

# Response to Administrative Review Reform Issues Paper

12 May 2023

## Acknowledgement

We acknowledge the family and domestic violence victim-survivors with whom we work and whose voices and experiences inform our advocacy in the hope for positive change.

WLSA members operate from many different locations across Australia. Across these locations, we acknowledge the Traditional Owners of Country, recognise their continuing connection to land, water and community, and pay respect to Elders past and present.

## Who we are

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 designed to improve women's lives through gender-led and trauma-informed specialist legal representation, support, and advocacy.

## What we do

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.

The principal areas of law that our members assist with are family law, family violence intervention orders, child protection, migration law, victims of crime compensation, employment law and discrimination law. Some of our members also assist with criminal law and civil law. Our members also deliver training programs and educational workshops to share our expertise regarding effective legal responses to violence and relationship breakdown.

The majority of our members' clients have experienced, or are still experiencing, family and domestic violence. 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, and trauma counsellors, for long-term safety outcomes.

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 and gender inequality. We contribute to policy development and law reform to ensure that the law does not unfairly impact on women experiencing violence and relationship breakdown.

## Contact us

For further information, please contact:

Lara Freidin  
Executive Officer  
Women's Legal Services Australia  
[lara@wlsa.org.au](mailto:lara@wlsa.org.au)

# Table of Contents

Response to Administrative Review Reform Issues Paper .....	4
Introductory Comments .....	4
Recommendations.....	4
Responses to Consultation questions .....	4
Part 1 – Structure and Membership (Q1 - 4).....	4
Design .....	4
Structure (Qu 5 - 9).....	5
Senior leadership (Qu 10 - 14).....	5
Members (Qu 15 - 19) .....	5
Appointments and reappointments (Qu 20 - 27) & Performance management and removal of members (Q28 - 33).....	6
Part 2 – Powers and Procedures .....	6
Making an application .....	6
Case Management, Directions and Conferencing (Qu 34 - 39).....	8
Information provision and protection? (Qu 40 - 44).....	8
Resolving a matter (Qu 45 - 51).....	8
Decisions and appeals (Qu 52 - 58) .....	8
Supporting parties with their matter (Qu 59 – 66).....	9
Other matters (Qu 67).....	10

# Response to Administrative Review Reform Issues Paper

## Introductory Comments

1. 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 Administrative Review Reform Issues Paper (Issues Paper). Our recommendations are informed by our collective practical experience supporting thousands of clients experiencing disadvantage and family violence over more than 40 years.
2. Alarming, 1 in 3 migrant and refugee women in Australia are experiencing family violence and rates are known to be even higher amongst women on temporary visas.<sup>1</sup> Women on temporary visas can experience unique forms of family violence because their visa status can be tied to the person who uses violence.<sup>2</sup> Women on temporary visas face additional barriers to seeking justice due to their visa status, financial position and trauma.<sup>3</sup> We see clients every day whose perpetrators use their visa status to further coerce, manipulate and control them.
3. The Government’s National Plan to End Violence Against Women and Children 2022-33 (‘National Plan’) recognises the vulnerability of migrant women and children to family violence. The National Plan recognises that migrant women seeking to leave a violent relationship face unique structural barriers, including negative impacts on their visa status and eligibility for social security. Importantly, many of the users of family violence against temporary visa holders are Australian citizens. The new federal administrative review body and broader justice system must be responsive to this context and become more inclusive and safer.
4. With our extensive experience in legal practice, WLSA urges the Government to take on board our comments and recommendations in response to the Issues Paper. These recommendations are driven by our vision and commitment to keeping women and children safe and assisting them to escape and recover from family violence in a way that is trauma informed, gender-responsive and culturally appropriate.

## Recommendations

5. In summary WLSA strongly recommends the new federal administrative review body (**the Body**) functions in a way that is **trauma-informed, gender and culturally appropriate, accessible, safe and fair, and most importantly, is responsive** to the complex needs of victim-survivors of family, domestic and sexual violence.

