Refugee & Immigration Legal Centre Inc

Response to the Discussion Paper, Family Violence and Commonwealth Laws (DP 76, Part G: Migration)

1. Introduction – Refugee & Immigration Legal Centre Inc.

1.1 The Refugee and Immigration Legal Centre ("RILC") is a specialist community legal centre providing free legal assistance to asylum seekers and disadvantaged migrants in Australia.[1] Since its inception over 22 years ago, RILC and its predecessors have assisted many thousands of asylum seekers and migrants in the community and in detention.

1.2 RILC specialises in all aspects of refugee and immigration law, policy and practice. We also play an active role in professional training, community education and policy development. We are a contractor under the Department of Immigration's Immigration Advice and Application Assistance Scheme ("IAAAS"). RILC has been assisting clients in detention for over 17 years and has substantial casework experience. We have often been contacted for advice by detainees from remote centres and have visited Curtin, Perth, Scherger, Darwin, Christmas Island and Nauru immigration detention centres/'facilities' on numerous occasions. We are also a regular contributor to the public policy debate on refugee and general migration matters.

1.3 RILC is the largest provider of refugee and immigration law services in Australia. Each year we assist around 4,000 people. Our clientele largely consists of people from a wide variety of nationalities and backgrounds who cannot afford to pay for legal assistance and are often disadvantaged in other ways. Much of this work involves advice and/or full legal representation to review applicants at the Migration and Refugee Review Tribunals. Due to funding and resource constraints, in recent years we have generally provided advice and assistance at the administrative level only.

1.4 The focus of our submissions and recommendations reflect our experience and expertise as outlined above.

2. Focus points

2.1 Our submission will address the following issues from Part G, Migration Law:

- Question 20-1: the Migration Review Tribunal application fee;
- Question 20-2: the bar to further protection visa applications under s 48A of the *Migration Act 1958* (Cth);
- Question 20-4 to 20-6: Prospective Marriage (Subclass 300) visas; and
- Proposal 22-1 and Question 22-1: refugee law and complementary protection.

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[1] RILC is the amalgam of the Victorian office of the Refugee Advice and Casework Service ("RACS") and the Victorian Immigration Advice and Rights Centre ("VIARC") which merged on 1 July 1998. RILC brings with it the combined experience of both organisations. RACS was established in 1988 and VIARC commenced operations in 1989.

3. The Migration Review Tribunal application fee

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?

3.1 Based on the experience of our clients who have had to seek review by the Migration Review Tribunal (MRT), RILC is extremely concerned about the imposition of the new fee of $770 for an application for review by the MRT on people who are experiencing 'severe financial hardship' and granted a fee waiver (see *Migration Amendment Regulations 2011 (No 4)*).

3.2 We note that there has always been an anomaly with the MRT fee waiver as the *Migration Regulations 1994* have always required that persons seeking fee waivers show *severe* financial hardship as opposed to financial hardship, the test for other Commonwealth review bodies. For example, in its migration jurisdiction, the Administrative Review Tribunal has a reduced fee for those suffering 'financial hardship' of $100. Moreover, if a review applicant not granted a fee waiver is successful, all but $100 of their application fee is refunded. A further example is that there is no fee payable at the Social Security Appeals Tribunal, regardless of the financial means of the applicant.

3.3 This fee will deprive impecunious people of review rights on serious matters. RILC agrees with the ALRC statement in the Discussion Paper (see Chapter 20, para. 20.18) that there is a "real risk that victims of family violence who are facing severe financial difficulties will be unable to pay even the reduced fee required to access merits review, which may ultimately prevent access to the family violence exception". This may also have significant effect on the ability of sufferers of family violence to access appropriate services to obtain much needed care.

3.4 RILC provides legal services to those who cannot afford to pay for a private migration agent. All but a handful of the people we represent at the MRT have been able to seek review only because they have been able to have the Tribunal fee waived completely. From our experience, the imposition of a fee of $770 will preclude people with meritorious cases who are already experiencing severe financial hardship from being able to access review by the Tribunal.

