Australian Government
Australian Law Reform Commission

Family Violence and Commonwealth Laws

ISSUES PAPER

Immigration

You are invited to provide a submission or comment on this Issues Paper

ISSUES PAPER 37 (IP 37)
MARCH 2011

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Commission Reference: IP 37

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Making a submission

Making a Submission to the Inquiry

Any public contribution to an inquiry is called a submission. The Australian Law Reform Commission seeks submissions from a broad cross-section of the community, as well as from those with a special interest in a particular inquiry.

The closing date for submissions to this Issues Paper is 12 April 2011.

There are a range of ways to make a submission or comment on the proposals and questions posed in the Issues Paper. You may respond to as many or as few questions and proposals as you wish.

Online submission tool

The ALRC strongly encourages online submissions directly through the ALRC's website http://www.alrc.gov.au/inquiries/family-violence-and-commonwealth-laws/respond-issues-papers, where an online submission form will allow you to respond to individual questions. Once you have logged into the site, you will be able to save your work, edit your responses, and leave and re-enter the site as many times as you need to before lodging your final submission.

Further instructions are available on the site. If you have any difficulties using the online submission form, please email web@alrc.gov.au, or phone +61 2 8238 6333.

Alternatively, written submissions may be mailed, faxed or emailed to:

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Open inquiry policy

As submissions provide important evidence to each inquiry, it is common for the Commissions to draw upon the contents of submissions and quote from them or refer to them in publications. Non-confidential submissions are made available on the ALRC's website.

The Commission also accepts submissions made in confidence. Confidential submission will not be made public. Any request for access to a confidential submission is determined in accordance with the *Freedom of Information Act 1982* (Cth), which has provisions designed to protect sensitive information given in confidence.

In the absence of a clear indication that a submission is intended to be confidential, the Commission will treat the submission as non-confidential.

Family Violence—Immigration Law

Contents

The Inquiry

1. On 9 July 2010, the Attorney-General of Australia, the Hon Robert McClelland MP, asked the Australian Law Reform Commission (ALRC) to inquire and report on the treatment of family violence in Commonwealth laws, including child support and family assistance law, immigration law, employment law, social security law and superannuation law and privacy provisions in relation to those experiencing family violence.

2. The ALRC was requested to consider what, if any, improvements could be made to relevant legal frameworks to protect the safety of those experiencing family violence.[1]

1 The full Terms of Reference are available on the ALRC's website at <www.alrc.gov.au>.

3. In undertaking the Inquiry, the ALRC was asked to consider legislative arrangements across the Commonwealth that impact on those experiencing family violence and whether those arrangements impose barriers to supporting effectively those adversely affected by this type of violence. The ALRC was also asked to consider whether the extent of sharing of information across the Commonwealth and with state and territory agencies is appropriate to protect the safety of those experiencing family violence.

Issues Papers

4. To form one basis for consultation the ALRC is releasing a series of four Issues Papers covering the treatment of family violence in:

- child support and family assistance law;
- immigration law;
- employment and superannuation law; and
- social security law.

5. These Issues Papers are intended to encourage informed community participation in the Inquiry by providing some background information and highlighting the issues so far identified by the ALRC as relevant to the Inquiry. The Issues Papers may be downloaded free of charge from the ALRC's website, <www.alrc.gov.au>.

6. The Issues Papers will be followed by the publication of a Discussion Paper in mid–2011. The Discussion Paper will contain a more detailed treatment of the issues, and will indicate the ALRC's current thinking in the form of specific proposals for reform. The ALRC will then seek further submissions and will undertake a further round of national consultations in relation to these proposals.

Request for submissions

7. With the release of these Issues Papers, the ALRC invites individuals and organisations to make submissions in response to specific questions, or to any of the background material and analysis provided.

8. There is no specified format for submissions. The ALRC welcomes submissions, which may be made in writing, by email or using the ALRC's online submission form. Submissions made using the online submission form are preferred. Submissions will be published on the ALRC website, unless marked confidential. In the absence of a clear indication that a submission is intended to be confidential, the ALRC will treat the submission as non-confidential.

> Submissions using the ALRC's online submission form can be made at: <http://www.alrc.gov.au/inquiries/family-violence-and-commonwealth-laws/respond-issues-papers>.

In order to inform the content of the Discussion Paper, submissions addressing the questions in this Issues Paper should reach the ALRC by 12 April 2011.

Outline of Issues Paper

9. This Issues Paper, *Family Violence—Immigration Law* (IP 37), deals with the treatment of family violence in Commonwealth immigration law, namely under the:

- *Migration Act 1958* (Cth) (the Act); and
- *Migration Regulations 1994* (Cth) (the Regulations).

10. Although the Terms of Reference refer to 'immigration', this paper will use the term 'migration' to be consistent with the language of the Act and Regulations.

11. The 'family violence exception' contained in the Regulations is designed to ensure that visa applicants do not have to remain in violent relationships in order to obtain permanent residence in Australia.[2] The exception—which is invoked mainly in partner visa cases—provides for the grant of permanent residence to victims of family violence, notwithstanding the breakdown of the spousal or de facto relationship on which their migration status depends.

12. This paper begins with a brief overview of the partner visa scheme before addressing a number of issues surrounding the 'family violence exception' including: the appropriateness of the definition of 'relevant family violence'; evidentiary requirements for making a claim of family violence; sponsorship arrangements; and information sharing.

13. The second part of this paper considers the position of asylum seekers who seek refugee status in Australia as victims of family violence. It considers the current provisions in the Act and asks whether 'complementary' forms of protection are needed to protect victims of family violence whose claims may not fall under the United Nations *Convention Relating to the Status of Refugees* (Refugees Convention),[3] but who may need international protection.

Partner visa scheme

14. Partner visas allow non-citizens to enter and remain in Australia on the basis of their spousal or de facto relationship (opposite and same-sex) with an Australian

2 Provisions relating to family violence are found in pt 1 div 1.5 of the *Migration Regulations 1994* (Cth).

3 See *Migration Act 1958* (Cth) s 5 which defines the Refugees Convention as 'the Convention relating to the Status of Refugees done at Geneva on 28 July 1951'. See *Convention Relating to the Status of Refugees*, 189 UNTS 151, (entered into force on 22 April 1954).

citizen or permanent resident.[4] All applicants for a partner visa must be sponsored by an Australian citizen or permanent resident.[5]

15. Applications for partner visas are considered, in the first instance, by Department of Immigration and Citizenship (DIAC) officers. In the event of an unfavourable decision, applicants can apply for merits review of the visa decision to the Migration Review Tribunal (MRT).[6]

16. There is a three-stage process for people coming into Australia with the intention of marrying an Australian sponsor, and a two-stage process for those applying as a spouse or de facto partner of an Australian sponsor.[7]

The three-stage process

17. A non-citizen coming into Australia for the purpose of marrying an Australian sponsor can apply for a Prospective Marriage Visa (Subclass 300).[8] The visa allows the holder to enter and remain in Australia, for a nine-month period, within which the marriage must take place.[9] After the marriage, an application can be made for permanent residence on the basis of the spousal relationship via the two-stage process discussed below.

18. The three stages can be illustrated as follows:

Stage 1 ➔	**Stage 2 ➔**	**Stage 3**
Prospective Marriage Visa (Subclass 300)	Temporary Partner Visa (Subclass 820)	Permanent Partner Visa (Subclass 801)

The two-stage process

19. In all other instances—irrespective of whether the application is made onshore or offshore—a partner visa application is an application for both a temporary and permanent visa.[10] In the first stage, a temporary visa is granted for a period of two

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4 See, generally, Department of Immigration and Citizenship, *Fact Sheet 30: Family Stream Migration—Partners* (2010), <http://www.immi.gov.au/media/fact-sheets/30partners.htm> at 13 December 2010. 'Spouse' is defined in *Migration Act 1958* (Cth) s 5F and *Migration Regulations 1994* (Cth) reg 1.15A; and 'de facto partner' in *Migration Act 1958* (Cth) s 5CB, *Migration Regulations 1994* (Cth) regs 1.09A, 2.03A.

5 *Migration Regulations 1994* (Cth) reg 1.20(2)(a). The sponsor undertakes, among other things, to assist the applicant, to the extent necessary, financially and in relation to accommodation for a two year period.

6 *Migration Act 1958* (Cth) s 347.

7 See Immigration Advice and Rights Centre, *Domestic/Family Violence and Australian Immigration Law* (2009), 4–6 for a comprehensive outline of the different onshore and offshore categories, and the two-stage and three-stage visa processes.

8 *Migration Regulations 1994* (Cth) sch 2 cls 300.215, 300.216 require the applicant to establish that the parties genuinely intend to marry within the visa period and genuinely intend to live together as spouses.

