An asylum seeker's access to Medicare and associated health services while awaiting determination of a Protection Visa application in Australia

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Introduction

The right to access Medicare while waiting for a decision to be made on an application for a Permanent Protection Visa (subclass 866) ('Protection Visa') is governed by legislation and is dependent on the conditions of the Bridging Visa the applicant holds.

The requirements for access to Medicare differ for asylum seekers who have applied for a Temporary Protection Visa (subclass 785) or Safe Haven Enterprise Visa (subclass 790), which are the Protection Visa classes available for unauthorised maritime arrivals. This paper discusses the situation for asylum seekers who passed through immigration clearance when arriving in Australia and have applied for the Permanent Protection Visa.

The criteria for a Protection Visa is that a person meets the definition of a refugee or satisfies the complementary protections.[1] This visa is only available for people currently in Australia who have arrived and entered Australia lawfully (ie arrived in Australia with a valid visa, such as a Tourist (subclass 600) or Student Visa (subclass 500)). This Protection Visa is different to the visas available to people who have arrived irregularly.[2] If a person is subsequently granted a Protection Visa, they have the status of an Australian permanent resident and have access to Medicare and other services.

After lodging an application for a Protection Visa, the applicant will be issued a Bridging Visa which is a temporary visa and allows the applicant to remain lawfully in Australia while awaiting a decision on the application.

It is during the lengthy wait for the Protection Visa application to be processed (and, if necessary, the appeal process) that applicants are in need of medical care. Yet, many are prevented from accessing Medicare due to conditions placed on their Bridging Visas.

The Department of Home Affairs ('DHA') has reported that during 2017–18, there were 27,931 valid Protection Visa applications lodged,[3] yet only 1,425 Protection Visas were granted during that period.[4] The DHA has chosen not to publish processing times, however, based on the author's experiences, Protection Visa applicants can be waiting for two to five years for a decision, and even longer if the applicant needs to lodge an application for merits review and possibly also for judicial review. There are long lasting

psychological effects on visa applicants waiting this length of time without having access to Medicare and the authors argue that all people that have applied for a Protection Visa should be given access to Medicare from the time the application is submitted.

II Legal requirements to access Medicare

The *Health Insurance Act 1973* (Cth) defines who is eligible for Medicare.[5] There are only limited classes of people who are able to access Medicare without being a permanent resident or an Australian Citizen.[6] This includes a person in Australia who has applied for a permanent visa and currently holds a Bridging Visa with the 'right to work'.[7]

III Conditions attached to Bridging Visas

Whether the visa applicant has the right to work while on their Bridging Visa depends on the class of Bridging Visa (A through to F) held and the conditions attached to the Bridging Visa.[8]

The class of Bridging Visa granted to a Protection Visa applicant is determined by the applicant's visa status at the time of lodging the application.[9] That is, whether or not a Protection Visa applicant is able to access Medicare while awaiting a decision depends on their immigration status before they applied. It is not, for instance, based on need, strength of their visa application, or any health-related claims for protection.

If a person makes a valid application for a Protection Visa while on a substantive visa (a visa other than a Bridging Visa), then they will be granted a Bridging Visa A with permission to work and will therefore be eligible for Medicare.[10]

Case Study 1: Mohammed arrived in Australia to study from Indonesia. While studying he came out to his family as gay and became fearful of returning to Indonesia. Just before his Student Visa expired, he applied for a Protection Visa. He was subsequently granted a Bridging Visa A, allowing him to work and access Medicare while he awaited a decision from the DHA.

If a person makes a valid application for a Protection Visa while not holding a valid visa (that is, they are 'unlawful') and are not in immigration detention, they will be granted a Bridging Visa C with no right to work.[11] However, they will be able to apply for the right to work if they can show that they have a compelling need to work (ie they are demonstrably in financial hardship).[12]

Case Study 2: Duc arrived in Australia on a Tourist Visa and remained for many years after it had expired. While he was 'unlawful' (ie holding no visa), he applied for a Protection Visa, and was subsequently granted a Bridging Visa C, with no right to work. He needed to apply for permission to work by demonstrating financial hardship. This required him to provide copies of bank statements in Australia and his home country as well as receipts and evidence of his expenses. He also needed to include details of why his friends and family could not financially support him.

If a person makes a valid application for a Protection Visa while on a Bridging Visa E, they will be granted a Bridging Visa E with no right to work.[13] They can apply for the right to work, but they must show that they have both a compelling need to work (ie they are demonstrably in financial hardship), and that they have an acceptable reason for the delay in applying for the Protection Visa.[14]

Case Study 3: Parvesh and Diya are a couple who were on a Bridging Visa E while pursuing a complicated skilled visa matter, which was unsuccessful. They then lodged an application for a Protection Visa. As they were already on a Bridging Visa E, they were granted another Bridging Visa E in association with the Protection Visa application.

