Australian Government
Department of Immigration and Citizenship

Professor Rosalind Croucher
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Dear Professor Croucher

Family Violence and Commonwealth Laws Inquiry

The Department of Immigration and Citizenship (the Department) welcomes the Australian Law Reform Commission's (the Commission's) inquiry and notes that a number of proposals have been made in relation to migration law in the discussion paper published on 19 August 2011. The Department also appreciates the opportunity to contribute to the inquiry. To this effect, I have below provided information in relation to some of the specific proposals and questions set out in the discussion paper.

In the context of visa policy relating to family violence, the key focus for the Department is ensuring that our legislation and policies do not encourage victims of family violence to remain in or return to violent relationships. The family violence provisions at Division 1.5 of the *Migration Regulations 1994* (the Migration Regulations) are intended to protect family violence victims who have outstanding applications for certain visas. Attachment A provides details on the number of family violence claims to the Department, and how many of these cases were referred to the Department of Human Services (Centrelink).

While we support the expansion of measures to protect victims of family violence, the Department only has a limited role in the broader context of protecting people from violence or supporting them after leaving a violent relationship. The Department does not fund family violence services. However, settlement service providers do play a role in referring clients to appropriate support services. This forms part of the Department's broader case work support to eligible migrants.

Themes

The Department notes that a number of key themes have guided the Commission in its inquiry; including seamlessness, accessibility, fairness, effectiveness, autonomy, privacy and system integrity.

We agree with the review paper's focus on these key themes, and appreciate the importance of these factors in providing protection for the victims of family violence.

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In particular, from a migration law perspective, we note the importance in maintaining a balance between accessibility and system integrity. Striking the right balance between control and facilitation is a central challenge for government agencies in Australia and around the world.

In the migration context, the right to live permanently in Australia is a valuable opportunity for which hundreds of thousands of people apply each year. The opportunity on offer and competition for the finite number of places available means that some applicants will seek to contrive or exaggerate claims to meet visa requirements.

It is important that the Department has appropriate policy and program management levers in place to identify and treat appropriately these non-genuine applications while providing minimum inconvenience to genuine applicants. Non-genuine applications have the potential to disadvantage genuine applicants who are waiting for decisions on their visa applications and to reduce the benefit to Australia which the Government hopes to deliver through the Migration Program.

This challenge is present in the context of family violence claims as it is in all aspects of the Department's business.

In the context of accessibility, the Department has noted with concern that some clients applying to be granted a visa under the family violence provisions in Division 1.5 of the Regulations appear to be paying significant amounts of money to either migration agents or competent persons who assist with their claims. The Department notes a similar concern from the Australian Domestic and Family Violence Clearing House was cited in the Discussion Paper.[1] In the migration context, an ideal arrangement would be sufficiently simple that it could be accessed by all applicants without generating an 'industry' while providing robust assessment of claims and correct identification of non-genuine applications.

Consistent definition of family violence

Proposal 3-8 recommends that the Regulations be amended to provide for a consistent definition of family violence.

The Department agrees that there is merit in having a consistent definition of family violence. One important element of such a definition, in the immigration context, is the opportunity to test the strength of a visa applicant's claims.

The Department has received claims of family violence that fall outside of a wider community understanding of what constitutes family violence. For example, these have included the former partner:

- having an extra-marital affair;
- receiving a pension which provided a lower income than the applicant expected before they migrated; or
- not cooking or performing other household chores the visa applicant expected of them.

[1] Discussion paper, p 715

While each of these circumstances may have been unpleasant for the visa applicant they do not in isolation constitute family violence and, in the absence of other behaviour by the former partner, would not usually be expected to cause fear on the part of the visa applicant.

As the reactions and feelings of an individual are subjective, there is a risk that a definition without scope to test the reasonableness of those feelings may be open to behaviours which would not usually be accepted as family violence. One suggestion to address this is to require that the fear be 'well founded' or 'reasonable'. This would be consistent with how the Department assesses Protection visa requirements, and it would also be based on the concept of 'reasonableness', on which there is a significant body of case law. This test of reasonableness requires that an ordinary person, in the same circumstances, would have the same feeling of fear.

Policy guidance to decision makers

Proposal 3-9 recommends that the Department update its official policy guidance to decision makers to include examples to illustrate coercive and controlling behaviour that may amount to family violence. It is proposed that these examples should include, but not be limited to:

- the threat of removal; and
- violence perpetrated by a family member of the sponsor at the instigation, or through the coercion, of the sponsor.

The Department agrees that amendments to the definition of family violence should be accompanied by amendments to the Department's Procedures Advice Manual (PAM) and that examples may assist decision makers and visa applicants to understand the definition.

Such amendments would need to distinguish between the theoretical change in visa eligibility that may occur if a relationship ends and the 'threat of removal' being used as a tool for 'coercion or control' by an abusive spouse.

