RACS REFUGEE ADVICE & CASEWORK SERVICE

23 August 2019

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By Email: legcon.sen@aph.gov.au

Dear Committee Secretary

RACS Submission to the Senate Legal and Constitutional Affairs Committee on the impact of changes to service delivery models on the administration and running of Government programs

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

RACS welcomes the opportunity to provide comment on the inquiry to the proposed changes to service delivery models, and in particular the possible privatisation of Australia's visa and citizenship program as it relates to refugees and asylum seekers.

This submission addressed the impact of changes to service delivery models on the administration and running of Government programs, with particular reference to:

a. the privatisation of Australia's visa and citizenship program, including:
i. the integrity of Australia's visa and citizenship system; and
iii. the implications to national security, data security and privacy.

RACS notes that in relation to prior consultations held with the Department of Home Affairs regarding automation and/or outsourcing of functions relating to Australia's visa regime, Department officials have made clear that the refugee and humanitarian visa services would be exempted from any such reforms. Without making comment on the broader appropriateness of privatising Australian visa and citizenship programs, we submit that it is entirely appropriate that these refugee and humanitarian functions of the Department, and particularly applications for Protection visas, remain public functions, staffed and administered in their entirety by the Australian public service.

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State-Based Locus of Protection Obligations

Protection visas are designed as the central plank of Australia's regime for compliance its international legal obligations arising under the Refugees Convention and other instruments. It is the Australian government's responsibility to ensure that, in particular, refugees and other persons who these Conventions are concerned with are protected from return to situations of harm. This means that Protection visas are distinct from the rest of Australia's visa framework, which by contrast is designed primarily with Australian domestic concerns in mind.

Given that the Australian government is therefore ultimately responsible for compliance with these obligations, and is accountable to the international community for any breaches thereof, we consider that it would be fundamentally inappropriate for these functions to be outsourced to a private [presumably for-profit] operator. Mistakes, oversights or systematic failures by the private operator would still be sheeted home to the Australian government; and the very nature of privatisation means that the Australian government would have limited oversight of the privatised regimes.

Governance and Administrative Law Concerns

We are further concerned at the possibility for privatisation of Protection visa applications and determinations to reduce the public law remedies available to applicants. Private contractors exercising government functions are, at Australian law, significantly less accountable than government agencies are. Their decisions may fall outside of the scope of judicial review for jurisdictional errors, meaning that the courts would be unable to review and overturn even patently unlawful and/or flawed decisions against people seeking Australia's protection. Where a legally erroneous decision is made by a government Department, or a governmental review body [such as a Tribunal], the federal court system's ability to review this and quash the decision is an important part of Australia's systems for government accountability. Privatisation of these functions would jeopardise this and increase the risk of unlawful decisions being allowed to stand.

Not only would an inability to seek judicial review prevent individual applicants from seeking redress for unfair decisions, it would also seriously hinder the interpretation and development of the law in this area. Refugee law is a deeply complex and rapidly evolving area, and has often required the courts to issue rulings to clarify and apply the existing law to new facts and legal scenarios. In the absence of judicial review, courts would no longer have the opportunity to issue such guidance, leaving decision-makers [and lawyers] working in the area fumble in the dark, and potentially make inconsistent decisions from one matter to the next.

Privatisation would also exempt applicants in the area from the operation of the Freedom of Information Act 1982 (Cth) ('FOI'). As practitioners in the area, we can attest that access to an individual's own information is an essential part of most applications for Protection visas. The government is subject to FOI requests; private contractors are not. While governmental agencies are required to take contractual measures to obtain documents produced or held by private contractors performing government functions, there can be no complete guarantee of the effectiveness of these contractual provisions, and at a minimum there is a risk that documents will be lost in transit or that applicants would face far greater delays in obtaining responses to FOI requests made to the Department of Home Affairs while their application is processed by a private contractor. Accordingly, privatisation would risk leaving applicants forced to make their case for Protection without access to their own documentation and files.

Specialised Nature of Protection Visa Assessment

Many areas of migration law in Australia, such as those concerning business sponsorships, are relatively well-defined and rely on straightforward and intuitive criteria set out in legislation and policy. Refugee law, and the law applying to Protection visas, is different. Claims for protection involve interpretation of a deep and rich vein of Australian administrative law, drafted to reflect international legal instruments and guidance, and further defined by a litany of judicial cases and decisions. As an inherently politically-contested area, they also involve a variety of complex and interlocking statutory provisions implemented by various governments over the past several decades. The end result of this is a complex and challenging area of law that requires significant specialised expertise to properly interpret.

