in Federal Asylum Centres where legal representatives are co-located. Through a consultation process, the Australian Government could identify what timelines would be fair and appropriate for the Australian context.

A key lesson from the first few years of the new Swiss asylum procedures is the need for adequate guidance to be provided to decision-makers as to which cases to refer to the extended procedure. The 2021 evaluation of the procedures identified a certain degree of inconsistency in the way cases were being streamed in the different regions, and found that not all cases where further investigation was necessary were being referred to the extended procedures.[54] The situation improved with the development of further guidance, including a formal checklist for decision-makers.

Recommendation

8. Home Affairs should carry out robust consultations with the refugee sector, refugee-led organisations reflecting a diversity of experiences, refugee lawyers, the ART and federal courts to identify fair and appropriate timelines for both the prioritised and extended procedures, as well as to develop criteria for a detailed checklist to guide decision-makers in identifying cases that should be transferred to the extended procedures.

3.6 System-Wide Perspective

Another hallmark of the Swiss asylum reforms is the focus on a system-wide perspective and coordination between the SEM and the Federal Administrative Court. The court was consulted regularly during the reform process. Key to the success of the reforms was the court's willingness to prioritise the review of cases refused through the accelerated procedures. Equally important was the fact that the court's independence was respected. For example, the ongoing regular consultations between the court and the SEM are limited to a 'technical exchange' on issues like prioritisation, access to files and administrative adaptations of the system.

In Australia, streaming cases for faster decision-making at Home Affairs will be futile if those cases get held up in backlogs at the new ART or the Federal Circuit and Family Court.

Recommendation

9. The Australian Government should ensure that any reforms aimed at increasing the efficiency of asylum procedures take a system-wide view. The ART and the Federal Circuit and Family Court will need to work collaboratively with Home Affairs to ensure that efforts to prioritise specific types of cases are reflected across the system. This must be done in a way that respects the independence of the ART and the courts.

3.7 The Importance of Legal Representation

Central to the Swiss approach is the recognition that a system with shorter procedural timelines can only work effectively and fairly where all applicants have access to independent and high-quality legal assistance. Applicants are provided with a first advice session by the legal service providers upon registration at the very start of the process. At this point, a legal representative is assigned to all applicants who do not waive the right to such representation (for example, because they already have a lawyer representing them). Legal representation includes assistance prior to the asylum interviews and attendance at all interviews conducted by the SEM. Legal representatives are also

responsible for reviewing and responding to the draft decisions, explaining the decision to the applicant, and advising on options and prospects of review. If an application for review is lodged, the legal representative remains responsible until the court procedure is finalised. If the legal representative determines that a review application does not have any prospect of success, their mandate is terminated but applicants are provided with the contact information of other legal service providers. If the case is referred to the extended procedures, the legal representative may retain the case (despite physical relocation of the respective applicants to a Canton) or a new representative at the cantonal level may become responsible for the case. If the case is transferred, the legal representative is responsible for ensuring that the relevant case information is transferred to the new representative.

The evaluation of the test phase – which included interviews with applicants, legal representatives, SEM adjudicators and other key actors – found that the access to government-funded legal representation led to asylum seekers being better informed and considerably enhanced the efficiency of the procedures. The opportunity given to the applicants and their legal representatives to comment on draft decisions resulted in fewer mistakes and greater acceptance of decisions by applicants.[55]

In contributing to more fair and efficient processing, investment in government-funded legal representation can also lead to overall cost savings. An evaluation of the test phase carried out in collaboration with McKinsey & Company estimated that, once the new asylum system was rolled out nationally, it would produce a yearly net saving for the Swiss Government of €80 million.[56] Investing in legal representation would likely lead to overall cost savings for the Australian Government. Legal representation can contribute to smoother and more efficient hearings, leading to more efficient use of decision-making capacity. Faster processing would also reduce the total number of applications by disincentivising – and thus reducing the number of – unmeritorious applications, and would contribute to better employment, health and social outcomes for applicants ultimately found to be owed protection.