Expansion of Family Violence provisions

Proposal 20-1 suggests that the Migration Regulations be amended so that the family violence provisions apply to all secondary applicants for all onshore permanent visas. It is proposed that the family violence provisions should apply:

- as a 'time of application' and 'time of decision' criterion for visa subclasses where there is a pathway from temporary to permanent residence; and
- as a 'time of decision' criterion, in all other cases.

The Department agrees that, as noted in the discussion paper, there would be difficulties in expanding the family violence provisions to all temporary visas. As the discussion paper notes, the policy rationale behind the family violence provisions is to prevent people remaining in violent relationships in order to preserve his or her eligibility for a permanent visa.

To do this effectively, it is necessary to identify people who have a reasonable expectation of obtaining permanent residence on the basis of their partner relationship. The Commission's proposal to open the provisions to people in Australia with open permanent visa applications would be a feasible way of identifying this cohort. It would be legally and practically more difficult to define groups of temporary residents who had similar reasonable expectations.

If the Government agreed to the application of the family violence provisions to all permanent visas where the applicant is in Australia, consideration would need to be given to some consequential policy and implementation issues. These include:

- measures to ensure that the expanded provisions worked with an appropriate degree of system integrity, for example a requirement that the primary applicant is granted a visa before a victim is granted theirs and/ or a sponsorship bar that prevented a victim from sponsoring their ex-partner for 5 years;
- interaction with 'Skill Select', a new model for selecting skilled migrants which will take effect from 1 July 2012 and which will change both the visa application process and the distinction between onshore and offshore visas for skilled migrants;
- how such provisions would apply to long-term Subclass 457 visa holders who move to Employer Nominated Scheme (ENS) or Regional Skilled Migration Scheme (RSMS) visas; and
- how would the Department best ensure consistency in the processing of family violence cases across multiple visa streams?

The Department notes concerns expressed by stakeholders in the discussion paper that some family violence support services are not available to temporary visa holders. It would appear, however, that where this is a concern the appropriate solution would lie in revising access to services rather than in granting a permanent visa. There is nothing in the migration legislation which would prevent a temporary visa holder from accessing family violence support services.

Access to Ministerial Intervention

Proposal 20-3 asks if s351 of the *Migration Act 1958* (the Migration Act) should be amended to allow additional access to Ministerial Intervention for temporary visa holders who have experienced family violence. It also asks what factors should influence whether or not persons in this situation should be granted a permanent visa.

The Ministerial Intervention provisions are designed as a safety net option of last resort for people who do not meet the legal requirements for the grant of any visa. To this extent, Ministerial Intervention may have a role in allowing family violence victims who have exhausted all other visa options to be considered for grant of a visa. However, Ministerial Intervention is a personal, non-delegable, non-compellable and non-reviewable Ministerial power that is not part of a visa application process. A request for intervention does not guarantee the grant of a visa.

To access Ministerial Intervention, people must apply for a visa, their application must be refused by the primary decision maker, and that refusal must be upheld by a review tribunal. This assists in ensuring that all visa options are explored and therefore limits the number of cases that are presented to the Minister for consideration. Allowing family violence victims to make direct requests to the Minister without having a review tribunal decision would fundamentally change the concept and operation of Ministerial Intervention.

The suggested amendments may also raise questions as to why family violence victims get direct access to the Minister, while such direct access is not available to other vulnerable groups, such as the parents of young Australian citizen children.

Prospective Marriage (Subclass 300) visas

Proposals 20-2 and 20-3 suggest that the Prospective Marriage visa be amended to allow former or current Prospective Marriage visa holders to access the family violence provisions in circumstances where they have not married the Australian sponsor.

The Department agrees that a person should not feel compelled to marry a violent partner in order to ensure they satisfy migration requirements. As Prospective Marriage visa holders may remain in Australia for up to 9 months prior to marriage, there is a risk that some visa applicants may be manipulated and forced to remain in an abusive relationship. Such amendments would ensure that Prospective Marriage visa holders who suffered family violence would have a legal basis for having their claims heard by the Department.

There is a risk, as noted in the discussion paper, that some applicants may perceive the requirements of a Prospective Marriage visa as easier to pass and seek to use this and a family violence claim to quickly obtain permanent residence. As noted by Visa Lawyers Australia, however, this risk can be mitigated if appropriate integrity measures are in place for both the Prospective Marriage visa and the family violence provisions.

Question 20-5 asks if the Prospective Marriage visa should be abolished and replaced with a framework that allows fiancés to enter Australia on a special class of visitor visa, in a similar arrangement to that managed by New Zealand.

In the Department's view such a measure would be unlikely to improve the circumstances of persons who suffer family violence.

The Discussion Paper appears to contemplate that holders of a special visitor visa would not have access to the family violence provisions until they had applied for a Partner visa. It appears to the Department, however, that holders of such a visa may have a reasonable expectation of being sponsored for a permanent visa at the conclusion of their initial stay. This would be the case particularly for fiancés or couples who wish to use such a visa to develop their relationship to the point required for a Partner visa. As a result, holders of this visa may have similar incentives to remain in a violent relationship as some Prospective marriage visa applicants currently do.

