

CHAPTER 7

MIGRANTS AND REFUGEES

7.1 This chapter discusses:

- the availability of free legal assistance for migrants and refugees; and
- obstacles for effective assistance to migrants and refugees

Availability of free legal assistance for migrants and refugees

7.2 Migrants and refugees who are unable to afford legal assistance in relation to immigration law matters have two sources of free legal assistance. The first is through legal aid; the second is through free advice and casework services offered by CLCs and services that are funded by the Immigration Advice and Application Assistance Scheme (IAAAS) through the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA).

Legal aid for migrants and refugees

7.3 There are various restrictions on the availability of legal aid assistance in immigration matters. Under the Commonwealth Guidelines, in addition to the applicant being subjected to the means and merits test, legal aid assistance can only be granted in migration matters where:

- there are differences of judicial opinion which have not been settled by the Full Court of the Federal Court or the High Court; or
- the proceedings seek to challenge the lawfulness of detention. A challenge to the lawfulness of detention does not include a challenge to a visa decision or a deportation order.¹

7.4 The University of Technology Sydney Community Law and Legal Research Centre argued that these limitations ignore that immigration is a Commonwealth matter for which legal aid should be provided.²

7.5 Victoria Legal Aid argued that the restrictive nature of the Guidelines, which were introduced in the 1997 changes to legal aid, has caused a reduction in the level of legal aid available to migrants and refugees. That is because although the Commonwealth sought to supplement the services to migrants and refugees through the IAAAS scheme, some LACs have not successfully tendered for these contracts. As

1 Victoria Legal Aid, *Submission 97*, p.11.

2 *Submission 65*, p.4-5.

a result, LACs are limited to only providing legal aid to those applicants who meet the guidelines.³ This is discussed further below.

7.6 The Committee also heard that the high rate of legal aid refusal that these restrictions allow, leads to substantial pressure being placed on those services offered through IAAAS funding:

The UTS CLLRC believes that based on the high rate of referrals for immigration matters there is a significant unmet legal need which is not adequately met by legal aid. The Immigration Advice and Rights Centre (IARC) is the only CLC which specialises in immigration matters in NSW and as such is a highly strained service. The Refugee Advice and Casework Service (RACS) is the only service in NSW which provides specialised advice for protection visas and refugees and is similarly over stretched.⁴

Immigration Advice and Application Assistance Scheme

7.7 Those migrants and refugees who are refused legal aid assistance may seek assistance from services delivered through IAAAS contracts. These services are delivered by LACs who have successfully tendered for IAAAS contracts, CLCs such as the Immigration Advice and Rights Centre (IARC), or specialist services operating under such contracts, for example, the Refugee Advice and Casework Service (RACS).

7.8 Victoria Legal Aid provides assistance under the IAAAS scheme:

Under IAAAS, VLA can formally represent a limited number of particularly disadvantaged asylum seekers in applications to the Department of Immigration (DIMIA) and to the Refugee Review Tribunal (RRT). The IAAAS contract is a service for which VLA successfully tendered to DIMIA and it provides immigration applicants either in the community or in detention some level of representation.⁵

7.9 The IAAAS scheme also provides funding to some CLCs such as IARC to enable them to offer assistance to migrants and refugees. IARC funding is made up of Commonwealth and state funding (because of its role as a CLC under the program), funding from IAAAS and some self-generated funds.

7.10 Ms Suhad Kamand of the IARC explained at the Sydney hearing that of the drop-in advice it provides, 60 per cent would be covered by funding under the Commonwealth and state community legal centres funding program, 20 per cent

3 Victoria Legal Aid, *Submission 97*, p.11.

4 UTS Community Law and Legal Research Centre, *Submission 65*, p.4-5.

5 Victoria Legal Aid, *Submission 97*, p. 11.

would be covered by self-generated funding, and 20 per cent would be covered under the IAAAS.⁶