9 Ibid sch 2 cl 300.511.

10 Applications are made at the same time and on the same form. See Department of Immigration and Citizenship, *Form 47SP—Application for Migration to Australia by a Partner* (2010), <http://www.immi.gov.au/allforms/pdf/47sp.pdf> at 13 December 2010. The definitions of temporary and permanent visas are set out in the *Migration Act 1958* (Cth) s 30.

years based on the relationship. After this 'probationary' period, the relationship is reassessed and a permanent visa can only be granted if, among other things, the relationship is assessed as 'genuine and continuing'.[11]

20. The two stages can be illustrated as follows:

Stage 1 (Temporary)	➔	**Stage 2** (Permanent)
Partner Visa (Subclass 820)– lodged onshore	➔	Partner Visa (Subclass 801)
Partner Visa (Subclass 309)– lodged offshore	➔	Partner Visa (Subclass 100)

21. All temporary partner visas, therefore, involve an assessment as to whether the relationship is 'genuine and continuing' at the time the application is lodged, and at the time of the decision to grant the visa. Permanent partner visas only involve an assessment as to whether the relationship is 'genuine and continuing' at the time of the decision to grant the visa.[12]

The family violence exception

22. The family violence exception was introduced to address 'community concerns that some migrants might remain in an abusive relationship because they believe they may be forced to leave Australia if they end the relationship'.[13]

23. In the partner visa context, the Regulations prescribe family violence as one of three exceptions to the requirement of a 'genuine and continuing' relationship.[14] The exception may be invoked by persons who have applied for permanent residence, but whose relationship has ended, *and* they, or a member of their family unit, has suffered 'relevant family violence' committed by the Australian sponsor.[15] In such cases, the visa applicant can still be considered for permanent residence.

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11 Permanent visas can be granted before the two year waiting period if, at the time of application, the relationship is of five years or more; or two years or more if there is a dependent child of the relationship.

12 See, eg, *Migration Regulations 1994* (Cth) sch 2 cls 100.21, 801.21.

13 Department of Immigration and Citizenship, *Fact Sheet 38: Family Violence Provisions* (2010), <http://www.immi.gov.au/media/fact-sheets/38domestic.htm> at 13 December 2010.

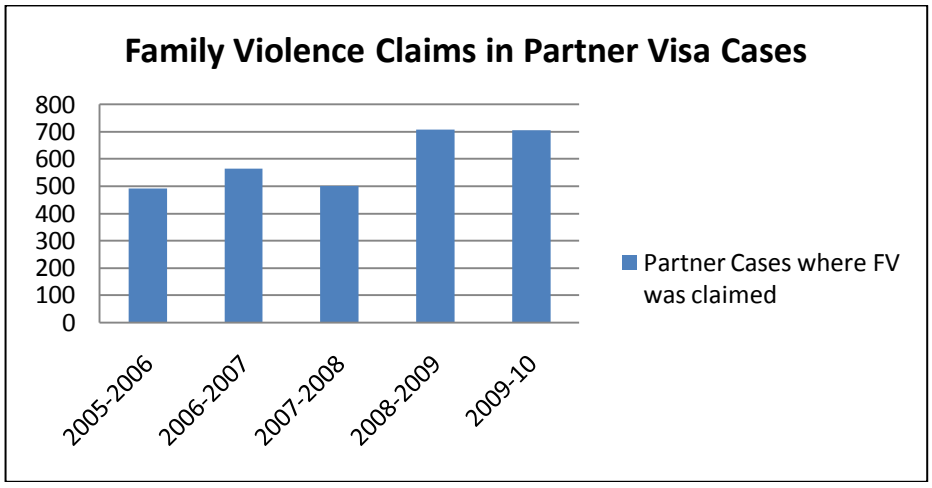
14 See, eg, *Migration Regulations 1994* (Cth) sch 2 cls 100.221(3)–(4). Other exceptions are where there the relationship has ceased and the sponsor has died; or where the relationship has ceased and there are children involved.

15 Department of Immigration and Citizenship, *Fact Sheet 38: Family Violence Provisions* (2010), <http://www.immi.gov.au/media/fact-sheets/38domestic.htm> at 13 December 2010.

24. The family violence exception can also be invoked in certain skilled stream (business) visa classes.[16] In those cases, the secondary visa applicant (partner of the primary visa applicant) can rely on the family violence exception if the relationship has ceased, and the secondary visa applicant, or a member of his or her family unit, has suffered family violence committed by the primary visa applicant.[17]

25. The Regulations set out, for each of the applicable visa subclasses, who can be an 'alleged victim' and 'alleged perpetrator' of family violence, and who can invoke the exception.[18]

26. DIAC statistics show that only a small percentage of partner visa cases involve family violence claims (see table below).[19] However, as family violence tends to be under-reported generally, and particularly in migrant communities, these numbers may not accurately reflect the extent of the problem.[20] Further, the ALRC understands that, in cases where the family violence exception was not claimed before a DIAC delegate, but made for the first time before the MRT, this is not recorded in the MRT's official statistics.[21]



Source: Data collected from Annual Reports of the Department of Immigration and Citizenship.

16 These are: Established Business in Australia (Subclass 845); State/Territory Sponsored Regional Established Business in Australia (Subclass 846); Labour Agreement (Subclass 855); Employer Nomination Scheme (Subclass 856); Regional Sponsored Migration Scheme (Subclass 857); and Distinguished Talent (Subclass 858).

17 See, eg, *Migration Regulations 1994* (Cth) sch 2 cl 846.321(3).

18 Ibid div 1.5 and sch 2.

19 For example, DIAC's Annual Report for 2009–10 shows that 44,755 partner visa applications were granted. Over the same period, only 705 applications with claims against the family violence provisions were made.

20 See, eg, P Easteal, 'Double Jeopardy: Violence Against Immigrant Women in the Home' (1996) 45 *Famly Matters* 26.

21 Sobet Haddad, Migration and Refugee Review Tribunals, *Consultation*, Sydney, 12 November 2010.

Definition of 'relevant family violence'

27. The Regulations define the term 'relevant family violence' to mean a reference to conduct, whether actual or threatened, towards:

> (a) the alleged victim; or
>
> (b) a member of the family unit of the alleged victim; or
>
> (c) a member of the family unit of the alleged perpetrator; or
>
> (d) the property of the alleged victim; or
>
> (e) the property of a member of the family unit of the alleged victim; or
>
> (f) the property of a member of the family unit of the alleged perpetrator;
>
> that causes the alleged victim to reasonably fear for, or to be reasonably apprehensive about, his or her own wellbeing or safety.[22]

28. This definition takes a similar approach to the definition of family violence in the *Family Law Act 1975* (Cth) in giving focus to the effect of the conduct on the victim, rather than categorising types of conduct.[23]

Judicial consideration of the term 'violence'

29. The term 'violence' is not defined by the Regulations, but it has been the subject of some judicial consideration. Early authorities on this issue took a broad view that violence was 'not meant to exclude instances where the damage suffered by the applicant was not wholly physical'.[24] However, in *Cakmak v Minister for Immigration and Citizenship*, the Full Federal Court commented that the term 'violence' was restricted to physical violence, and that things like belittling, lowering self esteem, 'emotional violence' or 'psychological violence' broadened the scope of the Regulations beyond their words.[25]

30. In *Sok v Minister for Immigration and Citizenship* the Full Federal Court, disapproved of these comments, holding that violence is not restricted to actual or threatened physical violence.[26] The court considered that 'domestic violence' is a term of art in contemporary Australia and, in the modern day context, is generally understood to encompass emotional abuse or economic deprivation.[27] A critical part of the courts' reasoning was that reg 1.23(2)(b) of the Regulations refers to violence that

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22 *Migration Regulations 1994* (Cth) reg 1.21(1).

23 *Migration Amendment Regulations (No 13) 2007* (Cth) reg 3 amended the definition and replaced the term 'domestic violence' with 'family violence'. The definition of 'relevant family violence' applies to all visa applications made on or after 15 October 2007.

24 See *Malik v Minister for Immigration and Multicultural Affairs* (2000) 98 FCR 291. This approach was also adopted in *Ibrahim v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1279; *Meroka v Minister for Immigration and Multicultural Affairs* (2002) 117 FCR 251

25 *Cakmak v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 135 FCR 183, [62].

26 *Sok v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 144 FCR 170.

27 Ibid, [24].

causes the victim to fear for his or her 'personal well-being or safety', and that personal well-being is generally considered to encompass psychological health.[28]

ALRC consideration of the term 'relevant family violence'

31. In *Family Violence: Improving Legal Frameworks*, ALRC CP 1, the ALRC and the New South Wales Law Reform Commission (NSWLRC) (the Commissions) foreshadowed these issues and asked how the definition of 'relevant family violence' in the Regulations was working in practice.[29] The Commissions flagged that the responses received would be used in this Inquiry.

