FAMILY VIOLENCE AND COMMONWEALTH LAWS

DISCUSSION PAPER

INTRODUCTION

Before responding to the issues and questions raised in the Discussion Paper, RAILS Inc. wishes to make an initial submission that the two stage partner visa process be abandoned. We support amendments to the legislation which would provide for the grant of a permanent partner visa once an application has been assessed as satisfying the legislative requirements governing spouse and de facto (including same-sex relationships) relationships. If this were the case it would not be necessary to have any of the three "exceptions" in the legislation in relation to partner visas – the family violence exception, the child of the relationship exception and the death of the sponsoring spouse exception. In our view the benefits of this approach, including time and cost benefits, outweigh any perceived benefits the two stage visa process provides in deterring non-genuine partner visa applications.

CHAPTER 20

Question 20 – 1

RAILS Inc. believes that the MRT review application fee should be waived in total for review applicants who are suffering severe financial hardship. To not do so will restrict the ability of such persons to access the legal system. In our experience this will impact mostly on women subjected to family violence, many of whom will be raising children as a single parent, many of whom are socially isolated and suffering the traumatic effects of having been subject to violence. An aspect of that violence is often financial abuse rendering these women with very little, possibly no money, much less $770. The vast majority of women assisted by RAILS to access the family violence provisions in the Migration Regulations had no access to income support through Centrelink, were not in a position to find employment because of the impact of the violence on their health and well-being, and had no savings. We cannot emphasise strongly enough our opposition to the removal of the fee waiver in total and state categorically that in our experience this will significantly limit women's access to justice. RAILS supports the submission to the General Attorney General from the Community Legal Centres in NSW.

Proposal 20-1

RAILS Inc. strongly endorses the proposal to amend the Migration Regulations to provide that the family violence exception applies to all secondary applicants for all onshore permanent visas. It should apply as a time of application and time of decision criterion for visa subclasses where there is a pathway from temporary to permanent residence; and as a time of decision criterion in all other cases.

From our experience there are several categories of temporary visa holders that face significant hardship as they are not able to access the family violence exception provisions. We support the notion that the scope of the family violence exception provision be broadened to include situations where the temporary visa holder may be included in an

application for permanent residence on the basis of their relationship with the primary visa holder, however the relationship with the primary visa holder breaks down and there is family violence. For example, where a person is the holder of a student dependent visa and the primary student visa holder applies for permanent residence under the general skilled migration program.

We also support the broadening of the provision to enable holders of the prospective marriage visa to access the family violence provisions where the relationship has broken down before the marriage took place. For the victims of violence, there is very little difference in their situation before marriage, or after marriage. They face the same social, economic, and personal disadvantage; they are often subject to the same social mores, blame, family dishonour, social discrimination and sometimes physical harm if forced to return to their home country as a failed prospective spouse rather than a failed spouse.

Further to this point, we also support the removal of the September 2009 amendments which saw the inclusion of the requirement that the family violence must have occurred while the married or de facto relationship existed. In an abusive relationship the violence may occur before a marriage takes place, however, faced with return to the home country and the shame involved including in some instances the "loss of virginity", or the lack of a home or employment to return to, or a return to languishing in a refugee camp, a person may feel compelled to remain in the violent/abusive relationship and follow through with the marriage where they face further harm.

Also, a person may be in a relationship in which issues of control and unreasonable abusive behaviour have emerged and which cause them to make the decision to leave this relationship, in the belief that if they stay, the abusive behaviour may escalate. The very act of leaving the relationship in itself often causes a significant escalation in violent / abusive behaviour prompting the victim to seek and obtain a domestic violence protection order through the Magistrates Court. Where this has occurred after the relationship has ended, a strict application of the legislation by the decision maker may lead to a visa refusal as it is seen to be violence which has not occurred while the marriage / de facto relationship existed.

We therefore support an amendment which provides for a visa grant on the basis of a family violence protection order granted after the parties have separated.

