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Submission to the Senate Standing Committee on Legal and Constitutional Affairs

Inquiry into the operation of
Commonwealth Freedom of Information
(FOI) laws

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Acknowledgment of Country

*We acknowledge the Traditional Owners,
Custodians and Elders of the Gadigal People of
the Eora Nation, past, present, and future, on
whose traditional land we work.*

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Introduction

The Refugee Advice and Casework Service (**RACS**) provides critical free legal advice, assistance and representation to financially disadvantaged and vulnerable people seeking asylum in Australia. We advocate for systemic law reform and policy that treats refugees with justice, dignity and respect, and we make complaints about serious human rights violations to Australian and United Nations bodies.

RACS acts for and assists refugees, people seeking asylum, people that are stateless or displaced, who are in the community, in immigration detention centres, alternative places of detention and community detention. Our services include supporting people to apply for protection visas, apply for work rights and permission to travel, apply for family reunion, lodge appeals and complaints, assist with access to citizenship and challenging government decisions to detain a person.

RACS welcomes this review into the practical operation of Commonwealth Freedom of Information (**FOI**) laws. Our submission focuses on the ways in which RACS utilises the FOI system, and the issues encountered when making FOI requests from the Department of Home Affairs (**the Department**). As such, this submission is divided into the following sections:

1. A characterisation of RACS' client profile and our use of FOI laws;
2. Issues in processing FOI requests by the Department of Home Affairs (**the Department**); and
3. The impact of delays on RACS' clients.

Use of Freedom of Information (FOI) laws

Access to information is a fundamental element of Australian administrative law.¹ It allows individuals to have access to information about them that is held by government agencies, so that they may know on what basis decisions that fundamentally affect their lives are made.² Robust procedures for granting access to information allows for greater scrutiny of the reasoning provided for in such decisions, which in turn can improve the quality of decision-making by government agencies.³

As outlined in the introduction to this submission, RACS runs specialised programs that provide critical free legal advice, assistance, and representation, for financially disadvantaged and vulnerable people seeking asylum in Australia including but not limited to assisting women who have experienced or fear domestic, family or gender-based violence, assisting people subject to Australia's offshore processing regime, and assisting refugees to reunite with their families in Australia.

In each of our specialised program areas mentioned above, and across all our programs and projects, timely access to information held by the Department is critical to our ability to provide legal advice and assistance to our client, and in turn for our clients to understand their legal rights and make an informed decision about options available to them. For example, for people experiencing long-term detention, especially those subject to Australia's offshore processing regime, access to detention records is critical and assist us understand our clients' migration history in order for us to advise on legal options open to them.

Similarly, the need for timely access to information is also critical to RACS' ability to provide legal assistance to women who have experienced or fear domestic, family or gender-based violence. In RACS' experience women who have experienced or fear domestic or gender-based violence whose partners had control over their application, and have since separated, often have limited understanding of their legal status, and limited or no access to documents relation to any visa application. In such matters FOI requests are the only reasonably safe option to obtain documents that help RACS understand our clients' immigration status and to provide with legal advice and assistance.

In the refugee status determination (**RSD**) process, access to information can be the difference between an applicant for protection being granted safety or deportation to harm and persecution. RACS provides critical legal assistance to people seeking asylum in Australia at all stages of this process. From the initial stages of applying for protection to applying for citizenship, this process requires an applicant to accurately recall extensive

¹ Ludwig, Joe, "The Freedom of Information Act - No Longer a Substantial Disappointment" [2010] AdminRw 3; (2010) 59 Admin Review 4.

² Ibid.

³ Ibid.

details concerning their life history. For example, Form 866 used to apply for a protection visa is a 36-page document that asks the applicant to record information about their family, education, residential history, travel history, employment, initial arrival in Australia and their history of persecution.⁴ Where an applicant arrived in Australia without a visa, they can also be asked to recall details of their Arrival/Entry Interview with the Department, during which they are questioned about their protection claims and identity.

