Submission Paper

FECCA
Federation of Ethnic Communities' Councils of Australia

Submission to the Australia Law Reform Commission

Impact of Commonwealth Laws on those Experiencing Family Violence

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Federation of Ethnic Communities' Councils of Australia

FECCA House
Unit 1, 4 Phipps Close
Deakin ACT 2600

PO Box 344
Curtin ACT 2605

p 02 6282 5755
f 02 6282 5734
e admin@fecca.org.au
w www.fecca.org.au

About FECCA

FECCA is the national peak body representing Australians from culturally and linguistically diverse (CALD) backgrounds.

We provide advocacy, develop policy and promote issues on behalf of our constituency to government and the broader community. FECCA supports multiculturalism, community harmony, social justice and the rejection of all forms of discrimination and racism.

Introduction

FECCA welcomes the Australian Law Reform Commission's Inquiry and commends them on their focus on family violence and Commonwealth law reform.

FECCA will use this opportunity to respond to the specific issues, proposals and questions raised in the Discussion paper which directly affect and are relevant to culturally and linguistically diverse (CALD) communities in Australia. We have chosen to respond to those questions where we are able to provide evidence based answers based largely on information from our national consultations. Primarily, our response is informed by grassroots consultations with CALD communities and the services they access.[1] In particular FECCA held a women's consultation in Sydney in partnership with the Australian Human Rights Commission and the Metro Migrant Centre which drew over 70 women. Family violence was a key topic that was discussed at this meeting.

Our consultations have revealed overarching issues regarding core concerns and barriers relating to CALD communities across many legislative, policy and service delivery areas. These include issues related to level of English language and linguistic proficiency, cultural practices and attitudes towards private and public family issues, gender roles and

[1] Please see FECCA 2011, *The Quest for 'a Level Playing Field': Access and Equity Report 2010-2011*, FECCA, Canberra, accessible at < www.fecca.org.au>.

information provision preferences. Furthermore, certain CALD communities and individuals, such as refugees, may experience fear of authority or complex issues relating to torture and trauma, which impede their access to appropriate support and care. The complexity of migration legislation and visa requirements are issues which can compound problems in many areas, in particular when dealing with family violence.

In the field of family violence FECCA draws attention to the fact that this form of violence affects predominantly women, irrespective of their cultural, ethnic, religious and socio-economic backgrounds.[2] However, it is also understood that there are systemic factors which may position CALD women and their families at greater risk of experiencing certain types of violence and/or disadvantage and isolation from the appropriate support services. In addition to the challenges and barriers noted above, gender roles which can create isolating financial, cultural and religious dependency arrangements with spouses, families and communities can be considered relevant to the experiences of CALD women undergoing family violence.

Overall, FECCA frames this submission with an understanding that there is a requirement to maintain the integrity of Australia's visa and welfare systems. However, we also advocate for ensuring that the basic human rights of people are protected in all cases. This means that all people legally residing in Australia, both on temporary and permanent terms, should have equitable access to support services.

[2] United Nations 2010, *The World's Women 2010: Trends and Statistics*, Department of Economic and Social Affairs, United Nations, New York, p. 127.

FECCA Response to Proposals

Common Interpretive Framework Proposals:

Proposal 3–8 The *Migration Regulations 1994* (Cth) should be amended to provide for a consistent definition of family violence as proposed in **Proposal 3–1**.

Proposal 3–1 The *Social Security Act 1991* (Cth) should be amended to provide that family violence is violent or threatening behaviour, or any other form of behaviour, that coerces and controls a family member, or causes that 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 violence that causes a child to be exposed to the effects of behaviour referred to in (a)–(h) above.

Proposal 3-8 seeks to amend the *Migrations Regulations 1994* (Cth) in order to provide increased consistency across core legislative areas, move legal understandings and frameworks toward a more contemporary reflection of family violence behaviours and circumstances, particularly in regard to coercive control, and ultimately, permeate and coordinate the workings of state and territory legislative structures which family violence implicates.

In principle, FECCA supports this legislative move for a number of important reasons. First, by increasing consistency across core legislative areas, which directly concern and impact family violence, at both a commonwealth and state and territory level, there may be increased

capacity for greater understanding of and subsequently greater access to, legal structures which have proven to be complicated and onerous in the past. For those who may move across state and territory borders, this could have the capacity to address issues related to different interpretations across state and territory lines.

