REFUGEE ADVICE & CASEWORK SERVICE

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Law Council of Australia - The Justice Project

The Refugee Advice & Casework Service (RACS) is a specialist refugee legal centre that has been assisting people seeking asylum in Australia on a not-for-profit basis since 1988.

RACS welcomes the opportunity to contribute to this review of access to justice in Australia. Our submission outlines specific laws, policies and practices that entrench disadvantage for people seeking asylum in Australia, and points to potential measures for changing them or alleviating their consequences.

Our submission aims to centre and amplify the experiences of the people we work with. After a series of general observations, our submission addresses eight thematic areas of legal need. The case studies we provide have been assembled from our lawyers' experiences and illustrate the various difficulties faced by people seeking asylum when their needs are not met. In some cases, we suggest specific measures that may improve access to justice. In each case study, names and other identifying information have been changed.

In addition to specific areas for policy reform identified in our submission, we consider that stable and sustainable funding for legal services in this area should be a matter of high priority to the Law Council of Australia and the wider legal sector.

Please do not hesitate to contact us for any further information or clarification.

Sincerely

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Refugee Advice and Casework Service
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This submission was prepared by
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1. Preliminary questions and general observations

1.1 *The legal needs and capabilities of people seeking asylum*

People seeking asylum in Australia can be distinguished from other non-citizens (including other refugees), by the fact that the question of their refugee status is unresolved. In addition to the legal needs flowing from their status, many people seeking asylum in Australia have an intersectional experience of disadvantage, often resulting from a series of adverse events beginning prior to their arrival in Australia. Like other disadvantaged groups, asylum seekers may ignore their legal problems or act without seeking advice, compounding their disadvantage.[1]

Refugees are entitled to a range of rights under international law, including protection from being removed from Australia in circumstances in which they would be exposed to persecution or serious human rights violations. The process for determining whether a person seeking asylum is a refugee is therefore of central importance to the international refugee system. In Australia, this process mainly occurs in the context of applications for protection visas. Australia entrusts to its immigration laws (especially the *Migration Act 1958* (Cth)) the task of ensuring that refugees (and people whose return to harm is otherwise prohibited by human rights law), are identified and have access to the rights to which they are entitled. Importantly, refugee status is declaratory and not constitutive, meaning that a refugee who is seeking asylum is entitled to many of the rights of refugees before she is recognised as such.[2]

1.2 *The meaning of access to justice for people seeking asylum*

RACS endorses the Law Council's Asylum Seeker Policy. In RACS' view, access to justice for people seeking asylum in Australia ought to be understood as:

- Access to fair and timely legal procedures for identifying protection obligations (flowing from refugee status or other non-refoulement obligations);
- Early access to appropriate legal advice and assistance in navigating the legal procedures involved in an application for a protection visa and other associated legal processes.
- Appropriate and accessible health and support services which are adapted and responsive to the unique and particular needs of those seeking asylum, such that capability to engage with the legal process is maximised.
- Treatment and conditions in compliance with Australian law and Australia's human rights law obligations, including, for refugees, the rights established in articles 3 to 34 of the Refugee Convention;
- Access to equality before the law in relation to other areas of the Australian legal system, including family reunion under the migration programme.

1.3 *Tools for evaluating access to justice for people seeking asylum*

RACS considers that there is a considerable need for increased investment in evidence-based research and evaluation in the justice sector, including in research about the impact of legal assistance services on individuals, communities and the wider justice system. According to the OECD and the Open Society Justice Initiative, 'there has been uneven investment in sound evidence-based research and evaluation into understanding what strategies work, work cost effectively, when, why and for whom' in the justice sector compared to other sectors, such as health and education.[3]

We note the Law Council's discussion of a Justice Index Tool for tracking access to justice initiatives and gauging their effectiveness against measurable indicators and baseline

[1] Law Council of Australia, *The Justice Project: Introduction and Consultation Questions*, 27; Hugh McDonald and Zhigang Wei, 'How people solve legal problems: Level of disadvantage and legal capability' *Justice Issues Paper No 23* (Law and Justice Society of NSW 2016) 2.

[2] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/4/Eng/REV.1 (1992 edition) [28].

[3] OECD - Open Society Justice Initiative, *Understanding Effective Access to Justice*, Workshop Paper, Paris, 3-4 November 2016, available at <http://www.oecd.org/gov/Understanding-effective-access-justice-workshop-paper-final.pdf>.

assessments. In the context of people seeking asylum, RACS considers that such a tool could be effective in areas well-adapted to quantification and analysis. For example, a tool of this kind may be effective in measuring access to language services or the duration of relevant legal processes. However, the value of much of this information lies in the approach to its interpretation. For example, while timely assessment of claims is a highly desirable feature of a refugee status determination process, the speed with which an application is resolved is not necessarily a useful indication of access to justice.[4] Further, qualitatively indeterminate aspects of the refugee status determination process (such as interpretation of country of origin information or procedural fairness in the credibility assessments) present significant difficulties.

Similarly, although the benefits of early access to appropriate legal services are widely agreed, they are difficult to monitor or quantify. This may represent a knowledge gap into which research would strongly benefit future policy making.