The assessment of credibility plays a fundamental role in determining an individual's need for protection. Decision makers from the Department are trained to assess an applicant's credibility at each stage of the protection assessment process.⁵ This is done by collecting information from the applicant, identifying any inconsistencies in their claims, testing the applicant's knowledge, inviting further comment, and finally making and recording a finding of credibility.⁶ Whether evidence provided by the applicant is accepted as credible impacts if and how a decision maker can consider that evidence in their analysis of a well-founded fear of persecution and real risk of serious harm.⁷ If an applicant fails to provide information or provides information that is inconsistent or contradictory with previous representations, it may lead to an adverse credibility finding. It follows that it is essential for applicants to be aware of previous representations made to the Department concerning their claim for protection in order to avoid such doubts of their credibility.

However, in RACS' experience, the practical ability of people seeking asylum to accurately recall or access such previous representations is severely limited. This issue is a result of the compounded impact of a number of psycho-social, cultural, and linguistic barriers which include, but are not limited to:

- **The experience of trauma:** It is well established that people seeking asylum globally experience multiple traumas before and during their arrival in the country where they are seeking protection.⁸ Studies have revealed that trauma, particularly of the kind experienced by people seeking asylum, often leads to memory loss or gaps, loss of concentration, impairment in cognitive function and the deterioration of mental health.⁹ Traumatic memories are also uniquely encoded in a manner such that an applicant may be able to recall the sensory and emotional aspects of an event (i.e. sights, sounds, emotions) but have difficulties with identifying

⁴ Form 866 can be accessed here: <<https://immi.homeaffairs.gov.au/form-listing/forms/866.pdf>>

⁵ Department of Home Affairs (2020) *Legal Framework for Protection Processing (Refugee Law and CP) – May 2020* <<https://www.homeaffairs.gov.au/foi/files/2020/fa-200500429-r1-document-released-part-5.PDF>>.

⁶ Ibid

⁷ United Nations High Commissioner for Refugees (UNHCR) and the European Refugee Fund of the European Commission (2013) *Beyond Proof: Credibility Assessment in EU Asylum Systems* <<https://www.unhcr.org/sites/default/files/legacy-pdf/51a8a08a9.pdf>>.

⁸ Sanjida Khan, Sara Kuhn and Shamsul Haque, 'A Systematic Review of Autobiographical Memory and Mental Health Research on Refugees and Asylum Seekers' (2021) 12(1) *Frontiers in Psychiatry* 1, 2.

⁹ Ibid 5; Philippe Charlier et al, 'Memory Recall of Traumatic Events in Refugees' (2018) 392(1) *The Lancet* 2170; Altaf Saadi et al, 'Associations Between Memory Loss and Trauma in US Asylum Seekers: A Retrospective Review of Medico-legal Affidavits' (2021) 16(3) *PLoS ONE* 1, 5.

contextual aspects (i.e. time, place, sequence, context).¹⁰ For some people seeking asylum, the need to cope with past traumas may lead to avoidance, suppressing memories, or dissociation when prompted to recount their experience of these traumatic events.¹¹ This can explain why there may be a lack of detail, incoherence or gaps in an applicant's retelling of an event. The impacts of post-traumatic stress disorder including depression, anxiety, disturbed sleep patterns, nightmares, headaches, pain, and cardiovascular symptoms further impede the accuracy of memory recall for people seeking asylum.¹²

- **Limited English language skills:** Multilingual and cross-communication in the protection process can also allow for misunderstanding. While interpreters may aid with addressing some of these linguistic barriers, cultural and dialectical differences can continue to cause communication issues. Applicants also receive long and dense letters from the Department with information concerning their protection matter. For example, a protection visa decision and assessment record can be multiple pages of information setting out complex findings about an applicant's identity, credibility, the applicability of relevant laws to their claims and an assessment of whether they meet the refugee criterion. This information is only provided in English with no translation in the applicant's chosen language. Without assistance, it is unlikely that a non-English speaking applicant would be able to genuinely understand the information provided to them and the legal consequences this has on their matter.

In light of the significant barriers faced by refugees and people seeking asylum in communicating and recalling information, FOI requests are also critical in RACS's ability to access information including health records that can uncover critical information about an applicant's physical and mental health that may be determinative in the RSD process.

