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By email: cwlth_family_violence@alrc.gov.au

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Re: Family Violence—Immigration, ALRC Issues Paper 37

Domestic Violence Victoria, In Touch Multicultural Centre against Family Violence, the Domestic Violence Resource Centre, Victorian Women Lawyers, the Multicultural Centre for Women’s Health and the Asylum Seeker Resource Centre welcome this opportunity to comment on the ALRC Issues Paper on Family Violence and Commonwealth Laws – Immigration Law and make this joint-submission in response.

Our group of agencies share significant concerns about how the immigration system contributes to the precarious situation faced by migrant and refugee women and children experiencing family violence in Australia and strongly support this review of Immigration law. We hope that the findings of this review will instigate essential changes to Australia’s Migration Act, its Regulations and administrative framework in favour of immigrant and refugee women and children experiencing family violence and we look forward to hearing the ALRC’s recommendations.

Please contact us for any further information of clarification of the content of our submission.

Yours sincerely,

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Domestic Violence Victoria (DVVic) – is the peak body for over fifty family/domestic violence services in Victoria that provide support to women and children to live free from violence. With the central tenet of DV Vic being the safety and best interests of women and children, DV Vic provides leadership to change and enhance systems that prevent and respond to family/domestic violence.

InTouch, the Multicultural Centre against Family Violence, is a statewide service, which provides services, programs and responses to issues of family violence in CALD communities. By acknowledging the rights and diverse experiences of our clients, we develop and implement a number of culturally sensitive and holistic models for the provision of services to both victims and perpetrators of family violence. In tackling the issues of family violence we act on multiple levels – individual, relationship and community. Our organisation strives to create a world where all women and children will be safe and free from violence. Through active recruitment of bilingual and bicultural staff, InTouch is able to offer services to clients in more than 30 different languages and dialects. InTouch services include: crisis intervention and recovery, prevention and awareness raising, education and research and advocacy.

Women’s Legal Service Victoria (WLSV) is a statewide not for profit organisation providing free and confidential legal information, advice, referral and representation to women in Victoria. WLSV specialises in issues arising from relationship breakdown and violence against women. In addition to delivering services to women, WLSV develops and implements preventative family violence programs and influences the development of legal policy and law reform. WLSV also provides education, training and professional development on the law and related areas.

Domestic Violence Resource Centre Victoria (DVRCV) – is a statewide service that provides information, training and resources to improve service and policy responses to family violence to a wide range of sectors and professional groups; also provides commentary and advice on policy initiatives and law reform.

Victorian Women Lawyers (VWL) is the peak body for women lawyers in Victoria, with over 550 members. VWL aims to promote and protect the interest of women lawyers in Victoria. VWL’s objectives include:

- working towards the reform of the law;
- participating as a body in matters of interest to the legal profession; and
- promoting the understanding and support of women's legal and human rights.

VWL has drawn on the expertise and input of member practitioners in order to respond to the Inquiry.

Multicultural Centre for Women’s Health is an immigrant and refugee women’s health organisation, established in 1978, that provides national leadership and excellence in multilingual health promotion, training, research and advocacy across Australia.

MCWH aims to improve the health and wellbeing of immigrant and refugee women with a strong focus on building capacity among immigrant and refugee women themselves to take action in relation to their own health and wellbeing.
The Asylum Seeker Resource Centre (ASRC) protects and upholds the human rights, wellbeing and dignity of asylum seekers. We are the largest provider of aid, advocacy and health services for asylum seekers in Australia. Most importantly, at times of despair and hopelessness, we offer comfort, friendship, hope and respite.

We are an independent, registered non-governmental agency and we do not receive any direct program funding from the Australian Government. We rely on community donations and philanthropy for 95 per cent of our funding. We employ just 24 full time staff and rely on 600 dedicated volunteers. We deliver services to over 1,000 asylum seekers at any one time.

