CHAPTER 3

LEGAL AND OTHER ASSISTANCE TO ASYLUM SEEKERS

Terms of reference [a] and [k] ask the committee to consider:

> The adequacy of legal assistance provided to asylum seekers under the Federal Government's Immigration Advice and Application Assistance Scheme
>
> The accessibility of judicial review for impecunious asylum seekers, particularly since 1 July 1998 when the Commonwealth Legal Aid guidelines were amended to remove grants of aid for asylum seekers except in extremely limited circumstances

Introduction

3.1 In this chapter, the term 'legal assistance' is used in a broad sense and refers to assistance or advice relating to the Migration Act and its requirements, rather than assistance or advice necessarily given by lawyers. While Immigration Advice and Application Assistance Scheme (IAAAS) contractors must be registered migration agents, they will not necessarily be legal practitioners. The complexity of immigration and refugee law makes advice desirable in some instances, but certainly not in most.

3.2 Assistance is offered to asylum seekers under two Commonwealth government schemes: the Immigration Advice and Application Assistance Scheme (IAAAS) and the Commonwealth Legal Aid scheme.

3.3 This chapter outlines the operation of both schemes, and addresses the question of the adequacy of the level of assistance provided.

IAAAS

3.4 The IAAAS is a service administered by the Commonwealth Department of Immigration and Multicultural Affairs, which applies to immigration applications generally, and not specifically to asylum seekers. The scheme offers:[1]

- application assistance to protection visa applicants in immigration detention;
- application assistance to eligible protection visa applicants in the community;
- application assistance to other eligible non-protection visa applicants in the community; and
- immigration advice to eligible members of the community.

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1 The following outline of the Immigration Advice and Application Assistance Scheme is taken from Department of Immigration and Multicultural Affairs Fact Sheet No. 70

3.5 The scheme provides help to applicants in one of two ways, either through advice, or 'assistance'. Full assistance covers the preparation, lodgement and presentation of applications for visas and also application assistance at the merits review stage after a primary application has been refused. However, there is no provision made at all for representation at the merits review stage (RRT) or with applications for judicial review. In some instances, people may not be able to access 'full assistance', but are able to obtain some help. They may receive 'one-off' preliminary advice, either in a short interview or by telephone. DIMA notes that 'application' and 'advice' differ, in that full assistance results in the establishment of a formal client/adviser relationship.[2]

3.6 People eligible for application assistance under IAAAS include:

- all people in immigration detention who seek to apply for a protection visa;
- prospective protection visa applicants in the community with cases of merit **and** who are experiencing financial hardship **or** have suffered torture and trauma[3]

3.7 IAAAS services are currently provided by seventeen organisations, on the basis of contracts awarded by a competitive tender process.[4] In 1999-2000, the Budget allocation was $1.994 million, for the following: $1.296 million for anticipated application assistance to protection visa applicants in immigration detention;

- $289,000 for disadvantaged protection visa applicants in the community;
- $119,000 for other applications assistance for disadvantaged applicants in the community; and
- $290,000 for immigration advice to disadvantaged protection visa applicants in the community.[5]

3.8 The IAAAS replaces the earlier Application Assistance Scheme (AAS) and the Immigration Advisory Services Scheme (IASS), which were merged in late 1997.[6]

Legal aid

3.9 The second avenue for the provision of legal assistance to applicants is the Legal Aid Scheme, administered by the Commonwealth Attorney-General's

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2 *Submission No. 69D*, Department of Immigration and Multicultural Affairs, p. 1031

3 Department of Immigration and Multicultural Affairs Fact Sheet No. 70 – *Immigration Advice and Application Assistance Scheme*

4 Department of Immigration and Multicultural Affairs, *Annual Report 1998-99*, pp. 94-95

5 Department of Immigration and Multicultural Affairs Fact Sheet No. 70 – *Immigration Advice and Application Assistance Scheme*

6 Senate Legal and Constitutional Affairs References Committee, *Inquiry into the Australian Legal Aid System – Third Report*, June 1998, p. 116

Department according to the terms of the Commonwealth Guidelines for the grant of legal aid. Applicants for legal aid funding may only receive funding for matters that fall within the designated priority areas, and must also satisfy the means test and the merits test. The merits test has three facets:

- legal and factual merits – the "reasonable prospects of success" test;
- the "ordinarily prudent self-funding litigant" test; and
- the "appropriateness of spending limited public legal aid funds" test.[7]

3.10 Priority for migration matters is described by Guideline 4.

> **Guideline 4**
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> 4.1 Legal assistance may be granted in relation to proceedings in the Federal Court or High Court dealing with a migration matter, including a refugee matter, only where:
>
> (i) There are differences of judicial opinion which have not been settled by the Full Court of the Federal Court or the High Court; or
>
> (ii) 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.
>
> 4.2 Legal assistance for migration matters may be granted only in accordance with para 4.1, even if the matter could also be characterised as falling within another priority or guideline area.
>
> Applicants in all other cases should be referred for possible assistance available through the Immigration Advice and Application Assistance Scheme (IAAAS).

3.11 These replace the earlier guidelines under which legal aid funding could be provided for all stages of the refugee determination process, including disbursements incurred in the process of the application. According to Guideline 5 – Immigration Cases:

> **5.1 Refugees**
>
> The Commission may grant assistance for applications for refugee status if the applicant is in Australia and has a well founded fear of persecution if he/she returned to his/her country of nationality.
>
> The Commission will require detailed information about the circumstances which cause the applicant to fear persecution if returned to his/her country of nationality.

7 Each of these terms is described further in the Guidelines: p. 2

> Aid should normally be limited to the giving of advice, preparation of written material and costs of expert reports. Where in the opinion of the Commission the applicant is unable adequately to represent himself/herself the grant may extend to presentation.
>
> **5.2 Other Immigration cases**
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> The Commission will not usually grant assistance for other immigration cases.

Policy on assistance

3.12 In establishing the process for determining refugee status, government intended to provide a system in which legal advice should not be necessary:

> Departmental and review tribunal processes, especially those relating to refugee claimants, have been carefully set up with the explicit aim of ensuring that applicants do not need legal advisers to prepare or pursue their claims.[8]

3.13 Evidence from the RRT also suggests that the nature and structure of the RRT process has removed any requirement for the assistance of legally qualified persons:

> Applicants, almost all of whom do not speak English fluently and are unacquainted with Australian legal and cultural norms, are spared the expense of engaging lawyers, impecunious applicants are not at a disadvantage under the current system.[9]

3.14 DIMA stress that:

> The IAAAS is not intended as a mechanism to provide universal publicly funded visa application and immigration advice services to non-citizens.[10]

3.15 DIMA has claimed that a basic reason why an applicant should not need assistance is that the system is designed to place the onus of establishing certain aspects of the case on the decision maker rather than the applicant (as would be the case under an adversarial process):

> [T]he obligation of ensuring that Australia does not breach its protection obligations is on the case officers. It is on the decision maker. Therefore, in that sense, there is no need for the applicant, either through advice or individually, to have a thorough knowledge of refugee case law…

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8 *Submission No. 69*, Department of Immigration and Multicultural Affairs, p. 833. See also discussion in Chapter 4

9 *Submission No. 62*, Refugee Review Tribunal, p. 682. This issue is discussed further in Chapter 5

10 *Submission No. 69*, Department of Immigration and Multicultural Affairs, p. 834

> It is not an adversarial process. We have gone to great lengths through the design of the application form, through the training of case officers and where people are interviewed – so that there is an understanding of interview techniques and cultural awareness and so on – to ensure that it is as easy as possible for the applicant to just answer the questions and have everything that is required before the case officer. So we would argue that, with the onus being on the way it is and the way the administrative and procedural system is set up, there is no need for the applicant to be represented by a legal practitioner.[11]

3.16 In relation to legal aid, DIMA has stated that the guidelines restrict access for two reasons. Firstly, legal aid funds should not duplicate assistance available under IAAAS, and secondly, the review processes available under the RRT should reduce the need for judicial review.

3.17 One submission asserts that the restricted availability of legal aid funding was prompted in part by abuse by some members of the legal profession:

> Legal aid should be available for the judicial review of worthy cases. However there is currently a high level of abuse and irresponsibility on the part of some lawyers which has provoked the current government to attempt to remove the right of judicial review altogether. As indicated above, sanctions on lawyers who abuse the system would also be justified.[12]

3.18 The Committee notes that several submissions argue against the provision of legal assistance.[13] For example, Mr Harry Taplin, who made an individual submission, stated:

> There should be no such legal assistance. It is an obscenity that persons in the country illegally are able to obtain legal aid. It is time that this plundering of the public purse, aided and abetted by some elements of the legal profession, was brought to an end. With all the assistance and relief we provide it is no wonder that we are seeing an increase in illegal arrivals. No doubt we are viewed as an "easy touch".[14]

3.19 The Committee recognises the sentiments and concerns expressed , but also recognises Australia's international obligations for the fair and equitable treatment of people seeking refugee status.

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11 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 47

12 *Submission No. 66*, Macpherson and Kelley, p. 805

13 See for example, *Submission No. 41*, Mr Harry Taplin, p. 379; *Submission No. 2*, Mr Steven Sharp, p. 5, *Submission No. 11*, Ms Brenda Macintyre, p. 49

14 *Submission No. 41*, Mr Harry Taplin, p. 379

Access to advice and assistance only on request

3.20 There are clear limits to DIMA's responsibility to inform detainees of visa application matters, and the extent to which organisations and individuals seeking to provide advice and assistance are able to gain access to detainees.[15] Under current law, an immigration detainee has a right to make an application for refugee status, and is provided with legal assistance under IAAAS when making an application. However the department and its agents are under no obligation to provide any information or services unless requested to do so. The onus, therefore, is on the detainee to expressly make a request. This is based on Section 256 of the *Migration Act*, which says:

> Where a person is in immigration detention under this Act, the person responsible for his or her immigration detention shall, at the request of the person in immigration detention, give to him or her application forms for a visa or afford to him or her all reasonable facilities for making a statutory declaration for the purposes of this Act or for obtaining legal advice or taking legal proceedings in relation to his or her immigration detention.

