

22. Refugee Law

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Summary

22.1 This chapter considers the position of asylum seekers who seek protection in Australia as refugees on the basis of having experienced family violence. While family violence claims can fall under the definition of a refugee as contained in the United Nations *Convention Relating to the Status of Refugees* (the Refugees Convention)—as incorporated into Australian law by the *Migration Act 1958* (Cth)—this remains a complex area of the law marked by inconsistent decision making.

22.2 The ALRC recommends that the Minister for Immigration and Citizenship should issue a direction under s 499 of the *Migration Act 1958* (Cth) in relation to family violence in refugee assessment determinations. Such a direction should refer to guidance material on family violence contained in the Department of Immigration and Citizenship’s (DIAC) *Gender Guidelines*.¹ The ALRC further recommends that the *Gender Guidelines* should be the subject of ongoing, comprehensive and periodic review.

22.3 The ALRC recommends that DIAC amend its instruction, *Ministerial Powers—Minister’s Guidelines—s 48A cases and requests for intervention under s 48B*, in the *Procedures Advice Manual 3* (PAM) to refer to secondary visa applicants who are the victims of family violence.

¹ Department of Immigration and Citizenship, *Procedures Advice Manual 3, Gender Guidelines: Assessing Gender-Related Claims* (2010).

22.4 These recommendations are intended to improve consistency in decision making, and to ensure that procedures allow for, and support victims in, making family violence claims under the Refugees Convention.

Refugee law in Australia

The Refugees Convention

22.5 Australia is a signatory to the Refugees Convention, the key international instrument that regulates the obligations of states to protect refugees fleeing from persecution.² Article 1A(2) defines a refugee as a person who,

owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

22.6 The *Migration Act* incorporates art 1A(2) into Australian domestic law, and gives effect to Australia's obligation of *non-refoulement*—not to return a person in any manner whatsoever to the frontiers of territories where the person's life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion.³ Section 36(2) provides for the grant of a protection visa to a 'non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol'.

22.7 The term 'persecuted' in art 1A(2) is qualified by s 91R(1) of the *Migration Act*, which provides that art 1A(2) does not apply, unless persecution for one or more of the Convention reasons is:

- the 'essential and significant reason(s), for the persecution'; and
- the persecution involves 'serious harm' to the person; and
- the persecution involves 'systematic and discriminatory conduct'.

22.8 A non-exhaustive list of instances of 'serious harm' is provided in s 91R(2) of the *Migration Act*, including:

- a threat to the person's life or liberty;
- significant physical harassment of the person;
- significant physical ill-treatment of the person;
- significant economic hardship that threatens the person's capacity to subsist; and
- denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.

2 *Convention Relating to the Status of Refugees*, 189 UNTS 151 (entered into force on 22 April 1954).

3 The principle of non-refoulement is enshrined in the Refugees Convention art 33.

22.9 The onshore component of Australia's Refugee and Humanitarian Program allows asylum seekers to apply for a protection visa.⁴ Primary refugee status assessments are made by a DIAC officer, as delegate of the Minister for Immigration and Citizenship. Unsuccessful applicants can seek merits review by the Refugee Review Tribunal (RRT) and, thereafter, judicial review by the courts. Under s 417 of the *Migration Act*, the Minister may personally consider and grant a visa on humanitarian grounds, if he or she considers it to be in the public interest.⁵ This personal intervention power is only exercisable by the Minister and only in cases where the applicant has exhausted all avenues of merits review.⁶

Family violence and the definition of a refugee

22.10 Applicants who make asylum claims based on family violence have faced difficulties meeting the definition of 'refugee' in art 1A(2) of the Refugees Convention—both internationally and in Australia. While it is generally accepted that instances of family violence can constitute 'serious harm', two compounding and interlinking factors have historically excluded victims of family violence from protection under the Refugees Convention. These are family violence claims in the context of gender-related persecution and the public/private dichotomy.

