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29 September 2011

Mr Khanh Hoang
Legal Officer
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001

By email: khanh.hoang@alrc.gov.au cc: cwlth_family_violence@alrc.gov.au

Dear Mr Hoang,

Thank you for providing the Refugee Advice and Casework Service (Australia) Inc. (RACS) with the opportunity to make a submission to the Law Reform Commission in relation to the Discussion Paper on Family Violence.

About RACS

RACS, the oldest Community Legal Centre specialising in providing advice to asylum seekers, was originally set up in NSW in 1987 to provide a legal service to meet the specific needs of asylum seekers.

A not-for-profit incorporated association, RACS relies primarily on income through the Immigration Advice and Application Assistance Scheme (IAAAS) administered by the Department of Immigration and Citizenship (DIAC), donations from the community, an extensive volunteer network and a Management Committee.

RACS' principal aims may be summarised as follows:

- to provide a free, dedicated legal service for individuals seeking asylum in Australia;
- to provide referral for counselling and assistance on related welfare issues such as accommodation, social security, employment, psychological support, language training and education;
- to provide a high standard of community education about refugee law, policy and procedure;

- to provide training sessions, workshops and seminars on refugee law, policy and procedure to legal and welfare agencies and individuals involved in advising and assisting refugees;
- to establish a resource base of current information and documentation necessary to support claims, for use by RACS, community organisations and lawyers assisting refugee claimants;
- to participate in the development of refugee policy in Australia as it relates to the rights of those seeking asylum in this country; and
- to initiate and promote reform in the area of refugee law, policy and procedures.

RACS works with a diverse caseload of asylum seekers in Australia. Traditionally, the majority of our clients have been based in the Australian community. Recently, the majority of RACS' clients have been detained as part of the Australian Government's policy of mandatory detention. RACS' clients in detention are comprised of both irregular maritime arrivals (IMAs) and community arrivals, who are subject to different application processes and procedures.

RACS provides assistance to IMAs in detention centres by advising and representing them throughout the Protection Obligations Determination (POD) process, which consists of a first level Protection Obligations Evaluation and a review level Independent Protection Assessment. In addition to this on-site assistance, RACS provides telephone advice to detainees.

RACS also assists non-IMA detainees in Villawood Immigration Detention Centre by providing advice and representation for Protection visa applications, interviews with DIAC and subsequent appeals to the Refugee Review Tribunal (RRT) where necessary.

Submissions

RACS focuses our submissions in the area of family violence matters relevant to Migration Laws and particularly the Australian refugee laws. We respond to relevant questions raised in the ALRC's papers and make submissions accordingly.

1. **Question 20–1** *From 1 July 2011 the Migration Review Tribunal will lose the power to waive the review application fee in its totality for review applicants who are suffering severe financial hardship. In practice, will those experiencing family violence face difficulties in accessing merits review if they are required to pay a reduced application fee? If so, how could this be addressed?*

   Based on the current legislation, visa applicants for specific subclass visas can invoke the family violence provisions. The change of the MRT fee structure will certainly affect those potential review applicants who are financially disadvantaged in seeking review when the review fee cannot be waived in its totality. This financial consideration would be an additional barrier for those financially disadvantaged victims who are considering whether or not to leave a violent relationship.

RACS notes and agrees with the ALRC's views that *the family violence exception should be made accessible to secondary visa applicants where an application for a permanent visa is made onshore*[i]. When the family violence provisions become generally available to victims of onshore permanent visa applicants, the adverse impact on financially disadvantaged victims due to the 1st July 2011 fee waiver changes will be more widespread.