3.21 The operation of this section is reinforced by Section 193(2):

> (2) Apart from section 256, nothing in this Act or in any other law (whether written or unwritten) requires the Minister or any officer to:
>
> (aa) give a person covered by subsection (1) an application form for a visa; or
>
> (a) advise a person covered by subsection (1) as to whether the person may apply for a visa; or
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> (b) give a person covered by subsection (1) any opportunity to apply for a visa; or
>
> (c) allow a person covered by subsection (1) access to advice (whether legal or otherwise) in connection with applications for visas.

3.22 This, in conjunction also with s193(3) effectively limits the access of individuals and organisations to detainees. As a result, until a detainee has requested a lawyer and a lawyer is duly appointed to act for them, organisations or agents will not gain access.[16]

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15 Similar issues were raised in the 1998 Human Rights and Equal Opportunity Commission Report, *Those who've come across the seas*, p. 29

16 *Submission No. 50*, Amnesty International, p. 479. The same amendments also limit the capacity of the Human Rights and Equal Opportunity Commission or the Commonwealth Ombudsman to send unsolicited information to detainees, and affect their ability to undertake investigations of third party complaints. See Senate Legal and Constitutional Affairs Legislation Committee Report on the *Migration Legislation Amendment Bill (No. 2) 1998* (*1999*) tabled in April 1999, p. 4. This followed the *Teal* case in which the Human Rights and Equal Opportunity Commission attempted to send sealed

3.23 Limits also apply to the involvement of IAAAS providers. The committee was advised that as soon as the refugee determination process is complete, signified by the receipt of an RRT decision, the relationship between the detainee and the IAAAS contractor is considered by DIMA to be completed and no further contact is facilitated. Legal Aid WA have reported that:

> The Department's view as recently stated to Legal Aid by the Port Hedland detention centre manager is that on receiving an RRT decision, Legal Aid's representation of that client ceases pursuant to Legal Aid's contract with the Department and therefore DIMA will not facilitate telephone calls from Legal Aid to its clients …[17]

3.24 There are problems with this approach:

> Problems arise, however, where an immigration detainee does not ask for a lawyer but would clearly benefit from being given access to a lawyer…
>
> The thinking behind this policy seems to be an apprehension by DIMA that lawyers will somehow attempt to subvert the migration process by advising their clients to make false claims for asylum. In my view this is misplaced.[18]

3.25 There have also been suggestions that in some instances, even where a detainee does request legal advice, this has not been provided:

> [It] creates a real uncertainty as to what precisely is going on behind the locked gates of the detention centres. There is a strong suspicion amongst refugee advocates that requests for access to lawyers are in fact routinely being denied. [19]

3.26 Amnesty International state that a detainee with whom they were associated was denied telephone access to a lawyer.[20] HREOC also stated they had received a number of complaints from detainees at Port Hedland who claimed that their verbal and written requests for legal assistance were ignored.[21]

3.27 In practice, access to advice is also constrained by practical difficulties, the most important of which is often the location of the detainees. Some evidence to the committee has pointed out the problems associated with providing adequate assistance to a detainee who is held at Port Hedland.[22] Advisers must therefore either travel to

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letters to detainees which DIMA refused to deliver on the grounds that they were unsolicited correspondence and not a response to a complaint delivered by a detainee

17 *Submission No. 40*, Legal Aid Western Australia, p. 368

18 *Submission No. 35*, Nick Poynder, p. 242

19 *Submission No. 35*,Nick Poynder, p. 243

20 *Submission No. 50*, Amnesty International, p.482

21 Human Rights and Equal Opportunity Commission, *Those who've come across the seas*, 1998, p. 214

22 *Submission No. 18*, Refugee Council of Western Australia, p. 96. This issue is also raised by Human Rights and Equal Opportunity Commission, *Those who've come across the seas*, 1998, p. 213

Port Hedland or communicate by telephone. Legal Aid Western Australia (LAWA) advised that funding via the IAAAS provides for one visit to Port Hedland for both the primary and review stages, but that all other communication must occur by phone, on most occasions with the aid of an interpreter, a method while suitable for routine communications is unreliable when taking detailed instructions. LAWA stated in its submission to the Committee that 'the adequacy of legal assistance is at times compromised by the location of asylum seekers in Port Hedland.'[23] The Committee notes, however, that LAWA has an office in Port Hedland.

3.28 The Torture and Trauma Survivors Services of the Northern Territory, in its submission to the Committee, also highlighted the problems experienced by asylum seekers in the Northern Territory because of the absence of IAAAS providers in the territory, stating:

> In the course of service delivery, we have noted that clients' emotional well being has been adversely affected by the lack of local legal support and information about the processes of seeking asylum.[24]

3.29 Location is likely to become a more severe difficulty with the use of other remote locations as detention centres for illegal arrivals, such as Curtin airbase at Derby in Western Australia and Woomera in South Australia.

Is there a need for legal assistance?

3.30 Several submissions have disputed the approach that legal assistance is not required to effectively access the refugee determination system, and have argued instead that there are strong practical grounds for providing asylum seekers with access to competent legal advice.[25] According to the Australian Council of Social Services (ACOSS) this stems from the common characteristics of asylum seekers who may have experienced torture/trauma in their country of origin, and as a consequence:

- are often under a great deal of emotional stress;
- are frequently apprehensive about dealing with government officials;
- have few if any links to friends, relatives or community networks who may be of assistance;
- commonly cannot speak, read or write in English;
- have little, if any, understanding of how the refugee determination system works, or of what their rights and responsibilities are in Australia; and
- have limited, if any, income or financial resources at their disposal.[26]

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23 *Submission No. 40*, Legal Aid Western Australia, p. 366

24 *Submission No. 26*, Torture and Trauma Survivors Service, p. 153

25 See, for example, *Submission No. 73*, Law Council of Australia, p. 1067

26 *Submission No. 33*, Australian Council of Social Services, p. 227

3.31 For the refugee determination process to work, it would appear that access to accurate information is critical. Every effort must be made to ensure that asylum seekers understand the rules relating to entry; their rights and obligations; and the basis on which their claims for asylum will be accepted. The corollary to this point is that access to interpreter and translator services is equally critical since it is generally the medium by which such communication takes place.

3.32 The committee recognises that there is often a great disparity among asylum seekers in terms of knowledge, education, and financial resources, and any factor which limits the access of asylum seekers to information can severely disadvantage a genuine applicant, when perhaps a well informed and prepared fraudulent application might get through.

3.33 Provision of information is also important as a means of correcting erroneous impressions detainees may have of Australia and its asylum laws. The Committee has received evidence of instances in which arrivals have been misled by people smugglers in relation to conditions of entry to this country, as well as the information they should provide to gain entry.[27]

3.34 The Committee notes that the complexity of the migration field militates against the capacity of a refugee applicant to effectively navigate the system unaided. In combination, the *Migration Act 1958* and its associated regulations are extensive and subject to continuous change. Similarly, the applicants for a Protection Visa are required to fill out long and complex forms, posing particular problems if they do not read, speak, or write English to a fairly advanced degree.

3.35 This factor was remarked upon by the ALRC:

> I think our migration law is almost as complex as the United States and that is the most complex of all migration law. It is infinitely more complex than the UK law. It is infinitely more complex than the Canadian law. We opted for a regulatory arrangement, whereby we specify each and every particular of every visa class. We do not give a great deal of open-ended discretion in our migration law. It is important that, when you design a regulatory regime as complex as that, you also work on the assumption that people are going to have to get legal advice. …
>
> it is certainly far too complex for the migrant applicants themselves.[28]

3.36 The Committee considers that a broader approach needs to be taken to this issue, focusing on effective communication of key information, rather than assuming that the best method of such communication is by means of lawyers. Such

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27 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 777

28 *Transcript of evidence*, Australian Law Reform Commission, p. 511. See also *Submission No. 15*, Springvale Community Aid and Advice Bureau, p. 71

information would provide some understanding of the law and facilitate the work of IAAAS providers.

The importance of assistance at the initial application and merits review stages

3.37 Providing more assistance at both the initial determination stage and at the appeal stage may be beneficial to both the applicant and those government authorities who must make a determination. Refugees may not provide the sort of information that is needed by the administrative process, because of time limits, limited knowledge of English and little if any understanding of the process :

> Their claims can be virtually incomprehensible, in many cases emphasising the irrelevant points and omitting the relevant points. For example, it is common for asylum seekers to play down any "problems" they may have had with the authorities in their home country, so as to show the Australian authorities that they will be good citizens. The risk here is that the "problem" may have been persecutory in nature, and when the applicant later raises the issue with, for example the Refugee Review Tribunal (RRT), he or she will be accused of recent invention and the claim will be rejected on credibility grounds[29]

3.38 Getting the application papers correctly completed is essential for two reasons. The first is that the bulk of applicants have their applications determined by DIMA on the basis of their paper applications alone, with only a small percentage being interviewed.[30] According to the Kingsford Legal Centre:

> It is especially important that applicants have assistance in preparing written applications as the asylum process is so heavily geared towards decision making based on written material only.[31]

3.39 The second reason is the importance that RRT members place on the credibility of the applicant,[32] so it is critical to the applicant that the initial papers reflect as fully as possible their true claims. These points are reflected by the comment of National Legal Aid:

> Most did not speak English and would have had enormous difficulty preparing and lodging their own applications for protection visas. Failure to submit a well-written and comprehensive protection visa application, including a detailed statement setting out the claims for refugee status, usually leads to rapid rejection of the application, and can cause great problems in any review before the RRT. This is particularly evident in cases

29 *Submission No. 35*, Nick Poynder, p.244

30 *Submission No. 46*, Refugee Advice and Casework Service, p.417. See also Chapter 4

31 *Submission No. 36*, Kingsford Legal Centre, p. 306

32 See further discussion on the issue of credibility in Chapter 5

> where the Tribunal finds that the applicant lacks credibility because they did not include all claims in their written application to DIMA [33]

3.40 Overall, the particular vulnerability of some applicants and their language difficulties, combined with a lack of experience of Australian administrative processes make it difficult for them to lodge a high quality application. At the same time it is apparent that it is important to the determination process that applications be detailed and accurate. IAAAS contracted assistance need only be provided by registered migration agents trained specifically in migration law and practice, and the Committee sees no particular benefit in requiring legally qualified persons to undertake this work.