RACS would support the development of a Justice Impact Test for assessing the potential consequences of new laws and policy proposals. For example, RACS considers that such a process may have provided valuable information relating to the impacts of recent reforms on the Australian asylum process and funding for relevant legal services, which appear to have been pursued without sufficient regard for the potential downstream impact on the justice system. In particular, poor access to advice and representation at the primary stage complicates and undermines the primary application process, while the same problem at the judicial review stage significantly increases costs and delays in the court system. A stronger evidence base on these issues would prove valuable to future policy-making.

2. Offshore processing, boat turnbacks and the right to apply for protection

Although most of our observations reflect our experience of working with people seeking asylum who are in Australia, it is important to recognise that Australia's policies of offshore processing and boat turnbacks have erected formidable barriers to access to justice in this area. Statutory affirmations of the government's power to remove people from Australia in contravention of international law are complemented by the practical barriers to legal domestic legal processes faced by people in this situation.[5] Prior to the introduction of the turnback policy, the government's policy of 'enhanced screening' (involving rapid returns of newly arrived asylum seekers) effectively prevented access to any of the protections of the Australian legal system.[6] Meanwhile, a group of people affected by the offshore processing policy, but brought back to Australia for medical treatment, are legally prevented from accessing Australian asylum procedures.[7] People affected by these policies are deliberately denied the ability to access protection under Australian law. Significant and far-reaching reform will be required in order to ensure safety for those affected by these policies and restore Australia's international human rights record.

Experiences of Australia's asylum system vary significantly according to a person's mode of arrival. Australian law prevents people who arrive by boat from making a valid application for a protection visa without Ministerial permission.[8] This means that even refugees who declare themselves to Australian authorities immediately and request consideration of their status face a legal barrier to accessing the protection they may need and be entitled to. This limitation institutionalises a lack of equality before the law and has given rise to the so-called 'Legacy Caseload'. This is comprised of people who sought asylum in Australia 2012 and 2013 but have until recently been prevented from having their status considered in any legal process.

[4] See, for example, case studies 3.3 and 6.1, below.

[5] *Migration Act 1958* s 197C.

[6] Australian Human Rights Commission, *LA and LB v Commonwealth of Australia (Department of Immigration and Border Protection)* [2015] AusHRC 96 (Report into the 'enhanced screening' process).

[7] *Migration Act 1958* s 46B.

[8] *Migration Act 1958* s 46A.

3. Refugee status determination processes

3.1 *Early access to appropriate legal advice and assistance*

Where a person does have the right to apply for protection under Australian law, the application process is increasingly complex and adversarial.[9] In light of the needs and capabilities of people seeking asylum, and the serious consequences of an unfair or ineffective process, these characteristics render the process poorly adapted for self-representation. People seeking asylum often lack familiarity with Australian legal and bureaucratic systems and rarely have the language skills required to engage effectively with those systems in English. For example, many asylum seekers find it difficult to understand what information is relevant to their claims, or how much evidence is required to support them.

The Immigration Advice and Application Assistance Scheme (IAAAS), managed by the Department of Immigration and Border Protection, previously provided access to legal representation for most asylum seekers in need of assistance. Changes to IAAAS since 2013 have dramatically restricted the reach of this programme, including by removing access for people who arrived in Australia without a visa. This has had a profound impact on the people who comprise the Legacy Caseload, most of whom have been unable to pay for legal assistance after protracted periods of detention and subsequent periods without the right to work and earn income.

In response, significant sector-wide efforts (including partnerships among community organisations, law firms and refugee legal centres) have allowed many people seeking asylum to access basic assistance with preparing visa application forms, but these services have been stretched beyond capacity, and are often unable to provide necessary ongoing representation.[10] Worst affected are the many applicants who require intensive, ongoing assistance but who are not extended government-funded assistance.

The proposed removal of dual regulation of immigration lawyers can be anticipated to reduce barriers to legal professionals who wish to assist people seeking asylum in relation to visa applications on a pro bono basis.[11] However, RACS agrees with the Law Institute of Victoria's view that the level of unmet legal need in this area far exceeds that which can be addressed through pro bono work.[12]

Publicly available information in community languages may complement individual legal advice and assistance and can be a useful resource for asylum seekers and community members. However, the Protection Application Information and Guides (PAIGs) that have been developed by the Department of Immigration and Border Protection are wholly inadequate as a substitute for legal services. In RACS' experience, applicants find the PAIGs difficult to understand and respond to. The translations prepared for some language groups necessarily include technical language that is unfamiliar or unintelligible to the people to which it is directed. Further, even if the availability of individual advice and assistance were not a necessary condition for fair engagement in the application process, written information in a person's own language does little to enable a person to complete a lengthy application form in English.

As RACS has previously argued, early access to legal assistance and representation delivers significant benefits and is in the interests of efficiency, due process and the rule of law. Policies that

[9] See, for example, s 5AAA of the *Migration Act 1958*, which places the burden of proof entirely on the applicant for a protection visa.

[10] Legal assistance, advice and representation in this context generally refers to "immigration assistance" which is defined under s 276 of the *Migration Act 1958* and can generally only be provided by a person who is a registered migration agent: s 280.

