Family Violence and Commonwealth Laws: Immigration

To: Australian Law Reform Commission

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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 Issues Paper *Family Violence and Commonwealth Laws: Immigration* (the Issues 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.

Executive Summary

In this submission, the LIV provides comments on select questions from the Issues Paper and we recommend that:

1. The government amend the *Migration Regulations* 1994 (Cth) (the Regulations) to provide that an applicant should not be taken to have failed to meet the requirements of *Regulation 1.15A* where they fail by reason of relevant family violence (Question 1).

2. The government amend the definition of 'relevant family violence' in the Regulations consistent with the definition recommended by ALRC Report 114 (Question 2).

3. 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(Question 3).

4. 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 should be addressed (Question 4).

5. 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 (Question 5).

6. The government amend the Regulations to make it clear that a family violence protection order granted after the parties have separated is sufficient evidence that 'relevant family violence' has occurred (Question 6).

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

8. Competent persons, if retained, not be required to give evidence about who has allegedly committed relevant family violence (Question 9).

9. 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).

10. 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).

11. Sponsors should *not* be required to submit to a police check in relation to past family violence convictions or protection orders when making an application for sponsorship (Question 16).

12. DIAC should not be able or required to bring information about a sponsor's past family violence history to the attention of prospective spouses (Question 17).

13. 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).

14. 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).

Question 1

What issues arise in the use of the 'relevant family violence' definition in the *Migration Regulations* 1994 (Cth)? How does the definition operate in practice?

DIAC statistics show that only a small percentage of partner visa cases involve family violence claims, but also that family violence tends to be under-reported.[1] A balance must therefore be struck between maintaining the integrity of the family violence exception, with ensuring that genuine victims of family violence are protected. In our view, the Regulations have been made and interpreted by Department of Immigration and Citizenship DIAC), the Migration Review Tribunal (MRT) and the courts with too much emphasis on preventing unmeritorious claims, rather than with a view to assisting applicants who suffer family violence.

The "family violence exception" provides an exception to the requirement under Temporary and Permanent Partner Visas that a relationship is "genuine and continuing" where an applicant shows that the relationship with the sponsor has ended because "relevant c" occurred. The requirement for the relationship to have ended has been interpreted strictly, so that the decision-maker must be first satisfied that a genuine and continuing relationship existed at some point, which subsequently ceased because of relevant family violence. The existence of a genuine and continuing relationship is therefore to be considered as a "primary issue".[2] Where no relationship is found to have existed, there will be no consideration of the family violence exception.

The LIV is extremely concerned by the approach of the DIAC, the MRT and the courts, in cases where a genuine and continuing relationship is found never to have existed because evidence of family violence shows, for example, that there was "no mutuality of

[1] Issues paper, p6.
[2] *Collins v Minister for Immigration* [2003] FMCA 571, [42].

support or companionship at any stage of the relationship".[3] In *Shadali*, McInnis FM held that it was open for the MRT to find that:

> *[The sponsor's] behaviour towards [the applicant] following her arrival to Australia in failing to provide for her, failing to present with her socially as a married couple and confining her to her house and mistreating her reflect a relationship which falls well short of the requirements in Regulation 1.15A.It also tends to strongly suggest that he sponsored her migration for purely selfish reasons of procuring a domestic servant and a submissive sexual partner rather than a desire to ek on a shared life together.*[4]

McInnis FM notes that "although it may superficially appear to be unfair to the Applicant for the Tribunal to use against the Applicant evidence of domestic violence, it does not follow that the use of that material by the Tribunal constitutes an error".

We recommend that the Regulations be amended to provide that an applicant should not be taken to have failed to meet the requirements of *Regulation 1.15A* where they fail by reason of relevant family violence. This would effectively enable extremely vulnerable applicants, such as the applicant in *Shadali*, to access the family violence exception. Alternatively, a new visa category could be created specifically to protect victims of family violence and provide an alternative visa option.

Question 2

Should the Migration Regulations 1994 (Cth) be amended to insert a definition of family violence consistent with that recommended by the ALRC and New South Wales Law Reform Commission in Family Violence—A National Legal Response (ALRC Report 114)?

The LIV supports amendment of the definition of 'relevant family violence' in the Regulations consistent with the definition recommended by ALRC Report 114.