Gender-related claims and the public/private dichotomy

22.11 First, family violence claims have tended to exist within the wider context of gender-specific harm, including: sexual violence; forced marriage; female genital mutilation; and honour killings.⁷ These types of harms—generally experienced by women—are not afforded protection, because neither gender nor sex is an enumerated Convention ground. Therefore, courts have traditionally failed to consider whether such gender-related claims may fall under the ground of particular social group, or other Convention reasons.⁸

22.12 A more problematic distinction relates to the public/private dichotomy. As Anthea Roberts explained, the Refugees Convention is primarily aimed at protecting individuals from state or public forms of persecution, rather than intruding into the private realm of family life and personal activities.⁹

4 The requirements for a Protection Visa (Class XA) (Subclass 866) are found in the *Migration Regulations 1994* (Cth) sch 2.

5 *Migration Act 1958* (Cth) s 417(1) provides that 'the Minister may substitute for a decision of the Tribunal under s 415 another decision, being a decision that is more favourable to the applicant, whether or not the Tribunal had the power to make that other decision'.

6 *Ibid* s 417(3).

7 See A Roberts, 'Gender and Refugee Law' (2002) 22 *Australian Yearbook of International Law* 160, 164 where she draws a distinction between 'gender-specific harm' and 'gender-related claims'. Roberts also notes that, while men can also be victims of family violence, the majority of asylum claims on the basis of being victims of family violence are made by women.

8 H Crawley, *Refugees and Gender: Law and Process* (2001), 21–26, 79–90.

9 A Roberts, 'Gender and Refugee Law' (2002) 22 *Australian Yearbook of International Law* 160, 161.

22.13 This is most evident in the interpretation of the term ‘persecution’. The Refugees Convention contains no definition of ‘persecution’.¹⁰ However, the term is widely recognised as involving a certain relation between the individual and the state, whereby persecution occurs in the public sphere and the perpetrators are the state or its agents.¹¹

22.14 In *Applicant A v Minister for Immigration and Ethnic Affairs*, the High Court explained that:

Persecution by private individuals or groups does not by itself fall within the definition of refugee unless the State either encourages or appears to be powerless to prevent that private persecution. The object of the Convention is to provide refuge for those groups who, having lost the *de jure* or *de facto* protection of their governments, are unwilling to return to the countries of their nationality.¹²

22.15 As family violence tends to be perpetrated by non-state actors within private relationships, such claims have historically been construed as falling outside the bounds of the Refugees Convention, because the state cannot be implicated in the infliction of that harm.¹³

The role of state responsibility

22.16 The issue of state responsibility—in cases where the harm is inflicted by non-state actors for a non-Convention reason—was clarified by the landmark decision of the High Court in *Khawar*.¹⁴

22.17 In *Khawar*, the applicant, Ms Khawar, fled Pakistan to Australia with her three daughters, after years of escalating abuse from her husband and his family. She claimed asylum on the basis that the Pakistani authorities (the police) had systematically discriminated against her by failing to provide her protection and that this was tolerated and sanctioned by the state. Thus, it was argued her well-founded fear of persecution was based on the lack of state protection for reasons of her membership of a particular social group—‘women in Pakistan’.

22.18 The case was eventually appealed to the High Court, where Gleeson CJ defined the issues in dispute in the following terms:

The first issue is whether the failure of a country of nationality to provide protection against domestic violence to women, in circumstances where the motivation of the perpetrators of the violence is private, can result in persecution of the kind referred to in Art 1A(2) of the Convention.

10 Though as noted above, the term ‘persecution’ is qualified by s 91R of the *Migration Act 1958* (Cth) for the purposes of Australian law.

11 See, eg, C Yeo, ‘Agents of the State: When is an Official of the State an Agent of the State?’ (2003) 14 *International Journal of Refugee Law* 510, 510. The Convention grounds reflected the concerns of the drafters of the Convention to protect those fleeing state based persecution in the aftermath of World War II.

12 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225.

13 Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 1)*, Report 69 (1994), 243.

14 *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1.