[11] Migration Amendment (Regulation of Migration Agents) Bill 2017.

[12] Law Institute of Victoria, Letter to the Hon. Peter Dutton MP, Minister for Immigration and Border Protection, 27 April 2015, available at <https://www.liv.asn.au/getattachment/dbd6b7d4-925b-47d1-beae-daea01d6d920/Call-for-Reinstatement-of-Legal-Assistance-Funding.aspx>

facilitate this access represent an effective use of limited resources and should be given high priority.[13]

In particular, due to the complexity of Australian refugee law, the significant need for intensive assistance and the range of skills required for effective assistance (for example, relating to working with interpreters and knowledge of relevant country situations), a high degree of specialisation and expertise delivers significantly better outcomes.

Holistic or multi-disciplinary service provision is a suitable model for addressing asylum seekers' often intersectional experience of disadvantage. This is borne out by RACS' experience of joined-up initiatives with the Asylum Seekers Centre, the Jesuit Refugee Service and the NSW Alliance for People Seeking Asylum. Joined-up services facilitate the concurrent engagement with multiple legal and non-legal problems and can therefore represent a proactive approach to assisting disadvantage groups.

Case study 3.1: A specialised, joined-up, targeted service

Joan is a lesbian woman from Uganda who arrived in Australia on a tourist visa. She fears persecution if she returns to Uganda. A person she spoke to in Sydney told her she should go to the Asylum Seekers Centre (ASC).

By this time, Joan had used almost all of her savings and was at high risk of homelessness. The intake caseworker at ASC assessed her financial and housing needs and referred her to the RACS lawyer based at ASC. The ASC Legal Team assessed her situation and protection claims and provided her with initial advice on the process involved in making a protection visa application. Joan spoke English quite well but was overwhelmed by the 42-page application form. She found it difficult to talk openly about being gay because she had rarely been able to do so before arriving in Australia.

For further assistance, the ASC Legal Team registered Joan for ASC's weekly legal clinic staffed by pro bono lawyers from a law firm. Although the pro bono lawyers are not specialists in refugee or immigration law, they are guided and supervised by RACS. Joan met with the lawyer for several hours to draft a statutory declaration explaining what she had experienced in Uganda and her fears of returning there. The lawyer was able to work with Joan over several months, building trust and rapport, and completed a well-drafted, comprehensive and sensitively written statement in support of her protection claims. The visa application was complete and therefore easy for the Department of Immigration to process efficiently.

During this period, as a client of ASC, Joan was assisted with accommodation, financial assistance and referred for specialist counselling and social support. She also regularly attended the music lessons offered by ASC volunteers each week.

In this case, access to a joined-up, multidisciplinary service allowed Joan to effectively address multiple legal and non-legal problems. Pro bono partnerships increased the accessibility of legal assistance. Without access to advice and assistance early in the process, Joan may not have been unable to provide an application that would appropriately represent her circumstances, increasing the need for review and appeal processes which are costly and time-consuming.

3.2 *Access to language services*

Free access to qualified and impartial interpreters is a significant enabler for expanding access to legal advice and engagement in the visa application process. The Consultation Paper rightly observes that a major implication of the withdrawal of IAAAS funding is that interpreting services

[13] RACS, submission to the Productivity Commission, 4 November 2013, available at <http://www.pc.gov.au/inquiries/completed/access-justice/submissions/submissions-test/submission-counter/sub047-access-justice.pdf>.

are no longer paid for.[14] Protection visa applicants are expected to complete applications in English and are required to provide NAATI-certified translations of identity documents and supporting evidence. Lawyers and migration agents who do not speak a relevant language, but who might otherwise provide pro bono assistance to people in situations of disadvantage, are discouraged by the high cost of interpreting and translating.

Access to language services ought to be considered an integral part of any effective funding framework for legal advice and assistance.

3.3 *The fast track process*

Limited access to legal assistance has exacerbated the effect of access to justice barriers that are built into the protection visa application process. Established by amendments to the Migration Act in December 2014, the 'fast track process' entrenches the discriminatory treatment of refugees who arrive in Australia without a visa. It establishes a parallel process for the applications of asylum seekers who arrived by boat, stripped of many of the procedural safeguards in the ordinary protection visa application process.

Critically, people seeking asylum who are affected by the fast track process are not permitted to apply to the Administrative Appeals Tribunal (AAT) for review of any decision to refuse their application. Instead, their applications are referred to the Immigration Assessment Authority (IAA). Unlike the AAT, the IAA makes decisions on the papers, with no legal obligation to interview the person affected.[15] This unusual and deficient model of review undermines ordinary principles of procedural fairness and represents a significant barrier to engagement in the review process for people seeking asylum. As many applicants are from non-English speaking backgrounds and have poor access to legal assistance, the IAA's model of review 'on the papers' has the effect that applicants are often unable to exercise even the limited rights available under the law (for example, by understanding the reasons for the refusal of their application and responding to those reasons). In addition, even where an applicant is capable of identifying relevant information and providing it to the IAA in writing, the IAA is required to ignore that information except in exceptional circumstances where the applicant satisfies the IAA that the new information was not known or could not have been provided before the primary decision.[16] Some fast track applicants are excluded from all forms of merits review.[17]

When combined with the unprecedented lack of access to legal advice and representation, these new procedural limitations create a perfect storm of barriers to access to justice.