Furthermore, the application of the violence definition proposed in 3-1, which would see the terms 'relevant' and 'reasonable' omitted, could assist in providing greater access and equity to those attempting to gain safety from violence through legislative procedures. These terms can be considered biased to certain understandings of what or who determines what can be considered relevant and reasonable. This bias may not take into account the diversity of clients' cultural and religious understandings and experiences of family violence.

Furthermore, utilising the term 'reasonable' moves the focus off the alleged perpetrator and places the onus on the victim to prove the violence in a manner which is often financially and psychologically debilitating. This implication can also be argued as supporting or perpetuating the power imbalances which underpin family violence.

FECCA recommends:

1. The *Migration Regulations 1994* (Cth) should be amended to provide for a consistent definition of family violence across core legislative areas as put forward in Proposal 3 - 8.

Proposal 3–9 The Department of Immigration and Citizenship's *Procedures Advice Manual 3* for decision makers should include examples to illustrate coercive and controlling conduct that may amount to family violence, including but not limited to:
(a) the threat of removal; and
(b) violence perpetrated by a family member of the sponsor at the instigation, or through the coercion, of the sponsor.

The tools utilised by the Department of Immigration and Citizenship (DIAC) in decision making processes should reflect and complement not only what is present in legislation but also contemporary understanding of the nature of family violence. Thus the *Procedures Advice Manual 3* (PAM 3) should be updated to incorporate the proposed legislative amendments under Proposal 3-8.

By clearly including examples of coercive and controlling conduct in PAM 3, DIAC decision makers will benefit from an enhanced understanding and knowledge of the fear of deportation and settlement stresses which are characteristic of many victims who attempt to apply for new visa arrangements and permanent residency for family violence protection reasons.[3] By having greater insight into such practices, which affect some CALD communities and sponsor arrangements, FECCA believes that decision makers will have increased capacity to provide just outcomes for victims and their families.

Recognising that family violence may also be perpetrated by family members, other than the individual sponsor, is also an important facet of the above proposal. For some families involved in visa sponsor arrangements the desire to safeguard marriage and maintain extended family relations and community ties, may induce violence, in particular coercive and controlling behaviours, which are harmful and isolating.[4]

[3] Australia Immigrant and Refugee Women's Alliance (AIRWA) 2011, *AIRWA Submission to the Australian Parliamentary Group on Population and Development Roundtable: Ending Gender-based Violence in the Asia-Pacific Region*, AIRWA, Canberra, pp. 9 -10.
[4] Ibid.

Providing examples of such behaviours within PAM 3 will assist in decision making processes, which in family violence matters may often be uncertain and confusing for victims and decision makers alike.

FECCA Recommends:

2. That the *Procedures Advice Manual 3* (PAM 3) should be updated to incorporate the proposed amendments to the *Migrations Regulations 1994* under Proposal 3-9.
3. That PAM 3 incorporates examples which illustrate coercive and controlling behaviours, including but not limited to threats of deportation.
4. That these examples be extended to demonstrate the role of sponsor family members, who may be integral to the perpetuation of coercive and controlling violent behaviours, particularly around visa and settlement security.

20. Migration Law - Overarching Issues

Question 20–1 From 1 July 2011 the Migration Review Tribunal will lose the power to waive the review application fee in its totality for review applicants who are suffering severe financial hardship. In practice, will those experiencing family violence face difficulties in accessing merits review if they are required to pay a reduced application fee? If so, how could this be addressed?