32. In response, some stakeholders argued that the definition was not working well in practice.[30] Justice for Children attributed this to 'the attitudes of [judicial officers] that victims are only seeking permanent residence'.[31] The Magistrates' Court and Children's Court of Victoria submitted that it had 'little insight' into how the definition was working in practice, but acknowledged the practical reality that:

> Allegations are regularly made in family violence protection applications of threats to revoke visas or migration support, to 'send a person home' and respondents regularly suggest applicants have 'made up' allegations of family violence to circumvent the Regulations.[32]

33. Other stakeholders suggested that the current definition of 'relevant family violence':

- is too narrow and should be broadened to reflect current understandings of family violence, including having the reasonableness test removed;[33]
- should reflect the broader definition used in the Victorian family violence legislation, or align more generally with the definition in the *Family Law Act 1975* (Cth) and all state and territory definitions of family violence;[34]
- is problematic in its inclusion of the term 'relevant', as this is out of step with other state, territory and federal definitions of family violence, and appears to suggest that relevance of violence is determined according to culture.[35]

34. In the report, *Family Violence: A National Legal Response*, Report 114 (2010) (ALRC Report 114), the Commissions recommended the adoption of a common interpretative framework in relation to family violence across state and territory family violence legislation, the *Family Law Act* and, in limited instances, criminal law. The

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28 Ibid.
29 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: Improving Legal Frameworks*, ALRC Consultation Paper 1, NSWLRC Consultation Paper 9 (2010), Question 4–6.
30 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), 287.
31 Ibid.
32 Ibid.
33 Ibid, 288.
34 Ibid.
35 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010).

Commissions recommended that each legislative scheme should provide that family violence is:

> violent or threatening behaviour, or any other form of behaviour, that coerces or controls a family member or causes a family member to be fearful. Such behaviour may include but is not limited to:
>
> (a) physical violence;
>
> (b) sexual assault and other sexually abusive behaviour;
>
> (c) economic abuse:
>
> (d) emotional or psychological abuse;
>
> (e) stalking;
>
> (f) kidnapping or deprivation of liberty;
>
> (g) damage to property, irrespective of whether the victim owns the property;
>
> (h) causing injury or death to an animal irrespective of whether the victim owns the animal; and
>
> (i) behaviour by the person using the violence that causes a child to be exposed to the effects of behaviour referred to in (a)–(h) above.[36]

35. The Commissions considered that systemic benefits would flow from the adoption of a common interpretative framework, across different legislative schemes, promoting seamlessness and effectiveness in proceedings involving family violence.[37] A particular benefit of a common understanding of family violence relates to the gathering of evidence of family violence for use in more than one set of proceedings. This may be helpful to victims of family violence who may engage with other systems—in addition to migration—that deal with or involve a consideration of family violence.

36. The ALRC is interested in stakeholder experiences with respect to the definition of 'relevant family violence' in the migration context. Further, the ALRC welcomes comments on whether the Regulations should be amended to insert a definition consistent with that recommended in ALRC Report 114.

Question 1 What issues arise in the use of the 'relevant family violence' definition in the *Migration Regulations 1994* (Cth)? How does the definition operate in practice?

36 Ibid, Recs 5–1, 6–1, 6–4.
37 Ibid, 55.

Question 2 Should the *Migration Regulations 1994* (Cth) be amended to insert a definition of family violence consistent with that recommended by the ALRC and New South Wales Law Reform Commission in *Family Violence—A National Legal Response* (ALRC Report 114)?

Scope of application of the family violence exception

Visa schemes not covered

37. As noted above, the family violence exception can be invoked by applicants for partner and certain skilled stream (business) visas. The exceptions do not apply to the following visa categories: Temporary Skilled Visa (Subclass 457); New Zealand Citizen Family Relationship (Temporary) Visa (Subclass 461); student visas; tourist visas; and other family visas. This suggests that the exception is not intended to cover temporary visas or those where the criteria for a grant of a visa does not include a requirement for a 'genuine and continuing' relationship between the visa applicant and another person.

38. The ALRC is interested in comment about whether the family violence exception should be expanded to apply to other visa categories beyond partner and business classes.

Question 3 Should the application of the family violence exception under the *Migration Regulations 1994* (Cth) be expanded to cover other visa categories?

Prospective marriage visas

39. In the report, *Equality Before the Law: Justice for Women*, ALRC Report 69 (1994), (*Equality Before the Law*) the ALRC expressed concerns in relation to the position of women entering Australia on a Prospective Marriage Visa (Subclass 300).[38] As noted above, the prospective marriage visa holder must marry his or her Australian sponsor within the visa period (nine months), before applying for a temporary or permanent spouse visa.[39]

40. At the time of applying for a temporary Partner Visa (Subclass 820), applicants who are holders (or previous holders) of a Prospective Marriage Visa (Subclass 300) can invoke the family violence exception. However, the family violence exception applies only if: the person *has married* his or her Australian sponsor; the marriage has

38 Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 1)*, Report 69 (1994), 224.

39 At the time of *Equality Before the Law*, the time period within which the parties were required to marry was 6 months.

broken down; and there has been family violence committed against the visa applicant, a member of the family unit of the applicant or a dependent child of the couple by the Australian partner.[40]

41. In effect, if the marriage never takes place, for whatever reason, the non-citizen who is a victim of family violence is precluded from accessing the family violence exception. In *Equality Before the Law*, the ALRC highlighted stakeholder concerns that 'the provisions treat women as a commodity in that if the relationship does not work out, the woman can be sent back to her country of origin'.[41] Similar concerns have been expressed by a number of commentators.[42] For example, Edwin Odhiambo-Abuya argued that:

> Despite the reality of domestic violence occurring in such relationships ... the law fails to recognise there is little or no difference between domestic violence inside or outside the marriage for immigrant victims. It is easy to imagine that both married and unmarried victims have similar challenges to getting citizenship. Based on this assumption, it would be proper to amend this part of the legislation to bring it to terms with reality. Effectively, this will make fiancées eligible to benefit from domestic violence concessions currently offered to their married counterparts under immigration law.[43]

42. The requirement for a Prospective Marriage Visa (Subclass 300) holder to have married their sponsor before accessing the family violence exception was reinforced by legislative amendments affecting visa applications made on or after 9 September 2009, which require that the family violence 'must have occurred while the married relationship or de facto relationship was in existence between the alleged perpetrator and the spouse or de facto partner of the alleged perpetrator'.[44]

43. The *Equality Before the Law*, the ALRC recommended that the family violence exception should apply to partners who have been sponsored on a Prospective Marriage Visa (Subclass 300), whether the breakdown occurred at any time before the marriage, or after marriage, but before an application for permanent residence has been lodged.[45]

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40 See *Migration Regulations 1994* (Cth) sch 2 cl 820.211(8)–(9).

41 Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 1)*, Report 69 (1994), 224.

42 See M Crock, 'Women and Migration Law' in P Easteal (ed), *Women and the Law* (2010) 328; P Easteal, 'Broken Promises: Violence Against Immigrant Women in the Home' (1996) 21 (2) *Alternative Law Journal* 53; E Odhiambo-Abuya, 'The Pain of Love: Spousal Immigration and Domestic Violence in Australia—A Regime in Chaos?' (2003) 12 *Pacific Rim Law & Policy Journal* 673.

43 E Odhiambo-Abuya, 'The Pain of Love: Spousal Immigration and Domestic Violence in Australia—A Regime in Chaos?' (2003) 12 *Pacific Rim Law & Policy Journal* 673, 706.

44 See *Migration Amendment Regulations (No 12) 2009* (Cth). The requirement is expressed in regs 1.23(3),(5),(7), (12), (14).

45 Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 1)*, Report 69 (1994), Rec 10–4.

Question 4 Should the *Migration Regulations 1994* (Cth) be amended to allow a former or current Prospective Marriage (Subclass 300) visa holder to access the family violence exception when applying for a temporary partner visa in circumstances where he or she has not married the Australian sponsor?

Evidentiary requirements

44. The family violence exception operates as a deeming provision. A person, who claims to be a victim of family violence, will be 'taken to have suffered relevant family violence' if, among other things, a valid claim is made based on judicially or non–judicially determined evidence of family violence.[46]

45. The categories of judicially and non-judicially determined evidence, examined below, serve to highlight the balancing of important policy considerations in this area. On the one hand, requiring evidence of family violence that has been the subject of judicial consideration—while preferable—places particular burdens on migrant victims who may lack resources and access to courts. On the other hand, it could be argued that evidence from non-judicial sources—in the form of statutory declarations from doctors, nurses and psychologists—lacks the robustness of court procedures where evidence is tested, and hence may be open to abuse.

