

1 December 2022

Ms Bianca Hidalgo
Executive Officer (acting)
Administrative Appeals Tribunal
Review Support
Sydney Caseload Strategy and Executive Support

Via email: bianca.hidalgo@aat.gov.au

Dear Ms Hidalgo,

Women's Legal Services Australia thanks the Administrative Appeals Tribunal for the opportunity to provide feedback on the Migration and Refugee Practice Direction.

About WLSA

1. Women's Legal Services Australia (WLSA) is a national network of 13 specialist women's legal services in each State and Territory across Australia, specifically developed to improve women's lives through specialist legal representation, support, and advocacy.
2. WLSA members provide high quality free legal services, including representation and law reform activities, to support women's safety, access to rights and entitlements, and gender equality. We seek to promote a legal system that is safe, supportive, non-discriminatory, and responsive to the needs of women. Some of our services have operated for almost 40 years.
3. WLSA members have specialist expertise in safety and risk management, maintaining a holistic and trauma-informed legal practice, providing women additional multidisciplinary supports, including social workers, financial counsellors, trauma counsellors, and cultural safety workers, for long-term safety outcomes.
4. WLSA members approach the legal issues facing women and their experience of the legal system within a broader analysis of systemic gender inequality. We are committed to providing individual services whilst also working towards deeper legal and cultural change to redress power imbalances and address violence against women and gender inequality.

Our advocacy focus

5. WLSA and our individual member services work to contribute to policy and law reform discussions to ensure that the law does not entrench gender inequality or gender-based discrimination, or unfairly impact on women experiencing violence and relationship breakdowns. We are informed by a feminist framework that recognises the rights of women as central.
6. Our primary concern when considering any law reform is whether the changes will make the legal system fairer and safer for both our clients and all victims of violence against women. Our submission reflects this focus.

7. The terms “*victim*,” “*survivor*,” and “*victim-survivor*” have been used interchangeably throughout this submission to refer to women, children and others who have experienced or are experiencing family and domestic violence and abuse in any of its forms. While acknowledging that anyone can experience domestic and family violence and abuse, the research and our members experience over more than forty years clearly highlights that domestic and family violence and abuse is predominantly perpetrated by men against women and children. Our language in this submission is gendered to reflect this.
8. Some jurisdictions, such as NSW, are shifting away from the language of “*domestic and family violence*” to “*domestic and family abuse*”. This is to better acknowledge that domestic and family violence and abuse can include physical and non-physical violence and abuse.

Introductory comments

9. Everyday, Women’s Legal Services Australia (WLSA) observes the significant impact the migration system, including the Administrative Appeals Tribunal (AAT), has on women on temporary visas who are experiencing family violence. We welcome the opportunity to provide feedback on the Migration and Refugee Division Practice Direction (Practice Direction) and our recommendations are informed by our collective practical experience spanning more than 40 years and thousands of clients experiencing disadvantage and family violence.
10. Migrant and refugee women in Australia are experiencing family violence at an alarming rate. 1 in 3 experience family violence and rates are known to be even higher amongst women on temporary visas.¹ Women on temporary visas can experience unique forms of family violence because their visa status can be tied to the person who uses violence.² Women on temporary visas face additional barriers to seeking justice due to their visa status, financial position and trauma.³ We see clients every day whose perpetrators use their visa status to further coerce, manipulate and control them.
11. The recently launched National Plan to End Violence Against Women and Children 2022-33 (‘National Plan’) recognises the vulnerability of migrant women and children to family violence. Importantly, the National Plan recognises that migrant women face structural barriers other women do not, such as the impact ending a relationship has on their visa status and eligibility for social security. Many of the users of family violence against temporary visa holders are Australian citizens. It is an issue we must face as a community and it is critical the justice system is responsive to this context and provides an inclusive and safe place for all.
12. With over 40 years of members’ experience in legal practice, WLSA urges the Tribunal to take on board our comments and recommendations in response to the draft Practice Note. These recommendations are driven by our vision of keeping women and children safe and assisting them to escape and recover from family violence in a way that is culturally sensitive.

