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The Executive Director
Australian Law Reform Commission
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Family Violence – Commonwealth Laws Discussion Paper 76

Dear Executive Director,

Please find attached a response from the Immigration Advice & Rights Centre ("IARC") to the *Family Violence – Commonwealth Laws Discussion Paper 76*.

We thank you for the opportunity to provide a submission in regards to these important and relevant reforms and welcome any further opportunity to provide consultation regarding the Commission's findings.

Kind regards,

Andrea Christie-David
Solicitor
Immigration Advice & Rights Centre

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Chief Executive Officer
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1 Introduction

1.1 The Immigration Advice and Rights Centre ("IARC") was established in 1986 as a specialist immigration community legal centre. Due to its extensive knowledge of Australia's immigration law and policy IARC has made contributions to law reform discussions with a view to enhancing the operation and efficacy of migration law.

1.2 Drawing upon our centre's experiences in the provision of pro bono advice, case work, education and training we provide the below submission highlighting issues relevant to clients who have been victims of family violence and make claims under Division 1.5 of the *Migration Regulations 1994* ("Family Violence Provisions").

1.3 In preparing this submission, we have addressed the most relevant areas of the Family Violence – Commonwealth Laws Discussion Paper 76 ("Discussion Paper") under subject matter headings in lieu of addressing each proposal individually. We have also outlined some matters we consider to be relevant to this review that are not specifically addressed in the Discussion Paper.

2 Family Law Definition

2.1 IARC supports the application of the definition of family violence within the *Social Security Act 1991* (Cth) to the Family Violence Provisions. IARC further submits that the Family Violence Provisions be amended to enable applicants to make claims based on actions of their partner's family or other individuals influenced or coerced by their partner.

3 MRT Fee Waiver

3.1 Since the power of the Migration Review Tribunal ("MRT") to waive the review application fee was abolished on 1 July 2011 IARC has seen, first hand, the detrimental impact it has had upon applicants. Individuals making an application under the Family Violence Provisions may have little to no access to funds. In many cases these applicants are the victims of not only physical abuse but also subject to control of their finances. Some clients rely on access to donations by community organisations, shelter from refugees and the generosity of other migrants from their country of origin to survive. Accordingly, these applicants are unable to gather the requisite \$770 for the reduced MRT fee, let alone the \$1,540 required for the full fee in the event that their fee waiver application is unsuccessful.

3.2 A facet of these cases that warrants closer consideration is the psychological state of these applicants and the impact this has on their ability to comply with the complex Family Violence Provisions and strict time frames. We are continually seeing cases where applicants have made minor errors in their statutory declarations, resulting in a reference to Centrelink or a refusal. In other cases applicants delay in gathering their documentation and are not given more than one extension to provide such documentation, again resulting in a refusal. To add to their stress they are then required to gather the money to appeal to the MRT within a very limited time frame, amidst the chaos and trauma of their personal life.

- 3.3 Swit amendments to the law without consultation and, ostensibly, without consideration for the disadvantage it may cause to such victims of Family Violence has begun to cause hardship to clients approaching IARC who are unable to meet the MRT application fee.

3A Hypothetical Case Study

A client presents with a cancellation of her temporary partner visa by the Department of Immigration & Citizenship ("DIAC") on the basis that she failed to provide evidence by a specific date in support of her claims of family violence. The client's spouse controls all of her finances. The documentation is submitted to the Sydney DIAC office by the client and a refusal is made a few days later in the Melbourne DIAC office.

- The client's only option is to appeal this decision, one made due to internal oversight by DIAC, who held the required documentation prior to making the adverse decision. This case highlights the scenario where an error by DIAC, or the control of finances by a spouse, results in the applicant's inability to meet the requirements within strict time frames. Further, the applicant is then unable to gain access to sufficient funds to make an application to the MRT due to the control of their finances by their spouse or their limited options for work due to their uncertain visa status.

- 3.4 IARC submits that the ability for the MRT to waive the full review application fee should be reinstated.

4 Application of Family Violence Provisions to secondary applicants

- 4.1 If the Family Violence Provisions are amended to ensure consistency and fairness whilst being structured in a manner so as to minimise abuse and fraud there is no reason why the Family Violence Provisions could not be applied to all permanent visa classes.

- 4.2 An applicant for a partner visa should not be treated differently to a person who is a secondary applicant of a person who will be given permanent residence status in Australia. In other words, where the sponsor's rights in the partner visa scenario will be the same as those eventually granted to a primary applicant, a dependant applicant who becomes the victim of domestic violence should be afforded the same protections regardless of the type of visa for which they have applied.

- 4.3 IARC submits that all permanent visa applicants should be able to access a consistent and fair regime to gain Australia's protection if they become victims of family violence at the hands of a primary visa applicant.

5 Prospective Spouse

- 5.1 The inability for applicants who arrive in Australia as the holder of a Prospective Marriage (Subclass 300) visa to apply for a permanent visa under the Family Violence Provisions has meant that many individuals are facing abuse at the hands of their sponsor without access to Australia's protection. Many of these applicants would face shame and be ostracised if forced to return to their country of origin and, in some cases, face persecution.

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- 5.2 Furthermore, where an applicant has come to Australia and had a child with their sponsor without ever marrying their sponsor they are unable to make claims to remain in Australia with their now Australian citizen child.

5A Case Study

IARC has working relationships with several women's refugees. These refugees repeatedly seek advice regarding women who have been brought to Australia to marry their Australian partner as the holders of Prospective Marriage (Subclass 300) visas. They are receiving clients who have been abused by their Australian partner and left the relationship due to this abuse, therefore never marrying their sponsor. The women become destitute and a significant burden on these refugees, housing them while they pursue all available legal remedies or gather sufficient funds to return home.

