18 May 2011

By email
The Executive Director
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001

Dear Executive Director

SUBMISSIONS ADDRESSING FAMILY VIOLENCE AND COMMONWEALTH LAWS: IMMIGRATION ISSUES PAPER 37 (IP 37) MARCH 2011

We write with regard to the above issues paper to provide our comments on some of the points raised. Ultimately, we agree that the provisions in the Migration Regulations 1994, which have been created to protect sufferers of family violence, should be amended to ensure that they operate more effectively and offer the protection they are intended to provide.

We respectfully submit that the current scheme is complex and interpreted strictly, which makes it difficult for genuine applicants to demonstrate they have suffered family violence, in particular where they have not had the matter heard by a court. We submit that the scheme could be improved by introducing a more flexible approach to decision-making by the Department of Immigration and Citizenship (DIAC), thus providing a more balanced approach to the assessment process, which currently places too great an evidentiary burden on the applicant.

We also agree that preventative measures could be introduced into the spouse visa application process to preclude violent offenders from sponsoring migrants to enter Australia as their partners.

We have made specific comments below in relation to these issues.

Question 1 & 2

We agree that references to “relevant family violence” and “reasonable fear” in the definition of family violence provided in the Migration Regulations 1994 may no longer be appropriate given their inconsistency with other definitions of family violence provided in Commonwealth laws. It would certainly be more efficient, cost effective and less traumatic for victims who are involved in more than one court proceeding as a result of family violence suffered, to be able to prepare evidence that could be used in all forums, rather than having to tailor evidence to satisfy the individual requirements of each forum.

Despite our comments above, it is our experience that the current definition of family violence contained in the Migration Regulations operates well enough in practice. It should
be remembered that the definition of family violence in the Migration Regulations has been developed for the purpose of determining the victim’s right to a visa despite the breakdown of the intimate relationship on which the visa application was based, rather than to establish all the details of the perpetrator’s behavior per se.

The ALRC’s proposed definition of family violence shifts the focus from the victim’s personal experience of family violence to an itemized list of perpetrator behavior, which has the potential to place undue emphasis on evidence of perpetrator behavior which may be difficult for the victim to provide. If changes to the definition of family violence are introduced then we respectfully submit that consideration needs to be given to whether the new definition will place an onerous evidentiary burden on the applicant.

Question 3 & 4

We agree that the provisions with respect to family violence should be extended to applicants who have arrived in Australia on a Prospective Marriage Visa (“sc300 visa holders”) but have not married their sponsor. It is inconsistent with the purpose of the legislation to deny these visa holders access to the family violence provisions when they are potentially even more vulnerable than other partner visa migrants. As the sc300 is only granted for a period of 9 months, such visa holders will have had very little opportunity to develop any sort of support network within Australia, are less likely to speak fluent English and will have had less opportunity to find work by which they could independently support themselves. Furthermore, although it is a requirement that a sc300 visa applicant has previously met their sponsor in person, they are less likely to have lived with their sponsor and/or been exposed to their violent behavior until after the visa holder’s arrival in Australia.

We assume that the exclusion of sc300 visa holders from the family violence provisions is justified on the basis that they have not shown their commitment to remaining in Australia by marrying their Australian spouse. However for grant of a Prospective Marriage Visa DIAC has had to accept that the visa applicant has a genuine intention to marry their partner once they arrive in Australia. The genuineness of this intention can be further confirmed by the person’s travel to Australia and the contact they have with their Australia fiancé once they are in Australia. Evidence of this could be provided with any application an unmarried sc300 visa holder makes for a spouse visa under the family violence provisions. Opening the Partner Visa subclass 820 to unmarried sc300 visa holders cannot harm the integrity of the family violence scheme, given the extensive safeguards already in place to determine whether family violence has occurred.

For greater consistency, and to protect potentially the most vulnerable group of partner visa migrants, we respectfully submit that the family violence provisions should be extended to sc300 visa holders who have entered Australia but have not yet married their Australian spouse.

We do not believe other categories of visa applicants should have access to the family violence provisions unless certain conditions apply, such as:

1) The victim of family violence is dependent on the perpetrator’s visa to remain lawfully in Australia; AND
2) The couple’s relationship is a “long-term relationship”, as per the definition in the Migration Regulations 1994;
3) The couple have been lawfully resident in Australia for a minimum period of time, say 2 years; AND
4) The couple have:
   (i) submitted a permanent visa application; OR
   (ii) have children who are:
       A. studying full time, or
       B. despite the family violence which has occurred, the parents will share parental responsibilities, as evidenced by a court order or other formal arrangement between the two parties.

