To the President, Professor Rosalind Croucher

Submission to the Australian Law Reform Commission: Family Violence Provisions

The family violence provisions contained in the **Migration Regulations 1994** (the regulations') are in need of urgent reform. Contrary to its objective to protect the vulnerable, it can effectively compel a person suffering family violence to remain in a violent relationship, at significant risk to their well-being, and or to the well-being of family members. It also gives the person inflicting the violence significant power over the victim and can actually promote post-relationship violence. Besides these structural flaws in the relevant law to be discussed in this submission, the present system also allows arbitrary decision making by delegates of the Minister within the Department of Immigration and Citizenship, and also by Centrelink officers appointed as 'independent experts', such that protective measures contained in the regulations are undermined.

The Fundamental Flaw: The violence must have occurred during the relationship

The objective of the family violence provisions is to protect a person who has suffered or who is suffering family violence. In an immigration law context, these provisions come to the fore in partner visa applications (and also in relation to other applications, such as employer nomination permanent residence visa applications).

The family violence provisions are contained in Division 1.5 and rr 1.21 to 1.27 of the regulations. 'Relevant family violence' and 'independent expert' are defined in r1.21(1) as:

1.21 Interpretation

(1) In this Division:

...

independent expert **means a person who:**

(a) is suitably qualified to make independent assessments of non-judicially determined claims of family violence; and

(b) is employed by, or contracted to provide services to, an organisation that is specified, in a Gazette Notice for this definition, for the purpose of making independent assessments of non-judicially determined claims of family violence.

non-judicially determined claim of family violence has the meaning given by subregulations 1.23 (8) and (9).

relevant family violence means conduct, whether actual or threatened, 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 safety.

Pre-9 November 2009, the family violence provision did not require that the violence occurred during the relationship between the visa applicant and the sponsor. This was confirmed by the Full Court of the Federal Court in **Muliyana v Minister for Immigration and Citizenship** [2010] FCAFC 24 (15 March 2010). The Full Court of the Federal Court found that the relevant clause for the partner visa concerned did not require that the relevant family violence occurred during the relationship. At [33]-[38], Siopsis and Edmonds JJ, with whom Moore J agreed, stated:

REASONING

33 In *Sok*, Riley FM observed that the express words of cl 100.221(c) of Sch 2 of the Regulations do not state that the domestic violence needed to have occurred during the currency of the spousal relationship or that the domestic violence needed to have caused or contributed to the cessation of the spousal relationship. Her Honour nevertheless identified an 'obvious policy' behind the provisions to enable a person in circumstances of domestic violence to leave an abusive relationship without compromising his or her immigration status. Her Honour concluded that the policy so identified required the domestic violence to have occurred during the currency of the relationship.

34 However, in our view, her Honour's identification of an 'obvious policy' behind the provisions to enable a person in circumstances of domestic violence to leave an abusive relationship without compromising his or her immigration status, is too narrowly stated. There is no warrant, in terms of policy, for treating such a 'humanitarian ground', to adopt the phrase used by Wilcox J in *Ibrahim* at [40], as inapplicable to a person who has suffered domestic violence after the spousal relationship has ceased for whatever reason (whether temporarily or not) who does not wish to return to that relationship but in taking this position, would not be compromising her (or less frequently, his) immigration status. In short, the policy is intended to cover both situations: not to force a person to stay in an abusive relationship; and not to force a person to go back into an abusive relationship, in either case without compromising his or her immigration status. If that is the correct identification of the policy, then it matters not whether the domestic violence occurred before or after the cessation of the spousal relationship; just that domestic violence occurred and the spousal relationship has ceased; and that may well explain why there is no temporal limitation in the text of cl 100.221(4)(c) confining it to the former situation.

35 No doubt there will be cases where the violence occurs between former spouses in circumstances, for example, many years after the relationship has ended, such that it would not qualify as 'domestic violence' within the broader

concept of a 'non-judicially determined claim for domestic violence'. But that is not this case where the Tribunal made an unchallenged finding that the appellant had suffered domestic violence.

36 Absent the confined policy identified by her Honour, there is nothing in the text of the legislation viewed in its context: *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408, and nothing in any referrable relevant extrinsic material, which would suggest that the domestic violence had to be the cause or a reason for the cessation of the spousal relationship and, for that reason, had to have occurred prior to the cessation of the spousal relationship. Indeed, acceptance of the broader policy identified in [34] above, inevitably leads to the conclusion that it matters not when the violence occurred, before or after cessation of the spousal relationship, provided it was 'domestic violence' as defined.