This is in line with a substantial body of research that shows that legal assistance increases not only fairness but also efficiency.[57] As McAdam and Ghezelbash have argued, refugee lawyers

> help asylum seekers prepare their statements coherently and systematically. They identify relevant evidence and legal principles, which assists decision-makers to focus on the key aspects of the claim. When an asylum seeker is unrepresented, decision-makers have to spend much more time ensuring the applicant understands the process and possible outcomes. They also want to ensure the person feels they have had a fair hearing. Overall, this is an inefficient use of public resources.[58]

In this context, we welcome recent moves by the Australian Government to increase funding to free specialist refugee legal advice providers.[59]

As has been emphasised already, shorter procedural timelines can only be implemented fairly if applicants have access to high-quality legal representation throughout the process. This does not necessarily need to be government-funded representation. However, applicants should all have a right to access and be assigned a lawyer from a government-funded specialist refugee legal advice provider, with the option of waiving that right and accessing a paid representative if they so choose. Having an independent government-funded lawyer assigned as the default option is the most effective way of ensuring accessibility and that applicants do not fall through the cracks and are not left to navigate the shorter procedural deadlines in the prioritised procedures without representation.

Recommendation

10. The Australian Government should ensure that there is adequate funding available for specialist free refugee legal advice providers and that every applicant has access to full representation, particularly at first instance at Home Affairs. Adequate funding also needs to be made available

for representation at the ART and Federal Circuit and Family Court, unless the representative determines that the case has no reasonable prospect of success.

Legal service providers in the Swiss system are selected for each asylum region following a public tender and are awarded a contract for five years with the possibility of a further one-year extension. The long duration of the contracts was deemed crucial for establishing functioning working relations between government officials and legal practitioners. It also facilitates longer term recruiting of experienced lawyers. The funding also covers interpreting costs, in recognition of the fact that high-quality interpreting services are essential for legal representatives to carry out their functions.

The Swiss model of financing legal service providers is based on a fee-per-case model. This model has been criticised by some NGOs working in the sector for creating incentives for lawyers hired by the legal service providers to avoid lodging appeals.[60] This concern was partly addressed by the tender process, which made clear that the case fee must be calculated in a way that covers administrative costs as well as all expenses for possible appeals procedures. However, as the tender process was competitive, there has been an incentive to reduce the number of appeals procedures incorporated in the calculation.

Recommendation

11. The Australian Government should ensure that funding for specialist free refugee legal advice providers is provided on a long-term basis and is aimed at increasing the overall capacity of organisations (rather than being provided on a fee-per-case model). The funding agreements should include interpreting costs, where these are not covered by the relevant state or territory government.

3.8 Ensuring Adequate and Effective Decision-Making Capacity

An important component of the Swiss system is the ongoing effort to quantify projected demand on the asylum system and adjust capacity if the number of asylum applications increases. This includes provisions to deal with the regular variations of application numbers, as well as a plan for a fast rise in decision-making capacity in emergency scenarios. Where additional decision-makers are appointed at the primary decision-making level in the SEM, this triggers a quasi-automatic increase in funding to increase the capacity of legal service providers, and informs separate parliamentary procedures for the appointment of additional judges to the Federal Administrative Court. This is accompanied by robust training for new as well as experienced decision-makers. Similarly, the funding agreement between the Swiss Government and legal service providers includes an allocation for the training of legal representatives.

Recommendation

12. The Australian Government should take a data-driven approach to calculating the decision-making capacity and legal assistance needs required for timely decision-making and for meeting target processing times at Home Affairs, the ART and the Federal Circuit and Family Court. This approach should take into account the number and complexity of existing cases and the future anticipated caseload. It should include a plan for the rapid increase of decision-making capacity across the system and for increased legal assistance to deal with potential future sudden surges in asylum claims. This should be accompanied with robust training for both new and experienced decision-makers, as well as legal representatives, so they can effectively carry out their duties and functions.

Conclusion

This policy brief has examined how Australia can draw on lessons from Switzerland in designing asylum procedures that are both fast and fair. The foundational principle underpinning the

recommendations is that fairness enhances efficiency. Attempts to limit procedural safeguards and the right to be heard are counterproductive and result in longer delays, with more cases being overturned on review. However, the Swiss experience demonstrates that efficiency gains can be achieved through shorter procedural deadlines for certain caseloads without compromising the rights of asylum seekers, provided that applicants have access to legal representation throughout the process.

The Swiss experience shows that successful asylum reforms require extensive stakeholder engagement and consultations. It is imperative that the high-level recommendations provided in this policy brief are progressed through early and continued stakeholder consultations – both to articulate the specific content, as well as to enhance the legitimacy and effectiveness of the reforms.