The current definition of 'relevant family violence' is problematic because it requires an assessment of reasonableness in relation to a victim's fear or apprehension. The focus on the victim, rather than the perpetrator, is inappropriate because it allows myths and stereotypes to persist about the nature of family violence, including who is a victim, what constitutes violence and what is a reasonable response by a victim. The definition of 'relevant family violence' recommended by the ALRC Report 114 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.

Question 3

Should the application of the family violence exception under the Migration Regulations 1994 (Cth) be expanded to cover other visa categories?

The LIV recommends 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.

The Issues Paper notes that the family violence exception can be invoked for certain skilled (business) stream visas but not for Temporary Skilled Visa (Subclass 457); New

[3] *Shadali* v *MIAC* [2007] FMCA 1230 [35].
[4] *Ibid*.

Zealand Citizen Family Relationship (Temporary) Visa (Subclass 461); student visas; tourist visas; and other family visas, most of which are temporary visas. Under temporary visa conditions, secondary applicants (spouse or dependents) are wholly dependent on the visa status of the primary visa holder. Therefore where a primary visa holder is subject to cancellation for any reason, any secondary visa holders will be subject to cancellation on the basis of cancellation of the primary visa. Further, most temporary visas contain conditions affecting eligibility for further visa application. Therefore, if the family violence exception was expanded to temporary visas, a link would be maintained between the primary and secondary visa holder, even though the couple have separated, because the secondary visa holder is wholly dependent on the validity of the primary visa and may then be limited in further visa options. The fate of the victim of family violence would still therefore be dependent on their former spouse.

The LIV recommends that a new temporary visa subclass be created for former spouses of temporary visa holders, who are victims of family violence. The new visa category could be granted for a temporary period such as 6 or 12 months, to allow the victim time to access support and decide how to proceed (for example, make a further visa application or exit Australia).

Question 4

Should the Migration Regulations 1994 (Cth) 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?

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. We agree that it is an anomaly that the family violence exception can be invoked on application for a temporary Partner Visa (Subclass 820) where a person has married his or her Australian sponsor, but cannot be invoked when the marriage never takes place, even though the applicant and his or her sponsor might have previously been in a relationship (although perhaps not meeting the requirements under Regulation 1.23).

We understand that the purpose of allowing a former or current Prospective Marriage (Subclass 300) Visa holder to access the family violence exception is primarily to ensure that people who travel to Australia intending to marry and who suffer family violence do not feel pressured to marry their sponsor to prevent return to their country of origin. We agree that in reality, there is little or no difference between family violence inside or outside the marriage for immigrant victims and that victims should not be disadvantaged by operation of the law in this way. We also recognise, on the other hand, that a Prospective Marriage Visa is a temporary visa and that the purpose of the marriage requirement is to ensure the integrity of the Partner visa program, which is intended to facilitate migration of married and de facto partners.

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 under question 3.

Question 5

What issues arise for applicants in making judicially determined claims of family violence under the Migration Regulations 1994 (Cth)?

The LIV agrees that only final family violence orders, and not ex parte orders, should constitute a judicially determined claim for the purposes of Regulation 1.23(4), to ensure that the perpetrator has had the opportunity to be heard. We note, however, that significant time may elapse before a final order is made by the court and that this time may affect a person's immigration status. We recommend that 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.

Question 6

Should the Migration Regulations 1994 (Cth) be amended to make it clear that a family violence protection order granted after the parties have separated is sufficient evidence that 'relevant family violence' has occurred?

The LIV supports amendment of the Regulations to make it clear that a family violence protection order granted after the parties have separated is sufficient evidence that 'relevant family violence' has occurred.

Regulation 1.23 currently provides that the relevant family violence, or part of the violence, must have occurred while the married or de facto relationship existed. Regulation 1.23 clarifies the effect of the primary visa criteria, which provides that the applicant is eligible for a permanent partner visa notwithstanding that the relationship between the applicant and the sponsoring partner has ceased because the applicant or a member of the family unit has suffered family violence committed by the sponsor.

The operation of the family violence exception and Regulation 1.23 takes an artificially neat approach to the break-down of a relationship, by assuming that a victim leaves a sponsor following an incidence of family violence. 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.

Question 7

Are the provisions governing the statutory declaration evidence of competent persons in the *Migration Regulations* 1994 (Cth) too strict? If so, what amendments are necessary?

The LIV agrees that the provisions governing the statutory declaration evidence of competent persons in the Regulations are too strict. Further, we are concerned that the Minister is required to seek the opinion of an independent expert only where the victim's evidence has been presented in accordance with Regulation 1.24. Therefore the independent expert provisions provide no safeguard for applicants who fail to meet the

strict requirements under Regulation 1.23 (as interpreted by the courts), as no referral will be made.

