14 October 2011

The Australian Law Reform Commission
Level 40, MLC Tower
19 Martin Place
Sydney NSW 2000

Email to: khanh.hoang@alrc.gov.au

Dear Australian Law Reform Commission,

Re: Family Violence and Commonwealth Laws (DP 76)

The Law Institute of Victoria (LIV) welcomes the opportunity to make this submission to the Australian Law Reform Commission in response to the Family Violence and Commonwealth Laws Discussion Paper. Thank you for the extension of time.

Our submission is attached.

Please contact Laura Helm, Lawyer to the Administrative Law and Human Rights Section on lhelm@liv.asn.au or (03) 9607 9380 in relation to this matter.

Yours sincerely,

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Family Violence and Commonwealth Laws (DP 76)

To: Australian Law Reform Commission

14 October 2011

Queries regarding this submission should be directed to:

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Introduction

The Law Institute of Victoria (LIV) welcomes the opportunity to make this submission to the Australian Law Reform Commission (ALRC) in response to the Family Violence and Commonwealth Laws Discussion Paper (the Discussion Paper).

The LIV is Victoria's peak body for lawyers and those who work with them in the legal sector, representing over 14,500 members. The LIV's Administrative Law and Human Rights Section Migration Law and Refugee Law Reform Committees are made up of legal practitioners experienced in immigration and refugee law. Many Committee members are accredited specialists in immigration law and many have experience representing victims of family violence.

This submission addresses proposals and questions relating to migration law, as set out in Chapters 3, 20, 21 and 22 of the Discussion Paper, in the order they appear in the Discussion Paper. This submission should be read together with our submission of 17 May 2011 in response to the ALRC Issues Paper Family Violence and Commonwealth Laws: Immigration.[1]

Executive summary

In this submission, the LIV provides comments on select proposals and questions from the Discussion Paper, including:

1. The LIV supports Proposal 3.8, which would ensure a consistent definition of family violence across federal laws.

2. The LIV supports Proposal 3.9, to include examples of family violence in the Department of Immigration and Citizenship's Procedures Advice Manual 3 for decision makers.

3. The LIV supports Proposal 7-2, which will establish an income stream for victims of family violence who were previously on a Prospective Marriage (Subclass 300) visa, allowing them to sort out their affairs and decide how to proceed.

4. We are concerned about fee waiver changes at MRT-RRT and the potential impact on clients who are seeking a review of a decision under the family violence exception and will continue to monitor this area.

5. In our view, the LIV's recommendation for a new temporary visa for victims of family violence who hold temporary spouse dependent visas is more consistent (than Proposal 20-1) with the purpose for which temporary visas are granted and ensures that there is no incentive to incorrectly claim family violence. The LIV would, however, support amendments to the *Migration Regulations* 1994 (Cth) (Migration Regulations) to provide that the family violence exception applies to secondary applicants for all onshore permanent visas at the time of decision, in light of processing times which mean that many applicants will wait many months or sometimes years for decision.

6. The LIV agrees that s48A of the *Migration Act* 1958 (Cth) (Migration Act) should be amended to allow secondary visa applicants who are experiencing family violence to make a further protection visa application onshore.

7. A new temporary visa subclass is a better policy solution than ministerial intervention for people experiencing family violence.

8. The current disadvantage faced by former or current Prospective Marriage (Subclass 300) Visa holders who have never married and who are the victims of family violence could be addressed by allowing affected applicants to access the family violence exception or

[1] LIV submissions are available on our website at http://www.liv.asn.au/Membership/Practice-Sections/Submissions

alternatively, by allowing access to the new visa category recommended in our 17 May 2011 submission.

9. The LIV is not convinced that a new class of visitor visa would address the situation of women entering Australia on a Prospective Marriage Visa (Subclass 300), where the women becomes a victim of family violence and the marriage never takes place.

10. The LIV is pleased that the ALRC agrees with stakeholder views that requiring the Department of Immigration and Citizenship (DIAC) to disclose a sponsor's past history of family violence would be problematic.

11. The LIV welcomes Proposal 20-4, that 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.

12. The LIV welcomes Proposal 20-5, that 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.

13. The LIV supports amendment of the Migration Regulations, rather than Procedures Advice Manual 3 (PAM), to make explicit that a family violence protection order granted after the parties have separated is sufficient evidence that 'relevant family violence' has occurred.

14. Where an applicant receives an ex parte family violence order, this evidence should provoke a stay on visa processing until finalisation of the court process, unless the decision-maker is satisfied that relevant family violence has been established on the basis of non-judicially determined evidence.

15. The LIV welcomes Proposal 21-2, to amend the Migration Regulations to provide that an applicant should not be taken to have failed to meet the requirements of reg 1.15A where they fail by reason of family violence.