7.11 The IARC argued that the IAAAS did not allocate sufficient funding for application assistance and immigration advice for non-protection visa immigration matters. In 2001/02 the total funding for such assistance was \$111,000, of a total IAAAS funding for that year of over \$6.5 million.⁷ The IARC explained that \$111,000 would fund 124 new visa applications. In the two years of 2000–02, the IARC provided full application assistance to 36 clients and opened 147 new files. However, in each year around 5000 people seek assistance in phone or by person.⁸

7.12 Ms Suhad Kamand explained that those it is forced to turn away due to lack of resources must usually proceed without assistance or representation:

A large number of people that we have to turn away who do seek ongoing assistance are low to nil income earners. They have poor English language skills. They are unfamiliar with the way things are done in Australia and with government and tribunal processes. They are left without representation. They cannot go to commercial agents because they cannot afford commercial agents, and pro bono lawyers often do not offer migration advice because of the registration requirements—they are not registered to provide migration advice. Non-fee-charging agents simply do not have the capacity to assist them.⁹

7.13 Migrants' demand for legal assistance is illustrated by their level of representation in seeking assistance from CLCs generally (that is all CLCs, not just those receiving IAAAS funding). The NACLCLC gave the Committee figures indicating that for the 2002 calendar year, those who were born in a country other than Australia comprised 31.2 per cent of all clients seeking assistance from CLCs. Furthermore, those who were born in a non-English speaking country made up 22.2 per cent of all clients.¹⁰

7.14 Apart from LACs and CLCs that have been funded with IAAAS contracts, there are also several specialist services which are funded by IAAAS contracts to provide assistance to refugees.

7.15 An example of such a service is RACS, which is funded by IAAAS, grants from philanthropic organisations and community donations. RACS provides advice and assistance to refugees and asylum seekers. RACS explained that the support it is able

6 *Committee Hansard*, 13 November 2003, p. 100.

7 IARC, *Submission 52*, p.5.

8 *ibid.*

9 *Committee Hansard*, 13 November 2003, pp. 99-100.

10 National Association of Community Legal Centres, *Submission 84A*, p.1.

to offer falls seriously short of meeting the needs of asylum seekers in NSW and remote detention centres throughout Australia.¹¹

7.16 RACS stated that, since 2000, it has represented about 800 asylum seekers from over 50 countries, and that over 80 per cent of those have been granted refugee status.¹² A new and demanding area of work has been the provision of legal assistance to Temporary Protection Visa (TPV) holders. RACS explained that in the majority of these cases it does not receive government funding assistance.

7.17 In relation to the demand TPV holders make on CLCs and specialist services, the CCLCG noted that as the expanded TPV regime requires reassessments at 3 year intervals, and as such people are not eligible for legal aid, the pressure will become unrelenting:

The Migration Amendment Regulations which commenced on 28th August 2003 broaden the TPV regime to all on-shore applicants seeking protection, whether arriving with or without documentation. The result will be to increase the number of people on TPVs, which will in turn increase pressure on limited community and legal services. As on-shore refugees will then be required to undergo status determination at three year intervals, the demand on legal services will be unrelentless (sic). This will put heightened pressure on already over stretched services such as the Refugee Advice and Casework Service. Given that TPV holders are amongst the most socially and economically excluded people in our society and are unable to access the private migration sector, legal aid limitations will likely result in significant hardship.¹³

Access to justice for migrants and refugees: obstacles for effective legal assistance

Background

7.18 The Committee heard of various obstacles to the effective delivery of legal assistance to migrants and refugees. These include:

- restrictions in the Commonwealth priorities and guidelines on the circumstances in which legal assistance can be granted to migrants and refugees;
- interpreter services;
- need for assistance at primary review stages;
- conflict of interest arising from DIMIA granting IAAAS funding; and
- Migration Agents Registration Authority compliance costs.

11 RACS, *Submission 66*, p.2.

12 *ibid.*

13 CCLCG *Submission 60*, p.41

Restrictions in the Commonwealth Priorities and Guidelines

7.19 As explained above, the Commonwealth Priorities and Guidelines limit the availability of legal aid for immigration and refugee matters to cases that challenge points of law in either the Full Court of the Federal Court or the High Court. The Committee heard evidence from both LACs and CLCs, criticising the restrictions that the Commonwealth priorities and guidelines place on legal aid for migrants and refugees.