We also raise the issue of violence perpetrated against the visa applicant or a member of their family, by relatives in the household, other than the sponsoring spouse. In our experience, violence perpetrated by parents-in-law, or other extended family members of the sponsoring spouse who are living in the family home of the couple, is a harmful experience that should not have to be endured in order to remain eligible for permanent residence. We are aware of situations where the sponsoring spouse has not directly perpetrated the violence, but neither have they acted to protect their partner against this violence. We suggest that the legislation be amended to include this scenario, or that DIAC policy clarify that where the sponsoring spouse does nothing to intervene to protect their partner, their apparent condoning of the violence can be regarded as coming within the provisions of the existing legislation.

Question 20-2

RAILS Inc. supports amendments to the regulations which would enable secondary applicants to access Ministerial discretion under s 48B to waive the s.48A bar to the lodging of a further application for an onshore protection visa where those secondary applicants have experienced family violence. RAILS Inc. has provided immigration assistance to women who are secondary applicants in their husband's protection visa application and whose relationship with their husband has broken down due to family violence. The woman then seeks to lodge an application for an onshore protection visa in her own right; basing many of her claims on her fears of further violence being perpetrated against her if forced to return to the home country, or forced to return to the violent marriage on return to the home country. However the woman's right to lodge a protection visa application in her own right is circumvented by the operation of s.48A and faces great difficulty in convincing DIAC that it is an appropriate case for the Minister to invoke s.48B.

Amending regulation 48A to allow for a further onshore application for a protection visa to be lodged by a secondary applicant where in these circumstances is strongly endorsed by RAILS Inc.

Question 20-3

Proposal 20-2

RAILS Inc. supports option one Proposal 20-2. In our experience women who hold a subclass 300 prospective marriage visa and who are subjected to family violence by the sponsor are in the same position as women who hold a subclass 309 visa and are subjected to family violence by the sponsoring spouse and the law should not distinguish between the two situations. They face the same social, economic and personal disadvantage; they are often subject to the same social mores, blame, family dishonour, social discrimination and sometimes physical harm if forced to return to their home country as a failed prospective spouse rather than a "failed" spouse.

As stated previously, in our experience a person may be in a relationship in which issues of control and abusive unreasonable behaviour have emerged and which cause them to make the decision to leave this relationship, in the belief that if they stay, the abusive behaviour may escalate.

In an abusive relationship the violence may occur before a marriage takes place, however, faced with return to the home country and the shame involved, or the lack of a home or employment to return to, or a return to languishing in a refugee camp, a person may feel compelled to remain in the violent/abusive relationship and follow through with the marriage where they face further harm.

Question 20-4

The granting of permanent residence under the family violence provisions rests on whether or not the evidentiary requirements are satisfied. In our view this is all that is necessary to ensure the integrity of the visa system.

Question 20-5

RAILS does not support this proposal.

Question 20-6

RAILS supports the introduction of a provision that sponsors submit to a police check in relation to past family violence convictions or protection orders when making an application to sponsor a spouse / de facto partner and that there by a discretionary power for the decision maker to refuse approval of the sponsorship on that basis.

Proposal 20-4

RAILS Inc. endorses the proposal that the Australian government makes available regular and consistent education and training on family violence and its impact on victims for visa decision makers, competent persons and independent experts.

Proposal 20-5

RAILS Inc. endorses the proposal that the Australian government should provide information on the legislation and support services available to victims of family violence, prior to and on arrival in Australia. This strategy was utilised with women in the Philippines being sponsored by Australian citizen/residents partners and it has proven to be a preventative measure to some degree.

CHAPTER 21: The Family Violence Exception – Evidentiary Requirements

Proposal 21-1

At the outset, we propose that the September 2009 amendments which saw the inclusion of the requirement that the family violence must have occurred while the married or de facto relationship existed, be removed from the legislation. We also support corresponding change to policy contained in the Procedures Advice Manual 3.

As previously stated RAILS believes that, a person may be in a relationship in which issues of control and unreasonable abusive behaviour have emerged and which cause them to make the decision to leave this relationship, in the belief that if they stay, the abusive behaviour may escalate. Research supports the finding that the very act of leaving the relationship in itself often causes a significant escalation in violent / abusive behaviour prompting the victim to seek and obtain a domestic violence protection order through the Magistrates Court. Where this has occurred after the relationship has ended, a strict application of the legislation by the decision maker may lead to a visa refusal as it is seen to be violence which has not occurred while the marriage / de facto relationship existed.

