21. The Family Violence Exception—Evidentiary Requirements

Contents

Summary

21.1 This chapter considers the evidentiary requirements for making a family violence exception claim under the *Migration Regulations 1994* (Cth). This was an area identified by stakeholders as being in need of substantial reform.

21.2 As noted in Chapter 20, a key policy tension in this area is the need to ensure the accessibility of the family violence exception while maintaining the integrity of the visa system. If evidentiary requirements are too strict and rigid, it may prevent access to the family violence exception for genuine victims. On the other hand, if evidentiary requirements are not sufficiently robust, there is scope for fraudulent claims or other abuse of the family violence exception for migration outcomes.[1]

21.3 The ALRC recommends a new model for dealing with non-judicially determined claims of family violence. The key recommendation is for the *Migration Regulations* to be amended to provide that any evidence—in addition or as an alternative to a statutory declaration from 'competent persons'—can validly support a non-judicially determined claim of family violence. In addition, the ALRC

1 See Australian Law Reform Commission, *Family Violence and Commonwealth Laws*, Discussion Paper 76 (2011), 700–703 for a more detailed discussion of the tension, and history of the family violence exception.

recommends that the prescriptive requirements governing statutory declarations from competent persons in reg 1.26 be repealed. This will allow applicants to bring a wide range of evidence in support of their family violence claim. Where the visa decision maker is not satisfied that an applicant has suffered family violence, referral can be made to an independent expert within the Department of Human Services (Centrelink).

21.4 Such a system will increase accessibility and flexibility to victims of family violence while maintaining the need for robust scrutiny of evidence. In particular, integrity measures are reinforced through building on moves towards specialisation within DIAC and retaining the mechanism for referral to an independent expert.

21.5 The area of judicially determined claims of family violence was less problematic. The ALRC recommends, however, that subsections in reg 1.23 of the *Migration Regulations* that require that the violence, or part of the violence, must have occurred while the relationship was in existence, be repealed.

Evidentiary requirements

Legislative history

21.6 In their initial form, the *Migration Regulations* restricted the forms of acceptable evidence to support a family violence claim to judicially-determined evidence.[2] However, in response to concerns that immigrant women faced barriers to accessing the judicial system—and the ALRC's recommendations in the 1994 report, *Equality Before the Law: Justice for Women* (ALRC Report No 69)[3] (*Equality Before the Law*)—legislative changes were introduced in 1995 to broaden the range of evidence that could be provided to prove that family violence had occurred.

21.7 These changes introduced 'non-judicially determined' forms of evidence, including statutory declarations from the applicant and certain 'competent persons'.[4] The result was the creation of a two-track system—judicially and non-judicially determined claims—through which victims of family violence could access the family violence exception and be granted permanent residence. The ultimate decision as to whether a person met the family violence exception remained with the visa decision maker.

21.8 While the 1995 amendments made the exception more accessible to victims of family violence, it caused some unintended consequences. In particular, there was uncertainty as to the level of evidence required in a competent person's statutory declaration to satisfy a visa decision maker that family violence had occurred, and also whether the visa decision maker could question the veracity of a competent person's opinion.

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2 Applicants were required to substantiate their claims of family violence through the judicial system, involving police and the courts.

3 Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 1)*, Report 69 (1994), Rec 10.2. The ALRC recommended that the family violence exception should extend to cases where evidence of domestic violence is available from community and welfare workers, medical and legal practitioners and suitable third parties.

4 The role of 'competent person' is discussed in more detail below.

21.9 As a result of these concerns, the Australian Government sought to amend the legislation to make the evidentiary requirements more rigorous.[5] However, the resolution to pass these amendments was disallowed by the Senate on 1 November 2000.[6]

The current evidentiary regime

21.10 In 2005, the *Migration Regulations* were amended to provide a new system of non-judicially determined evidence.[7] As a result, the current system provides that:

- if the visa decision maker is satisfied on the non-judicially determined evidence that the applicant has suffered 'relevant family violence', the visa decision maker must proceed with the visa application on that basis;[8] or
- if the visa decision maker is not satisfied that the applicant has suffered family violence on the basis of non-judicially determined evidence, the matter must be referred to an 'independent expert' for assessment;[9] and
- the visa decision maker must take as correct the opinion of the 'independent expert'.[10]

21.11 These amendments reflected the policy position that where evidence of family violence has not been tested by a court, such evidence is 'to be assessed by the Minister, and in certain circumstances, an independent expert'.[11] An 'independent expert' is defined in reg 1.21 of the *Migration Regulations* as a person who is 'suitably qualified and is employed by, or contracted to provide services to, an organisation specified in a Gazette Notice for this definition'.[12] The only organisation gazetted is Centrelink.[13]

Judicially-determined claims of family violence

Forms of evidence

21.12 Evidence in support of a judicially-determined claim of family violence may take the form of:

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5 See *Migration Amendment Regulations (No 5) 2000* (Cth). It was proposed that where an applicant makes a non-judicially determined claim of family violence, the then Department of Immigration and Indigenous Affairs (DIMIA) must refer the matter to Centrelink for assessment by a social worker. That person must be employed by Centrelink as a social worker, and must be, or eligible to be, a member of the Australian Association of Social Workers. If the matter was appealed to the Migration Review Tribunal (MRT), the Tribunal would have the discretion to ask Centrelink for a report.

6 See Commonwealth, *Parliamentary Debates*, Senate, 1 November 2000, 18870 (P McKiernan—Senator).

7 *Migration Amendment Regulations (No 4) 2005* (Cth).

8 *Migration Regulations 1994* (Cth) reg 1.23(10)(a).

9 Ibid reg 1.23(10)(b).

10 Ibid reg 1.23(10(c).

11 Explanatory Memorandum, *Migration Amendment Regulations (No 4) 2005* (Cth).

12 *Migration Regulations 1994* (Cth) reg 1.21.

13 See Commonwealth of Australia, *Special Gazette S119* (2005). As discussed in Ch 4, Centrelink is now part of the Department Human Services (DHS).

- an injunction under s 114(1)(a), (b) or (c) of the *Family Law Act 1975* (Cth), granted on the application of the alleged victim against the alleged perpetrator;[14] or
- a conviction, or finding of guilt against the alleged perpetrator, in respect of an offence against the victim;[15] or
- an order under state or territory law against the alleged perpetrator for the protection of the alleged victim from violence, made after the court has given the alleged perpetrator an opportunity to be heard, or otherwise make submissions.[16]

21.13 Stakeholders indicated that applicants encountered few problems once a valid judicially-determined claim of family violence had been made. However, stakeholders highlighted numerous challenges faced by victims of family violence from migrant communities and culturally and linguistically diverse (CALD) backgrounds in accessing the legal system, including: language barriers; isolation; precarious economic and employment situations.[17] While these are systemic issues wider than those addressed in this Inquiry, the ALRC notes the ongoing efforts of the Family Law Council's inquiry into *Indigenous and Culturally and Linguistically Diverse clients in the family law system*.[18] The ALRC suggests that the recommendations of that Inquiry will have implications for victims of family violence from CALD communities.

Post-separation violence

21.14 In November 2009, the *Migration Regulations* were amended to require—for judicially-determined claims—that 'the violence, or part of the violence, that led to the granting of the order, must have occurred while the married relationship or de facto relationship existed between the alleged perpetrator and the spouse or de facto partner of the alleged perpetrator'.[19]

21.15 The ALRC recommends that this requirement be repealed. In the ALRC's view, the safety of victims of family violence is best protected by a policy that recognises that relationship breakdown may occur over a period of time, and that the family violence exception should work to prevent a person from remaining in, or returning to, a violent relationship.