Endnotes

[1] Department of Home Affairs (Cth), *Monthly Update: Onshore Protection (Subclass 866) Visa Processing: May 2024* (Report, 2024) 4 <https://www.homeaffairs.gov.au/research-and-stats/files/monthly-update-onshore-protection-866-visa-processing-may-2024.pdf>.

[2] Administrative Appeals Tribunal, *Migration and Refugee Division Caseload Report: Financial Year to 31 May 2024* (Report, 2024) 1, 6 <https://www.aat.gov.au/AAT/media/AAT/Files/Statistics/MRD-detailed-caseload-statistics-2023-24.pdf>.

[3] Evidence to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, 25 March 2022, Question AE22-137 (Permanent Protection Visa Applicants: Judicial Reviews) 1 <https://www.aph.gov.au/api/qon/downloadattachment?attachmentId=30e2c502-f987-463b-a825-e76c9dddf0bd>.

[4] Christine Nixon, *Rapid Review into the Exploitation of Australia's Visa System* (Report, 31 March 2023) 24 ('Nixon Review'), citing Evidence to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, 16 December 2022, Question OBE22-180 (Visa Processing: Permanent Protection Visa) 1 <https://www.aph.gov.au/api/qon/downloadattachment?attachmentId=828f9cb6-090c-4adf-b8a3-0df32a9760f7>. Note that this figure predates the reforms introduced in October 2023 that were aimed at speeding up processing times: see below n 15 and accompanying text. While updated median processing times are unavailable, Home Affairs states that '[m]ost new applications are now decided almost 8 times faster compared to recent years': Department of Home Affairs (Cth), 'Protection Visas Are for Genuine Asylum Seekers' (Web Page, 13 August 2024) <https://immi.homeaffairs.gov.au/protection-visa-subsite/Pages/protection-visas-are-for-genuine-asylum-seekers.aspx>.

[5] Administrative Appeals Tribunal, 'Migration and Refugee Division Processing Times' (Web Page) <https://www.aat.gov.au/resources/migration-and-refugee-division-processing-times>.

[6] Federal Circuit and Family Court of Australia, *Annual Reports 2022–23* (Report, 2023) 99 <https://www.fcfcoa.gov.au/sites/default/files/2023-11/FCFCOA%20Annual%20Report%202022-23.pdf>. Note that the court does not publish data specifically in relation to the time taken to finalise the review of Protection visa decisions, and instead reports on the broader category of migration matters.

[7] Note that this figure is an estimate based on piecemeal data, mixing both median and average processing times. As we note in Recommendation 4, the collection and publication of more detailed data across all stages of the asylum process are essential for enabling ongoing internal and external evaluation of how the system is operating.

[8] Achim Ahrens et al, 'The Labor Market Effects of Restricting Refugees' Employment Opportunities' (Working Paper No 510, KOF Swiss Economic Institute, January 2023) <https://www.research-collection.ethz.ch/handle/20.500.11850/595935>.

[9] Mary Anne Kenny and Nicholas Procter, 'The Fast Track Refugee Assessment Process and the Mental Health of Vulnerable Asylum Seekers' (2016) 23(1) *Psychiatry, Psychology and Law* 62.

[10] Nixon Review (n 4) 24.

[11] United Nations High Commissioner for Refugees (UNHCR), Submission No 17 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *The Performance and Integrity of Australia's Administrative Review System* (6 December 2021) 2 <https://www.unhcr.org/au/sites/en-au/files/legacy-pdf/61b6aa8b4.pdf>.

[12] *Convention relating to the Status of Refugees,* opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) art 33; *International Covenant on Civil and Political Rights*, opened for signature 19 December 1976, 999 UNTS 171 (entered into force 23 March 1976) art 7; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) art 3; *Convention on the Rights of the Child,* opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) arts 6, 37; *Migration Act 1958* (Cth) s 5 (definition of 'non-refoulement obligations').

[13] Kaldor Centre for International Refugee Law, Submission No 11 to House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into the Administrative Review Tribunal Bill 2023 (ART Bill) and the Administrative Review Tribunal (Consequential and Transitional Provisions No 1) Bill 2023 (Consequential and Transitional Bill)* (25 January 2024) 7–12.

[14] Ibid 6.

[15] Andrew Giles, Mark Dreyfus and Clare O'Neil, 'Restoring Integrity to Our Protection System' (Media Release, 5 October 2023) <https://minister.homeaffairs.gov.au/AndrewGiles/Pages/restoring-integrity-protection-system.aspx>.