7.20 NLA argued that the requirement that there be a 'difference of judicial opinion' before legal aid can be granted for judicial review proceedings is very narrow and means that disadvantaged clients with meritorious cases are denied assistance.¹⁴ Victoria Legal Aid noted that although it is able to offer assistance through the IAAAS funding, overall it now offers less assistance than it was able to previously because of restrictions in the Guidelines:

Whilst pleased to act as one of the service providers under the IAAAS in refugee matters, VLA's capacity to respond to community demand in this area is significantly less than it was prior to the 1997 Commonwealth arrangements. The guideline allowing for legal aid for asylum seekers at primary application (DIMIA) and merits review (RRT) stages was taken out of the 1997 and subsequent Commonwealth funding agreements. The IAAAS contracts were then implemented and some legal aid commissions, not all, as well as some private law firms successfully tendered for these contracts. The result is that some commissions, those without IAAAS contracts, are now unable to assist these clients.¹⁵

7.21 The inability of IAAAS to meet the needs of those who are denied legal aid was reinforced by the NLA, which argued that the number of TPV holders far exceeds the current service levels possible under the IAAAS:

The [IAAAS] administered by the Department of Immigration provides representation to only a small number of disadvantaged people in the community applying for visas to the Immigration Department or to review tribunals. Immigration Department statistics indicate that, Australia wide, in the financial year 2001-02, representation was provided under the scheme in 398 non-detention cases, Given that there are over 8000 Temporary Protection Visa holders applying for further visas, many of whom are unable to pay for representation, the current system clearly does not provide access to justice for this disadvantaged group.¹⁶

14 *Submission 81*, pp. 17-18.

15 Victoria Legal Aid, *Submission 97*, p. 14.

16 *Submission 81*, p. 18.

7.22 RACS argued that assistance of migrants and refugees should be provided by legal aid, rather than leaving the majority of applicants to seek assistance through IAAAS:

RACS submits that Legal Aid assistance in applying for a protection visa should be available for all asylum seekers who satisfy the means test and whose applications are not vexatious or frivolous or have no possible prospects of success. In addition, RACS submits that Legal Aid should be available for proceedings in the Federal Court or High Court where an applicant satisfies the means test, and whose claim has some merit, and is not vexatious or frivolous. RACS submits that this should include proceedings to challenge a decision about a visa or deportation order.¹⁷

Need for assistance at primary review stages

7.23 The Legal Services Commission of South Australia explained that the limited provision of legal aid in administrative law matters, such as social security matters, has a considerable impact on non-refugee migrants, as they may suffer from language difficulties, extreme social isolation, lack of understanding of the legal system, and a fear of authority. It noted that in regards to social security matters, the guidelines restrict aid to the Administrative Appeals Tribunal level or above and no legal aid is available at the preliminary stages.¹⁸

7.24 The Legal Services Commission of South Australia argued that AAT appeals are often hampered by evidence and comments made at the preliminary stages when the applicant was not represented. It noted that it would be helpful and efficient to assist at the early stages to try and prevent more costly appeals to the AAT. The Legal Services Commission of South Australia commented that it would support changing the guidelines to allow this, but such a change would require an increase in funding.¹⁹

7.25 Ms Suhad Kamand on behalf of IARC also made this point in relation to migration matters:

[U]nrepresented applicants can undermine the processes that the department of immigration has in place. If the department receives an incomplete application, if an application contains errors or if it does not contain all of the evidence required, it is slowed down in its processing. Applications that could be decided on a positive basis by the department get rejected and they go to the Migration Review Tribunal, where fuller evidence is provided and the DIMIA decision gets set aside. Perhaps if those people had representation at the primary stage, the matter would not have gone to the [Migration Review Tribunal].²⁰

17 Refugee Advice and Casework Service, *Submission 66*, p.4.

18 Legal Services Commission of South Australia, *Submission 51*, p. 22.

19 *ibid.*

20 *Committee Hansard*, 13 November 2003, p.100.