We therefore support an amendment to both law and policy which provides for a visa grant on the basis of a family violence protection order granted after the parties have separated.

Question 21-1

We do not support this proposal. The test applied by a magistrate in determining whether or not to grant a family violence protection order is different to the test applied in assessing whether or not a person has been subjected to family violence. In Queensland, the Magistrate will assess whether there is a history of domestic violence but will also assess the likelihood of future domestic violence occurring. It is a futuristic assessment of the risk of further violence. Therefore a family violence protection order may not be granted where the Magistrate assesses that there is very little likelihood of violence in the future, irrespective of violence occurring in the past. In Queensland many women are not successful in obtaining family violence protection orders if they are living in a women's refuge as they are assessed by the magistrate as not being at risk of future violence – they are "safe". There is a risk that suspending the processing of a visa application to await the outcome of an application for a family violence protection order through the magistrates court may result in a negative outcome for the visa applicant if the Magistrate does not grant the family violence protection order. Until the test is consistent in all jurisdictions, this proposal will affect women's lives further.

Proposal 21-2

For the reasons stated above, RAILS Inc. strongly supports the repeal of the requirement in reg. 1.23 that the violence must have occurred while the marriage or de facto relationship existed between the alleged perpetrator and the spouse or de facto partner of the alleged perpetrator.

Option One - Proposals 21-3

RAILS does not support the idea of the Independent Panel to assess non-judicial claims of family violence, particularly as there is insufficient information available currently as to how the panel would be established and how it would function.

Some of our concerns relate to the following issues.

Who would administer the panel? Would it be administered through DIAC, or another Commonwealth Government department, and therefore would it be truly independent. What process would be used to select Panel Members? What assurance is there that the panel would be comprised of people with extensive employment and experience in working with victims of family violence? Although this model features on-going training of panel members it depends on the agenda for such training.

The timeliness of the assessment by the Independent Panel is a critical issue. If there is a significant period of time that lapses between the date of separation / the date of the violence occurring and the date on which the applicant is assessed by the Panel Member, there is the risk that a person recounting past experience of family violence is not as compelling as a person recounting a more immediate experience, particularly if the person has since resettled well through finding employment, securing housing, and perhaps even established themselves in a new relationship. Furthermore, time delays would also cause the applicant to have to recall traumatic experiences and this may be detrimental to their health and well-being.

If, at some future date, legislative amendments replace the competent persons scheme with an Independent Panel, RAILS strongly endorses the ALRC proposal that the Panel

Member's assessment would be subject to review. In our view we there should be provision for review of a negative assessment, through the Migration Review Tribunal. We believe that such a review process should operate similarly to that which currently exists for the review of decisions made by the Commonwealth Medical Officer, in that additional evidence can be provided by the review applicant, and that evidence is assessed by a supervising or higher-level Panel Member, facilitated through the MRT.

If the Independent Panel is introduced, RAILS strongly supports the suggestion that the evidence would not be prescribed in legislation, and that the applicant can present any and all forms of evidence available to them to support their claim including, but not limited to, written and oral evidence from those people who have supported them through their experience of family violence. e.g. women's refuge workers, counsellors, family members, neighbours, community workers, doctors, etc.

Option Two – Proposals 21-4 to 21-8

Proposal 21-4

As there is currently insufficient information about how the Independent Panel would be formed and how it would function RAILS is unable to support that proposal. We therefore support Option Two.

In regard to option two we wish to state the following.

The requirement that the competent person name the alleged perpetrator may act as a deterrent for some competent persons as they may fear retribution or legal action as a consequence. For this reason we endorse the proposal that this requirement be deleted from the regulations.

Proposal 21-5

This proposal is endorsed by RAILS Inc. Whilst professionals who are designated "competent persons" under migration law may be very competent at assessing family violence, they may not be familiar with the technical, prescriptive requirements of the competent persons statutory declaration in the migration legislation. Assistance with minor errors or omissions could save the stress for the visa applicant and the expense to the public purse involved in having a visa application refused and becoming the subject of review. This strategy has been implemented by other statutory agencies in order to provide an opportunity to gather all necessary and correct evidence and in turn increase "access to justice".

