#### Deregulation of Migration Agent Lawyers:

#### Opportunities for Humanitarian Migration Law Practice

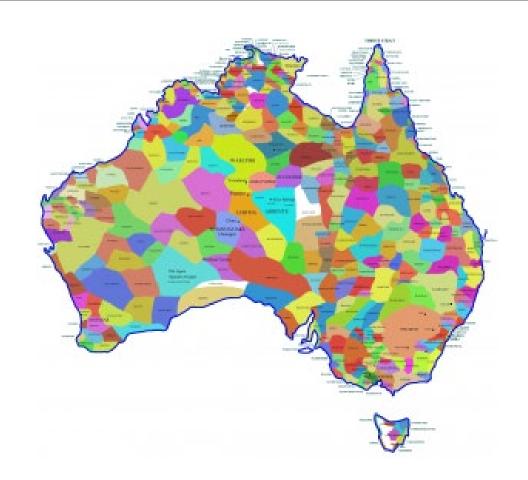
# 23 February 2021 - Online Webinar MARA SM 522

**Kylie McGrath Principal Solicitor** 





# Acknowledgement of Country



### Learning Objectives

- Communicate this significant change in the regulation of lawyers
- Provide a basic introduction to the structure of migration law
- •Introduce key information about areas of migration law that apply to the most disempowered asylum seekers, refugees and migrants
- •Provide information about RAILS including the work that we do, how to refer clients to us and volunteering/pro bono opportunities

### Outline

- 1. Deregulation
- 2. Basic structure of migration law
- 3. Key areas of migration law impacting on the most disempowered asylum seekers, refugees and migrants
- 4. Key practice tools
- 5. RAILS: Practice areas, referrals, pro bono and volunteering opportunities
- 6. Further resources

#### Presenter

- Kylie McGrath
- Principal Solicitor, Refugee and Immigration Legal Service (RAILS)
- •kylie.mcgrath@rails.org.au

References to 'the Act' and 'MA' are to the *Migration Act 1958* (Cth)



### 1. Deregulation

#### The current state of the law:

A lawyer is prohibited from providing <u>immigration assistance</u> unless they maintain a parallel registration as a Migration Agent: *s280(1) Migration Act 1958 (Cth)* 

<u>Immigration assistance</u> defined in s276 Migration Act 1958 (Cth)

A lawyer can provide immigration legal assistance without that parallel registration as a Migration Agent: s280(3) Migration Act 1958 (Cth)

Immigration legal assistance defined in s277 Migration Act 1958 (Cth)

# Deregulation

From 22 March 2021...

The Migration Amendment (Regulation of Migration Agents) Act 2020 (Cth) will take effect.

Lawyers, who are not Registered Migration Agents, will no longer be prohibited from providing immigration assistance.

### Deregulation

It is very important to keep in mind that all the rules that apply to lawyers practising in any other area of law continue to apply:

- Must have a practising certificate
- Need appropriate supervision
- Need to maintain a reasonable standard of competence and diligence
- You must work within a 'law practice' as defined by the Legal Profession Act 2007 (Qld)

- Lawyers who are not currently Migration Agents
- Lawyers who are currently Migration Agents
- Unrestricted practising certificate holders
- Restricted practising certificate holders
- Migration Agents who do not currently and are not eligible to hold a practising certificate

Impact of the change on lawyers who are not currently Migration Agents

You can now practice in all areas of migration law as a lawyer

You do not need to maintain a separate registration as a Migration Agent

Impact of the change on lawyers who are currently Migration Agents

Unrestricted practising certificate holders

Your Migration Agent registration will automatically cease on 22 March 2021

#### Impact of the change on lawyers who are currently Migration Agents

#### Restricted practising certificate holders

- Your registration as Migration Agent will not automatically cease on 22 March 2021
- It will automatically cease once you hold an unrestricted practising certificate
- You are required to notify OMARA within 28 days of becoming an unrestricted practising certificate holder
- There is a period of time in which you can choose whether or not to maintain your MARA registration
  - You have an initial 2 year grace period to maintain a dual registration as both as lawyer and Registered Migration Agent if you remain on a restricted practising certificate
  - This can be extended for a further 2 years in certain circumstances on request
  - You may choose not to maintain or renew your Migration Agent registration from 22 March 2021. You may wish to consider this if, for example, you are appropriately supervised within a legal practice.