The ASRC’s Human Rights Law Program has extensive experience in preparation of protection applications for asylum seekers and has included a strong focus on gender related protection claims in its work through the “Women’s Human Rights Advocacy Program”.
Q1 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?

We understand that ‘relevant family violence’ is limited in the Migration Regulations to violence perpetrated by the sponsor of the victim towards the victim. In practice this limits common forms of family violence where the perpetrators are people other than the sponsor. For example, In Touch Multicultural Centre Against Family Violence can cite multiple cases in which their clients are subject to violence from family members of the sponsor (brothers, fathers-in-law, mothers-in-law, uncles, nephews etc…). In such cases the victim will not be able to utilise the Family Violence provisions resulting in a significant inequity in the access and equity of the provisions.

We recommend amendment to the Regulations to allow for a definition of family member in line with the Victorian Family Violence Protection Act 2008, which is broad enough to include people considered as family members by different cultural groups, and to recognise a broader range of perpetrators of family violence and not to limit the use of the provisions exclusively to the sponsor. This is in keeping with notions of family and family members that exist in these cultural groups.

Q2 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)?

Yes.

As stated in the Family Violence and Commonwealth Laws Issues Paper, the definition of ‘relevant family violence’ takes a similar approach to the definition of family violence in the Family Law Act 1975 (Cth) “in giving focus to the effect of the conduct on the victim, rather than categorizing types of conduct”.

We understand that non-physical forms of violence are now being recognised by DIAC as forms of family violence (i.e, psychological and emotional violence) and we support this move. Until recently only physical violence was included in the definition of family violence within the Migration Regulations – this is inconsistent with contemporary evidence about the nature of family violence and its impact on victims.

However, we recognise that it may be difficult for some Judges and Registrars to understand the type of conduct that could cause a woman to fear for, or be apprehensive about, her personal well-being or safety. Family violence and abuse can take many forms including physical, sexual, verbal, financial or emotional. Much of a perpetrator’s behaviour would not be deemed to elicit fear in a reasonable man, but nonetheless does elicit fear in a woman who recognises them as precursors to and threats of violence. Conduct that may appear to some as reasonable may be viewed as unreasonable in the context of a history of violent behaviour even if the violence occurred many years previously. A clear
and broad definition in line with contemporary understanding of family violence will also have an educative effect on professionals in the system.

We support a clear definition of ‘relevant family violence’ to include physical, sexual, verbal, financial and emotional violence and that recognises the patterns and dynamics of family violence in line with the ALRC/NSWLRC Family Violence: A National Legal Response Report 2010. We further note that this definition has been included in the current Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 recently put before Parliament. If this definition is accepted, having a common legislative understanding and framework for family violence would enhance a seamless and effective family violence system.

Q3 Should the application of the family violence exception under the Migration Regulations 1994 (Cth) be expanded to cover other visa categories?

Yes, this is particularly important given the increasing numbers of clients of family violence services on visa classes listed in the Issues Paper at point 37., especially women on tourist and student visas, humanitarian and second applicants, and some temporary skilled visas.

Access to health, counselling, family violence and sexual assault services is variable and changeable for women on temporary visas. Each visa category carries different entitlements and these entitlements change regularly. While some agencies will provide a service to all women regardless of visa category, others restrict their services to those on permanent visas. This means that the system is extremely complex, confusing and difficult to navigate, both for service providers making referrals as well as for women when attempting to link into the system.

Access to emergency accommodation for this group of women is very limited; we have occasions, where women on temporary visas sponsored by a spouse have been ineligible for any type of housing or refuge assistance and support as their visa class makes them ineligible for any service as non-residents. Women may have to constantly move in and out of interim accommodation while they wait for family violence refuge places, however access to women’s refuge is extremely limited due to lack of exit options. Crisis accommodation services are funded for six weeks support per client and receive no funding to work with clients with no access to income. These women can remain in refuge for extended periods – up to two years in some instances. Issues including lack of housing options, ineligibility for public and community housing and lack of income support all limit the capacity of family violence services to support women without residency rights.