Whilst the experience of family violence can be considered diverse, additional pressures, such as the need to source finances for a review application fee, will have detrimental and negative impacts on family violence situations. Given that practices of economic control and coercion are documented as features of family violence and that settlement insecurity can put additional pressures on victims and their families, placing a fee, although reduced, could have the capacity to perpetuate violence and vulnerability.[5]

[5]Maureen Outlaw 2009, 'No One Type of Intimate Partner Abuse: Exploring Physical

Furthermore, increasing the barriers, in this case financial barriers, for those experiencing family violence to gain access to merit review may also contribute to sustaining a dependence upon abusive situations and relationships. Recent reports, such as *"I lived in fear because I know nothing": Barriers to the Justice System faced by CALD women experiencing family violence*[6], have demonstrated that the pressures of immigration requirements and processes have both supported, perpetuated and/or lead to family violence and at the same time increased a victim's dependency on the perpetrator.[7]

Proposal 20–1 The *Migration Regulations 1994* (Cth) should be amended to provide that the family violence exception applies to all secondary applicants for all onshore permanent visas. The family violence exception should apply:
(a) as a 'time of application' and a 'time of decision' criterion for visa subclasses where there is a pathway from temporary to permanent residence; and
(b) as a 'time of decision' criterion, in all other cases.

Question 20–2 Given that a secondary visa applicant, who has applied for and been refused a protection visa, is barred by s 48A of the *Migration Act 1958* (Cth) from making a further protection visa application onshore:

(a) In practice, how is the ministerial discretion under s 48B—to waive the s 48A bar to making a further application for a protection visa onshore—working in relation to those who experience family violence?

(b) Should s 48A of the *Migration Act 1958* (Cth) be amended to allow secondary visa applicants who are experiencing family violence, to make a further protection visa application onshore? If so, how?

and Non-Physical Abuse Among Intimate Partners' in *Journal of Family Violence*, vol 24, no 4, Springer Netherlands, p. 264.
[6] InTouch: Multicultural Centre against Family Violence, Melbourne 2010, *"I lived in fear because I knew nothing": Barriers to the Justice System Faced by CALD Women Experiencing Family* Violence, State of Victoria, Melbourne.
[7] Ibid., p. 18.

Question 20–3 Section 351 of the *Migration Act 1958* (Cth) allows the Minister for Immigration and Citizenship to substitute a decision for the decision of the Migration Review Tribunal if the Minister thinks that it is in the public interest to do so:

(a) Should s 351 of the *Migration Act 1958* (Cth) be amended to allow victims of family violence who hold temporary visas to apply for ministerial intervention in circumstances where a decision to refuse a visa application has not been made by the Migration Review Tribunal?

(b) If temporary visa holders can apply for ministerial intervention under s 351 of the *Migration Act 1958* (Cth), what factors should influence whether or not a victim of family violence should be granted permanent residence?

The next proposals are presented as alternate options: Proposal 20–2 OR Proposal 20–3

OPTION ONE: Proposal 20–2

Proposal 20–2 The *Migration Regulations 1994* (Cth) should 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.

OPTION TWO: Proposal 20–3

Proposal 20–3 Holders of a Prospective Marriage (Subclass 300) visa who are victims of family violence but who have not married their Australian sponsor, should be allowed to apply for:

(a) a temporary visa, in order make arrangements to leave Australia; or

(b) a different class of visa.

Question 20–4 If Prospective Marriage (Subclass 300) visa holders are granted access to the family violence exception, what amendments, if any, are necessary to the *Migration Regulations 1994* (Cth) to ensure the integrity of the visa system?

Question 20–5 Should the Prospective Marriage (Subclass 300) visa be abolished, and instead, allow persons who wish to enter Australia to marry an Australian sponsor to do so on a special class of visitor visa, similar to that in place in New Zealand?

Question 20–6 Should the *Migration Act 1958* (Cth) and the *Migration Regulations 1994* (Cth) be amended to provide that sponsorship is a separate and reviewable criterion for the grant of partner visas?

Proposal 20–4 The Australian Government should ensure consistent and regular education and training in relation to the nature, features and dynamics of family violence, including its impact on victims, for visa decision makers, competent persons and independent experts, in the migration context.

FECCA supports Proposal 20-4 as it will assist decision makers, competent persons and independent experts to gain greater understanding of the diversity of the manifestation of family violence. This tool will hopefully seek to encourage amongst such individuals and institutions a dedicated and inclusive approach that recognises the diversity and complexity of cultural and religious attitudes and behaviours towards family violence, its emergence and ways of reconciliation.

FECCA Recommends:

5. The implementation of Proposal 20-4.

6. That the education and training offered is to have a facet dedicated to the implications of culturally and religiously diverse attitudes and behaviours in relation to family violence.