<u>Impact on Registered Migration Agents who do not currently and are not eligible to hold a practising certificate</u>

Will not impact on your registration as a Migration Agent

#### **Specific scenario of concern:**

Are you currently a lawyer and Migration Agent but will no longer be a Migration Agent from 22 March 2021?

Are you working in a migration practice that is not a legal practice?

You will need to carefully consider whether you are working through an appropriate structure.

### Future Implications

#### **Becoming a migration agent in the future:**

Graduate Diploma in Australian Migration Law and Practice + Capstone

Practising certificate no longer sufficient

#### **Establishing a migration practice in the future:**

Will need to be a 'law practice' if you are not a Migration Agent and operating the practice in that capacity only

### Practical Implications

All lawyers who are currently migration agents to update their practising certificate on the OMARA website

In addition, email OMARAderegenquiries@homeaffairs.gov.au by 27 January 2021 if

- You are a restricted practising certificate holder (also advise which state or territory issued that certificate)
- You previously held an Unrestricted Practising Certificate but no longer do;
- You intend to cease to be the holder of an Unrestricted Practising Certificate before 22 March 2021;

# Practical Implications

- New 956 form is expected Form 956 Appointment of a registered migration agent, legal practitioner or exempt person.
- Immiaccounts

### Legal Disclaimer

This is not migration or legal advice and should not be relied upon to inform your decisions or practice. Please undertake your own research about your specific circumstances.

Please obtain specific advice on your circumstances as needed through:

- MIA (<u>advice@mia.org.au</u>),
- OMARA (https://www.mara.gov.au/contact-us/), or
- Through your state or territory legal professional body.

# Summary

# Poll

# 2. Basic Structure of Migration Law

# Key Sources of Law

- Migration Act 1958 (Cth)
- Migration Regulations 1994 (Cth)
- Case law
- Policy: Procedures Advice Manual 3 (PAM 3)
- Ministerial Directions

# Poll

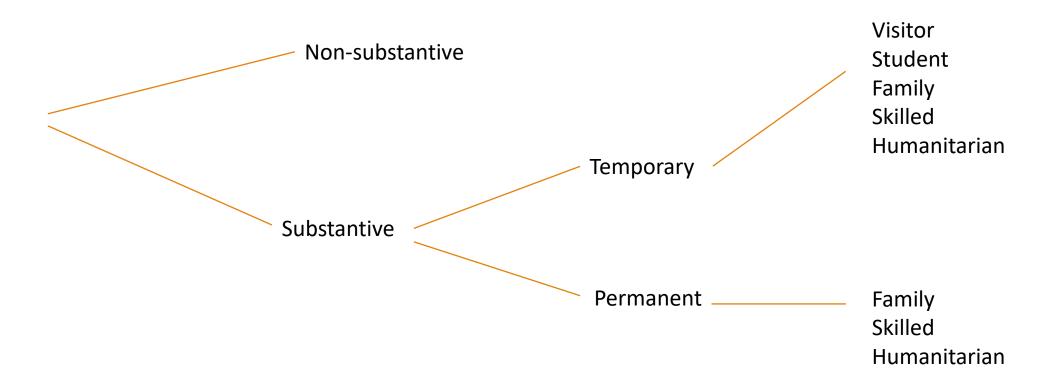
### Key Decision Makers

- Department of Home Affairs, Australian Border Force
- Merits review: Administrative Appeals Tribunal (Migration and Refugee Division or General Division) or Independent Assessment Authority AA (Parts 5, 7 and 7AA MA)
- Judicial review: Federal Circuit Court, Federal Court or High Court (Part 8 MA)
- Ministerial Intervention
- Judicial Review
  - Privative Clause: s474(1) + S157/2002 v Commonwealth (2003) 211 CLR 476
  - Significant provisions regulating lawyer's conduct in relation to migration litigation
    - A lawyer must sign and certify, on reasonable grounds, that migration litigation has reasonable prospects of success in order to file a document commencing migration litigation (s486I)
    - Costs can be pursued against a person who encourages another to pursue migration litigation that does not have reasonable prospects of success

### Foundational Legislative Provisions

- If a person is present in Australia and is not a citizen of Australia, that person must have a visa: s13 MA 1958
- If they do not, they can be detained (in immigration detention) and removed from Australia: s189(1) MA 1958
- The power to grant a visa to a person is set out in s29 of the Act