The second issue is whether women or, for the present purposes, women in Pakistan may constitute a particular social group within the meaning of the Convention.¹⁵

22.19 In separate judgments, the majority answered both questions in the affirmative. Gleeson CJ held that persecution may result where the criminal conduct of private individuals is tolerated or condoned by the state in circumstances where the state has the duty to provide protection against harm.¹⁶

22.20 Kirby J adopted the formula, ‘Persecution = Serious Harm + The Failure of State Protection’,¹⁷ to find that it was: ‘sufficient that there is both a risk of serious harm to the applicant from human sources, and a failure on the part of the state to afford protection that is adequate to protect the human rights and dignity of the person concerned’.¹⁸ He considered that ‘persecution’ is a construct of these two separate but essential elements. McHugh and Gummow JJ found that ‘the persecution in question lies in the discriminatory inactivity of the State authorities in not responding to the violence of non-state actors’.¹⁹

22.21 Although the judgments took different approaches, the cumulative effect was that, where serious harm is inflicted by non-state actors for a non-Convention reason, the nexus to the Refugees Convention is met by the conduct of the state in withholding protection—in a selective and discriminatory manner—for a Convention ground.

22.22 On the issue of particular social group, McHugh and Gummow JJ held that the evidence supported a social group, that was, ‘at its narrowest, married women living in a household which did not include a male blood relation to whom the woman might look for protection against violence by members of the household’.²⁰ Gleeson CJ considered that it was open on the evidence to conclude that ‘women in Pakistan’ comprise a ‘particular social group’.²¹

Family violence claims post-*Khawar*

Legislative amendments

22.23 Section 91R(1) of the *Migration Act* requires the applicant to show that the Convention reason is ‘the essential and significant reason’ for the persecution.²²

22.24 Commentators have argued that s 91R has made it more difficult to sustain claims for protection on family violence grounds. Catherine Hunter argues that, in the context of gender-related claims, the ‘essential and significant’ requirement will mean

15 *Minister for Immigration & Multicultural Affairs v Khawar* (2002) 210 CLR 1, [5], [6].

16 *Ibid.*, [30].

17 *Ibid.*, [118] referring to *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629, 653; *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489, 515–516.

18 *Ibid.*, [115].

19 *Ibid.*, [87].

20 *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1, [85].

21 *Ibid.*, [32].

22 *Migration Act 1958* (Cth) s 91R(1)(a). See also Explanatory Memorandum, Migration Legislation Amendment Bill (No 6) 2001 (Cth), [19]. Section 91R was inserted due to government concerns that decisions such as *Khawar* had widened the application of the Refugees Convention ‘beyond the bounds intended’.

that decision makers are likely to focus on aspects other than gender—such as political opinion or religion—until gender-related decisions are no longer controversial.²³ This concern is echoed by Leanne McKay, who states that applicants have ‘difficulty articulating their claims in asylum terms that are assessable by decision makers due to shame or fear’²⁴ and, therefore,

due to the restrictive terminology of s 91R ... there is now a risk that certain Refugees Convention reasons may not be identified or adequately addressed, resulting in legitimate claims going unrecognised.²⁵

22.25 Others have criticised the definition of persecution under s 91R(2) of the *Migration Act* for its failure explicitly to recognise psychological harm as serious harm, and the impact that this may have for victims of sexual violence and abuse.²⁶ In particular, such victims can experience serious psychological trauma even where there are minimal physical injuries.²⁷ Another concern is that s 91R(2) makes no reference to the failure of state protection as being an element of persecution and thus appears to direct decision makers towards cases where persecution emanates from the state.²⁸

22.26 Throughout the Inquiry, stakeholders expressed concern that the definition of ‘serious harm’ under s 91R of the *Migration Act* did not specifically address the experiences of victims of family violence,²⁹ and called for amendments to s 91R specifically to recognise gender-based claims,³⁰ including that ‘serious harm’ may include family violence coupled with the lack of state protection.³¹

22.27 However, the ALRC considers that substantive amendments to the *Migration Act*, and s 91R are not necessary, since that section does not provide an exhaustive list of types of harm that may constitute ‘serious harm’. While s 91R does not expressly acknowledge psychological harm or the failure of state protection, the ALRC considers that this is a sufficiently well established in Australian law in light of the decision in

23 C Hunter, ‘Khawar and Migration Legislation Amendment Bill (No 6) 2001: Why narrowing the definition of a refugee discriminates against gender-related claims’ (2002) 8(1) *Australian Journal of Human Rights* 107.

24 L McKay, ‘Women Asylum Seekers in Australia: Discrimination and the Migration Legislation Amendment Act [No 6] 2001 (Cth)’ (2003) 4 *Melbourne Journal of International Law* 439, 459 referring to Department of Immigration and Multicultural Affairs, *Refugee and Humanitarian Visa Applicants: Guidelines On Gender Issues For Decision Makers* (1996).