16. The LIV suggests that the factors set out on p710 of the Discussion Paper should be worked into a new family violence visa category, as recommended by the LIV, or included in the new test for family violence.

17. The LIV agrees that the process for non-judicially determined claims of family violence in reg 1.25 the Migration Regulations should be replaced with an independent expert panel.

18. The LIV supports the intention of Proposal 22-1, which is to improve consistency in decision-making in this complex area of law. A better approach, however, might be to incorporate the Gender Guidelines into the Ministerial Direction. If decision-makers are directed to have regard to the Gender Guidelines in PAM, they will be given the force of law, yet can be easily amended.

19. Section 91 of the Migration Act should be amended to include psychological harm in "serious harm" and to specifically define "women" as a particular social group to protect gender-related claims where there is a failure of state protection.

20. The *Migration Amendment (Complementary Protection) Bill* 2011 (Cth) should be amended to clarify that complementary protection will not be available where there is general lawlessness in the applicant's country of origin, rather than imposing requirements that an applicant must show that they personally face the risk of harm.

Discussion Paper Proposals and Questions

Part A - Common Threads

Chapter 3: Common Interpretative Framework

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.

The LIV supports Proposal 3.8, which would ensure a consistent definition of family violence across federal laws.

In our submission of 17 May 2011, we suggested that the current definition of 'relevant family violence' in the *Migration Regulations* 1994 (Cth) (Migration Regulations) is problematic, because it requires an assessment of reasonableness in relation to a victim's fear or apprehension. We support the definition of 'family violence' in Proposal 3.1 because it focuses on the conduct of the perpetrator, rather than the impact of conduct on the victim, and therefore gives a clear indication about what constitutes family violence.

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 LIV supports this recommendation. We refer the ALRC to ss5-7 of the *Family Violence Protection Act* 2008 (Vic), which sets out examples of family violence, economic abuse and emotional or psychological abuse. It should be made clear in PAM that any examples provided are illustrative only and not intended to be exhaustive.

Proposal 7–2

Proposal 20–3 proposes that the Migration Regulations *1994 (Cth) be amended to allow holders of Prospective Marriage (Subclass 300) visas to move onto another temporary visa in circumstances of family violence. If such an amendment is made, the Minister of FaHCSIA should make a Determination including this visa as a 'specified subclass of visa' that:*

(a) meets the residence requirements for Special Benefit; and

(b) is exempted from the Newly Arrived Resident's Waiting Period for Special Benefit.

The LIV supports Proposal 7-2, which will establish an income stream for victims of family violence who were previously on a Prospective Marriage (Subclass 300) visa, allowing them to sort out their affairs and decide how to proceed.

Part G - Migration

Chapter 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?

On 15 June 2011, the LIV and Law Council of Australia wrote jointly to the Minister for Immigration and Citizenship to express strong concern over the proposed changes to the Migration Review Tribunal and Refugee Review Tribunal (MRT-RRT) fee structure announced following the 2011/12 Federal Budget.[2] In our view, the fee waiver changes have significant potential to impinge upon access to proper merits review of Departmental decisions.

In our joint letter we noted that review applicants experiencing financial hardship will have very limited capacity to meet the reduced fee of $770. Even if the applicant is not in immigration detention, they may be subject to employment restrictions such that engaging in paid employment would constitute an offence. In many cases, the applicant will not have access to social security benefits, may have no assets against which to use credit to pay the fee and may have no other means of raising or borrowing the funds.

We are particularly concerned about the impact of the fee waiver changes on clients who are seeking a review of a decision under the family violence exception. Victims of family violence are often very vulnerable women, have limited English and are often unable to work due to language restrictions or have not been allowed to work because of their highly controlling partners. Whilst victims of family violence are usually eligible for some sort of Centrelink benefit (Special benefit), these are often subject to an Assurance of Support. We note that while many women are legally aided in these matters, Immigration Advice and Application Assistance Scheme funding would not cover the filing fee.

A response from the Minister (on 25 July 2011) suggests that the government thoroughly considered the possibility of any adverse impact on review applicants, with the aim to keep them to a minimum. We continue, however, to be concerned that the fee changes will adversely affect victims of family violence and we will continue to monitor this area.

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.

In our submission of 17 May 2011, the LIV recommended that the family violence exception should not be expanded to visa categories beyond Partner visas but rather, a new visa subclass should be created for victims of family violence who hold temporary Spouse Dependent visas. Proposal 20-1 goes further than the LIV recommendation, to provide a pathway to permanent residence for victims of family violence.

The LIV shares the ALRC's concern that the nature of the dependence between primary and secondary visa applicants may exacerbate family violence dynamics for those who are on

[2] LIV/Law Council submission to Minister Bowen on 'Changes to the Migration Review Tribunal and Refugee Review Tribunal Fee Structure' (15 June 2011), available on the LIV website, above n1.

temporary visas with a pathway to permanent residence. The ALRC suggests that there appears to be no sound policy reason why the family violence exception should apply to protect secondary visa applicants on certain business (skilled streamed) visas—as it currently does—but not to other onshore permanent visas.