Women who have given birth to a child to their Australian sponsor are faced with potentially losing access to their child who would either remain in Australia with the father or be sent into foster care. Anecdotally, we understand from women's refugees referring clients to IARC that these situations usually result in lengthy and traumatic family law disputes where the mother has no ability to remain in Australia to live with their child and may not be granted the right to take the child back to her country of origin. In all of these scenarios being separated from at least one parent is not in the child's best interests.

- 5.3 IARC submits that holders of Prospective Marriage (Subclass 300) visas should be able to access the Family Violence Provisions. In the alternative, IARC submits that holders of Prospective Marriage (Subclass 300) visas should be able to obtain a permanent visa on the basis of having joint custody of a child, in the same manner in which the provision in regulation 801.221(6)(c)(ii) operates.

Education & Training

- 6.1 IARC currently receives funding to deliver community information sessions to various organisations, including those that are able to provide statements as competent persons. The numerous requests we receive cannot possibly be met by the funding allocation. Accordingly, greater funding should be allocated either to a Government body or community organisations to deliver education and training with regards to the Family Violence Provisions.

- 6.2 IARC submits that funding should be allocated to the provision of education and training to visa decision makers, competent persons and independent experts with regards to the Family Violence Provisions.

7 Evidentiary Requirements

- 7.1 IARC supports proposals 21-1, 21-2, 21-4, 21-5, 21-6, 21-7 and 21-8.

- 7.2 With regards to orders made post-separation and the requirement that the violence occur during the relationship, IARC considers that these requirements do not always reflect the reality of relationships where violence has occurred. Some couples separate from one another in the hope that a period of

separation may result in reconciliation. It is during this period of "separation" that family violence can occur. The existing Family Violence Provisions are not able to be invoked in cases such as these where acts of violence arise during this period of "separation".

7A Case Study

A client presented with an apprehended violence order that was granted as a result of violence that occurred after the couple had separated. The couple made an attempt to reconcile and the relationship appeared to be returning to stability. The sponsor then committed an act of violence towards their spouse, resulting in the police making an application for the apprehended violence order.

This applicant was unable to make an application for a permanent visa under the Family Violence Provisions, despite meeting the overarching policy purpose of the provisions, in other words to protect individuals who come to Australia as the spouse of an Australian and are then victims of family violence at the hands of their spouse.

7.3 IARC submits that family violence orders made post-separation should be considered with respect to judicially determined claims.

7.4 With respect to proposal 21-3, IARC is of the view that this proposal requires further detail and analysis before the Commission makes its recommendation. The Minister has nominated Centrelink as the independent expert under the Family Violence Provisions. In our experience, the nomination of Centrelink as an expert can cause inconsistent decision making to occur where social workers have varying degrees of experience and knowledge with domestic violence matters.

7.5 The "independent expert panel" regime may result in victims becoming prejudiced in situations where they are required to relay their stories several times to various people with whom they have no rapport and, in some cases, many months or years after the incidents occurred. Their inability to connect with the independent expert or their timely recovery from the effects of the violence when interviewed may be construed as disingenuous or lacking credibility.

7.6 IARC submits that the establishment of an independent expert panel should not be favoured over the current regime, however would be willing to reconsider this proposal if it contained further details of how the panel would be nominated and operate in practice.

7.7 IARC further submits that the implementation of proposals 21-4, 21-5, 21-6, 21-7 and 21-8 is of even greater significance if the current regime applicable to non-judicially determined claims remains in force.

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8 Other Relevant Matters

Third Party Intervention

8.1 IARC has received several queries from the NSW Department of Family and Community Services (“Community Services”) regarding removal of children from homes where at least one parent is the holder of a temporary visa. In cases where the children may be from a previous relationship of the applicant, the children will also be holders of temporary visas. Where Community Services has formed a view that the child or children may be subject to harm from the Australian sponsor they may seek to remove the children. The parent holding the temporary visa is then required to make a decision to either remain in the home with their spouse or leave with their children. It is not difficult to understand why the parent would leave the home with their children, thereby ending the relationship.

8.2 In such a case the parent is not the one who forms the belief of fear, but instead Community Services forms the view that the child is at risk of harm. The relationship therefore ends as a result of third party Government intervention as opposed to the formation of a belief of fear by the spouse or their children. In these cases the Family Violence Provisions cannot be invoked despite the fact that the family may be at risk of harm.

8.3 IARC submits that the Family Violence Provisions should be amended to allow the belief of fear of violence to be formed by a third party authority who causes the relationship to cease.

Processing Times

8.4 Applications made under the Family Violence Provisions are processed according to the service standards applicable to the visa subclass under which they are claimed. In some cases this may be nine to twelve months and can cause significant hardship and stress. Once an application is made to the MRT the processing time can extend to up to two years. As noted in case study 2A above, applicants who do not have access to funds due to a visa cancellation or limited ability to work spend this time living in poverty at the mercy of community organisations.

8.5 IARC submits that claims under the Family Violence Provisions should be processed as a priority and that this obligation be enshrined in legislation.

9 Conclusion

9.1 IARC undertakes a great deal of casework for clients making claims under the Family Violence Provisions. Accordingly, the issues highlighted above focus on the significant matters arising in these cases. We look forward to adoption of recommendations by the Commission that will ensure consistent, fair and swift decision making by DIAC and related experts for people who are in an already vulnerable and unfortunate situation.