

THE RIGHTS OF NON-NATIONALS AND LEGAL AID

The Legal Aid Commissions

There are eight Legal Aid Commissions throughout Australia representing each State or Territory. The Commissions are independent statutory authorities, established under the respective State or Territory enabling legislation. The Commissions are funded by the Federal and State or Territory Governments to provide legal assistance to disadvantaged people.

All Legal Aid Commissions aim to ensure that the protection or assertion of the legal rights and interests of people are not prejudiced by reason of their inability to:

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

Commission Services and funding arrangements generally

Each of the Legal Aid Commissions offers a range of legal services to all members of the community including information, referral, advice, minor assistance (such as writing a letter or making a phone call), community legal education (including publications and presentations) and, upon the making of a grant of legal aid, dispute resolution and representation.

Each State, or the Commission in the respective State, and Territory has an agreement with the Commonwealth of Australia through the Commonwealth Attorney-General's Department for the provision of legal assistance services.

Each of these agreements specifies Commonwealth Legal Aid Priorities. The Priorities set out matters arising under Commonwealth law for which the funding provided can be used by Commissions in making grants of legal assistance for representation by a lawyer. The agreements also contain as a schedule the Commonwealth Legal Aid Guidelines ("the Guidelines").

Commission services and funding arrangements in relation to immigration matters

Under the Guidelines legal representation in migration matters is severely restricted and limited to test case matters in the Federal or High Court.

Due to the restrictive Guidelines and corresponding lack of funding not all the Legal Aid Commissions provide aid in respect of immigration matters. Three of the Commissions do not provide legal aid in immigration matters. These Commissions refer people seeking immigration advice to either a Refugee and Immigration Legal Service (RAILS), a Community Legal Centre (CLC) which has a contract to deliver immigration services, or to registered immigration agents. The other five Legal Aid Commissions have contracts with DIAC (Department of Immigration and Citizenship) under the Immigration Advice and Application Assistance Scheme (IAAAS) to provide immigration and advice to asylum seekers and some other non-citizens in the community and in immigration detention. Under the IAAAS Scheme, a detainee is referred to the Commission for legal advice and assistance soon after such assistance is requested by the detainee.

In addition to the IAAAS detention contracts, some Commissions also hold IAAAS Community Contracts through which “disadvantaged” people can be provided with free advice and, in some cases, application assistance. The funding provided under the community contracts is inadequate to meet the need in the community. Community funding is subject to means and merit tests. By way of example, in the Northern Territory, the vast majority of assistance that we provide is to clients who have arrived in Australia on humanitarian visas and who are seeking to be reunited with family through the offshore humanitarian program. Under the IAAAS contract we receive funding to assist these clients because they meet the double disadvantage test. That is, they are in financial hardship and from a non-English speaking background, or illiterate in their own language, or have a physical or psychological disability. In addition, although we are not funded to provide any further assistance under the IAAAS contract, we do provide minor assistance such as preparing statutory declarations and helping to complete forms on an advice basis.

1. SCOPE OF SERVICES

- (a) All residents in Australia have the same entitlements to access the services provided by the Legal Aid Commissions. There is no restriction of service based on visa or citizenship status. Foreign workers, foreign

spouses and other non-nationals in Australia, legally or illegally, are entitled to the same services as citizens of Australia. Generally, however, the Commissions do not assist foreign workers for visa issues due to lack of funding in this area. If the foreign worker is employed then he or she may not satisfy our means test. In certain cases if there is particular merit and client has no means, assistance may be provided, but we do not receive any direct funding unless they are seeking protection. For example, if a worker has been exploited by his or her employer or by his or her training provider if he/she is on an occupation training visa. However, this is rare and work is done unfunded.

Generally foreign spouses will be assisted by the Commissions where they have separated from their partner and are seeking permanent residence on the basis that either there is a child of the relationship or they have suffered domestic violence at the hands of their sponsoring spouse.

- (b) Legal Aid Commissions do assist other non-nationals (non-citizens) in Australia, including those who have arrived on false documents or have not been cleared by Immigration. Those Commissions which do immigration work predominantly assist asylum seekers who seek refugee status under the International Refugees Convention. Asylum seekers are arguably the most vulnerable of clients because as non-citizens they are denied many of the rights taken for granted by other client groups. Asylum seekers, while awaiting their determination of their refugee status are not entitled to social security support, access to English classes, resettlement assistance or public housing. A small number are entitled to income support from the Australian Red Cross.