Case study 3.3: Impact of poor access to legal assistance and the absence of the hearing rule in the fast track process

Hamza is from a persecuted religious minority and fears harm in his country of origin because of his role in religious organisation. He arrived in Australia by boat in 2013 and was permitted to apply for a protection visa in 2016. His English has improved dramatically but is not good enough for him to prepare his protection visa application without assistance. Due to the long wait lists for free legal assistance and concerned by the series of letters from the Department urging him to lodge his application, Hamza sought assistance from an English-speaking friend, who helped him prepare the application. Hamza provided certain photographs with his application as evidence of his

[14] Consultation Paper 16-17, citing the Law Institute of Victoria, Department of Justice and Regulation Access to Justice Review: Submission to the Department of Justice and Regulation (1 March 2016) 138, available at <https://www.liv.asn.au/getattachment/f5562281-ba7f-44f1-a615-3efe79b56c3a/submission-to-the-department-of-justice-and-regula.aspx>.

[15] *Migration Act 1958* s 473DB.

[16] *Migration Act 1958* s 473DD.

[17] See the definition of *excluded fast track review applicant* in s 5(1) of the *Migration Act 1958*; Kaldor Centre, *Factsheet: 'Fast tracking' refugee status determination* (August 2015) available at <http://www.kaldorcentre.unsw.edu.au/publication/%E2%80%98fast-tracking%E2%80%99-refugee-status-determination>.

activities in the religious organisation. Unable to pay for ongoing assistance, Hamza went through the application process unrepresented.

After an interview with the Department of Immigration and Border Protection, Hamza received notification that his application had been refused, accompanied by a 12-page statement of the reasons for the decision. The primary reason was that the decision-maker did not believe that Hamza in fact held his claimed role within the religious organisation. Due to Hamza's social isolation and the high demand for legal services, it was several weeks before he could have the decision explained to him in his language. Meanwhile, his application had been referred for review by the IAA, which has the power to make a decision at any time. After having the decision explained to him, Hamza approached the religious organisation in his country of origin, whose leaders wrote a letter corroborating his stated role. Hamza planned to provide the original copy of the letter to the IAA, but the IAA affirmed the decision to refuse his application before he was able to do so. Hamza has now been found not to be a refugee and has no further options to remain in Australia.

This case demonstrates the unfairness and inefficacy of the fast track process. If the IAA had had an obligation in interview Hamza and receive further information, it is likely that the availability of the additional evidence would have become clear and would have been taken into account. The disadvantage created by the nature of the process was compounded by limited access to appropriate legal assistance.

In RACS' experience to date, the majority of fast track applicants who receive a negative decision from the IAA (or who are excluded from IAA review), are taking the step of applying for judicial review in the Australian courts. Most fast track applicants do not have any knowledge of how judicial review differs from the process associated with their primary visa application and the limited merits review process in the IAA. This, along with intersectional experience of disadvantage noted above, means that fast track applicants often do not seek advice and assistance on their applications for judicial review or wait until just before a callover or final hearing to do so. This will impact on the efficiency and costs in Australian courts, which would be mitigated by better access to legal advice and assistance.

Expedited asylum procedures in the United States of America and United Kingdom's Detained Fast Track system (DFT) have lead to an increase in the number of appeals to superior courts. Research suggests that this trend has resulted in decreased efficiency and increased costs.[18] The UK's DFT system, which is said to have been the inspiration for the fast track system, was deemed unlawful by the British High Court because the lack of appropriate time to seek and obtain legal assistance was deemed to create an 'unacceptable risk of unfairness.'[19] In many respects, Australia's version is worse. The UK's DFT system provided funded legal advice and representation as well as access to the standard review process. It also exempted vulnerable asylum seekers and applied only to applicants for whom a quick decision could be made.

For the reasons above, Australia's fast track process is incurably unfair. All applicants for refugee status in Australia should have access to independent review of negative decisions in accordance with principles of procedural fairness. Amendments to the Migration Act should repeal Part 7AA of the Migration Act and reinstate access to the AAT for all protection visa decisions.

Even where people seeking asylum have access to AAT merits review (outside the fast track process), the window for application is unfairly strict and short in light of the disadvantages affecting people seeking asylum. A strict 28-day limitation period applies to applications for review of protection visa decisions, and, unlike other AAT applications, the Tribunal has no power to consider late applications in compelling circumstances. Reform to merits review processes could

[18] Stephen Legomsky, 'Restructuring Immigration Adjudication' (2010) 59 *Duke Law Journal* 1635.