25 L McKay, ‘Women Asylum Seekers in Australia: Discrimination and the Migration Legislation Amendment Act [No 6] 2001 (Cth)’ (2003) 4 *Melbourne Journal of International Law* 439, 459.

26 Ibid, 454.

27 H Crawley, *Refugees and Gender: Law and Process* (2001), 43; *UNHCR Guidelines on International Protection: Gender-related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees* (2002), UN Doc HCR/GIP/02/01.

28 L McKay, ‘Women Asylum Seekers in Australia: Discrimination and the Migration Legislation Amendment Act [No 6] 2001 (Cth)’ (2003) 4 *Melbourne Journal of International Law* 439, 459.

29 ANU Migration Law Program, *Submission CFV 79*; National Legal Aid, *Submission CFV 75*; Law Institute of Victoria, *Submission CFV 74*; Good Shepherd Australia New Zealand, *Submission CFV 41*; RAILS, *Submission CFV 34*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*; WEAVE, *Submission CFV 31*.

30 Law Institute of Victoria, *Submission CFV 74*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*; WEAVE, *Submission CFV 31*.

31 ANU Migration Law Program, *Submission CFV 79*; Good Shepherd Australia New Zealand, *Submission CFV 41*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*.

Khawar.³² The ALRC has concluded that problems arise not because of a lack of understanding that family violence claims may fall under the Convention, but in the application of the principles in *Khawar* as it relates to s 91R.

Complexity of gender-related cases

22.28 In addition to the barriers imposed by s 91R in relation to ‘serious harm’, subsequent cases post-*Khawar* suggests that the area remains complex and challenging for decision makers and applicants alike. In particular, findings of fact as to what comprises a ‘particular social group’ and whether the state has withdrawn protection for a Convention reason, require an in-depth understanding of the applicants’ claims and how it relates to country information.³³ Complex family violence claims are often intertwined with other Convention grounds, such as political opinion and religion, making it difficult to identify the nexus between the Convention reason and the harm feared.³⁴

22.29 Applicants face particular challenges in making claims with respect to a particular social group. For example, proving that a state is withdrawing or withholding protection for a Convention reason in a selective and discriminatory manner may be difficult for those who face language barriers, lack legal representation, or lack access to current country information.³⁵ Claims that define the particular social group too broadly risk a finding that the harm feared is not motivated by their membership of that particular social group. On the other hand, claims that define the particular social group too narrowly risk a finding that the group is impermissibly defined by the harm feared.³⁶

22.30 Decision makers also face challenges in making consistent decisions. The consideration of whether the applicant is a member of a particular social group is dependent on the cultural, legal, social and religious factors that must be properly understood. Decisions about whether a victim of family violence can access ‘effective state protection’ therefore depends on access to current and up-to-date country information. As Gleeson CJ emphasised in *Khawar*:

An Australian court or tribunal would need to be well-informed about the relevant facts and circumstances, including cultural conditions, before reaching a conclusion that what occurs in another country amounts to persecution by reason of the attitudes

³² See also, Migration and Refugee Review Tribunals, *Submission CFV 31*; RILC, *Submission CFV*.

³³ See, eg, *AZAAR v Minister for Immigration and Citizenship* (2009) 111 ALD 390; *NAIV v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 83 ALD 255; *SBBK v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 117 FCR 412.

³⁴ C Hunter, ‘*Khawar* and Migration Legislation Amendment Bill (No 6) 2001: Why narrowing the definition of a refugee discriminates against gender-related claims’ (2002) 8(1) *Australian Journal of Human Rights* 107.

³⁵ R Bacon and K Booth, ‘Persecution by Omission: Violence by Non-State Actors and the Role of the State under the Refugees Convention in *Minister for Immigration and Multicultural Affairs v Khawar*’ (2002) 24 *Sydney Law Review* 584, 600.