The designation of this as a "visitor" visa is perhaps inappropriate as current Visitor visa options available to applicants require that they intend only a visit to Australia – rather than have a pre-formed intent to seek to migrate. The creation of a further visa category is also contrary to deregulation efforts underway by the department to reduce the number of visas and simplify them. Persons in a relationship with an Australian Citizen or permanent resident may enter Australia on a Visitor visa subject to meeting relevant criteria including that they intend a genuine visit.

An advantage of keeping the Prospective Marriage visa is that applicants and sponsors must meet a range of other migration checks, including in depth health and character assessments. It also allows for some scrutiny of relationship intentions, which is one of the advantages of the visitor visa option cited by the Commission[2]. Applicants for Prospective Marriage visas must have met their sponsor in person and have a genuine intention to marry. Like the New Zealand model, sponsors of Prospective Marriage visa applicants must meet the same requirements as for Partner visa sponsors (although neither visa in Australia currently imposes a character requirement on sponsors).

The New Zealand model, where the period of relationship determines the period of stay, potentially offers less than the existing Partner visa, for example a de facto relationship of 12 months duration would meet the requirements for a provisional Partner visa. Additionally the current Prospective Marriage visa provides a longer stay period than the standard Visitor visa (nine months as opposed to three).

It is also worth noting that New Zealand must still maintain a separate visa regime for fiancés who will be involved in an arranged marriage[3].

Sponsorship for Partner visas

Question 20-6 asks if the Migration Act and Migration Regulations should be amended to provide that sponsorship is a separate and reviewable criterion for the grant of Partner visas.

The Department notes that for all Partner visas, there is a requirement that the application be sponsored by an eligible sponsoring partner. A sponsorship bar applies to people who are repeat sponsors or who were previously sponsored as a partner themselves.

Since March 2010, there has also been a requirement under Regulation 1.20KB to assess the sponsor's character where there are minor children included in the application and a bar on approving sponsorships from people who have a conviction for a registrable offence.

These legal requirements are subject to assessment by decision makers and are reviewable.

However, despite these requirements, the Department remains cautious about placing additional sponsorship barriers between Australians and their foreign partners, especially those based on the previous behaviour of the sponsor. Such measures could lead to claims that the Australian Government is arbitrarily interfering with families, in breach of its international obligations. It could also lead to claims that the

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[2] Discussion paper, p 685

[3] This is recorded in footnote 84 of the Discussion Paper, p 684

Government is interfering in relationships between Australians and their overseas partners in a way in which it would not interfere in a relationship between two Australians.

There is a significant conceptual difference between applications involving minor children, to which Regulation 1.20KB applies, and those involving adults. While children may have limited choice about migrating to Australia, an adult is able to choose with whom they form a partner relationship or to enter into an arranged marriage.

Depending on the way any additional character requirements were applied, here may also be a risk that Australian sponsors could be disadvantaged by previous conduct that occurred a long time ago.

Family violence training

Proposal 20-4 recommends that the Government ensure consistent and regular education and training is provided to decision makers, competent persons and independent experts in relation to the nature, features and dynamics of family violence, including its impact on victims, in the migration context.

The Department agrees that it is important that decision makers, competent persons and independent experts have a strong awareness of family violence issues in the migration context.

The Migration Regulations, including the family violence provisions, are complex and it is understandable that competent persons and visa applicants may require some assistance to understand them. To this effect, it may be possible to review or improve current information in order to assist competent persons and applicants understand particular migration requirements; including the process for making and assessing family violence claims as well as guidelines on how to complete forms and to comply with statutory declaration requirements. However, such information can only ever extend to clarifying process and requirements. In its decision making role, the Department cannot guide competent persons or visa applicants on how to make successful claims.

Due to the large and diverse number of competent persons, it would not be possible for the Department to undertake a comprehensive training program.

The suggestion from stakeholders cited in the Discussion Paper that competent persons require training from the Australian Government on the nature and dynamics of family violence raises serious questions about the role which competent persons play in current arrangements. The groups designated as competent persons are expected to be professionals who work with victims of family violence and so have expertise which can inform Departmental decision making. Under current arrangements, far from providing training on the features and dynamics of family violence to these groups, the Department relies on their professional training and expertise.

Settlement information

Proposal 20-5 recommends that culturally sensitive and appropriate information about family violence services and rights be provided to persons who arrive in Australia. The Department is open to discussing ways in which information services and delivery can be enhanced within the existing framework.

The department notes that all migrants receive or have easy access to information about legal rights and family violence services through a number of programs and products managed by the Department. Details of these can be found at Attachment B. These programs and products are developed and delivered in line with the Government's broader Access and Equity Framework to provide fair, equitable and accessible information that takes the needs of clients into consideration.

