

Submission to Australian Human Rights Commission

Current and emerging threats to TGD
human rights

3 May 2024

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.*

Table of Contents

TABLE OF CONTENTS	2
INTRODUCTION	3
REFUGEE ASSESSMENT PROCESS	4
TRAINING WITH DECISION MAKERS	4
INTERVIEWING VISA APPLICANTS	5
DEFICIENCIES IN THE ASSESSMENT PROCESS	6
CASE STUDY: TRUDI	7
IDENTITY AND DOCUMENTATION	8
ACCESS TO SERVICES	9
CONCLUSION	11

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.

Our services include supporting people to apply for protection visas, re-apply for temporary 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.

In 2022, RACS established a best practice toolkit and clinic dedicated to assisting refugees and people seeking asylum who require protection due to their sexual orientation, gender identity and expression, and/or sex characteristics (SOGIESC). Through this clinic, RACS currently assists over 100 clients, 20 of whom are trans and gender diverse (TGD).

RACS welcomes this opportunity to contribute to the Australian Human Rights Commission's national project aiming to map current and emerging threats to TGD human rights in Australia.

We wish to draw specific attention to the threats to TGD asylum seekers and refugees who are seeking protection in Australia. Namely, this submission comments on the manner in which the Department of Home Affairs (Department) processes and assesses protection visa applications made by TGD people, and concludes that decisions makers and other public servants within the Department would benefit from further training. This submission also draws attention to the difficulties our clients have in accessing services.

We would like to extend our gratitude to the following contributors to this submission:

Carly Elwin

Gretel Emerson

Isobel McGarity

Refugee Assessment Process

RACS represents a number of people seeking asylum whose claims for protection are based on their SOGIESC.

For background, an application for a protection visa is first assessed by the Department of Home Affairs who must be satisfied, *inter alia*, that an applicant would face serious or significant harm in their country of origin because of their SOGIESC. Should the Department refuse an application, this decision can be reviewed by the Administrative Appeals Tribunal (AAT).

Of the 20 TGD clients that RACS are currently assisting, 13 are being processed by the Department, 4 are being processed by the Tribunal, and 3 have been refused by both the Department and the AAT are either being assessed by the Minister or currently without a visa. In RACS' opinion, there have been significant defects and errors in the decision-making process with respect to those clients who have been refused.

This refugee status determination process is particularly sensitive and can be traumatic for TGD people who face barriers to justice due to a lack of training for decision-makers, intrusive questioning at interview, and difficulties using interpreters. With limited funding for specialised services, such as RACS' SOGIESC clinic, access to free legal help to navigate this process is restricted. RACS is concerned about the threats to the rights of TGD people navigating the protection visa application process and recommends that further training and awareness may improve this experience for these refugees and asylum seekers.

RACS is also concerned that there are aspects of the decision-making process that put TGD people at risk of being returned to countries in which they would face harm.

Training with decision makers

The sensitive and personal nature of protection claims for TGD refugees and asylum seekers mean that decision makers at the Department and Tribunal ought to be given SOGIESC specific training on interacting with this group of people. RACS' SOGIESC toolkit recognises the pressing needs and vulnerability of these refugees and asylum seekers, acknowledges the barriers to justice they face, and notes the specific issues that TGD people experience in raising and proving their protection claims. It also aims to bridge the gaps in the Department and Tribunal's internal training for decision makers.

The Department's Gender and Sexual Orientation Procedural Instruction from 2018 was released after a Freedom of Information (FOI) request¹ and, while it may not be the most

¹ Department of Home Affairs, 'Gender and Sexual Orientation Procedural Instruction' (18 April 2018) <<https://www.homeaffairs.gov.au/foi/files/2019/fa-190700951-document-released.PDF>>.

recent iteration of the instruction, would benefit from updating. RACS recommends that the Commission engage with the Department on training and updates to these instructions.

The Departmental instruction does show awareness that intrusive or blunt questions about a TGD person's sex or gender should be avoided, and that not all TGD people have or want to medically transition. However, we are concerned that the instruction does use the terminology "transsexual" in one instance, and overall lacks substance in noting how processing TGD applications may require more specific training beyond general LGBTQIA+ training. It appears to lack awareness of how the RSD process is built upon a Western idea of gender and sexuality and does not acknowledge how intersecting identities of one's gender, sexuality, race, religion, or disability can exacerbate existing barriers to justice.

