TOWNSVILLE COMMUNITY LEGAL SERVICE INC.

SUBMISSION FAMILY VIOLENCE AND COMMONWEALTH LAWS

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Background

1. TCLS is a non-profit, community-based legal centre located in the regional city of Townsville, North Queensland.

2. TCLS employs the only non-commercial registered migration agent outside Brisbane.

3. Our principal interest is commenting on the intersection between migration law and family violence.

4. TCLS has previously commented on these issues in *Not in My Backyard: Human Rights and Migration Issues in Townsville* published as a part of the Unity in Diversity Conference in 2009. A copy is **enclosed**.

5. In that paper we recommended that:

   - Victims of family violence within the immigration system should not be treated differentially;

   - The treatment of fiancé visa holders may well constitute discrimination on the basis of marital status;

   - Observance and entrenchment of *Convention on the Elimination of all Forms of Discrimination against Women* and *Declaration on the Elimination of Violence against Women* should be the ultimate goal of the Australian Government.

6. TCLS assists a substantial number of victims of family violence involved in the immigration system.

7. TCLS handles approximately fifteen (15) cases per annum and receives referrals from womens' services and legal service providers in regional cities including Rockhampton, Mackay, Mt Isa, Townsville and Cairns and smaller towns such as Ingham, Air, Bowen and Charters Towers.

8. TCLS undertakes full representation in family violence cases, acting on the record from application under the exception through to visa grant.

Overarching Issues

9. We agree with the ALRC's comments at 20.3.

10. We do not agree with the ALRC's characterization that "in light of the need to ensure the integrity of the visa system the ALRC does not propose that the family violence exception be extended to apply to temporary visa holders." (20.3)

11. We take the view that the overriding obligation Australia has as a States Party to the *International Covenant on Civil and Political Rights*, the *Convention on the Elimination of all Forms of Discrimination against Women* and *Declaration on the Elimination of Violence against Women*, the *Convention Against Torture* and others militates against this simplistic, policy and/or politically driven approach.

12. Whilst we do not argue for a system that "threatens" the "integrity" of the visa system, whatever this means, there does need to be an approach that recognizes our obligations as a States Party, addresses the needs of victims of family violence and does not allow systemic abuse or exploitation of the visa system.

13. We take the view those phrases like "threatens the integrity of the visa system" are somewhat emotive and have no proper place in an ALRC Inquiry.

Fee Waiver

14. We are very concerned about the chilling effect the removal of the fee waiver by Migration Amendment Regulation 2011 (No 4) (Cth) will have on applicants experiencing family violence. We agree with the ALRC's comments at 20.17-19.

15. In response to Question 20-1, we take the view that the removal will be a disincentive to applications for review and have all the attendant consequences for those affected.

Access to Special Benefit

16. We take the view that substantial change in circumstances that follows a separation due to family violence warrants payment of special benefit. We agree with the ALRC's comments at 20.20.

17. Sec 729(2)(f)(v) of the *Social Security Act 1991* allows this to occur for other visas.

The Incidence of Family Violence in Partner cases

18. We agree with the suggestion at 20.26. We are aware of cases that are not considered under the regulations because:

- The sponsored does not separate from the sponsor
- The sponsored does separate from the sponsor but makes no application and returns to country of origin or elsewhere
- The sponsored does separate from the sponsor and the permanent visa is granted without reference to violence

19. We also suggested that the incidence of applications whilst small may not reflect the reality of many sponsored's circumstances. In our paper we suggested:

> *This does not of course reflect the true extent of those who experience family violence as a part of their experience as a sponsored spouse. There is considerable research to suggest that migrant women do not report family violence or have difficulties obtaining support in respect of violence because of a number of factors:*
>
> - *The isolation women feel from family and community and from their country of origin;*
> - *Issues around language proficiency;*
> - *Anxieties about their immigration status;*
> - *Violent partners who threatened to thwart the process through which they could obtain permanent residency if they tried to leave.*[1]

20. In our view some careful longitudinal research is needed to see if the sponsored's remain with sponsors and whether violence was present and at what stages of the relationship.