Of particular relevance to partner migrants is the *Beginning a life in Australia* booklet which contains information about the family violence services available in Australia, including contact phone numbers and addresses for family violence services in each state and territory. It also contains information about criminal offences and legal rights in relation to family violence, violent acts in the community and sexual assault. This booklet is currently available on the Department's website in 37 community languages.

To complement this information in this booklet, the Department could consider enhancing the content of Partner visa grant letters in order to more clearly set out its availability and the information it contains.

In addition, from 1 July 2011, the Department now requires all Adult Migrant English Program (AMEP) service providers to provide a distinct settlement course to AMEP clients upon entry to and exit from the program. The entry course will provide new arrivals with information about Australian society, culture, laws, services and practices. The course for exiting AMEP Clients will reinforce this information. Course content is developed by AMEP providers and may vary but usually includes general information and contacts on legal rights, family law and domestic violence.

The department is cognisant of the particular difficulties refugees may face in settling into Australia and the most extensive assistance is provided to humanitarian entrants. Within the department's specialist settlement programs, the delivery of information is responsive to the needs and circumstances of this group.

The Discussion Paper notes, as an example, that partner migrants from the Philippines are required to attend a seminar before moving overseas[4]. The Department believes that it is important to put this information in context. *All* emigrants, not just partner emigrants, from the Philippines are required to register with the Commission for Filipinos Overseas and to attend a Pre-Departure Orientation Seminar[5].
The Department understands that the content of such seminars can be tailored to different types of emigrants.

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[4] Discussion paper, p 691

[5] See: http://www.cfo.gov.ph/index.php?option=com_content&view=article&id=1378%3Apre-departure-registration-and-orientation-seminars&catid=145%3Aintegration-and-reintegration&Itemid=833
[Viewed 20/9/11]

The Department would caution that any efforts to provide additional information on family violence should be developed in a way that does not stigmatise foreign partners or their sponsors and does not unnecessarily duplicate the information available through existing programs and products.

Judicially determined claims

Proposal 21-1 recommends that the Department's Procedures Advice Manual (PAM) provide that, in considering judicially determined claims, family violence orders made post-separation can be considered.

The Department can advise that this approach is already consistent with current policy and is happy to provide additional clarification in PAM.

Question 21-1 asks if an application for a family violence protection order is made, should the migration decision-making process be suspended during the court process.

The Department would suggest that there should be a degree of caution regarding any formal delaying mechanisms. Indeed, one reason that the family violence provisions cater for non-judicial evidence is to allow applicants who have suffered family violence certainty about their visa status given the long periods of time which can be involved in obtaining court orders.

Current processing practice is that, if a case officer is made aware that an interim order had been made and that the client was awaiting the hearing date for the final orders, then the officer would not go ahead and refuse the visa. Instead, they would await the outcome of the hearing. This is consistent with general case management whereby a case officer would give an extension of time to a client to provide evidence if a reason for the delay has been provided.

Family violence after relationship breakdown

Proposal 21-2 recommends that the Government repeal the Regulation 1.23 requirement in the Migration Regulations that specifies that the family violence (or part of) must have occurred while the partner relationship was in existence. Question 21-2 asks if the above requirement is not repealed, what other measures should be taken to improve the safety of family violence victims where the violence occurs after separation.

When considering this proposal it is important to recall the intention of the family violence provisions in the migration context is that people should not feel compelled to remain in a violent relationship. If family violence occurs after the relationship has already ceased the behaviour should not be condoned and the victim may be in need of support services. At that point, however, the visa applicant's position in the context of the Migration Regulations has already changed and the family violence provisions cannot perform their intended function.

However, the Department accepts the arguments made in the Discussion Paper that the point at which a relationship ceases can be difficult to determine. We also acknowledge that persons can be particularly vulnerable to family violence at this time.

Reflecting this concern, the Department could consider if policy guidelines on this issue can provide greater flexibility for cases where family violence occurs during the course of a relationship breakdown. For example, the PAM could indicate that decision makers, in contemplating if the family violence took place before the relationship ended, should have regard to claims that the applicant left the relationship because the behaviour of the sponsor made them feel fearful. The fact that the violent behaviour occurred after the applicant left could then justify that the applicant's feelings of fear were 'reasonable'.

In this vein, PAM could also clarify that Regulation 1.23 should only be invoked to refuse an application where a clear break in the relationship has occurred and the alleged family violence occurs well after that event.

The Department must also respectfully disagree with the Commission's summation that the requirements of Regulation 1.23 mean that the breakdown of the relationship must be attributable to the family violence[6]. The Migration Regulations do not make any such requirement and neither Departmental decision makers nor Independent Experts turn their mind to such a consideration. Indeed, Part 6.1 of the Div 1.5 Special Provisions Relating to Family Violence PAM states that officers must keep in mind that the relationship need not have ceased because of the alleged family violence.