More broadly and related to the barrier faced by refugees and people seeking asylum in understanding their legal rights, and accessing justice, FOI requests, have also assisted RACS to uncover that clients were impacted by the unlawful disclosure of personal information by the Department of people held in immigration detention in February 2014. Such findings have enabled RACS to advise clients on risk resulting from the unlawful disclosure of their personal information including to their safety if returned to their country

¹⁰ United Nations High Commissioner for Refugees (UNHCR) and the European Refugee Fund of the European Commission (2013) *Beyond Proof: Credibility Assessment in EU Asylum Systems*, p. 65 < <https://www.unhcr.org/sites/default/files/legacy-pdf/51a8a08a9.pdf>>.

¹¹ United Nations High Commissioner for Refugees (UNHCR) and the European Refugee Fund of the European Commission (2013) *Beyond Proof: Credibility Assessment in EU Asylum Systems*, p. 65 < <https://www.unhcr.org/sites/default/files/legacy-pdf/51a8a08a9.pdf>>.

¹² United Nations High Commissioner for Refugees (UNHCR) and the European Refugee Fund of the European Commission (2013) *Beyond Proof: Credibility Assessment in EU Asylum Systems*, p. 65 < <https://www.unhcr.org/sites/default/files/legacy-pdf/51a8a08a9.pdf>>.

of origin, the safety of their families and to advise and assist in complaints to the Office of the Australian Information Commissioner (AOIC).

Overall, applicants frequently approach RACS with little or no documents relating to their protection matter. They often struggle to explain their immigration history or current visa situation. In a review of 111 clients assisted by RACS in 2020 and 2021, around 70% of clients who requested legal assistance did not have substantive documents related to their protection matter.¹³ Of the 34 clients who did, 47% only had access to these documents as they were previously assisted and held by RACS.¹⁴

Case study: exploring the limitations in accessing and retaining legal documents

Arash* first contacted RACS for assistance with reapplying for a temporary protection visa on 9 June 2022. At the time, he held a Safe Haven Enterprise VISA (**SHEV**) that was due to expire on 13 July 2022. If Arash did not reapply for a visa before his existing SHEV expired, he would be considered an unlawful non-citizen and at risk of being held in immigration detention.

Arash was very distressed when speaking with RACS. The only document he had in his possession that related to his protection matter was a picture of the first page of his SHEV grant notification. This provided very limited information about his matter or visa history, such as the date of his original visa application, his location at the time he was granted his visa, the date his SHEV was granted and identifying details such as his application ID. Crucially, it did not provide any clarity about the substantive reasons Arash claimed protection in Australia, any evidence provided in support of this or any findings by a decision maker in relation to the consideration of his application.

The application Arash was seeking assistance with requires an applicant to list their residential address history for the past 5 years, whether their claims for protection have changed since they were first granted a SHEV and the specific details of any offence they have been convicted of. After having experienced persecution in his country of origin, a history of substance abuse and several periods of detention in Australia, Arash cited significant issues with accurately remembering the details of his protection application and life history. He believed he first arrived in Australia around 2012. He

¹³ This review involved examining the files of 111 clients: 38 from the period of 6 January 2020 to 9 March 2020, and 73 from the period of 17 November 2021 to 20 February 2022. These clients held a temporary protection visa and contacted RACS for assistance with applying for another temporary protection visa before their existing visa expired. In this context, the term 'substantive documents' refers to whether a client had a copy of their initial protection visa application in their possession. This would be critical to ensuring that the information provided in their new application did not raise any inconsistencies or contradictions with their first application.

¹⁴ These documents were held by RACS either because the organisation assisted the client with applying for a protection visa, or due to receiving a historic FOI release.

could recall that he made a protection visa application and the date it was granted due to the picture he retained of his grant.

During his contact with RACS, Arash also disclosed that his visa was cancelled in 2018. He stated that he subsequently spent three years in various places of detention before he was released around 2021. However, he struggled to provide full details of the offences he was convicted of, including when he was charged, who was involved, what the Court's findings were and any sentence that was delivered. The RACS lawyer assisting Arash was able to deduce that his visa cancellation was likely revoked. Arash said he had no real understanding of his visa cancellation and how it was revoked. He believed that he had legal representation to assist him with this matter, but that he was uncertain of what information was provided to the Department to revoke the decision to cancel his visa.

* Names, countries of origin and other personal identifiers have been changed in case studies in order to protect confidentiality.