3.5 We can provide examples where incorrect decisions by DIAC, through no fault of the clients, would have resulted in substantial and continuing injustice occurring to them and their families, if the clients had not had the capacity to challenge the decisions in the MRT.

3.6 Firstly, in general, migration legislation is extremely complex and many persons affected by it do not speak English. There are always cases where applicants have not understood the requirements of the visa and have not provided sufficient information to allow DIAC to make a positive decision. The MRT is the avenue which enables applicants to understand the nature of the applications they are making and to remedy the defects in their applications. A not infrequent example of this is where victims of family violence and their caseworkers do not understand the very technical and complex requirements for providing evidence of such violence. These issues are often able to be resolved in their favour at the MRT. However, the new fee will mean that victims of family violence, who

are often homeless and without income because they are not yet permanent residents, will be deprived access to review and therefore denied the benefit of the measures which were introduced to provide them with protection against family violence.

3.7 One of RILC's cases involved a woman and her young children who were sponsored to Australia on partner visas. They later discovered that the partner was a registered sex offender and not allowed to live with children. Owing to a misapplication of the regulations, their visa applications on family violence grounds were refused by DIAC. The decision was set aside by the MRT. Had the new fee been in place, this woman would have been deprived of the opportunity to have the incorrect decision set aside.

3.8 In some circumstances, valuable support for victims of family violence may also be placed in jeopardy by the new regulations. In one of our cases, an elderly couple came to Australia to visit their daughter and granddaughter who were the victims of severe family violence from the daughter's ex-partner. The couple wanted to be able to stay in Australia to support their extremely vulnerable daughter. They applied for onshore parent visas and were refused because of misapplication of the regulations governing the grant of that visa subclass. Neither they, with no income at all, nor their daughter, who was in receipt of Centrelink payments for herself and her daughter only, would have had the capacity to pay a fee of $770. The couple would have had to depart Australia and leave their daughter and granddaughter in a highly precarious position. The incorrect decision of DIAC would have remained.

3.9 Given this example, we are of the view that any measure to address the regulations must provide a wider solution than fee exceptions for victims of family violence *only*. For this reason, RILC welcomes the ALRC's proposal that there be a possibility for temporary visa holders to access 'Special Benefit' payments under the *Social Security Act 1991*.

3.10 In recognition of the fact that the MRT fee waivers have the most restrictive criteria for access of the waiver and provide the least amount of relief from the fee, RILC calls for the abolition of the regulation relating to the new fee and the installation of a fee waiver accessible to those suffering 'financial hardship' as opposed to 'severe financial hardship'. There is little benefit to the MRT in retaining the new fee, and devastating consequences for those denied access to review. In fact, during 2010/2011 the number of fee waiver requests amounted to less than 10% of the lodgements (out of 10, 314 MRT lodgements). Less than 5% were granted: there were 511 fee waivers during that period. This would have amounted to about $393,500 if the new fee were paid, which is not a major source of revenue for the MRT.

Recommendation 1: A full fee waiver should be available to persons suffering from financial hardship, rather than 'severe' financial hardship.

Recommendation 2: The current regulation implementing the $770 fee should be removed to allow for consistency with other Tribunal schemes which have no or very low fees.

4. The bar to further protection visa applications under s 48A of the *Migration Act 1958* (Cth)

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?*

4.1 In RILC's experience, the process of applying to the Minister under s 48B can result in lengthy delays. It is a step which prolongs the protection process for our clients, but is in essence an unnecessary formality which is rendered necessary by administrative arrangement. A more direct route to application for a protection visa would solve this problem of delay. Even if the individuals making an application under s 48B have work rights, the delay can be financially damaging if the individual has limited English and/or children and consequently have difficulties to find work and to make childcare arrangements. The delay can also have an impact on the client's psychological wellbeing because of the prolonged state of uncertainty.