Assessment of family violence claims

46. The Regulations suggest a preference for evidence of family violence that has been considered by a court, resulting in a court conviction, an injunction, or a protection order under state and territory laws. Thus, where an applicant presents judicially determined evidence of family violence, the Regulations require that the decision maker proceed with the visa application on the basis that the alleged victim has suffered 'relevant family violence'.[47]

47. In contrast, where evidence of family violence stems from non-judicial sources, the decision maker must determine if satisfied on the evidence presented, that the alleged victim has suffered 'relevant family violence'.[48] If so satisfied, the decision maker must consider the application on that basis.[49] If the decision maker is not so satisfied, the decision maker must refer the matter to an 'independent expert' for assessment, and must take the opinion of the independent expert, to be correct.[50]

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46 See *Migration Regulations 1994* (Cth) regs 1.23(2)–(7) (for judicially determined claims); regs 1.23(8)–(9) (for non–judicially determined claims).
47 Ibid regs 1.23(2), (4), (6).
48 Ibid reg 1.23(10)(a).
49 Ibid reg 1.23(10)(b).
50 Ibid reg 1.23(10)(c).

48. 'Independent expert' is defined in reg 1.21 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'.[51] The only organisation gazetted is Centrelink.[52]

Judicially determined claims of family violence

49. Evidence in support of a judicially determined claim of family violence may take the form of:

- an injunction under s 114(1)(a), (b) or (c) of the *Family Law Act*, granted on application by the alleged victim against the alleged perpetrator;[53] or
- a conviction against the alleged perpetrator, or finding of guilt against the alleged perpetrator, in respect of an offence against the victim;[54] 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 had given the alleged perpetrator an opportunity to be heard, or otherwise make submissions.[55]

50. For protection orders granted under state and territory law to be considered under reg 1.23(4), they must be granted after the alleged perpetrator has been given an opportunity to make submissions. The Regulations do not require that an order be a final order, meaning that, prima facie, interim orders may meet the requirements. However, interim orders that are made ex parte may not comply with the Regulations, if the alleged perpetrator was not given the opportunity to be heard or make submissions.[56]

51. In ALRC Report 114, stakeholders raised concerns that making judicially determined claims may be a hurdle for migrants. The Victorian Government highlighted, for example, that:

> Research points to a high level of under-reporting of domestic violence, especially among immigrant and refugee women, and few proceed through the court process. This would suggest that many immigrant and refugee women would have difficulty meeting the judicial evidence requirement of the regulations.[57]

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51 Ibid reg 1.21.

52 See Commonwealth of Australia, *Special Gazette S119* (2005).

53 *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.

54 Ibid reg 1.23(6).

55 Ibid reg 1.23(4).

56 Departmental guidelines for decision makers suggest that ex parte orders are generally not to be accepted. See Department of Immigration and Citizenship, *Procedures Advice Manual 3* 2010 , Family Violence Provisions, [19.3].

57 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), 287.

52. In its submission, Immigrant Women's Support Services (IWWS) expressed concerns about amendments made to the Regulations in November 2009, introducing a requirement that, for judicially determined claims, 'the violence, or part of the violence, that led to the granting of the injunction must have occurred while the married or de facto relationship was in existence'.[58] In particular, IWWS were concerned that since the introduction of this amendment, DIAC officers were not readily accepting a final family violence protection order obtained after separation.[59] 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.[60] This concern highlights the fact that the Regulations fail to take into account that victim safety may be under threat during the separation period, when there is an increased risk of family violence.

53. The ALRC is interested in comment on the issues that arise with respect to the use of judicially determined claims of family violence in migration matters.

Question 5 What issues arise for applicants in making judicially determined claims of family violence under the *Migration Regulations 1994* (Cth)?

Question 6 Should the *Migration Regulations 1994* (Cth) be amended to make it clear that a family violence protection order granted after the parties have separated is sufficient evidence that 'relevant family violence' has occurred?

Non-judicially determined claims of family violence

54. Non-judicially determined claims of family violence were introduced in response to concerns that migrant communities—particularly those from non-English speaking backgrounds—lacked access to courts.[61] Acceptable evidence for making a non-judicially determined claim includes:

- 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;[62]
- a police record of assault along with two statutory declarations—one from the alleged victim, plus a statutory declaration made by a competent person;[63] or

58 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).
59 See Immigrant Women's Support Service, *Submission FV 61 Part 1*, 1 June 2010, 8.
60 Ibid.
61 See M Crock, 'Women and Migration Law' in P Easteal (ed), *Women and the Law* (2010) 328, 344.
62 *Migration Regulations 1994* (Cth) reg 1.23(8).
63 Ibid regs 1.23(9), 1.24(1)(a).

- three statutory declarations—a statutory declaration from the alleged victim, plus two statutory declarations by two differently qualified competent persons.[64]

The role of competent persons

55. Reg 1.21 of the Regulations lists categories of competent persons who may be relied upon to give a statutory declaration for the purpose of a non-judicially determined claim. They include:

- a registered medical practitioner;
- a registered psychologist;
- a registered nurse;
- a member, or person eligible to be a member, of the Australian Association of Social Workers who is performing the duties of a social worker;
- a person who is a family consultant 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 with a position that involves decision making responsibility for a women's refuge or a crisis and counselling service that specialises in family violence, that has a collective decision making structure, and whose position involves decision-making responsibility for matters concerning family violence of that refuge or crisis and counselling service.[65]; and
- where the alleged victim is a child—in addition to the above—a competent person can also be an officer of the child welfare or child protection authorities of a state or territory.[66]

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.[67]

57. While the opinion of the competent person need not refer to the definition of 'relevant family violence', there must be a clearly expressed opinion which reflects an assessment of the state of mind of the alleged victim by reference to the definition of 'relevant family violence'. It is not sufficient that a competent person expresses the opinion that the victim may have, or appears to have, suffered family violence.[68]

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64 Ibid regs 1.24(1)(b), 1.24(2).
65 Ibid reg 1.21(1)(a).
66 Ibid reg 1.21(1)(b).
67 Ibid regs 1.26(a)–(g).
68 *Minister for Immigration and Citizenship v Ejueyitsi* (2007) 159 FCR 94, [34].

58. The courts have required strict compliance with the above requirements before finding that a non-judicially determined claim of family violence has been made, and the applicant is 'taken to have suffered' family violence.

59. For example, in *Du v Minister for Immigration and Multicultural and Indigenous Affairs*,[69] the applicant submitted a statutory declaration from a doctor that stated: 'Thi Lan Du attended our surgery at Campsie on 21/2/97 with multiple bruises which were allegedly caused by domestic violence (assault by her husband)', coupled with one from a registered psychologist that stated: 'Du certainly expressed sentiments and a psychological condition that was consistent with an individual who has suffered from family violence and a marital breakdown'.[70]

60. Matthews J accepted the above evidence, but found these declarations did not meet the 'specific and peremptory terms' of the Regulations:

> It is not sufficient compliance, in my view, for a competent person simply to note the consistency between a person's presentation and their account of domestic violence, or even the occurrence of domestic violence. The Regulations require that the competent person express an opinion in very specific terms, namely, as to whether relevant domestic violence defined in reg. 1.23 has been suffered by a person.
>
> This involves not only an opinion that past acts of violence have occurred but also an assessment of the state of mind of the alleged victim.[71]

61. Strict interpretation of the statutory requirements has been favoured in subsequent cases, over more contextual approaches. In some instances, relatively small departures from the regulatory requirements have proved fatal to the claim that the applicant had suffered 'relevant family violence'. For example, non-judicially determined claims have been rejected on the basis that the declaration:

- was made on a state—rather than federal—statutory declaration form;[72]
- was signed one day and witnessed on another;[73]
- did not specify that the competent person was a coordinator of a women's refuge.[74]

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69 *Du v Minister for Immigration and Multicultural Affairs* [2000] FCA 1115.
70 Ibid, [10], [12].
71 Ibid, [18], [19].
72 See *Mohamed v Minister for Immigration and Citizenship* (2007) 96 ALD 114.
73 *McGuire v Minister for Immigration and Indigenous Affairs* [2004] FMCA 1014, [24].
74 *Kun Yu Cao v Minister for Immigration and Citizenship* [2007] FMCA 1239.