## Responses to Consultation questions

### Part 1 – Structure and Membership (Q1 - 4)

#### Design

6. WLSA welcomes the articulation of principles which will guide the approach of the new Body. We urge the inclusion of the following guiding principles:
  - i. **Procedural Fairness and transparency** – protecting the right to a hearing.
  - ii. **Human-centered** – centres applicants in the process. This is particularly important if legal assistance is not funded. Being human centric also means making non-legal supports available to applicants who have additional needs (eg trauma, disability, cultural safety), similar to the court support model.

---

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

<sup>2</sup> Ibid.

<sup>3</sup> Ibid, 43.

- iii. **Timely and Efficient** – which benefits both applicants and the Body.
  - iv. **Accessible, gender inclusive and culturally appropriate** policies and practices - including being gender responsive and gender inclusive, affordable for applicants with financial hardship and little/no income.
  - v. **Legally trained members** – given the function of the Body.
  - vi. **Trauma and Family violence informed** policies and practices - including providing options for out of time applications to protect review rights of applicants facing multiple barriers (for example, many victim-survivors of family violence cannot afford the review fee, or they may miss notification if they are in refuge and lose their appeal rights).
  - vii. **Informed by lived experience** of system users.
  - viii. **Recognises and respects diversity.**
7. In relation to improving decision-making, we recommend **embedding a continuous improvement cycle**, whereby performance appraisals of members include a review of primary decision making, identifies areas for improvement and capacity building, and holds members accountable for consistently poor decisions. WLSA considers that an additional role for the Body is educating Departmental decision makers on errors and systemic issues as part of a continuous improvement cycle.
8. WLSA urges the Government to **fund legal representation for applicants** who cannot afford legal representation, and further the legislation should require the Government to **meet model litigant standards**. We also recommend that decisions on remittal should be fast tracked by the new Body.

#### Structure (Qu 5 - 9)

9. WLSA recommends the **membership** of the new Body **reflects the diversity of the Australian community**, particularly in relation to disability, gender, culture/ethnicity and faith). WLSA also recommends that decisions of appointment and re-appointment are overseen by an independent body to maintain independence and diversity. We stress the importance of **members being legally qualified and trained** in ways to deliver services that are trauma-informed, safe, and recognises the complexity of family violence.
10. WLSA recommends that judicial members such as **registrars could make decisions** that don't need to go to a member. For example, a Registrar could deal with cases of remittance on the papers which relate to the applicant such as where there are compelling and compassionate reasons demonstrated, out of time applications, procedural or administrative errors. This could **reduce the backlog** of matters in the Body. WLSA also recommends a Registrar conducts case conferences and hearings.
11. The Body also needs an option to review applications on the papers for positive decisions, however when applications cannot be determined on the papers (such as when applicants cannot submit evidence before a hearing) applicants should be given an option to give oral evidence at a hearing.

#### Senior leadership (Qu 10 - 14)

12. WLSA recommends the Body is governed in a manner consistent with our existing court system in terms of appointments etc. As it is a legal decision-making body it should be held to the same standards. Senior leadership should have **ongoing and effective training** in aspects such as psychologically safe workplaces, continuous improvement, diversity, accessibility, accountability, transparency.

#### Members (Qu 15 - 19)

13. It is our view that all members **are legally qualified** and that the Body sets criteria for subject-matter expertise and assign matters appropriately.
14. If a decision requires an independent expert opinion to guide the decision maker, currently the onus to obtain costly expert evidence to support their review application or seek very limited pro bono

assistance. Applicants who are unable to provide expert evidence to support their applications are at a significant disadvantage.

15. WLSA has some concerns about having members available to hear matters on an ad hoc basis, including that it may be difficult for a sessional member to keep up to date with legislative and policy changes. WLSA suggests, as an alternative to addressing high volume areas, there is a priority system and processes where applications can be accepted on the papers.