³⁶ Case law has established that the common characteristic of a ‘particular social group’ cannot be the harm feared. See eg, *Ibid*, 600, citing *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225.

of the authorities to the behaviour of private individuals; but if, after due care, such a conclusion is reached, then there is no reason for hesitating to give effect to it.³⁷

Improving consistency in decision-making

The usefulness of *Gender Guidelines*

22.31 The ALRC considers that DIAC's *Gender Guidelines* can play an important role in ensuring that the principle in *Khawar* is properly and consistently applied.³⁸ The ALRC recommends that the Minister for Immigration and Citizenship should issue a direction under s 499 in relation to the assessment of family violence claims in refugee cases, and that such a direction should refer to guidance material in the *Gender Guidelines*. The ALRC further recommends that *Guidelines* should be the subject of ongoing, comprehensive and periodic review.

22.32 Stakeholders pointed out that inconsistency in decision making in this area may derive from lack of sensitivity or knowledge in relation to gender-related claims, or a failure to properly consider the *Gender Guidelines*.³⁹ Stakeholders supported the proposal for the Minister to issue a direction under s 499 to require decision makers to have regard to the *Gender Guidelines* as a means of improving consistency in decision-making.⁴⁰

22.33 For example, the Refugee and Immigration Legal Centre (RILC) considered that a s 499 direction 'is a necessary, but not sufficient step in the effective processing of gender-based claims', and that the requirement to 'have regard' does not go far enough to ensure that current in-depth understanding of gender issues is maintained by officials that would translate in consistent decision making.⁴¹ The RILC agreed with the ALRC that the *Gender Guidelines* are particularly useful, but considered that they could benefit from further improvement and clarification, in particular, to:

give recognition that a woman's failure to conform with society's expectation of her may be interpreted as a threat to the power structures in that (patriarchal) society and that an adverse political opinion may be imputed; and

provide greater clarity around when any of the approaches [to determining a gender based particular social groups] should be used in order to create a principled approach to the issue which would allow for consistent decision-making.⁴²

37 *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1, [26].

38 In the Discussion Paper, the ALRC highlighted that the *Gender Guidelines* gave specific and detailed guidance on assessing gender-related claims, and the intersection between family violence and refugee law.

39 Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*. See, also The Asylum Seeker Resource Centre, *A Case For Justice: Position Paper on the Legal Process of Seeking Asylum in Australia* (2011).14.

40 National Legal Aid, *Submission CFV 164*; 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*; Migration Institute of Australia, *Submission CFV 148*; RILC, *Submission CFV 129*; WEAVE, *Submission CFV 106*.

41 RILC, *Submission CFV 129*.

42 *Ibid.*

22.34 It was also suggested that, in order for a s 499 direction to have meaningful effect, it is important that the *Gender Guidelines* ‘are subject to periodic and comprehensive review and revision where necessary to keep abreast international and domestic developments in gender claims’.⁴³

22.35 The Refugee and Casework Advice Service (RACS) cautioned that while a direction issued under s 499 may seem ‘reasonable and attractive at first sight’, it is not clear how effective this would be in practice, since the directions

are secondary law (not merely policy), they are limited in practice because they require only that a decision maker consider the directions made. How the weight of mandatory considerations is to be taken is a matter entirely dependent on individual decision makers.⁴⁴

22.36 The Law Institute of Victoria supported the intention of an s 499 direction but argued that ‘a better approach, however, may be to incorporate the *Gender Guidelines* into the Ministerial Direction’.⁴⁵

22.37 DIAC stressed that ‘protection visa decision makers and Protection Obligations Evaluation (POE) officers are already directed to a variety of guidelines, including *Gender Guidelines*, to inform refugee status determinations’.⁴⁶ As an alternative to the issuing of a s 499 direction, the Department suggested that:

An internal reminder should be issued to decision makers ... this reminder can provide guidance on what is covered in the *Gender Guidelines* and direct officers as to when they must have regard to this instruction.⁴⁷

Is there a need for a Ministerial Direction?

