

Australian Asylum Law: Cuts to Funding a Threat to Access to Justice and a Burden on the System

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INTRODUCTION

Australia receives an incredibly small percentage of the world's refugees. According to the Australian Human Rights Commission, in 2012 the applications for asylum received by Australia constituted just 2.2% of the number of applications for asylum worldwide.¹ This fact is at odds with both the rhetoric employed to describe those seeking asylum in Australia and also with Australia's legal and policy approach. The creation of a two-tiered system giving preference to those who arrived with a valid visa, and the frequent and complex changes in law and policy in the past eighteen months would generally be characteristic of a system under stress. The removal of the Immigration Application and Assistance Scheme (IAAAS) funding which provided for legal representation to asylum seekers is a matter of significant concern, considering the special vulnerabilities in general of self-represented litigants, compounded by the further vulnerabilities of asylum seekers and the complexity and changeability of the law. The consequences of a lack of legal assistance funding, as seen in the United States, raises concerning questions as to access to justice, and in the context of refugee law, of Australia's compliance with its international law obligations.

ASYLUM LAW IN AUSTRALIA

Asylum law in Australia has progressively become an uncertain and unpredictable area of law. Australia currently assesses applications for protection based on

mode of arrival.² While individuals who travel to Australia by plane with a visa are able to apply for protection in Australia, those who arrive by boat are prevented from making a claim for asylum in Australia through the use of off-shore processing in Nauru and Manus Island.³

Not only does this two-tiered system put those asylum seekers who arrive by boat at a disadvantage, but it further contributes to the complexity of refugee law in Australia. In the past two years alone, refugee law and policy in Australia have changed frequently and significantly, with the current government determined not to allow boat arrival asylum seekers who are found to be refugees to be granted permanent protection.⁴ Without legal assistance, navigating these changes to the law is a difficult task, and asylum seekers in this context are at an even greater disadvantage. The UNHCR has commented that “[a]sylum seekers are often unable to articulate the elements relevant to an asylum claim without the assistance of a qualified counsellor because they are not familiar with the precise grounds for the recognition of refugee status and the legal system of a foreign country.”⁵

Significantly, this policy is out of step with international law and state practice. While similar policies of turning back boats exist elsewhere in the world – for example, in the United States,⁶ Italy⁷ and Thailand⁸ – they have been the subjects of international criticism where no protection assessment has been made prior to deportation.⁹ Aside from the boat turn back, Australian asylum law has attracted international criticism of its

‘two-tiered system’ of legal obligations based on mode of arrival.¹⁰ Not only does assessment based upon arrival create a criterion non-existent in the definition of a refugee contained in the *Convention Relating to the Status of Refugees*,¹¹ but it also is contrary to international refugee law, which prohibits the penalising of refugees because of the manner of entry, even if such mode of arrival is not authorised under domestic laws.¹²

REMOVAL OF FUNDING FOR LEGAL REPRESENTATION

Given the multifarious changes to refugee law and policy in recent times, it is particularly alarming that funding for legal representation of people who come by boat seeking asylum has been removed. Asylum seekers are a particularly vulnerable group in Australian society. Not only do they face cultural and linguistic challenges when engaging with the legal system, but many may also be illiterate in any language. This is compounded by the severe trauma that many asylum seekers have been through, which may affect their ability to recount their stories¹³ and contribute to a lack of trust in authority figures and a fear to tell the entire story.

Organisations such as the Refugee Advice and Casework Service (RACS) devote their services to assisting asylum seekers in the process of applying for protection in Australia. Established in 1987, RACS works with other legal and non-legal support services to ensure that asylum seekers are supported and have access to representation before the law.¹⁴

In March 2014, the Federal government followed through with its pre-election promise¹⁵ and formally withdrew legal aid for asylum seekers arriving without a valid visa under the Immigration Advice and Assistance Scheme (IAAAS). In place of legal assistance, the government indicated that it would instead provide instructions in different languages to explain the protection visa application process.¹⁶ This meant that IAAAS providers such as RACS have had significant cuts to their funding, severely impacting their ability to provide legal assistance to asylum seekers.

THE SELF-REPRESENTED LITIGANT

Self-represented litigants (SRLs) have been long been identified as a vulnerable group in the judicial system. SRLs have been found to experience difficulties understanding procedural requirements, the concept

of evidence and identifying and focusing on pertinent evidence.¹⁷ The draft Productivity Commission report into Access to Justice found that in situations where a SRL comes up against a represented litigant, the SRL inevitably is forced to settle for less than their unpaid legal entitlements and for a less favourable outcome.¹⁸

Asylum seekers as SRLs face these challenges to a greater extent, due to the special vulnerabilities of their position. They often lack the cultural and linguistic background to understand Australian refugee law, especially in the current context of frequent policy changes. The Law Council of Australia has expressed concern in relation to access to justice for asylum seekers without the IAAAS funding. According to the Council, the IAAAS funding allowed for the modest allocation of funding to assist asylum seekers prepare their claims. This funding, according to the Council, was not directed towards challenging negative decisions in courts, but rather functioned as a base line level of assistance for the initial application, which the Council considered to be ‘critical to an effective and efficient system of processing.’¹⁹

This touches on the secondary consequences of self-representation - the effect on the justice system as a whole. While there is no complete evidence as to the effect of SRLs on the justice system, multiple studies suggest that they increase the financial and logistical burden on the courts.²⁰ Cases involving SRLs can take longer to hear, due to their lack of preparation and understanding of court process, and delays due to incorrectly completed documents.²¹ In the context of asylum cases, this transfers to a significant burden on the Department of Immigration officials, tribunal members and judges making the determinations, as well as further costs due to detention. The Commission of Audit report into costs of detention and processing found that the cost to hold one asylum seeker in offshore detention costs \$400 000 a year, in comparison to \$239 000 for onshore detention and \$100 000 for community detention.²² Delays in decision-making will contribute to increase these costs. The situation in the United States is a testament to this, with the financial burden of denying legal representation costing taxpayers more, not less, in the long-term.²³