In our view, the LIV's recommendation is more consistent with the purpose for which temporary visas are granted and ensures that there is no incentive to incorrectly claim family violence. Further, Proposal 20-1 does not provide a visa pathway for a person on a temporary visa who suffers family violence and then leaves the primary visa holder, (as per the case study on p675 of the Discussion Paper), where no further visa application is made by the primary visa holder. As the case study suggests, a person will be in breach of their temporary visa conditions by leaving an abusive partner. The LIV's recommendation will ensure that victims of family violence are able to stay in Australia (for a specified time period), irrespective of when the family violence occurs and the temporary visa type, allowing the victim time to access support and decide how to proceed.

The LIV would, however, support amendments to the Migration Regulations to provide that the family violence exception applies to secondary applicants for all onshore permanent visas *at the time of decision*, in light of processing times which mean that many applicants will wait many months or sometimes years for decision.

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:

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?

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?

The LIV agrees that s48A should be amended to allow secondary visa applicants who are experiencing family violence to make a further protection visa application onshore. We note that separation due to family violence may give rise to an independent refugee claim for women from certain religious and cultural groups in certain countries. We agree with Domestic Violence Victoria[3] that women in this position should not be reliant on the Minister exercising his or her non-compellable and non-reviewable discretion under s 48B of the Migration Act in order to be allowed to apply for protection in her own right.

Question 20–3

Section 351 of the Migration Act 1*958 (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:*

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?*

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 LIV submits that our recommendation for a new temporary visa subclass (discussed above and in our 17 May 2011 submission) is a better policy solution than ministerial intervention for people experiencing family violence.

[3] Discussion Paper, at p670.

Ministerial intervention is an important aspect of Australia's migration system, allowing for compassion in exceptional circumstances and aiming to prevent injustices that might arise due to the inflexibility of migration laws. However, ministerial intervention is entirely discretionary, is not reviewable and is not transparent. Further, applications for ministerial intervention usually take a long time before decision, without access to bridging visas or other rights attached to an application. We note that commonly, the result of ministerial intervention is the grant of a temporary visa (for example, Tourist Visa (Subclass 676)), so that a person can apply for another substantive visa. Ministerial intervention is therefore likely to lead to a similar result as a new substantive visa subclass, but with increased delays, less certainty and limited rights and access to services for the victim.

In our view, the visa system should be amended to protect victims of family violence and provide visa options suited to their circumstances. Ministerial intervention should be a last resort only, where the migration system has failed. The LIV recommendation for a new visa subclass for victims of family violence (discussed above and in our 17 May 2011 submission) would provide a visa pathway, and limit the need for ministerial intervention.

Alternative options: Proposal 20–2 (Option 1) and Proposal 20-3 (Option 2):

Option One: 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

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.

The LIV shares the ARLC's concern about the position of women entering Australia on a Prospective Marriage Visa (Subclass 300), where the women becomes a victim of family violence and the marriage never takes place. The current disadvantage faced by former or current Prospective Marriage (Subclass 300) Visa holders who have never married and who are the victims of family violence could be addressed by allowing affected applicants to access the family violence exception or alternatively, by allowing access to the new visa category recommended above and in our 17 May 2011 submission. We refer further to our response to question 4 of our 17 May 2011 submission.

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?

The LIV is not convinced that a new class of visitor visa would address the situation of women entering Australia on a Prospective Marriage Visa (Subclass 300), where the women becomes a victim of family violence and the marriage never takes place. The New Zealand model (set out on p684 of the Discussion Paper) requires there to be a 'genuine and stable' partnership, so that there must be evidence of an existing relationship between the applicant and the sponsor. Even if there is evidence of an existing relationship, the applicant would later need to meet the criteria for a Partner visa (subclass 820), which includes either that the person is married to their sponsor or has been in a de facto relationship for the entire 12 months immediately prior to lodging the application, before accessing the (amended) family violence exception. In practice, we do not therefore believe that a special class of visitor visa will operate to alleviate the situation for people experiencing family violence.

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?*

The LIV is pleased that the ALRC agrees with stakeholder views that requiring the Department of Immigration and Citizenship (DIAC) to disclose a sponsor's past history of family violence would be problematic. In our view, issues of procedural fairness to the alleged perpetrator, privacy and discrimination outweigh any potential gains from disclosure to the applicant.

We note that proposal from Visa Lawyers Australia, to separate the approval of sponsorship from other requirements for a partner visa, and allow DIAC to deal with the sponsor separately (at p689 of the Discussion Paper). The proposal would allow for criteria to be created around the approval of sponsorship, and allow for merits review in the event of refusal. This process could be achieved without the provision of a sponsor's past history to the applicant.