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14 *Migration Regulations 1994* (Cth) reg 1.23(2). The injunctions referred to in s 114 of the *Family Law Act 1975* (Cth) relate to injunctions: for personal protection of a party to a marriage; restraining a party of the marriage from entering a matrimonial home or the premises in which the other party resides; and restraining a party to the marriage from entering the place of work of the other party to the marriage.

15 Ibid reg 1.23(6).

16 Ibid reg 1.23(4).

17 Good Shepherd Australia New Zealand, *Submission CFV 41*; AASW (Qld), *Submission CFV 38*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*; IARC, *Submission CFV 32*; WEAVE, *Submission CFV 31*; ADFVC, *Submission CFV 26*.

18 The Terms of Reference of the Council's Inquiry can be found at <www.ag.gov.au>.

19 See *Migration Regulations 1994* (Cth) regs 1.23(2), 1.23(5), 1.23(7), 1.23(12) and 1.23(14). These amendments to reg 1.23 were made by the *Migration Amendment Regulations (No 12) 2009* (Cth). While the requirement applies to both judicially-determined and non-judicially determined claims, stakeholder concerns were addressed primarily at judicially-determined claims.

Recognising the link between violence and separation

21.16 A number of stakeholders supported the proposal to repeal the requirement that the violence must have occurred while the relationship was still in existence.[20] There was general consensus that the requirement does not reflect the reality of relationships, where violence may escalate or begin at the point of separation. DIAC acknowledged that 'the point at which a relationship ceases can be difficult to determine' and that 'persons can be particularly vulnerable to family violence at this time'.[21]

21.17 The Immigration Advice and Rights Centre (IARC) argued that 'some couples separate from one another one in hope that a period of separation may result in reconciliation' and that, 'it is during this period of "separation" that family violence can occur'.[22] The Law Institute of Victoria (LIV) submitted that amendment was required to acknowledge 'victims of family violence leaving and returning multiple times and that family violence may take many different forms'.[23]

21.18 Nigel Dobbie, a specialist migration agent, went further, and argued that the requirement 'empowers the perpetrator' because the perpetrator:

> can simply end the relationship and immediately thereafter inflict violence on the victim, for example, by bashing her. As the relationship was over when the bashing occurred, the victim does not get the benefit of the family violence provision, despite a conviction of assault against the perpetrator.[24]

21.19 It was further submitted that the perpetrator is encouraged to 'dump and then bash', because a sponsor who commits violence after ending the relationship does not 'lose one of his two permitted sponsorships',[25] as no visa was granted on the basis of the family violence exception.

What is the legitimate role of the family violence exception?

21.20 If the relationship has ended and family violence occurs afterwards, a question arises as to whether the migration system—via the family violence exception—should be responsible for ensuring the safety of the person, or whether that responsibility is better addressed in other contexts.

21.21 DIAC noted that, if family violence occurs after the relationship has already ceased, the visa applicant's position in the context of the *Migration Regulations* has

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20 Confidential, *Submission CFV 165*; National Legal Aid, *Submission CFV 164*; N Dobbie, *Submission CFV 163*; RAILS, *Submission CFV 160*; ANU Migration Law Program, *Submission CFV 159*; Law Institute of Victoria, *Submission CFV 157*; Confidential, *Submission CFV 152*; Townsville Community Legal Service, *Submission CFV 151*; IARC, *Submission CFV 149*; Migration Institute of Australia, *Submission CFV 148*; WEAVE, *Submission CFV 106*.

21 DIAC, *Submission CFV 121*.

22 IARC, *Submission CFV 149*.

23 Law Institute of Victoria, *Submission CFV 157*.

24 N Dobbie, *Submission CFV 163*. The submission also recognised that family violence can also be inflicted on men.

25 Ibid. As noted in Ch 20, sponsorship limitations mean that a person is allocated a quota of two sponsorships in a lifetime. A sponsorship is counted towards the quota if a person has been granted a partner or prospective marriage visa on the basis of sponsorship, or, if a visa was granted because of the family violence provisions as a result of family violence committed by the sponsor.

already changed and the family violence exception can no longer perform its intended function[26]—that is, to allow persons to leave the relationship without prejudicing their migration status.

21.22 DIAC suggested that policy guidelines on this issue can provide greater flexibility for cases where family violence occurs during the course of a relationship breakdown. For example, the *Procedures Advice Manual 3 Guidelines* (PAM) could

> indicate that decision makers, in contemplating if the family violence took place before the relationship ended, should have regard to claims that the applicant left the relationship because the behaviour of the sponsor made them feel fearful. The fact that the violent behaviour occurred after the applicant left could then justify that the applicant's feelings of fear were 'reasonable'.[27]

21.23 DIAC further indicated that PAM could also be amended 'to clarify that Regulation 1.23 should only be invoked to refuse an application where a clear break in the relationship has occurred and the alleged family violence occurs well after that event'.[28]

21.24 The ALRC considers that, while amendments to PAM would be useful, requirement in reg 1.23 should be repealed. The *Migration Regulations* do not require a causal nexus between the breakdown of the relationship and the fact that the alleged victim has suffered 'relevant family violence'. This point was emphasised by DIAC in its submission; all that is required is that the relationship has ceased, and the victim has suffered family violence committed by the sponsor.

21.25 The ALRC considers that—given that there is no requirement that the violence must have caused the breakdown of the relationship—the difficulty in determining when a relationship has broken down and the propensity for violence to occur around the time of separation, the policy approach expressed by the Full Federal Court in *Muliyana v Minister for Immigration and Citizenship* is preferred. That is, the family violence exception

> is intended to cover both situations: not to force a person to stay in an abusive relationship; and not to force a person to go back into an abusive relationship, in either case without compromising his or her immigration status.[29]

21.26 The Court also suggested that there 'will be cases where the violence occurs between former partners in circumstances, for example, many years after the relationship has ended, such that it would not qualify as 'domestic violence' within a concept of a "non-judicially determined claim for domestic violence"'.[30] The ALRC considers that, a common sense reading of the provision would probably rule out instances where the violence occurred a substantial time after the relationship had ceased as being 'family violence'.

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26 DIAC, *Submission CFV 121*.
27 Ibid.
28 Ibid.
29 *Muliyana v Minister for Immigration and Citizenship* [2010] FCFCA 24, [34].
30 Ibid, [35].

21.27 In the ALRC's view, such a policy position better reflects the nature, features and dynamics of family violence.[31] There is substantial evidence to suggest that the separation of intimate couples is often a trigger for violence, where there is no prior history of violence in the relationship, or in any other setting.[32]

21.28 The ALRC considers that the safety of victims of family violence would be best protected by repealing the requirement that the violence, or part of the violence, must have occurred while the relationship was still in existence. However, in the event that the provision is not repealed, or until it is, the ALRC recommends that amendments to PAM be made, along the lines suggested by DIAC.

Recommendation 21–1 The Australian Government should repeal relevant provisions contained in reg 1.23 of the *Migration Regulations 1994* (Cth) requiring that, the violence, or part of the violence must have occurred while the married or de facto relationship existed between the alleged perpetrator and the alleged victim.

