

REFUGEE COUNCIL OF AUSTRALIA

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Submission to 1999 review of immigration advice and application assistance scheme for asylum seekers

Background:

The Refugee Council of Australia (RCOA) is Australia's peak refugee agency, representing some 120 organisational and individual members who work with and for refugees in Australia and around the world.

The aim of the Council is to promote the adoption of flexible, humane and constructive policies towards refugees, asylum seekers and displaced persons by the Australian and other Governments. In furtherance of this aim we monitor Government policy and practice as it pertains to refugees and, where relevant, represent the views of our members to relevant policy bodies.

It is in this capacity that the Council is responding to the invitation from the Department of Immigration and Multicultural Affairs (DIMA) to comment on the operation of the Immigration Advice and Application Assistance Scheme (IAAAS). In so doing, we present the views of community organisations working with asylum seekers in various capacities, as expressed to RCOA at various fora and interagency meetings. We wish it noted that RCOA does not itself provide application advice and thus has no vested interests, save the desire to ensure that IAAAS works for all parties: DIMA, advisers and, most importantly, the clients.

Views on Application Assistance:

As a preface to commenting specifically on the current operation of IAAAS, the Council wishes to present its views on related matters:

- amongst those who apply for refugee status in Australia, there are people who fit the Convention definition of a refugee, people who have valid reasons not to return to their country of origin for non-Convention reasons and people who apply for non-humanitarian reasons. RCOA is concerned to protect the interests of those in the first two categories;
- most refugees who come to Australia in search of asylum arrive in a traumatised and frightened state;
- many refugees arrive with limited financial resources and few friends or family members on whom they can rely for support;
- some refugees are unable to call on support from within their own community - either because they are fearful of contacting community members and/or their community is new and under-resourced and thus cannot offer practical or financial support;
- many refugees have little or no ability in English;
- some refugees are unfamiliar with dealing with bureaucracy and/or find such dealings very threatening because of their past experiences;

- the application process for refugee status in Australia has been modified over the years to make it easier for people to apply without assistance. This being said, those who are Convention refugees are more likely to be affected by all or some of the aforementioned impediments to their being able to present comprehensive and cohesive claims unaided;
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access to independent, competent and free casework assistance and/or advice during the application process is very important for people with fears of returning to their country of origin, in particular if they:

- are torture/trauma survivors
- speak little or no English
- have no family or community support
- are in detention
- have little education and/or come from a rural background
- have no income or other financial support; and

- such advice can greatly assist the determination process and substantially reduce its costs by ensuring that the applicant's claims are presented in a clear and comprehensive manner.

The position of the Refugee Council has long been that access to free competent application advice is very important for asylum seekers and that services providing this advice should be Government funded, in recognition both of the Government's obligations towards refugees and the assistance that such services can provide to decision makers.

Comments on the Review Process:

The Refugee Council welcomes the fact that the Immigration Advice and Application Assistance Scheme is being reviewed, noting that calls for such a review have come from a variety of sources including the Law Council of Australia, Amnesty International and the Australian Section of the International Commission of Jurists.

This withstanding, the Council has some concerns and queries regarding the way in which the current review is being conducted:

- the timeframe for responding is very short. Of those approached, some received their invitation immediately before Christmas (in RCOA's case on 23 December) and others received it in the first week of January, with the response date being 20 January. Giving less than a month to respond on such an important issue as this is inappropriate in any circumstances, and where the period includes several public holidays and a high probability of staff leave, leaves one to question how seriously DIMA is taking the consultation process;
- questions also arise in relation to those contacted to comment in relation to this review. RCOA has consulted with several recipients of the invitation and has concluded that the likely consultation list includes members of the DIMA-IGO-NGO Forum and current IAAAS providers. It would appear from our inquiries that certain key stakeholders have not been consulted, including the Human Rights Commission and the Ombudsman's office, the Asylum Seekers' Interagency and past-IAAAS providers. Has MARA been invited to comment? Further, it would appear from information received that there is no attempt to seek the views of the most important stakeholders - ie current and former clients of IAAAS providers;
- the terms of the review are not clearly articulated. At the same time as RCOA received the invitation to comment on IAAAS, we received a similar request in relation to the provision of material assistance (therein lies another issue: namely coordination within DIMA). This request was accompanied by a comprehensive paper presenting issues that DIMA was grappling with and accompanied by specific questions. This assisted community dialogue and will, most likely, result in the submissions being more clearly focused on those issues of particular concern to DIMA. The absence of comparable documentation in this review is regrettable; and

- of the two issues highlighted in the review document for comment, one is specifically related to the schedules of the IAAAS contracts, information that is confidential and known only by DIMA and the contractor. This therefore makes it difficult for non-contractors to address this issue in any meaningful way.