62. In other instances, claims have failed where the declaration:

- did not adequately set out the basis for the person's claim to be a competent person;[75]
- did not state who had committed the family violence;[76]
- simply recited the possession of an opinion, rather than clearly expressing an opinion;[77]
- included the wrong mix of 'competent persons'.[78]

63. Concerns have been expressed that the efforts by the judiciary to clarify and prevent abuse of non-judicially determined claims, by requiring strict compliance with the letter of the Regulations, have produced unconscionable rigidities in the law,[79] to the point where the regime has been described as a 'triumph of form over substance'.[80] This may have the effect of unduly denying victims of family violence access to the family violence exception.

64. Chris Yuen argues that, given that there is a mechanism for referral to an independent expert if the claim is doubtful, there is no need to apply the Regulations strictly in relation to statutory declarations made by competent persons.[81] This may be contrasted with the position prior to the introduction of referral to an independent expert in 1995, when the decision maker had to accept that the alleged victim had suffered family violence if the statutory declarations complied with the Regulations.[82] Under those circumstances, there may have been greater policy justification for a strict interpretation of the Regulations.

65. Further, competent persons are required to give evidence about who has committed the 'relevant family violence'. Doctors, nurses and psychologists are, arguably, in a position to provide an opinion on whether the victim has suffered

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75 See *Safatli v Minister for Immigration and Citizenship* [2009] FMCA 1191, where the court found the applicant did not meet the statutory requirements in circumstances where the psychologist had provided his registration number and ticked the box on the form indicating that he was a competent person for the purposes of the Regulations. Rather, the court indicated that a statement such as 'I am a psychologist registered as a psychologist under a law of the state of Victoria providing for the registration of psychologist' would have sufficed.

76 *Theunissen v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 88 ALD 97. Where more than one person is listed in the statutory declaration as having committed the relevant family violence, it is likely that the competent person must identify who has done what.

77 See, eg, *Minister for Immigration and Citizenship v Ejueyitsi* (2007) 159 FCR 94, [35]–[36], citing *Ibrahim v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1279, [43], where the court found that a doctor's statement that 'based on my full clinical assessment, I am of the opinion that Mr Ibrahim most likely suffered from family violence' did not meet the legislative requirements. Rather, according to the court, it was no more than a 'trust me' statement, which did not express an opinion.

78 See, eg, *Mardini v Minister for Immigration* [2005] FMCA 1409.

79 M Crock, 'Women and Migration Law' in P Easteal (ed), *Women and the Law* (2010) 328, 335.

80 See *Cakmak v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 135 FCR 183; *Ibrahim v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1279.

81 C Yuen, 'The Problematic Family Violence Provisions' (2010) (92) *Immigration News* 4, 4.

82 See *Migration Amendment Regulations (No 4) 1995* (Cth).

psychological or physical violence. However, it may be questioned whether it is appropriate to require competent persons to name who has committed the 'relevant family violence'.

66. In ALRC Report 114, the Commissions considered that a proper understanding of the nature and dynamics of family violence and its impact on victims better enables those working in the system to support and assist victims. To this end, the Commissions recommended that the Australian, state and territory governments, and educational, professional and service delivery bodies, ensure regular and consistent training for all participants.[83] The ALRC is interested in comment about whether competent persons receive adequate training and education about the nature and dynamics of family violence.

67. The ALRC is interested in comment about, and experiences in, using 'competent persons' in non–judicially determined claims of family violence. In particular, have the Regulations struck the requisite balance between the protection of victims of family violence and preventing abuse of the provisions?

Question 7 Are the provisions governing the statutory declaration evidence of competent persons in the *Migration Regulations 1994* (Cth) too strict? If so, what amendments are necessary?

Question 8 Should the *Migration Regulations 1994* (Cth) be amended to provide that minor errors or omissions are not fatal to the statutory evidence of a competent person?

Question 9 Is it appropriate for competent persons to give evidence about *who* has allegedly committed 'relevant family violence'?

Question 10 What training do competent persons receive about the nature and dynamics of family violence?

The role of independent experts

68. As noted above, for non-judicially determined claims, if the decision maker is not satisfied that the alleged victim has suffered 'relevant family violence', the matter must be referred to an 'independent expert' within Centrelink.

69. In cases before the MRT, the Tribunal is under no statutory obligation to provide reasons as to why it is not satisfied that the alleged victim has suffered family violence and is referring the matter to an 'independent expert'.[84] Similarly, there is no guidance in the Regulations as to what is required for referral to an 'independent expert'.

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83 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), Rec 31–1.

84 *Sok v Minister for Immigration and Citizenship* [2007] FMCA 1525, [53].

70. There has been some judicial consideration as to what appropriate qualifications a person needs to be 'suitably qualified' to provide an expert opinion in relation to family violence. In *Sok v Minister for Immigration and Citizenship*, Riley FM suggested that a suitably qualified person for the purposes of reg 1.21 could be a person who fell within the meaning of 'competent person'.[85] On the other hand, in *Ali v Minister for Immigration and Citizenship*, Nicholls FM commented that reg 1.21 contemplates a difference in qualifications required by an 'independent expert' and a 'competent person', and what is necessary is that the independent person providing the opinion meets the definition of independent expert.[86]

71. The ALRC is interested in obtaining detailed information about the decision making processes of 'independent experts' within Centrelink. In its submission to the inquiry resulting in ALRC Report 114, National Legal Aid submitted that:

> There is very limited transparency and accountability in relation to decisions of independent experts, despite the fact that they are accorded considerable power in the decision making process. Applicants are not generally provided with the experts' full reasons for decision unless a specific request for access is made. In Legal Aid NSW's experience, decision makers have tended to give little or no consideration to the issue of whether the expert's opinion was properly formed in accordance with the definition of relevant family violence.
>
> Although in some cases it may be possible to seek judicial review of decisions on the basis that the independent experts' opinion was not given in accordance with the Regulations, many applicants (particularly unrepresented applicants) are likely to be unaware of this.[87]

72. The Regulations are silent as to whether an independent expert should furnish reasons for his or her opinions to the applicant. In cases before the MRT, the Tribunal has an obligation to disclose to the applicant an independent expert opinion if the Tribunal is to rely on that opinion in a manner adverse to the applicant.[88]

73. The ALRC is interested in comment about the role of independent experts in non-judicially determined claims of family violence. Further, in considering the mechanisms for making non-judicially determined claims of family violence, do applicants face other difficulties in meeting the evidentiary requirements?

Question 11 What issues arise in relation to the use of independent experts in the determination of non–judicially determined claims of family violence made under the *Migration Regulations* 1994 (Cth)? For example:

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85 Ibid, [14].

86 *Ali v Minister for Immigration and Multicultural Affairs* [2007] FMCA 1405, [27].

87 National Legal Aid, *Submission to the Australian Law Reform Commission – Family Violence: Improving Legal Frameworks Consultation Paper* (2010) <http://www.nla.aust.net.au/res/File/NLA-ALRC-submission-15-07-10.pdf> at 16 February 2011.

88 *Migration Act 1958* (Cth) s 359A. For an illustrative example of the procedure followed by the MRT, see *Alameddine v Minister for Immigration and Citizenship* [2010] FMCA 313.

(a) should the legislation require decision makers to give reasons for referring the matter to an independent expert?

(b) what issues, if any, are there about those who are suitably qualified to give expert opinions?

(c) should the *Migration Regulations 1994* (Cth) specifically require independent experts to provide full reasons for their decisions to the applicant?

Question 12 Should the requirement that, an opinion of the independent expert is automatically to be taken as correct, be reconsidered? Should there be a method for review of such opinions?

Question 13 Do applicants in migration matters face difficulties in meeting evidentiary requirements in making claims of non-judicially determined claims of family violence? If so, how could these difficulties be addressed?

A need to streamline the process?

74. Current legislative arrangements under the Regulations potentially require a victim of family violence to recount their experiences and submit evidence numerous times during the course of the visa process. This may have the effect of re-traumatising victims.

75. For example, a victim may give evidence of family violence to 'competent persons' in order to make a non-judicial claim of family violence. If the decision maker is not satisfied as to the existence of family violence, the matter is referred to an independent expert, before whom the victim may be called to give further evidence. If the matter reaches the MRT, there is some ambiguity about whether the tribunal is bound by the existing independent expert opinion, or must follow the procedure in div 1.5 of the Regulations again.[89] That is, whether the tribunal must consider for itself whether it is satisfied on the evidence that the victim has suffered family violence, and if not, seek a fresh opinion of an independent expert. In the latter case, this may require a victim again to resubmit evidence to a decision maker sometime after the event has taken place.

76. The ALRC is interested in comment on whether there is merit in streamlining the evidentiary process in migration-related family violence cases to reduce the effect of re-traumatisation on victims, and if so, in what ways. In raising this issue, the ALRC is aware of the importance of the need to balance the integrity of the visa system—ensuring only genuine victims can access the exception—with protecting the safety of victims of family violence.