[1] Australian Centre for the Study of Sexual Assault, Just "keeping the peace": A reluctance to respond to male partner sexual violence, ACSSA Issues No. 1 March 2004, 18.

The Definition of Family Violence

21. We also take the view that family violence should include the sponsor's family and by discretion more broadly where it has the effect of making the relationship breakdown.

22. We have acted in cases where violence occurred independently of the relationship between sponsored and sponsor and was perpetrated by:

- The sponsor's siblings
- The sponsor's parents
- The sponsor's adult son's
- The sponsors friends

23. In our view the ALRC's characterisation at 20.39-20.41 misses the true point.

24. Where the relationship is genuine and continuing there is no need for intervention of the regulations. They only intervene where the relationship **has** broken down. They are not a response to family violence *per se*, but a response the visa/residence needs of the victim, who through no fault of their own has lost their connection to the sponsor because of violence. They are not a means of providing safety, that is the required response of law enforcement agencies and the Courts. The regulations are a means of providing a fair visa outcome in the circumstances.

25. The provisions need to be broadened to deal with cases where the relationship has broken down because of family violence. While we agree with the comments about coercion at 20.41, proving such conduct is very difficult.

26. We suggest that family violence include any relatives, howsoever related and including by blood, marriage, adoption or fostering.

Scope of the Exception

27. We agree with the extension of the exception to secondary visa holders where the visa pathway would lead to a permanent visa. We cannot see how this differs from the spouse visa circumstance.

28. We agree with the ALRC's views in 20.51 and 20.52.

29. We support proposal 20.1.

30. In respect of Question 20.2, we see no reason why the Minister should not be provided with discretion to consider the sorts of applications canvassed.

31. We have seen a significant number of women and children who hold secondary visas to primary temporary visa holders and who suffer family violence. Their situation is a vexed one. In many instances they have come from countries where family violence is not as proactively dealt with as Australia and where resources such as those described by the ALRC are available to assist them with counselling, support, finances and accommodation.

32. We take the view that resources should be made available to victims of family violence but that the ALRC's concerns at 20.65 are probably legitimate.

33. In respect of Question 20.3, we have been involved in cases where secondary applicants were successful in *Khawar v MIMIA* style protection visa applications. This may be the only pathway at present and is a slow and complex process.

34. In our view any amendment to sec 351 and factors might well take account of circumstances such as complimentary protection, *non-refoulement* and humanitarian or treaty concerns.

35. In our view there is no reason why community services should not be available to any victim of family violence regardless of visa class/subclass. We agree with the ALRC at 20.71 that the migration system must have a safety net for victims of family violence.

36. We take the view that it is very unlikely that the rules relating to Social Security eligibility will be broadened. In our view the way in which humanitarian visa holders are treated by Medicare, the Family Assistance Office and Centrelink should be mirrored for victims of family violence with a permanent visa application. There has clearly been a change in circumstances beyond the individual's control in these cases and this should be recognized where appropriate.

37. In respect of 20.74, applicants under the exception should be entitled to Special Benefit. In our view the change precipitated by violence should give rise to qualification for Special Benefit.

Prospective Marriage Visas

38. We agree that the Migration Regulations should be amended to allow former or current Prospective Marriage (Subclass 300) visa holders to access the family violence exception when applying for a temporary visa in circumstances where he or she has not married the Australian sponsor.

39. We have run several cases where the victim was required to make their way through the review and appeals system to the Minister because they could not access the exception. We raised this in our paper and understand that it is regarded by many including Departmental officials, to be an unjust, arbitrary and discriminatory distinction.

40. We agree with the ALRC's position at 20.91 and 20.97 and take the view that the status quo is not sustainable.

41. In two cases TCLS ran, the time taken to obtain a visa via Ministerial discretion was approximately three times that of an exception case. One of those matters went to the MRT twice because of technical issues around what was an "adverse decision".