The Department would also like to respectfully draw attention to some shortcomings in the arguments from stakeholders used by the Commission to support this proposal. For example, the Law Institute of Victoria proposes an example where "one physically violent incident [occurs] after separation [which] might have been preceded by a longer period of economic and psychological abuse prior to separation"[7]. Both economic and psychological abuse are already covered by the definition of family violence in the Migration Regulations. In this hypothetical situation, therefore, the alleged victim would meet the family violence provisions even with Regulation 1.23 in place.

The ANU College of Law also submitted that, as a result of Regulation 1.23, some people may remain in a relationship in which they feared violence until such time as violence actually occurred[8]. This argument errs because, even if Regulation 1.23 were repealed, the hypothetical person would not be eligible for a visa unless fear of family violence was made a ground for grant of a permanent visa. The extreme difficulty of predicting a person's future actions of this nature and assessing another person's apprehensions about those actions would make such a provision unworkable.

Non-judicially determined claims

Proposal 21-3 recommends that the process for non-judicially determined claims of family violence at Regulation 1.25 of the Migration Regulations should be replaced with an independent expert panel.

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[6] Discussion paper, 709
[7] Discussion paper, 707
[8] Discussion paper, 706

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

There may also be some other alternatives to consider which would achieve the same objective. These options, which are not mutually exclusive, include:

- appointing a principal decision maker, who is suitably qualified and experienced in family violence matters and could make expert judgements based on submissions from Departmental officers. A similar model is currently applied to decisions based on character; or
- utilising a national organisation which employs appropriate professionals who could conduct interviews nationally and provide reports to visa decision makers; or
- maintaining current independent expert arrangements but removing competent person arrangements. Instead, visa applicants could be allowed to present any evidence to their claims and visa decision makers could be permitted to use their judgement to grant but not refuse a visa based on this evidence; or
- creating a dedicated processing centre for family violence processing in which staff can be trained and develop expertise in assessing family violence claims. This may be more practical if the family violence provisions are extended to a wider range of visa subclasses, however, the Department has already seen benefits from centralising processing of all family violence claims made during processing of Permanent Partner visa applications in a single team.

We also note that under current arrangements family violence assessments are already undertaken by independent experts in the field, and that review mechanisms are already available for cases where it is determined that family violence did not occur, including both merits and judicial review. Further, where the applicant provides new and material information following an independent expert's finding that family violence did not occur, this information is provided to the independent expert to enable them to consider whether it affects their opinion.

The Department, however, also acknowledges that the formation of an independent expert panel (or similar body as in the options above) if well designed may provide benefits in terms of independence, simplicity of requirements and consistency of decisions.

Proposals 21-4 to 21-8 provide alternative recommendations to Proposal 21-3.

Proposal 21-4 recommends that the Migration Regulations be amended to provide that competent persons should not be required to give an opinion as to who committed the family violence in their statutory declaration evidence.

The Department considers that it may be possible to amend the requirement so that the competent person could say who they had been told the perpetrator was and indicate whether or not there was any doubt in their mind about this. However, the Department is cautious that the amendments suggested in the proposal may jeopardise the purpose of the statutory declarations, which is that they are corroborative evidence. We also acknowledge that competent persons are not witnesses to the violence, and at most can only confirm what they are told by the applicant.

One further option could be to ease the requirements on those who appear prima facie to have experienced family violence, but do not meet the current evidentiary requirements for judicial or non-judicial claims. This would involve broadening the non-judicial evidentiary requirement, for example, to include medical evidence, police reports, findings from other government agencies or witness statements. Such documents could be weighted according to their credibility and relevance. It could also be useful to expand the list of competent persons to include marriage counsellors where both parties have attended counselling.

Proposal 21-5 recommends that the Migration Regulations be amended to provide that decision makers can seek further information from competent persons to correct minor errors or omissions in statutory declaration evidence.

The Department believes that this proposal has merit in that it may also allow for a useful 'investigative' discussion to take place. This would improve efficiency while also limiting the chance of visas being refused on 'technicalities'.

However, we are cautious that such amendments may place a duty on decision-makers to inquire and raise questions as to how far a decision-maker would need to go in order to perfect an imperfect statutory declaration. There is a risk that the jurisprudence regarding the content of the duty may develop in a way that becomes cumbersome for the Department to administer.

Proposal 21-6 recommends that the Migration Regulations be amended to provide that visa decision makers are required to provide reasons for referral to an independent expert.

In this regard, the Department would echo a previous submission from the Migration Review Tribunal. A referral to an independent expert is a process of evidence collection that forms the basis of a decision. This works in the same way as when the Department refers other documents for verification or requests additional evidence in relation to an issue.

Like these other avenues of inquiry, following an independent expert opinion, the applicant is provided with the opportunity to comment on the information obtained if it will form the basis of an adverse decision.

