

SUBMISSION TO THE PRODUCTIVITY COMMISSION:

INQUIRY INTO ACCESS TO JUSTICE ARRANGEMENTS - RESPONSE TO DRAFT REPORT

1 Introduction: CASE for Refugees

- 1.1 The Centre for Advocacy, Support and Education for Refugees(CASE) is a not for profit community legal centre that provides free legal advice, representation and advocacy to disadvantaged refugees, humanitarian visa holders and people from culturally and linguistically diverse (CALD) backgrounds who live in Western Australia. Since its inception in 2002, CASE has grown to be a primary provider of specialist legal services to the recently-arrived CALD community in Western Australia. In 2012/13 over 1000 people approached CASE seeking assistance. We were able to assist about 680 of them. Approximately 60% of our clients are also victims of torture and trauma. Our clients come from 54 countries around the world.
- 1.2 CASE's services are delivered through a combination of 14 full and part-time staff and a large base of volunteers, including law students and pro-bono lawyers. CASE relies very heavily on our volunteers to continue to provide the services it does. In 2013, volunteers provided 3,177 hours of work to CASE. In addition, barristers and law firms provided over \$200,000 in pro bono services.
- 1.3 CASE provides specialist immigration legal services and currently assists onshore asylum seekers to claim protection, permanent humanitarian and protection visa holders to sponsor or propose family members for Australian visas through our Family Reunion Program and clients seeking administrative review through both the relevant administrative tribunals and the courts. This includes judicial review in the Federal Magistrates Court through our Judicial Review Asylum Seeker Project.
- 1.4 CASE also provides a generalist legal service to clients from CALD backgrounds. Clients are provided with initial legal advice, where appropriate clients are offered further appointments and written advice for more complex matters, legal representation in court proceedings. CASE also provides general advocacy services. Assistance is given for a wide range of legal matters including criminal injuries compensation, violence restraining orders, child protection, discrimination and equal opportunity, minor criminal matters and traffic offences, debts, citizenship, motor vehicle accidents, wills and powers of attorney, tenancy, employment and some other immigration matters. Community Legal Education is provided in relation to these legal matters also.
- 1.5 This submission reflects the experience and expertise of CASE as outlined.

2 Understanding and navigating the system (Draft Report Chapter 5)

Information Request 5.1: The Commission seeks feedback on the likely effectiveness and efficiency of extending the use of legal health checks to those groups identified as least likely to recognise

problems that have a legal dimension. More vulnerable groups include people with a disability, sole parents, homeless people, public housing tenants, migrants and people dependent on income support.

Where greater use of legal health checks is deemed appropriate, information is sought on who should have responsibility for administering the checks. What role should non-legal agencies that have regular contact with disadvantaged clients play? Do these organisations need to be funded separately to undertake legal health checks?

- 2.1 The Commission acknowledges in Chapter 5 that it can be difficult for people to understand and navigate the law and civil justice system. In particular, it can be difficult to identify whether a problem has a legal dimension. Further, many disadvantaged Australians have complex legal and non-legal needs.
- 2.2 CASE considers it crucially important to recognise the particular difficulties facing clients from CALD backgrounds. Not only are there language barriers, cultural differences and often backgrounds of torture and trauma, but there is lack of understanding of their legal rights and how to access the Australian legal system. It is not uncommon for clients from CALD backgrounds to additionally suffer from mental illness which further compounds the difficulties facing these clients.
- 2.3 CASE considers it fundamental to recognise the particular disadvantages these clients face in accessing justice. This may make the use of legal health checks useful for this group. However, given the complicated backgrounds of these clients we have concerns about the capacity of non-legal agencies to undertake legal health checks. It is often difficult for legally trained staff to identify the myriad of legal issues that may be facing these clients. There is a concern that non-legal agencies may not have the experience to fully understand the complexities involved. Whoever is doing legal health checks for this group needs to be able to address the combination of legal issues, language barriers, cultural differences, backgrounds of torture and trauma in conjunction with other potential issues such as mental illness, homelessness, reliance on income support.

3 Tribunals (Draft Report Chapter 10)

- 3.1 CASE routinely assists applicants with obtaining merits review from the Refugee Review Tribunal (RRT) and Migration Review Tribunal (MRT). We also occasionally assist with applications to the Administrative Appeals Tribunal (AAT). Our clients face linguistic, cultural, educational and financial barriers. These barriers may make it difficult for them to understand the process they are involved in, to articulate their case to a Tribunal or to identify suitable evidence to provide in support of their review application.

Draft Recommendation 10.1: Restrictions on the use of legal representation in tribunals should be more rigorously applied. Guidelines should be developed to ensure that their application is consistent. Tribunals should be required to report on the frequency with which parties are granted leave to have legal representation.

3.2 CASE supports this Recommendation so far as it relates to removing the need for applicants to have legal representation, particularly senior counsel, to adequately utilise the Tribunal system. To the extent that this imposes cost barriers and causes Tribunals to become more judicialised or 'court-like' it is to be discouraged.