4.2 According to DIAC statistics, in the 2010-2011 year (July 2010-June 2011), there was a total of 714 requests under s 48B. DIAC finalized 842 applications and 54 were finalized by the Minister. The Minister declined to intervene in 23 of these, and decided to intervene in 31 instances.[2] This leaves a potentially large protection gap for two reasons. First, DIAC is refusing a large number of applications before they reach the Minister, and second, there is a substantial backlog of applications which may be contributing to the delays.

4.3 Where the family unit breaks down, the status of the dependent members of the claim becomes unclear. This also raises the need for a more expeditious process.

4.4 Therefore, in our view, amendment to the *Migration Act 1958* (Cth) is desirable. In addition to delay, other difficulties related to discretionary processes arise. RILC has previously commented that the process of requesting intervention under a discretionary system can result in inconsistent decision making and lacks the safeguards that due legal process provides.[3]

4.5 The ability to make a further protection visa, where new or changed circumstances (i.e. the occurrence or likelihood of family violence) warrant re-examination of a claim, needs to be enshrined in law with formal, clear criteria.[4] If this ability were legislated, the decision about whether the 'jurisdiction' triggering a further application could be made by a decision-maker who was trained in refugee decision making, and who could even follow on to consider the actual protection visa claim if the jurisdictional threshold is satisfied. This would allow for transparent decision-making, the amassment of precedent decisions on further visa applications, and more efficient processing.

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[2] DIAC, *Ministerial Intervention Statistics – Australia: 2010-11*, (2011), available at: http://www.immi.gov.au/media/publications/statistics/ministerial-intervention/min-stats-australia-2010-11.pdf (accessed 12 September 2011).

[3] RILC, Submission to the Senate Legal and Constitutional Affairs Review Committee Inquiry into Migration Amendment (Complementary Protection) Bill 2009 (September 2009), para. 3.4.

[4] This is the system in New Zealand for example, where a first instance decision maker can make an appealable determination whether a subsequent claim will be considered. It must be considered if there has been "a significant change in circumstances material to the claim since the previous claim was determined" (provided that the change in circumstances was not brought about by the claimant acting otherwise than in good faith): *New Zealand Immigration Act 2009*, ss 140(1) and 195(1).

4.6 It would also ameliorate delay and prevent extra cost, which are matters that may diminish personal safety for victims of family violence while in Australia.

4.7 Other amendments may be required to meet the other barriers caused by family violence to the processing of claims. There could be a bridging visa issued to ensure the lawfulness of the individual's status. This visa could signify that he/she is part of a family unit until the main application is decided. If the main application is successful, derivative refugee status could apply to the individual and any dependents. If unsuccessful, the bridging visa could stay in place while their own protection visa application is processed. The visa could allow for the payment of a Special Benefit by Centrelink to ensure that the individual and any dependents are not in a precarious and vulnerable situation during processing.

4.8 Given the prevalence of this type of violence being committed upon women, the question of amendment raises wider issues in relation to women's protection claims. It is connected to the fundamental question of ensuring that women's claims are drawn out during the protection visa process. A woman who is part of a family unit is often automatically considered to be the dependent of a principal male claimant. She may not be aware that she has an independent protection claim, or she may not wish to speak in front of her partner. There should at least be the possibility of separate interviews for female family members, and the use of staff of the same sex. While this, and other advice, does form part of the Gender Guidelines, in our experience it is not always followed. Better management and support throughout the process may even prevent the need for recourse to a second protection visa application.

Recommendation 3: There should be a statutory process in place to allow a direct route to a protection visa for family violence victims.

Recommendation 4: Vulnerable persons with dependents or who are otherwise unable to work should have access to a Special Benefit while awaiting the decision on their claim.

Recommendation 5: The procedures outlined in the Gender Guidelines for women's protection visa applications should be followed to ensure that women's fears are heard and adequately addressed at all stages of the process.

5. Prospective Marriage (Subclass 300) visas

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.*

OR
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 to make arrangements to leave Australia; or
(b) a different class of visa.