22.38 The policy issue is whether consistency in decision making is best achieved by leaving the guidance in the PAM—and issuing reminders to decision makers—or elevating the material therein to a direction under s 499 and making it a mandatory consideration. The ramifications of this distinction were articulated by the Federal Court in *El Ess v Minister for Immigration and Citizenship*:

PAM3 is not a binding document ... PAM3 is intended by its own terms to be nothing more than procedural and policy guidance to officers applying the *Migration Act* and the *Migration Regulations* ... PAM3 does not have the effect of a direction pursuant to s 499 of the *Migration Act*, which would bind a person or body having functions or powers under the *Migration Act* as to the performance of those functions or the exercise of those powers. Because the PAM3 guidelines are not binding on a decision-maker, they cannot be relevant considerations, in the sense of considerations that the decision-maker is bound by legislation to take into account.⁴⁸

43 Ibid.

44 Refugee Advice & Casework Service Inc, *Submission CFV 111*.

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

46 DIAC, *Submission CFV 121*.

47 Ibid.

48 *El Ess v Minister for Immigration and Multicultural Affairs* [2004] FCA 1038. See also *Xie v Minister for Immigration and Multicultural Affairs* [2000] FCA 230; *Soegianto v Minister for Immigration and Multicultural Affairs* [2001].

22.39 There are a number of reasons why a direction is preferred. First, the direction would serve an educative function for decision makers by acting as a constant reference point in the assessment of family violence claims. In a complex area of the law, the requirement for decision makers to constantly turn their mind to, and apply principles to different and nuanced cases of family violence and gender-based claims, should over time lead to greater consistency in decision making.

22.40 Second, such a direction would add a measure of transparency and integrity to the decision-making process, and engender public confidence in it. Decision makers must be able to demonstrate to applicants that the matters under the Direction have been properly considered, and a failure to do so leaves the decision open to challenge on the grounds that the decision maker failed to take into account a relevant consideration. The UNHCR has argued that, in relation to its *Gender Guidelines*, while states may issue separate guidelines or incorporate procedural safeguards into legislation, ‘in either case it is preferable that decision makers are required to use any guidelines that exist’.⁴⁹

22.41 Section 499 directions have created some pitfalls in other areas of migration law. For example, a direction under s 499 in relation to decisions about character assessments under s 501 of the *Migration Act* has been held unlawful because it ‘improperly fettered a Tribunal’s discretion’.⁵⁰ In another instance, a direction was lawful, but ‘unjust’ for because it omitted ‘considerations which supported the non-citizen remaining in Australia, such as arriving as a minor and length of resident’.⁵¹ The drafting of a direction in relation to family violence would need to be careful to avoid such pitfalls.

22.42 Consistency in decision making may also be improved as a result of the ALRC’s recommendations in Chapter 20 in relation to targeted education and training for visa decision makers.⁵² Such training and education should take into consideration the intersection between family violence and refugee law, and the application of any direction issued under s 499.

Recommendation 22–1 The Minister for Immigration and Citizenship should issue a direction under s 499 of the *Migration Act 1958* (Cth) in relation to family violence in refugee assessment determinations. Such a direction should refer to guidance material on family violence contained in the Department’s *Gender Guidelines*.

Recommendation 22–2 The Department of Immigration should ensure that the *Gender Guidelines* as they relate to family violence are subject to periodic and comprehensive review.

49 UNHCR, *Comparative Analysis of Gender Related Persecution in National Asylum Legislation and Practice in Europe* (2004), 22.

50 *Asku v Minister for Immigration and Citizenship* (2001) 65 ALD 667.

51 *Toro Martinez v Minister for Immigration & Citizenship* (2009) 177 FCR 337, 357-358.

52 Rec 20–5.

Secondary visa applicants for protection visas

22.43 The ALRC recommends that the instruction *Ministerial Powers— Ministers Guidelines—s 48A cases and requests for intervention under s 48B of the Act* be amended to take into account family violence claims. This recommendation, combined with the issuance of a Ministerial Direction under s 499 of the *Migration Act* in relation to family violence in refugee status determinations may negate the need for a second protection visa application to be made.

The interaction between s 48A and 48B

22.44 In the Discussion Paper, the ALRC highlighted that those secondary visa applicants who are subjected to family violence once in Australia, are not able to apply for another protection visa in their own right, due to a bar under s 48A of the *Migration Act*.⁵³ The Minister for Immigration and Citizenship has discretionary and non-compellable power under s 48B to waive the s 48A bar, taking into account the public interest.