89 See *Sok v Minister for Immigration and Citizenship* (2008) 238 CLR 251, where the High Court held that the MRT can exercise all the powers and discretions in div 1.5 of the Regulations itself.

Question 14 In what ways, if any, should the evidentiary process for giving evidence in migration–related family violence cases be streamlined? For example, would there be merit in:

(a) streamlining the system to allow victims of family violence to obtain an opinion of an independent expert, without the need to first seek evidence from a competent person? or

(b) requiring the Migration Review Tribunal to be bound by an existing independent expert's opinion obtained by the primary decision maker?

Location of the family violence provisions

77. Currently, the family violence provisions are contained wholly within div 1.5 of the Regulations. In ALRC Report 114, the ALRC and NSWLRC suggested that the Australian Government may wish to consider the appropriateness of having the definition of 'relevant family violence' in the Regulations instead of in the Act.[90] The Commissions emphasised that provisions which affect the lives and safety of particularly vulnerable groups of society may be more appropriately placed in primary legislation. Stakeholders stressed that migrants are a particularly vulnerable group due to factors such as: isolation; language barriers; lack of family or other support; lack of access to medical or financial services; cultural values which may emphasise keeping quiet about spousal abuse; and systemic barriers to accessing legal support.[91] Victims of family violence may also be threatened with deportation or withdrawal of sponsorship.[92] Similar concerns have been highlighted in migration literature.[93]

78. To the extent that the family violence exception is intended to allow victims of family violence to leave abusive relationships, without having their migration status compromised, it plays an important role in protecting the lives and safety of those so affected. Division 1.5 of the Regulations contains both the definition of 'relevant family violence' and a number of 'machinery' provisions that regulate the operation of the exception more generally.

79. The ALRC affirms its views in ALRC Report 114 that placing at least the definition of 'relevant family violence' in the Act may afford a measure of visibility and stability to the definition. The ALRC is interested in comment about whether the definition of 'relevant family violence', or the family violence provisions as a whole, should be placed in primary legislation.

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90 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), 289.

91 Ibid, 287.

92 Ibid.

93 P Easteal, 'Broken Promises: Violence Against Immigrant Women in the Home' (1996) 21 (2) *Alternative Law Journal* 53, 53.

Question 15 Would the family violence provisions—including the definition of 'relevant family violence'—currently in the *Migration Regulations 1994* (Cth), be more appropriately placed in the *Migration Act 1958* (Cth)?

Sponsorship

80. The 2009 report of the National Council to Reduce Violence Against Women and their Children, *Time for Action*, acknowledged that:

> Women who are sponsored by Australian citizens and residents are particularly vulnerable to abuse due to the threat of deportation. In the late 1980s and early 1990s, domestic violence practitioners became concerned about the number of repeat or serial sponsors who abused the women and then triggered their deportation. Predominantly, the concern related to the abuse of Filipino women by serial sponsors, although more recently concerns have increased about women sponsored from other countries such as Russia, Thailand, Indonesia and Fiji.[94]

81. In *Equality Before the Law*, the ALRC expressed similar concerns about serial sponsors and recommended that where a prospective sponsor's record showed past violence or previous sponsorships, information should be drawn to the attention of the applicant by a DIAC officer at an interview. The ALRC also recommended that the information must be provided in a culturally and linguistically appropriate manner and the interviewer must be satisfied that the applicant understands the nature of the information provided.[95]

82. Legislative changes to the Regulations that took effect from 27 March 2010, inserted a new sponsorship limitation for child, partner and prospective marriage visas.[96] The new reg 1.20KB provides that the Minister for Immigration and Citizenship must refuse sponsorships when a child is included in a visa and the sponsor has a conviction or outstanding charge for a 'registrable offence'.[97] For a child visa, the sponsor's partner or spouse must also not have a conviction or outstanding charge for a 'registrable offence'. A 'registrable offence' is defined within the meaning of state and territory legislation dealing with registrable or reportable offences.[98]

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94 National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), [2.5] (citations omitted).

95 Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 1)*, Report 69 (1994), Rec 10–7. This recommendation was aimed at protecting the safety of women and to assist them to exercise their right to fully informed choice in marrying.

96 See *Migration Amendment Regulations (No. 2) 2010* (Cth).

97 *Migration Regulations 1994* (Cth), reg 1.20KB(2).

98 Ibid reg 1.20KB(13) defines 'registrable offence' as a registrable offence within the meaning of, or an offence that would be registrable under the following Acts if it were committed in that jurisdiction: *Child Protection (Offenders Registration) Act 2000* (NSW); *Sex Offenders Registration Act 2006* (SA); *Crimes (Child Sex Offenders) Act 2005* (ACT). An offence is a reportable offence within the meaning of the following Acts: the *Child Protection (Offender Reporting) Act 2004* (Qld); *Community Protection*

83. The Regulations also give power to the Minister for Immigration and Citizenship to request that a sponsor or the sponsor's partner submit to a police check, and to refuse sponsorship if the police check is not provided.[99] Police checks can be obtained from the Australian Federal Police.[100]

84. The ALRC is interested in comment on whether sponsors for partner visas should—in a manner similar to the requirement for child sponsorships—be required to submit to a police check in relation to past family violence convictions or protection orders, and whether such information should be given to the applicant. This requirement would be aimed at protecting the safety of prospective partners who may not be aware of a sponsor's past history of violence, and allowing them to make informed choices about pursuing the relationship. In including such a requirement, a number of issues would have to be addressed, including: affording procedural fairness to the sponsor; avoiding discrimination on the basis of previous convictions; and privacy concerns.

Question 16 Should sponsors be obliged to submit to a police check in relation to past family violence convictions or protection orders when making an application for sponsorship?

Question 17 Should the Department of Immigration and Citizenship bring to the attention of prospective spouses information about a sponsor's past family violence history? If so, how and what safeguards should be put in place, in particular to address:

(a) procedural fairness to the sponsor;

(b) discrimination on the basis of a criminal record; and

(c) the sponsor's privacy.

Information sharing

85. The ALRC is directed by the Terms of Reference to consider whether information sharing across Commonwealth, state and territory agencies is appropriate to protect the safety of those experiencing family violence.

86. The ALRC has heard in consultation that the MRT has, on occasion, had difficulty in ascertaining from courts whether family violence protection orders are in place when considering judicially determined claims of family violence.[101] The ALRC

(Offender Reporting) Act 2004 (WA); *Community Protection (Offender Reporting) Act 2005* (Tas); *Child Protection (Offender Reporting and Registration) Act* (NT) .

99 *Migration Act 1958* (Cth) s 56 contains a general power for the department to collect information relevant to a visa application.

100 Sponsors (or partners) must complete the National Police Check application form available from the AFP website. See Australian Federal Police, *National Police Checks*, <http://www.afp.gov.au/what-we-do/police-checks/national-police-checks.aspx> at 7 February 2011.

101 Sobet Haddad, Migration and Refugee Review Tribunals, *Consultation*, Sydney 12 November 2010.

is interested in whether DIAC officers as primary decision makers also experience similar difficulties in accessing information from the courts relevant to judicially determined claims of family violence.

87. In ALRC Report 114, the Commissions recommended the establishment of a national register which would include certain information about protection orders and family law orders and injunctions.[102] The ALRC is interested in comment on whether the MRT and DIAC should have access to the proposed register.

88. The ALRC is also interested in stakeholder views about what other reforms, if any, are needed to improve information sharing between courts and decision makers in migration matters involving family violence.

Question 18 What measures can be taken to improve the ability of decision makers in migration matters to obtain information about family court injunctions, state and territory protection orders, convictions and findings of guilt?

Question 19 Should the MRT and DIAC have access to any national register introduced in line with recommendations in *Family Violence—A National Legal Response* (ALRC Report 114)?

Question 20 What other reforms, if any, are needed to improve information sharing between the courts and decision makers in migration matters involving family violence?

Family violence in refugee law

89. The ALRC is of the view that the treatment of refugees who are victims of family violence falls within the Terms of Reference. The Macquarie dictionary defines term 'immigrate' as: 'to come into a country of which one is not a native for the purposes of permanent residence'.[103] This bears similarities to the object of the Act, which is expressed broadly as being 'to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens'.[104] The ambit of the Act extends to those people seeking refugee status in Australia.

90. Australia is a signatory to the United Nations *Convention Relating to the Status of Refugees* (the Refugees Convention), the key international instrument that regulates the obligations of states to provide refugees fleeing from persecution with protection.[105] Article 1A(2) of the Convention defines a refugee as someone who:

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102 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), Rec 30–18.

103 S Butler, *Macquarie Dictionary Online*Macquarie Dictionary Publishers, <http://www.macquariedictionary.com.au> at 15 September 2010.