Family violence protection orders

21.29 Until the requirement in reg 1.23 is repealed the ALRC recommends that PAM should be amended to clarify, or provide additional clarification, that a family violence protection order granted after separation should be regarded as sufficient evidence that family violence has occurred.

21.30 Since the introduction of the requirement in reg 1.23 that the violence must have occurred while the relationship was in existence, DIAC officers are less readily accepting a final family violence protection order obtained after separation.[33]

21.31 Stakeholders argued that the *Migration Regulations* do not make reference to the timing of the grant of a protection order and, therefore, the problems 'do not stem from the regulations but rather from the way in which a decision maker misapplies the law'.[34]

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31 The nature, features and dynamics of family violence are discussed in Ch 3.

32 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response,* ALRC Report 114; NSWLRC Report 128 (2010), 282.

33 This was raised by the Immigrant Women's Support Service, *Submission FV 61 Part 1*, 1 June 2010, 8, as part of the ALRC's Family Violence Inquiry in 2010. It was suggested that, previously, a final domestic violence protection order was sufficient judicial evidence of family violence in instances where it was applied for, and obtained, after separation.

34 IARC, *Submission CFV 32*. See also Visa Lawyers Australia, *Submission CFV 76*; Law Institute of Victoria, *Submission CFV 74*.

21.32 There was strong support for the proposal that PAM be updated to reflect that family violence orders obtained post-separation could be used to prove the existence of family violence.[35] DIAC submitted that 'this approach is already consistent with current policy and [we would be] happy to provide additional clarification in PAM'.[36]

Recommendation 21–2 Until Recommendation 21–1 is implemented, the Department of Immigration and Citizenship should amend its *Procedures Advice Manual 3 Guidelines* to provide that:

(a) relationship break downs may occur over a period of time;

(b) the requirement in reg 1.23 of the *Migration Regulations 1994* (Cth) should not be applied to refuse a family violence claim unless there has been a clear break in the relationship and the family violence occurs well after that event; and

(c) in considering judicially-determined claims, family violence orders made post-separation can be considered.

Non-judicially determined claims of family violence

International comparisons

21.33 A number of overseas jurisdictions—including the US, Canada, UK and New Zealand—have family violence provisions. Although these models reflect differing policy considerations in their respective countries, their approaches to evidentiary requirements provide a useful point of comparison with the Australian system.

United States

21.34 The US has a comprehensive legislative scheme for the protection of immigrant women who are victims of 'domestic violence'.[37] This is enshrined in the *Violence Against Women Act* (VAWA) of 1994.[38]

21.35 Under US immigration law, spouses of US citizens or lawful permanent residents may be granted conditional residence status, for a period of two years. In order to gain permanent residence, the couple must file a joint petition for removal of the conditional residency status within a 90 day period before the expiration of the two

35 Confidential, *Submission CFV 165*; National Legal Aid, *Submission CFV 164*; RAILS, *Submission CFV 160*; ANU Migration Law Program, *Submission CFV 159*; Townsville Community Legal Service, *Submission CFV 151*; DIAC, *Submission CFV 121*; IARC, *Submission CFV 149*; Migration Institute of Australia, *Submission CFV 148*; WEAVE, *Submission CFV 106*.

36 DIAC, *Submission CFV 121*.

37 The differences in terminology are discussed in Ch 20.

38 The Act was passed as part of *Violent Crime Control and Law Enforcement Act of 1994* Pub L No 103-332, 108 Stat 1796, 1902 (US) and codified in various sections of United States Code. The Act was 'reauthorised' in 2000 and 2005 and, although the title of the Act refers to women, protection applies to all spouses, including men.

year conditional residence grant.[39] That is, the immigrant must be supported in the petition for permanent residence by his or her US spouse.

21.36 The key protection mechanism in VAWA allows persons who are victims of domestic violence to self-petition for removal of their conditional residency status independently of their spouse.[40] A victim must be able to show that: the marriage was entered into in good faith; the abuser was a US resident or lawful permanent resident; he or she resided with the US resident or lawful permanent resident; during the marriage, either he or she, or a child, had been battered or subjected to extreme cruelty perpetrated by the US resident or lawful permanent resident; and he or she is of good character.[41] The protection extends to divorced women and widows who apply for self-petition within two years of divorce or death of the US citizen or lawful permanent resident.[42]

21.37 Although most victims of domestic violence will be able to apply for the self-petition, it is unavailable to those who are already in removal proceedings—typically, because he or she is present in the US without legal immigration status. In these cases, victims of domestic violence may seek to cancel their removal from the US on this basis.[43] Applications are made to a judge and, if successful, cancellation of removal entitles a victim to permanent residence.

21.38 The VAWA and the United States Code contain no specific provisions in relation to evidentiary requirements to support a claim for self-petition or cancellation of removal. Rather, a victim must fill out an application form and attach all supporting documentary evidence supporting the claim. Generally, applicants are encouraged to seek assistance from an attorney when making an application. In relation to cancellation of removal status, the United States Code provides that the Attorney-General 'shall consider any credible evidence relevant to the application'.[44]

Canada

21.39 In Canada, a person whose sponsorship has broken down due to family violence can apply for permanent residence on 'Humanitarian and Compassionate' grounds,[45] whether or not the person has temporary residence status.[46] Under the *Immigration Guidelines*, 'Humanitarian and Compassionate' grounds refer to circumstances where 'unusual, undeserved or disproportionate hardship would be caused to the person if he

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39 *Violence Against Women Act (1994) 2005* USC 8 (US) § 1186(a)(1).

40 Ibid § 1154(a)(1)(A)(iii)(I).

41 Ibid § 1154(a)(1)(A).

42 Ibid § 1154(a)(1)(A)(iii)(II)(aa)(CC)(aaa), (bbb).

43 Ibid § 1229b (2)(A)(i)(I)–(III). A victim must show, among other things, that she has been battered or subject to extreme cruelty by a spouse or lawful US permanent resident.

44 Ibid § 1229b(2)(D).

45 See *Immigration and Refugee Protection Act 2001* c 27 (Canada) s 25(1); *Immigration and Refugee Protection Regulations 2002* (Canada) reg 66.

46 *Immigration and Refugee Protection Act 2001* c 27 (Canada) s 25(1): 'the Minister must consider a request from any foreign national in Canada who is inadmissible or who does not meet the requirements of the Act'.

or she had to leave Canada'.[47] The guidelines for officers determining applications explicitly recognise family violence:

> Family members in Canada, particularly spouses, who are in abusive relationships and are not permanent residents or Canadian citizens, may feel compelled to stay in the relationship or abusive situation to remain in Canada; this could put them in a situation of hardship.
>
> Officers should be sensitive to situations where the spouse (or other family member) of a Canadian citizen or permanent resident leaves an abusive situation and, as a result, does not have an approved sponsorship.
>
> Officers should consider the following factors:
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> - information indicating there was abuse such as police incident reports, charges; or
> - convictions, reports from shelters for abused women, medical reports;
> - whether there is a degree of establishment in Canada;
> - the hardship that would result if the applicant had to leave Canada;
> - the laws, customs and culture in the applicant's country of origin;
> - the support of relatives and friends in the applicant's home country; and
> - whether the applicant has a child in Canada or/and is pregnant.[48]