[19] *Detention Action v Secretary of State for the Home Department* [2014] QB 34, available at <http://detentionaction.org.uk/wordpress/wp-content/uploads/2014/07/Detention-Action-DFT-Full-Judgement.pdf>.

harmonise the limitation periods for refugee and migration decisions with those relevant to other areas of the AAT's jurisdiction.[20]

4. Visa cancellation and the criminal justice system

The Legacy Caseload is the consequence of policies of successive Australian governments that have resulted in a protracted delay between when people sought asylum in Australia and the assessment of their eligibility for international protection. The bar on visa applications made by people who arrived in Australia by boat extends to applications for bridging visas.[21] Without a bridging visa, and subject to the Immigration Minister's discretion to allow a person to apply for a visa, unauthorised maritime arrivals are unlawful non-citizens who must be detained under the Migration Act. Approximately thirty thousand people who are affected by the fast track process and who arrived in Australia in 2012 and 2013 have relied on the Minister's non-compellable discretion in order to be released from detention on a Bridging Visa E. Government policy relating to the cancellation of these visas has highlighted the significant disjuncture between immigration law and the criminal justice system.

The Minister has the power to cancel a person's visa on prescribed grounds relating to failure to comply with visa conditions.[22] The grounds for cancellation are set out in the *Migration Regulations 1994*, and include being charged with an offence against a law of the Commonwealth, a State, a Territory or another country.[23] Rather than being triggered by a conviction for a criminal offence, this ground for cancellation is enlivened as soon as an individual is charged with an offence, irrespective of the circumstances of the charge or the nature of the offence. The effect of cancellation is tantamount to imprisonment, because the person becomes an unlawful non-citizen and must be detained. Although cancellation is discretionary, in practice the Department of Immigration and Border Protection has enforced a policy of cancelling bridging visas as a matter of course following any criminal charge.[24] In its December 2016 report, the Ombudsman noted that the Department refused to provide examples of any instance in which a delegate of the Minister had exercised their discretion to decide *not* to cancel a visa.[25]

The result of this is that people seeking asylum who are charged with any offence, regardless of the seriousness of the offence or the nature of the case against them, are deprived of their liberty, often resulting in prolonged periods of detention. Often this occurs in situations where an Australian citizen would be immediately released after being charged, or would be granted bail. Open-ended detention in this context is traumatic for the individual and their family members and not a proportionate response for minor, non-violent offences.

Further, the cancellation of a visa for criminal behaviour based on charges alone effectively reverses the presumption of innocence. This impact is accentuated by the significant differences in the respective procedural timelines for the visa cancellation process and criminal process. Visas are generally cancelled soon after a charge is laid, but lengthy delays often ensue before a person's criminal matter is resolved, resulting in prolonged detention even where a person may have no case to answer. Significantly, the outcome of the subsequent criminal process has no legal impact on the earlier decision to cancel the visa or the individual's legal right to be subsequently

[20] See for example *Administrative Appeals Tribunal Act 1975* (Cth) s 29(7).

[21] *Migration Act 1958* s 46A.

[22] *Migration Act 1958* s 116. This is in addition to the wide power to cancel visas on character grounds under s 501.

[23] *Migration Regulations 1994* regulation 2.43(1)(p)(ii).

[24] Ministerial Direction 63 sets out guidance for decision-makers in relation to the considerations that should be taken into account when cancelling a visa.

[25] Commonwealth Ombudsman, 'The Administration of people who have had their bridging visa cancelled due to criminal charges or convictions and are held in immigration detention' (21 December 2016) 9, available at <http://www.ombudsman.gov.au/__data/assets/pdf_file/0026/42596/December-2016_Own-motion-investigation-into-people-who-have-their-Bridging-visa-cancelled-following-criminal-charges.pdf>. The report observes that people often have less than ten minutes to prepare for an interview relating to their proposed detention. The scope for access to appropriate legal advice in these circumstances is severely limited (at 30).

released from detention. Accordingly, where charges are dropped or an individual is not convicted of any offence, the person nonetheless remains in detention, subject to the exercise of the Minister's discretion to permit a visa application or to grant a new visa.[26] RACS is aware of many instances in which people seeking asylum have been detained after being charged with minor, non-violent offences (including traffic fines) and in circumstances where neither the police nor the courts considered the detention necessary or appropriate for the community's safety. In some cases, people have remained in immigration detention years after the original charges were dropped or the person was acquitted. This disconnect between the fundamental safeguards of the criminal justice system and the wide powers for visa cancellation (rigorously applied by the Minister) represents an area of significant inequity and a genuine justice gap for people seeking asylum.

The presumption of innocence is an essential check on the powers of detention and punishment, and a fundamental principle underpinning the common law. As administrative detention is not subject to the same temporal limits as criminal processes relating to sentencing and remand, this presents significant scope for unfairness. The bail process, for example, is designed to ensure that the presumption of innocence is maintained where possible, and balanced with need to protect the community and uphold the integrity of the criminal justice system. It is unclear why non-citizens should be subject to a different, more punitive standard.

Case study 4: Protracted detention for traffic offences

Abdul is a 24 year-old man from Syria who was working to support his young family. He received a fine and good behaviour bond for minor traffic offences. His offence was not sufficiently serious to attract a prison sentence but his bridging visa was cancelled for 'criminal behaviour' and he was detained in an immigration detention centre, with no right to apply for a new visa. He remained in detention for 10 months before the Immigration Minister exercised his discretionary power to grant a new bridging visa. His period of detention caused significant hardship for his members, one of whom has serious health issues and was dependent on his care and support.