37 There are other reasons why we think our construction is to be preferred over that submitted on behalf of the Minister. Chief amongst them is that the Minister, on his own submission, would be involved in ascertaining and determining the cause or reason for a cessation in the spousal relationship. That is a matter for experts, not Ministers of the Crown or their delegates. But that is what would be involved, in many cases, if the fact-finding exercise requires one to fix the time of the cessation of the spousal relationship; and such time fixing would be necessary if the domestic violence must occur before that time for the requirement of cl 100.221(4)(c) to be satisfied.

38 No such fact-finding would be involved on the part of the Minister if the construction which we embrace is adopted. All that would be necessary would be findings that:

(4) The spousal relationship has ceased: cl 100.221(4)(b); and

(5) the visa applicant has suffered domestic violence committed by the sponsoring spouse: cl 100.221(4)(c).

The 9 November 2009 Amendments: Undermining the family violence provisions

On 9 November 2009, the law was amended such that the applicant had to show that the violence occurred during the relationship. The amendment was not contained in r1.21(1), but in r1.23 (which deals with how one establishes that relevant family violence has occurred); for example, r1.23(6) provides:

1.23 When is a person taken to have suffered or committed family violence?

...

Circumstances in which family violence is suffered and committed — conviction

(6) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if a court has:

(a) convicted the alleged perpetrator of an offence of violence against the alleged victim; or

(b) recorded a finding of guilt against the alleged perpetrator in respect of an offence of violence against the alleged victim.

(7) For subregulation (6), **the violence, or part of the violence, that led to the conviction or recording of a finding of guilt must have occurred while the married relationship or de facto relationship existed between the alleged perpetrator and the spouse or de facto partner of the alleged perpetrator.** (emphasis added).

There appears to be no sound basis in principle for the amendments that came into effect on 9 November 2009 that the violence occurred while the married relationship or de facto relationship existed between the alleged perpetrator and the spouse or de facto partner of the alleged perpetrator.

What the amendment has done is to give more power to the person committing the family violence over the victim, and forces the victim to stay in a violent situation when it is neither safe nor appropriate to do so. I explain my reasoning for this below:

Empowering the alleged perpetrator

The requirement that the violence occurred while the married relationship or de facto relationship existed between the perpetrator and the spouse or de facto partner of the perpetrator empowers the perpetrator because he[1] can simply end the relationship and immediately thereafter inflict violence on the victim, for example, by bashing her. As the relationship was over when the bashing occurred, the victim does not get the benefit of the family violence provision, despite a conviction of assault against the perpetrator.

The perpetrator effectively gets the last laugh, because the visa applicant would not usually have any other basis to remain in Australia (unless there was a child of the relationship and certain orders are obtained). The end result is that the victim is bashed and then will ultimately have to depart Australia, unless the Minister personally intervenes (which can only occur once the victim has gone through the agony of a visa application refusal, the expense and agony of a losing review at the Migration Review Tribunal, and the anxious wait for the Minister to exercise his non-compellable discretionary power to intervene and substitute a more favourable decision-a process that is cruel in the circumstances and a burden that should not be placed on the Minister, in any event). This is a perverse result.

There is another reason why the perpetrator is encouraged by the current law to 'dump and then bash'. A person is only permitted to sponsor two partners for a partner visa in their lifetime (and this includes a prospective spouse visa: subclass 300). Further sponsorships after the quota of two is exhausted requires the Minister find that there are compelling circumstances affecting the sponsor such that another partner or fiancé can be sponsored: see r1.20J(1)(a)(ii):

[1] I will refer to 'he' rather than 'he and she', for simplicity and also because men are the main perpetrators of family violence. This is not to diminish the seriousness of family violence against men

1.20J Limitation on approval of sponsorships — spouse, partner, prospective marriage and interdependency visas

(1AA) This regulation applies in relation to an application for:

(a) a Spouse (Provisional) (Class UF) visa; or

(b) a Partner (Provisional) (Class UF) visa; or

(c) a Prospective Marriage (Temporary) (Class TO) visa; or

(d) an Interdependency (Provisional) (Class UG) visa; or

(e) an Extended Eligibility (Temporary) (Class TK) visa; or

(f) a Partner (Temporary) (Class UK) visa.