21.40 Family violence is one of a number of factors to be considered in a 'Humanitarian and Compassionate' application, and the existence of family violence does not give an applicant the automatic right to permanent residence. Factors that must be considered when determining 'hardship' include, but are not limited to: establishment in and ties to Canada; the best interests of any child involved; health considerations; consequences of the separation of relatives; and factors in the applicant's country of origin.[49]

21.41 Similar to the US, there are no specific evidentiary requirements spelled out in the guidelines or legislation. Rather, the Immigration Guidelines state that the onus is on the applicant to put forth any 'Humanitarian and Compassionate' factors that he or she believes are relevant to the case, and 'to be clear in the submission as to exactly what hardship they would face'.[50]

21.42 The *Immigration Guidelines* also recognise that effective decision making in 'Humanitarian and Compassionate' cases involves 'striking a balance between certainty and consistency on the one hand and flexibility to deal with the specific facts of the case, on the other'.[51] As such, the guidelines specifically note that legislation,

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47 Immigration and Citizenship Canada, *IP 5: Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds* (2011), 12.7.
48 Ibid.
49 Ibid, 5.11.
50 Ibid, 5.7.
51 Ibid, 5.5.

policy statements, guidelines, and manuals and handbooks may legitimately influence decision makers in their work.[52]

United Kingdom

21.43 Persons seeking permanent residence in the UK on the basis of a marriage or civil partnership with a UK sponsor are—in a manner similar to Australia—subjected to a two-year temporary visa period.[53] Under the *Immigration Rules* (UK), victims of family violence may seek 'indefinite leave to remain' in the UK if, among other things, they are able to produce evidence, as required by the Secretary of State, that 'the relationship was caused to permanently break down before the end of that period as a result of domestic violence'.[54] There are no prescriptions on the type of evidence that may be presented.

21.44 Under the *Immigration Directorate Instructions* (the Instructions), visa decision makers have considerable discretion in assessing whether the relationship has broken down as a result of family violence. The Instructions provide guidance on the relevant types of evidence that an applicant may present and the appropriate weight to be given to each. For example, the Instructions provide that two types of evidence should be sufficient, of themselves, to establish family violence: a relevant court conviction against the sponsor; or full details of a relevant police caution issued against the sponsor.[55]

21.45 A criminal conviction is considered indisputable evidence that family violence has occurred.[56] Where the criminal case is pending, the visa decision maker is to consider evidence from both parties, and make a separate assessment of the application.[57] In relation to police cautions, the visa decision maker is directed to call the relevant police station to confirm whether a caution has been issued. If confirmed, it may provide evidence that the applicant has suffered family violence.[58]

21.46 In the absence of the above forms of evidence, applicants may provide as many pieces of evidence as possible to support their case. The Instructions set out a non-exhaustive list providing that such evidence can include:

- a medical report from a hospital doctor confirming that the applicant has injuries consistent with being a victim of domestic violence;
- a letter from a General Medical Council registered family practitioner who has examined the applicant and is satisfied that the applicant has injuries consistent with being a victim of domestic violence;

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52 Ibid, 5.6.
53 *Immigration Rules 1994* (UK) reg 287(a).
54 Ibid reg 289A(iv). Definition of 'indefinite leave' is taken to mean permanent residence. See UK Border Agency, *Partners* (2011) <www.ukba.homeoffice.gov.uk/partnersandfamilies/partners/> at 13 July 2011.
55 UK Border Agency, *Immigration Directorate Instructions* (2011), ch 8 section 4, [2.1].
56 Ibid, [3.1].
57 Ibid, [3.1.1].
58 Ibid, [3.2].

- an undertaking given to a court that the perpetrator of the violence will not approach the applicant who is the victim of violence;
- a police report confirming attendance at an incident resulting from domestic violence;
- a letter from a social services department confirming its involvement in connection with domestic violence;
- a letter of support or a report from a domestic violence support organisation.[59]

21.47 While the Instructions are comprehensive, they are not determinative, since 'any evidence of domestic violence should be considered by caseworkers when making a decision'.[60] The Instructions recognise that

> caseworkers might find they are required to make the kind of judgment normally undertaken by other professional bodies, they may also find that they have to consider the validity and authenticity of documents provided by the applicant. In view of this, caseworkers should seek advice from their senior case worker and/or other relevant bodies when assessing an application.[61]

New Zealand

21.48 Under the immigration instructions titled 'Residence policy for victims of domestic violence', victims of family violence can apply for permanent residence and have their claims assessed by a departmental officer.[62] Domestic violence applications are given priority processing, and are determined by immigration officers who have received specialist training in applying the policy.[63]

21.49 Under the immigration instructions, evidence of domestic violence means:

- a final protection order against the New Zealand citizen or resident partner or intended partner under the Domestic Violence Act 1995 (NZ); or
- a relevant New Zealand conviction of the New Zealand citizen or resident partner or intended partner of a domestic violence offence against the principal applicant or a dependent child of the principal applicant; or
- a complaint of domestic violence against the principal applicant or a dependent child investigated by the New Zealand police, where New Zealand police are satisfied that domestic violence has occurred; or

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59 Ibid, [2.3].
60 Ibid, [2].
61 Ibid.
62 Immigration New Zealand, *Operations Manual* (2011), S 4.5.20.
63 Ibid, S 4.5.25.

- a statutory declaration from the applicant stating that domestic violence has occurred and declarations completed by persons competent to make statutory declarations that domestic violence occurred.[64]

21.50 The Instructions list persons who are 'competent' to make a statutory declaration that domestic violence has occurred. Similar to the Australian system, such persons include social workers, doctors, nurses, psychologists, counsellors, and experienced staff members of approved women's refuges.[65]

21.51 The Instructions provide that immigration officers can verify that the competent persons have made statutory declarations by contacting the relevant professional bodies.[66]

The Australian system

21.52 In *Equality Before the Law*, the ALRC recommended that the family violence exception should extend to cases where evidence is obtained from community and welfare workers, medical and legal practitioners, and other suitable third parties.[67]

21.53 Following the ALRC's recommendation, the *Migration Regulations* were amended to allow for non-judicially determined evidence of family violence to include:

- a joint undertaking made by the alleged victim and alleged perpetrator in relation to proceedings in which an allegation is before the court that the alleged perpetrator has committed an act of violence against the alleged victim;[68]
- a police record of assault along with two statutory declarations—one from the alleged victim, plus a statutory declaration made by a competent person;[69] or
- three statutory declarations—a statutory declaration from the alleged victim, plus two statutory declarations by two differently qualified 'competent persons'.[70]

21.54 'Competent persons' who may give a statutory declaration for the purpose of a non-judicially determined claim include: medical practitioners; registered psychologists; registered nurses; social workers; family consultants under the *Family Law Act*; a manager or coordinator of a women's refuge; a manager or coordinator of a crisis or counselling service that specialises in family violence; or a person in a

64 Ibid, S 4.5.5.
65 Ibid, S 4.5.6. The instructions also provide that statutory declarations cannot be from competent persons who are from the same profession.
66 Ibid, S 4.5.6 (c).
67 Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 1)*, Report 69 (1994), Rec 10.2.
68 *Migration Regulations 1994* (Cth) reg 1.23(8).
69 Ibid regs 1.23(9), 1.24(1)(a).
70 Ibid regs 1.24(1)(b), 1.24(2).

position that involves decision-making responsibility for a women's refuge or a crisis and counselling service that specialises in family violence.[71]

21.55 Where the alleged victim is a child, a 'competent person' can also be an officer of the child welfare or child protection authorities of a state or territory.[72]

21.56 Statutory declarations by competent persons must: set out the basis of the person's claim to be a competent person; state that in their opinion the applicant has suffered 'relevant family violence'; name the person who committed the family violence; and set out the evidence on which the person's opinion is based.[73] The statutory declaration of a competent person can be provided on a standard form—called Form 1040—which can be accessed from DIAC's website.[74]

21.57 As noted above, if the visa decision maker is not satisfied that the alleged victim has suffered 'relevant family violence' on the basis of non-judicially determined evidence, the matter must be referred to a DHS (Centrelink) independent expert for assessment. The visa decision maker must take as correct the opinion of the independent expert.