104 *Migration Act 1958* (Cth) s 4.

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

> 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.[106]

91. Section 36(2) of the Migration Act incorporates by reference art 1A(2) of the Convention into Australian municipal law, and gives effect to Australia's obligation of *non-refoulement* under Article 33.[107] It 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'.[108]

92. The term 'persecution' in art 1A(2) of the Refugees Convention is qualified by s 91R(1) of the Act, which provides that art 1A(2) does not apply unless persecution for one or more of the Convention reason(s) 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'.[109]

93. In turn, a non-exhaustive list of instances of 'serious harm' is provided in s 91R(2), 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.[110]

The asylum application process

94. The primary decision to grant refugee status is made by a DIAC officer as a 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 Act, the Minister may personally consider,

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106 Ibid art 1A(2).

107 The principle of non-refoulement is enshrined in *Convention Relating to the Status of Refugees*, 189 UNTS 151, (entered into force on 22 April 1954) art 33: 'No contracting state shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

108 *Migration Act 1958* (Cth) s 36(2).

109 Ibid s 91R(1).

110 Ibid s 91R(1)(b).

and grant a visa on humanitarian grounds, if he or she considers it to be in the public interest. This personal intervention power is only exercisable by the Minister and only in cases where the applicant has exhausted all avenues of merits review.

Family violence and the definition of a refugee

95. Historically, applicants whose asylum claims are based on family violence have faced difficulties meeting the definition of a 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 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

96. 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.[111] These types of harms—generally experienced by women—are not afforded protection because neither gender, nor sex, is an enumerated Refugees Convention ground. As such, courts have traditionally failed to consider whether such gender-related claims may fall under the ground of particular social group, or other Convention reasons.[112]

97. A second, and more problematic distinction, relates to the public/private dichotomy. As explained by Anthea Roberts, the Refugees Convention is primarily aimed at the protection of individuals from state or public forms of persecution, rather than intruding into the private realm of family life and personal activities.[113] This is most evident in the interpretation of the term 'persecution'.

98. The Refugees Convention does not define 'persecution'.[114] However, the term is widely recognised as involving certain a relation between the individual and the state, whereby, persecution occurs in the public sphere and the perpetrators are the state or its agents.[115] As stated by Gleeson CJ in *Minister for Immigration and Multicultural Affairs v Khawar*:

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111 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'. 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.

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

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

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

115 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 thus reflect the concerns of the drafters of the Refugees Convention in protecting those fleeing state based persecution in the aftermath of World War II.

> the paradigm case of persecution contemplated by the Convention is persecution by the state itself. Article 1A(2) was primarily, even if not exclusively, aimed at persecution by a state or its agents on one of the grounds to which it refers.[116]

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

> The Convention is primarily concerned to protect those racial, religious, national, political and social groups who are singled out and persecuted by or with tacit acceptance of the government of the country from which they have fled or to which they are unwilling to return. 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.[117]

100. 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 Convention, because the state cannot be implicated in the infliction of harm. In *Equality Before the Law*, the ALRC observed that:

> Sexual violence against women tends to be seen as occurring in the private rather than public sphere and discounted as persecution ... Discriminatory practices may also be seen as 'private' where they affect family life. In many cases, most notably in cases of sexual or domestic violence, the nexus between the individual and the state is generally more complex than in 'public' forms of persecution. Difficulties arise as to the exact extent of state responsibility.[118]

The role of state responsibility

101. 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 of Australia in *Minister for Immigration and Multicultural Affairs v Khawar* (*Khawar*).[119]

102. In *Khawar*, the applicant 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'.

103. Her case was rejected by the Department of Immigration, Multiculturalism and Ethnic Affairs, and the RRT on the basis that there was no nexus to a Convention ground. The RRT considered that she was harmed for personal reasons arising from her marriage and relationship with her husband, and that the Convention was not intended

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116 *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1, [22].
117 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225.
118 Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 1)*, Report 69 (1994), 243.
119 *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1.

to provide protection to people involved in personal disputes. The RRT made no findings in relation to the failure of the police to provide protection or the Pakistani state's attitude towards a particular social group comprised of women.[120]

104. The case was appealed to the Federal Court where Branson J found that the RRT had erred in not making findings in relation to any particular social group of which Ms Khawar might be a member.[121] Consequently, the RRT also committed an error in not making any findings about the lack of state protection in relation to a particular social group of which Ms Khawar was a member.[122] A Full Federal Court dismissed an appeal from Branson J's decision.[123]

105. On appeal to the High Court, two issues were in dispute. These were summarised by Gleeson CJ 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.
>
> 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.[124]

106. 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 such protection against harm.[125]

107. Kirby J adopted the formula, 'Persecution = Serious Harm + The Failure of State Protection',[126] to find it 'sufficient that there is both a risk of serious harm to the applicant from human sources, and a failure on the part of state to afford protection that is adequate to protect the human rights and dignity of the person concerned'.[127] He considered that 'persecution' is a construct of these two separate but essential elements.

108. 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'.[128]

109. Although the judgments took different approaches, the cumulative effect appears to be that where serious harm is inflicted by non-state actors for a non-Convention reason, the nexus to the Convention is met by the conduct of the state in withholding

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120 See *Reference N98/21419* (Unreported, RRT, 1998).
121 *Khawar v Minister for Immigration and Multicultural Affairs* (1999) 168 ALR 574, [55].
122 Ibid.
123 *Minister for Immigration & Multicultural Affairs v Khawar* (2000) 101 FCR 501.
124 *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1, [5], [6].
125 Ibid, [30].
126 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.
127 Ibid, [115].
128 Ibid, [87].

protection—in a selective and discriminatory manner—for reasons of a Convention ground.

110. On the issue of particular social group, McHugh and Gummow JJ held that the evidence supported a social group: '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'.[129] Gleeson CJ considered that it was open on the evidence to conclude that 'women in Pakistan' are a 'particular social group'.[130]

The position of victims of family violence post Khawar

111. While the principle in *Khawar* has allowed family violence claims to be more fully considered, subsequent cases before the RRT and the Federal Court have highlighted that such cases remain complex and challenging. Issues surrounding what comprises a 'particular social group', and whether the state has withdrawn protection for Convention reasons, remain hurdles for those making claims for protection as victims of family violence.[131]

112. First, proving that a state is withdrawing or withholding protection for a Convention reason in a selective and discriminatory manner may be particularly difficult for those asylum seekers facing language barriers, lack of legal representation, or access to current country information.[132] The courts have made it clear that, where the state is unable to provide effective protection for reasons of shortage of resources, maladministration, incompetence or ineptitude, 'that would not convert the personally-motivated domestic violence into persecution on one of the grounds set out in Article 1A(2)'.[133] In such cases, those who are victims of family violence have no recourse to protection under the Convention.

113. Secondly, much depends on how an applicant argues that he or she is member of a particular social group. In each instance, it is for the applicant to present the case to the decision maker. 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 narrow risk a finding that the group is impermissibly defined by the harm feared.[134]

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

130 Ibid, [32].

131 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.

132 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.

133 *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 [26], [84].

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

114. Decision makers also face challenges in making consistent decisions. For example, the consideration of whether the applicant is a member of a particular social group is dependent on the cultural, legal, social and religious factors which must be properly understood. Decisions about whether a victim of family violence can access 'effective state protection' 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 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.[135]

Legislative response to Khawar

115. Section 91R of the Act was inserted in response to concerns that decisions such as *Khawar* had widened the application of the Refugees Convention 'beyond the bounds intended'.[136] Consequently, commentators have expressed concern that by narrowing the refugee definition, the Act places major burdens on those with family violence claims.

116. First, s 91R(1) requires the applicant to show that the Convention reason is 'the essential and significant reason' for the persecution.[137] Catherine Hunter argues that, in the context of gender-related claims, the 'essential and significant' requirement will mean decision makers are likely to focus on aspects other than gender, until gender-related decisions are no longer controversial.[138] 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',[139] and therefore:

> due to the restrictive terminology of s 91R ... there is now a risk that certain Refugee Convention reasons may not be identified or adequately addressed, resulting in legitimate claims going unrecognised.[140]

117. Others have criticised the definition of persecution under s 91R(2) of the 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.[141] In particular, such victims can experience serious psychological trauma from even the most minimal of

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

136 Explanatory Memorandum, Migration Legislation Amendment Bill (No 6) 2001 (Cth), 18.

137 *Migration Act 1958* (Cth) s 91R(1)(a).

138 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.

139 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).

140 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.

141 Ibid, 454.

physical injuries.[142] 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.[143]

118. The ALRC is interested in comment about whether the current legislative arrangements in the *Migration Act 1958* (Cth) are adequate to protect the safety of those seeking asylum as victims of family violence. The ALRC, however, is not eliciting views about the Refugees Convention.