# Key Categories of Visas



# Poll

# What must be established for a person to be granted a visa?

#### **Validity Criteria:**

- S46 and Reg 2.07
- Schedule 1

#### **Additional Criteria:**

- Schedule 2
- Criteria that goes to the heart of the visa application
- Health, character and the integrity of previous visa applications

3. Key Areas of Law Impacting on the Most Disempowered Asylum Seekers, Refugees and Migrants

#### Those who fear to return to their country of origin

#### Three classes of visas, known as protection visas: s35A

#### Permanent:

Protection Visa (Class XA) Subclass 866

#### *Temporary*:

- Temporary Protection (Class XD) Subclass 785
- Safe Haven Enterprise (Class XE) Subclass 790

#### **Key Validity Requirements**

Schedule 1, s46, s48A, s91N, s46A, s48B, s91K

#### Those who fear to return to their country of origin

#### Key Additional criteria related to that fear of return

- Applicant must show either that they are a refugee, meet the complimentary protection criteria or a member of the family of one of these: s36(2)
  - Refugee Applicant is outside the country of his or her nationality (or former habitual residence) and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country: s5H(1)
  - 5 key elements
    - Real chance
    - Serious harm
    - For one or more of 5 broad reasons (Convention ground)
    - State can't provide adequate protection
    - Nowhere of safety in relevant country

#### Those who fear to return to their country of origin

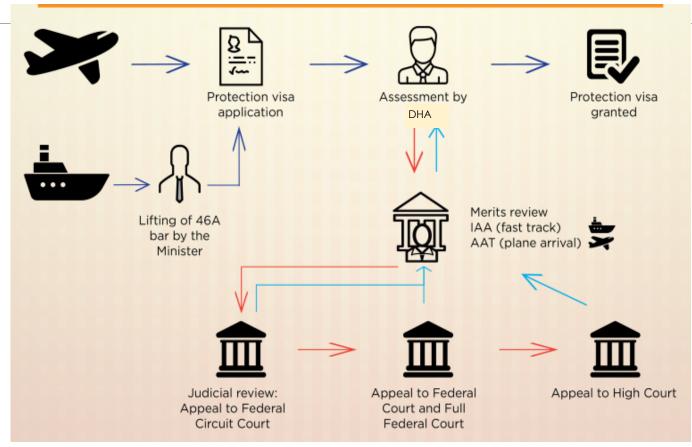
#### **Complementary Protection**

The Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm: s36(2)(aa) MA 1958

#### Significant Harm

- Arbitrarily deprived of life
- Death penalty
- Torture
- Cruel or inhumane treatment or punishment
- Degrading treatment or punishment

### Onshore protection application process



Source: Refugee Advice and Casework Service (RACS)

#### Key Resources

AAT Guide to Refugee Law in Australia - <a href="https://www.aat.gov.au/guide-to-refugee-law-in-australia">https://www.aat.gov.au/guide-to-refugee-law-in-australia</a>

ECOI net - <a href="https://www.ecoi.net/">https://www.ecoi.net/</a>

#### Refugee Family Reunion

4 key options for refugee family reunion

- Split family provisions
  - Class XB, Subclasses 200-204
  - Validity requirements Sch 1
    - No application fee
  - Key additional requirements Sch 2

Not a viable option for those who arrived in Australia by plane and then claimed protection

### Refugee Family Reunion

#### **Offshore Partner Visa**

- Temporary Class UK, subclass 820 leading to Permanent Class BS, subclass 801
- Validity requirements Sch 1
  - Application fee \$7715
  - \$2860 or 1935 for each additional child
- Key additional requirements Sch 2
  - For partner or spouse

### Refugee Family Reunion

#### **Offshore Child Visa**

- Class BT, subclass 802
- Validity requirements Sch 1
  - Application fee \$2,665
- Key additional requirements Sch 2
  - Must be dependent child of the sponsor
  - Under 18,
  - Or over 18, engaged in full time study, financially dependent