A new model

21.58 The ALRC recommends a new model for non-judicially determined claims of family violence, in which applicants can—in addition to statutory declarations from competent persons—submit any other evidence in making a valid non-judicially determined claim of family violence. The ALRC also recommends the repeal of reg 1.26 of the *Migration Regulations* governing the form of statutory declarations. Further, PAM should be amended to reflect that evidence other than from competent persons is relevant and should be given weight as is appropriate in the circumstances of the individual applicant. The current processes for referral to an independent expert would remain available where a visa decision maker is not satisfied on the evidence that an applicant has suffered family violence.

21.59 The net effect of the ALRC's recommendation is a model that is simple to administer, accessible to victims of family violence, and provides for robust scrutiny of evidence by building upon moves towards specialisation within DIAC.

No prescriptions on types of evidence that can be presented

21.60 Many overseas jurisdictions do not limit the types of evidence that can be submitted in support of a family violence claim. There are a number of reasons why this approach should be adopted in Australia.

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71 Ibid reg 1.21(1)(a).
72 Ibid reg 1.21(1)(b).
73 Ibid regs 1.26(a)–(g).
74 Department of Immigration and Citizenship, *Form 1040: Statutory Declaration Relating to Family Violence* (2009) <www.immi.gov.au/allforms/pdf/1040.pdf> at 20 July 2011.

21.61 First, accessibility would be improved because an applicant's claim would no longer hinge on whether or not he or she can access 'competent persons'. This addresses stakeholder concerns that the limited range of professionals deemed 'competent' under the *Migration Regulations* represents a barrier to access for those who cannot speak English and are socially isolated; who lack financial resources; or who live in remote and regional areas.[75]

21.62 Secondly, allowing other evidence to be adduced not only creates a wider pool of evidence but, in some instances, better quality evidence. For example, stakeholders suggested that victims from CALD communities are more likely to disclose to bi-lingual workers—who are often the first point of contact for victims in their communities—than to competent persons with whom they may not have an ongoing relationship.[76] The ALRC's model reflects the position that there are other people, beyond 'competent persons' who are also capable of providing corroborative evidence in support of a person's family violence claim.

21.63 DIAC acknowledged this, and suggested that one option to reduce dependence on competent persons would be to broaden the non-judicial evidentiary requirements to include 'medical evidence, police reports, findings from other government agencies or witness statements'.[77] It was envisaged that 'such documents could be weighted according to their credibility and relevance'.[78]

21.64 Stakeholders supported the option to expand the range of competent persons to include: bi lingual workers;[79] counsellors and case managers in family violence services;[80] English as a second language (ESL) teacher;[81] and lawyers.[82] DIAC suggested that the list of competent persons could be expanded 'to include marriage counsellors where both parties have attended counselling'.[83]

21.65 The ALRC considers that expanding the range of competent persons does not go far enough in ensuring flexibility and accessibility for victims of family violence. There are good policy reasons to retain the current list of 'competent persons' in its current form. As DIAC noted in its submission, 'competent persons' reflect a range of professionals who 'are expected to have expertise in family violence and who can provide credible and corroborative evidence to the Department'.[84] Expanding the range of 'competent persons' to other groups of people may blur this distinction and reduce the integrity of the competent person regime. It is worth noting that the words

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75 RILC, *Submission CFV 129*; IARC, *Submission CFV 149*; ANU Migration Law Program, *Submission CFV 79*; Visa Lawyers Australia, *Submission CFV 76*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 33* WEAVE, *Submission CFV 31*.

76 Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*. This point was also made by stakeholders in a number of consultations conducted by the ALRC.

77 DIAC, *Submission CFV 121*.

78 Ibid.

79 Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*.

80 Ibid.

81 Good Shepherd Australia New Zealand, *Submission CFV 41*.

82 Ibid.

83 DIAC, *Submission CFV 121*.

84 Ibid.

'competent' and 'opinion' in the *Migration Regulations* reflect that such persons have some degree of expertise in understanding family violence due to their profession or due to their position in a family-violence related field.

21.66 Increased flexibility could also be achieved by the ALRC's proposal to amend the *Migration Regulations* to provide that visa decision makers can contact competent persons to amend minor errors or omissions.[85] However, the ALRC agrees with DIAC that such an amendment 'would call into question how far this duty should extend and risks case law developing in a way that would be hard for the Department to administer'.[86] The ALRC's recommendations are aimed at improving simplicity of the system, rather than making it more burdensome and complex.

Removing prescriptive requirements

21.67 While there is utility in keeping the list of 'competent persons', removing the prescriptive requirements surrounding the statutory declaration of such persons in reg 1.26 is a necessary reform. The repeal of the provision will remove the risk that claims are held invalid based on 'technicalities'. The rigidity of the statutory declaration requirement was cited by stakeholders to be a substantial barrier to access of the family violence exception.[87] This general concern was reflected in the submission from Visa Lawyers Australia:

> The current legislative scheme places too much emphasis on the applicant to provide evidence in a certain form and too little emphasis on DIAC officers considering the evidence. The scheme seems to have created a checklist style assessment of the evidence, which allows for very little discretion and therefore limits the amount of in-depth consideration DIAC officers are required to perform. We believe the current system provides little room for flexibility, which ultimately limits the effectiveness of the scheme.[88]

21.68 Removing the prescriptive requirements will also address a number of unintended consequences. For example, stakeholders suggested that it is not uncommon for victims to have to go back to 'competent persons' numerous times to have forms amended in order to meet the strict statutory declaration requirements. Repeated visits to competent persons, who are professionals with limited time, have financial implications for victims, many of whom may be suffering from economic abuse.[89] DIAC noted with concern that

> Some clients applying to be granted a visa under the family violence provisions in Division 1.5 of the *Regulations* appear to be paying significant amounts of money to either migration agents or competent persons to assist with their claims.[90]

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85 Australian Law Reform Commission, *Family Violence and Commonwealth Laws*, Discussion Paper 76 (2011), Proposal 21–5.

86 DIAC, *Submission CFV 121*.

87 Visa Lawyers Australia, *Submission CFV 76*; Law Institute of Victoria, *Submission CFV 74*; AASW (Qld), *Submission CFV 38*; Good Shepherd Australia New Zealand, *Submission CFV 41* RAILS, *Submission CFV 34*; IARC, *Submission CFV 32*; WEAVE, *Submission CFV 31*.

88 Visa Lawyers Australia, *Submission CFV 76*.

89 DIAC, *Submission CFV 121*; IARC, *Submission CFV 32*; ADFVC, *Submission CFV 26*.

90 DIAC, *Submission CFV 121*.

21.69 Reduced visits to 'competent persons' may also reduce the number of times a person has to re-disclose traumatic experiences of family violence.