Representation before the RRT

3.41 There have also been claims that it would be advantageous to applicants to receive funding for representation before the RRT.[34] Currently, IAAAS funding does not cover attendance at RRT hearings, and as a result a high proportion of asylum seekers go unrepresented:

> It is a matter of common sense that those people without representation are less likely to succeed in the Tribunal, particularly given the complexities of the law and the difficulty lay people face in gathering evidence such as country reports.[35]

3.42 It is claimed that applicants often do not understand critical issues in the determination process. However, some aspects of these complaints have been challenged.[36]

3.43 It has been argued there may also be advantages to government in providing legal assistance. Sound advice early in the application process may result in a higher quality application that better addresses the refugee criteria, and therefore increases the efficiency of the determination process and the likelihood of a correct decision early in the process. The Australian Law Reform Commission argue that:

> The presentation of a full and reasoned case at the time of making the primary application will not only assist primary decision makers, but, if a visa is refused, the applicant's case appears on file from the outset and is available to future decision makers.[37]

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33 *Submission No. 63*, National Legal Aid, p. 718

34 This issue of representation is further discussed in Chapter 5

35 *Submission No. 36*, Kingsford Legal Centre, p. 305. See also *Submission No. 66*, Macpherson and Kelley, p. 802

36 See below, Chapter 5

37 *Submission No. 31A*, Australian Law Reform Commission, p. 296. See also *Submission No. 35*, Nick Poynder, p. 241

3.44 Legal Aid Western Australia pointed out that a properly presented application enables the DIMA case officer to undertake shorter interviews with asylum seekers and thereby process more applicants more quickly.[38] Legal Aid WA also state that:

> Many applicants have difficulty in talking directly about what has happened to themselves. We consider that proper preparation and time spent at this initial stage significantly reduces the frequency of 'additional claims' being made at a later stage.[39]

3.45 However, there is limited evidence to support the claims that a legally qualified person is necessary to present a case to the RRT and also to act as a representative. The Committee agrees that clear, detailed and organised information will assist decision makers at all stages. This is the task for which IAAAS providers are funded.

3.46 The Committee also notes that, while there have been some problems identified with the inquisitorial process of the RRT, or with the manner in which it is applied, the process itself is intended to draw out information and assist the applicant. The Committee has made recommendations addressing a number of RRT issues, including the issue of representation.[40]

3.47 The Committee considers the objective of government in establishing a process which limits the need for legal assistance is admirable and should be maintained. The Committee considers that in some instances it may be necessary to use two or three member panels on the RRT,[41] but that in many cases this should not be necessary. What is required is that an adequately resourced assistance and advice service provide a level of service to clients commensurate with their level of need.

The importance of legal assistance before the Federal Court

3.48 A further issue is the importance of receiving legal assistance in preparing and presenting an appeal on questions of law before the Federal or High Court. Assistance for preparing and conducting court litigation must be done by qualified legal practitioners, and is within the ambit of legal aid. There is evidence that those who undertake proceedings in the Federal Court unrepresented by legal counsel are much less likely to succeed than those who are represented, with few decisions favouring the applicant.[42] Where the applicants were unrepresented, only 5.4% of cases were decided in the applicants' favour, compared to 14.5% in cases where the applicants were represented.

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38 *Submission No. 40*, Legal Aid Western Australia, p. 367

39 *Submission No. 40*, Legal Aid Western Australia, p. 2

40 See below, Chapter 5

41 See below, Chapter 5

42 Australian Council of Social Services, *Submission No. 33*, p. 227 cites these figures from the Australian Law Reform Commission study, *Empirical Information About the Federal Court of Australia*

> Our litigation system assumes the two opposing sides are able to present their respective cases competently, in order to bring out the facts and issues in dispute. The Commission's research into cases in the federal jurisdiction shows that, where a party is unrepresented or receives less than competent representation, parties have less chance of success[43]

3.49 The Committee also note the comments of the High Court in the case of *Dietrich.* Although these comments refer to assistance in a criminal trial, they have relevance to any adversarial process. Mason CJ and McHugh J stated:

> It is in the best interests, not only of the accused, but also of the administration of justice that an accused be so represented, particularly when the offence charged is serious… An unrepresented accused is disadvantaged, not merely because almost always he or she has insufficient knowledge and skills, but also because an accused in such a position is unable dispassionately to assess and present his or her case[44]

3.50 In assessing the need for assistance for appeals to the courts, it is evident that as a group, asylum seekers are likely to benefit from legal representation during the judicial review process. From the statistics gathered by the ALRC, it is clear that unrepresented litigants have much less chance of winning a Federal Court case than someone who is represented, and this factor is likely to apply particularly to asylum seekers who by reason of their background can be expected to have even less familiarity with Australia's court system than Australian litigants. It is probable that many asylum seekers will have difficulty paying for legal counsel. Counsel is also of greater significance to the judicial review process which is based on the adversarial system unlike the primarily inquisitorial system adopted by the RRT.

3.51 However, the Committee also notes that the quality of a case will also affect the outcome, and that the lack of success in the courts may also reflect the applicant's limited grounds for appeal.

3.52 Government has argued that legal assistance for judicial review is less important given the availability of administrative review in the RRT. The basis of this argument is sound, in that a range of issues can be considered at the Tribunal stage, effectively identifying if there are matters that can be addressed. There are also limits to the grounds of appeal from the RRT and this has been the basis for some of the limit to legal aid availability. To justify a decrease in assistance for judicial review of administrative decisions on the basis of the availability of merits review by the RRT is to seemingly assume that there will not be errors of law made by the RRT.

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43 *Submission No. 31A*, Australian Law Reform Commission, p. 294

44 (1992) 177 CLR 292, para 13

Is there a right to legal assistance?

3.53 It has also been argued[45] that asylum seekers have a legal right to receive assistance. On this point, the committee was referred to several international legal instruments.[46] Article 14 of the International Covenant of Civil and Political Right provides:

> All persons shall be equal before the Courts and Tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial Tribunal established by law…

3.54 Article 16 of the Convention relating to the Status of Refugees states:

> a. A refugee shall have free access to the courts of law on the territory of all Contracting States.
>
> b. A refugee shall enjoy in the contracting state in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance…

3.55 In relation to detainees, Principle 17 of the *Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment* states:

> (1) A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after his arrest and shall be provided with reasonable facilities for exercising it.
>
> (2) If a detained person does not have a legal counsel of his own choice, he shall be entitled to have legal counsel assigned to him by a judicial officer or authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay.

3.56 Also relevant in respect to detainees is Article 9.4 of the *International Covenant on Civil and Political Rights*:

> Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

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45 For example, by *Submission No. 73*, Law Council of Australia, p. 1068

46 See also Chapter 6

3.57 Amnesty International, the Law Council of Australia and the Jesuit Refugee Service argue for a wide interpretation of these obligations. According to Amnesty International:

> Current practice, laws and directives on the right to legal advice for asylum-seekers are confusing, complex and inconsistent. Under international human rights standards and domestic Australian law, all asylum-seekers are entitled to legal assistance to pursue asylum applications. However, Australian immigration law and policy in effect restricts this right in a manner which shows little regard to the requirement, under international human rights treaties, to give proper effect to the rights enshrined within them. Amnesty International calls on all states to ensure that every asylum-seeker has access to legal assistance at all times, if necessary, by the provision of public funds.[47]

3.58 This view is disputed by DIMA, who argue in favour of a more limited interpretation:

> Legal advice has been that Australia is probably obliged under international law to provide legal assistance for persons wishing to challenge the legality of their detention. There is no requirement that legal aid funds be made available for making and pursuing applications seeking to engage Australia's protection obligations.[48]

3.59 The Committee notes the findings of High Court in the *Dietrich*[49] case, which discussed the general issue of the right to representation under Australian domestic law. Although that case was concerned with whether an accused person charged with a serious crime punishable by imprisonment, who cannot afford counsel, has a right to be provided with counsel at the public expense, the ruling of the court is still relevant to the issue of refugees. Nonetheless, it does not **require** the provision of counsel.

3.60 Overall, however, there is limited requirement in international instruments to provide publicly funded assistance, whether by legally qualified practitioners or others. Article 14 of the ICCPR focuses on ensuring a fair determination process. The RRT's use of the inquisitorial model has been specifically adopted so that a fair determination can be achieved without needing counsel. Within the RRT, interpreters are freely available to ensure that applicants are able to follow the proceedings, and put the applicant's views fully to the Tribunal. In the context of an inquisitorial tribunal, this is considered to be more important to fair proceedings than the availability of counsel *per se*.

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47 *Submission No. 50*, Amnesty International, p. 512. See also *Submission No. 54*, Jesuit Refugee Service, p. 553 and *Submission No. 73*, Law Council of Australia, p. 1068

48 *Submission No. 69*, Department of Immigration and Multicultural Affairs, p. 835. See also *Submission No. 35*, Nick Poynder, p. 241

49 *Dietrich v The Queen* (1992) 177 CLR 292. See also above, Paragraph 3.48

3.61 Article 16 of the Refugee Convention refers to "refugees", and this may be limited in meaning.[50] Asylum seekers do have unrestricted access to the RRT and are not disadvantaged in access to legal processes relative to residents.