Without a comprehensive understanding of an applicant's legal situation and immigration history, RACS is unable to accurately and effectively advise or assist a client. In these circumstances we rely on access to an applicant's Departmental file through the FOI scheme to bridge this gap. Only once we obtain a client's file from the Department are we then able to provide full legal advice that is catered to their specific circumstances and history. Having access to these documents empowers lawyers with the necessary information to thoroughly advise applicants about their legal options and rights. At times, the unavailability of documents and information related to a client's protection matter can be determinative of our decision as to whether or not we are in a position to assist them. A functioning, timely and robust FOI scheme is critical to the performance of our organisation as a legal service provider, and to our clients' ability to understand and access their legal rights and options.

Issues in processing FOI requests

Urgency

The necessity of a timely and efficient FOI scheme is magnified in circumstances where clients have a critical deadline and an urgent need to access their information. Such deadlines can include an invitation to apply for a visa after the lift of a statutory bar, an invitation to attend a protection visa interview, a request to provide further information, a request to respond to a notice of intention to refuse/ cancel a visa, a visa expiry date, deadlines to appeal an administrative decision and Court hearing dates. These deadlines are often tight, non-negotiable and place a significantly high burden on already marginalised clients to provide information they may not recall or have access to.

An example of this is the 1 October 2017 deadline that was given to 7500 people seeking asylum in Australia.¹⁵ Between 2012 and 2015 the Australian Government barred people who arrived by boat after 13 August 2012 from making an application for protection. From 2015 onwards, this statutory bar was progressively lifted for cohorts of people in this group. Towards the end of 2016, the Department issued warning letters to people yet to apply for protection. This included people who were waiting for legal assistance, given the Australian Government simultaneously removed access to funded legal assistance for this community as a whole around the same time. On 21 May 2017, then Minister for Immigration, Peter Dutton announced that if people did not apply for a protection visa by 1 October 2017 they would be deemed to have forfeited any claim for protection, be barred from any other visa in Australia and returned to their countries of origin.¹⁶ As discussed earlier, the process of applying for protection in Australia is a complex and detailed process, and requires that an applicant accurately recall extensive details concerning their life history. Many of these applicants would have arrived in Australia and participated in an arrival interview between 2012 and 2013, to then be prevented from applying for a protection visa for several years, and then summoned to complete an application with supporting evidence.

Case study: responding to urgent deadlines

Milad* arrived in Australia on 1 April 2013 via boat. He was interviewed by an officer of the Department of Immigration and Citizenship on 9 May 2013 after being detained on arrival. At this appointment, Milad was asked about his identity, his arrival in Australia and his reasons for claiming protection. He was advised that if any information given at a future interview is different from what he provided during his Arrival Interview, doubts may be raised about the reliability of what he has said.

¹⁵ Hon Peter Dutton MP (2017) *Lodge or leave – Deadline for illegal maritime arrivals to claim protection*, <https://minister.homeaffairs.gov.au/peterdutton/Pages/2017/deadline-for-illegal-maritime-arrivals-to-claim-protection.aspx>.

¹⁶ Ibid

Between the time of his arrival until March 2016, Milad was living in the community but was barred from making an application for protection. After receiving a letter inviting him to apply for protection, Milad approached RACS for assistance. On 26 April 2017 he received a letter from the then Department of Immigration and Border Protection (**DIBP**) instructing that he had a final 30 days to lodge his protection visa application. Milad was then assisted to prepare his paper application and supporting statement which was then provided to him on 16 May 2017 to finalise and lodge with the DIBP.

* Names, countries of origin and other personal identifiers have been changed in case studies in order to protect confidentiality.

Milad's case demonstrates the strain that is placed on applicants for protection where they are subject to these strict deadlines by which they must provide information or make applications to the Department. It is unreasonable to place such a burden on vulnerable applicants to abide by these deadlines where, as explored below, the Department does not adhere to its own statutory deadline to fulfil FOI requests. This discrepancy between the burden placed on refugee and people seeking asylum to meet deadlines, and the Department's ability to provide information in a timely manner undermines principles of procedural fairness, the principles that undermine good decision making by government agencies, and applicants' ability to properly respond to deadlines and requests by the Department.