A further consideration is that not all violence committed against women falls within the definition of family violence. Women on temporary visas, in particular Visa subclass 457, and international students, are particularly vulnerable to violence perpetrated by employers and landlords, due to their vulnerable work and housing status.

Women who arrive in Australia on visa subclass 457 are either contracted to work for a specified employer for a period of four years, or they accompany spouses who are contracted in this way. Workers on these visas tend not to link automatically with any settlement or preventative health services unless there is a specific health issue that needs to be addressed. Women’s dependence on their employers and spouses for their visa status means that deportation is a live and constant threat.
Workers on this visa are vulnerable to exploitation from employers and partners due to the temporary nature of their visas, especially in cases when they are moving toward permanent residency after the temporary visa expires. This vulnerability is compounded by the fact that visas are tied to a specific employer. Should the employment relationship break down with that employer, the visa is no longer valid and women are required to leave Australia immediately. Women may apply for a new visa of which acceptance is not automatic. There is a lack of information about work rights and of the occupational health and safety obligations of employers, which makes it difficult to take action on workplace violence.\(^1\) For secondary visa holders, women’s visas are tied to those of their spouses or family members. This visa condition creates imbalances in relationships, with spouses or family members exploiting the precarious immigration status of women to exert control over or to subject women to violence.\(^2\)

International students are often employed in precarious (casual and contract) employment, facing the threat of job loss should they speak out about sexual harassment or violence in the workplace. The precarious and insecure housing situation of international students also contributes to their vulnerability to violence and a range of disincentives to seek assistance.\(^3\)

**Q4** 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?

Yes, we agree that the *Regulations* should be amended 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 for the reasons outlined in the Issues Paper and raised by the *Equality before the Law* report.

In practice this regulation creates opportunities to abuse the system. We are aware of cases in which men have sponsored women to come to Australia on prospective marriage visas with no intention of marrying at nine months, have kept them as virtual sexual slaves – including in some cases prostituting the women – and after nine months have facilitated their deportation to their countries of origin. We are also aware of men who have been able to do this on more than one occasion, i.e., after the requisite five-year period have sponsored further women to come to Australia and to abuse in this manner.

**Q5** What issues arise for applicants in making judicially determined claims of family violence under the *Migration Regulations 1994* (Cth)?

While we understand the need for robustness and scrutiny, our concern is that an unrealistically high evidentiary burden not be set for victims of family violence under the *Migration Regulations*.

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We understand that despite Interim Intervention Orders being able to be used as evidence in judicial claims, they are routinely dismissed. It is common for Interim Intervention Orders to be granted ex parte; the ineligibility of these types of Orders to be considered leaves groups of women without access to the family violence exception while they await a hearing for a final order. This presents a particular burden for the family violence service system, often supporting and accommodating women without access to special benefits for months. This bottlenecks of the service system means that others in turn cannot access accommodation services. We recommend amendment to the Regulations to allow for routine recognition of Interim Intervention Orders and police issued Family Violence Safety Notices.

It is not uncommon for Undertakings rather than final Family Violence Intervention Orders to be issued by the courts. We understand that recent amendments to the Regulations disallow Undertakings to be used as evidence in judicial claims of family violence. This also leaves significant numbers of women without permanent access to the family violence exception. For the vast majority of women, their key interest is that they want the violence to stop and by the time they come to court to ensure that they do not want to have to attend several times to get an order. As a result a number of matters resolve by an undertaking as the woman is usually too fatigued to come back to court for a judicial consideration to grant an order. We argue therefore, in recognition of this common outcome in family violence cases, that the Regulations are amended to recognise Undertakings as well.

We note that there is a lack of clarity in relation to access to legal representation for women with insecure visa status and that these women sometimes receive conflicting advice in relation to their eligibility for legal representation. This may impact their decision to proceed to a court hearing or resolves matters by accepting undertakings.

Q6 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?