### Refugee Family Reunion

#### **Orphan Relative**

- Class BT, Subclass 117
- Validity requirements Sch 1
  - Application fee \$1630
- Key additional requirements Sch 2
  - Orphan: Reg 1.14
    - Has not turned 18
    - Does not have spouse or de facto
    - Cannot be cared for by either parent because each of them is dead, permanently incapacitated or of unknown whereabouts
  - Relative: Reg 1.03
    - Brother or sister (including step)
    - Grandparent (including step)
    - Aunt or uncle (including step)
    - Niece or nephew (including step)

# Poll

### Those Who Have Experienced Family Violence

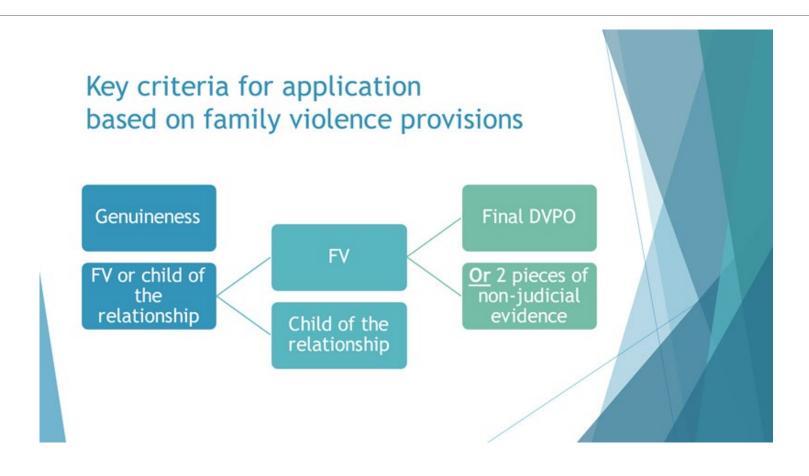
- The experience of family violence can have a positive, negative or neutral impact on visa status
- A key area of interaction between family violence and migration law is the 'family violence provisions'
- Some complexity to partner visa applications
  - Onshore, offshore
  - Apply simultaneously for temporary and permanent visa

#### THREE EXCEPTIONS TO RULE

- Death of the partner
- Child of the relationship
- Family violence provisions



### Family Violence Provisions



#### Cancellations

- Increasingly common feature of migration law
- Cancellation on the basis of:
  - Identity
  - Integrity
  - Character
- Key cancellation powers
  - s109
  - s116
  - s501

# Poll

## 4. Key Practice Tools

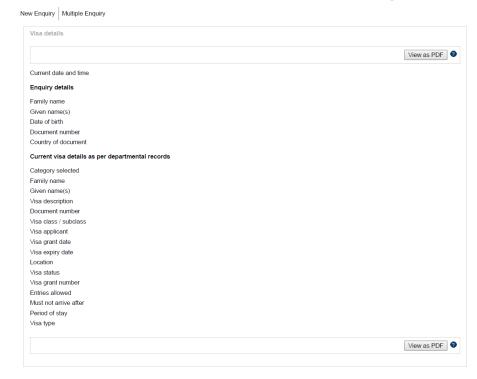
#### Legend



## Key Practice Tools

#### **VEVO**

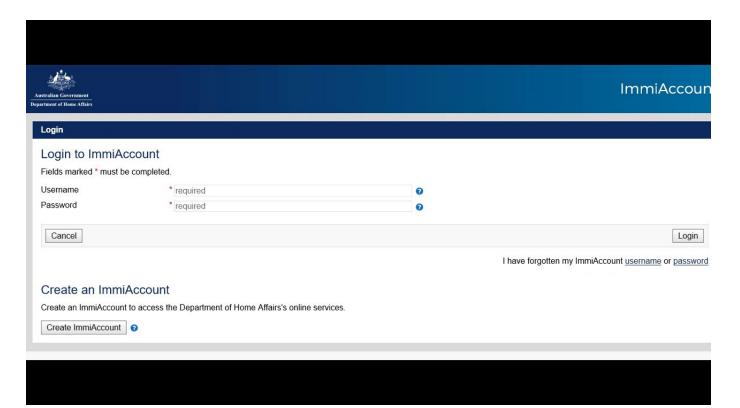
VEVO for Organisations



https://immi.homeaffairs.gov.au/visas/already-have-a-visa/check-visa-details-and-conditions/check-conditions-online