5.1 We can identify two categories of at risk persons whose needs both fall within the problem area that the family violence exception was designed to meet and who are

particularly vulnerable due to circumstances in their home country. Persons within this group would be most at risk of staying in an abusive relationship in order to avoid the consequences of being returned.

5.2 The two groups are 1) persons who would face a real risk of being persecuted on return to their country of origin, and 2) persons who, while not meeting the definition of a refugee in Article 1A of the Refugee Convention, would nevertheless face harm on return, or severe social stigma such as ostracism because of their decision to form a relationship and leave the country before marriage takes place or because of the domestic abuse suffered while abroad. Return of people within this group would be unreasonably harsh.

5.3 For this latter group, where there is little chance of success with a protection visa application, it is appropriate to allow an individual to apply for some form of humanitarian visa. This visa could operate either to allow the holder to remain lawfully or to pursue Ministerial intervention without the cost and additional time of first appealing the decision to cancel the Prospective Marriage (Subclass 300) visa at the MRT.

5.4 However, RILC wishes to raise some concerns about the creation of a new class of visa or the opening up of access to an existing visa in these circumstances. Even if provision was made for these individuals, the fundamental problem persists that vulnerable persons in these situations are unaware of their options. They are often in a precarious position because of their subjection to abuse, their lack of English ability, and their fear of social disapprobation. If information was provided to them in their own language, prior to their arrival in Australia, this could go some way to addressing this underlying issue. DIAC could also provide more information upon the breakdown of the relationship and the cancellation of the Prospective Marriage visa.

5.5 For those persons who do not fall within the two categories, a temporary visa in order to make arrangements to leave Australia would be suitable. This visa could allow a 6-week period (extendable in exceptional circumstances) for recovery from any injury or trauma, physical or psychological, and to make arrangements for a safe return to the home country. The visa could allow for provision of a Special Benefit to cover rehabilitation and living expenses. Given that any damage was inflicted by the violence of an Australian citizen, it may be an appropriate burden for the Australian government to bear.

Recommendation 6: The creation of a visa class to allow individuals to stay lawfully or to directly apply to the Minister for intervention where it would be unreasonably harsh to force return.

Recommendation 7: The provision of early advice about immigration options upon the breakdown of a marriage.

Recommendation 8: The creation of a temporary 6-week visa to provide rehabilitative support for victims of family violence and to allow appropriate arrangements to be made for safe return.

6. Refugee law and complementary protection

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.*

6.1 In general, we welcome the ALRC proposal to make the PAM3 Gender Guidelines a mandatory consideration in refugee status assessments. We are also of the view that an amendment to s 91R of the Migration Act 1958 is unnecessary.

6.2 Lack of state protection should not be enveloped within the meaning of 'serious harm'. Properly understood, a lack of state protection is a distinct element of 'persecution' which should be present in addition to the risk of serious harm. This has been encapsulated, as the ALRC paper suggests, in the formula of the House of Lords in *Shah*,[5] and adopted by Kirby J in *Khawar*,[6] that: Persecution = Serious Harm + The Failure of State Protection. To adjust this formula for gendered claims would be to further distinguish and marginalize such claims from the mainstream of cases.

6.3 Second, a proper understanding of 'serious harm' should easily encompass the physical and psychological effects of family violence. As the Gender Guidelines note in relation to sexual violence, though it is equally applicable to other forms of violence, "sexual violence can amount to a violation of the prohibition against cruel, inhuman or degrading treatment, the right to security of a person and, in some instances, the right to life as contained in a variety of international instruments such as the CAT and ICCPR."[7]

6.4 Third, it may typecast women's claims, circumscribing them to that category alone. There would be even less consideration than there currently is that the nexus in a domestic violence case may also be satisfied by the person inflicting the harm, not just the discriminatory failure of state protection. For example, infliction of violence by a non-state actor on an individual may be due to her actions in transgressing social norms, which could satisfy nexus in relation to the Convention grounds of (imputed) political opinion or religion. Her actions may be seen as a threat to the perpetrator's power which is reinforced by the traditions and culture of the society. This may also curtail the possibility of development of reasoning in the future, in line with human rights developments,[8] that violence against women is a form of discrimination against women, targeting a woman *as* and *because* she is a woman.[9] In this way, it is possible that a claim could be recognized on the basis that the infliction of violence by a non-state agent was for reasons of her membership of a particular social group, "women", rather than the state's failure to provide protection due to her membership of this group.