Proposal 21-6

RAILS endorses this proposal. Please see discussion in our previous submission.

Proposal 21-7

RAILS endorses this proposal.

Proposal 21-8

RAILS strongly endorses this proposal. In our view, the independent expert holds enormous power. The DIAC case officer has to accept their assessment and likewise the Tribunal Member has to accept the assessment of the independent expert as being correct. Yet the process undertaken by the independent expert is not subject to any scrutiny, they are not required to provide reasons for their decision, there is no process for seeking a review of their assessment, other than the expensive and limited provision for judicial review. In our experience the quality of the process and assessment by the independent expert varies greatly from person to person. There is very little consistency in their approach. Some have been sensitive in their manner and impartial in their processes, yet others have been leading in their questions and held obviously stereotyped and biased views of the motive of women from certain countries who marry Australian citizens/ permanent residents.

In other cases the independent expert has gone beyond the scope of their role in that their questions have addressed the issue of the "genuine and continuing marriage relationship", rather than focussed on whether or not the applicant has been a victim of relevant family violence perpetrated by their sponsoring spouse.

Previously RAILS submitted that it has concerns about the practice of having two social workers present for the independent assessment. The legislation provides that the referral be made to "an independent expert", yet invariably there are two social workers present during the conduct of the assessment. One conducts the interview and the other is the scribe. However the question arises as to what occurs at the conclusion of the interview. Are both social workers involved in the discussion and in deciding whether or not the applicant has been subjected to family violence?

We further submit that in our experience there have been occasions where the independent expert has been engaging in an investigation, rather than limiting their role to assessing whether or not the applicant has been subjected to family violence. For example, the independent expert has contacted the competent person to check their views on specific matters. We believe this goes beyond the scope of the role of the independent expert.

RAILS holds the view that the legislation should be amended such that the evidence provided by competent persons should be regarded in the same way as judicial evidence i.e. it has to be accepted by the DIAC case officer, rather than the DIAC case officer having to be satisfied by the non-judicial evidence.

We note that in other countries, for example the USA, the evidence is not limited to prescribed evidence. Rather any type of document that asserts that the applicant has experienced domestic violence may be submitted as evidence.

For example, where the evidence provided includes a statutory declaration from a women's refuge worker, it should be accepted, when the applicant has been living in a woman's refuge. It should be accepted as an assessment would already have been made as the eligibility criteria for accommodation under the SAAP program requires that the person seeking accommodation be at risk of harm and homelessness because of domestic/family violence.

However, if the above amendment does not occur, RAILS holds the view that decision makers (both DIAC and MRT) be required to give reasons for referring a case to an independent expert. In addition, legislative amendments should require that independent experts provide full reasons for their decisions; and decisions which contradict that of the competent persons should be subject to a review process. The latter particularly as the process of referral to an "independent expert" is that of one professional is reassessing an assessment made by another professional who may have extensive experience in the area of domestic and family violence.

CHAPTER 22 – Refugee Law

Proposal 22-1

RAILS strongly endorses the proposal that the Minister for Immigration and Citizenship should issue a direction under s.499 of the Migration Act 1958 to visa decision makers to have regard to the DIAC Procedures Advice Manual 3 "Gender Guidelines" when making refugee status assessments.

RAILS submits that family violence claims clearly fall within the definition of a refugee contained in the United Nations Convention Relating to the Status of Refugees as it is incorporated into Australian domestic law in the Migration Act and Regulations. However, in view of the inconsistent decision making in this area of law a Ministerial Direction referring decision makers to the Gender Guidelines contained in policy is imperative.

Question 22-1

In our view the powers of the Minister under s.417 of the Act allow the Minister to substitute a more favourable decision to an applicant whose protection visa claims have failed but who fears further family violence. However this is a non-compellable power and is therefore subject to the whim of each respective Minister. RAILS preference is for the Complementary Protection legislation to be amended to include more direct reference to victims of family violence and to enable certainty of protection.