[16] Department of Home Affairs (Cth), *Monthly Update: Onshore Protection (Subclass 866) Visa Processing: February 2024* (Report, 2024) 1–2 <https://www.homeaffairs.gov.au/research-and-stats/files/monthly-update-onshore-protection-866-visa-processing-february-2024.pdf>.

[17] *Administrative Review Tribunal Act 2024* (Cth); *Administrative Review Tribunal (Consequential and Transitional Provisions No 1) Act 2024* (Cth); *Administrative Review Tribunal (Consequential and Transitional Provisions No 2) Act 2024* (Cth).

[18] Kaldor Centre for International Refugee Law (n 13). Note that the decision to maintain the separate procedures for migration decisions was a missed opportunity.

[19] Constantin Hruschka, 'The Swiss Asylum Procedure: A Future Model for Europe?' (Report, Friedrich Ebert Stiftung, January 2019); Dietrich Thränhardt, 'Speed and Quality: What Germany Can Learn from Switzerland's Asylum Procedure' (Report, Bertelsmann Stiftung, 2016). Both reports focus on the features of the new model and findings from the test phase preceding the national roll-out of the new system in 2019.

[20] The reform was confirmed by a popular vote with a majority of 66.8 per cent in a referendum on the new law in June 2016: Federal Chancellery of Switzerland, 'Votation Populaire du 05.06.2016' <https://www.bk.admin.ch/ch/f/pore/va/20160605/>.

[21] An independent evaluation from non-government organisations working in the sector during the first year of the application of the new system raised particular concerns around the funding model for legal assistance, overly accelerated timelines and conditions in Federal Asylum Centres where applicants are held for the duration of the accelerated procedures: Bündnis Unabhängiger Rechtsarbeit im Asylbereich, 'Zur Neustrukturierung des Asylbereichs: Bilanz zu Einem Jahr der Umsetzung' (Report, 2020) 6–13 <https://xn--bndnis-rechtsarbeit-asyl-vsc.ch/wp-content/uploads/2020/09/DOSSIER_Rechtsarbeit_DE.pdf>.

[22] It also draws on additional written information and documents provided by the interview subjects before and after the interviews. All protocols relating to these interviews were approved by the UNSW Human Research Ethics Committee: see Approval No HC230007, 20 March 2023.

[23] Daniel Ghezelbash, 'Fast-Track, Accelerated, and Expedited Asylum Procedures as a Tool of Exclusion' in Catherine Dauvergne (ed), *Research Handbook on the Law and Politics of Migration* (Edward Elgar Publishing, 2021) 248.

[24] This timeframe includes appeal and removal procedures.

[25] This is a simplified overview that does not include the Dublin procedures implementing the Dublin III regulation, which establishes the criteria and mechanisms for determining the European Union Member State responsible for examining an asylum application lodged in a Member State by a third-country national: *Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person* [2013] OJ L 180/31.

[26] *Asylum Act 1998* (Switzerland) art 26 ('*Asylum Act*'). At this stage, a triage is also carried out to decide whether or not a Dublin procedure will be initiated.

[27] An application can be cancelled without a formal decision if (a) the application cannot be considered an asylum claim according to the *Asylum Act* (n 26), (b) the application is not sufficiently justifiable and/or the applicant withdraws it, (c) the applicant fails to cooperate without a valid reason, or (d) the applicant fails to make themselves available to the authorities for more than 20 days, or for more than 5 days if the person is accommodated in a Federal Asylum Centre: see generally Swiss Refugee Council, *Country Report: Switzerland* (Report, 2023) 55 <https://asylumineurope.org/wp-content/uploads/2023/06/AIDA-CH_2022-Update.pdf>.

[28] *Asylum Act* (n 26) art 37 provides that there is some flexibility to add 'several days' if it is clear that this will make it possible to render a decision in the accelerated procedures.

[29] This feedback is provided in a legal representative's statement, the purpose of which is to identify whether 'the facts are properly established and … the decision will be correct and comprehensible in terms of formality and in the merits': Swiss Refugee Council (n 27) 21 n 52.

