

30 September 2011

The Executive Director  
Australian Law Reform Commission  
By email: [cwlth\\_family\\_violence@alrc.gov.au](mailto:cwlth_family_violence@alrc.gov.au)

Dear Executive Director,

**Re: Submission from CLCNSW on Family Violence and Commonwealth Laws:  
Discussion Paper**

Community Legal Centres NSW (**CLCNSW**) is the peak body for 40 community legal centres (**CLCs**) across NSW. CLCs provide a variety of free legal services to disadvantaged clients and communities including legal advice, casework, community legal education, law reform activities and referrals. CLCs regularly assist victims of domestic violence and many CLCs auspice a Women's Domestic Violence Court Assistance Scheme (**WDVCAS**).

CLCNSW does not have capacity at this time to make a detailed submission on all of the topics in the Discussion Paper, and we note that a number of individual CLCs will be making submissions on the Discussion Paper.

CLCNSW will therefore confine our contribution to Question 20-1, as we have recently written to the federal Attorney-General, and the Minister for Immigration, in relation to this issue.

**Question 20-1:** *Abolition of full fee waivers for applications to the Migration Review Tribunal*

Prior to 1 July 2011, full waivers of the Migration Review Tribunal (**MRT**) application fee were available to applicants who could demonstrate severe financial hardship. Since 1 July 2011, full fee waivers are no longer available.

As a result of *Migration Amendment Regulation 2011 (No 4)*, since 1 July 2011 the MRT can only reduce the fee by 50% if satisfied that the payment of \$1540 would cause severe financial hardship to the review applicant. The person facing severe financial hardship still has to pay \$770 to access merits review.

It is unreasonable to expect that someone who would face “severe financial hardship” if required to pay \$1540, will nevertheless be able to pay \$770. The new regulation does not call for any assessment of whether the potential applicant for review can actually pay \$770, or whether they will effectively be denied merits review.

This is of great concern as it effectively means that people without financial means (quick access to \$1540, or the reduced fee of \$770) will be unable to access the MRT, and therefore unable to obtain merits review of Department of Immigration & Citizenship (DIAC) decisions to refuse or cancel a visa.

Access to the MRT means real outcomes for many of the applicants: During 2010/11, 41% of all DIAC decisions reviewed by the MRT were “set aside” (i.e. overturned from a negative to a positive decision). Only 36% of the DIAC decisions were “affirmed” (i.e. determined to be correct).<sup>1</sup> For partner visa applications (which includes people using the domestic violence provisions), the set aside rate is even higher: 62%.<sup>2</sup>

### **Why access to the MRT is important for people who have experienced family violence**

Merits review can be an essential step in obtaining a secure and independent visa status for people who have experienced family violence perpetrated by their visa sponsor or by the primary applicant for a visa.

Victims of family violence who cannot access the MRT will be stuck with the original visa refusal decision made by DIAC, even if the DIAC officer has made a blatant error or omission in reaching their decision to refuse a visa.<sup>3</sup>

Some temporary visa holders prefer to return to their home countries if their relationship with an Australian partner has broken down (including where family violence occurred). However, for other temporary visa holders, being able to remain in Australia will be vital for their well-being, for reasons including:

- A real or known risk of being disowned by their family, or ostracised in their country of origin (e.g. because they are seen as ‘not a good wife / woman’, or their separation has caused shame and tension for their family – e.g. if a dowry was paid, or if the marriage was with a family friend / relative);
- Having no financial opportunities in their home country (exacerbated by being a separated woman);

---

<sup>1</sup> MRT – RRT Caseload Report: Detailed Statistics 2010-11 (p.7), available at: <http://www.mrt-rrt.gov.au/Conduct-of-reviews/Conduct-of-reviews/default.aspx#stats>

<sup>2</sup> Ibid.

<sup>3</sup> It is *extremely* rare and difficult to convince DIAC to retract and re-make their decision - DIAC generally states that it is inappropriate for it to re-open and re-make decisions because of the common law doctrine of *functus officio*.

- Being at greater risk of harm, especially if her ex-partner (or his family) are likely to stalk and attack her in her home country, where there is little protection from family violence; and / or
- Needing to stay with her child, or children, in Australia – a child that they are not able to take outside of Australia (e.g. where the Australian father does not authorize a passport for the child, or permission to travel).

For people whose well-being and human rights depend upon being able to regularise their immigration status and remain in Australia, being unable to access the MRT presents a serious barrier to safety. Some of these women will return to their partners (in hope that they will pay the MRT fee, and the case can be re-assessed as an ongoing relationship); some will stay unlawfully in Australia after their visa ends; some will lodge Protection Visa applications (even if they clearly cannot meet the protection visa requirements, as this is a more affordable way to remain legally in Australia and eventually access the Minister’s discretion to “intervene” under s417 of the *Migration Act 1958*).<sup>4</sup>

Below is an example of how the current MRT fee structure could undermine the efforts of a victim of family violence to leave the violent relationship without being forced to leave Australia.

#### **Example 1 – Victim of Domestic Violence**

Laila separated from her Australian-citizen husband due to serious domestic violence, and is staying on her cousin’s couch. Her husband is angry and wants her to return to him.

Laila had been married for 3 years, and living in Australia for 15 months. Laila is 8 months pregnant, and during a visit to the GP, the GP had questioned her about bruising and Laila had explained her fear of her husband. Laila also disclosed the domestic violence to her one cousin in Australia, and a migrant support worker, but not to the police.