Delay

Under section 15(5) of the *Freedom of Information Act 1982 (FOI Act)*, upon receipt of a FOI request, the Department must, as soon as practicable and not later than 14 days after the receipt of the request, take all reasonable steps to notify the applicant of their receipt of the FOI request. No later than 30 days after the receipt of the FOI request (unless an extension is granted), the Department must take all reasonable steps to notify the applicant of a decision.¹⁷ Section 15AC of the FOI Act instructs that the Minister is taken to have made a decision personally refusing to give access to the documents requested on the last day of the initial decision period (that is, 30 days after receipt of the request where no extension has been sought by the Department).

Despite the deadlines stipulated in the FOI Act, in our experience the majority of FOI requests lodged by RACS are subject to serious delays, and in most cases without a request for extension of time. Evidence submitted to the Federal Court of Australia by former Senator Rex Patrick revealed that, as at March 2023, there were 587 review requests still awaiting an outcome that were submitted in 2020 or earlier.¹⁸ Approximately

¹⁷ *Freedom of Information Act 1982* (Cth) s 15(5).

¹⁸ Christopher Knaus, The Guardian, 21 March 2023, *Australia's FOI backlog: 587 cases remain unresolved more than three years on*, <<https://www.theguardian.com/australia-news/2023/mar/21/australia-foi-freedom-of-information-backlog-587-cases-unresolved-more-than-three-years>>.

80% of the 325 FOI requests lodged in 2020 had not yet been allocated to a reviewer within the Office of the Australian Information Commissioner (**OAIC**).¹⁹

These delays are further magnified in the OAIC Annual Report 2021-22, and in research from March 2023 conducted by the Australia Institutes' Democracy & Accountability Program.²⁰ This research indicated that the actual proportion of FOI requests that were resolved within the statutory time frame has fallen from 85% during 2017 to 2018, to 70% in 2021 to 2022.²¹ RACS submits that such statistics and delays in processing FOI requests are arguably excessive and unreasonable, particularly in light of the vulnerabilities of some applicants outlined above, and the importance of access to information in protection applications.

As RACS utilises FOI requests for the purpose of advising refugees and people seeking asylum, we are primarily focused on the timeliness of FOI requests determined by the Department. The Department is responsible for processing a large portion of FOI requests, receiving approximately 43% of all requests in 2021-22 alone.²² However, during that same period, 4,701 requests out of a total 11,203 requests decided by the Department were decided more than 90 days after the statutory period of 30 days had expired.²³ Overall, the Department's compliance with statutory timeframes in general was only 45% in 2021.²⁴ This is significantly lower than the overall Australian Government average of 70%.²⁵ It also demonstrates a large and consistent decrease in timeliness as 62% of decisions complied with the statutory period in 2020-21, 66% in 2019-20 and 74% in 2018-19.²⁶

Such delays are of paramount concern when FOI requests are made to obtain personal information. In 2021-22, the Department only decided 41% of personal FOI requests within the statutory timeframe, a decrease from 61% in 2020-21 and 69% in 2019-20.²⁷ The concern regarding the Department's lack of timeliness to process personal FOI requests is exacerbated by the Department's claim that it seeks to 'balance its FOI resources more towards meeting the demand for non-personal information within

¹⁹ Christopher Knaus, The Guardian, 21 March 2023, *Australia's FOI backlog: 587 cases remain unresolved more than three years on*, <<https://www.theguardian.com/australia-news/2023/mar/21/australia-foi-freedom-of-information-backlog-587-cases-unresolved-more-than-three-years>>.

²⁰ Bill Browne, The Australia Institute, March 2023, *Nothing to see here Australia's broken freedom of information system*, <<https://australiainstitute.org.au/wp-content/uploads/2023/03/P1342-Nothing-to-see-here-Australias-broken-FOI-system-WEB.pdf>>.

²¹ Office of the Australian Information Commissioner, 2022, *Annual report 2021-22*, p. 146, <https://www.oaic.gov.au/__data/assets/pdf_file/0021/23097/OAIC_annual-report-2021-22_final.pdf>.

²² Bill Browne, The Australia Institute, March 2023, *Nothing to see here Australia's broken freedom of information system*, <<https://australiainstitute.org.au/wp-content/uploads/2023/03/P1342-Nothing-to-see-here-Australias-broken-FOI-system-WEB.pdf>>.