Recommendations

13. In summary WLSA recommends the AAT amend the Practice Direction so that it reflects a gender and safety analysis and that:

¹ Australian Government, National Plan to End Violence Against Women and Children 2022-2033, 44.

² Ibid.

³ Ibid, 43.

- a. It provides culturally appropriate information about the case management hearing process and the supports available
- b. The time limit for statement of facts, issues and contentions be changed to 14 days prior to a hearing or decision (3.1-3.2)
- c. The onus to consider gender issues is shifted to AAT (3.4)
- d. There is flexibility around the requirements for applicants to provide contact details (4.3)
- e. References to 'difficult to pronounce names' are removed (4.7)
- f. The time to respond to hearing invitations is extended to 14-28 days (9.4-9.6)

Further detailed recommendations to improve each draft Practice Direction are detailed below.

Applying a gender and safety lens

14. Applying a gender and safety lens to the draft Practice Direction is critical to ensure there are no unintended consequences that would inadvertently make women unsafe or negatively impact their mental health and wellbeing.
15. Australia's National Plan to End Violence Against Women and Children 2022-23 (the National Plan) recognises the "increased risk and unique forms of violence experienced by...migrant and refugee women including those on temporary visas...while recognising the intersections with other forms of discrimination experienced by women across a range of backgrounds and experiences."⁴
16. The National Plan notes that "access to justice involves making sure that systems are culturally, linguistically, physically and geographically accessible to diverse communities – for example, migrant and refugee women including those on temporary visas, who may have a first language other than English, and victim-survivors living in remote areas."⁵ It is within this context that any reviews and reform to our justice system must ensure they accessible and safe to all.
17. All people should feel safe at any Court or Tribunal, regardless of the jurisdiction or matter. The safety of victim-survivors while attending in-person matters at the AAT is paramount. Appropriate steps should be taken to ensure the safety of victim-survivors, including ensuring that attending a hearing is safe, accessible, confidential and that appropriate support is available for women to engage in their legal process. In jurisdictions where applicants might not be represented, such as at the AAT, the onus should be on the AAT to ensure the process is safe, accessible and fair.

Case management hearings

18. The Practice Direction introduces a case management hearing where a member will talk to the applicant and any representative about the review, including evidence to be lodged and set timeframes.

⁴ Ibid, 114.

⁵ Ibid, 63.

19. While a case management hearing is a useful concept and can assist with clarifying what types of evidence is needed, the benefits will only really be realised if the parties have representation. The process will otherwise disadvantage the applicant, especially if they have lower levels of education, speak other languages and/or are experiencing family violence. Adding another step with representation also increases costs, which many people - especially women on temporary visas who are experiencing violence - are unable to afford. The AAT must take a number of steps to ensure a case management hearing is accessible and safe for victim-survivors.
20. WLSA recommends that the AAT provide up-to-date information in plain English and other languages about the process, what to expect and what services are available to help them, especially in instances where an applicant has or is experiencing family violence. The AAT should also make applicants aware that they can have a non-legal support person present during proceedings and may be able to access free migration legal assistance from a community or specialist legal centre.

Time limits for lodging statement of facts, issues and contentions (3.1 – 3.2)

21. Requiring statement of facts, issues and contentions within 14 days of lodging an application for review is onerous for applicants who are unrepresented and lawyers and agents who might not have assisted the client at the primary application stage.
22. If the applicant has not previously been represented, their file needs to be requested under Freedom of Information (FOI) so that appropriate submissions can be made to assist the Tribunal and ensure the Member is aware of the full facts of the case. FOIs can take a significant time to process and the 14 days timeline would not allow for this process to unfold.
23. Further, where an applicant has not been previously represented and has experienced trauma or gender related harm, care needs to be taken to ensure disclosures of relevant information can be made in a culturally safe and trauma informed way. A 14 day deadline would create additional barriers to applicant's disclosing the full extent of their claims and any statement of facts, issues and contentions risks being incomplete. This puts the AAT at risk of not understanding the full extent of the applicant's situation, particularly if they are still experiencing crisis and need the support of their treating professionals to meaningfully engage in the process. If applicants cannot meaningfully engage in their review process, the AAT risks offending the principles of procedural fairness and its decision making may fall into error.
24. If the requirement to submit the statement of facts, issues and contentions within 14 days must remain, WLSA expects a hearing or decision will follow shortly. If the case will take years to be considered, it will render the materials out of date and further work will be needed to re-submit. This places increasing pressure on services, including Women's Legal Services, that are already stretched and receive little funding to do this work. Furthermore, it also risks re-traumatising applicants and will increase the cost for applicants who do not have free legal assistance.
25. We therefore recommend that the statement of facts, issues and contentions should be submitted up to 14 days prior to the hearing or decision.