Therefore, while commending DIMA for initiating a review, the Council wishes its concerns about the way in which the review is being conducted to be noted, so too its reservations about the worth of a review that appears compromised in so many ways.

Views on IAAAS:

Leaving aside the aforementioned reservations, the Refugee Council would like to present the following views on the current operation of the Immigration Advice and Application Assistance Scheme (IAAAS):

(i) Quantum of Funding:

All community workers and advisers in this field are painfully aware that the number of people in need of and eligible for assistance (ie who have met means and merits criteria), far exceed the capacity of funded service providers. IAAAS providers report that they are having to turn away asylum seekers who they would previously have assisted and/or give one-off advice to people they consider would be best served with full application assistance, simply because they have no capacity to assist.

The alteration of eligibility criteria for Legal Aid assistance has had a significant impact on this sector and has greatly increased the pressure on funded agencies. The Council reiterates its concern about this and challenges the legitimacy of the argument presented to justify this action.

Exact figures are difficult to obtain but it would appear that approximately 75% of work in this area was previously being done by the various Legal Aid Commissions or was funded by them. The Attorney General's decision to excise three quarters of the funding pie on the basis of the existence of the remaining quarter has no logic at all, unless of course, DIMA undertakes to compensate by increasing the funding it provides to meet the shortfall.

(ii) The Tender Process:

The Refugee Council recognises that increasingly Government agencies are employing competitive tendering process to select service providers to undertake Government funded work. It is the Council's opinion that the way in which competitive tendering has been introduced in this sector has not necessarily enhanced the efficiency or quality of the application advice provided because:

- it has increased the number of funded providers without increasing the total amount of funding: this has meant that each provider receives less funding and is unable to take advantage of efficiencies of scale, staff specialisation, resource development etc;
- the criteria on which the tenders are awarded are not transparent and thus there is uncertainty about whether tenders are awarded on the basis of cost alone or whether clearly defined standards in relation to the quality of service are also included; and
- the profit and non-profit and sectors are having to compete against each other in the tender process despite the acknowledged differences between the two (see section v below) and their respective strengths and weaknesses.

(iii) What IAAAS Funds:

There are a number of issues concerning that which DIMA does, or rather does not fund under IAAAS that impact on the quality of service provided to the client and to the ability of the service provider to operate within the terms of the contract. It is probable that many of these will be covered in more detail by service providers but some that have been repeatedly discussed in community fora (thereby indicating the depth of concern about them) are:

- non-payment for assessment: IAAAS providers are only able to claim payment from DIMA for applicants taken on as clients ie people who have been assessed as eligible for application advice. This assessment process is time-consuming and in many cases will result in rejection of a client, thus meaning that the provider receives no future benefit, as well as no recompense, from the work undertaken. This is particularly significant for community agencies that are not able to cross-subsidise IAAAS work with commercial work;

non-payment for attendance at RRT hearings: it is noted that the contract does not cover attendance of the adviser at RRT hearings because there is no representation requirement. Experience has shown that while some applicants are able to attend hearings alone, others are very reluctant to do so - needing both moral and practical support from the (in many cases) only person who is familiar with all aspects of their case. This is particularly true for torture/trauma survivors who constitute a high proportion of the IAAAS clients. This non-payment can result in a number of problems:

- if a client requests that an adviser accompany him/her, the adviser is bound to do so otherwise he/she would be acting contrary to their client's instructions and thus would be in breach of their professional code;

- following on from the above, if the adviser follows instructions in such a case, their organisation/firm must cover the costs - again an issue for community agencies;

- if, as has been reported to happen, the adviser will not attend because they are not being paid to do so, in a case where the client has asked for the adviser to be present, there is a breach of professional conduct;

- non-attendance makes it more difficult for an adviser to understand the exact nature of the issues of contention and to provide the additional information required by a tribunal member following the hearing. Even if an adviser were to listen to the tape (which takes almost as long as attending), he/she misses out on the important non-verbal communication that takes place during a hearing;