Commissions are very aware of the problems faced by women who have been trafficked to Australia. Commissions provide assistance to these women to access the appropriate visas. These may be protection visas or temporary and permanent witness protection visas for those who may have assisted police and would be in danger if they returned to their country of origin.

The five Commissions which receive funding through the IAAAS contracts provide advice and assistance for protection and non-protection visas (in cases of domestic violence) for disadvantaged persons. Commissions assist people both in the community and in immigration detention.

If a person enters Australia without a valid visa or passport and is detected, then he or she is detained in an immigration detention centre. In the Northern Territory, for example, we have a number of people attempting to enter Northern Australia by boats organised by people smugglers based in Indonesia. Throughout Australia people often try to enter Australia on false documents or with no documents at the airport. Under the IAAAS agreements special funding is given to aid such people in detention and, in the majority of cases, these people are referred to the Commissions by the DIAC. If the unauthorised arrival has also committed a criminal offence, such as illegal fishing or illegal drug importation, for example, then the Commission would be notified by the Prosecuting Authority. Legal Aid is available for representation in respect of any criminal charges.

In addition, some Commissions also receive funding to assist clients in the community who have been cleared by immigration. Some of these people may have valid documents and some may not for a number of reasons. Funding from IAAAS enables the Commissions to provide free advice and, in some cases, application assistance to eligible “disadvantaged” visa applicants, including onshore asylum seekers.

- (c) The Commissions do not distinguish between the lawfulness of foreigners in Australia. The Commissions receive funding to assist both those who have arrived on false documents and those who have entered without documents or entered illegally. In addition, general immigration advice and assistance across a broad range of visa types, such as spouse visas, orphan relative visas, carer visas and vulnerable child visas are given either under IAAAS or general legal aid funding (not always under IAAAS).

2. APPLICATION PROCEDURES

- (a) The same procedures apply for citizens and non-citizens. All applicants are treated equally as long as they are present in Australia.
- (b) In Australia the law essentially adopts the Refugee Convention Definition of a refugee, namely a person who is outside their country of nationality or their usual country of residence and:
 - unable or willing to return to or seek the protection of that country due to a well founded fear of prosecution for reasons of race,

religion, nationality, membership of a particular social group or political opinion;

- not war criminals or people who have committed serious non-political crimes.

There are some legislative qualifications to this definition. The Legal Aid Commissions, which have an IAAAS contract, provide application assistance to asylum seekers in the community and in detention. Usually an assessment is made by a solicitor at the Commission and aid is then granted. Clients who are in detention are referred for legal advice and assistance by DIAC. Clients who are in the community are identified by the Legal Aid Commission as requiring assistance and likely to have prospects of successfully establishing refugee status. To be eligible for Legal Aid they must also satisfy a means test and the IAAAS disadvantage criteria. It is the Department of Immigration and Citizenship, however, that makes the decision as to whether an applicant for asylum meets the criteria for refugee status.

- (c) There are many challenges facing Legal Aid lawyers in providing services in this area. The restrictions on what Commissions are allowed to do under the Guidelines or IAAAS contracts, plus the lack of funding, is compounded by the vulnerability of the clients and their multi-faceted issues, which may include:

- the person's timely access to legal services when they are in immigration detention – especially where they are held in an off-shore excised place;
- building trust and understanding with clients;
- obtaining appropriate interpreters;
- dealing with traumatised people;
- strict time limits in some cases to lodge visa applications;
- client's financial hardship;
- lack of social support.

The reality for the Commissions is that a lot of the work which is done for these clients is done on a pro bono basis and through attempts to link clients with other specialist services, which in turn are often under-funded or unfunded.

Other challenges are the restrictive Guidelines and conditions of the IAAAS contracts, the lack of funding which affects the capacity of the Commissions to take on work in this area of obvious legal need, as well as the volume of work including those matters which may fall outside the IAAAS contracts. To try and meet the need, the Commissions liaise with other IAAAS providers in their State or Territory in relation to capacity and with other providers to link clients into particular services. At other times, Commissions will make a policy decision to give Legal assistance although no specific funding is available.

