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National Legal Aid

19 August 2011

Committee Secretary
Joint Select Committee on Australia's
Immigration Detention Network
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Parliament House
Canberra ACT 2600
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Dear Committee Secretary

Re: Inquiry into Australia's Immigration Detention Network
National Legal Aid submission

About National Legal Aid
National Legal Aid (NLA) represents the Directors of the eight State and Territory Legal Aid Commissions (Commissions) in Australia. The Commissions are independent statutory authorities established under respective State or Territory enabling legislation. They are funded by State or Territory and Commonwealth governments to provide legal assistance to disadvantaged people.

NLA aims to ensure that the protection or assertion of the legal rights and interests of people are not prejudiced by reason of their inability to:

- obtain access to independent legal advice
- afford the appropriate cost of legal representation
- obtain access to the Federal and State and Territory legal systems, or
- obtain adequate information about access to the law and the legal system.

Terms of reference and this submission
This submission focuses on terms of reference (o) the total costs of managing and maintaining the immigration detention network and processing irregular maritime arrivals or other detainees; and (r) processes for assessment of protection claims made by irregular maritime arrivals and other persons and the impact on the detention network, in connection with the provision of legal advice and assistance in relation to applications for judicial review of decisions made by the Department of Immigration and Citizenship (DIAC) and the Independent Protection Assessment Office (IPAO).

In the course of providing some of the legal advice and assistance required by detainees we have some experience in relation to some of the other terms of reference being (b) the impact of length of detention and the appropriateness of facilities and services for asylum seekers; (d) the health, safety and well-being of asylum seekers, including specifically children, detained within the detention network; (e) impact of detention on children and families, and viable alternatives; and (h) the reasons for and nature of riots and disturbances in detention facilities. Our submission also briefly addresses the above-mentioned terms of reference.

Terms of reference
(o) the total costs of managing and maintaining the immigration detention network and processing irregular maritime arrivals or other detainees; and
(r) processes for assessment of protection claims made by irregular maritime arrivals and other persons and the impact on the detention network

Provision of legal services
The Federal Court has recently emphasised the importance of competent, publicly funded legal advice in reducing costs and demands on the migration system, noting that such advice is likely to decrease the number of applications before the Court, and that those that did proceed would be better focussed[i].

As a result of the case of *M61*[ii], people in detention who have been refused a protection visa (or a right to apply for a protection visa) must be able effectively to exercise their rights to access the court for judicial review.

Following *M61*, more than $100 million over four years in additional funds was allocated to the DIAC, including $73.2 million over two years for the IPAO to deal with increased workloads, $26.1 million over two years for internal and external legal expenses in relation to judicial review applications, and some $8.2 million over four years allocated to the Federal Magistrates Court for the same reason[iii].

No additional allocation of funding was made to ensure independent legal advice and assistance is provided to those wishing to consider, or exercise, their right to seek judicial review. Commissions, working co-operatively with each other, and other legal assistance and pro-bono legal service providers, are currently struggling to provide the required assistance with general funding which was allocated to Commissions under the National Partnership Agreement on Legal Assistance Services before the decision in *M61* was known[iv]. (Attached please find article for information from The Australian, dated 15 August 2011, for information).

Commission experience, based on working with many people in immigration detention, is that some detainees are extremely poorly informed about their options and associated processes. We suggest that it would assist those who have meritorious cases to make them successfully and as efficiently as possible if they had appropriate legal advice and assistance. It might also dissuade those with

unmeritorious cases from proceeding. Overall, legal assistance to applicants will, as suggested above, assist the smooth functioning of the judicial review system. It is likely to reduce the overall costs of processing these cases.

(b) the impact of length of detention and the appropriateness of facilities and services for asylum seekers

The Migration Act sets out, in section 256, that DIAC is obliged to provide reasonable facilities for obtaining legal advice or taking legal proceedings in relation to their immigration detention.

Commission experience is that generally facilities in detention centres are inadequate to enable detainees to seek and obtain proper advice, and to understand and comply with the court's procedural requirements. Detainees need to be able to make use of telephones, video link, fax and postal facilities to enable effective communications with legal assistance providers. At present, some people in immigration detention who wish to lodge judicial review applications are missing the 35 day time limit through no fault of their own.

Inadequate communication facilities, the practical impediments to commencing proceedings, and the difficulty in accessing legal assistance and advice, are likely to have adverse consequences for the Federal Magistrates Court. Cases may be filed out of time, applications for judicial review may be generic or unformulated, applicants will be self-represented and may be lacking language skills, and they may be trying to engage in merits review. In extreme cases, urgent injunctive relief may have to be sought for people who have not been able to commence proceedings and whom the Department may attempt to remove from Australia before they have a proper opportunity to do so.