3.62 The focus of both Principle 17 of the *Body of Principles for the protection of all persons under any form of detention or imprisonment*, and Article 9.4 of the ICCPR is legal representation to challenge the lawfulness of detention rather than a right to assistance in the refugee determination process more generally. Australia provides for such assistance in the legal aid guidelines, and in addition offers IAAAS funding to all asylum seekers in detention who have engaged protection obligations, providing they request it.

3.63 The committee is not persuaded by the arguments of the Law Council of Australia, the Jesuit Refugee Service and Amnesty International that international and domestic law requires such broad legal assistance. The central issue must remain whether the determination process is fair, rather than focusing on the more limited question of whether there is legal representation. Proceedings before courts and tribunals may be fair, notwithstanding the absence of separate legal assistance.

Conclusions and recommendations

3.64 The law does not require DIMA or its agents (such as ACM) to provide detainees with information regarding their rights. The Committee does not consider that providing information to detainees would necessarily result in unfounded claims, and thereby complicate and lengthen the process.

3.65 The Committee considers that an alternative which can assist in the information process may be the provision of information that details the key information and issues that affect asylum seekers and explain issues, including the policy of detention. The information provided in various formats should outline the refugee determination process and the relevant deadlines, as well as the criteria for refugee status and how the IAAAS scheme works to provide assistance in the application process. Such information could be provided in a range of community languages at minimal expense.

3.66 This would be to the advantage of applicants, who would gain a clearer understanding of the Australian system, and would also ensure adequate access to that system since everyone would have access to the same information irrespective of language or literacy.

3.67 At the same time, the administrative process would benefit by having better informed applicants able to understand to some degree the relevant conventions and the processes involved. Fewer resources would need to be spent in translating or interpreting basic information, and information could be provided more clearly and concisely by applicants with a better understanding of the law.

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50 See above, Chapter 1

3.68 The Committee believes that a cost-effective method should be developed of communicating information on the onshore refugee determination process, especially for those who are not literate.

Recommendation

Recommendation 3.1

The Committee **recommends** that DIMA investigate the provision of videos or other appropriate media in relevant community languages, explaining the requirements of the Australian onshore refugee determination process. This material should be available to those in detention, and to IAAAS providers.

3.69 The Committee also considers the effective working of the refugee determination process depends on the quality of the information that is put into it, and groups who assist in this task are an asset to the system. As the ALRC stated:

> …what you should be trying to do by a variety of different stratagems is get lawyers playing a much more constructive role in both litigation and review proceedings.[51]

3.70 It is also worth noting that in most cases refugee advocacy groups have limited resources, and often work *pro bono* on behalf of clients. It seems unlikely that they would waste their time and limited resources on unmeritorious claims.

Quality and Quantity of assistance available

3.71 Determining trends in the assistance available to asylum seekers is a complex task due to the changing basis of funding schemes. Firstly, assistance for migrants generally is often not differentiated from assistance to asylum seekers. Secondly, there has been the transition from two separate schemes[52] to the single IAAAS. Thirdly, the legal aid guidelines have changed from pre-July 1998, where legal aid covered both administrative and judicial stages of the refugee determination process, but after that date applied only to judicial review. At the same time, the real availability of assistance per applicant varies according to fluctuating numbers of initial applications for protection visas. Applications in 1995-96 totalled 5,830, while there were 11,134 in 1996-97, 8,128 in 1997-98 and 6,426 in 1998-99. To further complicate comparison, some Legal Aid Commissions provide services under contract to the IAAAS, which are quite separate from 'legal aid' services.[53]

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51 *Transcript of evidence*, Australian Law Reform Commission, p. 509

52 See above, Paragraph 3.8

53 Legal Aid New South Wales and Legal Aid Western Australia currently hold Immigration Advice and Application Assistance Scheme contracts. See Department of Immigration and Multicultural Affairs Fact Sheet No. 70 – *Immigration Advice and Application Asistance Scheme*, p. 2

3.72 In 1995/96, a total of 9178 cases received advice or assistance from either the IASS and AAS, or Legal Aid.[54] With the new restrictive guidelines in place, it seems that few if any cases received legal aid assistance after July 1998. According to DIMA statistics, IAAAS providers gave assistance to 918 new detention cases and a total of 164 people in the community in 1998-99.[55] However, these figures differ somewhat from others provided by the department.[56]

3.73 In outright terms, the amount of funding available to assist protection visa applicants under the various Commonwealth schemes has decreased over the past four years. In 1995-96, combined funding under the IASS and AAS schemes was $2 289 000. In 1996-97, this figure had fallen to $1 910 000. The IAAAS allocation in 1997-98 was $1 900 000 with a budget allocation for 1998-99 of $1 966 000.[57]

Under the previous IASS and AAS schemes, in 1995/96 a total of 7 821 clients received some degree of assistance.[58] Under IAAAS, in 1997-98, 552 protection visa applicants received assistance. In 1998-99, 1367 received assistance,[59] and a further 8852 received immigration advice.[60] 'Immigration' advice includes non-protection visa issues. According to DIMA figures, protection visa cases that attracted application assistance as a percentage of lodgements rose from 4.7% in 1997-98 to 12.5% in 1998-99.[61] DIMA also provided the following breakdown of assistance provided under IAAAS in 1997 – 2000:[62]

54 7330 under Immigration Advisory Services Scheme, 491 under Application Assistance Scheme, and 1357 under Legal Aid.

55 Department of Immigration and Multicultural Affairs Fact Sheet No. 70 - *Immigration Advice and Application Assistance Scheme*, p. 1

56 *Submission No. 69D*, Department of Immigration and Multicultural Affairs, p. 1032

57 Department of Immigration and Multicultural Affairs Annual Reports, and Department of Immigration and Multicultural Affairs, Fact Sheet No. 70 – *Immigration Advice and Application Assistance Scheme*

58 *Submission No. 69D*, Department of Immigration and Multicultural Affairs, p. 1035. In 1996-7, 758 people received assistance under Application Assistance Scheme, however figures are unavailable for Immigration Advisory Services Scheme in that year

59 Note the discrepancy between the figure of 1367 in this paragraph and that of 1082 in the table below. The difference is based on a figure of 334 protection visa applicants at review. See *Submission No. 69D*, Department of Immigration and Multicultural Affairs, p. 1032

60 *Submission No. 69D*, Department of Immigration and Multicultural Affairs, p. 1032. The difference between advice and assistance is explained above at Paragraph 3.5

61 *Submission No. 69D*, Department of Immigration and Multicultural Affairs, p. 1032

62 *Submission No. 69D*, Department of Immigration and Multicultural Affairs, p. 1033

Table 3.1

	PV in detention	PV in the community	Sub-total	Other visas in the community	Total
1997-98	474	68	542	10	552
1998-99	918	115	1033	49	1082
1999-00* [as at 23/8/99]	35	6	41	6	47

Source: *Submission No. 69D*, Department of Immigration and Multicultural Affairs, p.1033

3.74 With respect to legal aid, the *Statistical yearbook on legal aid* provides the following figures for the number of migration related matters[63] which received legal aid:

Table 3.2 Funded applications

1993-94	512 [269 refused]
1994-95	905 [277 refused]
1995-96	1357 [342 refused]
1996-97	1442 [576 refused][64]

Source: Attorney-Generals department, Statistical Yearbook on legal aid 1993/94-1996/97

3.75 Although figures are not publicly available for 1997-98**,** it would seem that the legal aid guidelines have restricted the numbers of asylum seekers receiving legal aid,[65] presumably because no applications have met all the requirements.

3.76 In the context of its 1997-98 inquiry into the Australian legal aid system, the Committee, commenting on the new guidelines, stated:

> The Committee regards as unacceptable the virtual removal of all legal aid for migration matters, it notes the Commonwealth is abrogating responsibility for an area in which it has passed laws.[66]

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63 No specific figures are given for refugee matters as such. Nevertheless, they remain a valid measure of assistance granted in refugee matters since legal aid was generally not granted to any migration matter not related to refugees. See Guideline 5.2 of the pre-98 Guidelines above at Paragraph 3.11

64 The 1997/98 Statistical Yearbook for Legal Aid had not been published at time of printing

65 In 1999, the Law Council advised it was not aware of any grants of legal aid having been made to asylum seekers since the introduction of the guidelines, *Submission No. 73*, Law Council of Australia, p. 1070. It is not known how many cases may be appropriate for legal aid assistance under the merits test, but are excluded by the operation of the means test

66 Senate Legal and Constitutional References Committee, *Inquiry into the Australian legal aid system – Third report*, June 1998, p. 117

3.77 Several submissions have offered critical comments on the operation of the new guidelines and the IAAAS. The Law Council states:

> Many asylum-seekers that would have previously been eligible for legal aid now have no access to free legal assistance. For the year ending 30 June 1997, Victoria Legal Aid referred 280 initial cases to private practitioners and provided legal assistance for a further 80 cases on appeal to the Refugee Review Tribunal. Those 360 cases went to private practitioners who were chosen by the applicants. Currently, under IAAAS for Victoria, there are only 111 referrals and asylum-seekers have no choice of who provides them with assistance. The Law Council has no reason to believe that the demand for legal assistance has diminished.[67]

3.78 Similarly, according to the Kingsford Legal Centre:

> In 1997/98 there were 8,508 applicants for a protection visa (asylum seekers), yet during the same period only 542 asylum seekers were assisted by IAAAS. … [and] only 68 asylum seekers in the community were provided with application assistance.[68]

3.79 National Legal Aid commented:

> It is our experience that many asylum seekers with strong claims are unable to obtain assistance because of the limitations of the scheme. Under LAC NSW's IAAAS contract for 1997-98 for asylum seekers in the community, there were places available for only 40 cases, either at primary level or in the Refugee Review Tribunal (RRT). We exhausted our places available to assist asylum seekers in the community well before the end of the 1997-98 financial year. Enquires of other contractors showed that they too had no places available, and we had to turn people away who sought our assistance.[69]

3.80 According to the Kingsford Legal Centre, this problem is further exacerbated by the fact that:

> in 1998/99 only 52% of IAAAS funding for asylum seeker assistance was allocated to NSW, even though in the previous year 76% of asylum applications came from NSW.[70]

3.81 In considering these criticisms, two comments can be made. Firstly, the fact that many asylum seekers do not receive IAAAS is consistent with the aim of the

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67 *Submission No. 73*, Law Council of Australia, p. 1068

68 *Submission No. 36*, Kingsford Legal Centre, p. 305. However the 68 community-based asylum seekers would seem in fact to be part of the 542 and not additional. See also *Submission No. 63*, National Legal Aid, p. 718

69 *Submission No. 63*, National Legal Aid, p. 718. See also *Submission No. 40*, Legal Aid Western Australia, p. 368, and *Submission No. 68*, Asylum Seekers Centre, p.814

70 *Submission No. 36*, Kingsford Legal Centre, p. 305

scheme which does not provide universal assistance. The committee disagrees with the comments of the Law Council of Australia to the extent that since the objective of IAAAS is to provide assistance to as many people as possible within the constraints of limited funding, achieving this objective is not related to assistance being provided by private legal practitioners. Nor is the objective impaired by allocating clients to IAAAS providers rather than letting clients chose their own advisers.