(1) Subject to subregulations (2) and (3), if a person applies for a visa mentioned in subregulation (1AA) as the spouse, de facto partner or prospective spouse of the sponsor, the Minister must not approve the sponsorship of the applicant unless the Minister is satisfied that:

(a) not more than 1 other person has been granted a relevant permission as:

(i) the spouse, de facto partner or prospective spouse of the sponsor on the basis of a sponsorship or nomination; or

(ii) a person who ceased a relationship of a kind mentioned in subparagraph (i) with the sponsor after the person, or another person mentioned in the prescribed criteria for the visa, had suffered family violence committed by the sponsor; and

Because of this limitation on sponsorships, if the sponsor perpetrator bashes the visa applicant after ending the relationship, he does not lose one of his two permitted sponsorships. It appears to be ok to bash her if you are not in the relationship, because that does not affect the quota. This is perverse.

Forcing the victim to remain in a violent relationship

The victim is also compelled to stay in the violent relationship until she can get sufficient evidence that the violence occurred during the relationship. This an extremely dangerous situation, but given the burden on the victim to show that the violence occurred during the relationship, when does the victim think she has enough evidence such that she can leave and meet the regulatory requirement (assuming she even knows there is such a requirement)? Would she understand psychological harm is sufficient, or a slap on the face, or does she think she needs more evidence, such as a black eye, or a split lip or a broken limb. Again, the empowerment of the perpetrator comes to the fore. He can simply tell DIAC the relationship ended a month before any of the violence occurred. What is the victim to do in that situation, even if what the perpetrator has said is not true?

Furthermore, when does a relationship end? The bashing of the victim might be evidence in itself that the relationship is over, and therefore it did not occur during the relationship; afterall, why would one bash the person one is meant to be with in a committed relationship. This is another reason why the requirement that the violence occurred during the relationship is unworkable.

The plight of the subclass 300 visa applicant/subclass 300 visa holder: Prospective Spouse visa

Another problem arises for subclass 300 visa (prospective spouse visa) applicants and for subclass 300 visa holders. There are no family violence provisions for a subclass 300 visa applicant. If the sponsors inflicts violence upon his visa applicant fiancé, for example, she has no recourse as far as immigration law is concerned, and the sponsor has not lost a permission to sponsor a partner as the subclass 300 visa has not been granted.

Similarly, if the subclass 300 visa is granted, and if the visa holder enters Australia, if she suffers family violence before the partner visa application is made (noting here the family violence has to occur during the relationship), she has no recourse to the family violence provisions. She would need to stay in the relationship and lodge the partner visa application onshore (subclasses 820 and 801), which has the family violence provision.

The plight of the subclass 309 visa applicant

There is no family violence provision for a subclass 309 visa applicant. The subclass 309 visa applicant is in the same predicament as that faced by the subclass 300 visa applicant or subclass 300 visa holder. The subclass 309 visa applicant would need to enter Australia, stay in the relationship and then wait to suffer further violence, so that for the purposes of subclause 100.221(4) she can show that she suffered family violence after entry holding a subclass 309 visa:

100.221…

(4) The applicant meets the requirements of this subclause if:

(a) **the applicant first entered Australia as the holder of a Subclass 309 (Spouse (Provisional)) visa or a Subclass 309 (Partner (Provisional)) visa** and either:

(i) continues to be the holder of that visa; or

(ii) is no longer the holder of that visa because the visa:

(A) was granted before 1 November 1999; and

(B) has ceased to be in effect because the applicant:

(I) was outside Australia at the end of the 30 month period specified in the Subclass 309 visa for travelling to and entering Australia; or

(II) left Australia after the end of the 30 month period specified in that visa for travelling to and entering Australia; and

(b) the applicant would meet the requirements of subclause (2) or (2A) except that the relationship between the applicant and the sponsoring partner has ceased; and

(c) **after the applicant first entered Australia** as the holder of the visa mentioned in paragraph (a) — either or both of the following circumstances applies:

(i) either or both of the following:

(A) the applicant;

(B) a member of the family unit of the sponsoring partner or of the applicant or of both of them;

has suffered family violence committed by the sponsoring partner;

...(emphasis added)

Cultural relevance

In many cultures, once a woman leaves her family she is not to return. She is expected to stay with her partner and his family. Furthermore, to return is to bring shame upon her family. To live alone as a single female is not permitted and or is condemned morally (and such condemnation can result in violence against the woman by the community by zealots).