Under Section 4 of Part A of the ALRC's Discussion Paper, the ALRC has identified a number of barriers to self-disclosure of family violence by victims and they include:

- *lack of confidence to classify what they are experiencing as family violence, such as financial or economic abuse—in particular, those from Non-English Speaking Background with disability may not interpret threats of abandonment, withdrawal of services or tampering with aids as family violence, even though such acts are designed to threaten and control the person';*
- *lack of knowledge—both of what constitutes family violence legally, and of the significance of family violence in obtaining entitlements;*
- *shame, or fear of other stigmas associated with family violence;*
- *learned practices such as staying silent about victimiation as a result of being taught that speaking out against victimisers or revealing victimisation (even unintentionally) had negative consequences and was often pointless';*
- *the person using family violence supervises all contact with the service agency;*
- *fear of adverse consequences such as being _punished' by not receiving payments or more stringent work requirements; having to repeat an account of family violence multiple times;*
- *lack of privacy at Centrelink offices—being _mortified' by being expected to discuss family violence in public, at the front counter;*
- *concerns that disclosure of family violence will not be believed or their experiences trivialised; and*
- *fear of retribution*[ii].

RACS believes that, the MRT fee waiver structure will add another barrier to this list due to a victim's financial constraints. Prior to 1 July 2011, advisors could inform the potential review applicant that if paying the review fee would cause her severe financial hardship, she could apply to have the fee waived. Nov she must pay $770 regardless.

RACS submits that the relevant regulations that came into effect on 1 July 2011 should be abolished and the law should revert to its former structure to allow the MRT to waive the review application fee in its totality in circumstances where a review applicant would suffer severe financial hardship if required to pay a review fee.[iii]

2 **Question 20–2** *Given that a secondary visa applicant, who has applied for and been refused a protection visa, is barred by s 48A of the Migration Act 1958 (Cth) from making a further protection visa application onshore: (a) In practice, how is the ministerial discretion under s 48B—to waive the s 48A bar to making a further application for a protection visa onshore—working in relation to those who experience family violence? (b) Should s 48A of the Migration Act 1958 (Cth) be amended to allow secondary visa applicants who are experiencing family violence, to make a further protection visa application onshore? If so, how?*

The way in which s 48B requests are being processed is similar to s 417 or s 351 requests, except that the Minister's personal power does not depend on whether the matter has been decided by the RRT or MRT. However, the Minister's personal power under s48B is rarely exercised. According to statistics, 842 s 48B requests were finalized by the DIAC (presumably the Ministerial Intervention Unit) and only 31 requests were successful and resulted in the applicant being allowed to re-apply for a Protection visa in the 2010-2011 financial year.[iv] While the statistics did not show how many of the requests were based on family violence that occurred after the applicant's initial Protection visa application, the total figure does show a low rate of intervention. This may be due to a number of reasons including statistical constraints. While there are policy guidelines in relation to s 48B requests, the ability of victims of family violence victims to re-apply for a Protection visa depends firstly on the Departmental officer's interpretation of the policy guidelines and secondly the Minister's interpretation of the notion of public interest.[v] When a family violence victim seeks advice on refugee law in order to make an informed decision as to whether to leave the violent relationship or not, the uncertainty in her ability to re-apply for a Protection visa would seem to encourage her to remain in the violent relationship.

Section 48A was enacted to prevent abuse by people in the same family unit who would otherwise take turns to seek a Protection visa as a primary visa applicant.[vi] While there are good policy reasons to give effect to s 48A, the Legislature may not have considered the practical difficulties for victims of family violence under these circumstances. In any event, the likelihood of actual abuse by victims of family violence would be rare, even if they were allowed to re-apply for a Protection visa.

RACS submits that s 48A should be amended to allow family violence victims to re-apply for a Protection visa under prescribed circumstances similar to the way in which s 48 allows for regulations to prescribe situations where further substantive visa applications are allowable[vii]. The prescribed situations should extend to allow for those people who otherwise would be caught by s 48A but who have since left the violent relationship due to family violence, as prescribed. When the regulations specifically provide for this exception, victims' ability to re-apply for a Protection visa need not be dependent on a Ministerial request.