3.82 DIMA has selected a group of qualified practitioners through public tender, all of whom should be capable of providing the required service. DIMA also assesses its own processes in order to maintain high levels of quality control and performance by contractors.

3.83 Given that the bulk of IAAAS funding is spent on protection visa applicants in detention, the extent to which applicants in the community who have a *prima facie* case for assistance under IAAAS but who do not receive it because funds have run out, is unclear. Final judgements on the adequacy of IAAAS funding therefore depend on an accurate assessment of any gap in service provision.

Recommendation

Recommendation 3.2

The Committee **recommends** that an appropriate body such as the ANAO undertake an efficiency audit to determine if community-based protection visa applicants, eligible for IAAAS assistance, are not receiving it. The audit should assess if funds could be managed more efficiently to provide additional services.

3.84 Were such a study to reveal a significant gap, it may be necessary to reconsider the amount of funding provided for asylum seekers in the community under the IAAAS.

Scope of the IAAAS

3.85 Other material provided to the Committee has suggested that IAAAS is limited by its inadequate provision for legitimate disbursements (costs incurred by legal advisers in the course of representing their clients' cases). IAAAS does not provide separate funding for disbursements, and instead contractors meet such payments out of the flat fee they are paid per client. In relation to refugee applicants, the critical disbursements are the costs associated with interpreters to assist with interviews, both with the adviser and at the RRT; translations of key documents; and medical and psychiatric assessments.

3.86 Under current government policy, the department's Translating and Interpreting Service (TIS) provides 24-hour telephone services and on-site assistance. Where this involves telephone interpreting to individuals wishing to speak with government or certain community organisations, this is free to individuals. TIS also provides:

> a fee-for-service basis to individuals, Commonwealth and State/Territory government agencies, community organisations and private sector businesses and organisations in relation to commercial transactions.[71]

3.87 These services are provided free of charge to clients at RRT hearings,[72] but other interpreter services must be paid for out of the allocation under the IAAAS contract. It is also relevant that:

> It is the stated policy of DIMA and the RRT that they will not accept documents which are not in English or accompanied by a translation by an accredited translator.[73]

3.88 The Committee also notes that under section 427(1)(d) of the *Migration Act*, the RRT has the power to call, but not pay for, any medical examination that the Tribunal thinks necessary.

3.89 This means that these arrangements must be borne by the client or paid for out of the IAAAS allocation. Where such evidence is useful at the primary determination stage, DIMA should order such services.

3.90 According to those practising in the field, these disbursements are often critical to the preparation of an adequate application.[74] As LAWA states:

> Almost without exception asylum seekers that we have represented at the Port Hedland detention centre have required an interpreter.[75]

3.91 According to National Legal Aid, a variety of supporting documents and assessments may be of great importance to establishing a valid claim:

> It is often essential to provide documents which support an applicant's claims (eg letters from relatives in the home country, court or military documents) or to establish their identity. Also, many asylum seekers suffer from the physical and/or psychological effects of torture and trauma. These conditions often need to be confirmed by expert medical evidence to properly support the applicant's claims.[76]

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71 Department of Immigration and Multicultural Affairs, Fact Sheet No. 67 – *Translating and Interpreting Service*

72 *Submission No. 62*, Refugee Review Tribunal, p. 702, Refugee Review Tribunal Practice Directions Paragraph 8.8

73 *Submission No. 62*, Refugee Review Tribunal, p. 701, Paragraph 8.3

74 *Submission No. 33*, Australian Council of Social Services, p. 220 and *Submission No. 36*, Kingsford Legal Centre, p. 305.

75 *Submission No. 40*, Legal Aid Western Australia, p. 366. See also *Submission No. 36*, Kingsford Legal Centre, p. 305, and *Submission No. 46*, Refugee Advice and Casework Service, p. 412

76 *Submission No. 63*, National Legal Aid, p. 719

3.92 It is therefore argued that IAAAS funding should provide additional funds to meet these costs. Failure to do so may also have the undesirable effect of giving an incentive for IAAAS contractors to minimise disbursements so as to maximise profit:

> [A]n adviser who is seeking to cut costs and maximise return will be reluctant to incur the additional costs of an interpreter, it has been brought to the RCOA's attention that this is not an infrequent occurrence…[77]

3.93 In relation to other disbursements it has been stated:

> The fact that expert reports are not covered results in one of two things: reputable advisers sacrifice their fees in order to pay for reports; less scrupulous advisers do not commission reports, even when such would benefit their client's case.[78]

Conclusions and recommendations

3.94 The Committee has heard evidence relating to the importance of having IAAAS funding cover attendance of advisers at RRT hearings. In some instances there may be significant advantages to be gained for the applicant. Nevertheless, the Committee does not consider that expanding funding to cover attendance is the best way to approach this issue. The Committee has considered this issue above[79] and considers it also in Chapter 5.

3.95 In relation to interpreters and translators, the Committee has already noted the importance it attaches to this service. Current DIMA arrangements through the Translating and Interpreting Service (TIS) are generally adequate in covering translation and interpreting at key points in the refugee determination process such as interviews with DIMA, and hearings at the RRT. Although IAAAS funding is available to cover requirements at other times, the Committee is concerned that the current system could provide an incentive for the IAAAS contractor to minimise the supporting materials that are translated, which could itself impact on the quality of the overall application. The Committee believes that all steps be taken to ensure that the best possible information is provided with the initial application.

3.96 It is therefore considered important to separate funding for disbursements for translation and interpreting services, to ensure that these can be provided where needed. IAAAS contractors should be able to purchase these services from suitably accredited providers and be reimbursed by DIMA upon production of receipts. This would provide a strong accountability mechanism for the department to ensure that funds were spent correctly, and individual contractors who run up unusually large disbursements could be quickly identified against average cost levels.

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77 *Submission No. 24*, Refugee Council of Australia, p. 124

78 *Submission No. 24*, Refugee Council of Australia, p. 124

79 See above, Paragraphs 3.13, 3.36, 3.41-3.47

Recommendation

Recommendation 3.3

The Committee **recommends** that the IAAAS provide a separate fund for translation and interpretation services. These should be capped at an appropriate level, with IAAAS managers having the discretion to extend the funding in cases where more extensive services are required.

3.97 In relation to disbursements for medical and psychiatric reports, the Committee acknowledges that there are circumstances where such reports may be crucial to an effective refugee determination process, especially in cases of torture or trauma. The Committee is also aware of the dangers inherent in granting contractors an 'open cheque book' with regard to disbursements, and recognises that such a system unless carefully controlled could provide scope for gross abuse and very great expense, as advocates, honestly or otherwise, seek multiple and expensive assessments in search of a positive judgement.

3.98 While supporting the power of the RRT to authorise such examinations, the committee believes that if such information is likely to be important to the application, it should form part of the initial application and not make its first appearance only at the appeal stage.

Recommendation

Recommendation 3.4

The Committee **recommends** that the IAAAS provide a separate fund for medical and psychiatric assessments. These should be capped at an appropriate level, with IAAAS managers having the discretion to extend the funding in cases where more extensive services are required.

Basis of funding

3.99 The basis of the funding arrangements for IAAAS contractors has attracted some criticism. Under the IAAAS contract, providers are allocated a set amount per client based on an estimate of the average cost of representing that client, and all costs incurred by the provider must be deducted from that amount.

> DIMA asks potential contractors to tender for work under the scheme based on DIMA's estimate of how long a contractor should spend in preparing an application. This time is, in our experience, much less than the amount of time we would consider necessary to prepare an adequate application.[80]

80 *Submission No. 63*, National Legal Aid, p. 719

3.100 According to the Kingsford Legal Centre in giving evidence to the inquiry claimed that this average amount is inadequate relative to the true costs of properly representing a client:

> As the budget for the IAAAS is so inadequate, many community organisations who may have the skills and experience to provide services under the Scheme, simply to do not submit a tender as the amount of funding available is lower than the costs of providing the service.[81]

3.101 Others have complained that the basis of IAAAS funding skews advantage towards the 'for-profit' sector for a number of reasons, including their ability to cross subsidise their IAAAS work with other areas of legal and immigration practice.