Proposal 20–5 The Australian Government should ensure that information about legal rights, family violence support services, and the family violence exception are provided to visa applicants prior to and upon arrival in Australia. Such information should be provided in a culturally appropriate and sensitive manner.

FECCA supports this proposal as it echoes much of the CALD communities' feedback regarding domestic and family violence gathered during FECCA's Access and Equity Consultations 2010-2011.[8] In these consultations, participants spoke of the need for greater information, particularly prior to arrival in Australia, regarding their rights and

[8] FECCA 2011, *The Quest for 'a Level Playing Field': FECCA Access and Equity Report 2010-2011,* FECCA, Canberra, p. 65.

responsibilities, the services available to them and the family violence provision.

Consultations participants wanted this information to be delivered in an accessible way which took into account cultural appropriateness and sensitivity, as proposed above, but also linguistic sensitivity where needed. Furthermore, they spoke of a need for a diversity of accessible information and services, which are primarily delivered by bilingual, bicultural community-based and/or culturally competent workers and advocates who understand the legal frameworks and the cultural dynamics of family violence, its prevention and methods of support.

It must also be noted that although FECCA supports Proposal 20-5, we are mindful that current crisis services do not have the capacity, specialisation or funding to cater for victims who enter and reside in Australia on certain visas which restrict their access to employment and public welfare.[9]

FECCA Recommends:

7. That Proposal 20-5 is implemented to ensure that information provision regarding legal rights, family violence support services, and the family violence exception are provided to visa applicants and their families prior to and upon arrival in Australia.
8. That this information is provided in a culturally appropriate and sensitive manner which takes into account individual and community linguistic and literacy needs.
9. That this information be provided in a variety of formats to ensure information preferences, which may be based on cultural attitudes and practices, be provided. This may include digital, print, video and face-to-face engagement.

[9] M Athaide 2010, *A Call for Justice towards immigrant women: Amending Australia's Domestic/Family Violence Provisions,* research project with ACT Women's Services Network, p. 4.

21. The Family Violence Exception—Evidentiary Requirements

Proposal 21–1 The Department of Immigration and Citizenship's *Procedures Advice Manual 3* should provide that, in considering judicially-determined claims, family violence orders made post-separation can be considered.

Question 21–1 Where an application for a family violence protection order has been made, should the migration decision-making process be suspended until finalisation of the court process?

Proposal 21–2 The requirement in reg 1.23 of the *Migration Regulations 1994* (Cth) that the violence or part of the violence must have occurred while the married or de facto relationship existed between the alleged perpetrator and the spouse or de facto partner of the alleged perpetrator should be repealed.

Question 21–2 If the requirement in reg 1.23 is not repealed, what other measures should be taken to improve the safety of victims of family violence, where the violence occurs after separation?

The next proposals are presented as alternate options: **Proposal 21–3 OR Proposals 21–4 to 21–8**

OPTION ONE: Proposal 21–3

Proposal 21–3 The process for non-judicially determined claims of family violence in reg 1.25 the *Migration Regulations 1994* (Cth) should be replaced with an independent expert panel.

OPTION TWO: Proposals 21–4 to 21–8

Proposal 21–4 The *Migration Regulations 1994* (Cth) should 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.

Proposal 21–5 The *Migration Regulations 1994* (Cth) should be amended to provide that visa decision makers can seek further information from competent persons to correct minor errors or omissions in statutory declaration evidence.

Proposal 21–6 The *Migration Regulations 1994* (Cth) should be amended to provide that visa decision makers are required to provide reasons for referral to an independent expert.

Proposal 21–7 The *Migration Regulations 1994* (Cth) should be amended to require independent experts to give applicants statements of reasons for their decision.

Proposal 21–8 The *Migration Regulations 1994* (Cth) should be amended to provide for review of independent expert assessments.

22. Refugee Law

Proposal 22–1 The Minister for Immigration and Citizenship should issue a direction under s 499 of the *Migration Act 1958* (Cth) to visa decision makers to have regard to the Department of Immigration and Citizenship's *Procedures Advice Manual 3* Gender Guidelines when making refugee status assessments.