6.5 However, we consider that while the ALRC proposal is a better option than amendment of the Migration Act, it is a necessary, but not sufficient step in the effective processing of gender-based claims. Firstly, there are some gaps in the Gender Guidelines themselves, and secondly, the requirement to have regard to them does not go far enough to ensure that a current and in-depth understanding of gender issues is maintained by

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[5] *Islam v Secretary of State for the Home Department and Another, ex parte Shah* [1999] UKHL 20.

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

[7] Para. 15.3.

[8] States are increasingly held accountable for a failure to protect against domestic violence, even where the withholding of protection is not intentional or discriminatory. Regional human rights courts have held that the state has a positive duty in relation to violence against women by a private actor. States can be held accountable for these acts due to the State's lack of due diligence in prevention, investigation and punishment. In international human rights law, where violence against women is endemic, and supported by the state system, it enters the public realm. See for example *Maria da Penha Maia Fernandes,* (Case 12.051) (IACHR, Apr. 16, 2001) and *Opuz v Turkey*, (Application No. 33401/02) (ECtHR, Jun. 9, 2009).

[9] Article 1 of CEDAW defines discrimination against women. The Committee has clarified that the definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. CEDAW, General Recommendation No. 19: Violence Against Women (11th Session, 1992).

officials and that this is translated where appropriate into practical effect through decisions.

6.6 The Gender Guidelines contain some important considerations for decision makers. RILC agrees that the three points singled out by the ALRC are particularly useful. However, on two of those points RILC considers that the Gender Guidelines are not sufficiently elaborated. The Guidelines, as noted by the ALRC, state clearly that gender-related persecution may include 'violence against women, including family and sexual violence such as rape where the state is unwilling or unable to provide protection';[10] and that sexual violence and harm perpetrated in the 'private' sphere or by non-state agents can also amount to persecution.[11] However, there is insufficient guidance on the application of this guidance, which in our view goes to the heart of the inconsistent and erroneous decision making in family violence claims.

6.7 Part of the problem where non-state agents are involved is the identification of a Convention reason and its nexus to the harm feared. The section in the Gender Guidelines on women and political opinion falls short in important respects. It fails to recognise that a woman's failure to conform with society's expectations of her may be interpreted as a threat to the power structures in that (patriarchal) society and that an adverse political opinion may be imputed. This is a striking omission given the excellent discussion about women and religious grounds, where the Guidelines note that:[12]

> [t]he failure of men and women to conform to models of behaviour prescribed by their religion may be perceived by authorities or other agents of harm as the failure to practise or to hold certain religious beliefs. Women's non-conformity may be interpreted as an attempt to corrupt society or even a threat to the religion's continued power.

The Guidelines acknowledge that women may be perceived as having a political opinion "hostile to the current administration" if they "possess a feminist ideology",[13] but this does not encompass situations where non-state agents may perceive a threat to their way of life, or indeed a huge range of actions of non-conformity by a woman that do not necessarily indicate the possession of a feminist ideology, whatever that may mean, such as choosing who she may marry, accessing an education or employment, initiating a divorce or another attempt to have freedom from male violence. Such an understanding would be consistent with UNHCR's view on women and political opinion.[14]

6.8 The typical ground relied on in family violence claims, membership of a particular social group, is also not adequately explained in the Gender Guidelines. For information about cases where gender has been determined to form a particular social group, and cases where it has not, the Guidelines refer the decision maker to case law in the Refugee Law Guidelines.[15] This is an instruction which may or may not be followed by the decision maker. Even if the decision-maker does have regard to the Refugee Law Guidelines, they do not provide clear guidance.