3 **Question 20–3** *Section 351 of the Migration Act 1958 (Cth) allows the Minister for Immigration and Citizenship to substitute a decision for the decision of the Migration Review Tribunal if the Minister thinks that it is in the public interest to do so: (a) Should s 351 of the Migration Act 1958 (Cth) be amended to allow victims of family violence who hold temporary visas to apply for ministerial intervention in*

circumstances where a decision to refuse a visa application has not been made by the Migration Review Tribunal? (b) If temporary visa holders can apply for ministerial intervention under s 351 of the Migration Act 1958 (Cth), what factors should influence whether or not a victim of family violence should be granted permanent residence?

The above question was raised in the context of situations where an onshore temporary visa holder or applicant has suffered family violence and the MRT has not made a decision because the matter has not advanced to that stage. The second part of the question appears to be based on a presumption that the Ministerial power under s 351, if exercised, would result in the grant of a permanent visa. This presumption is unfortunately incorrect. Under s 351, the Minister is under no obligation to consider whether to consider the matter at all but if s/he considers the matter he can decline to intervene. If the Minister decides to intervene, s/he can intervene by granting the applicant a visa, temporary or permanent. The Minister can grant a temporary visa (such as a substituted subclass 676 visitor visa) which would allow the applicant to get around the s48 barrier to re-apply for a substantive visa (such as a Parent visa). At one stage in the past, the then Minister was quite willing to grant such a temporary visa so the applicant did not have to leave Australia to lodge an application for an offshore substantive visa. However, the applicant however had to pay the significant visa application charge (VAC) to apply for a suitable onshore substantive visa.

Difficulties arose when the applicant did not have the financial resources to pay the VAC and to validly apply for that permanent visa. To further complicate the matter, such an applicant was not able to seek Ministerial intervention again because the Ministry's view was that, once the power to intervene (to grant the temporary visa) had been exercised, the Minister's personal power under s 351 (or s 417) had been spent. If the applicant wanted to seek Ministerial intervention again, s/he had to trigger another Ministerial intervention power, ie., by applying for a visa and going through another Tribunal process again.

Historically Ministerial intervention powers have been rarely exercised in relation to unsuccessful temporary visa applicants. Rarer still did it result in the granting of a permanent visa, despite the fact that the Minister had such a power.

In the relevant part of the ALRC's Discussion Paper a number of concerns were identified in this respect and they include:

- Allowing family violence victims of temporary visa holders to invoke the family violence provisions and be considered for a permanent visa would compromise the integrity of the visa system. [viii]
- Family violence victims who have been in Australia on a temporary visa for some years and have lodged a permanent visa as a secondary applicant should be considered differently.[ix]

- Temporary visa holders' inability to access the family violence provisions restricts their ability to access crisis services, accommodation and income support.[x]
- *Australia has moral and legal obligations to ensure the safety of victims of family violence, once they are in Australia, whether temporarily or permanently.*[xi]
- Victim's ability to *access appropriate social security payments and entitlements are important in empowering victims to leave violent relationships and hence protect their safety.*[xii]
- The Canadian model should be considered, where victims of family violence can seek permanent residence when certain circumstances exist, regardless of whether they are on a temporary visa or not.[xiii]

It is RACS' tentative view that, viable solutions for those victims of family violence whose temporary visa applications have not been finally determined do not lie in resorting to the Minister's personal powers under s 351, whether that section is to be amended or left in its current form.

If the issues are about allowing the temporary visa applicant a way to remain in Australia temporarily after leaving the violent relationship (and no longer qualified as a secondary applicant), Ministerial intervention powers under s 351 are not necessary. There are other practical ways a victim can seek to remain in Australia temporarily without resorting to the Ministerial intervention power. One example in the case that the victim becomes unlawful as a result of leaving the violent primary visa applicant, would be to apply for a Bridging visa E based on the victim's intention to make suitable arrangements to leave Australia[xiv].