The precariousness of a person's visa status in these circumstances means that people seeking asylum are often reluctant to engage with the appropriate authorities in order to protect other fundamental rights.[27] This phenomenon has flow-on effects on the kind of disadvantage experienced by asylum seekers in Australia. For example, people who fear being detained (because they are unlawful or may easily become unlawful through visa cancellation) face difficulty exercising tenancy rights, challenging unsafe or unlawful workplace conditions, or reporting crime, including family violence.

The framework for visa cancellation should align more closely with criminal procedure. In particular, efforts at advocacy for policy reform in this area would limit the unnecessary and prolonged detention of people who are detained for "criminal behaviour" despite not having committed any criminal offence (or where the relevant behaviour would not ordinarily result in detention). Although amendments to the Migration Regulations would be required to prevent the use of the cancellation power in the ways described in this section, simple changes to Departmental policy could avoid many of these situations.

People who are notified of an intention to cancel a visa should be given access to legal advice, adequate time to respond and appropriate language services.

Gaps of this kind (whereby immigration law outcomes relate closely with other areas of law) may be an appropriate area for consideration by an Independent Monitor for Migration Laws.

[26] Ibid 14.

[27] The same observation can be made in relation to situations in which a person might become unlawful not due to visa cancellation, but due to delays and inconsistent approaches in relation to the grant of bridging visas to people who are unauthorised maritime arrivals under the Migration Act: see section 7 below.

5. Bridging visa policy

Associated bridging visas granted to protection visa applicants expire 28 days after an adverse merits review decision. In RACS' experience, policy and procedures relating to the grant of bridging visas to people who subsequently apply for judicial review of that merits review decision are unclear and inconsistent. In particular, people who arrived in Australia as unauthorised maritime arrivals are commonly not granted new bridging visas.[28] Despite their ongoing engagement with the legal process, asylum seekers consequently become unlawful, with significant negative implications for their livelihoods. Expiry of a person's bridging visa means they can no longer lawfully work in Australia, yet applicants who are unsuccessful at merits review simultaneously become ineligible for income support. Policy should ensure that individuals engaged in judicial review of visa decisions are granted bridging visas in a way that is systematic and efficient. This issue is of special urgency in light of the significant backlog of judicial review applications currently emerging from the fast track process.

Case study 5: Failure to grant bridging visas at judicial review

Abbas, a 53 year-old man from Iraq, applied to the Federal Circuit Court for judicial review of a decision to refuse his protection visa application. A barrister acting pro bono considered that his case had a good chance of success. However, his existing bridging visa was about to expire.

Abbas took evidence of his ongoing legal proceedings to the office of the Department of Immigration and Border Protection. He explained that his case was still at court and he did not want to become unlawful. He was not granted a bridging visa and consequently became unlawful. As a result of having no visa, Abbas's employer (who had been extremely happy with his work), was forced to stop employing him. Losing his job for this reason led to extreme financial stress and a dramatic deterioration in Abbas's mental health. Without work he could no longer pay rent and is at risk of becoming homeless. He awaits a court date set for 2019 but remains unlawful and liable to be detained at any time.

6. Detention

Many people in immigration detention experience difficulty accessing legal advice and representation. It is the universal experience of lawyers who represent clients in detention that the ability to provide legal services is frustrated by features of the detention environment. This is liable to exacerbate the effects of other disadvantages. People in detention often have irregular access to telephones and the internet, and the Australian Border Force regularly moves people between detention centres without notifying their representatives. RACS is aware of instances in which people have been transferred interstate on the day before a scheduled court date, or removed from Australia despite ongoing court proceedings in relation to their refugee status.[29]

Many procedural elements of Australian immigration law are designed to expedite visa application processes for people in immigration detention.[30] These periods are devised with the laudable objective of avoiding unnecessary periods of detention. However, in the context of poor access to legal advice and representation (particularly as a consequence of changes to IAAAS),[31] short limitation periods conversely have a prejudicial effect, whereby applicants risk losing their statutory rights or making invalid or incomplete visa applications due to the barriers to accessing legal assistance at short notice.

[28] As with other visa situations, unauthorised maritime arrivals require the Minister's personal intervention to permit a valid application for a bridging visa or the grant of a visa from detention.

[29] See for example *SZSPI v Minister for Immigration and Border Protection* [2014] FCAFC 140.

[30] See for example *Migration Act 1958* (Cth) s 58 and *Migration Regulations 1994* (Cth) reg 2.15, which give visa applicants in detention only three days to respond to invitations to give certain information, which may be crucial to their eligibility for protection. See also s 412 and regulation 4.31, under which protection visa applicants whose applications are refused by the Department lose their right to merits review after seven days.

[31] See section 3 above.