[30] This had been temporarily extended to 30 days: *Ordonnance sur les mesures prises dans le domaine de l'asile en raison du coronavirus (Ordonnance COVID-19 asile) du 1er avril 2020* [Ordinance on Measures Taken in the Field of Asylum due to Coronavirus (Ordinance COVID-19 Asylum) of 1st April 2020] (Switzerland) art 10. The Ordinance was in operation until December 2023.

[31] In admissibility procedures, the time limit for lodging a review is 5 working days. *Asylum Act* (n 26) art 108 sets out the procedural time limits for appeals.

[32] This headline figure reflects the overall length of the procedures. Breaking this down further, the average processing time was 72 days for the accelerated procedure, 254 days for the extended procedure, and 964 days for the legacy cases in the old procedure: Swiss Refugee Council (n 27) 12.

[33] Provisional admission is a type of temporary leave granted to persons not eligible for asylum in Switzerland if the execution of a deportation order would be unlawful, unreasonable or impossible: *Foreign Nationals and Integration Act 2005* (Switzerland) art 83. It is mainly granted for humanitarian reasons, including – among other things – to comply with obligations arising from the *non-refoulement* principle. These statistics cover the period between 2019–24: State Secretariat for Migration (Switzerland) (SEM), *Asylstatistik Total: Stand ZEMIS vom 31.07.2024* (Excel Spreadsheet, 2024) <https://www.sem.admin.ch/dam/sem/de/data/publiservice/statistik/asylstatistik/uebersichten/asyl-jahre-total-d.xlsx.download.xlsx/asyl-jahre-total-d.xlsx>.

[34] SEM (n 33).

[35] European Union Agency for Asylum, 'Latest Asylum Trends' (Web Page) <https://euaa.europa.eu/latest-asylum-trends-asylum>.

[36] '23% More Asylum Applications in 2023', *SWI* (online, 15 February 2024) <https://www.swissinfo.ch/eng/identities/23-more-asylum-applications-in-2023/72596802>.

[37] In 2022, there were 12,239 pending cases, which increased by 3,328 to 15,567 pending cases (counted as persons) at the end of 2023: SEM, *Statistique en Matière d'Asile: 2023* (Report, 15 February 2024) 6, 19 <https://www.sem.admin.ch/dam/sem/fr/data/publiservice/statistik/asylstatistik/2023/stat-jahr-2023-kommentar.pdf>.

[38] Swiss Refugee Council (n 27) 99–102, 102–7. The concerns focused especially on overcrowding and the lack of adequate protection for minors in these facilities.

[39] See generally Daniel Ghezelbash, *Refuge Lost: Asylum Law in an Interdependent World* (Cambridge University Press, 2018); Daniel Ghezelbash, 'Legal Transfers of Migration Law: The Case for an Interdisciplinary Approach' (2023) 7(2) *International Journal of Migration and Border Studies* 182; Daniel Ghezelbash, 'Lessons in Exclusion: Interdiction and Extraterritorial Processing of Asylum Seekers in the United States and Australia' in Jean-Pierre Gauci, Mariagiulia Giuffré and Lilian Tsourdi (eds), *Exploring the Boundaries of Refugee Law: Current Protection Challenges* (Brill Nijhoff, 2015) 90.

[40] The Swiss Federal Constitution requires consultation with all interested stakeholders in important legislative matters: *Federal Constitution of the Swiss Confederation 1999* (Switzerland) art 147.

[41] SEM, 'Gemeinsame Erklärung der Asylkonferenz vom 21.01.2013' (Joint Declaration, 21 January 2013) <https://www.sem.admin.ch/dam/data/sem/aktuell/news/2013/2013-01-21/erklaerung-d.pdf>; SEM, 'Gemeinsame Erklärung der Asylkonferenz vom 28 März 2014' (Joint

Declaration, 28 March 2014) <https://www.sem.admin.ch/dam/data/sem/aktuell/news/2014/2014-03-28/erklaerung-d.pdf>.

[42] For the explanations and material provided by the Federal Council in relation to the public vote, see Federal Council (Switzerland), 'Votation Populaire du 5 Juin 2016' (Web Page) <https://www.admin.ch/gov/fr/start/dokumentation/abstimmungen/20160605.html>.

[43] See Federal Chancellery of Switzerland (n 20).

[44] See nn 15–16 and accompanying text.