In the case of (4)(ii), we would suggest that any temporary visa that is granted be granted with the same visa expiry date as the main visa holder’s visa.

To ensure that all family violence sufferers are captured by the family violence provisions in the Migration Regulations we respectfully submit that where a visa holder who has suffered family violence in accordance with the Migration Regulations definition, is not eligible to apply for a visa through either the partner visa scheme or through the type of scheme outlined above, it should be open to them to make an appeal to the Minister through the ministerial intervention provisions at section 351 of the Migration Act 1958, even though a decision to refuse a visa application has not been made. Such an exception could be created for family violence sufferers leaving it to the Minister’s discretion to consider the particular facts of the case to determine whether the victim should be entitled to a further temporary, or a permanent, stay. Perhaps a new onshore visa category could be created for this purpose.

**Question 5**

We agree that victims of family violence face difficulties in having their claims judicially determined. Migrants are more likely to be unfamiliar with court processes and face language and cultural barriers which make it difficult for them to access the Australian legal system. In addition, testifying in court about violence in their relationship is confronting, traumatic and potentially places them at an increased risk of further violent attacks from their partner.

The Migration Regulations accept most forms of judicially determined claims of family violence without question as such evidence is considered to be the most reliable form of evidence that family violence has occurred. This is not surprising as such evidence has been tested in a court of law, and it makes no sense for an assessing officer at DIAC to question the veracity of such evidence. However the legislation as it stands goes a long way to addressing the difficulties faced by applicants using the courts to address their experience of family violence by offering an alternative way of proving family violence through the non-judicially determined pathway. We do not believe that any changes to acceptance of judicially determined evidence by DIAC is necessary.

**Question 6**

Question 6 raises two separate issues: one related to timing of the family violence protection order, and the other related to timing of the actual family violence. We deal with these separately below.
It is important to note that the plain meaning of the relevant *Migration Regulations* referred to, is that claims of family violence will only be considered by DIAC if it occurred while the partner relationship existed. While there is clearly a reference in the *Regulations* to the timing of the actual violence, there is no reference to the timing of the judicial procedure relating to the claim. We regard any interpretation of these provisions to mean that injunctions, court orders and convictions obtained after a relationship has ceased but referring to violence during the relationship as legally incorrect.

Given the plain meaning of the *Migration Regulations* in this regard, in our view it is the DIAC policy (Procedures Advice Manual 3) that should be amended to explicitly state that the *Regulations* provide only for consideration of the timing of family violence that was the subject of a judicially-determined claim, and not the date of the judicial procedure itself.

Where the injunction, court order or conviction refers only to incidents after the cessation of the relationship, it should be noted that it is still open to the applicant to use non-judicially determined evidence to substantiate their claim of family violence during the duration of the relationship.

The second issue raised is whether the timing requirement should be preserved at all. That is, whether a person who suffers family violence only after their relationship has ended should also be included within the family violence provisions.

In situations where a relationship between an Australian and a migrant breaks down before a permanent visa has been granted and without occurrence of family violence, the migrant is no longer entitled to remain in Australia on their partner visa and must move onto another visa or leave. The migrant would or should be aware of this when they end their relationship with their Australian spouse.

If the relationship ends and at some point afterwards violence occurs, it is difficult to say whether this should suddenly entitle the migrant to a permanent visa. We consider that there are likely to be cases where these circumstances would warrant granting a visa under family violence provisions. Especially having regard to how long the couple were separated before the violence occurred, the nature of the violence, and the person’s ongoing ties to Australia now that the relationship has broken down.

For this reason, we submit there should be some flexibility for DIAC case officers to deal with such a situation. This could take the form of an exception contained in each of the relevant Regulations providing for consideration of family violence that occurred after the breakdown of the relationship, but only in exceptional circumstances.

Alternatively, it may be more appropriate that an application to the Minister be made in such circumstances rather than trying to carve out a specific exception. We regard either of these approaches as allowing for the flexibility and consideration of individual facts and circumstances which are required.

**Question 7 & 8**

We agree that the provisions governing the statutory declaration evidence of competent persons in the *Migration Regulations* are too strict and need to be amended to enable a more discretionary approach on the part of DIAC decision makers. The provisions are currently drafted and applied so strictly that a genuine claimant may be refused because the
evidence has not been provided in the correct form. We respectfully submit that minor errors should not be fatal to the statutory evidence of competent persons.