#### Appointments and reappointments (Qu 20 - 27) & Performance management and removal of members (Q28 - 29)

16. WLSA recommends that all members are selected through a **transparent and merit-based** selection process that is legislated. The appointment requirements must prioritise membership diversity, including in relation to characteristics such as gender, cultural background, faith, age, social class and disability. WLSA recommends nominations be sought from the wider legal profession so as to **represent the cross section of society** and draw on the breadth of expertise in the legal sector.
17. WLSA recommends that decisions of appointment and re-appointment are **overseen** by an independent body who makes recommendations of appointments to the Attorney-General's Department, to maintain independence and diversity. The Minister should not be able to directly appoint or reappoint members without consultation.
18. To support a transparent and merit-based appointment process it is critical that members are **held accountable for their decisions**. WLSA recommends that quality of decision-making is one of the factors included in annual performance appraisals of members, with actions identified to address issues identified.
19. WLSA also strongly supports incorporating members' past performance to inform reappointment or appointment at a higher level. **Review of past performance** should include measures such as quality of decision-making, and timeliness. For example, one of our member services had a matter where the AAT Member took nearly 3 years to send a request for further information, despite having committed to sending the request on the day of the hearing. The applicant had severe mental health issues and no access to Medicare/Centrelink, so the community was left to support this family while waiting for the Member to act.
20. WLSA recommends that to maintain confidentiality, independence and prevent any actual or perceived conflict of interest, members should be **prevented from appearing** as a representative or an expert witness in matters in the Body while they are members or for a period after their term as member concludes. WLSA also considers it critical that a Member **recuses themselves** from the matter/ list where there are actual or perceived conflicts of interests.

#### Part 2 – Powers and Procedures

##### Making an application (Q30 - 33)

21. Drawing on the extensive experience of our member services, WLSA strongly urges the application methods and processes of the new Body be more accessible, reasonable, and responsive than the current process by incorporating the following:
  - i. **Simplify the process** to lodge an appeal - including by changing the system which currently prevents applications from being lodged online when they also include an application for reduced fees. The online system needs to be capable of accepting applications that include an application for reduced fees.
  - ii. **Provide more generous timelines**, in recognition of the complexities involved in these matters and particularly in circumstances of family violence.
  - iii. As the **statement of reasons** may waive the requirement to provide natural justice for applicants, the process should not ask applicants to provide this, rather the refusal decision

- only should be required.
- iv. As this is a de novo review, the onus should be on the Body to **explore all evidence** including new evidence with the applicant (it should be inquisitorial and fact finding).
  - v. If the process is applicant friendly and doesn't require legal representation, the **onus should not be on the applicant to raise their grounds**. They are not legally trained and WLSA considers it is unreasonable and unfair to expect that applicants understand the system and can advocate for themselves in circumstances where they don't speak English and have experienced trauma.
  - vi. **Remove upfront application fees** – costs should be awarded at the end if unsuccessful (consistent with protection visa approach), allowing applicants to apply and not lose standing.
22. Based on our experience with victim-survivors of family violence on temporary visas, WLSA strongly recommend the **timeframes are at least 60 days** to allow time for applicants to seek help, information and legal advice or representation. WLSA also strongly urges the new Body to allow out of time applications and extensions where there are **compassionate and compelling circumstances**. In our view, the time limits should be consistent across all matters to avoid confusion in the migrant community and amongst professionals interacting with the system.
23. WLSA strongly recommends a **different and lower fee structure** than is currently in place. Fees are currently not reasonable or appropriate even for applicants accepted as experiencing financial hardship. The financial hardship reduced fee is currently \$1500. This is well out of reach for most of our clients and forces them to use brokerage payments.
24. WLSA strongly urge the new Body to have an option to **waive fees entirely**. Further we recommend that **fees be refunded** where the matter is remitted at the new Body or Judicial Review stage. WLSA member services have had cases where the client didn't have enough funds in her account at the time the payment was processed and she lost her appeal rights because the payment couldn't be deducted. Another client missed her notification because she was in refuge while fleeing family violence and hadn't had the opportunity to update her address in time (there is currently only 28 days to do this from the decision).
25. The online guidelines on reduction of review application fees (dated 2015) also need to be updated and simplified as they are currently confusing for applicants. It is also likely outdated and not consistent with current practices by registrars. WLSA also draws your attention to our clients' experience that gathering evidence to support financial hardship applications can be time consuming and cause considerable stress because of the current short timeframes to apply to the AAT. The current application fees are also very high, particularly in cases where an application must be made to the AAT as part of the process to apply for Ministerial Intervention. We urge changes with establishment of the new Body.
26. WLSA feel strongly that the new system should **not be punitive**, but rather incorporates more flexibility in its processes to promote compliance. WLSA recommends giving the applicant a verbal and written warning before deciding not to hear the application. In our experience, there are many reasons someone may not be able to comply with the application requirements, including that they cannot understand or read the information, or have limited understanding of the process and what they must do etc, particularly unrepresented applicants. WLSA also supports the idea that the new Body has more powers to expedite applications where family violence is involved.
27. WLSA strongly urges the new Body's methods of lodgement be **as flexible as possible**, and responsive to the needs of applicants – taking a human-centred and accessible approach. It is also our view that all categories of applicant should be able to lodge an application orally. The system must be underpinned by a principle of Accessibility. In our experience, most people applying and affected by the decisions of the Body have limited resources and understanding of the justice system, as well as