So what happens to a woman who suffers family violence while applying for, or while holding, a subclass 300 visa or for a subclass 309, but who is not able to access the family violence provisions because the onshore application has not been made (in the case if a subclass 300 visa holder) or because the subclass 309 visa holder has not entered Australia and suffered the family violence after entry? It would appear that they are left to suffer, possibly without family support, or they would need to seek other visa pathways to remain in Australia, which would be extremely limited, if at all available.

The result is a system that discriminates against migrants who make offshore partner visa applications or prospective spouse visa applications. They do not get the family violence provisions that are available to a person who applies onshore directly for a partner visa (subclass 820 and subclass 801); for example, such as a student visa holder applying for a partner visa holder onshore. Geography thus plays a major role in relation to who gets the family violence provision.

If the violence is what is to be condemned, and if the victims are to receive the family violence provisions, the class of the visa held, and where the violence occurred, should not be the determining factor, but yet it is material. This needs to be changed. Even if one is of the view that it is hard to investigate allegations of family violence for a subclass 300 or 309 visa applicant, there should be some pathway for a subclass 300 visa holder or subclass 309 visa holder.

The Evidence Required

I do not propose to go through the different ways an applicant can provide relevant family violence. I will focus on the competent persons and the independent expert, being a Centrelink social worker because reform is needed. Subregulations 1.23(9)(a), (b) and (c) provides:

1.23

...

(9)For these Regulations, an application for a visa is taken to include a ***non-judicially determined claim of family violence*** if:

(a) the applicant seeks to satisfy a prescribed criterion that the applicant, or another person mentioned in the criterion, has suffered family violence; and

(b) the alleged victim is:

(i) a spouse or de facto partner of the alleged perpetrator; or

(ii) a dependent child of:

(A) the alleged perpetrator; or

(B) the spouse or de facto partner of the alleged perpetrator; or

(C) both the alleged perpetrator and his or her spouse or de facto partner; or

(iii) a member of the family unit of a spouse or de facto partner of the alleged perpetrator (being a member of the family unit who has made a combined application for a visa with the spouse or de facto partner); and

(c) the alleged victim or another person on the alleged victim's behalf has presented evidence in accordance with regulation 1.24 that:

(i) the alleged victim has suffered relevant family violence; and

(ii) the alleged perpetrator committed that relevant family violence.

Regulation 1.24 provides:

1.24 (1) The evidence referred to in paragraph 1.23(9)(c) is:

(a) a statutory declaration under regulation 1.25 (which deals with statutory declarations by or on behalf of alleged victims) together with:

(i) a statutory declaration under regulation 1.26 (which deals with statutory declarations by competent persons); and

(ii) a copy of a record of an assault, allegedly committed by the alleged perpetrator, on:

(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;

that is a record kept by a police service of a State or Territory (other than a statement by the alleged victim or by the person allegedly assaulted); or

(b) a statutory declaration under regulation 1.25, together with 2 statutory declarations under regulation 1.26.

For the purposes of rr 1.24 and 1.26, the competent persons prescribed for the purposes of the statutory declarations are contained in r1.21(1):

1.21 (1) In this Division:

competent person means:

(a) in relation to family violence committed against an adult:

(i) a person registered as a medical practitioner under a law of a State or Territory providing for the registration of medical practitioners; or

(ii) a person registered as a psychologist under a law of a State or Territory providing for the registration of psychologists; or

(iii) a person who:

(A) is a registered nurse within the meaning of section 3 of the *Health Insurance Act 1973;* and

(B) is performing the duties of a registered nurse; or

(iv) a person who:

(A) is a member of the Australian Association of Social Workers or is recognised by that Association as a person who is eligible to be a member of that Association; and

(B) is performing the duties of a social worker; or

(v) a person who is a family consultant under the *Family Law Act 1975*; or

(vi) a person holding a position of a kind described in subregulation (2); or

(b) in relation to family violence committed against a child:

(i) a person referred to in paragraph (a); or

(ii) an officer of the child welfare or child protection authorities

...

The problem that arises is that delegate of the Minister must refer the matter to the independent expert for assessment pursuant to r1.23(10)(c) if the delegate is not satisfied that the alleged victim has not suffered relevant family violence. The delegates do not give, in applications that I have been involved with, reasons for their state of non-satisfaction, despite the required evidence being given under r1.24 for the purposes of r1.23(9), being provision of the statutory declaration or declarations of the competent persons. When requested, responses have been of a non-informing nature such as 'that is what I have decided' or similar language.