While it is important to ensure that the scheme is applied consistently there needs to be scope in the legislation for DIAC officers to seek further evidence where the competent witness evidence has not been provided in the correct form. We agree that to dismiss such evidence is a “triumph of form over substance” and undermines the purpose of the legislation.

Question 9

We do not believe that it is inappropriate for competent witnesses to identify who the applicant identified as their attacker. The requirement that competent persons identify the perpetrator of the violence in their statements may seem superficial given that it is second-hand evidence, but we believe it serves a useful purpose. While the competent witness is essentially providing hearsay evidence, recounting who the applicant identified as their attacker, provides the decision-maker with corroborative evidence, which serves to show narrative consistency and goes to the applicant’s credibility. The prejudice to the sponsor of accepting hearsay evidence does not arise in this context as there are no direct or immediate repercussions for the perpetrator if a finding is made that family violence has occurred.

We respectfully submit that the law should be amended so that a failure on the part of a competent witness to identify the perpetrator is not fatal to the validity of the evidence provided. Whether or not the competent witness has identified the perpetrator in their statement should determine the weight the evidence is given in the decision maker’s considerations rather than go to its validity.

Question 10

We are unaware of what training competent witnesses receive in relation to family violence. It is however evident from our dealings with competent witnesses that they are not familiar with the provisions in the Migration Regulations and require guidance when preparing their statutory declaration evidence to ensure that it satisfies the legislative requirements. This is of particular concern for unrepresented applicants who rely on non-judicially determined claims, as they will be relying on their own reading of the legislation and the ability of the competent witnesses to comply with the statutory requirements.

We understand that there is a need to maintain the integrity of the system but we do not see the justification for including such rigidities in the form of evidence competent persons provide. If a competent witness has provided evidence and has failed in some respect to comply with the legislative requirements it is unclear why DIAC officers should not have the power to go back to the competent person and seek further evidence from them, especially if this is in relation to something which could easily be provided such as evidence of credentials.

While further training of competent persons may assist in enabling them to satisfy the current legislative requirements, a less rigid approach to the form in which their evidence is provided, would allow the substance of their evidence to serve its proper purpose.
We wish to express a general concern that 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 considerations DIAC officers are required to perform. We believe the current system leaves little room for flexibility, which ultimately limits the effectiveness of the scheme. We believe DIAC officers should have more discretion to seek further evidence where a case requires it.

Question 11

We respectfully submit that the decision-maker should be required, as a matter of procedural fairness, to furnish the applicant with reasons for their referral of the matter to an independent expert. As the independent expert’s assessment is automatically taken to be correct, and the applicant is given no further opportunity to provide evidence to the DIAC decision-maker, applicants should be entitled to know the deficiencies in the evidence already provided before they are assessed by the independent expert.

We do not know what issues may arise in relation to the suitability of the independent experts used as the process is not transparent and no information is given about the qualifications of the expert. This information should form part of the reasons for decision which are given to the applicant by the independent expert once they have finalized their assessment.

We think it critical to the integrity of decision making and the independent assessment process, that the applicant is given reasons for the independent expert’s decision and is made aware of the expert’s credentials to provide the assessment. Failing to provide this information automatically, means applicants cannot easily discover why their application may have been refused, which can make it harder to make a successful appeal.

By releasing the independent expert’s assessment, representatives assisting in these matters will have a better understanding of the independent assessment process and be in a better position to advise their clients should the need for an independent assessment arise. It will also enable an independent assessment to be challenged in appropriate circumstances.

Question 12

The independent expert’s opinion should not automatically be deemed correct. Although there are obvious resource justifications for ending the process with the independent expert’s opinion, it is risky to rely on one opinion and give it ultimate determinative power, especially when the applicant is not provided with reasons for their decision.

In our experience, the process of assessment with the independent expert is generally a one-off meeting with the applicant over the space of 1-3 hours. In that setting the independent expert is expected to obtain a candid and full account of the applicant’s experience of family violence. It is well documented that people suffering from trauma have difficulty recounting their experiences coherently, and may need a number of sessions with a health professional before they will be comfortable recounting such personal information. This combined with the stress caused by the importance of the occasion, and the risk of not striking a rapport with the expert may result in an unsatisfactory meeting, leading to a negative assessment.
It is of concern that an assessment undertaken in such circumstances is used to ultimately determine whether someone has suffered family violence. We believe that it should be possible to have the independent expert’s opinion reviewed to ensure integrity of the process.