The couple then fell pregnant in Australia, and had to pay for private health insurance (out of their savings) for the pregnancy and birth-related healthcare costs. Even after they ran out of money, they continued to be ineligible for work rights or access to Medicare, because they do not meet the 'delay' criteria.

If a person makes a valid application for a Protection Visa (subclass 866) while in immigration detention, they may be granted a Bridging Visa E to permit them to live in the community while their application for protection is processed. It is mandatory under Department policy that in these circumstances the condition 'no right to work' be attached to the Bridging Visa E.[15] They can apply for the right to work (and therefore access to Medicare) by demonstrating both a compelling need to work and an acceptable reason for delay in application.[16]

Case Study 4: Chelsea was unlawful and homeless in Australia for a number of years, before being detained by immigration deten-

Protection Visa flowchart

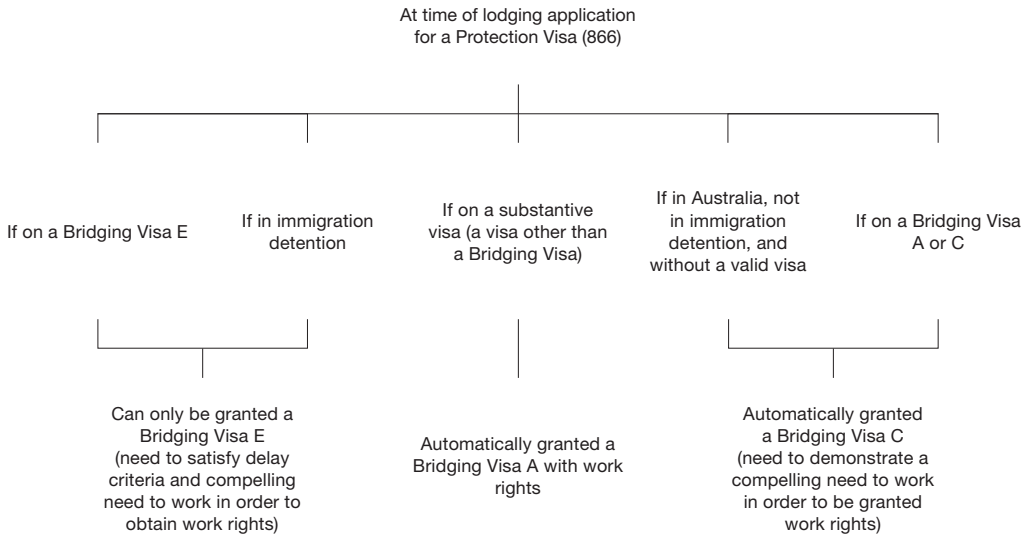

Figure 1: Flowchart of the class of Bridging Visa which will be granted to a Protection Visa applicant

tion. After lodging an application for a Protection Visa, she was released into the community on a Bridging Visa E. As a person who had been homeless for so long, she did not have a bank account or identity documents. She also had a number of serious health conditions which had been untreated. Yet she remained ineligible for Medicare or work rights.

A pressing need for healthcare is *not* a factor considered by the DHA in the application to grant work rights or access to Medicare.

Reasons for delay for Bridging Visa E holders

When considering whether or not a Bridging Visa E should be granted with the right to work, addressing the additional criteria relating to 'reasons for delay' often present a serious obstacle for asylum seekers needing to work (and access Medicare).

Department Policy states that it is very unlikely that a person who has remained in the community unlawfully for a long time, or only applied for a Protection Visa when they became located by the Department will have an acceptable reason for delay.[17] It is only if circumstances change in the applicant's home country, which is then made the basis for their protection claims that will then be considered an acceptable reason for delay.[18]

A closer look at Case Study 4: *Chelsea had a well-founded fear of harm at the hands of police, medical staff and others in her country of origin, and she had no reason to believe that her experience would be different in Australia. She had suffered trauma regarding this, and on this basis did not engage with authorities in Australia. Yet, none of these were considered an acceptable or 'reasonable' explanation for her delay in applying for the Protection Visa.*

The reason the Department imposes no work rights on Protection Visa applicants, and the considerations to be weighed in making the decision above, relate to the policy goal of encouraging people to genuinely and continuously engage with the Department and regularise their status.[19]

A closer look into Case Study 3: Parvesh and Diya pursued a Skilled Visa application and requested the Minister to intervene. While awaiting the outcome, the couple were granted a Bridging Visa E. Over four years passed between the date they originally lodged their application and the final refusal. They had never been unlawful, and had always complied with all visa requirements. As they did not apply for protection immediately upon arrival to Australia, they were deemed to have 'unreasonably' delayed in their Protection Visa application, and therefore did not meet the 'delay' criteria.