THE UNITED STATES AND ASYLUM SEEKERS – A WARNING

The situation of asylum seekers in the United States is a cautionary tale for the removal of low-cost competent



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legal assistance. Except for asylum seekers eligible for a ‘U Visa’ – a visa for immigrants who have been victims of gender related crimes – there is no legal assistance available for asylum seekers in the United States.²⁴ This leaves them particularly vulnerable as not only may they have limited understanding of the US legal system, but also, as a consequence of this barrier to justice, deplorable ethical and professional standards have developed.²⁵

In the US, legal practices have evolved which are at best unprofessional and at worst, fraudulent and unethical.²⁶ On the crooked end of the spectrum, so-called ‘travel agency lawyers’ have been found to mislead clients as to charges for services, or in other cases, fail to complete documentation for their application correctly.²⁷ The inclusion of false information, included perhaps under the misapprehension of assisting the claim of a client, can be ultimately detrimental to a claim. Other examples of poor practice include initiation and charging of frivolous legal proceedings or the abrupt abandonment of proceedings.²⁸

This is in part due to the nature of asylum arrival. Many individuals arrive in debt to those who organized their passage to the United States.²⁹ Such individuals are often coached by their smugglers with fictional stories to tell immigration officials. As continuity of evidence is vital for a successful claim in the US system, this places such applicants in a disadvantaged position, even if they are subsequently able to gain adequate legal representation.

Considering the financial burden asylum seekers are

generally already shouldering before the additional burden of legal costs, and their special vulnerability in discerning the quality of representation given, questions are raised as to the equitable and just nature of this system.³⁰ A Stanford Law Review study of US asylum practices found that 46% of persons who appeared with representation were granted asylum, compared to 16% of those who were unrepresented.³¹ This correlation suggests that self-representation in the context of refugee law raises further concerns of equality of access than which self-representation generally generates; a worrying finding considering the grave consequences for individuals when a case is incorrectly decided – being sent back to the place they fled.

ASSISTANCE DESPITE THE DIFFICULTIES: THE RACS LEGAL HELP FOR REFUGEES CLINIC

In Australia, the removal of IAAAS legal aid for asylum seekers who came by boat and are in Australia and in turn, funding cuts to IAAAS providers such as RACS, has severely restricted the provision of legal assistance to those who really need it. Lawyers at RACS have seen firsthand the negative impact that delays and uncertainty can have on a client’s ability to articulate their claims of being a refugee. In response, services have had to draw on their own resources and a large volunteer base to meet the legal needs of asylum seekers. An example of this is the RACS Legal Help for Refugees Clinic.



Image by Russavia

Significant changes have already been made recently to Australian refugee law and policy, and it appears likely that more changes will occur soon. In response to both the current policy settings and funding cuts, the RACS clinic has begun to help the large cohort of unrepresented asylum seekers who have been living in legal limbo, barred from lodging a valid application for a permanent protection visa, unsure of what their future holds, by offering them time with a lawyer to talk about their claims for protection.

Prior to an appointment at the Legal Clinic, RACS obtains, under Freedom of Information, the clients' documents held by the Department of Information. At their RACS appointment, the clients meet with a legal student volunteer who collects personal information. Then the clients see a volunteer lawyer who helps them to draft a statement to document their claims to be a refugee within the meaning of the Refugee Convention.

For many, an appointment with a volunteer lawyer at the Clinic is the first time an asylum seeker has had the opportunity in Australia to articulate and recount their claims to being a refugee and the reasons why they had to leave their home country. They are most likely on a Bridging Visa E with no work or study rights, receiving only a small amount of financial assistance. They may be a non-English speaker, lacking family or social support structures in Australia. Often, this is an emotional experience for not only the client, but also the volunteer students and lawyers who are assisting the client.

Regardless of what Refugee Status Determination process there will be in the future, empowering asylum seekers to articulate their claims for protection is a vital task. The hope is that a session at the Clinic, which provides people with their documents and a legal statement documenting their claims, will one day assist them in making a protection application, particularly if there is a continuation of the policy to defund legal assistance for boat arrival asylum seekers. While the Legal Clinic is providing important legal assistance, this is far short of the legal representation necessary to ensure access to justice for asylum seekers and prevent individuals falling through the system.

CONCLUSION

The future of refugee and asylum seeker law and policy in Australia remains uncertain. If history is any indication, it will continue to be subject to frequent changes. For now, the withdrawal of IAAAS funding to service providers such

as RACS has made it impossible to provide adequate legal assistance to all those in need without drawing on a large volunteer support base. The RACS Legal Help for Refugees Clinic is a positive example of the ability of legal assistance to promote access to justice for asylum seekers. However, it relies heavily on volunteers in order to continue to function. While the volunteer clinic does provide vital assistance, the extent of this assistance is limited due to the inherent limitations of the volunteer model. The deleterious effects of the removal of low-cost legal assistance for asylum seekers in the United States should be treated as a warning for Australia should legal funding not be reinstated. Cutting funding to legal assistance will have consequences not only for asylum seekers' access to justice, but also for the Australian legal system as a whole. Not only are courts and government officials being shouldered with the burden of dealing with SRLs, but furthermore, the delays will only compound the growing costs of ongoing detention both off-shore and on-shore.

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