facing multiple barriers which limit their ability to make applications online due to accessibility, literacy levels and other accessibility barriers.

#### Case Management, Directions and Conferencing (Qu 34 - 39)

28. WLSA strongly supports the idea of the new Body having powers to use **directions hearings, case conferencing and other case management** approaches, particularly where non-legal support services are also involved. Our support is contingent on applicants having access to legal representation. This could be provided by way of a duty-lawyer service at the new Body, and that the allocated Member is appropriately assigned. WLSA considers this approach could be very valuable to gather more information from the applicant prior to the Directions hearing to gain a better understanding of the applicant's situation and context. WLSA also recommends that Registrars with appropriate training can run these case management approaches and hearings, as well as making lower-level decisions.

#### Information provision and protection? (Qu 40 - 44)

29. WLSA recommends that any documents relied on to make the decision should be made available to the applicant, including for example country information cited in the footnotes of protection visa decisions. We also consider that only as little information as possible should be redacted.
30. WLSA's view is that the new Body should **not be able to compel** the production of documents. The scope of documents in issue should be raised at a case conference and documents subpoenaed if necessary. Further, anything the new Body (or applicant) has concerns about sharing should go to a Directions hearing or case conference for decision. Private hearings and non-disclosure/non-publication orders should be considered for sensitive matters such as where there are protection, family violence and safety concerns.

#### Resolving a matter (Qu 45 - 51)

31. Dispute resolution processes are not applicable for migration matters, however WLSA recommends that case conferencing be used to attempt to resolve matters earlier. WLSA recommends that a suitably trained Registrar could conduct the case conferences and hearings.
32. WLSA is concerned with the new Body labelling applications as are frivolous or vexatious, although we recognise that sometimes there may appear to be no merit based on a written application. This may be the case where the applicant has self-lodged or the applicant is not aware of what is in the application (for example the husband makes an application for the whole family and the wife is not aware). WLSA recommends the Body explore whether there is any merit in such an application by holding a hearing rather than dismissing an application. Further, some applications may be frivolous because there is no other option given the flawed design of the system, for example without an AAT appeal you cannot apply for Ministerial intervention.
33. The Body should be able to dispense with a hearing where a positive decision can be made, or in circumstances where applicants are unable to participate in a hearing because of barriers such as trauma, mental health conditions, or accessibility. In all other cases a hearing must be held.
34. To ensure hearings are accessible, informal, economical, proportionate, just and quick, WLSA recommends the following:
- Provide options** for hearings in person, via phone or online
  - Limit hearings** to matters in issue/ dispute to make a positive finding
  - Fund legal representation** for applicants – this is the best way to ensure accessible, economical, just and quick process
  - Provide **non-legal supports** – interpreters, support workers etc
  - Give applicants **reasonable and consistent timeframes** for participation

#### Decisions and appeals (Qu 52 - 58)

35. WLSA recommends that oral and written reasons for decisions be issued **as soon as possible**, and no



more than 60 days from the decision being made. For the new Body to achieve quality, consistency, accessibility and simplicity in explaining the reasons for the decision WLSA strongly encourages regular accessibility training for members, and the consistent use of plain language and interpreters in explaining reasons for decisions.