The Tribunal lacks specific guidelines on how Members can appropriately consider SOGIESC or TGD applicants, though their Guidelines on Gender offer a brief note for Members to focus their questioning on self-realisation of SOGIESC rather than sexual acts.² We consider the lack of any specific training or guidelines at the Tribunal level concerning.

We hold concerns that these training deficiencies is putting TGD refugees and asylum seekers at risk during the RSD process. From RACS' experiences in representing TGD clients at Departmental interviews and at Tribunal hearings, it is evident that the limited training available is not applied or considered consistently, leading to TGD people being misgendered, deadnamed, and retraumatised. RACS calls for stronger and more consistent training for all decision makers and front-line staff at both the Department and Tribunal levels that is regularly updated and developed in consultation with those with lived experience of seeking protection based off their SOGIESC.

Interviewing visa applicants

RACS has observed that at Department interviews and Tribunal hearings the little SOGIESC training available to decision makers is not being consistently applied when engaging with TGD clients. Invasive or inappropriate lines of questioning is not uncommon in our experience, for example asking a transgender female questions about whether she wears heels, skirts, or makeup to present as feminine, despite the officer being able to see the applicant. It is also common for decision-makers to question clients about what, if any, surgeries they have had and whether they plan to do so. RACS has also observed officers deadname our clients or use incorrect pronouns while interviewing them. This raises concerns for a TGD person's wellbeing while engaging in the RSD

² Administrative Appeals Tribunal, 'Guidelines on Gender' (July 2015) <<https://www.aat.gov.au/AAT/media/AAT/Files/MRD%20documents/Legislation%20Policies%20Guidelines/Guidelines-on-Gender.pdf>>.

process and demonstrates to us the gap in understanding and awareness from decision makers.

RACS' toolkit explores how, for a TGD person, talking to a Departmental officer or Tribunal Member about their gender in a formal institutional setting is not easy when the topic being discussed is so personal, sensitive, and often the cause of past trauma and persecution. This is not assisted by decision makers asking uncomfortable questions, misgendering someone, or relying on an interpreter from the same country or ethnicity as the client. While interpreters are required to be professional and impartial, we have had concerning instances where interpreters have made inappropriate comments. In one case, one of our client's transgender identity was spread by an interpreter to their community, which led to threats to their safety in Australia. While RACS assisted our client to make complaints to the Department and relevant translating service, it was not possible to specifically identify the interpreter who breached confidentiality, and the matter was closed.

Our TGD clients fear being outed by interpreters, and often feel as though they are unable to accurately interpret their language around gender and sexuality. Despite not having proficiency in English, many TGD clients prefer to forego an interpreter to remain safe. Noting these concerns, we recommend further training for interpreters and greater awareness by decision makers of the difficulties this poses to the interview process.

Further, the interview or hearing process can feel entirely unnecessary when written submissions and sufficient supporting documentation can be provided by a TGD person or their lawyer. In matters where we are able to provide sufficient evidentiary documentation to verify a person's TGD identity and demonstrate the harm they would face in their country of origin, we believe that current practices to hold an interview with a decision makers puts unwarranted stress on the client. Not only is engaging with an authority often an uncomfortable experience for refugees and asylum seekers, but this interaction also becomes more difficult when the line of questioning relates to one's personal experiences of their sex or their gender.

Deficiencies in the assessment process

RACS has long advocated for reform around the refugee status determination process and has a history of calling for change with respect to the fast-track process.³ RACS welcomed the Government's plans to address a significant backlog of refugee matters at both primary (Department) and secondary (AAT) level. The Government has announced that it will seek to swiftly process and address the backlog. The following case study

³ See, for example, our most recent submission to the Senate Committee inquiry into a migration amendment bill before the Senate, available on the Inquiry website here (submission 73): https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/MigrationAmendment24/Submissions.

unfortunately demonstrates that this focus on fast processing has led to extremely concerning outcomes, including for one of our clients.

Case Study: Trudi

Trudi* is a transgender woman from a south-east Asian country who fled to Australia to pursue safe access to gender affirming health care and protection. RACS assisted Trudi to lodge a Protection Visa application with a detailed statement of her protection claims. Without offering an interview or providing an opportunity to respond to any concerns about the application in writing, the Department refused to grant Trudi a protection visa. The basis for this refusal was that Trudi provided no evidence of past harm on the basis of her transgender identity in her country of origin.