21.70 The ALRC acknowledges that the prescriptive requirements play an important role in ensuring that statutory declaration evidence is robust. The removal of these requirements from the *Regulations* can be offset by—as discussed below—moves towards specialisation and targeted training and education for decision makers. The ALRC agrees with DIAC that documents could be weighted according to their credibility and relevance. The ALRC recommends that PAM should be amended to reflect that evidence other from competent persons may be relevant, and is entitled to weight as is considered appropriate in the circumstances of the individual concerned. Guidance should reflect the position that all evidence submitted may be relevant, rather than providing another 'checklist' or hierarchy of evidence that must be strictly followed.

21.71 For example, while it may be reasonable to assume that a statutory declaration from a 'competent person' should be given more weight than a statement from someone who is not a professional, this should not be a blanket rule. Rather, the totality of the evidence should be considered, taking into account the circumstances of the individual. The ALRC notes that visa decision makers, in other areas of migration law, are routinely required to weigh evidence and make a decision in relation to credibility. This mirrors the position taken in the United Kingdom where such guidance is given to decision makers.

Leveraging specialisation

21.72 Expanding the range of available evidence will place an extra burden on decision makers. However, this also provides opportunities to build upon existing moves towards specialisation within DIAC, with benefits to both the Department and victims of family violence. DIAC submitted that one option for reform could include:

> creating a dedicated processing centre for family violence processing in which staff can be trained and develop expertise in assessing family violence claims. This may be practical if the family violence provisions are extended to a wider range of visa classes, however, the Department has already seen benefits from centralising processing of all family violence claims made during processing of permanent visa applications in a single team.[91]

21.73 The ALRC considers that such moves towards specialisation will better equip visa decision makers with the ability to consider family violence evidence, provide some level of consistency and uniformity in the approach to family violence within DIAC, as well as provide a basis for targeted education and training.[92]

21.74 Specialisation may also bring benefits in terms of quicker resolution of claims, and reduce the need for merits and judicial review. This would help address the

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91 Ibid.

92 The ALRC makes recommendations about training and education for visa decision makers in Ch 20.

concerns of some stakeholders that family violence claims require expedited review processes.[93]

Retaining independent experts

21.75 Given the way in which the *Migration Regulations* are currently structured, applicants may have an expectation that where statutory evidence is presented in the required form, the claim should succeed. There was agreement among stakeholders that the referral procedures to an independent expert lacked transparency and do not comply with the basic rules of procedural fairness, particularly because visa decision makers in practice do not give reasons for referring the matter.[94]

21.76 Stakeholders supported the proposal that visa decision makers should have to give reasons for referral to an independent expert.[95] Nigel Dobbie submitted that, despite the requirement in the *Migration Regulations* to reach a state of non-satisfaction,

> the delegates do not give, in applications that I have been involved with, reasons for their state of non-satisfaction, despite the required evidence being given ... being the provision of the statutory declaration or declarations from competent persons.[96]

21.77 Other stakeholders expressed similar concerns that applicants were being referred unnecessarily—or as a matter of routine—even in cases where the 'the statutory declarations have been of sufficiently high quality'.[97] The ANU Migration Law Program expressed a view that the independent expert process

> remains an area open to policy manipulation and anecdotal evidence supports trends in referral rates from DIAC officers on particular case demographics. For example it is standard practice for DIAC officers to refer cases where men are the victim of family violence to an independent expert, regardless of the evidence or competent persons documentation provided.[98]

21.78 In contrast, DIAC and the MRT argued that there is no need to give reasons for referral, since referral is not the final decision, but rather a step in the process.[99] DIAC stressed that

> a referral to an independent expert is a process of evidence collection that forms the basis of a decision ... To require decision makers to explain and seek comment on

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93 IARC, *Submission CFV 149*.

94 N Dobbie, *Submission CFV 163*. See also ANU Migration Law Program, *Submission CFV 79*; National Legal Aid, *Submission CFV 75*; Visa Lawyers Australia, *Submission CFV 76*; AASW (Qld), *Submission CFV 38*; RAILS, *Submission CFV 34*.

95 National Legal Aid, *Submission CFV 164*; N Dobbie, *Submission CFV 163*; RAILS, *Submission CFV 160*; Migration Institute of Australia, *Submission CFV 148*; ANU Migration Law Program, *Submission CFV 79*; Visa Lawyers Australia, *Submission CFV 76*; Good Shepherd Australia New Zealand, *Submission CFV 41*.

96 N Dobbie, *Submission CFV 163*.

97 RAILS, *Submission CFV 160*. See also ANU Migration Law Program, *Submission CFV 159*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*.

98 ANU Migration Law Program, *Submission CFV 159*.

99 DIAC, *Submission CFV 121*; Principal Member of the Migration and Refugee Review Tribunals, *Submission CFV 29*.

> both a decision to refer and the outcomes of that referral would be cumbersome and potentially result in duplicate processes.[100]

21.79 The ALRC considers that the question of whether evidence is provided is the manner required should be separated from whether that evidence can satisfy the visa decision maker that family violence has occurred. Visa decision makers are not experts in family violence, and that requiring visa decision makers to give reasons for referral —where this is not the final step in the decision making process—may be cumbersome and result in 'duplicate' processes, rather than a simpler system.

Consistency of independent expert assessments

21.80 There was general concern expressed among stakeholders that independent expert assessments lacked consistency and transparency. Stakeholders pointed to examples where the independent expert:

- had not applied the correct definition of relevant family violence;[101]
- conducted investigations on specific matters rather than confining their assessment to whether or not the victim had suffered family violence;[102] and
- held views and attitudes that are contrary to the well-being and protection of victims of family violence.[103]

21.81 RAILS submitted that, in its experience 'the quality of the process and assessment by the independent expert varies greatly from person to person' with 'very little consistency in their approach'.[104] The Australian Domestic and Family Violence Clearinghouse (ADFVC) was concerned that 'there is no clear criteria that must be met by independent experts with respect to training, experience and supervision'.[105]

21.82 The concerns about inconsistency in decision making may be alleviated as a result of a number of recommendations in this Report. The adoption of a uniform definition of family violence across the different legislative schemes and targeted training in relation to the nature, features and dynamics of family violence should result in more consistent decision-making by 'independent experts'. As noted in Chapter 3, because the definition of 'relevant family violence' is different to the definition of 'family violence', this results in some confusion among independent experts when assessing family violence claims.[106] In Chapter 4, the ALRC makes recommendations that Centrelink social workers (who are independent experts) should receive training and education, including in relation to the nature, features and dynamics of family violence.[107]

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100 RILC, *Submission CFV 129*.
101 ANU Migration Law Program, *Submission CFV 159*.
102 RILC, *Submission CFV 129*.
103 WEAVE, *Submission CFV 31*.
104 RILC, *Submission CFV 129*.
105 ADFVC, *Submission CFV 26*.
106 See also *Al-Momani v Minister for Immigration and Citizenship* [2011] FMCA 453.
107 Rec 4–5.

21.83 Further, the expansion of the range of evidence that can be considered by the visa decision maker should also translate to better evidence before an 'independent expert' when a matter is referred. This should have positive impact on the ability to independent experts to make good decisions.