Yes, it is critical that family violence that has occurred during or post separation is recognised as ‘relevant family violence’. There is a wealth of evidence that separation is a risk factor for heightened violence. Family violence does not end with separation and in fact ‘abusive controlling violence may escalate after separation’\textsuperscript{4} Separation can initiate new levels of violence and forms of retaliation including forcing a woman to stay in a relationship with threats of greater violence, harm towards children and pets and, significantly for migrant women, threats that leaving a relationship and/or reporting violence will jeopardise visa applications and risk deportation and cause personal and communal shame.

Q7 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?

We suggest that amendments to the Migration Regulations should be made in order to broaden the scope of competent persons able to provide statutory declaration evidence. Anecdotal evidence suggests that it is very difficult to locate and gain access to competent persons within given timeframes. We would support amendments to allow for a greater range of professionals to be competent persons.

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for the purposes of the *Migration Regulations*, provided that that competency includes expertise on the nature and dynamics of family violence and its impact on victims. For example, counsellors and case managers in family violence services could be included in the categories of competent persons as they usually have the most direct and ongoing contact with the victim through the case management process.

We would also support amendments to ensure that the template form used by competent persons is more accessible and easier to complete. The competent person should also have assurance that their details will not be released to the perpetrator under any circumstance. In practice lawyers working in this area have encountered situations where the competent person approached by a victim refused to provide a statutory declaration for fear of retribution from the accused.

Immigrant and refugee women are often assisted by bilingual workers from their community, who are often a first and trusted port of call in family violence situations. However, these workers, especially those from newly-emerging communities, may not fall under the definition of a competent person if they do not also have a relevant qualification. The scope of competent persons should be extended to include bilingual workers. These workers should be appropriately trained (as indicated below at question 10).

**Q8 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?**

Yes, as the issues paper discusses there is a clear need for guidance in the application of the *Regulations* that allows for less strict adherence to their minutiae.

We suspect that a culture of mistrust exists within the Department of Immigration and Citizenship whereby there is a common misconception that people seeking to utilise the family violence exception of the *Migration Regulations* regularly attempt to rort the system in order to gain permanent Australian residency. We recommend that Immigration Officers dealing with Family Violence Provision cases receive training on the nature and dynamics of family violence and its impact on victims. This should include cross cultural awareness training specific to the impact of family violence on migrant and refugee women.

There is substantial evidence that victims of family violence can be re-traumatised by the adversarial and antagonistic legal system, indeed this was a key focus of the ALRC/NSWLRC Family Violence Inquiry in 2010. We are concerned that victims’ interactions with the Immigration Law system leave them exposed to re-traumatisation and does not treat them with dignity and respect.

**Q9 Is it appropriate for competent persons to give evidence about who has allegedly committed ‘relevant family violence’?**

No, as the issues paper discusses there are salient reasons why competent persons may not be able to name the perpetrator of violence including that the victim may not wish to name the perpetrator. We suggest that the template form needs to be revised so the competent person does need not need to provide the names as to who perpetrated the violence as there is unlikely to be any independent way of
knowing this. Their opinion on who perpetrated the violence and why they think so is relevant but the key assessment should be that the victim has suffered family violence.

**Q10 What training do competent persons receive about the nature and dynamics of family violence?**

We are unaware of what training is available to professionals in the competent persons categories, however we would note that myths about the causes, nature and impacts of family violence are pervasive in our community and are therefore likely to be held by some in the competent persons categories. Acknowledging the considerable task of doing so, we urge the need for training on the nature and dynamics of family violence to be part of the criteria for competent person eligibility.

A member of Victorian Women Lawyers has provided a particular example where such training could have prevented a potentially dangerous situation. A victim of family violence was taken by her abusive partner to the Royal Women’s Hospital to obtain medical treatment. During the consultation the victim confided in a Registered Nurse that she had experienced family violence at the hands of her partner. The Registered Nurse, without permission, left the consultation room and confronted the woman’s partner in relation to the allegations of family violence.