However, this assessment failed to consider the fact that when Trudi was in her country of origin, she was forced to present as a cisgender male to avoid harm. Without an interview and without this concern being raised for comment, Trudi was unable to articulate in her own words how her lack of past harm does not negate her risk of future harm given she has now been able to socially and medically transition in Australia.

RACS has lodged a review of this application with the AAT.

This case study clearly demonstrates that seeking to swiftly resolve matters without an interview, and failing to afford procedural safeguards to TGD clients, can have significant implications. RACS is concerned that the Department's processes for assessing when an interview is or is not necessary are being inappropriately applied for TGD people, leading to disparity in how these applications are considered. We note that improvements could be made in assessing when an interview is necessary and making it a less traumatic experience when one is required, while acknowledging when a positive decision can be made on the papers to alleviate the burden on TGD refugees and asylum seekers.

Recommendation 1:

That rights-based and mandatory training be implemented for all Department and Tribunal decision makers and front-line staff, in consultation with those with lived experience.

Recommendation 2:

That Departmental processes better consider the needs of TGD applicants, for example not conducting interviews where a positive decision can be made on the papers, and ensuring that applicants have the right to an interview if they are being considered for a refusal.

Identity and Documentation

It is particularly difficult for TGD people to legally change their name and gender marker on identity documents when applying for a protection visa. While changing one's gender on federal level identity documents does not require evidence of surgery or hormone therapy, this is often a requirement for state level identity documents.⁴ This limits access to this change to those who have Medicare to alleviate the costs of gender affirming health care. Access to Medicare is discussed in more detail below but is not guaranteed for all TGD people on temporary visas.

Further, applications for a protection visa are made using the details on one's passport. Should a TGD person be granted a protection visa, this visa grant would reflect the (often outdated) name and gender marker the application was made in. For the Department of Home Affairs to approve a change of name or gender prior to a visa grant, they often require a TGD person to provide an identity or travel document from their country of origin that reflects this change, expecting the person to approach the authorities from their home country for the purpose of seeking a new travel document. This request is both unreasonable and undermines the fact that the person is seeking protection from that same country of origin. Not only is changing their gender or name in their country of origin often not an option due to its being illegal or not recognised as an issue, but it is also not safe to do so.

The Department's reluctance to process updates to gender and name prior to a visa grant leads a TGD person to hold conflicting identity documents in Australia which exacerbates issues with accessing Medicare, Centrelink, NDIS, housing, or employment. Further, this makes meeting the identity requirements for a citizenship application more difficult and can delay processing.

We are concerned that the rigidity of the systems and regulations pertaining to identity documents, and the inconsistent requirements between states, is a significant barrier to justice for TGD people. While operating within a fixed and binary understanding of gender, these systems exclude TGD refugees and asylum seekers from reconciling their social identity with their legal identity, which greatly prohibits their access to services.

Recommendation 3:

That processing of changes to identity documents for TGD refugees and asylum seekers be amended to ensure consistency and ease and remove reliance on evidence of medical transition.

⁴ NSW Government, 'Change of Sex' <<https://www.nsw.gov.au/family-and-relationships/name-changes-and-corrections/change-of-sex>>.

Access to Services

As foreshadowed, access to Medicare is not guaranteed for all TGD refugees and asylum seekers on temporary visas while their protection visa application is being processed. Should a TGD person apply for protection in Australia while they continue to hold a substantive visa, they will ordinarily be granted a Bridging Visa that includes work rights and access to Medicare, however, this will not come into effect until the substantive visa they arrived on expires. This can lead to a gap of time (the extent of which depends on the substantive visa) without access to full time employment or Medicare.

However, many TGD people are not aware that they are eligible for a protection visa due to their SOGIESC and are unsure where they can access legal assistance to lodge this application. The experience of disclosing one's SOGIESC to a lawyer or a government authority can be difficult and uncomfortable, further exacerbating a delay in making the application. Moreover, lengthy processing times at the Department⁵ mean individuals may remain without access to work and Medicare for a significant length of time.⁶

In other cases, where a person may have allowed their substantive visa to lapse before applying for protection, they may not be allowed by the Department to work or access Medicare upon attempting to regularise their immigration status.