The LIV does not support the Visa Lawyers Australia proposal, which in our view does not match the relationship context of Partner visas. In our view, sponsorship should be dealt with as part of the visa application criteria. If a sponsor does not meet sponsorship criteria and the application is refused, this should be reviewable, in the same way as refusal on the basis of any other criterion.

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.

The LIV welcomes this proposal.

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.

The LIV welcomes this proposal.

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.

The ALRC notes that there is no temporal limitation in the Migration Regulations so as to exclude family violence protection orders obtained post-separation, where that order relates to evidence that violence occurred while the relationship was still in existence.

The LIV supports amendment of the Migration Regulations, rather than Procedures Advice Manual 3 *(*PAM), to make explicit that a family violence protection order granted after the parties have separated is sufficient evidence that 'relevant family violence' has occurred.

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?

Yes, where an applicant receives an ex parte family violence order, this evidence should provoke a stay on visa processing until finalisation of the court process, unless the decision-maker is satisfied that relevant family violence has been established on the basis of non-judicially determined evidence.

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.*

The LIV welcomes Proposal 21-2, to amend the Migration Regulations to provide that an applicant should not be taken to have failed to meet the requirements of reg 1.15A where they fail by reason of family violence. In our 17 May 2011 submission, we note that the law requires amendment to reflect the reality that separation may occur over time, with victims of family violence leaving and returning multiple times and that family violence may take many different forms so that one physically violent incident occurring after separation might have been preceded by a longer period of economic and psychological abuse prior to separation.

We note that in Canada, a person may apply for and be granted permanent residence, on 'humanitarian and compassionate' grounds—including as a victim of family violence—being that 'unusual, undeserved or disproportionate hardship would be caused to the person if he or she had to leave Canada' (on p710 of the Discussion paper). The Canadian system provides for a number of considerations that may warrant the grant of a permanent visa in such circumstances, and the ALRC envisages that similar factors could be considered where a person experiences family violence post-separation. We note that the Canadian approach is similar to the Australian approach to ministerial intervention, but accessed through a substantive visa application.

The LIV suggests that the factors set out on p710 should be worked into a new family violence visa category, as recommended by the LIV, or included in the new test for family violence.[4]

Alternate options: Proposal 21–3 OR Proposals 21–4 to 21–8

Option One: 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.*

[4] The factors suggested by ALRC on p710 are:

- the degree of establishment in and ties to Australia;
- the best interest of any child involved;
- whether the person is of good moral character; and
- whether return to the country of origin would result in undue hardship to the applicant.

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.*

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.*

The LIV prefers option one and we are pleased that this is the ALRC's preliminary view. In our 17 May 2011 submission, we recommended that:

- The 'competent person' statutory declaration process should be replaced with an improved independent expert scheme (Questions 7-8 and 14).

- A panel of 'independent experts' should be created, independent of government. The panel of experts should receive specialist training on the application of the definition of 'relevant family violence' and independent experts should be required to give full reasons for their opinion (Question 11).

- The requirement that an opinion of the independent expert is automatically to be taken as correct should be amended to make it clear that the decision-maker must be satisfied that the basis of the opinion is expressed and is in accordance with the definition of relevant family violence. The decision-maker should have power to obtain a fresh report if the basis is not explained (Question 12).

We agree with the reasons given by the ALRC (at p 734-5) for replacing the current process for non-judicially determined claims of family violence with an independent expert panel, which would:

- be consistent with other areas immigration policy to outsource decision-making to independent experts;

- simplify the procedural requirements; and

- allow for targeted training and education of panel members.

We agree that the expert panel should provide full reasons to provide a mechanism for review of the decision.

If the competent person regime is retained, we reiterate that they should not be required to give evidence about who has allegedly committed relevant family violence.

Chapter 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.*

The LIV supports the intention of Proposal 22-1, which is to improve consistency in decision-making in this complex area of law. A better approach, however, might be to incorporate the Gender Guidelines into the Ministerial Direction. If decision-makers are directed to have regard to the Gender Guidelines in PAM, they will be given the force of law, yet can be easily amended.

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?

The LIV recommends legislative amendment to afford explicit protection to victims of family violence.

In our 17 May 2011 submission, we recommend:

> Section 91 of the *Migration Act* 1958 (Cth) (Migration Act) should be amended to include psychological harm in "serious harm" and to specifically define "women" as a particular social group to protect gender-related claims where there is a failure of state protection (Question 21).

Further, the *Migration Amendment (Complementary Protection) Bill* 2011 (Cth) should be amended to clarify that complementary protection will not be available where there is general lawlessness in the applicant's country of origin, rather than imposing requirements that an applicant must show that they personally face the risk of harm (Question 22).