Despite being requested to show how the delegate reached the state of non-satisfaction in law, when the delegate has before him or her evidence prescribed for r1.23 and 1.24, no response is forthcoming. Such decision making smacks of arbitrariness and lacks transparency and procedural fairness.

The Independent Expert

The authority of the independent expert is contained in r1.23(10), which provides:

1.23
...

(10) If an application for a visa includes a non-judicially determined claim of family violence:

(a) the Minister must consider whether the alleged victim has suffered relevant family violence; and

(b) if the Minister is satisfied that the alleged victim has suffered the relevant family violence, the Minister must consider the application on that basis; and

(c) if the Minister is not satisfied that the alleged victim has suffered the relevant family violence:

(i) the Minister must seek the opinion of an independent expert about whether the alleged victim has suffered the relevant family violence; and

(ii) the Minister must take an independent expert's opinion on the matter to be correct for the purposes of deciding whether the alleged victim satisfies a prescribed criterion for a visa that requires the applicant for the visa, or another person mentioned in the criterion, to have suffered family violence. (emphasis added)

The opinion of the independent expert is binding on the Minister (see r1.23(10)(c)(ii)). But what is the expertise of the independent expert to provide such opinions, in the complex area of migration law. Why does the independent expert's opinion override those provided by competent persons, for example, of a qualified social worker who is not working for Centrelink and of a registered psychologist? There is no logic in the Centrelink officer having so much authority. They are also

inexperienced in administrative law and often misunderstand the law to be applied and or fall foul of procedural fairness: see, for example, **Liu v Minister for Immigration and Citizenship** [2011] FMCA 601 (5 August 2011), where the Federal Magistrates Court found that the independent expert's report was infected with jurisdictional error and reiterated the following principle of law:

> 14. In the case before this Court, the Tribunal was not satisfied that the Applicant had suffered relevant domestic violence, and accordingly, sought the opinion of an independent expert as to whether the Applicant had suffered relevant domestic violence. It is common ground that the independent expert who provided the opinion which was adopted by the Tribunal was properly qualified and validly appointed to provided such an opinion.
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> 15. The Tribunal accepted the independent expert's opinion as correct and properly made and, accordingly, found that the Applicant was not taken to have suffered domestic violence.
>
> 16. However, it is a jurisdictional error on the part of the Tribunal to accept the independent expert's opinion if that opinion is one that is not authorised by the Regulations. This principle was stated by the Full Court of the Federal Court of Australia in *Minister for Immigration and Multicultural Affairs v Seligman* (1999) 85 FCR 115 at [66] in the context of a review of a decision of a delegate of the Minister for Immigration and Multicultural Affairs which placed reliance on an opinion of a Medical Officer of the Commonwealth. The Full Court stated at [66] as follows:
>
> *"The delegate is only entitled and obliged to take that opinion as correct if it is an opinion of a kind authorised by the regulations and, it may be added, validly so authorised. If it is not or if it travels beyond the limits of what is authorised, then to act upon it as though it is binding is to act upon a wrong view of the law and to err in the interpretation of the law or its application, a ground of review for which s476 of the Act provides."*
>
> ...
>
> 43. The duty of the independent expert was to give an opinion as to whether the Applicant had suffered relevant domestic violence in accordance with the definition of relevant domestic violence in Regulation 1.23(2)(b) of the Regulations. It went beyond that obligation in basing its conclusion that the Applicant had not suffered relevant domestic violence on its finding that the Applicant had not established "*conclusively*" that he had been a victim of relevant domestic violence.
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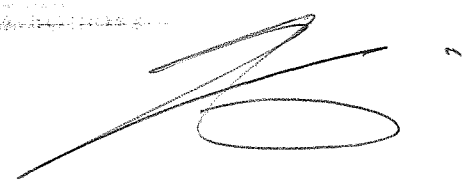
> 44. In the circumstances, it was a jurisdictional error on the part of the Tribunal to accept the independent expert's opinion as leading it to conclude that the Applicant had not suffered relevant domestic violence.

A panel should determine whether there has been family violence rather than an independent expert

I think that there is room to look at an expert panel to determine if there has been family violence. The Centrelink officer, with respect, is not sufficiently equipped to deal with the task on his or her own. It might be that a single person is not able to undertake this complex task, such that a panel or advisory group is a more suitable model.

Conclusion

On the basis of the views I have expressed, it is respectfully submitted that the law relating to family violence needs urgent reform.



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