Gender related issues (3.4)

26. The draft Practice Direction places the onus on applicants to raise 'gender related issues' and consider whether a Member of a certain gender should hear their matter. This unfairly places the onus on the applicant to know what 'gender related issues' means and to be able to identify when this may or may not be appropriate or applicable to their case. Many clients when they come to our services do not know that what they are experiencing is family violence, and some women are illiterate and require interpreter support. It is unreasonable to expect that an applicant may know if they should raise 'gender related issues', let alone what factors may be relevant to disclose.
27. Due to these circumstances, WLSA recommends the onus to raise gender issues be shifted to the AAT. The AAT has the capability to assess (unless claims have not previously been raised at the Department stage) when there are gender sensitive claims and is able to act accordingly. This approach aligns with the commitments made in the National Plan for the justice system to be accessible to migrant and refugees and better supports victim-survivors of family violence.
28. Where an applicant raises gender issues that have not previously been decided, the AAT should take appropriate steps to ensure the applicant is able to raise those claims in full in a culturally safe, trauma informed and supported way.

Contact details (4.3)

29. The requirement to provide the contact details of the applicant as well as the representative is inflexible and does not consider the circumstances of clients experiencing family violence, including those in temporary refuge, people experiencing homelessness and disadvantage, mental health issues and people who are illiterate. Many women on temporary visas who are experiencing violence may not have a stable address and if they are forced to provide one, some may have no choice but to list the address of the person who is using violence against them. We urge the AAT to ensure safety is the first priority when asking for contact details.
30. We strongly recommend the AAT adopts a flexible approach and allow the application to select one type of correspondent method that is safest for them; it shouldn't be prescribed. For example, only requiring an email, phone number or address. If this recommendation is implemented the definition of 'contact details' will also need to be amended so that an address and another form of contact is not required.

Pronunciation of names (4.7)

31. It is important that all people experiencing the justice system, including the AAT, feel welcome and culturally safe. This is reflected in the National Plan that states "access to justice involves making sure that systems are culturally...accessible to diverse communities."⁶ The language used in the heading and body of 4.7 does not reflect this sentiment. It is inappropriate and reflects unconscious bias towards 'plain' and/or 'Anglo' names. Singling out people who subjectively have a 'difficult name' could lead to people feeling culturally unsafe.

⁶ Ibid, 63.

32. We strongly recommend editing the heading to read 'Correct name and address', removing the reference to 'difficult names' and instead provide the option to include phonetic spelling only if the applicant wishes to do so.

Responding to the hearing invitation (9.4-9.6)

33. Requiring applicants to respond to a hearing invitation within 7 days ignores the considerable stress and insecurity that a woman on temporary visa experiencing violence may be enduring. Many women in this situation are in crisis and such a short timeline does not consider her immediate and practical needs. For example, a victim-survivor may be prioritising safety, food and shelter and often not just for her, but her children as well. For example, Women's Legal Service Victoria assisted a client who had just had a baby and was experiencing significant stress as a result of family violence. Her application for review was one day late due to her payment (paid on day 7) not being processed due to insufficient funds and she was forced to re-apply, including re-paying the application fee, which she was unable to afford due to the family violence. Other women on temporary visas experiencing violence may also be in temporary crisis accommodation and may need to move during this period. In circumstances where a women may move, 7 days does not allow enough time for a mail re-direct to operate and she may inadvertently miss a deadline.
34. WLSA strongly recommends extending the hearing invitation notice period to 14-28 days.

If you require any further information, please contact me via email, Vanessa Burn, Chair of the WLSA Migration Committee yburn@wlc.org.au.

Yours faithfully,



Vanessa Burn
Chair
Migration Committee
Women's Legal Services Australia