²³ Office of the Australian Information Commissioner, 2022, *Annual report 2021-22*, p. 134, <https://www.oaic.gov.au/__data/assets/pdf_file/0021/23097/OAIC_annual-report-2021-22_final.pdf>.

²⁴ Office of the Australian Information Commissioner, 2022, *Annual report 2021-22*, p. 134, <https://www.oaic.gov.au/__data/assets/pdf_file/0021/23097/OAIC_annual-report-2021-22_final.pdf>.

²⁵ Office of the Australian Information Commissioner, 2022, *Annual report 2021-22*, p. 146, <https://www.oaic.gov.au/__data/assets/pdf_file/0021/23097/OAIC_annual-report-2021-22_final.pdf>.

²⁶ Office of the Australian Information Commissioner, 2022, *Annual report 2021-22*, p. 146, <https://www.oaic.gov.au/__data/assets/pdf_file/0021/23097/OAIC_annual-report-2021-22_final.pdf>.

²⁷ Office of the Australian Information Commissioner, 2022, *Annual report 2021-22*, p. 147, <https://www.oaic.gov.au/__data/assets/pdf_file/0021/23097/OAIC_annual-report-2021-22_final.pdf>.

statutory timeframes'.²⁸ The Department advised that FOI requests that were decided over 90 days outside of the statutory timeframe were predominantly personal information requests.²⁹ This is a direct reflection of the consequences in the Department's prioritisation of resources to address non-personal FOI requests.

This data regarding the delay in processing FOI requests is consistent with RACS' experience with the Department. It is not uncommon for clients to wait several months before their documents are released to them. Most recently, we are aware of a case where a client contacted RACS as they required assistance with reapplying for their temporary protection visa before their existing visa expired on 2 June 2022. As part of the reapplication process the applicant was assisted with lodging an FOI request on 17 March 2022 to obtain a copy of their Departmental file. The requested documents were not released to the client until 27 April 2023, signifying a waiting period of 13 months and exceeding the client's urgent deadline of 2 June 2022.

RACS submit that this prioritisation of non-personal information is particularly detrimental to refugees and people seeking asylum who may be urgently seeking information to ensure that they or their families can find safety in Australia. Overall, these staggering statistics reveal the increasing concern of continued delays by the Department in processing FOI requests, which are made even more pressing with respect to requests for personal information. RACS submits that these delays are excessive and unreasonable. These figures urge a systemic review and reform of the Department's performance and process to ensure that individuals, particularly those facing significant urgency and vulnerability, are able to access and obtain documents in a timely manner.

²⁸ Office of the Australian Information Commissioner, 2022, *Annual report 2021-22*, p. 148, <https://www.oaic.gov.au/__data/assets/pdf_file/0021/23097/OAIC_annual-report-2021-22_final.pdf>.

²⁹ Office of the Australian Information Commissioner, 2022, *Annual report 2021-22*, p. 147, <https://www.oaic.gov.au/__data/assets/pdf_file/0021/23097/OAIC_annual-report-2021-22_final.pdf>.

Impact of delay on clients

Lengthy processing times

Processing times for protection visa applications in particular are already lengthy and arduous. Statistics from the Department demonstrate that as of April 2023, 27,464 people are awaiting a decision on their refugee status.³⁰ These delays are exacerbated by long processing times for permanent protection visas, averaging 1,076 days for a primary decision in 2022 to 2023,³¹ while the median time for review of a primary decision is 104 weeks.³² Applicants who are awaiting documents to be released under the FOI scheme can find themselves waiting longer periods before they are even able to access legal support and begin their journey of applying for protection.

In the intervening period, people awaiting a decision typically live in the community on bridging or temporary visas. A study of over 1000 refugees and people seeking asylum over a period of three years found that an insecure visa status closely correlates with significantly higher post-traumatic stress disorder symptoms, depression symptoms and a 2.5 times greater likelihood of reporting suicidal intent.³³ People with insecure visa statuses also experienced more post-migration stressors including financial, logistical, social and conflict-related stressors.³⁴

Work rights and poverty

The availability of work rights is dependent on the conditions of an applicant's visa. RACS offers refugees and people seeking asylum assistance with applying for work rights and may lodge FOI requests to obtain a client's Departmental file or previous work rights requests to do so. Delays in processing such FOI requests risks maintaining people seeking asylum in a state of poverty, without an opportunity to access long term gainful employment or enduring shelter.