Despite some casual work, Laila has no savings. She is not eligible for Centrelink payments. Her family overseas are very upset that she is pregnant and separated. They are not offering her support, and have warned her not to return to them.

Wanting to remain in Australia, she contacted DIAC. She was told that there are domestic violence provisions for the type of visa she held, and that she should submit evidence of the domestic violence. Laila did not receive any professional migration advice and submitted statutory declarations from her cousin, her neighbour, and the migrant support worker. She did not ask her GP, as she could not afford the GP’s consultation fee at the time. DIAC refused

---

<sup>4</sup> By being denied access to the MRT (because of lack of funds), a victim of domestic violence will not be able to subsequently access the Ministerial Intervention power under s351.

her visa application on the basis that the statutory declarations were not made by the approved “competent persons”.

Laila sought advice from a community legal centre. She was advised about the exact form of evidence required, and that she should apply to the MRT for review, where she could submit the appropriate evidence and had a good chance of success.

However, Laila does not have \$1540, nor \$770, so she cannot apply to the MRT. She will be denied merits review merely for financial reasons, and is left with stark options:

- as soon as her child is born, taking the child to her home country where they will be ostracised, and where she has no housing or means of support to care for a child (if DIAC will assist for the airfare for her and her child, and she can get permission to take the child out of the country); or
- returning to her violent husband, and seeking his help with the MRT fee (to argue that they are still partners, despite the period of separation); or
- applying for a protection visa (despite not meeting the requirements in relation to risk of “serious harm” in her home country) because this only costs \$30. Then applying to the Refugee Review Tribunal (no cost upfront). Then seeking the discretionary, and rarely granted, intervention of the Minister for Immigration to grant her a visa.
- staying in Australia unlawfully, with no rights to work, health care etc, and at risk of being detained at anytime.

### **Why the abolition of full fee waivers will affect access to the MRT for victims of family violence**

The high fees to access the MRT (both the full fee, and the reduced fee of \$770), present a real barrier to accessibility of merits review for victims of family violence.

Victims of family violence who are in Australia on temporary or provisional visas are likely to have few ties to the community or sources of financial support. During the relationship they may have been subject to financial abuse – e.g. not being allowed to work, or having their earnings taken by their partner. Some family violence perpetrators prevent their partners from attending English classes, thereby ensuring their ability to find work or access services, in Australia is limited. Furthermore, many employers are only willing to employ permanent residents, so merely having a temporary visa can be a barrier to earning an income.

Temporary visa holders are generally not eligible for social security payments. Even if, as the ALRC Discussion Paper proposes, temporary visa holders become eligible for Special Benefit in the future, that payment is not sufficient to cover the cost of accommodation, food, health care, and the MRT fee (full or half fee).

Therefore, women on temporary visas who have experienced family violence and have separated (or wish to separate) from their Australian partner, often face severe financial

hardship, and struggle to find and afford safe accommodation. Women in this situation will not be able to afford private migration assistance (to assist them to communicate with DIAC about their situation, and to provide the required evidence of domestic violence at the first instance), and may not be able to access overstretched free legal assistance at the crucial time. Nor will they be able to afford the reduced fee of \$770 to access the MRT if they are initially refused a permanent visa by DIAC.

In 2010-2011, 511 fee waivers were granted by the MRT, representing 5% of the applicants to the MRT that year<sup>5</sup>. We have made a Freedom of Information request to try to find out how many of these successful fee waiver applications were made by people who raised family violence claims, and hope to provide this information to the ALRC.

### **What changes are needed?**

It is essential that complete fee waivers are available where the situation is warranted: most obviously where the person would be otherwise prohibited from seeking review of a government agency's decision about a significant issue (such as the grant or refusal of a permanent visa). This is particularly so for people who rely on that visa decision to enable them to leave a violent relationship, and remain in Australia where family violence protections are greater than in some other countries.<sup>6</sup>

Potential solutions could include:

- a. The reintroduction of a full-fee waiver option for any applicant who would be effectively denied access to the MRT due to the inability to pay the fee<sup>7</sup>;
- b. A hierarchy of fees, depending on the nature of the application to the MRT: e.g. business / employment related matters paying a higher fee; family visas paying a more moderate fee; family violence claims and applications from people in immigration detention incurring no fee; or
- c. Amend the Migration Regulations 1994 to specify that no fee is payable by an applicant who claims (at DIAC or MRT-level) to meet the family violence provision for the visa they have applied for.

Ideas (b) and (c) have the benefit of requiring less MRT resources to evaluate the fee payable (less time spent on analysing the financial situation of an applicant to see if they are eligible for a fee waiver or reduction).

---

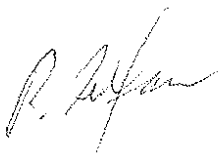
<sup>5</sup> Email from Tina Edwards, acting Executive Officer, MRT, to Roxana Zulfacar, 14 July 2011.

<sup>6</sup> It is not uncommon for Australian ex-partners who are originally from the same country as the visa applicant, or who have family ties in that country, to threaten to pursue the visa applicant to that country if they try to leave the relationship.

<sup>7</sup> Despite the assertions of the Government that the abolition of the full fee waiver was financially necessary, the cost of full fee waivers to the MRT should be fairly minimal given that only 511 fee waivers were granted last year.

If you would like to discuss any aspect of this submission, please contact Roxana Zulfacar on 02 9212 7333.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'R. Zulfacar', written in a cursive style.

Roxana Zulfacar  
Advocacy & Human Rights Officer