A lack of understanding of the immigration processes, limited English, and a trauma-based response, including inaction, are common and not unexpected experiences of asylum seekers.

A closer look at Case Study 2: Duc it was only while on a Bridging Visa C, and after applying successfully for work rights, that he became eligible for Medicare. Due to the fact that he was unlawful in Australia for an extended period of time and living in insecure housing, he had no valid identity documents. Due to the nature of his visa application, his Migration Agent advised him not to contact his embassy to apply for a new passport. Without the appropriate identity documents, he was still unable to obtain a Medicare card.

This situation is made more complex because the DHA no longer provide 'Immi-Cards' (a form of identity document) to Protection Visa applicants.

IV State and territory laws and policies on asylum seekers accessing medical treatment without expense

States and territories in Australia have begun to fill the gaps made by federal legislative requirements for Medicare and have enacted legislations to guarantee healthcare to asylum seekers regardless of the individual's Medicare status. Tasmania enacted legislation,[20] and the Australia Capital Territory enacted subordinate legislation,[21] to ensure that asylum seekers without Medicare can receive free medical treatment.

The Queensland Government has a policy which states that Medicare ineligible asylum seekers are not charged in Queensland public health services.[22]

Whereas, here in New South Wales, there is no legislation, subordinate legislation or policy ensuring access to health services without Medicare. Thus, an asylum seeker without Medicare is required to pay for their medical treatment unless they are covered by the Asylum Seeker Assistance Scheme or if the applicant is in immigration detention.[23]

Without access to Medicare, an asylum seeker is reliant on individual doctors' discretion in not charging for their services, or on the assistance of charities. For asylum seekers with a chronic illness requiring daily medication, not having access to the Pharmaceutical Benefits Scheme is costly and a barrier to efficient treatment. Without funds or the right to work, applicants in these situations, depend on doctors arranging for pharmaceutical companies to provide compassionate access to medication. This is not guaranteed and there is always the risk that it will end.

V The health of asylum seekers and the long-term effects of not having medical care

The effect of not having access to Medicare during the long process of applying for protection can be long lasting. A person's medical condition can be part of their claims for protection, yet they are required to survive without Medicare while their application is considered. An applicant's medical condition is not even considered in an application in order to be eligible for Medicare.

Extensive medical and community service literature finds that people from refugee backgrounds experience significantly higher rates of poor health, including mental health.[24] The reasons for this include both poor access to health services before coming to Australia, violence and other harms, and lack of access to services once in Australia.

The Australian Medical Association also highlights that asylum seekers are at high risk of mental health issues, including psychological disorders such as 'post-traumatic stress disorder, anxiety, [and] depression'.[25]

Health concerns for Case Study 4: Chelsea developed significant mental health and drug and alcohol use issues, as well as being diagnosed with HIV. Her extended periods of disengagement with health and other support services, as well as trauma responses has made her remain hesitant to seek health care and support.

Having to wait several years for the grant of a Protection Visa, all the while being denied Medicare, the right to work or ability to access medical services without large expense means that an individual is at a high risk of being in a worse health condition than when they had first made the visa application.

For Australia to assess an individual as a refugee, but in the process deny them access to work rights and Medicare, means that newly granted Permanent Protection Visa holders, when they finally do have access to Medicare, are likely in significantly worse health, and may require more health services than what they may have needed at the onset of their visa application.

VI Conclusion

To a Protection Visa applicant, the importance of having access to Medicare and healthcare cannot be understated. Protection Visa applicants are a particularly vulnerable group in need of care and assistance, and should not be excluded from involvement in society during the application process. The processing times for Protection Visas are at record lengths and during this time, the applicant waits with uncertainty and added stress. If an applicant is unable to engage with medical services during the application process then they will be in a worse physical and psychological condition than when they first made the application and may also be less likely to engage with the services after the grant of the visa.

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Disclaimer: This article is not construed as legal advice. The law and regulations referenced in this article are current at the time of writing. A person seeking advice on Bridging Visas should contact a Registered Migration Agent for advice specific to their circumstances. The names used in this article are aliases.

References

1 Under the *Migration Act 1958* (Cth) which implemented Australia's commitment to the *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) read together with the *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967), the *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), the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), and the *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

2 Such as Temporary Protection Visas (subclass 785) or Safe Haven Enterprise Visa (subclass 790) which are available to 'unauthorised maritime arrivals' (people who have arrived in Australia but have not passed immigration clearance).