People seeking asylum have limited to no access to services such as Centrelink and Medicare. Although there are programs such as the Status Resolution Support Services (**SRSS**), fewer than 1,600 people currently access the service, which at a maximum level pays a single person \$42 per day.³⁵ Without the ability to subsist independently, people

³⁰ Department of Home Affairs, Monthly Update: Onshore protection (Subclass. 866) Visa processing: <https://www.homeaffairs.gov.au/research-and-statistics/statistics/visa-statistics/live/humanitarian-program>.

³¹ Answers to Question on Notice OBE22-180; SE23-414.

³² Administrative Appeals Tribunal, Migration and Refugee Division Caseload Report, Financial Year to 30 June 2021: <https://www.aat.gov.au/AAT/media/AAT/Files/Statistics/MRD-detailed-caseload-statistics-2020-21.pdf>

³³ Angela Nickerson et al. (2019) 'The association between visa insecurity and mental health, disability and social engagement in refugees living in Australia' *European Journal of Psychotraumatology* 10(1).

³⁴ Angela Nickerson et al. (2019) 'The association between visa insecurity and mental health, disability and social engagement in refugees living in Australia' *European Journal of Psychotraumatology* 10(1).

³⁵ Refugee Council of Australia (2023) *Status Resolution Support Services (SRSS)* < <https://www.refugeecouncil.org.au/srss/>>.

seeking asylum without work rights are left to rely on short term philanthropic support, friends or volunteer community members to cover basic needs such as food and shelter.

While these issues are not squarely caused by FOI processing, there is limited legal support that organisations such as RACS can provide while awaiting the release of information under FOI. In our experience delays in resolving a lack of work rights can exacerbate the financial, employment, and housing stress that applicants experience in the interim period. This is evident in Winnie's story, explored below, which captures how long waiting periods for FOI processing can interact with and exacerbate an applicant's other civil law concerns.

Case study: civil law complications while awaiting FOI processing

Winnie* approached RACS for assistance with applying for work rights in March 2023. Winnie is living at a women's refuge after having experienced domestic violence from her former partner in Australia. Without work rights, she is reliant on support from the refuge and social support services to cover her essential costs. This included her food, telephone, and opal card expenses. However, she was advised that she would not be able to receive this support on an ongoing basis and would have to eventually leave the refuge. Winnie also has ongoing custody proceedings in relation to her son, who was in out-of-home care. She was instructed by her legal representative for her family law proceedings that obtaining work rights could assist with demonstrating her capacity to support herself and her son.

When Winnie spoke with RACS, she only had a copy of her current Bridging Visa E and her passport. She could not recall the information provided on her former visa applications, or her protection visa application. RACS then assisted Winnie to lodge an FOI request on 20 March 2023. After the statutory deadline to make a decision had passed, RACS requested an OAIC review of the Department's decision on 3 May 2023. At the time of this submission, these documents are still yet to be released.

* Names, countries of origin and other personal identifiers have been changed in case studies in order to protect confidentiality.

Family separation

In addition to applications for protection, RACS also assists refugees and relatives in Australia with applying for family reunion. The preparation, review and lodgement of applications are resource and information intensive as it requires the details and testimony of several family members. To ensure that information provided in these

applications are consistent, RACS will assist applicants with lodging FOI requests where relevant.

The Australian National Audit Office's (**ANAO**) March 2023 report into the family migration program in Australia identified numerous delays and inconsistencies in the Department's handling of family visa applications, and failure to preventing applications being stalled or delayed.³⁶ The report found that despite a quarter of applications waiting longer than three years for a decision, the Department has no clear method for detecting when an application has become excessively delayed or has stalled.³⁷

The separation of families during what is an already a stressful period of settlement following forced displacement is significantly detrimental to the psychological health of refugees. This is particularly so where there is pre-migration trauma and post-migration stress.³⁸ Specifically, quantitative research indicates that there is correlation between family separation during this period and increased rates of depression, post-traumatic stress disorder, anxiety, and poorer quality of life in refugee groups.³⁹ Notably, the ability for refugees to integrate into society and recover from trauma may be compromised due to separation from family.⁴⁰

In short, unrealistic visa eligibility criteria, onerous evidentiary requirements, high costs and rigid visa caps already cause significant delays in visa processing, especially for families. Delays in processing FOI requests exacerbate these already extreme circumstances that people seeking asylum are forced to endure. The status quo of the Australian migration system currently demonstrates on its face that the "dysfunction and delays in the family migration program are a result of government laws and policies which treat family unity as a privilege, rather than a fundamental right".⁴¹ Ameliorating delays in the supply of relevant information under FOI to assist in, and mitigate the challenging circumstances already faced by those seeking asylum would be a significant step for a government that has already firmly committed to addressing Australia's chronic and systemic flaws in its migration policies.