- single unit cost for client assistance: this belies the fact that not all clients are the same and require the same level of support. On one extreme you have a client who is extremely traumatised, is reluctant to divulge critical information, does not speak English, needs expert assessment and requires documents to be translated. On the other, there is the client from whom their claims can be easily elicited in English;

- no explicit requirement that interpreters be engaged: it is our understanding that the use of interpreters is at the discretion of the IAAAS provider and payment for an interpreter has to be covered from the overall allocation. Thus an 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 RCOA's attention that this is not an infrequent occurrence and we are concerned about the implications of this for the quality of the application;

- no provision for expert opinions: the contract cost does not cover medical or psychological reports for clients, despite, as previously noted, the high incidence of torture/trauma survivors amongst the eligible client group and the acknowledged value to decision makers of expert testimony. Neither does it cover reports commissioned from academics on country situations. These have been shown to be of particular value in certain cases yet they can cost in the order of \$500 to \$1,000. 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;

- no provision for translating material: as with expert evidence, no specific provision is made to have relevant documentation translated. Costs must be borne by the provider and whether or not this path is taken depends on the position of the provider.

The above mentioned issues that are linked to the level of prescription in the contract parallel the most commonly mentioned community concerns about IAAAS providers. Whereas on the one hand some providers provide a comprehensive and ethical service to their clients, others have been able to use the lack of prescription and provide the minimum service to maximise the financial benefit from the contract. Practices mentioned include not using an accredited interpreter, failing to conduct a second interview in order to verify claims with the client before submission and the provision of minimal supporting evidence (medical reports, country information, translations of documents etc).

In addition, the fact that providers funded under the refugee component of IAAAS are not funded to assist former clients bring spouses and other immediate family members to Australia has been highlighted as a significant omission in the scheme. Having established a relationship with the client, they are best placed to perform this vital function.

(iv) Method of Payment:

Since the introduction of Government funding for application advice approximately a decade ago, there have been many versions of the way in which the service provider has been paid. In the early days, the service was paid an annual fee that had been negotiated between the provider and DIMA (then DIEA) and against which the provider had to acquit. Since then the payment method has progressively moved to a fee per client basis:

- first with the payment of an annual fee based on the service assisting a specified number of clients at a specified unit cost;
- most recently with the payment being on a client by client basis, with a cap on the number of community clients.

In recent years we have also seen new players entering this arena, with selection being according to the aforementioned tender process.

RCOA's association with community based application advice goes back to 1987. Over these twelve years we have watched the various funding models come and go and have yet to see one that meets the expectations and requirements of the community.

The annual funding cycle that has operated throughout has caused major problems for community based providers. Uncertainty about funding beyond the end of the financial year, together with delayed contract negotiation, have meant that few years have passed with any continuity of flow through to the coming year. This has affects the quality of service in many ways:

- no forward planning is possible because the funding cycle is so short and there is no certainty of refunding;
- there is no staff security - contracts being linked to the current funding round. This is very hard on staff and results in a higher than desirable staff turnover;
- there is no incentive for investment in staff training or resources when the nature of the operation is so ephemeral.

The recent introduction of unit based funding has exacerbated these problems. Providers can no longer even plan for a twelve month period but have to be in the position to up-size or down-size according to the referrals received. This has a huge impact on community based agencies that are not in a position to cross subsidise DIMA work.

The current contract payment structure is thus significantly disadvantaging the community sector and favouring private providers.

(v) Profit vs Non-profit Sector:

The introduction of IAAAS saw a move away from a service that was dominated by non-profit providers (including the Legal Aid Commissions) and towards one where profit and non-profit providers are working side by side. Further, as has been indicated above, the nature of the contract skews advantage towards the profit sector for a number of reasons, including their ability to cross subsidise their IAAAS work.

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 and that the staff of these services:

- are committed to the ethos of community service;
- have elected to work in this area because of their interest in international affairs and their desire to work with people from different backgrounds. This is of particular importance in this area as it is necessary to develop a close rapport with the client in order to elicit all relevant information;
- typically are very dedicated to their work and ensure that the submissions made on behalf of their clients are of the highest possible quality, irrespective of cost restraints; and
- develop considerable expertise in the area of refugee law and about the countries from which refugees come.

Further, and importantly, the community based services have had a high community profile. They are the services to which community workers feel comfortable about referring clients and to whom they turn for advice and information.