Additionally, as well as complex questions of law, claims for Protection are often made by persons with histories of torture and trauma, ongoing physical and psychological scars and disabilities, limited formal education, and/or limited access to documentary supporting evidence. The primary evidence in support of their claim may well be the person's own testimony, meaning that decision-makers must make careful enquiries with a nuanced understanding of the difficulties that an applicant may face in articulating their case, and a sensitivity to cultural and trauma-informed factors.

The above matters mean that the accumulated expertise of the public service in this area is entirely appropriate and, indeed, necessary in order to make sound decisions on applications for Australia's protection. This is particularly so given that decisions on Protection visa applications are often, quite literally, matters of life and death – and are more analogous many ways to those of the judiciary than simple administrative or bureaucratic assessments. RACS considers that given the seriousness of these matters, and the factual and legal complexity of the decisions made, it would be inappropriate to

contract such matters out to a private decision-maker rather than using the specialist knowledge and skills developed by government in this area.

Unsuitability of Commercial Imperatives

RACS considers that privatisation of this area would also risk importing a number of commercial imperatives to the process, which are unsuitable for the vulnerable applicants engaging with the Protection visa process. For instance, a private provider may face pressure to raise application fees [currently kept deliberately low in order to facilitate access by desperate asylum seekers] – which would cause significant hardship for many clients RACS deal with who live at or below the poverty line. A private provider may wish to mandate that Protection visa applications be accepted only via an online portal, for ease of administrative processing – posing serious barriers to access for, say, Rohingyan refugees for whom the very nature of the persecution they face has meant they have limited education and may be unfamiliar with technology and/or the English language. Or a commercial desire to deliver decisions on large numbers of applications within a tight timeframe may lead to compromises in the quality of decisions, and limited time spent by a privately contracted decision-maker conducting research, considering the claims made for protection, or limiting the time allowed for applicants to provide additional information and documents.

Each of the above measures may have a commercially rational basis, and may be useful as applied to other kinds of visa "product". However, in relation to Protection visas and the humanitarian programme, where the imperative is not commercial but is instead to fulfil Australia's international obligations and ensure ease of access for vulnerable asylum seekers, RACS considers that they would be entirely inappropriate. Instead, in RACS experience, the impact of such measures would, at best, be to shift the burden of assisting applicants onto an already overburdened and underfunded charitable and community sector, and at worst to deny access to Australia's protection to those who face removal to countries in which they face harm, torture and death.

Disruption of Existing Intra-Governmental Processes

The Protection visa assessment process is complex and does not exist in a vacuum. Clients undergoing the process may also need to engage with the Department of Home Affairs regarding status resolution, character assessments, health assessments, etc. Privatisation of one or more components of this system is likely to contribute to a disconnect between these systems and agencies, and risks creating gaps in service provision or the loss of critical information. For already-vulnerable applicants, navigating such administrative quagmires is likely to be burdensome if not simply overwhelming, and

increases the risk of flawed decision-making and systems failure in relation to individuals with complex matters and needs.

The Protection visa process also requires a variety of interactions between government departments, and not simply Immigration/Home Affairs. Liaison occurs with the AFP for police clearances and information gathering, DFAT for on-the-ground expertise and reporting, other executive bodies such as the AAT for review matters, and many other bodies. Contracting-out the Protection process [and/or other functions] is likely to produce a disconnect between these bodies that is not present when all are taking place "within government", and contribute to miscommunications and/or undue processing delays.

As a final matter, information security for Protection visa applicants is absolutely critical. In RACS experience, many clients are deeply and justifiably concerned that, if information about their applications for Protection were leaked, it could endanger family and friends overseas or the applicants themselves in Australia or [if their applications for Protection are unsuccessful] upon return to their home country. RACS is also aware of cases of foreign actors attempting to gain information about clients with politically or personally sensitive matters, rendering the protection of this data even more essential. At present, data security is handled with all of the applicable expertise and resources of the federal government. However, a private contractor is likely able to bring significantly fewer resources to bear, and would likely be the "weakest link" in the data security chain. Private contractors may prove difficult to vet, and would almost certainly be easier for hostile actors to penetrate than the Australian federal government. The implications of this weakness would be, foremost, to endanger applicants and those connected to them in the event of a breach, but also to decrease the confidence that applicants may have to be full and frank about producing their claims. RACS' clients often require reassurance that they can disclose sensitive information in detail to the Australian government in order to support their claims in the knowledge that it will be treated securely and not released; it is likely that it would prove far harder to assuage similar doubts in relation to a private contractor.

Please do not hesitate to contact us for further information on

Sincerely,
REFUGEE ADVICE AND CASEWORK SERVICE (AUST) INC

Sarah Dale
Centre Manager and Principal Solicitor