21.84 The ALRC also notes that the creation of a statutory mechanism for merits review of independent expert decisions, while preferable, has the potential to create a burdensome and complex system that is not easily administered. This would go against the ALRC's intention to create a simpler system.

Independent experts: merits review and procedural fairness

21.85 In the Discussion Paper, the ALRC proposed that the *Migration Regulations* be amended to require independent experts to give applicants statements of reasons for their decisions, and to provide for review of independent expert decisions.[108]

21.86 A number of stakeholders supported these proposals. RAILS submitted that the ability to have an independent expert review was essential because

> the independent expert holds enormous power ... yet the process undertaken by the independent expert is not subject to any scrutiny, they are not required to provide reasons for their decisions, and there is no process for seeking a review of their assessment, other than the expensive and limited provision for judicial review.[109]

21.87 DIAC did not consider statutory amendments to provide for merits review of independent expert decisions necessary, given that applicants have a right to appeal to the MRT. Current practice is that 'a summary of the decision of the independent expert's assessment is provided to the applicant for comment' before a decision is made on the case.[110] If new information is provided by an applicant, the decision maker can refer the matter back to the independent expert for review of the original decision. However, review is not a right, but is at the discretion of the visa decision maker.

21.88 DIAC submitted that the full record of the independent expert's opinion is not given because, in some circumstances, there is information that cannot be passed to the applicant because it has been provided confidentially to the independent expert or to DIAC by a third party. In such circumstances, 'it may be difficult to provide even the gist of the information without revealing the source'.[111] However, it was noted that, typically

> The reasons provided to the applicant do provide an indication of the information which has shaped the independent expert's opinion and the way in which the different pieces of information has been weighed.[112]

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108 Australian Law Reform Commission, *Family Violence and Commonwealth Laws*, Discussion Paper 76 (2011), Proposal 21–7, 21–8.
109 RAILS, *Submission CFV 160*; RAILS, *Submission CFV 34*.
110 DIAC, *Submission CFV 121*.
111 Ibid.
112 Ibid.

21.89 The scope of the duty of procedural fairness owed by independent experts and visa decision makers to an applicant has been subject to recent judicial consideration.

21.90 In *Maman v Minister for Immigration and Citizenship*, Raphael FM found that the independent expert owed procedural fairness obligations to an applicant to disclose the contents of a letter written to the independent expert from the sponsor that was adverse the applicant's claims.[113] The Federal Magistrate Court also found that the MRT, when assessing whether an independent expert decision was properly made, must consider whether procedural fairness obligations were afforded to the applicant by the independent expert, and where it is found not so, refer such matter back to the independent expert to avoid jurisdictional error.[114] In its submission, DIAC expressed an intention to appeal this decision to 'clarify the scope of the duty', but would not challenge the conclusion that a 'duty of procedural fairness exists'.[115]

21.91 However, in *Al-Monami v Minister for Immigration and Citizenship*, the court considered that, due to the procedural fairness obligations owed to an applicant by the MRT, this 'relieves an independent expert from following a like procedure for the purposes of preparing the report'.[116] Driver FM agreed with Raphael FM that there are circumstances in which the MRT is obliged to refer back to an independent expert matters raised by an applicant in response to any summary of the independent expert's findings given to the applicant pursuant to s 359A of the *Migration Act*. Driver FM indicated that such instances may include circumstances where:

> a) the report is based on information that the applicant was not shown by the independent expert or had an opportunity to comment upon to the independent expert and, if he had had that opportunity, the report might be different; or
>
> b) the matters raised by the applicant in responding to the invitation to comment about the report cast doubt upon the validly of the report such that the Tribunal could not be satisfied that it was bound by the report.[117]

21.92 DIAC submitted that it was 'open to suggestions for improving the decision summary to ensure that family violence applicants gain a better understanding of how their case was assessed and decided, while protecting confidential information, where necessary'.[118] The ALRC welcomes this, and notes that DIAC may wish to work with DHS to consider how this could be achieved.

21.93 Given the ongoing judicial consideration around this issue, and DIAC's intention to challenge the decision in *Maman* to clarify the scope of any procedural fairness obligations,[119] the ALRC makes no recommendations in relation to the procedural fairness obligations of the independent expert. However, the ALRC considers it vitally important that victims of family violence are afforded procedural fairness by independent experts by the maximum extent possible, including being

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113 *Maman v Minister for Immigration and Citizenship* [2011] FMCA 426, [3].
114 Ibid.
115 DIAC, *Submission CFV 121*.
116 *Al-Momani v Minister for Immigration and Citizenship* [2011] FMCA 453, [47].
117 Ibid, [50].
118 DIAC, *Submission CFV 121*.
119 Ibid.

given reasons for the decisions. The ALRC notes that any such clarification by the courts should be reflected in PAM to the extent that it affects visa decision makers.

Recommendation 21–3 The Australian Government should amend the *Migration Regulations 1994* (Cth) to provide that an applicant can submit any form of evidence to support a non-judicially determined claim of family violence.

Recommendation 21–4 The Australian Government should repeal reg 1.26 of the *Migration Regulations 1994* (Cth) relating to the requirements for a valid statutory declaration from a competent person.

Recommendation 21–5 The Department of Immigration and Citizenship should amend its *Procedures Advice Manual 3 Guidelines* to provide that evidence other than from competent person:

(a) may be relevant to a non-judicially determined claim of family violence; and

(b) is entitled to weight as is appropriate in the circumstances of the individual concerned.

Independent expert panel

21.94 An alternative for reform of the non-judicially determined claim of family violence is the establishment of an independent expert panel. While the ALRC flagged this as the preferred option in the Discussion Paper,[120] stakeholders were cautious in supporting such a reform without further consideration of a number of issues.

21.95 The ALRC makes no recommendations for the establishment of an independent expert panel; however, the ALRC considers that the idea has some merit. The section below canvasses the issues to be considered if an independent expert panel is to be pursued.

Parallels with the health assessment regime

21.96 In the Discussion Paper, the ALRC envisaged that an independent expert panel scheme could operate in a manner similar to the arrangements in place for health assessments required for all visas.[121]

120 Australian Law Reform Commission, *Family Violence and Commonwealth Laws*, Discussion Paper 76 (2011), 734.

121 Ibid, 732.

21.97 All permanent visa applicants are required to meet health requirements.[122] Applicants are asked to undergo a medical examination, an X-ray, and a HIV/AIDS test (if 15 years of age or older). The Minister must—subject to some exceptions—seek the opinion of a Medical Officer of the Commonwealth (MOC) as to whether the health requirement has been met.[123] A MOC is a medical practitioner who has been appointed in writing by the Minister for the purposes of the *Migration Regulations*.[124] Where the matter is referred to an MOC for his or her opinion, the Minister must take as correct an opinion for the purposes of deciding whether the person meets a requirement or satisfies a criterion.[125] In some cases, the health requirement may be waived, but cannot be waived where the applicant is assessed as representing a risk to public health or safety in Australia.

21.98 Depending on the type of visa application lodged, the applicant may have review rights. In such circumstances, the applicant is able to submit further medical evidence for review by to a Review MOC (RMOC).[126] The RMOC is able to:

- set aside and refuse the decision and substitute a new decision; or
- affirm the Department's original decision; or
- refer the case back to the Department for further consideration.[127]

21.99 Therefore, under the current framework, the role of the visa decision maker is limited to assessing whether or not the MOC or RMOC has applied the legislation correctly, and the visa decision maker takes no part in assessing the health of the applicant.