Without access to Medicare, TGD people struggle to access gender affirming health care. Much has been written about the cruciality of gender affirming health care and its ability to save lives, particularly for refugees and asylum seekers who have experienced harm and persecution in their country of origin for being TGD. People seeking asylum disproportionately experience physical and mental ill-health due to their overt experiences of persecution and trauma,⁷ which can be exacerbated by struggling to then access medical support in Australia that is sensitive to one's SOGIESC.

Access to employment for TGD refugees and asylum seekers is similarly dependant on the rights afforded by a Bridging Visa but can also be impacted by issues associated with identity documents. If a TGD person has work rights on their temporary visa or is granted a permanent protection visa, they may face issues with obtaining employment when they are unable to produce consistent or accurate identity documents.

⁵ Refugee Council Australia, "Thousands of People Seeking Asylum Living in Poverty" (17 October 2022) <<https://www.refugeecouncil.org.au/thousands-of-people-seeking-asylum-living-in-poverty/>>.

⁶ Asylum Seeker Resource Centre, 'Poverty through Policy the Impact of Excluding People Seeking Asylum from Mainstream Social Support' (April 2023) <https://asrc.org.au/wp-content/uploads/2023/04/ASRC_Policy_Through_Poverty_Finalv1.pdf>.

⁷ Jesuit Social Service, "The Living Conditions of People Seeking Asylum in Australia" (2015) <https://jss.org.au/wp-content/uploads/2015/12/Asylum_Seeker_Position_Paper_-_December_2015.pdf>.

TGD people on temporary visas are often barred from accessing mainstream state housing support such as Link2Home or other non-profit housing shelters that require evidence of permanent residency. Further, finding safe and affordable private housing as a TGD person is extremely difficult in the current economic climate. Resultantly, many TGD refugees and asylum seekers remain in a state of perpetual housing insecurity and uncertainty and are forced to compromise on their safety and security.⁸ For instance, people seeking asylum often make housing more accessible by sharing with other people, however, TGD people in shared accommodation are more susceptible to gendered violence, abuse and discrimination. The following case study demonstrates the precarious position TGD asylum seekers may be in while awaiting the processing of their protection visa.

Case Study: Amy

Amy* fled the Middle East due to being a transgender woman who had experienced significant persecution based off her identity. Once in Australia, Amy was without sufficient funds for private accommodation, so moved into a women's-only hostel in a shared dorm.

After a couple of nights in this hostel, Amy became concerned that the other women in the room were suspicious of her being transgender, and she no longer felt safe. Amy's visitor visa did not expire for 6 months, so she was unable to start working and was not eligible for crisis accommodation while on this visa. This left Amy in an unsafe position while waiting for her protection visa to be processed by the Department to give her access to Medicare, permanent residency, and work rights.

While many services are available for TGD people and for refugees and asylum seekers separately, there is a notable lack of services available for this intersection. Existing services struggle to meet the demand leading to ballooning waitlists and a lack of funding and resources. Working within the existing limitations faced by TGD refugees and asylum seekers needing to access services in Australia, we call for greater support and funding for specialist casework support services.

Recommendation 4:

That access to Government services such as Medicare, NDIS, and housing support be improved for TGD refugees and asylum seekers.

⁸ Jesuit Refugee Service, "A Place to Call Home a Report on the Experiences of Homelessness and Housing Exclusion among People Seeking Asylum in Greater Sydney Introduction" (10 December 2021) <<https://aus.jrs.net/wp-content/uploads/sites/20/2021/12/A-Place-to-Call-Home-Report-Final.pdf>>.

Recommendation 5:

That specialised support services for TGD refugees and asylum seekers be adequately resourced, including funded legal assistance.

Conclusion

In summary, RACS is concerned that TGD refugees and asylum seekers are facing greater barriers to justice in the RSD process. Insufficient and inconsistent training and processes at the Department and Tribunal mean that decision-makers are not appropriately considering the applications and protection claims of these clients. TGD applicants often face intrusive or inappropriate questioning during interview or hearing and feel unsafe when engaging with interpreters during these processes. RACS recommends that stronger and more consistent training of Department and Tribunal decision makers needs to be implemented in consultation with those with lived experience, and that processes for assessing when an interview is necessary needs to be improved.

Barriers to accessing justice and services for TGD refugees and asylum seekers see them face issues with identity documents, Medicare, work rights, housing, and employment. We recommend that changes to identity documents remove reliance on evidence of medical transition, and that access to Government services be improved. Further, we recommend that specialised support services for TGD refugees and asylum seekers be adequately resourced to meet the demand.