**Question 13**

It has been our experience that some applicants making non-judicially determined claims face great difficulties in obtaining evidence from competent persons. Where competent persons are willing to provide evidence they generally need to be guided in detail through the preparation of their statutory declaration and provision of credentials to ensure that they meet all the legislative requirements. This is time consuming since often competent persons have limited time to assist and do not understand the need to ensure all the finer details are correct before their evidence will be acceptable to DIAC. Unrepresented applicants are unlikely to be aware of the significance of the form competent witness evidence needs to take and are less likely to insist that competent persons ensure that their evidence complies with the law. Unrepresented applicants are therefore at greater risk of providing evidence which DIAC will not accept.

The issue for other applicants is actually finding two suitable competent persons who are willing to provide evidence. In a recent case, an applicant in a regional area was unable to find two suitable competent persons who were willing to provide statements on her behalf. Despite the genuineness of her claim it took her months of searching to find health professionals willing to assist her. The applicant lived in a small town and her doctor, the only competent person she knew, refused to provide a statement because the perpetrator was known to her, and she did not wish to become involved. There were few other health professionals in the area and of those it took the applicant weeks to get into see them, where again they refused to assist her. In the end the applicant was forced to travel some distance from her home to find suitable competent witnesses. Each time the applicant was forced to recount her story and request assistance recreating the trauma for the applicant.

To avoid this type of situation, we respectfully submit that it would be useful to create a register or panel of competent persons who can provide evidence on behalf of applicants that they have suffered family violence. These people could be trained in the legislative requirements, and could be accessed only by referral from DIAC, where an applicant does not have access to two competent persons of their choosing. The panel of professionals could operate similarly to panel doctors used for medical examinations under the *Migration Act 1994*. This would alleviate the difficulties faced by applicants seeking access to competent persons in regional areas.

**Question 14(a)**

An alternative to the suggestion at Q13 above, of creating a panel of competent persons an applicant can use to obtain evidence of family violence, would be to enable an applicant to go directly to an independent expert for assessment. While such a referral would streamline the process the risk is that the single expert opinion continues to be provided in a manner that is not transparent and is not reviewable. We respectfully submit that direct referral to an independent assessor should not be introduced unless the applicant:

- Is given a copy of the expert’s opinion, and
- Is able to seek review of the opinion, and/or
- Can be referred to a second independent expert for assessment where the first expert does not make a positive finding.

**Question 14(b)**

We respectfully submit that the MRT should not be bound by an existing independent expert opinion unless that opinion provided a positive assessment. Since the independent expert’s opinion is generally taken to be correct it can be assumed that cases that have been appealed to the MRT are based on a negative expert assessment. To make the MRT bound by such an assessment from the expert would ensure that the appeal was doomed to fail.

**Question 16**

We believe that spouse visa sponsors should be required to provide police checks from all countries where they have lived for 12 months or more in the last ten years, just as the spouse visa applicant is required to do. A declaration from the sponsor on Form 40SP that they have not been found guilty of violent offences and have not committed any form of family violence should also be included on the form.

**Question 17**

We do not believe that any information obtained about the sponsor through the process outlined at Q16 above can be disclosed by DIAC to the applicant, as this would be in breach of privacy laws. While it may be possible for an additional statement on Form 40SP to be included whereby the sponsor agrees to permit DIAC to disclose information to the applicant, a more balanced approach may be to treat the sponsor’s character as part of DIAC’s decision as to whether to approve the sponsorship. The approval of sponsorship can then be one criterion of the spouse visa application.

Presently, there are no separate provisions in the *Migration Regulations* under which a person applies to become a sponsor of a family member. This means that sponsorship approval is dealt with as part of the visa approval process, treating the sponsor and visa applicants essentially as joint parties to the same application. One reform that in our view warrants consideration is the separation of sponsorship applications and visa applications into distinct legal provisions in the *Migration Regulations*. While approval of sponsorship would remain a criterion for grant of visa, distinct legal provisions dealing solely with family sponsorship applications would allow DIAC to treat the sponsor as a client distinct from the visa applicant. This is turn would assist DIAC in discussing character concerns (or any other issues that go to the eligibility of the sponsor) with the sponsor confidentially, and without the risk of disclosure to the visa applicant. Where it is evident that a sponsor has a violent past DIAC could be given the power to refuse sponsorship on the basis that the sponsor is not of good character. Such a decision, giving reasons for the decision, would need to be sent to the sponsor only, and a separate decision would also need to be sent to the applicant advising that the sponsorship had been refused.

We thank you for giving us the opportunity to make these comments and look forward to hearing your conclusions and recommendations as a result of this inquiry.
Yours faithfully,

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