3 This number excludes 'unauthorised maritime arrivals', and other people who have applied for a Temporary Protection Visa (subclass 785) or Safe Haven Enterprise Visa (subclass 790): Department of Home Affairs, *Onshore Humanitarian Program 2017–2018: Delivery and Outcomes for Non-Illegal Maritime Arrival* (Non-IMA) as at 30 June 2018 (Report, 30 June 2018) <https://www.homeaffairs.gov.au/research-and-stats/files/ohp-june-18.pdf>.

4 Ibid.

5 *Health Insurance Act 1973* (Cth) s 10.

6 Ibid ss 3(1), 10.

7 Ibid s 3(1).

8 *Migration Regulations 1994* (Cth) regs 2.05(1)-(2) ('*Migration Regulations*').

9 Ibid regs 2.01, 2.07.

10 Ibid reg 2.01, sch 1 reg 1301

11 Ibid.

12 Ibid reg 1.08. Financial Hardship is not defined in the *Migration Regulations*. Department of Home Affairs Policy states that 'a person can be taken to be in financial hardship if the cost of reasonable living expenses exceeds their ability to pay for them' and applicants are required to include supporting information about the person's financial circumstances: 'PAMS – Regulations – Sch2 Bridging Visas – Visa Application and Related Procedures – Compelling Need to Work' (Policy Document).

13 Ibid regs 2.01, 2.07.

14 Ibid reg 1.08; Department of Home Affairs, 'PAM3: Act - Compliance and Case Resolution - Program Visas - Bridging E Visas – Grant of Further BVE Without Condition 8101' (Policy Document) ('Grant of Further BVE').

15 *Migration Regulations* (n 8) reg 2.24, sch 2 reg 050.612, sch 8 condition 8101.

16 Ibid sch 2 reg 050.212(8)(b)–(c).

17 Department of Home Affairs (n 14).

18 Ibid.

19 Department of Home Affairs, 'PAM3: Act - Compliance and Case Resolution - Program Visas - Bridging E Visas – BVE 050, Protection Visa Applicants and Condition 8101' (Policy Document).

20 In Tasmania, the *Health (Fees) Regulations 2017* (Tas) s 9(2) states that a Medicare-ineligible asylum seeker is not required to pay any fees for any facility or service provided by or on behalf of the State. The *Health (Fees) Regulations 2017* (Tas) s 9(1) limits the definition of a Medicare-ineligible asylum seeker to a person who has applied for a Protection Visa and whose application has not been withdrawn or finally determined in accordance with the *Migration Act 1958* (Cth) and who is not permitted to engage in work in Australia or entitled to Medicare. This does not include applicants who are seeking to have their case reviewed through judicial review or ministerial intervention.

21 Section 7 of the *Health (Fees) Determination 2019 (No 1)* (ACT) provides asylum seekers with full medical care including pathology, diagnostic, pharmaceutical and outpatient services in ACT public hospitals free of charge. An asylum seeker is defined in the *Health (Fees) Determination 2018 (No 1)* (ACT) as a person who has an application for protection which is being assessed by the Commonwealth Government or, if they have been refused by the Commonwealth, a person who is an applicant for judicial review in the courts. This does not extend to those awaiting a decision on an application for ministerial intervention.

22 Queensland Health, 'Refugee Health and Wellbeing: A Policy and Action Plan for Queensland 2017–2020' (Policy Document, April 2017) <https://www.health.qld.gov.au/__data/assets/pdf_file/0031/646078/refugee-policy.pdf>.

23 NSW Health, 'Medicare Ineligible and Reciprocal Health Agreement: Classification and Charging' (Policy Directive No PD2016_055, 1 December 2016) 24. <https://www1.health.nsw.gov.au/pds/ActivePDSDocuments/PD2016_055.pdf>.

24 Australian Medical Association, 'Health Care of Asylum Seekers and Refugees — 2011. Revised 2015' (Position Statement, 23 Dec 2015) <https://ama.com.au/position-statement/health-care-asylum-seekers-and-refugees-2011-revised-2015>; Peta Masters et al, 'Health Issues of Refugees Attending an Infectious Disease Refugee Health Clinic in a Regional Australian Hospital' (2018) 47(5) *Australian Journal of General Practice*, 305; Kevin Pottie, 'Prevalence of Selected Preventable and Treatable Diseases among Government-Assisted Refugees: Implications for Primary Care Providers' (2007) 53(11) *Canadian Family Physician* 1928.

25 Australian Medical Association (n 24).

SSI's Community Kitchen
(Settlement Services International)