In saying this the Refugee Council does not wish to imply that there are not competent and dedicated staff working within commercial law firms and with migration agencies, nor that the work done by all commercial operations is substandard. Experience has shown, however, that within the commercial sector the profit motive can lead to compromise - and this may be at the expense of the client.

(vi) Detention Advice:

The Refugee Council acknowledges the need for expeditious processing of applicants held in detention but questions the wisdom of requiring the application to be lodged within a mandatory 3 days of referral.

Such a short response time presupposes that the adviser has no prior commitments and is able within a very short time span to:

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- secure the services of an accredited interpreter;
- develop a sufficient relationship of trust - this cynicism is further fed by the view that those investigating the complaints may be biased through association with the firm/adviser against whom the complaint is being made;
- further, the complaints process is so slow that if an asylum seeker is rejected because of poor representation, they are likely to have been repatriated before the case is considered.

How can the stated aim of having applications prepared "in a fair, comprehensive and ethical manner" be matched against a 3 day limit for undertaking all the above?

The fact that primary submissions must, of necessity, be compromised by this time constraint means that more cases are likely to be rejected at the primary stage and flow on the Refugee Review Tribunal (with additional detention costs of >\$10,000 plus RRT and legal costs). The imposition of such an unreasonable time limit on primary IAAAS applications for detention cases would therefore seem to be contrary to the objective of the scheme and very expensive to the taxpayer.

(vii) Monitoring:

As implied above, there is the perception in the community that while some IAAAS providers are providing quality representation, others are cutting corners and thus compromising their clients' best interests. It is possible that some of the concerns being voiced are ill founded but the consistency and frequency of comment suggests that there could well be substance to some complaints and thus it is important that there be a way in which complaints can be thoroughly and independently investigated. In theory, MARA should afford aggrieved parties a complaints mechanism but there are a number of reasons why this does not work as it should:

- applicants are unaware of their right to complain about their adviser and about what they can legitimately expect from an adviser;
- if they are aware of the above, applicants are afraid to complain lest such a complaint would affect their application;
- community groups who become aware of problems are reluctant to complain without permission of the aggrieved applicant and this is often not forthcoming for the above mentioned reason;
- when complaints have been lodged, there is little if no evidence that they have an affect so there is a high level of cynicism about the MARA complaints process;
- this cynicism is further fed by the view that those investigating the complaints may be biased through association with the firm/adviser against whom the complaint is being made;
- further, the complaints process is so slow that if an asylum seeker is rejected because of poor representation, they are likely to have been repatriated before the case is considered.

It is therefore argued that in the case of IAAAS, the MARA complaints mechanism is not working as it should and there needs to be another way to ensure that the interests of the applicants are protected.

Recommendations:

In the light of the above, the Refugee Council seeks that the following recommendations be considered by the IAAAS reviewers:

that recognition be given to the important contribution community based and non-profit providers make to this area;

- that funding for free means and merits tested application advice for refugee claimants be restored to a level commensurate with need;
- that the selection criteria used to assess application from potential IAAAS providers be made available and that the selection process be transparent;
- that the number of IAAAS providers DIMA elects to fund in any one state is not so great as to spread the money too thinly and compromise the providers' ability to deliver a quality service;
- that the contractual arrangements between profit and non-profit advisers differ in recognition of their different contributions and funding structures;
- that when costing services, separate provision be made for the funding of additional costs (interpreters, medical reports, translations etc);

- that multi-year partnership agreements be entered into, subject to meeting certain performance criteria;
- that the refugee component of IAAAS be expanded to cover assistance with the reunion with immediate family members for those granted protection visas;
- that a condition of funding be that applicants are systematically informed of their rights and responsibilities under IAAAS and are provided information about how to make a complaint should they wish to do so;
 - that the response time for detention applications be increased to 14 days;
 - that DIMA undertake a regular audit of IAAAS submissions to monitor their quality and that periodic checks are made of client satisfaction;
 - that a separate complaints mechanism be established for IAAAS which would:
 - be required to assess claims expeditiously;
 - have the power to "stop the determination clock" to enable an investigation;
 - be able to substitute a new adviser if such a need was determined.

Conclusion:

The Immigration Advice and Application Assistance Scheme enables some very vulnerable people to gain access to vital application assistance and advice. There are, however, a number of problems with the scheme, not least being the substantial gap between supply and demand and the structural inadequacies outlined above. The Refugee Council trusts that DIMA will take these issues into consideration in the current review process and attend to the above recommendations.