The LIV recommends repeal of the statutory declaration process, so that competent persons no longer provide evidence about family violence. The statutory declaration process is problematic because there is no requirement that the person be trained in assessing family violence. Further, the process focuses too closely on technicalities rather than the substance of claims. They appear to be treated like Supreme Court pleadings, which is inappropriate in an administrative context where applicants may not speak English as a first language.

The statutory declaration process should be replaced with an improved independent expert scheme. This would remove DIAC officers (or MRT on appeal) from the decision-making process, recognising that they are not trained to make findings about family violence and therefore should not be making findings about whether or not it occurred. However, DIAC officers should be required to consider whether the expert's opinion was properly formed in accordance with the definition of 'relevant family violence'.

Repeal of competent person provisions would provide an opportunity for quality control, to ensure that only reputable professionals trained in the area of family violence make assessments about whether family violence has occurred. An improved independent expert scheme must, however, be more transparent and accountable than under current provisions. There should be full reasons given for an opinion about family violence to ensure that the opinion has a proper basis and is made in accordance with the legislative definition of family violence. Provision should also be made for review of an independent expert opinion or for the opportunity to seek a second opinion.

Question 8

Should the Migration Regulations 1994 (Cth) be amended to provide that minor errors or omissions are not fatal to the statutory evidence of a competent person?

See answer to question 7 above.

Question 9

Is it appropriate for competent persons to give evidence about who has allegedly committed 'relevant family violence'?

The LIV considers that it is inappropriate for competent persons to give evidence about who has allegedly committed relevant family violence. Those assessments are capable of being made only by a court of law with the benefit of evidence. We note that the current requirement could potentially expose competent persons to allegations of defamation if applied strictly.

Question 10

What training do competent persons receive about the nature and dynamics of family violence?

The LIV is not in a position to comment on the specific training received by the diverse list of competent persons under Regulation 1.21, which includes medical practitioners,

psychologists, nurses and social workers. This question highlights the quality assurance problem with the statutory declaration process and we reiterate our recommendation that the system be replaced with an improved independent expert scheme.

Question 11

What issues arise in relation to the use of independent experts in the determination of non–judicially determined claims of family violence made under the Migration Regulations 1994 (Cth)? For example:

(a) should the legislation require decision makers to give reasons for referring the matter to an independent expert?

(b) what issues, if any, are there about those who are suitably qualified to give expert opinions?

(c) should the Migration Regulations 1994 (Cth) specifically require independent experts to provide full reasons for their decisions to the applicant?

The LIV recommends that full reasons should be given by independent experts. A requirement for reasons would ensure that decision-makers are able to ascertain that the basis of the opinion is in accordance with the definition of relevant family violence, as proposed below in response to question 12.

We propose that "independent experts" should be truly independent of government and that a panel of independent experts should be created. The panel of experts should receive specialist training on the application of the definition of 'relevant family violence'.

Question 12

Should the requirement that, an opinion of the independent expert is automatically to be taken as correct, be reconsidered? Should there be a method for review of such opinions?

The requirement that an opinion of the independent expert is automatically to be taken as correct should be amended. The Regulations should 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.

Provision should also be made for review of an independent expert opinion or for the opportunity to seek a second opinion. We acknowledge that difficulties might arise where two independent expert reports provide conflicting opinions but both appear to be made on a proper basis and according to the correct definition. The Regulations could provide that the decision-maker may choose which evidence to prefer, but this must be done on the basis of objective criteria. Applicants should be given the opportunity to comment on the reasons given by an expert where a negative opinion is given.

Question 14

In what ways, if any, should the evidentiary process for giving evidence in migration–related family violence cases be streamlined? For example, would there be merit in:

(a) streamlining the system to allow victims of family violence to obtain an opinion of an independent expert, without the need to first seek evidence from a competent person?

The LIV supports streamlining of the evidentiary process for giving evidence in migration-related family violence cases so that all applicants are required to seek the opinion of an independent expert from a panel of experts and that evidence no longer be accepted from competent persons. See above discussion under question 7 above.

Question 16

Should sponsors be obliged to submit to a police check in relation to past family violence convictions or protection orders when making an application for sponsorship?