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[10] Para. 14.2.
[11] Para. 15.1.
[12] Para. 21.2.
[13] Para. 22.2.
[14] UNHCR, *Guidelines on International Protection No. 1: 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*, (7 May 2002), HCR/GIP/02/01, available at: http://www.unhcr.org/refworld/docid/3d36f1c64.html [accessed 22 September 2011].
[15] Para. 23.1.

6.9 In a section called "Gender based groups" the Refugee Law Guidelines merely state conflicting case law without providing any suggestions for a model approach for decision makers. They state:

> Australian courts have accepted that "single women in India", "married women in Tanzania", "young Somali women" and "women or divorced women who had converted to Christianity in Nepal" may constitute particular social groups for the purposes of the Convention. On the other hand, in *Lek v MILGEA* Wilcox J held that "young single women" in China were not a particular social group. In *Jayawardene v MIMA* Goldberg J doubted that a group such as "single women" or "single women without protection in Sri Lanka" was a proper group for the purposes of the Refugees Convention…

The Refugee Law Guidelines go on to discuss the decision in *Khawar,* referring to the different groups formed in separate judgments, which are as distinct as merely "women in Pakistan" to "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 that household." It also refers to Justice Callinan's view that it is unlikely that half of the humankind of a country can be a particular social group.

6.10 This approach in the Refugee Law Guidelines is sorely lacking. It does not clarify when any of the approaches should be used or in any other way indicate a principled approach to the issue which would allow for consistent decision making. Moreover, in RILC's view some of the case law referred to is inconsistent with well-established principles of refugee decision making. Callinan's doubt for example is wrongly placed, and appears to reflect a fear of floodgates argument rather than principle. A particular social group in other contexts is not restricted by requirements of size or cohesion. The better approach is that a group may be constituted as "women" or other similar variations of this such as "women in x country" or "young women". There can be no doubt that women are a sufficiently identifiable group such as to constitute a particular social group.[16] Whether or not in the particular case there is a risk of persecution *for reason of* membership of this group, and indeed whether the particular claimant has a well-founded fear of persecution will depend on the claimant's individual circumstances as well as a range of political, geographical, social, and cultural factors. Guidance to decision-makers should reflect these principles.

6.11 Further, in order for the requirement that a decision-maker has regard to the Gender Guidelines to have meaningful effect, it is crucial that the Guidelines are subject to periodic and comprehensive review and revision where necessary to keep abreast of international and domestic developments in gender claims.

6.12 The decision record should provide for transparency of reasoning in order to ensure that the Guidelines have been adhered to, and to allow for review of the way in which the Guidelines were used and applied to the individual's case. In our view this is the only way to ensure accountability, to approach any semblance of consistent decision-making and to prevent lip service being paid to the Guidelines. This should not be a mere "tick the box" exercise. Although transparent assessment of credibility is desirable in all cases, it is particularly important in the context of family violence claims, where the potential for gendered attitudes to come through in decision making is strong and where decision makers may not have a good understanding of women's responses to violence.

[16] "Women's innate physiological and physical characteristics undeniably make them an identifiable and distinct social unit. Furthermore, since most societies are patriarchal, there are few places in the world where women are not 'treated differently from and unequally to men' in public and private spheres of life": See A. Dorevitch and M. Foster, "Recent Obstacles on the Road to Protection: Assessing the Treatment of Sex-Trafficking Victims Under Australia's Migration and Refugee Law" (2008) 9 *Melbourne Journal of International Law* 1-46.

6.13 In support of reference to the Gender Guidelines, or as RILC argues, an improved and clarified version of the Guidelines, it would also be valuable for decision makers to have access to education on the correct use and application of the guidance, through additional training.