22.45 An issue arises as to whether the bar under s 48A unduly impacts upon victims of family violence who may otherwise have a legitimate claim for refugee protection. The Refugee Advice and Casework Service (RACS) argued that while there were good policy reasons to give effect to s 48A—to prevent abuse by people in the same family unit who would otherwise take turns to seek a Protection Visa as a primary visa applicant⁵⁴—the legislature may not have considered the practical difficulties for victims of family violence under these circumstances.⁵⁵

22.46 DIAC submitted that s 48B is not intended to give individuals affected by circumstances not related to any of the five Refugees Convention grounds the opportunity to ‘lodge another Protection visa application’.⁵⁶ DIAC noted that because family violence is not one of the five Refugees Convention grounds it is not addressed by the instruction, *Ministerial Powers— Ministers Guidelines—s 48A cases and requests for intervention under s 48B of the Act*.⁵⁷

Is there a need to amend s 48A?

22.47 A number of stakeholders called for amendment to s 48A to allow secondary visa applicants who are the victims of family violence to be allowed to apply for a

53 *Migration Act 1958* (Cth) s 48A(1)(a), (b). Section 48A only applies where an application for a protection visa has been made, and the grant of the visa has been refused (whether or not the application has been finally determined). A decision is finally determined when either: a decision that has been made with respect to the application, is no longer subject to merits review; or a decision made with respect to application was subject to review but the period in which the review could be instituted has ended without a review having been instituted as prescribed.

54 See also Migration Legislation Amendment Bill (No 6) 2001 (Cth).

55 Refugee Advice & Casework Service Inc, *Submission CFV 111*.

56 DIAC, *Submission CFV 121*.

57 *Ibid*.

protection visa in their own right.⁵⁸ Some argued that a secondary visa applicant who separates from her husband for family violence reasons ‘may be at risk of harm upon return because of their husband’s activities but may not be able to speak to that risk without their husband as a primary applicant’, and thus may feel compelled to remain in the violent relationship.⁵⁹

22.48 Stakeholders expressed concern that Ministerial Intervention under s 48B can result in significant delays, and in some instances applicants face ‘great difficulty in convincing DIAC that it is an appropriate case for the Minister to invoke s 48B’.⁶⁰ It was argued that there is a ‘substantial backlog’ of applications contributing to delays that may adversely affect a victim’s ‘psychological well-being’.⁶¹ For example, the RACS submitted that the Minister’s power under s 48B is rarely exercised, such that

when family violence victims seek advice on refugee law in order to make an informed decision as to whether to leave the violent relationship ‘the uncertainty in her ability to re-apply for a Protection visa’ would seem to encourage her to remain in a violent relationship.⁶²

22.49 Further concerns were raised that a system that relies on the discretionary power of the Minister ‘can result in inconsistent decision making and lacks the safeguards that due legal processes can provide’.⁶³ The Refugee and Immigration Legal Centre (RILC) expressed concern that a substantial number of s 48B requests were finalised by Departmental staff, leaving ‘potentially large gaps in protection’, because ‘DIAC is refusing a large number of applications before they reach the Minister’.⁶⁴

22.50 RACS called for s 48A to be amended to allow victims of family violence to apply for a further protection visa under ‘prescribed circumstances’—being situations where a person would be caught by s 48A but who have since left the violent relationship due to family violence.⁶⁵ The RILC suggested that, if the ability to make a further visa application was legislated,

the decision about whether ‘jurisdiction’ triggering a further application could be made by a decision maker who is trained in refugee decision making, and who could even follow on to consider the refugee claim. This would allow for transparent decision-making, the amassment of precedent decisions on further visa applications, and more efficient processing.⁶⁶

58 RAILS, *Submission CFV 160*; Law Institute of Victoria, *Submission CFV 157*; Migration Institute of Australia, *Submission CFV 148*; RILC, *Submission CFV 129*; Refugee Advice & Casework Service Inc, *Submission CFV 111*; WEAVE, *Submission CFV 106*.

59 Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*. See also RAILS, *Submission CFV 160*; Law Institute of Victoria, *Submission CFV 157*.

60 RAILS, *Submission CFV 160*.

61 RILC, *Submission CFV 129*.

62 Refugee Advice & Casework Service Inc, *Submission CFV 111*.

63 RILC, *Submission CFV 129*.

64 The RILC highlighted that for the year 2010—2011, there was a total of 714 requests under s 48B. DIAC finalised 842 applications and 54 were finalised by the Minister.