42. We agree with Option 1: Proposal 20-2.

Sponsorship

43. The sponsorship limitations are important but in some ways of very limited impact

44. In respect of serial sponsors, we have observed there are a number of ways to subvert the existing protections such as marrying within the newly arrived migrant sector/community as opposed to re-sponsoring from outside Australia.

45. In our experience it is not uncommon for those who might be subject to the serial sponsor regulations to become aware of the issues through internet access and developing proactive strategies.

46. Whether there should be registrable offences is a policy question. In our view these sorts of questions and checks are appropriate character issues for sponsors. This would allow the much broader approach to sponsor character.

47. This needs of course to be balanced by the right to not face discrimination on the basis of criminal record in anything other than relevant and appropriate circumstances.

48. We agree with the ALRC at 20.116 that Procedural fairness would dictate that any decision based on registrable or relevant findings be put to the proposed sponsor and they be given a chance to respond fully.

49. We agree with 20-6 that there should be a proper consideration of sponsorship where certain issues arise such as previous sponsorships, criminal record and/or history of DVOs.

Education

50. We agree with proposals 20-4 and 20-5

Information Sharing

51. We have no considered view on the matters raised.

Evidentiary Requirements

Judicially determined claims of family violence

52. The current system is operating in an adequate manner though judicial education on the issues, the exception and the process is much needed, especially in rural and regional areas.

53. We have encountered judicial officers who take a very conservative view of the motives of sponsored who become victims of family violence and their assumed threat to the interiority of the visa system. These officers need professional development so they can understand the issues in context.

54. Whilst we have not experienced the concerns outlined in 21-20, we do take the view that such a reading would be somewhat ignorant of the nature and cycle of family violence.

55. We agree with the barrier in 21.23 and suggested similarly in our enclosed paper.

56. We agree with the concerns in 21.30.

57. We agree with proposal 21-1.

58. In respect of Question 21-1, we take the view that processing should not be suspended given the orders are but one aspect of the decision making process and are only required to evidence that violence has occurred within the relationship.

59. In our experience the process of obtaining final orders can be as quickly as 2 weeks (where uncontested or given on a no admissions basis) up to 12 months where contested.

60. We agree with proposal 21-2.

61. We agree with the types of considerations in 21-44.

Non-judicially determined claims of family violence

62. We have experienced cases where competent persons declarations were refused including on the bases listed at 21.54 and 21.55.

63. We consider that the requirements need to be amended to deal with the issues raised. There seems, for example, no good reason why 2 competent persons of the same professional background shouldn't be acceptable.

64. In our case the 2 persons were social workers, though one worked as a women's shelter coordinator, who was able to amend her title and thereby satisfy the requirements. This is clearly a ridiculous situation.

65. We have never had a case referred to the Independent Expert.

Options for Reform

66. We agree with 21.120 that the list should be expanded.

67. We agree that discretion to allow substantial compliance should be considered as is suggested by 21.121.

68. We do not support 21.132; this regime is not transparent and is not a good model for these issues. There is much to be critical of the MOC

regime and one only needs to look at the case decisions to see how it has become very problematic from the applicants' point of view. Cases such as *Robinson v MIMIA* [2005] FCA 1626, *Ramlu v MIMA* [2005] FMCA 1735 and many others highlight the complexity of this model.

69. The Joint Standing Committee on Migration – Treatment of people with a disability (Committee) Inquiry shows how complex this area has become. The Inquiry also catalogued the multitude of criticisms leveled at the regime. http://www.aph.gov.au/house/committee/mig/disability/report.htm

70. We give cautious support to an independent if it avoided the pitfalls of the MOC system. We therefore give partial support to proposal 21-4.

71. Our preference is the competent persons regime with the enhancements suggested by the ALRC. This means that the assessment is undertaken within the community by recognized experts and with first hand knowledge of the applicant. In our view the independent panel is likely to be overtaken, outsourced and overburdened by bureaucracy and will likely follow the MOC.

Refugee Law

72. We have run cases for Khawar like applicants from PNG, the Solomon Islands and Tonga. All were successful but required substantial effort to resolve.

73. We agree with proposal 22-1.

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