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Response to Discussion Paper on family violence in Commonwealth laws

Immigration Law

We welcome the opportunity to make this response on the Family Violence Provisions in the *Migration Act 1958*.

Introduction

In addition to teaching Australian National University College of Law Migration Law Program runs a migration advice clinic in Canberra under the auspices of the Aids Action Council. Their accommodation and secretarial support has assisted us to gather volunteer migration agents able to provide free advice on a weekly basis. Our work in this area together with the private migration law caseload of all teachers engaged in the Program (who are also practising migration lawyers/agents) provides insight into the practical realities faced by clients seeking entry under the family violence exception.

We are pleased with the discussion paper and the proposals listed and thank the ALRC for the work they have done in investigating issues and promoting alternatives.

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This response will only address any major comments we would like to make on specific items raised in the discussion paper. If there are no comments made the ALRC can be assured we agree with the proposals provided and have no extra information or comments.

Proposals

In relation to the current definition of family violence and the proposal to include the terminology 'coercive and controlling conduct' in the PAMS as a guidance for officers considering violence perpetrated by someone other than the spouse /sponsor we disagree strongly with this solution.

This is due to a high number of cases we have worked with where the perpetrator is not the spouse. The spouse however does not coerce or control the perpetrator, the spouse merely refuses to intervene or assist. Often this is due to cultural influences or personality weakness on the part of the spouse. When we lodge our applications under this clause both the agents and the DIAC officers are aware it does not meet the legislative provisions. In each case we have argued that the spouse is complicit in the violence through their lack of intervention.

In addition we have not found that couples who remain in a strong and genuine marriage or relationship will take any action to access the family violence provisions.

Addressing this issue in policy will not remove the need for DIAC to turn a 'blind eye' to the legislative requirements or if they abide by the legislation, for the case to be refused and taken to the MRT where the member will need to consider the wider issues at hand.

Recommendation; We strongly recommend that the legislation be amended to enable cases to proceed in a manner that meets the actual legislative provisions. Although working with the current definitions of relevant family violence will stretch the abilities of the English language the very least that can be done without amending the definition to make it clearer would be to

1. Extend the definition of *perpetrator* to include family members of the sponsoring spouse
2. Extend the references to family violence to include *conduct that allows a perpetrator to commit conduct*- in line with the definition of relevant

family violence in regulation 1.21. (see example below)

relevant family violence" means conduct **committed by a perpetrator, or conduct that allows a perpetrator to commit conduct,** towards: (a) the alleged victim; or (b) a member of the family unit of the alleged victim; or (c) a member of the family unit of the alleged perpetrator; or (d) the property of the alleged victim; or (e) the property of a member of the family unit of the alleged victim; or (f) the property of a member of the family unit of the alleged perpetrator; that causes the alleged victim to reasonably fear for, or to be reasonably apprehensive about, his or her own wellbeing or safe

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?

There is no doubt that applicants who are affected by the family violence provisions will find the application fee for the Migration Review Tribunal to be prohibitive. This is the reason behind implementation of the original waiver. The removal of this waiver and ability to refund half the fee will do little for applicants who are in desperate situations such clients affected by these provisions.

Recommendation; Changes are made the migration regulations to allow a fee waiver or full fee refund for applicants to the Migration Review Tribunal who fall under the family violence provisions.

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?

This is an interesting proposal and one we agree warrants serious consideration. We do not however consider that introducing a new route to Ministerial discretion/intervention would be the most judicious way to approach the issue.

Temporary visa holders who are still in the process of applying for a permanent visa as secondary applicants and who fall under the family violence umbrella would be best served if Australian law followed the Canadian model and implemented a new visa category. This would break the nexus of dependence on the primary applicant and allow them to apply for a visa separately. The visa application would need to carry the right to a bridging visa with work rights to allow applicants to maintain households and care for any dependents if necessary.

This would certainly assist those who hold Subclass 300 visas (see proposal and questions 20- 3 to 20-5).

Aside from family violence the visa could be extended to:

- Allow parents of infant Australian citizens who are not in a spousal relationship to apply for permanent residency

- Address problems associated with applications for more than one Protection visa as indicated in Question 20 - 1 and Question 20 -2 [1].
- Allow discretion to assist those on other temporary visa pathways who had recently married Australian citizens and had not lodged spouse applications; but their spouse has died.

Whilst we do support strict criteria for the grant of such a visa and recognise that these should include strong ties to Australia, we would recommend that the criteria is not definitive and an amount of discretion remains with the decision maker to avoid precluding applicants who may otherwise be best served by applying for this visa.

Recommendation; A new visa category is introduced which explicitly allows applicants to apply for permanent residence on Humanitarian or compassionate grounds.

Chapter 22 Refugee and Humanitarian

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?

Ministerial discretion is broad and not restricted to the criteria outlined in the Minister's guidelines.

However Senate inquiries have revealed that the majority of stakeholders remain concerned that the upholding of our international obligations rests upon a no compellable, non reviewable power under the Migration Act.

There is no doubt that it is now up to the personal discretion of the Minister to consider if family violence falls under this power. Allowing a new visa category

[1] Currently parents of Australian citizen infants must rely on the onerous financial requirements of the contributory parent visa regime or Ministerial Discretion.

(see above) for applicants to access, in addition to complementary protection; may alleviate the need for some people to claim protection on the grounds of family violence. In addition it may provide the Minister with incentive to allow applicants to apply for this particular visa category should they appear to meet the criteria.

Yours sincerely

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