6.14 Further, the information made available to decision makers on departmental databases should be reviewed in order to ensure decision makers have access to appropriate COI from a variety of sources. When considering whether information relating to the context for women in a particular society is appropriate, decision makers may like to have regard to the Country of Origin Information (COI) Checklist published by the International Association of Refugee Law Judges.[17] The checklist suggests the following questions:

- How relevant is the COI to the case at hand?
- Does the COI source adequately cover the relevant issue(s)?
- How current or temporally relevant is the COI?
- Is the COI satisfactorily sourced?
- Is the COI based on publicly available and accessible sources?
- Has the COI been prepared on an empirical basis using sound methodology?
- Does the COI exhibit impartiality and independence?
- Is the COI balanced and not overly selective?
- Has there been judicial scrutiny by other national courts of the COI in question?

Recommendation 9: The Gender Guidelines should be amended to provide a more comprehensive guide to gender-related persecution which is consistent with broader refugee law principles.

Recommendation 10: Decision-makers should be instructed to have regard to the Gender Guidelines as well as to transparently address their decision-making process in relation to the Guidelines in the decision record.

Recommendation 11: The Gender Guidelines should be subject to ongoing revision in light of new case law.

Recommendation 12: Decision makers should have further education and training on gender-based and gender-related persecution for refugee and complementary protection claims made available to them.

Recommendation 13: There should be development of women's country of origin information that is relevant, in-depth, publicly sourced, impartial and balanced. Decision makers should be directed to use this information to contextualise gender-related claims.

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?*

6.15 We note that the *Migration Amendment (Complementary Protection) Bill 2011* ("Complementary Protection Bill") was passed in the Senate on 19 September 2011. RILC welcomes this development in general and hopes that this will address the concerns

[17] COI-CG Working Party, *Judicial Criteria for Assessing Country of Origin Information (COI): A Checklist*, Paper for 7th Biennial IARLJ World Conference (Mexico City, 6-9 November 2006).

that we hold in regard to the ministerial intervention power under s 417 of the Migration Act.

6.16 RILC, as submitted on a previous occasion in relation to the Complementary Protection Bill,[18] has serious reservations about the efficiency and effectiveness of the Ministerial intervention process. The simple fact of the existence of the Complementary Protection Bill attests to the shortcomings of the discretionary system. RILC is aware of numerous cases where the process, as a result of its unregulated and *ad hoc* nature, neither properly identified nor assessed circumstances where a person faced a real risk of being arbitrarily deprived of their life or being subjected to torture, or cruel, inhuman or degrading treatment or punishment.[19]

6.17 The result of this flawed process is the probability that Australia has breached its *non-refoulement* obligations under the CAT, ICCPR and the CRC. RILC therefore welcomes the news that the Complementary Protection Bill has passed, but maintains certain concerns about its form. RILC in particular welcomes the intention of the Australian Government to grant all persons recognized on complementary protection grounds similar basic civil, political, economic and social rights as those afforded to refugees, including the right to family unity. This ensures that women subject to family violence do not receive a subsidiary status with inferior protections.

6.18 RILC wishes to make one comment in relation to amendments to the Complementary Protection Bill, but will mostly focus on the recommended application of the Complementary Protection Bill in recognition of the fact that the amendment of the Bill is outside the scope of the ALRC discussion paper. We share the concerns raised in other submissions in relation to the shortcomings of the Complementary Protection Bill, especially in relation to the exclusion of protection where the risk is one faced by the population of the country generally. We note that a culture of impunity for offenders created by general lawlessness and/or conflict is no different to the culture of impunity created by a discriminatory refusal of state protection and see a significant protection gap in the narrowness of the complementary protections in this regard. A provision similar to that of New Zealand's would be preferable, where there must be an individualized risk but there will also be consideration of the general context of human rights abuses. The New Zealand Immigration Act 2009 provides: "…the refugee and protection officer concerned must take into account all relevant considerations, including, if applicable, the existence in the country concerned of a consistent pattern of gross, flagrant, or mass violations of human rights."[20]