Question 21 What, if any, legislative changes are necessary to the *Migration Act 1958* (Cth) to ensure the safety of those seeking protection in Australia as victims of family violence?

A need for complementary protection?

119. The need to protect those seeking asylum—including victims of family violence—whose claims are not covered by the Refugees Convention, but who may need international protection, was a key rationale of the Migration Amendment (Complementary Protection) Bill 2009 (Cth) (the 2009 Bill).[144] On the same day it was introduced, the 2009 Bill was referred to the Senate Legal and Constitutional Affairs Committee (the Senate Committee) for inquiry. The 2009 Bill lapsed when parliament was prorogued on 19 July 2010.

120. On 24 February 2011, the Migration Amendment (Complementary Protection) Bill 2011 (Cth) (the Bill) was introduced into parliament. The Bill—based on the 2009 Bill—incorporates amendments to address recommendations made in the report, *Migration Amendment (Complementary Protection) Bill 2009 [Provisions]*, by the Senate Committee.[145]

121. The Bill proposes amendments to s 36 of the Act to produce a statutory regime for assessing claims that may engage in Australia's *non-refoulement* obligations under various human rights treaties other than the Refugees Convention.[146] The Bill provides

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142 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.

143 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.

144 Explanatory Memorandum, Migration Amendment (Complementary Protection Bill) 2009 (Cth).

145 Commonwealth, *Parliamentary Debates*, House of Representatives, 24 February 2011, 3 (C Bowen—Minister for Immigration and Citizenship); Senate Legal and Constitutional Affairs Legislation Committee, *Migration Amendment (Complementary Protection) Bill 2009 [Provisions]* (2009).

146 Specifically, the *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force on 23 March 1976); the *Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment*, 10 December 1984, [1984] G.A Res. 39/46, (entered into force on 26 June 1987); and the *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4, (entered into force on 2 September 1990). *Non-refoulement* is an international law principle that prevents the return of persons to countries where their lives or freedom may be endangered. The stipulation against *non-refoulement* is expressed in a range of international human rights, humanitarian, and extradition

that, a non-citizen to whom Australia does not owe protection obligations under the Refugees Convention may still be granted a protection visa—with the same rights and entitlements as refugees—if that person meets the criteria for 'complementary protection'.[147]

122. Under the Bill, 'complementary protection' arises in circumstances where the Minister for Immigration and Citizenship 'has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm'[148] because:

> (a) the non-citizen will be arbitrarily deprived of his or her life; or
>
> (b) the death penalty will be carried out on the non-citizen; or
>
> (c) the non-citizen will be subject to torture; or
>
> (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
>
> (e) the non-citizen will be subjected to degrading treatment or punishment.[149]

123. The Bill provides exhaustive definitions of 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' that, prima facie, cover instances of family violence. Thus, 'cruel and inhuman treatment or punishment' is defined to include acts or omissions by which:

> (a) severe pain or suffering, whether physical or mental, is intentionally inflicted upon a person; or
>
> (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhumane in nature.[150]

124. Degrading treatment or punishment is defined as an act or omission that 'causes, and is intended to cause, extreme humiliation which is unreasonable'.[151]

125. Importantly, the Bill gives a broader definition of 'torture' than that in art 1 of the *Convention Against Torture and other Cruel, Inhumane or Degrading Treatment* (CAT).[152] Under the CAT, 'torture' is limited to an act that is inflicted by or at the instigation of, or with the consent or acquiescence of, a public official or other person acting in an official capacity.[153] In contrast, under the definition proposed by the Bill, torture may be committed by any person, regardless of whether or not the person is a public official or person acting in an official capacity.[154] This has a particular impact

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treaties and has been 'repeatedly endorsed in a variety of international forums'. See generally, A Duffy, 'Expulsion to Face Torture? Non-refoulement in International Law' (2008) 20 *International Journal of Refugee Law* 373, 384.

147 Migration Amendment (Complementary Protection Bill) 2011 (Cth) item 12.

148 Ibid.

149 Ibid item 14.

150 Ibid item 2.

151 Ibid item 3.

152 *Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment*, 10 December 1984, [1984] G.A Res. 39/46, (entered into force on 26 June 1987).

153 Ibid art 1.

154 Migration Amendment (Complementary Protection Bill) 2011 (Cth) item 9.

on victims of family violence. As the Public Interest Law Clearing House (Vic) Inc submitted to the inquiry into the 2009 Bill by the Senate Committee:

> On this interpretation, the Bill goes beyond Australia's obligations under the CAT as there are many instances in which private persons may subject others to torture. For example, some types of female genital mutilation may be carried out by religious groups in private, or a person may be subject to domestic violence so grave that it would meet the proposed definition of cruel, inhumane or degrading treatment.[155]

126. Similar examples in relation to the coverage of complementary protection were cited in the Second Reading Speech of the 2009 Bill by the Hon Laurie Ferguson:

> For example, it is not certain that a girl who would face a real risk of female genital mutilation would always be covered by the refugee convention, whereas she would be covered under complementary protection.
>
> Women at risk of so-called honour killings can also potentially fall through gaps in the refugee convention definition. In some countries victims of rape are executed along with, or rather than, their attackers. Again, depending on the circumstances, this situation may not be covered under the refugee convention.[156]

127. The Explanatory Memorandum to the Bill emphasises that the criteria for complementary protection 'reflects that a high threshold is required to engage Australia's *non-refoulement* obligations'.[157] As such, the Bill also specifies circumstances where there is not a real risk that the non-citizen will suffer significant harm, including where:

> (a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or
>
> (b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or
>
> (c) the real risk is one faced by the population generally and is not faced by the non-citizen personally.[158]

128. The requirement that the risk of harm must be faced by the non-citizen personally was a source of concern expressed to the inquiry of the Committee into the 2009 Bill.[159] For example, Amnesty International submitted that:

> The requirement that the risk faced must not be 'faced by the population of the country generally' may provide, for example, for an applicant fleeing domestic violence to be excluded from [complementary] protection on the grounds that

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155 See Public Interest Law Clearing House (Vic) Inc, *Submission to the Standing Committee on Legal and Constitutional Affair on its Inquiry into the Migration (Complementary Protection) Bill 2009* (2009) <www.pilch.org.au/Assets/Files/Migration%20%28Complementary%20Protection%29%20Bill%202009.pdf> at 21 February 2011.

156 Commonwealth, *Parliamentary Debates*, House of Representatives, 9 September 2009, 8891 (L Ferguson).

157 Explanatory Memorandum, Migration Amendment (Complementary Protection Bill) 2009 (Cth), 3.

158 Migration Amendment (Complementary Protection Bill) 2011 (Cth) item 14.

159 See Senate Legal and Constitutional Affairs Legislation Committee, *Migration Amendment (Complementary Protection) Bill 2009 [Provisions]* (2009), 7, 8.

> the applicant originates from a country where domestic violence is widespread and where perpetrators are not generally brought to justice. Additionally, the stipulation that the risk must be 'faced by the non-citizen personally' has the potential to exclude, for example, applicants who have not been directly threatened with female genital mutilation but due to their age and gender, face a probable risk that they will be subjected to the practice upon return.[160]

129. The Committee recommended that the provision be reviewed 'with a view to ensuring it would not exclude from protection people fleeing genital mutilation or domestic violence from which there is little realistic or accessible relief available in their home country'.[161] On its face the Bill does not give force to this recommendation.

130. Nonetheless, it appears that the amendments to the Act proposed by the Bill provide some scope for the protection of victims of family violence whose claims may have fallen through the cracks, especially in cases of severe gender-related harm or torture. For example, the Refugees Convention would not protect a non-citizen making a *Khawar* type claim, in circumstances where the state does not withdraw or withhold protection in a selective and discriminatory manner, but rather cannot provide protection for reasons of lack of resources, maladministration, or incompetence. This is so irrespective of the severity of the harm faced. Under complementary protection, such a non-citizen may be protected if there is a real chance that he or she will suffer significant harm if returned to the country of origin.

131. The ALRC is interested in comment about whether legislative amendments, such as those proposed in the Bill are necessary to ensure that victims of family violence whose claims may not be covered by the Refugees Convention to whom Australia owes *non-refoulement* obligations are protected.

Question 22 Are legislative reforms, such as those proposed in the Migration Amendment (Complementary Protection) Bill 2011 (Cth), necessary to protect the safety of victims of family violence, to whom Australia owes *non-refoulement* obligations, but whose claims may not be covered by the United Nations *Convention Relating to the Status of Refugees*?

160 Ibid, 17.
161 Ibid, Rec 2.