³⁶ Department of Home Affairs, Australian National Audit Office, Auditor General Report No. 16 2022-23 *Management of Migration to Australia - Family Migration Program*, p. 8: <https://www.anao.gov.au/work/performance-audit/management-migration-to-australia-family-migration-program>

³⁷ Department of Home Affairs, Australian National Audit Office, Auditor General Report No. 16 2022-23 *Management of Migration to Australia - Family Migration Program*, p. 8: <https://www.anao.gov.au/work/performance-audit/management-migration-to-australia-family-migration-program>

³⁸ Belinda Liddell et al., 'Understanding the effects of being separated from family on refugees in Australia: a qualitative study', *Australian and New Zealand Journal of Public Health* 2022, 46(5), 647, <<https://doi.org/10.1111/1753-6405.13232>>

³⁹ Belinda Liddell et al., 'Understanding the effects of being separated from family on refugees in Australia: a qualitative study', *Australian and New Zealand Journal of Public Health* 2022, 46(5), 647, <<https://doi.org/10.1111/1753-6405.13232>>

⁴⁰ Belinda Liddell et al., 'Understanding the effects of being separated from family on refugees in Australia: a qualitative study', *Australian and New Zealand Journal of Public Health* 2022, 46(5), 647, <<https://doi.org/10.1111/1753-6405.13232>>

⁴¹ Human Rights Law Centre, *Sweeping reforms needed to address delays in family reunion*, 6 April 2023: <https://www.hrlc.org.au/news/2023/4/6/family-reunion-sweeping-reform-needed>.

Concluding remarks

Our Freedom of Information laws enshrine the right to access government-held information. The accessibility of this information is critical in ensuring accountability and transparency in government decision making. It also allows individuals to better understand the reasoning for decisions that impact their lives. The importance of a functioning FOI scheme is magnified for people engaged in the refugee status determination process, for whom the ability to access information held by the government in a timely manner has significant consequences on their liberty and safety.

While current FOI laws provide a good basis for applicants to access information, our submission has spoken to the practical issues in its operation which undermine its effectiveness. Given the focus on our service delivery on refugees and people seeking asylum, our submission focused on requests made to the Department of Home Affairs. The Department received the most FOI requests in 2021-22 (14, 644) and 2020-21 (15, 825), representing close to 3 times the amount of the agency with the second highest requests.⁴² Their continued lack of adherence to the 30-day statutory limit for deciding on a request and excessive delays in processing limit the practical utility of the FOI scheme. This delay also has a significant impact on our clients, spanning extended separation from family members, extreme financial stress, and mental health complications from ongoing visa uncertainty. As such, RACS makes the following recommendations:

Recommendation 1:

A systemic review should be conducted into the Department's process of fulfilling FOI requests to identify the cause of delays.

Recommendation 2:

The Department must be sufficiently resourced to meet the existing statutory timeframe under the FOI Act.

Recommendation 3:

The OAIC must be sufficiently resourced to reduce delays in reviewing FOI decisions.

⁴² Office of the Australian Information Commissioner, 2022, Annual report 2021-22, p. 137, <https://www.oaic.gov.au/_data/assets/pdf_file/0021/23097/OAIC_annual-report-2021-22_final.pdf>.

Recommendation 4:

FOI laws should include an enforcement mechanism that requires agencies to adhere to the stipulated statutory timeframe and place a positive obligation on agencies to notify applicants when statutory timeframes are not met.

A handwritten signature in black ink, appearing to read 'Sarah Dale', written in a cursive style.

Sarah Dale

Centre Director & Principal Solicitor (LPN:5511423)

Refugee Advice & Casework Service (RACS)