6.19 Recourse to complementary protection may be an effective additional avenue to the ministerial intervention power *provided that* decision-makers apply the complementary protections in a principled, systematic and consistent manner. RILC recommends in particular that the standard of proof applied in complementary protection cases is the same as that applied in refugee decision making. We are concerned that 'natural and foreseeable consequences' might be read as an additional step to prove. RILC calls for the same standard of proof to be used, because the same reasons for a lower standard of proof than civil or criminal cases exist in relation to complementary protection claims.[21]

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[18] RILC, Submission to the Senate Legal and Constitutional Affairs Review Committee Inquiry into Migration Amendment (Complementary Protection) Bill 2009 (September 2009).
[19] *Id*.
[20] Sections 130(3) and 131(3).
[21] The difficulties facing claimants in obtaining evidence, recounting their experiences, and the seriousness of the threats they face. Also, given that refugee and complementary protection claims will be considered in a single procedure a common standard is appropriate.

Further, "real risk" is comparable to the refugee test of 'real chance' and "substantial grounds" has been interpreted by the Committee for the Convention Against Torture as indicating a standard of proof that is higher than a mere suspicion, but not at the level of highly likely to occur.[22]

6.20 There should be no controversy in finding that domestic or family violence can fall within the definition of significant harm. As UNHCR has acknowledged: "[t]here is no doubt that rape and other forms of gender-related violence, such as dowry-related violence, female genital mutilation (FGM), domestic violence, and trafficking, are acts which inflict severe pain and suffering – both mental and physical…."[23]

6.21 Moreover, we note that the Complementary Protection Bill codifies the potential for internal relocation such that a real risk will not exist if it is reasonable for the non-citizen to relocate. The amendments refers to reasonableness, and RILC urges that this assessment include an enquiry into the ability of the claimant to subsist. The Bill contemplates relocation to an area where there would not be a real risk of suffering significant harm, and 'significant harm' has a unique meaning as defined by the Bill. This meaning may exclude living conditions as it requires the intentional infliction of cruel or inhuman treatment. However, the ability to subsist is an issue that may disproportionately affect women fleeing family violence as in many countries it may be difficult for women, particularly single women, to access employment, property, and other basic services. In this regard, reference to the Gender Guidelines would also be useful, as they note: "[f]inancial, logistical, social, cultural and other barriers to reaching internal safety may significantly affect persons of one gender over another" and that "[l]egal or socio-economic reasons or child-care responsibilities may prevent women from...living on their own or without family members."[24]

6.22 Further, in applying the relocation exclusion, decision makers should consider the ability of the perpetrator(s) of violence to locate the claimant and the ability of the state to provide protection. There should be due recognition that the level of protection in the area of relocation required by the complementary protection amendments is protection 'such that there would not be a real risk that the non-citizen will suffer significant harm.' Therefore, the mere fact that the country in question has laws on the books in relation to violence against women will not be sufficient to meet the required level of protection.

6.23 RILC calls on decision makers to honour the shared duty of enquiry into claims in recognition of the fact that victims of violence may be reticent or unable to provide evidence. The effects of such trauma on memory, and the ability to express emotion and to articulate fears of future treatment should always be given due weight in the assessment of credibility. The reasoning in relation to credibility should be clear and transparent in this respect.

Recommendation 14: The complementary protection provisions in the *Migration Act 1958* (Cth) should be amended to provide for the human rights record of a country to be taken into account when assessing whether an individual faces a real risk of significant harm.

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23 UNHCR, *Guidelines on International Protection No. 1: 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*, (HCR/GIP/02/01, May 7, 2002), at para. 9.

24 Para. 16.3.

Recommendation 15: The complementary protection provisions should be applied in practice to reflect its *complementary* role to refugee status, so that where possible common standards are used.

Recommendation 16: Decision makers should recognise women's realities in gathering evidence, assessing credibility and applying the complementary protection provisions in relation to internal relocation.

Refugee & Immigration Legal Centre Inc
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