# Key Practice Tools

#### **Immiaccount**



https://online.immi.gov.au/lusc/login

### Key Practice Tools

**Form 956** 

https://www.abf.gov.au/form-listing/forms/956.pdf

**FOI** 

https://www.homeaffairs.gov.au/foi/Pages/how-to-make-a-request.aspx

### 5. Key Practice Tips

- Cross cultural communication
  - Don't make assumptions
  - Building trust is important
  - Be conscious of dress
  - Shaking hands may not be appropriate
  - Be alert to impacts of trauma and mental health conditions
  - Be conscious of impact of gender on dynamics
    - between lawyer/Migration Agent and clients, and
    - between client and anyone else who might be present in the appointment or the space.
  - Be alert to shame and the impact that may have on the information provided to you

### Using Interpreters

- When to use an interpreter? At all times when English is not the clients best or preferred language
- How to use an interpreter?
  - Contact interpreter through the Translating and Interpreting Service (TIS) https://www.tisnational.gov.au/
  - Arrange seating so client can hear interpreter (phone) or place the interpreter to the side for direct communication (on-site interpreter)
  - Speak directly with the client. Maintain eye contact where appropriate.
  - Clearly establish context and ground rules:
    - Explain role of interpreter and confidentiality
    - Who you are/where you fit in the legal system
    - Why you are interviewing and asking questions
    - What you're aiming to achieve
  - If control slips stop straight away and re-establish ground rules
  - Avoid private conversations between the interpreter and client, and between yourself and interpreter
  - Periodically check the client is okay with the interpreter and the interpretation, and understands your questions and advice

### Using Interpreters

- Which interpreter to use?
  - Ask what client's preferences are....
    - A client may not be comfortable with an interpreter from another ethnic or political group
    - A client may prefer a male/female interpreter
    - A client may prefer an interpreter not from QLD (possible when using a telephone interpreting service)
  - Competency of interpreters
    - Use a NAATI accredited interpreter at L3 or higher wherever possible
    - NAATI recommends L4 for any court work

https://jccd.org.au/wp-content/uploads/2018/02/JCCD-Interpreter-Standards.pdf

# Consistency and Attention to Detail are Key

Fundamental driving forces within the migration system

- Integrity of the migration system
- Concept that visa status and citizenship are a privilege, not a right

# Consistency and Attention to Detail are Key

#### This means that:

- All information provided to the Department must be;
  - true and correct
  - carefully scrutinised for internal consistency before being provided to the Department
  - cross referenced against
    - all previous information held by the Department (FOI)
    - all publicly available information
    - all information provided to other government Departments and agencies that are shared with the Department
- All documents provided must be genuine

#### **Consequences:**

- Visa or citizenship refusal or cancellation
- Immigration detention and removal
- Re-entry bans

#### RAILS

#### **Practice areas**

- RAILS core areas of practice are:
  - Protection visa applications for those who arrived in Australia by plane
  - Legal support for asylum seekers and refugees who have arrived in Australia by plane including transitory clients
  - Family violence provisions
  - Refugee Family Reunion
  - Cancellation of refugee and humanitarian visas (or partner visas relying on family violence provisions) on basis of integrity and identity provisions
- At Department, merits review and in the Courts
- Advice services
  - Evening Advice Service: Wednesday night advice clinic for financially disadvantaged clients in relation to priority areas including matters with deadlines, status advices, citizenship and refugee family reunion