To require decision makers to explain and seek comment on both a decision to refer and the outcomes of that referral would be cumbersome and potentially result in duplicate processes.

Proposal 21-7 recommends that the Migration Regulations be amended to require independent experts to give applicants statements of reasons for their decision.

The Department agrees that clients should be provided with reasons for decisions. As part of this, the independent expert's decision summary is given to the client to comment before a decision is made. This has the benefit of giving the applicant another opportunity to make submissions which are taken into account prior to the visa decision.

Currently, applicants are provided with the reasons for an independent expert's opinion by visa processing officers in order to provide them with natural justice. Part C of the family violence referral form gives applicants the chance to provide additional information if they disagree with the independent expert's opinion.

Typically, the reasons provided to the applicant do provide an indication of the information which has shaped the independent expert's opinion and the way in which the different pieces of information have been weighed.

In some circumstances, however, there is information which cannot be passed back to the applicant because it has been provided confidentially to the independent expert or the Department by someone who fears for their well-being if the applicant knew they were the source of the information. In the context of partner relationships, it may be difficult to provide even the gist of the information without revealing the source.

The statement of reasons is a summary rather than a full record of the independent expert's consideration. This is, however, analogous to visa decision making where officers must provide the reasons for their decision not a detailed account of the process by which it was reached.

The Department is open to suggestions for improving the decision summary to ensure that family violence applicants gain a better understanding of how their case was assessed and decided, while protecting confidential information where necessary.

The Federal Magistrates Court recently found (in the case of *Maman v Minister for Immigration & Anor* [2011] FMCA 426) that independent experts owe a duty to afford applicants procedural fairness in preparing their reports. The Department is appealing this decision in order to clarify the scope of this duty but will not challenge the conclusion that a duty of procedural fairness exists. The outcome of this appeal would be relevant to this proposal.

Proposal 21-8 recommends that the Migration Regulations be amended to provide for review of independent expert assessments.

The Department notes that it is already possible for there to be a review of independent expert assessments. Visa applicants are afforded the opportunity to comment on a finding from an Independent Expert that family violence has not occurred. Where the visa applicant provides new information in response, a visa decision maker can refer the matter back to the Department of Human Services (Centrelink) for a review of the original opinion prior to the primary decision. The applicant then has further right of review by appealing to the Migration Review Tribunal.

Humanitarian Stream

Question 20-2 asks how the s48B ability to waive the s48A bar for further Protection visa applications works in relation to those who experience family violence.

There is no obligation under the United Nations *Convention of 1951 and Protocol of 1967 Relating to the Status of Refugees* ('the Refugees Convention') for Australia to provide protection to individuals due to family violence where such violence does not result in a well founded fear of persecution for reasons of one or more of the five Refugees Convention grounds (that is: race, religion, nationality, particular social group or political opinion).

Family violence is not one of the five grounds and as such, is not specifically addressed by the s48B guidelines.

Furthermore, the purpose of s48B of the Migration Act is to enable individuals with new information or changes in their country of origin that may give rise to a successful claim for protection under the Refugees Convention to pursue those claims. It is not intended to give individuals affected by circumstances not related to any of the five Refugees Convention grounds the opportunity to be able to lodge another Protection visa application.

For these reasons, family violence is not addressed by the instruction Ministerial Powers – Minister's guidelines – s48A cases and requests for intervention under s48B of the Act which provides guidelines for departmental officers to assess whether cases should be referred to the Minister to consider intervening under s48B.

As a result, these guidelines do not specifically provide for cases to be referred to the Minister because of family violence. However, if a failed Protection visa applicant has been prevented by family violence issues from presenting Refugees Convention related claims, their case may be considered for referral to the Minister under s48B, on the basis that relevant information was not presented previously for plausible and compelling reasons.

Question 20-2 also asks if s48A of the Migration Act should be amended to allow secondary applicants who are experiencing family violence to make further Protection visa applications onshore.

The Department considers that such an amendment would make it more complex to determine if an individual was barred by s48A of the Act from lodging a further Protection visa application, and as noted above, family violence does not fall within the criteria to be assessed for a Protection visa grant and therefore, within the ambit of s48A or s48B.

Furthermore, if an applicant applying for a Protection visa on the basis that they are a member of the same family unit as a person making protection claims is refused a Protection visa, and they believe that they have claims that were not raised in the family's application for any reason (including the occurrence of family violence), or if instances of family violence may engage Australia's other non-refoulement international obligations if clients are forced to return to their home country, they may ask the Minister to intervene under s48B or s417 of the Act.

Proposal 22-1 recommends that the Minister for Immigration and Citizenship issue a direction under s 499 of the Migration Act to visa decision makers to have regard to the PAM instruction Gender Guidelines when making refugee status assessments.

Protection visa decision makers and Protection Obligations Evaluation (POE) officers are already directed to a variety of guidelines, including the Gender Guidelines, to inform refugee status determinations. The Department is therefore uncertain of the value of having the Minister issue a further direction under s499 of the Migration Act.