Committee view

7.26 The Committee is concerned that the Guidelines introduced in 1997 have resulted in a reduction of available legal assistance for migrants and refugees. The Committee acknowledges that the Commonwealth Government has sought to meet this need with specialist funding under the IAAAS, but the Committee is concerned by evidence from LACs that this has not effectively met the need, and that overall LACs are now able to offer less assistance to migrants and refugees than they were prior to 1997.

7.27 Migrants and refugees are amongst the most disadvantaged groups in terms of access to justice. The Committee believes that, because of the special needs of this group due to language and cultural barriers, and due to the responsibility the Commonwealth has in this area, assistance should be provided to these persons by LACs. It is not appropriate that some LACs (those that have successfully tendered for IAAAS funding) are able to assist migrant and refugees in such matters whilst others are not.

7.28 The Committee is also concerned that the increase in demand caused by the introduction of TPVs is not being met by current IAAAS funding.

7.29 The Committee believes that if greater assistance were provided to migrants and refugees at the preliminary stages, it is likely that the need for complex and expensive review may be reduced. By assisting such people at an earlier stage through legal aid, the Commonwealth would not only meet its obligation for such persons, but may also reduce the cost and burden on the review system.

7.30 The Committee considers that the Commonwealth priorities and guidelines should be amended, to allow LACs to assist migrants and refugees at the preliminary and review stages where an applicant meets the means and merits tests, as was possible prior to 1997. Accordingly, the Commonwealth should provide additional funding to LACs to meet such demand.

Recommendation 41

7.31 The Committee recommends that the Commonwealth Priorities and Guidelines relating to the provision of migration assistance be amended such that assistance is available to those applicants meeting the means and merits tests, for preliminary and review stages of migration matters, including challenges to visa decisions and deportation orders.

Recommendation 42

7.32 In implementing Recommendation 41, the Committee recommends that the Commonwealth provide the necessary funding to legal aid commissions to meet the need for such services.

Interpreter services

7.33 A issue frequently raised regarding access to justice for migrants and refugees was the lack of interpreter services available to CLCs and specialist services.

7.34 In order to deliver legal assistance to migrants and refugees, the ability to have access to translator/interpreter services is obviously of great importance. The translation service offered by the Commonwealth is the Commonwealth Translating and Interpreter Service (TIS). TIS provides free telephone interpreters and a limited number of face-to-face interpreters.²¹

7.35 QAILS explained that ordinarily TIS is a fee paying service, but to date CLCs have been given an exemption subject to certain limitations. These limitations include that services to Queensland CLCs are subject to a quota, and bookings are on a first come, first served basis. This often results in CLCs being unable to provide assistance to a client because the quota has been reached.²²

7.36 QAILS also explained that the interpreter service does not extend to court representation, and that clients with significant language barriers have had to appear in court without an interpreter. This is a particular problem in civil matters, because unlike criminal matters, Queensland courts do not have the power to order interpreter services in civil proceedings.²³

7.37 Both QAILS and the CCLCG explained in their submissions that TIS does not offer its services after business hours, which is when most CLCs hold their advice sessions.²⁴

7.38 CCLCG noted that the limitations of TIS mean that it is the second choice for interpreter services for CLCs in NSW. The first choice is the NSW Community Relations Commission for a Multicultural NSW (CRC). CCLCG noted that prior to 1998, the NSW Ethnic Affairs Commission (as it was then) provided face-to-face interpreters to CLCs, on request for free. However CCLCG explained that in 1998, after the Commonwealth limited TIS to Commonwealth matters only, the NSW Government brought in a fee-for-service policy. CCLCG negotiated with the NSW Government for a limited exemption for CLCs. These limits to the exemption mean that the CRC service is not available for Commonwealth matters and equity/compensation matters.²⁵

21 Combined Community Legal Centres' Group NSW, *Submission 60*, p.28.

22 Queensland Association of Independent Legal Services, *Submission 73*, p.43.

23 *ibid* p.44.