Case study 6.1: Detention-related barriers for visa applicants

Rachel is a 19 year-old woman from Cambodia detained in Villawood Immigration Detention Centre. Rachel was detained after she was detected living in Australia after the expiry of her visa. There is evidence that if she returns to Cambodia, Rachel faces a risk of being sold into a sex trafficking ring. She had completed the protection visa application form but was unable to lodge a valid application because she could not pay the visa application charge of $35. She had $35 in cash but the Migration Regulations require the fee to be paid by credit card or money order. Her assigned Departmental case manager told her that she had to arrange the application on her own and was not entitled to any legal assistance. Rachel contacted RACS using the mobile phone of a fellow detainee. For several days RACS was unable to reach her through the detention centre. When RACS was able to make contact with her, Rachel explained that she had signed a consent form and would be removed from Australia the following week. Rachel was distressed and told RACS that she felt forced to sign the agreement because the officers told her that she would be deported anyway and it was better if she left voluntarily.

RACS intervened to cover the $35 application fee so that the protection visa application Rachel had prepared could be validly lodged. Shortly after this, RACS was notified that an interview about Rachel's application had been scheduled for three days later. This short period placed considerable pressure on Rachel and her lawyer to prepare relevant documents and evidence in time.

RACS' requested postponement of the interview to enable Rachel adequate opportunity to meet with her legal representative and prepare the documents required to set out her protection claims in appropriate detail. Rachel's experience of trauma and sexual abuse made it difficult to prepare a detailed statement within the three day period before her interview. The request to reschedule the interview was refused. As a result, the lawyer and Rachel were forced to prepare Rachel's statement about the circumstances giving rise to her fear of abuse on the phone. This was difficult for Rachel, who had not spoken about these experiences before and who felt distressed, ashamed and intimidated.

In this case, the expedited processing of Rachel's application acted as a barrier to access to justice in that it failed to take account of the time required by Rachel to obtain the assistance she required in order to prepare her case in a way that was appropriate for her circumstances. In the absence of a predictable framework for funded legal assistance in these circumstances, short statutory timeframes operate against the interests of the detained person and increase the likelihood of a person being arbitrarily detained or wrongfully removed from Australia. Where IAAAS is potentially available for applicants in detention, it is ineffective unless staff who have contact with detainees take active steps to facilitate access to it. Rachel's case also demonstrates the impact of administrative impediments a person can face when attempting to lodge a protection visa application in detention without access to a credit card to pay the visa application charge. Further, the case suggests an absence of sufficient administrative safeguards to ensure that a person intending to seek protection is not pressured to return to their country before their claims have been properly assessed.

The Migration Act permits the Department of Immigration and Border Protection to give information to a visa applicant's representative and deems this to be the same as giving it to the visa applicant themselves.[32] This sensible framework for represented applicants becomes dysfunctional if a representative is unable to contact their client in detention in order to take instructions or pass on information or requests. Under the Migration Act people in immigration detention must be given access to facilities for obtaining legal advice on request,[33] but there is no corresponding provision requiring Border Force or detention centre staff to facilitate a lawyer's communication to their client, and no obligation to advise a person's representative when a person in detention is transferred

[32] *Migration Act 1958* s 494D.

[33] Department of Immigration and Border Protection, PAM3: Detention Services Manual - Chapter 1 - Legislative and principles overview - Detainee access to legal representation

from one detention centre to another.

Case study 6.2: Impact of transfer within the detention network without notice

Mohammad, a 26 year-old Rohingya man from Myanmar, is in immigration detention after the cancellation of his bridging visa. Border Force has moved Mohammad between detention centres in Melbourne, Perth and Christmas Island without warning and without notifying his lawyer, who is assisting him with his application for a protection visa.

Mohammad's lawyer tried to contact him after receiving a request from the Department of Immigration requiring a response within three days. The lawyer made a request for a telephone appointment, for which Border Force requires a minimum of 24 hours' notice. After receiving the request, staff at the detention centre informed Mohammad's lawyer that Mohammad was no longer detained there. When the lawyer asked for Mohammad's whereabouts, the lawyer was told that staff were not authorised to provide that information, even to Mohammad's legal representative. The lawyer speculatively contacted other detention centres, hoping to locate Mohammad. The Department of Immigration did not respond to the lawyer's requests for confirmation of Mohammad's whereabouts until one week later. The lawyer was unable to take instructions from Mohammad within the three-day period, and Mohammad missed the deadline for response.

Changes to legislation or policy could ensure that legal representatives or authorised recipients are notified of any decision to transfer a person from their current place of detention.

The structural problem underlying these barriers to access to justice is that Australia's legal framework results in the detention of people for open-ended periods and the detention of people who do not need to be detained. RACS recommends that the advocacy efforts be directed at reform in this area. The Australian government should closely consider alternatives to mandatory, indefinite detention and take steps to limit detention in accordance with international human rights principles.[34]

7. Family violence and protection visa applicants

People seeking asylum who experience family violence are not protected by the family violence provisions of Australian immigration law.[35] The family violence provisions protect some visa applicants after the breakdown of a relationship where they have been the victim of family violence committed by their sponsor.[36] The provisions were introduced to address situations in which partners would stay in abusive relationships in fear of being unable to remain in Australia if the relationship was understood to have broken down.

In RACS' experience, some asylum seekers are reluctant to leave or report abusive relationships because they rely on their status as a spouse of a person with protection claims. The often protracted period between the time a person seeks asylum and the time a decision is made on their status (more than four years for most fast track applicants) has dramatically increased the likelihood of these situations occurring. The low threshold for bridging visa cancellation during this period has meant that many people are also reluctant to report family violence, knowing that it is likely that this would result in their partner being detained for an indeterminate period of time.[37]

[34] See for example Australian Human Rights Commission, *Alternatives to Detention*, available at <https://www.humanrights.gov.au/alternatives-detention> (accessed 27 September 2017).