Question 22–1 Under s 417 of the *Migration Act 1958* (Cth), the Minister for Immigration and Citizenship may substitute a decision for a decision of the Refugee Review Tribunal, if the Minister considers that it is in the public interest to do so. Does the ministerial intervention power under s 417 of the *Migration Act 1958* (Cth) provide sufficient protection for victims of family violence? If not, what improvements should be made?

13. Income Management – Social Security Law

Proposal 13–1 The *Social Security (Administration) Act 1999* (Cth) and the *Guide to Social Security Law* should be amended to ensure that a person or persons experiencing family violence are not subject to Compulsory Income Management.

Whilst evidence that Income Management can assist people experiencing family violence exists, there are also anecdotes and research which suggests that Income Management, particularly where it is compulsory, may exacerbate the violence and increase feelings of insecurity.[10] FECCA has taken a stance against the imposition of Income Management primarily because of its ability to stigmatise, inadvertently discriminate and impede culturally familiar practices, such as shopping at local markets. Given this, FECCA does not support compulsory income management.

With the continuation of non-compulsory Income Management we do, however, recommend that information regarding the program and any subsequent changes be provided in a culturally competent and linguistically sensitive manner to communities and individuals. Moreover, FECCA recommends that this information provision be rigorous and seek to be mindful of the continued migration and arrival of new diverse

[10] Equality Rights Alliance 2011, *Women's Experience of Income Management in the Northern Territory*, Equality Rights Alliance, Canberra, p. 35.

communities to Australia, who may be susceptible to or are experiencing family violence.

FECCA recommends:

10. The *Social Security (Administration) Act 1999* (Cth) and the *Guide to Social Security Law* be amended to ensure that a person or persons experiencing family violence are not subject to Compulsory Income Management.

11. That in the event individuals are placed on Income Management voluntarily, that they have access to information that is culturally competent and linguistically sensitive.

12. That further research into the relationship between Income Management and family violence is undertaken.

Question 13–1 Are there particular needs of people experiencing family violence, who receive income management, that have not been identified?

CALD individuals and families, in particular women, who are experiencing family violence and are receiving Income Management or are candidates for the program may have specific needs and face distinct challenges and barriers. Recently, these have been found to be specifically related to the exacerbation of settlement stresses and feelings of lack of respect, exclusion and discrimination through the implementation of Income Management.[11] The impact of stigma and community shame experienced by BASIC card holders, who face isolation from their communities due to the limitations of what shopping outlets and community activities are financially accessible under the scheme, is of particular note.

Recently, Equality Rights Alliance released the report *Women's Experience of Income Management in the Northern Territory* which in part

[11] Ibid, p. 6.

demonstrates the emotional and psychological implications of Income Management on CALD and Aboriginal women.[12] Specifically, the report details how these women felt inadequate as parents as a result of being placed on the program.[13] Even though this was not specifically mentioned in relation to CALD women experiencing family violence, it suggests that this additional emotional burden could not only negatively impact on a women's capacity to move away from family violence but also to seek support services to do this.

Proposal 13–2 In order to inform the development of a voluntary income management system, the Australian Government should commission an independent assessment of voluntary income management on people experiencing family violence, including the consideration of the Cape York Welfare Reform model of income management.

Proposal 13–3 Based on the assessment of the Cape York Welfare Reform model of income management in Proposal 13–2, the Australian Government should amend the *Social Security (Administration) Act 1999* (Cth) and the *Guide to Social Security Law* to create a more flexible Voluntary Income Management model.

Question 13–2 In what other ways, if any, could Commonwealth social security law and practice be improved to better protect the safety of people experiencing family violence?

Proposal 13–4 Priority needs, for the purposes of s 123TH of the *Social Security (Administration) Act 1999* (Cth) are goods and services that are not excluded for the welfare recipient to purchase. The definition of 'priority needs' in s 123TH and the *Guide to Social Security Law* should be amended to include travel or other crisis needs for people experiencing family violence.

[12] Equality Rights Alliance 2011, *Women's Experience of Income Management in the Northern Territory*, Equality Rights Alliance, Canberra
[13] Equality Rights Alliance 2011, *Women's Experience of Income Management in the Northern Territory*, Equality Rights Alliance, Canberra