As an alternative, the Department believes that an internal reminder should be issued to decision makers who process Protection visa applications, and to POE officers conducting refugee status determinations for Offshore Entry Persons. This reminder would provide guidance on what is covered in the Gender Guidelines and direct officers as to when they must have regard to this instruction.

Question 22-1 asks if s417 of the Migration Act provides sufficient protection for victims of family violence, and if not, what improvements should be made.

Ministerial intervention under s417 is intended as a safety net option of last resort and may have a role where other visa options are not available. The Minister's Guidelines for s417 indicate that the power is to be used in cases where there are unique and exceptional circumstances, or where Australia's non-refoulement obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the International Covenant on Civil and Political Rights (ICCPR) are engaged. After the Complementary Protection provisions commence, this power will continue to be used in relation to clients in compelling and compassionate circumstances (such as family violence victims) by allowing their cases to be referred to the Minister for possible intervention.

On 19 September, the Australian Parliament passed the Migration Amendment (Complementary Protection) Bill 2011 to incorporate Australia's *non-refoulement* obligations under other international treaties into the Protection visa application process.

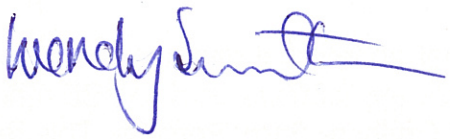
This means that, when implemented, people who may not be recognised as refugees for one of the five reasons outlined in the *Convention Relating to the Status of Refugees* – race, religion, nationality, social group or political opinion – are eligible to receive a Protection visa through the usual process that is more transparent and accountable.

This may include people fleeing situations of family violence where there are substantial grounds for believing that, as a necessary and foreseeable consequence of being returned, there is a real risk that a person will suffer significant harm.

I would like to close by thanking the Commission for presenting this Discussion paper. We look forward to working together with the Commission on this issue in the future and to reviewing the final report to the Government in due course.

If you would like any further information about the Department's response, or to discuss the issues outlined in this letter, please contact Mr Robert Day, Director, Family Section on (02) 6264 1265.

Yours sincerely



Dr Wendy Southern PSM
Deputy Secretary
Policy and Program Management Group

29 September 2011

Attachment A

Family violence claims

Table 1 shows the number of claims against the family violence provisions since the 2008-09 program year and the outcome of cases referred to Department of Human Services Centrelink.

Table 1: Family violence cases referred to Department of Human Services (DHS) Centrelink

Family violence cases referred to DHS Centrelink	**2008-09**	**2009-10**	**2010-11**
Family violence claims made to DIAC	708	705	**1 023**
Total cases referred to DHS Centrelink:	98	109	**208**
• Meets Provisions	45	32	**69**
• Does not meet Provisions	37	19	**69**
• Not yet decided or withdrawn	16	58	**70***
% of claims referred	13.8%	15.5%	**20.3%**

*As at 30 June 2011

Attachment B

Summary of settlement programs and products

PRE-ARRIVAL SERVICES

Life in Australia value statement booklet

This booklet is intended for people who are applying for a visa to live in Australia, either permanently or on a temporary basis. It provides an overview of Australia, its history, way of life and the values we share.

As part of the visa application process, many visa applicants must confirm that they will respect Australian values and obey the laws of Australia.

The booklet is produced by the Department of Immigration and Citizenship and is available online in English and 29 community languages at www.immi.gov.au/living-in-australia/values/book/.

The booklet contains a section on domestic violence. It describes violence, including violence within the home and within marriage, as illegal behaviour which is very seriously regarded in Australia.

Australian Cultural Orientation (AUSCO)

The AUSCO program is an orientation course for refugee and humanitarian visa holders preparing to settle in Australia, delivered overseas by the International Organisation for Migration (on DIAC's behalf) before they travel to Australia. The course provides an introduction to aspects of Australian life which will enhance entrants' settlement prospects, help create realistic expectations for their life in Australia and help entrants learn about Australian culture, history, institutions, law and so forth, prior to arrival.

The AUSCO course is available to all refugee and humanitarian visa holders over the age of five and is designed for and delivered to four main groups—adults, youth, children and pre-literate entrants. Family sessions have been developed so that family members attending different courses have one day of a joint session to discuss issues such as shifts in family dynamics and gender roles. AUSCO also provides a forum for discussion on the rights of women and children in Australia, sexual harassment and domestic violence. Where possible, the course is delivered over five days to ensure all topics are covered in sufficient detail.

ON ARRIVAL SERVICES

Beginning a Life in Australia (BALIA)

The BALIA booklet provides useful national, state/territory and local settlement information for newly arrived migrants and is the primary information product for skilled migrants.

The booklet is produced by the Department of Immigration and Citizenship and is available online in English and 37 community languages at www.immi.gov.au/living-in-australia/settle-in-australia/beginning-life/.