> The Refugee Council is concerned about the erosion of the community non-profit sector because it is our experience that this sector offers many benefits to both DIMA and the clients …
>
> The funding formula based on a case by case basis also creates significant problems for community organisations who are already chronically under-resourced. Block funding to cover the costs of employing advisers/solicitors to undertake advice and assistance to asylum seekers in the community would provide certainty in financial planning and contribute to a better managed, more effective advice service. [82]

3.102 These statements assume particular significance in the light of comments made by the ALRC regarding the quality of these community organisations:

> All of the participating players, that is the tribunals and the department, were generally in agreement that the best quality advice and representation to migration and refugee applicants generally came from those legal aid or legal assistance type agencies. They are run relatively on a shoestring, but they do produce very good non-entrepreneurial lawyers who are technically often very highly proficient in this area. That is all they do, and they do not have an incentive to make money out of each individual case.[83]

3.103 The ALRC therefore support funding for community services, stating that 'adequate resourcing of such services is the most effective way of providing appropriate legal advice and representation for refugee applicants and provide significant cost savings in the long run'.[84]

3.104 It has been suggested that community organisations are of particular value by reason of the 'personal sensitivity is required in order to practice refugee law

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81 *Submission No. 36*, Kingsford Legal Centre, p. 305

82 *Submission No. 24*, Refugee Council of Australia, p. 125, *Submission No. 36*, Kingsford Legal Centre, p. 305. see also *Submission No. 74*, Libby Hogarth & Associates, p. 1133

83 *Transcript of evidence*, Australian Law Reform Commission, p. 508

84 *Submission No. 31A*, Australian Law Reform Commission, p. 296

responsibly, as well as a range of skills and expertise extending beyond the law, and including elements of psychology, cultural studies and linguistics.'[85]

3.105 According to DIMA however, the basis for funding advice and assistance services remains the best available, and is an improvement on the earlier grants based funding arrangements used for the earlier assistance schemes. DIMA argue that the new arrangements enable a more accountable tendering process in which contractors must demonstrate their capacity and performance levels, and that the grants based system was rejected following a review by the department in 1997 which identified a number of weaknesses.[86] In relation to the effect on community organisations, DIMA contend that, notwithstanding the fact that a number of these organisations continue to receive funds under the scheme:

> The IAAAS aims to provide the maximum amount of assistance to persons in need within the allocated funding. It is not intended to provide core funding to support the continued existence of community bodies.[87]

3.106 The Committee believes it is important not to expect cross-subsidisation of services, and that this principle should be the basis of a realistic assessment of costs.

Quality control of IAAAS

3.107 A further issue raised by submissions concerns the quality of the assistance provided by some of the IAAAS contractors. According to DIMA, standards are already in place to ensure delivery of proper professional services by IAAAS service providers, and ensure that performance against these standards is closely monitored by DIMA:

> Such standards include the timely lodgement of well-prepared applications, respect for client confidentiality, a current knowledge of migration procedure and adherence to the Migration Agents Code of Conduct.[88]

3.108 DIMA point out that:

> All IAAAS service providers who are not staff of Legal Aid Commissions are required to be registered migration agents and consequently are subject to the Migration Agents Registration Authority (MARA) Code of Conduct set out in the regulations under the Migration Act. …
>
> The Department closely monitors complaints made to the MARA concerning IAAAS providers, the Department also monitors complaints made to legal professional bodies.[89]

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85 *Submission No. 61*, South Brisbane Immigration and Community Legal Service, p. 629

86 *Submission No. 69D*, Department of Immigration and Multicultural Affairs, p. 1037

87 *Submission No. 69D*, Department of Immigration and Multicultural Affairs, p. 1039

88 Government Response to Human Rights and Equal Opportunity Commission Report, *Those who've come across the seas*, tabled 29 June 1999, p. 47

3.109 DIMA has also developed an information paper that is provided to all recipients of IAAAS funding, that sets out the facts of the scheme, and the type and scope of the assistance that the contractor is required to provide.[90] Contracts, however, are not available for public consideration. This information sheet also sets out the methods by which those dissatisfied with services provided under the scheme can lodge complaints with the Migration Agents Registration Authority (MARA).

3.110 A number of submissions to the Committee have raised doubts as to the effectiveness of these mechanisms. The Law Council of Australia points out that:

> It is not a requirement that they [contractors] are legally qualified nor is it a requirement that they have any experience in refugee law or in working with asylum-seekers.[91]

3.111 It seems that at least in some cases, the result can be substandard work.

> [I]t is apparent that some of these representatives are simply not up to the task of properly preparing a refugee claim. Often the application is nothing more than a cut and paste job on country information with a few additional words from the applicant…[92]
>
> With the exception of three organisations, the standard [of] applications which I have seen, completed pursuant to this scheme, is extremely poor. Examples of procedures used by such agents, which I consider inadequate, are:

- Forms and or statements completed for people who do not have competent English language skills without the aid of an interpreter.
- People being left with an interpreter and asked to "tell him/her your story", which is then submitted to the Department of Immigration and Multicultural Affairs without additional questions being asked.
- Submission of forms and statements to the Department without being read back to the applicant in her/her own language to check for errors and/or omissions.
- Agents telling applicants that claims and details of claims can be added later, when in reality they cannot.[93]

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89 Department of Immigration and Multicultural Affairs, *Answers to questions on notice 29 July 1999*, Part E 1

90 Immigration Advice and Application Assistance Scheme – Client Information, Department of Immigration and Multicultural Affairs, *Answers to questions on notice 29 July 1999*, Part E2

91 *Submission No. 73*, Law Council of Australia, p. 1064

92 *Submission No. 35*, Nick Poynder, p. 245

93 *Submission No. 30*, McDonells Solicitors, p. 207. See also *Submission No. 40*, Legal Aid Western Australia, p. 367, and *Transcript of evidence*, Ethnic Communities Council of NSW, p. 163

3.112 Some of these comments are reflected in the 1998-99 Annual Report of MARA which relates that standards of professional conduct constitute the largest category of complaints, comprising 129 (65%) of the total of 198 complaints. Of this category, 24 (18.5%) were based on poor communication, involving failure to liase, inform and comply with client instructions.[94]

3.113 Other witnesses have pointed to structural aspects of the contracts that place pressures on the contractors that may not be conducive to high quality. One example of this is the apparent contractual requirement for some contractors to achieve a minimum number of clients.[95]

3.114 However the Committee notes from later evidence that this appears to be more of a target than an absolute requirement.[96]

3.115 Legal Aid Western Australia have recommended that any such problems could be addressed by:

> specific criteria setting out minimum standards for presenting claims. In our experience a detailed 5 – 10 page statutory declaration signed by the applicant setting out the applicant's claims is required for a typical genuine applicant.[97]

The adequacy of the complaints process

3.116 Coupled to the criticisms of the quality of the services provided by the IAAAS contractors, other evidence has suggested additional inadequacies with the complaints process available to users of the system.

3.117 ACOSS point to the barriers facing clients accessing the complaints process which applies to the IAAAS, including the fact that:

- clients are often unaware of their right to complain about the quality of service provided by IAAAS providers;
- clients are hesitant to lodge a formal complaint for fear that doing so may negatively affect their application;
- the slowness of the process means that many aggrieved parties are deported before their complaint has been adequately dealt with. [98]

3.118 The Refugee Council of Australia also criticised the complaints process, saying that according to their research:

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94 Migration Agents Registration Authority, *Annual Report 1998*, p. 15

95 *Submission No. 39*, John Young, p. 359

96 *Transcript of evidence*, John Young, p. 306

97 *Submission No. 40*, Legal Aid Western Australia, p. 367

98 *Submission No. 33*, Australian Council of Social Services, p. 221

- practitioners had little confidence that the complaints mechanism would bear results;
- it is extremely time consuming to lodge a complaint and busy representatives, especially those in the community sector, either take no action or use other avenues such as the Ombudsman (where oral complaints can be lodged);
- the deliberation process is often so lengthy it becomes meaningless;
- it is sometimes very difficult to persuade a client to lodge a complaint because they fear that it might jeopardise his/her immigration application status.[99]

3.119 The Committee also notes the difficulties that legal advisers can have in bringing complaints on behalf of their clients:

> I need instructions from clients. Those instructions are usually very hard to obtain for two reasons. Firstly, the client, especially in detention, is very concerned about their status in Australia; they are more concerned about succeeding in the application. Secondly, they are afraid – no matter what I say – of getting into trouble should they make a complaint. I have suggested that complaints be made on at least six occasions. My clients have declined to make complaints on each one of those.[100]

3.120 The Committee understands that the subject of the quality of IAAAS providers, and migration agents generally, has attracted considerable attention since the inception of the scheme. These concerns have been addressed as part of a major report by the Joint Standing Committee on Migration, in their 1995 report *Protecting the vulnerable? The Migration Agents Registration Scheme*,[101] and was also examined by a DIMA taskforce in 1996.[102] As a result of these inquiries, MARA continues to make efforts to improve the effectiveness of the complaints mechanisms. In the recent year this has included a reformed complaint handling process where the Authority:

- may receive either an oral or written complaint; and
- must seek permission from the client to convey the complaint to the agent; and
- requires agents to respond to the complaint within 21 days; and
- may refer the complaint to mediation; and
- must investigate the complaint if the parties are not willing to mediate.