3.3 CASE considers that in the MRT/RRT, qualified representatives provide valuable services to disadvantaged applicants and to the Tribunals themselves. Prior to the hearing, this typically takes the form of:

- explaining the role of the Tribunal within the wider migration system;
- explaining the reasons for the decision under review in language the applicant can understand;
- assisting the applicant to identify potential witnesses or other evidence that would assist them and excluding that which is not relevant; and
- preparing written submissions to the Tribunal, articulating the facts of the case, major issues in dispute from the applicant's perspective and arguments in support of the application.

3.4 Feedback CASE has received from Tribunal Members indicates that they value this work, particularly the preparation of a cogent written submission because it reduces the time required for them to prepare and conduct hearings.

3.5 CASE considers that the recently announced merging of specialist tribunals, including the MRT and RRT, with the AAT in June 2015 may exacerbate the disadvantage experienced by applicants. Currently, RRT and some MRT Members have specialist training and experience in working with applicants from disadvantaged CALD backgrounds, including those who have experienced torture and trauma. If specialist Members for migration matters are not maintained in the new Tribunal, the need for such applicants to have access to qualified representatives will be even greater than is currently the case.

3.6 MRT/RRT hearings involving disadvantaged applicants are also assisted where qualified representatives are involved. Their presence allows Members to request additional material based on issues that arise during the hearings and have that request heard and understood by those who will be assisting the applicant to obtain it.

3.7 It is CASE's experience that disadvantaged CALD applicants from countries where the legal systems is a source of oppression, or who have suffered torture or trauma in their home countries benefit from the presence of a qualified representative at their MRT/RRT hearing. Having these factors in their background often means that applicants will experience high degrees of anxiety when required to answer questions from Tribunal Members. This can interfere with the quality of information they are able to provide to Members.

3.8 CASE notes the concerns expressed in the Draft Report relating to timeframes in Tribunals. Within our client-base, this issue primarily affects those with applications before the MRT where a visa applicant is offshore. Extended delays can have life-altering consequences when it causes

children to be separated from parents or significantly extends the period of time that a visa applicant resides in a situation of conflict or extreme poverty. We acknowledge the efforts the MRT makes to prioritise such cases within the visa type but note that for many applications there are still substantial delays. In light of this, it is useful to note that in our experience, the assistance of qualified representatives for disadvantaged clients has the capacity to hasten, rather than delay, the conclusion of matters. This is because it allows for quicker identification of the relevant issues and reduces the likelihood that Tribunals will be given large amounts of irrelevant documents and information that need to be individually looked at and considered.

Self-Represented Litigants (Draft Report Chapter 14)

Information Request 14.1: What is the most effective and efficient way of assisting self-represented litigants to understand their rights and obligations at law? How can the growing complexity in the law best be addressed?

Information Request 14.2: There are a number of providers already offering partially or fully subsidised unbundled services for self-represented litigants. The Commission seeks feedback on whether there are grounds for extending these services, and if so, what are the priority areas? How might existing, and any additional services, better form part of a cohesive legal assistance landscape? What would be the costs and benefits associated with any extension of services? Where self-representing parties have sufficient means, what co-contribution arrangements should apply?

3.9 The judicial review migration case load, now encompasses 28 per cent of the Federal Circuit Court's total annual caseload.¹ Many of these litigants are unrepresented and the majority of those face additional linguistic, cultural and educational disadvantage. The problem is exacerbated by the complexity of the law in this area, which reduces the pool of pro bono lawyers that are available to assist.

3.10 In the experience of CASE, a significant proportion of these applications have little or no prospects of success. We suggest that partially or fully funding initial advice and merit assessments for such applicants, either prior to or just after lodgement of a judicial review application, would be valuable. Those cases with identified merit could then be identified as such within the Federal Court's Pro Bono Referral Scheme, while applicants' whose cases lack any prospect of success could be advised to withdraw before additional costs were incurred.

3.11 A number of factors peculiar to the refugee/migration caseload mean that the type of 'reality testing' usually provided by duty lawyers is insufficient. Firstly, as already stated, the law in this area is complex and highly specialised. Secondly, clients frequently speak little or no English, have no understanding of the Australian legal system and have suffered torture or trauma either in their home country and/or en route to Australia. Many have also been traumatised by the detention/processing regime that they have encountered in Australia, exacerbating their unease and mistrust of those in positions of authority. A final factor, which is unique to asylum-seekers

¹ 'Part 1: The Year in Review' *Federal Circuit Court of Australia* <
<http://www.federalcircuitcourt.gov.au/pubs/html/AR1213P1.html>>

applying for judicial review is that the usual cost-related disincentives that work to discourage unmeritorious claims have little or no effect on them because if they are unsuccessful, the existence of a debt to the Commonwealth is of little consequence when compared with their impending removal from Australia and uncertainty about their future.

3.12 These factors combine to mean that a merits assessment of the type CASE envisages, would need to be provided by legal practitioners with specialised training or experience with this type of judicial review, with high-need CALD clients and with access to specialist mental health and welfare services for the purpose of facilitated referrals.