Non-nationals placed in Immigration Detention

- (d) Clients who are not cleared through immigration are detained in immigration detention. These may be specific detention facilities or it may be that in the State or Territory a prison has been declared an immigration detention centre. In the Northern Territory, for example, we have a detention centre, but from time to time people are detained in the prison and not only those who have other criminal charges concerning their unlawful entry, such as illegal fishing or people smuggling.

People who enter Australia illegally either on boats or at airports are detained, as are people who have overstayed their visas or have had their visas cancelled. The Legal Aid Commissions are able to assist some of these clients. Asylum seekers get legal representation under the IAAAS scheme but other non-citizens in detention may not get assistance.

Those Commissions which are working under the IAAAS contracts and providing assistance to clients in detention will give those clients regular updates in relation to their cases.

Some of the detention centres are offshore, such as on Christmas Island. Those asylum seekers on Christmas Island are denied access to the onshore refugee determination process. They have no right to access the court system. Those clients, who have managed to land in Australia but who are then taken to detention on Christmas Island, have entered Australia and are therefore legally entitled to the onshore refugee determination process. However, due to the isolation of these clients, it is often very difficult for them to access this assistance. None of the Legal Aid Commissions are contracted to provide the service to those offshore in places like Christmas Island. The Victorian Legal Aid Commission, which has the largest and most vocal immigration practice, has provided assistance to applicants on Christmas Island, in relation to

their rights to judicial review of tribunal decisions via telephone conferencing.

3. UNDERSTANDING ISSUES FACING NON-NATIONALS

- (a) The understanding of lawyers and the judiciary in respect to the issues facing non-nationals varies. Generally, it is our experience that there is limited understanding of the legal issues affecting non-citizens on the part of those lawyers and members of the judiciary who do not specialise in migration law.

All the Legal Aid Commissions have community legal education sections. Through these community legal education sections Commissions produce materials and give presentations to highlight issues faced by the newly arrived refugees. Some of this work is through the Commissions' culturally and linguistically diverse education programs (CALD). Although the audience targeted in the CALD programs are refugees themselves, the promotion of these programs has led to engagement with the courts, police and other agencies, which has improved understanding in the wider community of the issues facing these particular communities. A lot more, however, could be done in this area.

4. INTERNATIONAL COOPERATION

If a client is legally assisted, then all efforts necessary for the case are made to engage international cooperation. For example, when assisting with a refugee family reunion the Legal Aid Commission would liaise with the UNHCR officers and embassies overseas, the International Red Cross and the International Office for Migration. In an application for refugee status the Commission may work closely with Amnesty International. No doubt more could be done to improve and develop our international relationships with organisations but funding for immigration matters remains severely limited.

5. MARKETING ACTIVITIES

- (a) The majority of Legal Aid Commissions provide community legal education information sessions to new and emerging communities, such as the Congolese community, the Sudanese community, the Afghani community and Iraqi community in relation to their rights under Australian law. Victorian Legal Aid also provides sessions to NGO

workers, court networkers and others who support these communities. Interpreters are provided where necessary, and all Commissions provide publications across all areas of law including refugee law and these are provided in a number of languages. The largest Commissions, NSW Legal Aid Commission and Victorian Legal Aid Commission provide information pamphlets in many different languages.

6. ADVOCACY

National Legal Aid (NLA) represents the Directors of each of the eight State and Territory Legal Aid Commissions. National Legal Aid is involved in making submissions for law reform to government on behalf of the combined Legal Aid Commissions. We have just finalised a submission to the Senate and Legal Constitutional Joint Standing Committee on Migration Amendment (Immigration Detention Reform Bill). Individual Commissions are better resourced and more vocal than others. In particular, the Victorian Legal Aid Commission participates in advocacy and reform of international human rights law through involvement in high level consultation with the Department of Immigration and relevant stakeholders, including the UNHCR, the Refugee Council of Australia, Foundations for Survivors of Torture and Trauma and the International Red Cross. Individual Commissions, as well as the combined Commissions (NLA) contribute to law and policy reform in this area.

At the present time all the Legal Aid Commissions are about to renegotiate funding which is undertaken every four years. Those Commissions which do immigration work will be advocating for increased funding with less restrictions on the immigration work we can undertake so as to meet our client's needs.