Improved consistency, simplicity and quality of decision making

21.100 Stakeholders saw substantial benefits in replacing the competent person regime with an independent expert panel scheme similar to that used for health assessments, including: greater accessibility for victims; quality and consistent decision making by experts; improved transparency and accountability; and opportunities for

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122 It is a criterion for most visa classes that the applicant meets health related public interest criteria (PIC). These are provided for in sch 4 to the *Migration Regulations 1994* (Cth) in PICs 4005, 4007 and 4006A. Section 60 of the *Migration Act 1958* (Cth) provides that the Minister may grant or refuse the visa depending on whether he or she is satisfied that the applicant meets the health criteria. Section 496 enables the Minister or a delegate to delegate the decision-making power to another person. Consequently, the task of examining the health criteria is delegated to medical officers of the Commonwealth. This power is also contained in reg 1.16 which provides that the Minister, 'may by writing signed by the Minister, delegate to an officer any of the Minister's power under these Regulations, other than this power of delegation'.

123 See *Migration Regulations 1994* (Cth) reg 2.25A(1). Under reg 1.16A the Minister may in writing appoint a medical practitioner to be a MOC for the purposes of the *Migration Regulations*.

124 Ibid reg 1.03 defines a MOC as 'a medical practitioner employed or engaged by the Australian government'.

125 Ibid reg 2.25A(3).

126 Department of Immigration and Citizenship, *Form 1071i: Health Requirement for Permanent Entry to Australia* (2011), 2.

127 Ibid, 2.

targeted training and education.[128] For example, the Law Institute of Victoria submitted:

> Repeal of the competent person provisions would provide an opportunity for quality control, to ensure that only reputable professionals in the area of family violence make assessments about whether family violence has occurred. An improved independent expert scheme must, however, be more transparent and accountable than under the current provisions.[129]

21.101 DIAC submitted that an independent expert scheme could, if well designed, provide for simplicity in evidentiary requirements, and consistency in decision making. DIAC agreed that

> there is scope to undertake a review of the current arrangements in relation to the assessment of non-judicially determined claims. The model of health assessment noted in the Discussion Paper may be one way of simplifying the evidentiary requirements for non-judicial claims of family violence while maintaining the rigour in the decision making process.[130]

Avoiding pitfalls of the medical assessment regime

21.102 The Townsville Community and Legal Centre (TCLC) provided cautious support the panel scheme so long as avoided 'the pitfalls of the MOC regime'.[131] In its view, 'there is too much to be critical of the MOC regime' from the view of applicants.[132] The TCLC pointed to the *Inquiry into Migration Treatment of Disability*, conducted the Joint Committee on Migration.[133] The Committee catalogued a number of criticisms of the current MOC system, including that:

- MOC decisions tend to be inconsistent and do not apply guidelines sufficiently and stringently;[134]
- MOCs are required to weigh considerations beyond their expertise such as a disease's 'significant cost to the Australian community';[135] and
- MOC decisions are often difficult to review and lack transparency.[136]

21.103 In order to improve the transparency and consistency of decision making, the Committee recommended that DIAC make available the 'Notes for Guidance' used by

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128 National Legal Aid, *Submission CFV 164*; Law Institute of Victoria, *Submission CFV 157*; IARC, *Submission CFV 149*; Migration Institute of Australia, *Submission CFV 148*; DIAC, *Submission CFV 121*; Law Institute of Victoria, *Submission CFV 74*; Visa Lawyers Australia, *Submission CFV 76*;

129 Law Institute of Victoria, *Submission CFV 74*.

130 DIAC, Submission CFV 121.

131 Townsville Community Legal Service, *Submission CFV 151*.

132 Ibid.

133 Joint Standing Committee on Migration–Parliament of Australia, *Enabling Australia: Inquiry into the Migration Treatment of Disability* (2010).

134 Ibid, [4.13].

135 Ibid, [3.5.2].

136 Ibid, [4.68].

MOCs on its website and provide each applicant with a breakdown of their assessed costs associated with diseases or conditions under the Health Requirement.[137]

A well-designed system

21.104 Stakeholders stressed the importance of having a well-designed system, and noted that a number of important matters would need to be resolved, including: who should comprise the panel; responsibility for its administration; and what assurances could be provided that it would be comprised of people with extensive experience in family violence.[138] RAILS submitted that 'the timeliness of the assessments by the Independent Panel is a critical issue',[139] as time delays and having to recall traumatic experiences with detrimental impact to a person's health and well-being. The Migration Institute of Australia submitted that 'the composition of any such panel would be fundamental of its success'.[140] DIAC suggested that a national organisation 'which employs appropriate professionals could conduct interviews nationally and provide reports to visa decision makers'.[141]

21.105 Another possibility is for the Australian Government to appoint professionals to the panel based on their experience and expertise in dealing with family violence claims.

21.106 In light of the above concerns, the IARC submitted that 'more detail and analysis is required before the Commission makes its recommendation'.[142] The ALRC that an independent expert panel would need to be appropriately designed to avoid the pitfalls of the MOC regime. In particular, there should be a number of desirable outcomes of an independent expert panel.

21.107 First, an independent expert panel scheme should simplify the procedural requirements and increase accessibility to visa applicants who experience family violence. An expert panel scheme would enable the removal of existing strict procedural requirements and allow victims to present a wide range of evidence to the decision makers, including evidence from those persons to whom a victim may more readily disclose family violence. This outcome was supported by stakeholders and mirrors the position taken in the UK and other overseas jurisdictions where, in the absence of judicially determined evidence, applicants are encouraged to present as many pieces of evidence as possible to support their claim. It also has the benefit of streamlining the system, by reducing the number of times a person may have to re-tell their often traumatic experiences of family violence.

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137 Ibid, Recommendation 5.
138 RAILS, *Submission CFV 160*; IARC, *Submission CFV 149*; Migration Institute of Australia, *Submission CFV 148*.
139 RAILS, *Submission CFV 160*.
140 Migration Institute of Australia, *Submission CFV 148*.
141 DIAC, *Submission CFV 121*.
142 IARC, *Submission CFV 149*.

21.108 Secondly, an independent expert panel scheme should be underpinned by targeted training and education in relation to the nature, features and dynamics of family violence for those experts appointed to the panel.[143] This would provide a measure of assurance to victims that their claims will be assessed by professionals with specialist understanding of family violence. This would arguably lead to more consistent decision making and, ultimately, help to protect the safety of victims of family violence.

21.109 Thirdly, the expert panel scheme should provide for transparency and appropriate review mechanisms. The *Migration Regulations* could provide that a decision maker must take as correct an opinion of the independent panel assessor, as is the case with health assessments. However, in review applications, where there is new evidence or where significant time has elapsed, a review opinion from a different panel member could be sought. Reasons for decisions should be provided to the applicant.

21.110 Lastly, access to an independent panel scheme should be free for applicants seeking to access the family violence provisions, given that many victims lack financial resources. Such a scheme would have financial implications. However, these may be offset in the long run if consistent decision making leads to lower rates of merits or judicial review. Further, quicker access to the family violence provisions for genuine victims will improve their safety and reduce dependence on social and other services that would otherwise be needed.

143 See Ch 20, Rec 20–5 where the ALRC recommends that training and education in relation to the nature, features and dynamics of family violence be provided for decision makers in the migration system.