36. As it currently stands, an appeal must be lodged within 35 days after notification of decision with reasons. WLSA recommends this be extended in the new Body and suggests a **90-day timeframe** be considered.
37. WLSA recommends that Internal Review of decisions become available in the new Body where there is a clear error identified. We also reiterate our recommendation that all Members are legally trained. Questions of law should be determined through Judicial Review.

#### Supporting parties with their matter (Qu 59 – 66)

38. Based on the extensive experience of our member services, WLSA strongly urges a **grant of funding** be available for applicants who cannot afford legal representation, and the scheme be applicant friendly. We highlight the extreme vulnerabilities of most applicants and the multiple barriers they face in taking part in the review process. The new Body must reduce the impact of barriers (such as communication, English proficiency, financial resources, caring responsibilities, cultural and religious expectations, mental health conditions, disability etc) to enable applicants to fully participate in the process.
39. WLSA considers that a code of conduct for representatives is only necessary for non-legal representatives, and it should include making a declaration that their representation will be only in the best interest of the applicant and on instructions. This goes some way to addressing the risk of systems abuse that we see in our members' practices. Legal representatives already have ethical obligations to the client and the administration of justice, and migration Agents are regulated by OMARA, so there is no need for additional requirements or code of conduct for these groups.
40. To assist parties to fully participate in processes under the new Body and improve user experience, WLSA recommends that departments and agencies give **clear notification of decisions** and information about appeal rights – in writing and orally ideally. The new Body can assist parties if there were **legal and non-legal supports** available including registry staff to help self-represented applicants navigate the system and seek independent advice and assistance.
41. Other organisations can also assist parties and improve their user experience if the new Body provided support services for victim-survivors of family violence, received training in trauma-informed practices, comprised a diverse workforce, was culturally safe, and provided access to social work and financial counselling services.
42. WLSA recommends the new body enhance access for vulnerable applicants by providing services that address the complex and multifaceted needs of applicants. The Body must **ensure accessibility** by delivering a service, system and processes that are **trauma informed, culturally and environmentally safe, communicate using clear and plain language, provide interpreters, and allow flexibility with multiple ways of providing information to the Body**. These are critical features to enhance access to vulnerable applicants. A duty lawyer service and court support-type service are also models we recommend for enhancing access and support for applicants.
43. To protect the safety and interests of applicants who have experienced or are at risk of trauma or abuse WLSA urges the Body to use non-legal workers such as social workers to conduct **risk assessments, refer clients to supports and respond to applicants in crisis**. We also strongly encourage the use of special lists and provisions for vulnerable applicants. Further, to be effective, the evidence required to establish vulnerability should be minimal to ensure the new Body is responsive to applicant needs. We strongly recommend there should be no need obtain a report

from a psychologist or GP to establish vulnerability as some of our clients do not have Medicare and this would place a significant burden on them and create a barrier to accessing these special processes. Further, within the physical facilities of the new Body, we recommend a **legal referral service and court support-type services** are made available.

44. WLSA considers the new Body's obligation to promoting accessibility should be legislated, and performance against this obligation be included in regular reviews of the functioning of the Body. The review cycle and framework should also be legislated.

45. It is our view that concerns about an applicant's capacity to participate in proceedings could be assessed at a case conference, and appropriate referrals made to assess the applicant independently from the new Body. A funding grant from the Body for the assessment will be required.

#### Other matters (Qu 67)

46. WLSA is encouraged by the Government's commitment to improving the migration system and assisting women on temporary visas fleeing family, domestic and sexual violence. Currently, the measures announced do not positively impact women in these circumstances. They continue to be exposed to unsafe situations and fall through the cracks with devastating consequences for themselves and their children. The establishment of the new Body provides a **unique opportunity** to change this. We welcome any opportunity to further discuss how to make this possible.