The LIV does not support any proposal to require sponsors to submit to a police check in relation to past family violence convictions or protection orders when making an application for sponsorship. We query whether specific evidence of prior family violence convictions or protection orders is an accurate predictor of future family violence being perpetrated by the sponsor. Further, given the extent of under-reporting of family violence we query the value of a police check. The proposal might provide a false sense of security to applicants about the likelihood of experiencing family violence without any proper basis.

Question 17

Should the Department of Immigration and Citizenship bring to the attention of prospective spouses information about a sponsor's past family violence history? If so, how and what safeguards should be put in place, in particular to address:

(a) procedural fairness to the sponsor;

(b) discrimination on the basis of a criminal record; and

(c) the sponsor's privacy.

The LIV would not support measures by DIAC to bring information about a sponsor's past family violence history to the attention of prospective spouses. We query whether procedural fairness can apply to personal relationships in this way and whether such measures would protect vulnerable applicants. Privacy laws currently prevent spouses and domestic partners from obtaining a broad range of information about each other without consent. It is difficult to see why prospective spouses from overseas only should be given access to information that would not be available to Australian resident prospective spouses, notwithstanding the additional vulnerability that might arise due to language and other cultural barriers.

Question 21

What, if any, legislative changes are necessary to the *Migration Act* 1958 (Cth) to ensure the safety of those seeking protection in Australia as victims of family violence?

The *Convention Relating to the Status of Refugees* (the Refugee Convention) limits protection to people with a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion (article 1A(2)), (the Convention grounds). The Convention grounds derive from the post-war historical and cultural context under which the Refugee Convention was negotiated and signed. Commentary on the Convention highlights the widespread cultural belief in the post-war context that family violence was somehow part of a "private" sphere, different from the public sphere of political and other persecution.[5]

The omission of sex and gender from the Convention grounds is out of step with current understanding about family violence and the role of the state in protecting individuals, in particular women and children, from experiencing violence in the home. Women may have experienced violence or have valid fears of violence for reasons such as refusal to accept arranged marriages, female genital mutilation, honour killings and failure to meet dowry agreements. Under the Migration Act, such women seeking asylum would need to characterise their claims under the established grounds of particular social group or political opinion and address the attitudes of state authorities to family violence. The Issues Paper explains the difficulty for women to prove their claims to protection based on the context of gender-related persecution and the public/private dichotomy.e

In 1985 the Executive Committee of UNHCR (Excom) in Conclusion 39 (XXXVI):

(c) Noted that refugee women and girls constitute the majority of the world refugee population and that many of them are exposed to special problems in the international protection field;

(d) Recognized that these problems result from their vulnerable situation which frequently exposes them to physical violence, sexual abuse, and discrimination;

States were encouraged to address the gap in international protection by:

.. adopting the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a "particular social group" within the meaning of Article 1 A(2) of the 1951 United Nations Refugee Convention.

The LIV recommends that the Migration Act should be amended to implement these directives 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.

[5] Goodwin-Gill, *The Refugee in International Law* (London: Clarendon Press, 1996) at 362-363.

Question 22

Are legislative reforms, such as those proposed in the *Migration Amendment (Complementary Protection) Bill* 2011 (Cth), necessary to protect the safety of victims of family violence, to whom Australia owes non-refoulement obligations, but whose claims may not be covered by the United Nations Convention Relating to the Status of Refugees?

The LIV strongly supports the *Migration Amendment (Complementary Protection) Bill* 2011 (Cth), under which people who do not meet the definition of "refugee" in the Refugee Convention, but who are still in need of protection under international law, can apply for a protection visa in the first instance to DIAC. The complementary protection regime will ensure that people who engage Australia's non-refoulement obligations under the International Convention on Civil and Political Rights (ICCPR); the 1988 Convention against Torture and other Cruel, inhuman or Degrading Treatment or Punishment (CAT); and the 1989 Convention on the Rights of the Child (CROC),[6] will have access to the same reviewable decision-making framework that is currently available to applicants who make claims under the Refugee Convention.

We agree, however, with the submission of Amnesty International, quoted in the Issues Paper, that the Bill should be amended in relation to the requirement that the risk of harm must be faced by the non-citizen personally and not be faced by the population generally. We are similarly concerned that the provision might exclude a complementary protection claim where domestic violence is widespread and where perpetrators are not generally brought to justice. We would therefore like to see amendment to the Bill 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.

[6] Senate Committee on Ministerial Discretion in Migration Matters report, (2004) Recommendation 19.