65 Refugee Advice & Casework Service Inc, *Submission CFV 111*.

66 RILC, *Submission CFV 129*.

22.51 The ALRC recognises the legitimate policy aim of the s 48A bar is to ‘prevent members of families pursuing claims for protection one after the other—dragging on resolution of their status for years’.⁶⁷ Legislative amendments that would exempt secondary applicants, who are victims of family violence, from the bar to making a further protection visa application would result in a two tiered system. That is, legitimate questions may be raised about why secondary applicants would be able to apply for a further protection visa based on family violence claims, while others must attempt to access Ministerial Intervention under s 48B. The ALRC makes no recommendations to amend s 48A.

Amending guidelines

22.52 However, the ALRC considers that there is scope for improvement of DIAC’s Guidelines. The ALRC is particularly concerned that family violence is not mentioned in the guidelines on s 48B ministerial intervention because ‘family violence is not one of the five Convention grounds’.

22.53 There may well be instances—as stakeholders have argued—where a secondary visa applicant’s experiences of family violence in Australia may give rise to an independent claim of family violence under the Refugees Convention. For example, a victim may face harm from the primary visa applicant’s family if returned to the country of origin for having brought shame to the family name by ‘their unwillingness to submit’ to the primary visa applicant.⁶⁸ As noted above, if there is a real chance that a state withdraws protection to the secondary applicant on a Convention ground, this could give rise to a well founded fear of persecution.

22.54 The ALRC also considers that the safety of victims of family violence can be improved by measures that would support a secondary applicant making an independent protection visa claim based on family violence. There is nothing to prevent a secondary applicant from lodging a further protection visa application during primary consideration of the current (undecided) protection visa application.⁶⁹ The RILC highlighted that it was fundamental to ensure that claims are brought out during the protection visa process, since ‘a woman who is part of a family unit is often automatically considered to be the dependent of a principal male applicant’, and may ‘not be aware that she has an independent claim for protection’.⁷⁰ It was argued that

There should at least be the possibility of separate interviews for female family members ... Better management and support throughout the process may even prevent the need for recourse to a second protection visa application.⁷¹

67 Explanatory Memorandum, Migration Legislation Amendment Bill (No 6) 2001 (Cth).

68 See eg, RAILS, *Submission CFV 160*; IARC, *Submission CFV 32*.

69 The PAM 3 Guidelines suggest that in such an instance, ‘if the requirements in Regulations Schedule 1 are met, the further application is valid and should be considered concurrently with the existing application. The decision record provides for making a decision in respect of multiple applications.

70 RILC, *Submission CFV 129*.

71 *Ibid.*

22.55 The barriers to disclosure of family violence—noted in Chapter 1—may also lead secondary visa applicants not to disclose family violence when an application for a protection visa is made. If a Ministerial Direction is issued under s 499 of the *Migration Act* in relation to family violence in refugee status assessments—as the ALRC recommends—it could incorporate material in the *Gender Guidelines* to direct decision makers to consider any claims a secondary visa applicant may have in relation to family violence. For example, the ALRC notes that DIAC’s *Gender Guidelines* provide, usefully that in relation to women

There may be the shame of disclosing certain experiences such as having being raped and fears of how they might be perceived by an interpreter or decision maker. There may also be social and cultural barriers to lodging their applications or pursuing their own claims. In some cultures, it might be culturally inappropriate for women to be outspoken or to come forward with information.

...

The interviewing officer should ensure by careful questioning that all members of the family unit have been declared, and that all vital information pertinent to the application has been elicited.

...

The possibility of claims should be explored in respect of each family member to ensure a full picture is obtained.⁷²

22.56 An amendment to the instruction on the Minister’s power under s 48B, along with education and training around family violence issues and a ministerial direction under s 499 of the *Migration Act*, will improve practices and support secondary visa applicants in making independent claims for protection before the s 48A bar is triggered.⁷³

Recommendation 22–3 The Department of Immigration and Citizenship should amend its instruction *Ministerial Powers—Minister’s Guidelines—s 48A cases and requests for intervention under s 48B* in the *Procedures Advice Manual 3* to refer to secondary visa applicants who are the victims of family violence.

72 DIAC, *PAM 3: Gender Guidelines, Barriers Facing Female Applicants*.
73 Rec 20–5.