Lawyers and organisations across the legal assistance sector have been working to develop a process for the 'triage' of judicial review proceedings by offshore entry persons. A practical issue which is yet to be adequately addressed in some jurisdictions is how detention centre staff should facilitate referrals to appropriate legal assistance.

(d) the health, safety and well-being of asylum seekers, including specifically children, detained within the detention network; and
(e) impact of detention on children and families, and viable alternatives

The observations of Commission staff providing legal advice and assistance to detainees is that many appear to be suffering greatly from stress related illness. Mental health facilities/treatment are perceived to be inadequate/insufficiently accessible. Clients continue to self-harm.

We have particular concerns about the effect of immigration detention on children and note that Victoria Legal Aid is involved in litigation seeking to clarify the question of the extent of the obligations of the Minister as legal guardian of unaccompanied non-citizen children who arrive in Australia, as provided for by the Immigration (Guardianship of Children) Act 1946.

United Nations High Commissioner for Refugees position is that the availability of legal advice and representation is one of the major factors influencing the effectiveness of alternatives to immigration detention. Its research also indicates that the effectiveness of alternative mechanisms will be much greater if people are fully informed of and understand their rights and obligations, the conditions of their release and the consequences of failing to appear for a hearing. International experience also suggests that such alternatives have a high rate of compliance and are more cost effective than immigration detention[v].

(h) the reasons for and nature of riots and disturbances in detention facilities

We suggest that some of the riots and disturbances at detention centres are likely to be the product of strain that detainees are suffering by reason of uncertainty of outcome for them. We suggest that it might help alleviate a pressured environment if people were able to have access to independent legal information and advice relevant to their situation, and to be able to readily communicate with legal advisers/representatives. We suggest that improved access to interpreters, and health services is also required.

Recommendations

1. That funding to legal assistance service providers is increased to deal with the significant increase in the numbers of asylum seekers in immigration detention requiring independent legal advice and assistance about judicial review rights.

2. That DIAC and the Commission in each State and Territory establish appropriate referral paths to ensure detainees who receive a negative recommendation from an IMR are immediately referred for legal advice and assistance.

3. That facilities at detention centres are upgraded to enable communications to occur more readily between detainees and legal advisers/representatives, including by the provision of adequate facilities for detainees to meet with their lawyers.

Conclusion

Thank you for the opportunity to make this submission. Please do not hesitate to contact us should you require further information.

Yours sincerely

Andrew Crockett
Chair

[i] *SZLHM v MIAC* [2008] FCA 754 (23 May 2008), at [41]:
41 The problems faced by unrepresented litigants have of course long been recognised: eg, *Managing Justice: A Review of the Federal Civil Justice Scheme* (Australian Law Reform Commission, Report No 89, 2000) at [5.147]–[5.157]. Indeed, regrettably, it would appear that little may have changed in a period extending over a decade since the inception of that inquiry. In *Muaby v Minister for Immigration & Multicultural Affairs* (Unreported, Federal Court of Australia, Wilcox J, 20 August 1998), Wilcox J observed:
The number of applications filed in the New South Wales District Registry for judicial review of decisions of the Refugee Review Tribunal is running this year at a rate more than twice that of last year. It is the experience of my colleagues, as well as myself, that a large proportion of these matters are commenced by a stereotyped form of application that is uninformative and bears little relationship to what the applicant says at the hearing. It seems the filing of an application for review has become an almost routine reaction to the receipt of an adverse decision from the Tribunal. The solution is not to deny a right of judicial review. Experience shows a small proportion of cases have merit, in the sense the Court is satisfied the Tribunal fell into an error of law or failed to observe proper procedures or the like. In my view, the better course is to establish a system whereby people whose applications are refused have assured access to proper interpretation services and independent legal advice. If that were done, the number of applications for judicial review would substantially decrease. Those that proceeded would be better focussed and the grounds of review more helpfully stated. If applicants cannot afford legal advice, as is ordinarily the case, it ought to be provided out of public funds. The cost of doing this would be considerably less than the costs incurred by the Minister under the present system, in instructing a solicitor (and usually briefing counsel) to resist all applications, a substantial number of which have no merit and are ill-prepared. That is to say nothing about the desirability of relieving the Court from the burden of finding hearing dates for cases that should not be in the list at all.

[ii] *Plaintiff M61/2010E v Commonwealth of Australia* [2010] HCA 41

[iii] Budget 2011-2012
http://www.budget.gov.au/2011-12/content/bp2/html/bp2_expense-14.htm..

[iv] *Asylum case overloading legal system*, The Australian, 15 August 2011 (Attached)

[v] Ophelia Field with the assistance of Alice Edwards, UNHCR Legal and Protection Policy Research Series, *Alternatives to Detention of Asylum Seekers and Refugees*, particularly at pp.45-50