The temporary residence status would not in itself resolve the problems envisaged, ie., access to family violence services including appropriate social security entitlements which may empower the victim to leave the violent relationship. **RACS is of the view that there is no particular need to amend the migration law in relation to family violence matters for those victims who come to Australia *on a truly temporary basis* (such as tourism or business visitors, international students and their spouses) knowing that they ultimately will have to return to their respective countries. If matters of access to social security entitlements are a particular concern for this group of victims, then social security law, not migration law, should deal with them by way of broadening the Special Benefit regime under the Determination made by the Minister for Families, Community Services and Indigenous Affairs.**[xv]

The real concerns are for holders of fiancée visa (subclass 300 – a temporary visa by definition) or secondary visa holders of first stage economic stream visas (temporary visas by definition) including secondary visa holders of a subclass 457 visa whose spouse has been promised to be sponsored for a permanent visa after arrival in Australia. These people are known by the DIAC to have the intention to remain in Australia permanently once certain conditions are satisfied. This is because the visa system intends and allows them to make an onshore application to remain in Australia permanently. This

group of temporary visa holders may be caught in a situation where they feel compelled to remain in a violent relationship in order to satisfy the conditions for permanent residence.[xvi]

RACS endorses the proposal made in the Discussion Paper that the law should be amended to allow this group of applicants to invoke family violence provisions and be considered to remain in Australia permanently.[xvii]

4 In response to the Australia refugee law in the context of family violence matters, the ALRC proposes that, "*The Minister for Immigration and Citizenship should issue a direction under s 499 of the Migration Act 1958 (Cth) to visa decision makers to have regard to the Department of Immigration and Citizenship's Procedures Advice Manual 3 Gender Guidelines ..".*[xviii] The DIAC and the RRT have put in place policy guidelines in relation to gender-based protection claims but it was noted that decision makers did not seem to consistently apply those policy guidelines. The need for creating a s 499 Direction compelling decision makers to observe and consider those guidelines may seem reasonable and attractive at first sight. It is, however, not clear how effective this would be in practice. Concerns have been raised in another area of migration law where s 499 Directions existed and have since been renewed to introduce new mandatory considerations.[xix] The practical result of a s 499 Direction would seem to be uncertain as while s 499 Directions are secondary law (not merely policy), they are limited in practice because they require only that a decision maker consider the directions made. How the weight of the mandatory considerations is to be taken is a matter entirely dependent on individual decision makers.

RACS is of the view that if certainty is a way to empower family violence victims to make informed decisions for themselves, substantive law (as opposed to administrative discretion under policy), which clearly spells out under what circumstances the Australian Government owes the victim an obligation for protection, should be created.

RACS notes and supports the ALRC's consideration that *the approach taken in Canada could provide a useful model in the Australian context.*[xx] RACS further notes that the current offshore visa subclass 204 (Woman at Risk) provides a good model which is similar to the Canadian approach,[xxi] except that we do not have an onshore equivalent. When we compare the visa granting criteria between subclass 200 (Refugee) and subclass 204,[xxii] one can see that the two visas are meant for different applicants and there is no policy reason why the subclass 204 visa cannot be created as an onshore option for the specific group of onshore victims. In addition, under the DIAC policy, subclass 204 visas are a high priority for processing. This supports the argument for the inclusion of a similar onshore subclass visa for family violence victims who would otherwise find it difficult to be accepted under the visa granting criteria of a subclass 866 visa.

5 **Question 22–1** *Under s 417 of the Migration Act 1958 (Cth), the Minister for Immigration and Citizenship may substitute a decision for a decision of the Refugee Review Tribunal, if the Minister considers that it is in the public interest to do so. Does the ministerial intervention power under s 417 of the Migration Act 1958 (Cth) provide sufficient protection for victims of family violence? If not, what improvements should be made?*

Please refer to submissions relevant to s 48B and s 351 Ministerial power above. RACS is of the view that, while the Minister's intervention powers under s 417 are helpful in some circumstances and should be preserved as a last resort, the Australian migration system should include a visa that is available for family violence victims in cases where returning to their own country would cause particular hardship and is not a practical option. This approach will overcome some of the problems associated with a refugee visa regime which has not envisaged victims of family violence in today's social climate. It also seeks to acknowledge the specific social problems associated with victims of family violence who come to Australia as a dependent of their spouse or partner.