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99 *Submission No. 24B*, Refugee Council of Australia, p. 278

100 *Transcript of evidence*, McDonells Solicitors, p.129. Mr Karp of McDonells goes on to give several examples of such poor practice. See also *Transcript of evidence*, Refugee Council of Australia, p. 100

101 Tabled in May 1995

102 Migration Agents Registration Authority, *Annual Report 1998*, p. 4

> If a complaint has been made about an agent who is also a lawyer the Authority may, at any time prior to disciplinary action, refer the complaint to the relevant authority.[103]

3.121 Several other improvements have been made:

> The Authority has a new power to refer complainants and agents to mediation. This was a direct response to concerns that the previous system was not adequately meeting the needs of the migration industry's clients, particularly since a large number of complaints were those types that did not involve serious breaches of the Code of Conduct and/or where the complainant's primary interest was restitution.[104]

3.122 In addition, MARA has implemented a system of Continuous Professional Development which requires all registered migration agents to undertake recognised developmental activities to ensure that competency levels in the industry are maintained and improved.[105]

3.123 The Committee notes that the complaints mechanism received 102 complaints in the year to June 1998, of which 28 were finalised. Of these:

> One agent was suspended; three complaints were closed with no further action required; 13 complaints about unregistered people were forwarded to the Department for investigation; and 11 complaints were discontinued as the complaint was either anonymous, or the complainant would not give the Authority permission to send the complaint details to the agent.[106]

3.124 Under statutory self regulation, MARA investigates complaints made against registered agents, while DIMA investigate allegations of offences under the Migration Act, including:

- giving immigration assistance when not a registered agent;
- requesting or receiving fees for immigration assistance when not a registered agent or making false representations that a person is a registered agent;
- making false or misleading statements about the effect of persons or another person’s ability, power, or action on decisions made under the Act; and
- undertaking to affect decisions under the Act for reward.[107]

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103 Migration Agents Registration Authority, *Annual Report 1998*, p. 20

104 Migration Agents Registration Authority, *Annual Report 1998*, p. 20

105 Migration Agents Registration Authority, *Annual Report 1998*, p. 2

106 Migration Agents Registration Authority, *Annual Report 1998*, p. 19

107 *Submission No. 69D*, Department of Immigration and Multicultural Affairs, p. 1040

3.125 Complaints are referred to the Investigations Sections within the department, and where appropriate, on to the Director of Public Prosecutions. In 1998-99, the department:

> Received 166 allegations against migration agents, the majority for unregistered practice. Of these, 81 originated from within DIMA or from other agencies, with 85 from the public. 19 were finalised through administrative action, seven briefs were prepared for the Director of Public Prosecutions for unregistered practice, 44 were finalised as unsubstantiated, and 60 finalised as "other" which would include where on preliminary investigation there was insufficient evidence to justify further action. There were two prosecutions and one conviction for unregistered practice. The remainder of the allegations are not yet finalised.[108]

Conclusions and recommendations

3.126 The Committee considers that there is evidence that some IAAAS contractors providing assistance to refugees may not be performing at satisfactory levels. The procedures in place to require registration with MARA, minimum levels of training, ongoing professional development, as well as the complaints process have identified concerns that need to be addressed. The Committee also considers that third parties should be able to make complaints about the quality of service.

Recommendation

Recommendation 3.5

The committee **recommends** that an independent evaluation of the administration of IAAAS, including the quality of work performed by contractors and the effectiveness of the complaints mechanism, be undertaken and completed by a qualified body within two years.

The independence of IAAAS from DIMA

3.127 Some critics of IAAAS have suggested that DIMA exercises too much control over the scheme, to the extent that it raises questions over the capacity of IAAAS to provide an effective and impartial advice service. It is arguable that allocating complete responsibility for the selection of tenders, the awarding and administration of contracts, and the conduct of disciplinary procedures to the department whose own decisions are to be challenged in the RRT creates a significant conflict of interest.

3.128 One specific issue in this regard relates to the capacity of DIMA to scrutinise the operations of IAAAS contractors. The Law Council of Australia state:

> Successful contractors are subjected to a high level of scrutiny by DIMA. For example, the Law Council understands that under the IAAAS contract,

108 *Submission No. 69D*, Department of Immigration and Multicultural Affairs, p. 1041

> DIMA has access to the contractors' premises and can inspect and examine files at the offices of the contractors. In the case of lawyer contractors, the Law Council is concerned that this may breach lawyers' obligations of legal professional privilege. It also undermines the actual and perceived independence of the contractor.[109]

3.129 As DIMA explain, this power is granted under Clause 15 of the standard contract, which is publicly available. This power is described as 'standard Commonwealth contracting procedures, to enable the Auditor General to perform investigations in accordance with the statutory duties of that office', or for departmental officials to 'access the premises of the contractor for the inspection of performance and/or Commonwealth or contract material.'

3.130 According to DIMA these powers are appropriate and do not constitute a breach of professional privilege.[110]

3.131 It is also relevant to note that under the terms of the standard form contract between DIMA and the IAAAS service provider, the contractor is obliged to protect the privacy of clients by complying with the Information Privacy Principles set out in the Privacy Act 1988.[111] The contract also explicitly recognises the establishment of legal professional privilege between the contractor and their clients, and that information subject to privileged relationship shall not be disclosed to DIMA without the prior written consent of the person involved.[112]

3.132 There has been the suggestion that it would be more appropriate that the Attorney-General's department were made responsible for the administration of IAAAS, in conjunction with their current responsibility for legal aid matters.

3.133 This view is rejected by the Attorney-General's department, who explain that the current administrative arrangements are based on the differences between the types of assistance. IAAAS covers assistance provided in relation to an administrative decision by DIMA or a merits review of that decision by the RRT. In contrast, Legal Aid provides legal assistance for a judicial review by the courts to examine the legality of the original administrative decision. It is therefore appropriate, in the view of the government, that DIMA retains control of matters relating to the administration of their portfolio responsibilities, while Legal Aid matters remain within the Attorney General's Department's purview.[113]

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109 *Submission No. 73*, Law Council of Australia, p. 1067

110 *Submission No. 69D*, Department of Immigration and Multicultural Affairs, p. 1040

111 Contract Clause 12

112 Contract Clause 31

113 *Submission No. 75A*, Attorney General's Department, p. 1195

Conclusions

3.134 The Committee considers it appropriate that DIMA should continue to administer the IAAAS, given its responsibility for the portfolio issues and the wider interrelationship between IAAAS contractors and the MARA scheme. The Committee also considers that the inclusion of privacy principles and the recognition of legal professional privilege in the standard contract provides adequate protection for clients of the IAAAS contractors, and that DIMA's rights to scrutinise the operations of contractors are therefore appropriately constrained.

Problems with Legal Aid

3.135 This section addresses problems specific to the current legal aid guidelines, which critics argue are flawed in several respects. These criticisms are addressed below.

The test is too narrow

3.136 According to a number of submissions, the merits test operates in such a narrow fashion as to deny legal aid to a range of people who may have real need for assistance. National Legal Aid highlight how this may occur:

> The Refugee Review Tribunal decides that a detainee is a refugee. Although the Tribunal does not accept the applicant's claims of what happened in his country of origin it does accept that circumstances arising since his departure from his home country leave him at risk of persecution. The Minister for Immigration and Multicultural Affairs applies to the Federal Court to review the decision of the RRT. The asylum seeker is refused legal aid for representation at the Federal Court as it is not a matter where there are unresolved differences of judicial opinion.
>
> The limited availability of legal aid is particularly harsh for those people found by the Tribunal to be refugees who are respondents to applications brought by the Minister.[114]

3.137 While the current legal aid guidelines certainly exclude such cases, this does not necessarily mean that the respondent will not have legal representation. Where the case is assessed to be strong, there is at least some possibility that the respondent will pay for their own counsel or be represented by a lawyer either acting *pro bono*, or on a contingency fee basis.

The relationship between legal aid funding and appeals

3.138 The Committee noted that in some instances representation is important. Other evidence to the Committee has suggested that there are strong administrative reasons to ensure that applicants are both advised and represented.

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114 *Submission No. 63*, National Legal Aid, p. 740. On this point, see also the comments in *Submission No. 31A*, Australian Law Reform Commission, p. 297

3.139 It is suggested that the limited legal advice is indirectly causing an increase in the number of appeals to the courts. The Minister for Immigration and Multicultural Affairs has previously drawn attention to the increasing number of refugee-related appeals:

> Recourse to the Federal Court and the High Court is trending upwards, with nearly 400 applications in 1994-95; nearly 600 in 1995-96; nearly 800 in 1997-98; and in 1998-99 as at the 25th November [1998], 435 applications.[115]

3.140 According to some submissions, many applicants who are disappointed by a negative result in the RRT lodge an appeal before the Federal Court, without understanding the nature of the appeal, seeing it as one more level of merit appeal. National Legal Aid comment that:

> applications frequently disclose no reviewable errors of law because applicants do not understand the concept of errors of law and the very limited grounds of judicial review available under the Migration Act.[116]

3.141 Reference has been made to "a large number of unrepresented applicants [before the Federal Court] who frankly have no idea why they are there".[117] Another witness commented :

> I would submit that the virtual abolition of legal aid is increasing the burden on the Federal Court and making people apply without lawyers to the court, thereby clogging the court system with, what are in many cases, unmeritorious claims. It would be preferable, I would suggest, that at least some initial advice be given to people who are thinking of applying to the Federal Court so that court time and money is not wasted.[118]

3.142 This comment however, assumes that applicants receiving such advice would not appeal anyway, even where the advice indicated their case had little merit. The Committee also notes the comments of Wilcox J in *Muaby v. Minister for Immigration and Multicultural Affairs,*[119] where his Honour commented:

> the solution is not to deny a right of judicial review. Experience shows that 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

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115 *Migration Legislation Amendment (Judicial Review) Bill 1998*, Second Reading Speech, Minister Ruddock, p. 2. A more detailed discussion of judicial oversight is at Chapter 6

116 *Submission No. 63*, National Legal Aid, p. 741

117 *Submission No. 35*, Nick Poynder, p. 248

118 *Transcript of evidence*, McDonells Solicitors, p. 125

119 (1998) 1093 FCA [20 August 1998]

> interpretation services and independent legal advice. If that were done, the number of applications for judicial review would substantially decrease.