24 *ibid*; Combined Community Legal Centres' Group NSW, *Submission 60*, p.28.

25 Combined Community Legal Centres' Group NSW, *Submission 60*, p.29.

7.39 CCLCG further noted that the lack of interpreter services was worse for regional areas, and gave the example that Illawarra Legal Centre has to travel to Sydney (an hour and half drive) to access CRC interpreters.²⁶

7.40 In order to remedy the difficulties that CLCs face in accessing interpreter services, CCLCG proposed the creation of a 'one-stop-shop' for interpreter services.²⁷ CCLCG estimates that servicing unmet interpreter demand in NSW CLCs would cost around \$100,000 (750 services at \$130 per service). CCLCG suggested that as the provision of interpreters should be on a needs basis, the real cost should be established through a 12 month pilot program. Such a pilot should be funded with a \$100,000 pool of funds from the Commonwealth and states/territories, and could be administered by the LACs.²⁸

Committee view

7.41 Clearly it is essential for the provision of access to justice that persons are able to comprehend the advice they receive, and the matters to which they are a party. The Committee is concerned by evidence that those seeking to provide free migration advice face difficulties in accessing face-to-face interpreters and is even more concerned by the reported lack of interpreter services in court proceedings, particularly civil matters.

7.42 The Committee believes that the inefficiencies caused by the Commonwealth/state divide in funding also occurs in translation services. The Committee believes that translation services would be more efficient and effective if they were funded jointly by the Commonwealth and the states/territories and made available for all matters regardless of whether the matter relates to the Commonwealth or the states.

7.43 The Committee supports the CCLCG's suggestion that a pilot program be established, jointly funded by the Commonwealth and the states/territories. The Committee believes that the provision of \$100,000 of funding for each jurisdiction, met jointly by the Commonwealth and the states/territories is a reasonable cost to test the viability of a 'one-stop-shop' for interpreter services.

Recommendation 43

7.44 The Committee recommends that the Commonwealth and states/territories should jointly fund a \$100,000 pilot program in each jurisdiction to assess the viability of a "one-stop-shop" interpreter service for community legal centres and legal aid services, to be administered by the legal aid commissions.

26 Combined Community Legal Centres' Group NSW, *Submission 60*, p.30.

27 *ibid.*

28 *ibid.*, p.31.

Conflict of interest issues

7.45 It was strongly argued in submissions and evidence that a conflict of interest arises because the IAAAS system is administered by DIMIA, which also appears against applicants in immigration matters.²⁹

7.46 Mr Tony Parsons from Victoria Legal Aid explained the difficulties:

We are regularly confronted with the situation where we attend our clients in detention centres, they ask us what the problem is and we say, 'The department of immigration is trying to throw you out of the country.' Then they ask: 'Who is providing money for your legal services?' and we have to say, 'The department of immigration.' It is an appalling conflict of interest. That money should be administered by the Commonwealth Attorney-General's office at the very least. People accuse us of providing Third World justice with that kind of conflict.³⁰

7.47 In addition to the conflict of interest that the IAAAS arrangements may cause, it was also noted by Ms Louise Boon-Kuo of RACS that its IAAAS contracts are currently in 6 month grants, which makes it very difficult to engage in long term planning.³¹

Committee view

7.48 The Committee believes that services for migrants and refugees would be best provided by legal aid, and consequently believes that the Commonwealth priorities and guidelines should be amended as suggested in recommendation 41. If, however, the Commonwealth continues to service the needs of migrants and refugees through IAAAS funding, the Committee believes it is inappropriate that this scheme is administered by DIMIA since this causes a clear conflict of interest and is unacceptable.

7.49 The Committee also believes that the length of IAAAS contracts (6 months) is too short to enable specialist service providers to engage in medium to long term planning, and that funding should at least be made annually.