End of submissions.

Please do not hesitate to contact RACS on (02) 9114 1600 if you require any further information with any aspect of this submission.

Yours sincerely,

REFUGEE ADVICE AND CASEWORK SERVICE (AUST) INC

Per:

Chris Yuen

Principal Solicitor

[i] *Family Violence – Commonwealth Laws, Discussion Paper 76*, August 2011 at par 20.49
[ii] At para 4.23 of the Discussion Paper.
[iii] On 21 September 2011 the Senate debated the issue but a motion to disallow the *Migration Legislation Amendment Regulations 2011 (No4)* was resolved in the negative. See Hansard at pp79-82: http://www.aph.gov.au/hansard/hanssen.htm
[iv] Ministerial Invention Statistics – Australia 2010-2011: http://www.immi.gov.au/media/publications/statistics/ministerial-intervention/min-stats-australia-2010-11.pdf
[v] In the first half of the 2010-2011 financial year, 379 cases of s48B requests were finalized by DIAC of which 17 positive outcomes were returned by the Minister. In the second half of the same financial year, 463 cases were finalized but only 14 were successful. It is not clear what factors contributed to the figures although one contributing factor may have been the change of the Minister at the end of 2010.
[vi] See s 48A(2)(aa) & (ab) of the *Migration Act 1958*.
[vii] See Reg 2.12 of the *Migration Regulations 1994* made under s 48 of the *Migration Act 1958*.
[viii] Para 20.65 of the Discussion Paper.

[ix] Para 20.66 of the Discussion Paper.
[x] Para 20.58-20.63 of the Discussion Paper.
[xi] Para 20.70 of the Discussion Paper.
[xii] Para 20.71 of the Discussion Paper.
[xiii] Para 20.69 of the Discussion Paper.
[xiv] See clause 050.212(2) of Schedule 2 of the *Migration Regulations 1994*
[xv] See para 20.73 of the Discussion Paper.
[xvi] For instance, fiancée visa holders must have married the sponsor and lodged the partner visa before the family violence provisions can be invoked. In the case of secondary applicants of first stage economic stream visas or of subclass 457 visas, the secondary applicant must continue to be in the relationship with the primary applicant (a member of the primary applicant's family unit) in order to be ultimately granted the permanent visa.
[xvii] See para 20.49 of the Discussion Paper where *the ALRC considers that the family violence exception should be made accessible to secondary visa applicants where an application for a permanent visa is made onshore*. See also par 20.54 where *the ALRC considers it important that where there is a pathway to permanent residence, the family violence exception should be accessible at both the time of application, and time of decision in the relevant criteria for the permanent visa. This would ensure that such persons can remove themselves from the violent relationship at the earliest stage.* RACS also notes the ALRC's considerations specific to fiancée visa holders at para 20.75-20.109 of the Discussion Paper.
[xviii] Proposal 22-1 of the Discussion Paper.
[xix] Section 501 character refusal/cancellation powers are subject to a s 499 Directions which were reintroduced in 15 June 2009, compelling the decision makers to consider whether the visa holder began to live in Australia as a minor and the length of time the person has been ordinarily resident in Australia, among other things. In practice, the mandatory consideration in relation to minors and length of time in Australia in the Directions were applied inconsistently by decision makers in deciding whether visa should be cancelled or not.
[xx] Para 20.69 of the Discussion Paper.
[xxi] The Canadian approach allows the grant of permanent residence to victims of family violence on the basis of humanitarian and compassionate grounds regardless of their onshore status. The humanitarian and compassionate grounds sought to take into account of the hardship caused by the applicant if she is compelled to return to her home country. One of the main considerations is the applicant's time spent in Canada and the ties she has developed with Canadian community.
[xxii] Compare clauses 200.222 and 204.222 in Schedule 2 of the *Migration Regulations 1994*.