3.143 The second argument is that once an action is commenced, an unrepresented litigant can become a significant drain on court resources. As an initial point, the Committee notes that *Migration Act*-related litigation in the Federal Court is characterised by a significantly above average number of unrepresented litigants:

> A report commissioned by the Australian Law Reform Commission, *Empirical Information about the Federal Court of Australia* (1999), found that applicants to the Federal Court were most commonly unrepresented in migration matters – 30.6% of applicants in migration matters were unrepresented.[120]

3.144 This contrasts with the Federal Court's average rate of unrepresented litigants which stands at only 15%.[121]

3.145 The Law Council of Australia[122] drew the Committee's attention to the comments of Madgwick J. of the Federal Court *Lunardi v. Minister for Immigration and Multicultural Affairs*,[123] in which his Honour noted that the applicant did not have legal representation and had not been able to provide reasons for his application to the Federal Court. His Honour stated:

> I have considered the matter for myself to try to determine whether the Tribunal has made any error of law. The unsatisfactoriness of this hardly needs to be stressed, but in a situation of governmental parsimony as to legal aid and where consideration for "human fate", in a phrase of Toohey J's, are involved, it seems to me that humanity dictates that I so proceed.[124]

3.146 In the course of their review of federal litigation, the Australian Law Reform Commission came to similar conclusions:

> The Commission has been told that participation of unrepresented applicants often results in long hearings, with the court allowing behaviour which might otherwise breach procedural rules and tolerating long winded presentations in order to ensure the applicant is afforded a fair hearing. Unrepresented applicants also place a burden on registry staff, a resource implication which is not usually revealed in statistics on caseload. [125]

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120 *Submission No. 33*, Australian Council of Social Services, p. 227

121 *Submission No. 31A*, Australian Law Reform Commission, p. 293

122 *Submission No. 73*, Law Council of Australia, p. 1070

123 (1998) 1091 FCA (27 August 1998)

124 See also the comments in *Kumula v. Minister for Immigration and Multicultural Affairs* (1998) 613 FCA [18 May 1998]

123 *Submission No. 31A*, Australian Law Reform Commission, pp. 294-295

3.147 The Chief Justice of the High Court of Australia, Mr Murray Gleeson, has also commented on the problems of unrepresented litigants:

> The system depends, not only for the justice of the ultimate outcome, but also for the efficiency with which the proceedings are conducted, upon the assumption that the competing cases are being put to their best advantage, by professionals who have the skills necessary to marshal evidence and argument, to identify the issues to be determined, to present the facts capably, and to understand and argue the law.
>
> For a system based upon that assumption, the unrepresented litigant is a serious problem…
>
> What is not so well understood outside the court system and the legal profession is the cost to the system, and the community, in terms of disruption and delay, of the unrepresented litigant. [126]

3.148 Finally, the Committee notes the possibility that limited legal aid may spur an increased number of class actions:

> The availability of Legal Aid is also likely to reduce the proliferation of class action matters as applicants would not need to pool their resources to seek judicial review.[127]

3.149 The Law Council of Australia on this point explain:

> While it may not be feasible for one party to challenge a matter without legal assistance, the group of a number of litigants can allow for a matter to be litigated at relatively little expense to individual claimants.[128]

3.150 The Committee is aware of at least three such class actions which were before the Federal Court, during the Committee's inquiry, in relation to Migration Act matters.[129] A rise in class actions may represent an indirect increase in the amount of refugee-related litigation.

Possible solutions

3.151 The Committee received a number of suggested solutions to the problems identified with the current legal aid arrangements.

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126 The Hon Murray Gleeson AC, Chief Justice of Australia, *The State of the Judicature*, Australian Legal Convention 10 October 1999, p. 26

127 *Submission No. 66*, Macpherson and Kelley, p. 805

128 *Submission No. 73*, Law Council of Australia, p. 1070. See, for example, *Din v Minister for Immigration and Multicultural Affairs* (1997) 147 ALR 673

129 These are *Herijanto v Refugee Review Tribunal and Another* (filed 31 July 1999); *Muin v Refugee Review Tribunal and Another* (filed 22 March 1999); and *Lie v Refugee Review Tribunal and Others* (filed 10 June 1999)

3.152 National Legal Aid, for example, recommended the removal of the current guidelines, and a return to the earlier merits test, by which legal aid could be granted for judicial review where there were "strong prospects of substantial benefit to be gained by the applicant".[130]

3.153 The Australian Law Reform Commission, addressing the limited context problem of the lack of assistance to those whose decisions are appealed against, raise the following suggestion:

> It has been suggested to the Commission that the establishment of a federal 'suitors' fund, such as that established under the *Suitors Fund Act 1951 (NSW)*, would provide assistance to such respondents. Under that Act, a suitors' fund is established from a percentage of court fees collected within the State. The Court has the discretion to grant a respondent to a successful appeal an indemnity certificate. The indemnity certificate entitles payment from the fund to cover the appellant's costs, and will generally be awarded where payment of such costs would cause the respondent undue hardship.[131]

Conclusions and recommendations

3.154 The committee concludes that, as a general proposition, legal assistance to litigants is of great benefit to both the courts and for the individual applicants. However, the relationship between legal assistance and the rate of appeals is not clear. The underlying question in this problem is whether receiving better legal advice prior to an appeal would lead applicants with poor cases to withdraw, or, as the minister asserts, whether most of the appeals are simply a device by applicants to extend the process and as such would go ahead with or without legal assistance. If the latter were the case, the only effect of increasing legal assistance would be to increase overall costs, with no effect on the appeal rate.

3.155 This issue is examined in more detail in a later chapter.[132] Nevertheless, there is currently not enough evidence to have a full understanding of the relationship between the availability of legal aid, and the numbers of appeals. The Committee is therefore not convinced that simply widening the availability of legal aid would necessarily solve the problems inherent in the numbers of appeals.

3.156 Similarly, the relationship between overall costs and unrepresented litigants remains uncertain. While unrepresented litigants undoubtedly constitute both a drain on the resources of the courts, and a cause of procedural frustration, the Committee has not received any evidence during this inquiry to categorically indicate the relative costs of increasing legal aid in order to decrease the numbers of unrepresented litigants. Such an analysis would be particularly difficult given the intangible nature of many of the costs associated with unrepresented litigants. Nevertheless, it is also clear

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130 *Submission No. 63*, National Legal Aid, p. 741

131 *Submission No. 31A*, Australian Law Reform Commission, p. 297

132 See Chapter 6

that the costs associated with widening legal aid so as to remove the problem of unrepresented litigants is likely to be high.

3.157 The Committee does agree however, that limiting legal aid may prove to be a false economy in the context of the overall justice system. As Chief Justice Gleeson commented: "Providing legal aid is costly. So is not providing legal aid."[133]

Recommendation

Recommendation 3.6

The Committee **recommends** that a body such as the Australian Law Reform Commission be asked to undertake a comprehensive study of:

- the causes of appeals to the courts in refugee matters, and whether increases in legal assistance would serve to reduce the numbers of unmeritorious claims; and
- the costs associated with unrepresented litigants in refugee matters, and whether increases in legal assistance would be an effective means of reducing the costs to the wider system.

3.158 The Committee also concludes that a major issue is the number of appeals being lodged without the applicant understanding the legal basis of the appeals or the limited chances of success. This results in both a waste of court resources, further delays in the refugee determination process, and perhaps the creation of false hopes for the applicant. For reasons that are explored in detail in Chapter 6, the Committee does not accept that the answer to this problem is to remove the availability of recourse to the courts. The better solution is to make the appeal process work better so that those with valid grounds of appeal are able to have their matter heard expeditiously while other cases are removed from the system.

3.159 The Committee therefore believes that legal aid Guidelines be changed to adopt a funding arrangement similar to that of IAAAS, providing for separate advice and assistance. Under this proposal, applicants to the court who satisfied the merits and means test, would be eligible for initial advice on their proposed appeal, which would both limit the costs of providing a wider service, and assist those with unmeritorious cases to abandon an appeal that has little likelihood of success. Where applicants choose to pursue an appeal, the judge hearing the matter will have the benefit of an application which focuses the appeal on relevant legal questions, thereby expediting the hearing of the matter, and in unmeritorious cases, will enable the judge to summarily dismiss the case with a minimum of delay.

133 The Hon Murray Gleeson AC, Chief Justice of Australia, *The State of the Judicature*, Australian Legal Convention 10 October 1999, p. 28

Recommendation

Recommendation 3.7

The Committee **recommends** that the Government amend the legal aid guidelines to enable the Legal Aid Commissions to provide limited legal advice to help applicants consider the value of an appeal.

The private legal sector and pro-bono schemes

3.160 The Committee notes that in addition to the IAAAS and Legal Aid schemes administered by the government, the third potential source of legal assistance for refugee applicants derives from private sector law firms, either paid for by the applicant or provided under *pro bono*, or voluntary schemes.

3.161 In this context, the Committee further notes the creation of a *pro bono* scheme by the Migration Agents Registration Authority (MARA) which operates as part of the Continuing Professional Development scheme.[134]

3.162 As a general comment, it seems unlikely that many asylum seekers will have the resources to pay for legal advice:

> Because of the nature of an asylum seeker (ie. A person seeking assistance of Australia and not an economic migrant) it is illogical to expect the private legal market to meet the relevant need. From our experience, these people do not come to this country with large financial resources.[135]

3.163 The Australian Law Reform Commission notes the involvement of Law Societies and Bar Associations, but raises the concern that:

> Lawyers provided under such schemes may not have specific or sufficient experience in this specialised area of practice. Refugee cases can involve complicated facts and legal arguments, idiosyncratic to the jurisdiction and based on a very complex and changing statutory regime.[136]

3.164 The Committee has received little evidence of the extent of pro-bono schemes and how many asylum seekers actually receive assistance from these sources.[137] In general terms the Committee welcomes all efforts by private lawyers and the law societies to provide assistance to indigent litigants.

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134 Migration Agents Registration Authority, *Annual Report 1998*, p. 11

135 *Submission No. 68*, Asylum Seekers Centre, p. 812

136 *Submission No. 31A*, Australian Law Reform Commission, p. 296

137 For a wider discussion of the nature and extent of pro bono services provided by the legal profession, see the Senate Legal and Constitutional References Committee, *Inquiry into the Australian legal aid system – Third Report*, June 1998, pp. 155 - 157

3.165 However, the Committee also considers it important that these services are not regarded as an alternative to a properly resourced government supported system based on an identified need. The Committee is concerned that the department appears to be deliberately establishing a program that requires agents and lawyers to provide their services on a *pro bono* basis. The Committee would be concerned that applicants forced to use services on a *pro bono* basis will either be serviced by relatively inexperienced agents and lawyers or will have comparatively cursory attention given to their application. In either case, the applicant would be worse off than if they had accessed an agent or lawyer under the IAAAS rate or secured their own representatives on a contingency fee basis.