Day advice to those who have experienced family violence

### How to Refer to RAILS

|  | Mode of service:              |  |
|--|-------------------------------|--|
|  | wode of service:              |  |
| RAILS ADVICE   | In person: EAS                |  |
| LEGAL TASK   | In person: Daytime advice     |  |
| Refugee and Immigration NO:  | Phone advice                  |  |
| DATE OF SERVICE:   | Mail advice                   |  |
| DATE OF SERVICE.   | Guaracti advice.              |  |
| CLIENT DETAILS   |                               |  |
| First Name:  | D.O.B:                        |  |
| Surname:   | Phone:                        |  |
| Address:   | Post Code:                    |  |
| Gender: Male Female  | Country of birth:             |  |
| Language spoken at home:   | Current visa:                 |  |
| Requires Interpreter: Yes No   | Date of arrival in AUS:       |  |
| Spoken English: Very well Well Not well Not all all Not stated   |                               |  |
| Written English: Very well Well Not well Not all all Not stated  |                               |  |
| Aboriginal or TSI: No Yes, Aboriginal Yes, TSI Both  |                               |  |
| Disability: No Yes If yes, describe:   |                               |  |
| Family type: Two parent family with dependent children No, of dependents                               |                               |  |
| Sole parent family with dependent children No. of dependents   |                               |  |
| Not living in a family (shared house, hostel, alone) Other:  |                               |  |
| Relationship status:  Never married   Widowed   Divorced   Seperated   Married (de facto)   Not stated |                               |  |
| EMPLOYMENT DETAILS   |                               |  |
| Status: Centrelink income: Income level:   | ligh ☐ Income source: Eamed ☐ |  |
| Employed No Med  | lium Government allowance     |  |
|  | Low No income                 |  |
| Other: If yes, what: No inco   | ome Other:                    |  |
| Any Dependants:  | <u> </u>                      |  |
| PROBLEM DETAILS  |                               |  |
| Description:   |                               |  |
|  |                               |  |
|  |                               |  |
|  |                               |  |
|  |                               |  |
|  |                               |  |
| Other parties involved: DIBP Other party Date of Birth   | Related client Relationship   |  |
| Name Date of Birth   | Relationship                  |  |
|  |                               |  |
|  |                               |  |
|  |                               |  |
|  |                               |  |

Self Referral Forms and Agency Referrals:

https://www.rails.org.au/our-legal-services/referral-forms

RAILS Admin:

07 3846 9300, <u>admin@rails.org.au</u>

# Pro Bono Volunteering Opportunities at RAILS

#### **CURRENT**

- Immigration lawyers with Unrestricted Practising Certificate/ migration agents (2 yrs> exp): General migration law Evening Advice Services on Wed nights (semi-remote). Apply via our website: <a href="https://www.rails.org.au/get-involved/volunteer">https://www.rails.org.au/get-involved/volunteer</a>
- For lawyers without migration law expertise: Unrepresented Asylum Seeker program Statement Clinics on Tues nights (face-to-face). Reapplication form filling and drafting updated Statement of Claims. RAILS contact: <a href="mailto:stacey.parker@rails.org.au">stacey.parker@rails.org.au</a>
- For career-break/ part-time lawyers/ law students/ migration agents: Casework assistance 9am-5pm one business day/ week (face-to-face). Apply via our website: <a href="https://www.rails.org.au/get-involved/volunteer">https://www.rails.org.au/get-involved/volunteer</a>

#### WATCH THIS SPACE

- Onshore protection visa application assistance opportunities coming soon
- Other areas of need: visa cancellations (esp in immigration detention) and citizenship applications.
- Contact our Pro Bono Coordinator <u>Stacey.Parker@rails.org.au</u> if you or your firm is interested in partnering with us in any of these spaces.

### 6. Further Resources

Lexis Nexis Migration Law Encyclopedia: <a href="https://clcs.org.au/members/lexisnexis?q=members/lexisnexis">https://clcs.org.au/members/lexisnexis?q=members/lexisnexis</a>

Migration Institute of Australia Notices: <a href="https://mia.org.au">https://mia.org.au</a>

Asylum Seekers Legal Working Group – chaired by RAILS to assist in the coordination of legal assistance services to asylum seekers in Queensland: contact <a href="mailto:secondee@rails.org.au">secondee@rails.org.au</a>

Compulsory Professional Development

- Immigration Essential for Lawyers <a href="https://mia.org.au">https://mia.org.au</a>
- RAILS CPD program

### CPD 2021 ww.rails.org.au/education

| 30 March             | Best practice for RAILS Evening Advisors                       |
|----------------------|--|
| 27 April             | Safe Haven Enterprise Visas - options and best practice        |
| 25 May               | Family Violence and migration law                              |
| Friday               | Assessing your digital capacity and innovation profile         |
| Friday<br>18 June    | Ethics - legal and ethical issues for clients with impairments |
| Core areas intensive | Assisting and advocating for clients with impaired capacity    |
| 27 July              | Presenting good submissions to the AAT                         |
| 31 Aug               | Cancellation of visas  |
| 28 Sept              | Judicial Review  |
| 26 Oct               | Onshore Refugees – Permanent Protection                        |
| 30 Nov               | Humanitarian visas   |

# Questions

# Thank you