29 For example see New South Wales Legal Aid Commission, *Submission 91*, p.35; Mr Grant Williams, *Committee Hansard*, 13 November 2004, p.3. Mr Tony Parson, *Committee Hansard*, 12 November 2004, p.34.; National Legal Aid, *Submission 81*, p.17.

30 *Committee Hansard*, 12 November 2003, p.34.

31 *Committee Hansard*, 13 November 2003, p.100.

Recommendation 44

7.50 The Committee recommends that if the IAAAS scheme is to continue as the main source of assistance for migrants and refugees, this program should be administered by the Commonwealth Attorney-General's Department as opposed to the Department of Immigration and Multicultural and Indigenous Affairs, to avoid any conflict of interest.

Recommendation 45

7.51 The Committee recommends that if the IAAAS scheme is to continue as the main source of assistance for migrants and refugees, the funding periods should be extended from 6 months to 12 months to allow specialist services and community legal centres to engage in longer term planning.

Migration Agents Registration Authority compliance costs

7.52 The Committee heard that compliance costs imposed by the Migration Agents Registration Authority (MARA) are an obstacle for CLCs or firms wishing to engage in pro bono legal advice regarding migration matters.

7.53 The IARC explained that the availability of free migration advice is limited by the requirement that those offering migration advice be registered migration agents. The IARC provided the Committee with a breakdown of the costs to gaining initial registration as a migration agent, which amounted to over \$5,000.³² It noted that no concession is available to non-fee charging agents for the MARA examination fee, and that the only concessions available for them are the registration fees. The initial registration fee is reduced from \$1760 to \$160 for non-charging agents, which reduces their total initial registration costs to around \$3,400. Re-registration is reduced from \$1050 to \$105.³³ The IARC further noted that the ongoing cost of maintaining registration is in the order of \$2,200 for non-fee charging agents (compared with \$4,200 for commercial agents).³⁴

7.54 The IARC expressed concern that the number of non-fee charging migration agents is decreasing and will continue to do so. The IARC noted that the 2001-02 MARA annual report stated that for that year there were 2773 registered migration agents, but of those only 270 were non-fee charging agents.³⁵ The Committee notes that the MARA annual report for 2002-03 indicates that as of 30 June 2003 the

32 Immigration Advice and Rights Centre, *Submission 52*, pp.2-3.

33 *ibid*, p.3.

34 *ibid*.

35 *ibid*, p.2.

number of overall registered agents had increased to 3084, but the number of non-fee charging agents remained static at 270.³⁶

7.55 The IARC was also concerned by the recent continuing professional development (CPD) requirements imposed by MARA, which it argues will inevitably increase the cost of such training. It was concerned that this will reduce the numbers of non-fee charging agents, because unlike commercial agents, they are unable to pass the costs down the line to consumers.³⁷

7.56 The IARC also explained that while it offers free or heavily discounted CPD seminars to other providers of non-profit migration advice, due to demanding administrative requirements from MARA regarding the provision of CPD courses (and limited resources on the part of IARC), it is unlikely that service providers such as IARC can continue to provide such free or discounted courses.³⁸

Committee view

7.57 The Committee is concerned by evidence that the availability of migration agents who provide free services may be reduced by compliance costs imposed by the MARA. The Committee believes that all possible barriers should be removed for those who seek to practice as non-fee charging migration agents.

7.58 The Committee believes that in its role of regulating the migration industry, MARA has an obligation to ensure that there are no unnecessary barriers to those who seek to practice as non-fee charging migration agents.

7.59 The Committee believes that MARA should co-operate with those such as IARC who run free or discounted CPD courses for non-fee charging migration agents. Such co-operation could involve meeting the administrative costs experienced by IARC in providing such courses, and/or in subsidising the costs of running such courses.

Recommendation 46

7.60 The Committee recommends that the Migration Agents Registration Authority co-operate with specialist migration advice services and community legal centres to minimise the costs of complying with the continuing professional development requirements that it administers.

36 *Migration Agents Registration Authority Annual Report 2002-03*, p.13.

37 IARC, *Submission 52*, p.3.

38 *ibid.*