[45] See Federal Department of Justice and Police (Switzerland) (FDJP), *Bericht über Beschleunigungsmassnahmen im Asylbereich* (Report, March 2011) 33 <https://www.sem.admin.ch/dam/sem/de/data/aktuell/gesetzgebung/abgeschlossen/asylg-aug/ersatz-nee/ber-beschleunig-asyl-d.pdf.download.pdf/ber-beschleunig-asyl-d.pdf>.

[46] Jo Fahy, 'Express-Asyl-Verfahren Soll Lage Entspannen', *SWI* (online, 6 January 2014) <https://www.swissinfo.ch/ger/politik/express-asyl-verfahren-soll-lage-entspannen/37675486>.

[47] For the reports of February 2015, see 'Restructuration du Domaine de l'Asile: Première Évaluation de la Phase de Test', *SEM* (Web Page, 16 February 2015) <https://www.ejpd.admin.ch/sem/fr/home/aktuell/news/2015/2015-02-16.html>.

[48] SEM, 'Entscheidbeständigkeitsquote: 2016 bis 2023 (Stand Ende Q1 2024)' (Excel Spreadsheet, 8 April 2024) <https://www.sem.admin.ch/dam/sem/de/data/publiservice/statistik/asylstatistik/2024/03/7-22-Entscheidbestaendigkeitsquote-d-2024-Q1.xlsx>.

[49] For a summary of the evaluation results, see FDJP, *Evaluation Testbetrieb: Zusammenfassung der Evaluationsergebnisse* (Report, November 2015) <https://www.sem.admin.ch/dam/sem/de/data/asyl/beschleunigung/testbetrieb/ber-sem-ergebnisse-eval-testbetrieb-d.pdf>.

[50] The first external evaluation was divided into two sub-projects: Egger, Dreher & Partner AG and Ecoplan AG, *Evaluation PERU: Teilprojekt Prozessqualität* (Final Report (Summary), 16 August 2021); Anne-Laurence Graf et al, *Evaluation PERU: Rechtsschutz und Entscheidqualität* (Final Report, 16 August 2021).

[51] Ghezelbash (n 23).

[52] See nn 13–14 and accompanying text.

[53] Giles, Dreyfus and O'Neil (n 15).

[54] For the results of the evaluation and further documents, see: SEM, 'Asile: Les Procédures Accélérées Fonctionnent Globalement Bien; Des Améliorations Ont Été Réalisées ou Sont en Cours de Réalisation' (Press Release, 23 August 2021) <https://www.sem.admin.ch/sem/fr/home/sem/medien/mm.msg-id-84791.html>.

[55] See Swiss Centre of Expertise in Human Rights, *Externe Evaluation der Testphase für die Neustrukturierung im Asylbereich* (Report, 17 November 2015) 30

<https://www.sem.admin.ch/dam/sem/de/data/asyl/beschleunigung/testbetrieb/ber-eval-testbetrieb-mandat4-d.pdf.download.pdf/ber-eval-testbetrieb-mandat4-d.pdf>.

[56] Evaluation Testbetrieb des neuen Asylverfahrens: Zusammenfassung der Evaluationsergebnisse (Evaluation of test operation: Summary of evaluation results), Swiss State Secretariat for Migration, November 2015. See also, McKinsey & Company, *Europe's New Refugees: A Road Map for Better Integration Outcomes* (Report, 1 December 2016) 38.

[57] See especially Nicholas AR Fraser, 'More than Advocates: Lawyers' Role in Efficient Refugee Status Determination' (2022) 65(4) *Canadian Public Administration* 647; Ingrid V Eagly and Steven Shafer, 'A National Study of Access to Counsel in Immigration Court' (2015) 164(1) *University of Pennsylvania Law Review* 1; Daniel Ghezelbash, Keyvan Dorostkar and Shannon Walsh, 'A Data Driven Approach to Evaluating and Improving Judicial Decision-Making: Statistical Analysis of the Judicial Review of Refugee Cases in Australia' (2022) 45(3) *UNSW Law Journal* 1085, 1101.

[58] Daniel Ghezelbash and Jane McAdam, 'Why the Government's Plan to Overhaul the Asylum System Is a Smart Use of Resources – and Might Just Work', *The Conversation* (online, 5 October 2023) <https://theconversation.com/why-the-governments-plan-to-overhaul-the-asylum-system-is-a-smart-use-of-resources-and-might-just-work-215061>.

[59] Giles, Dreyfus and O'Neil (n 15).

[60] See Bündnis Unabhängiger Rechtsarbeit im Asylbereich (n 21) 6.