3.13 In relation to more generalist legal services, we note that most Community Legal Services already provide ‘unbundled’ legal services. Funding constraints require that agencies such as CASE must pick and choose the extent to which we can assist a client. We regularly make choices such as whether to provide minor assistance or casework, whether to write a letter on our letterhead or to write in the client’s name, whether to prepare documents for a client to self-represent or whether to represent the client through court, whether to provide initial assistance only or whether to assist on an ongoing basis. Evaluations are made at each step as to the needs of the client and best and more efficient way to provide assistance.

3.14 There is a need to be cautious in assessing how much clients are capable of doing on their own. A blanket decision that all divorce matters can be dealt with without a lawyer, for example, are not advisable. These decisions need to be made on a case by case basis with reference to the particular needs and capabilities of the individual clients. Some clients are capable of doing parts on their own. Others need more close guidance or even representation throughout the process. The level of support required is often not immediately clear as it arises from an inter-play of language, culture, education, knowledge of the legal system, personal history, economic resources and mental health.

3.15 A recent example encountered by CASE involved a simple divorce hearing where most clients could have adequately self-represented. CASE prepared the paperwork for a divorce and the client represented herself. An interpreter was used in court but the client did not understand the legal proceedings and the divorce was not finalised. CASE then had to become further involved and will need to represent the client on the next court date. In cases such as this the benefit in representation is clear, both for the client and the court.

3.16 In regards to self represented litigants, legal advice at an early stage is crucial and can often resolve matters or at least guide them in the appropriate direction. Questions as to merit, jurisdiction, benefits of pursuing legal action can be addressed early on. Another recent example from CASE involves a civil law matter where a client has filed a claim in the Magistrates Court without realising the case involves equitable claims to property which can only be dealt with properly by the Supreme Court. Similarly, in another matter a client appealed a guardianship order in the Supreme Court, which could be dealt with by review in the State Administrative Tribunal. With both these matters, the self-represented litigants were referred to CASE by the Court, which saw the need for specialist assistance.

Pro Bono Services (Draft Report Chapter 23)

Information Request 23.1: Would there be merit in exploring further options for expanding the volunteering pool for Community Legal Centres (CLCs)? For example, are there

individuals with specialised knowledge that could provide advice in their past area of expertise such as retired public servants or retired migration agents that CLCs could draw on in the relevant area? Are there currently any barriers to prevent this?

3.17 CASE considers that CLCs are adept at identifying and recruiting skilled volunteers in their particular field. At CASE, we utilise a large pool of migration agents and solicitors who may be currently employed, retired or temporarily out of the workforce for family reasons. CASE also provides training and work experience for a significant number of law students.

3.18 Currently the Migration Agents Registration Authority (MARA) allows registered migration agents to claim an unlimited number of CPD points per year for volunteering at a not-for-profit organisation. This initiative has proven to be an encouragement to currently registered agents volunteering at CLCs such as CASE.

3.19 Several barriers exist to practicing lawyers who may wish to volunteer in our migration practice. In order to provide migration advice, they must register with MARA. They are then required to complete 6 points of CPD in the migration field each year, in addition to the 10 they already complete as legal practitioners. These additional 6 points represent a significant cost and time impost on potential volunteers. The migration CPD cannot be used by CASE for training purposes as the types of visas and migration issues that we assist with are rarely covered by CPD sessions.

3.20 Barriers also exist for retired or career-break lawyers who wish to volunteer. The introduction of a pro bono practicing certificate has been of benefit. However, its holders are still required to obtain the full quota of CPD points each year, at considerable cost to themselves. CASE recognises the importance of practitioners maintaining their knowledge and skills but the cost serves as a disincentive to volunteers who would not otherwise hold a certificate. The situation could be improved if holders of pro-bono certificates were able to claim a number of points for the volunteering work that they do. It would also recognise the specialised training that CLCs such as CASE provide to volunteers.

Recommendations

3.21 CASE for Refugees recommends that:

- A. The Commission recognise and acknowledge the acute and multifaceted barriers to justice experienced by members of the CALD community, including those relating to language, culture, education and literacy, torture/trauma history, understandings of the legal system, mental and physical health and finances;
- B. If the Commission recommends the funding of legal health checks for the CALD community that it be stipulated that they should be carried out by those who are able to address the combination of legal issues and facets of disadvantage impacting on solutions for those issues;
- C. Disadvantaged Tribunal applicants, including those from a CALD background, be provided with appropriate funded legal representation throughout the process;
- D. Advice and merit assessments for judicial review applications in the migration field be funded alongside existing access to the Pro Bono Referral Scheme;

- E. General legal advice for members of the CALD community remain a priority funding area to ensure that self-represented litigants clearly understand their rights and obligations and to ensure that appropriate and efficient use is made of the legal system;
- F. If unbundled services for self-represented litigants are to be provided, specialist community legal services be funded to make adequate and appropriate assessments as to which matters are suitable for such services, bearing in mind that if these assessments are not effective there is capacity to cause further congestion of the legal system;
- G. Legal practitioners who volunteer in CLCs be afforded a number of CPD points in recognition of their contribution.