Information on basic details on acceptable/lawful behaviour is provided on the following issues, together with contact details for related services: domestic or family violence, sexual assault, the legal age of consent, rights of children, child protection, forced early marriage, female reproductive health and rights, the police, telephone crisis counseling.

Australia – a new home settlement information DVDs

The department has developed two settlement information DVDs for newly arrived refugees and humanitarian entrants from Africa and Asia. Titled *Australia-a new home,* the DVDs give new arrivals the opportunity to watch important settlement information on topics including health, work, education and the law in their own home, as often as required, in their first few months in Australia.

The DVDs are voiced in key African and Asian languages with English subtitles, helping to address the communication challenges associated with low levels of literacy and English language proficiency. DVDs can be obtained through the Department's state and territory offices. The DVD chapters are also available in English on IMMI TV, at www.youtube.com/user/ImmiTV.

The DVDs include a section on family violence and Australian law where contact details are provided for the police and the family violence helpline.

Humanitarian Settlement Services Orientation Program (onshore)

The onshore Orientation Program is a course delivered in Australia by organisations contracted to deliver Humanitarian Settlement Services (HSS) to refugee and humanitarian visa holders preparing to settle in Australia. The course is delivered ideally within six weeks of arrival, depending on the needs of the client and the capacity of the provider. For refugees arriving from overseas directly, this program is meant to complement and reinforce the knowledge provided in AUSCO. For those already in Australia when their visas were granted, this program acts as an alternative to AUSCO.

The program's general goal is to equip clients with basic life-skill competencies to settle successfully in Australia. Its focus is on providing the practical skills and knowledge for refugees to build confidence and independence, and to develop their understanding of key information and services.

It includes a number of topics of direct relevance to women, such as: family life and parenting practices in Australia; cultural norms on gender roles and gender equality; and introduction to Australian Law (including basic family law, the role of child services and how to seek help). It also includes a youth-focused component on family relationships and family conflict.

Among the recommended resources for the program are the AUSCO handbook and *Australia – a new home* DVD. Frequently invited speakers include local community legal aid representatives and police representatives. Contact details for legal services and child protection services are also provided.

Adult Migrant English Program (AMEP) settlement course

The AMEP complements AUSCO and the onshore HSS Orientation Program and is available to eligible migrants from the humanitarian, family and skilled visa streams. All AMEP clients have access to up to 510 hours of English language courses in their first five years of settlement in Australia. Participation in the program is voluntary.

From 1 July 2011, the Department now requires all Adult Migrant English Program (AMEP) service providers to provide a distinct settlement course to AMEP clients upon entry to and exit from the program. The entry course will provide new arrivals with information about Australian society, culture, laws, services and practices. The course for exiting AMEP Clients will reinforce this information. Course content is developed by AMEP providers and may vary but usually includes general information and contacts on legal rights, family law and domestic violence.

Generally, settlement courses are structured around topics that provide clients with practical skills and information to navigate their way through issues they face along their settlement pathway. Speakers are often invited from various agencies to speak on these issues. Many providers use the BALIA booklet and Legal Aid contacts to help deliver this topic.

Settlement Grants Program (SGP)

The SGP provides further settlement services to eligible migrants and humanitarian entrants to assist them become self reliant and able to participate in Australian society as soon as possible after arrival.

The funding priorities of the SGP are informed by an annual assessment of settlement needs and through consideration of statistical data. This approach ensures that services provided through the SGP are targeted towards those communities and locations in greatest need of settlement assistance and are responsive to changing settlement patterns and needs.

The program is project-based and some projects focus on providing support to refugee and migrant women specifically. The SGP does not fund organisations to provide specialist counselling services. However, appropriate SGP activities may include:

- information provision and linking clients to appropriate mainstream services which provide early intervention workshops / training for young people and parents—together and separately, looking at the community's expectations around parenting, roles, rights and obligations under Australian law;
- information on and referral to appropriate specialist counselling services including culturally appropriate family mediation;
- programs for newly arrived young humanitarian and refugee entrants that explore both rights and responsibilities and cultural orientation in Australia delivered direct to young people and their parents; and
- in cases of family conflict, information about legal issues and the roles of police and courts, Australia's family law provisions and the role of child protection agencies.

Appropriate SGP services may include providing referrals to legal assistance and services and providing information on:

- Australia's legal framework, government systems, and key justice agencies;
- the role of police and how to seek their assistance; and
- Australian law, including information on domestic violence and family law issues including divorce and child contact.

One example organisation is the Refugee & Immigration Legal Services, Queensland, who are funded to:

Increase independence, knowledge and ability to navigate and access mainstream services and promote self reliance to eligible SGP humanitarian youth at Milpera State School in Brisbane Statistical Division. This will be achieved through a Legal Education Cultural Transition Program with workshops focusing on law and justice, police, gender equity, discrimination and conflict resolution.