[35] *Migration Regulations 1994* Part 1, Division 1.5.

[36] Family violence provisions are found in the *Migration Regulations 1994* Part 1 Division 1.5.

[37] See section 5, above, in relation to the cancellation of bridging visas.

The 2016 Victorian Royal Commission into Family Violence found that culturally and linguistically diverse communities are more likely to face barriers to obtaining help for family violence.[38] The Commission also found that the effects of family violence experienced by recent arrivals are compounded by a range of factors associated with the experience of migration and resettlement, as well as systemic barriers to seeking and obtaining help. The Australian Law Reform Commission recommended in 2012 that the Migration Regulations be amended to allow access to the family violence provisions for secondary applicants for onshore permanent visas.[39] The application of the family violence provisions to protection visas would protect applicants who are victims of family violence by allowing a victim to be considered for the visa after the breakdown of the relationship in the case that they are relying on their partner's claims.

Family breakdown and family violence situations often affect asylum seekers' access to legal services due to the small number of organisations which can provide access to the specialist services they need. Where lawyers are unable to continue acting for a family without a conflict of duties among members of the family, they are generally required to cease acting.[40] Critical gaps in services can mean that the advent of a new problem (family violence) can result in the loss of help with an existing problem (immigration status). This could be alleviated by a stable funding framework for legal assistance as discussed in section 3.

8. Children and unaccompanied children who seek asylum

It is well documented that Australia's legal framework for immigration detention is contrary to international standards, including Australia's obligations under the Convention on the Rights of the Child. Under existing law, the Immigration Minister is the legal guardian of unaccompanied children who are not Australian citizens.[41] These guardianship responsibilities, including the obligations to make decisions in accordance with the child's best interests, are fundamentally incompatible with other Ministerial powers under the Migration Act, including the Minister's obligations in relation to detention.

Case study 8: Conflicting obligations in relation to unaccompanied children

Akram arrived in Australia when he was 13 years old as an unaccompanied child. Akram's older brother, Sam, had arrived in Australia previously in September 2012. Sam is three years older than Akram and was living in Melbourne. Their father was killed in Iraq in the year before Sam arrived.

Akram desperately wanted to be reunited with Sam, but remained in detention on Christmas Island for several years, pending transfer to Nauru or Manus Island. Because he arrived by boat after 19 July 2013, Australian policy and law dictated that Akram had to be sent to a regional processing country. This is despite the Immigration Minister also being legally responsible for Akram's welfare as his legal guardian.

This legal framework is desperately in need of reform, which should include a statutory guardian who is independent of the Minister.[42] Advocacy efforts should be directed at amendments to the Migration Act to permit the detention of children only where it is genuinely a last resort and such that only community detention is ever available in relation to detention involving a child.

[38] State of Victoria, Royal Commission into Family Violence, Summary and Recommendations, Parl Paper No 132 (2014-16), March 2016, available at <http://files.rcfv.com.au/Reports/Final/RCFV-All-Volumes.pdf>.

[39] Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Improving Legal Frameworks* (ALRC Report 117), 8 February 2012, Recommendation 20-2.

[40] See for example Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015, rule 11.

[41] *Immigration (Guardianship of Children) Act 1946* (Cth) s 6.

[42] See for example Mary Crock and Mary Anne Kenny, 'Rethinking the Guardianship of Refugee Children after the Malaysian Solution' (2012) 34 *Sydney Law Review* 437.

9. Access to information

The *Freedom of Information Act 1982* (Cth) (FOI Act) provides a legally enforceable right of access to government-held documents and information. This is an important right for people seeking asylum, as detention records, earlier visa applications and records of interviews may have important implications for their ability to fairly engage in a range of legal processes.

The FOI Act requires relevant Ministers and agencies to make decisions on FOI requests as soon as practicable, and no later than 30 days from the date of a request.[43] Information sought by people seeking asylum is often required for the purposes of an ongoing or imminent visa application. However, in RACS' experience the Department of Immigration and Border Protection commonly fails to decide requests made by asylum seekers within the statutory period. The FOI Act establishes review rights, but the review processes are affected by delays that render them illusory in many cases.[44] People affected may be able to obtain the relevant information by pursuing review rights, but may not be able to do so until after the outcome of the process for which the information was originally sought. The obstacles to enforcing rights to access to information and the mismatch between timeframes for immigration processes and FOI processes compound access to justice problems for people seeking asylum.

The FOI section of Department of Immigration and Border Protection should be adequately resourced in order to comply with its statutory obligations. The Office of the Australian Information Commissioner and the AAT should be adequately resourced in order to make timely review decisions.

[43] FOI Act, s 15(5).

[44] A failure to provide information within the 30-day period is deemed to be a refusal of the request (s 15AC) giving rise to avenues for review, including internal review and review by the Office of the Australian Information Commissioner. Some decisions are also reviewable by the Administrative Appeals Tribunal.