We support the provision of continued professional development to those who are eligible to act as competent persons under the Migration Regulations 1994 (Cth).

**Q11 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?

a) Yes, the legislation should require decision makers to give reasons for referring the matter to an independent expert. This would improve the accountability and transparency of decision-making processes. It is also important to ensure the victim’s sense of control within the legal process.

b) Anecdotal evidence reports very high satisfaction with independent experts at Centrelink. They are well-trained, professional and respectful of their clients.

c) Yes, as above, this improves accountability and transparency of decision-making processes and support’s the victim’s agency.
Q12 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?

Yes, there should be a method for review of these cases for the reasons discussed in the issues paper (however, we note that In Touch has not to date encountered a case in which review was necessary).

Q13 Do applicants in migration matters face difficulties in meeting evidentiary requirements in making claims of non-judicially determined claims of family violence? If so, how could these difficulties be addressed?

The non-judicial evidentiary requirements are onerous, and particularly so for women from culturally and linguistically diverse backgrounds. Women receiving support from family violence services can be assisted with strategies to document and collect evidence of family violence; however these methods are difficult and require a high degree of accuracy and detail in record-keeping. For women who do not speak English, or who may be illiterate in their own language there are considerable challenges to being able to meet evidentiary requirements.

Suggestions for addressing these difficulties include: ensuring that Immigration Officers receive training on the nature and impact of family violence on vulnerable migrant and refugee women. Women experiencing family violence can have tremendous fear about returning to their home countries, about how their families will respond to their return, the cultural stigma of being a divorcee, return of dowries etc.

Q14 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? or (b) requiring the Migration Review Tribunal to be bound by an existing independent expert’s opinion obtained by the primary decision maker?

a) Yes, we would support such an amendment, especially as the requirement to seek statutory declarations from two competent persons can be onerous. With two statutory declarations, the focus tends to be on the consistency of the two reports rather than on the experience of the victim of family violence.

Q15 Would the family violence provisions—including the definition of ‘relevant family violence’—currently in the Migration Regulations 1994 (Cth), be more appropriately placed in the Migration Act 1958 (Cth)?

We would agree with this proposal as long as the Migration Regulations are 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/NSWLRC Report 114) as per Q2.
Q16 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?

Yes, this is a critical and urgent area of reform. It is a significant inequity that an applicant is required to undergo rigorous character and police checks whereas sponsors do not receive the same level of scrutiny. This checking process should be an essential safeguard for potential victims of family violence, and the absence of such a process is a significant gap that allows abusers to manipulate the immigration system to perpetrate violence against women.

Case Study:

Seven years ago a Serbian woman became the client of In Touch (formerly the Immigrant Women’s Domestic Violence Service, IWDVS). She was brought into Australia on a Spousal Visa after meeting an Australian man in her home country. On arrival in Australia she was taken directly to a motel in Melbourne’s north and locked in a room. Several hours later her sponsor and another man entered the room and the sponsor indicated that she was to have sex with his companion in exchange for payment to the sponsor. She resisted, cried out and alerted the motel administrators who called the police. She was taken into a family violence refuge and eventually was successful in obtaining an Intervention Order against the sponsor and permanent residency in Australia.

Four years later IWDVS took on a new client of Turkish origin. She also had been brought to Australia and forced into prostitution. She was able to get away from her abuser and seek specialist family violence support. The IWDVS worker recognised the sponsor’s name as the same as in the above case. In this case it was only the fact that the family violence support worker had been supporting both clients that the connection between the two cases was made - there had been no systemic checking as to the outcomes of his previous sponsorship nor to the presence of a Family Violence Protection Order.

While we understand that the 2005 changes to the Regulations limited serial sponsorship, we are concerned that this practice persists, and that inadequate assessments are made in cases such as the above. This case study is not an uncommon situation.

There have been cases where clients have come to Australia under arranged marriage to find that their spouse is so severely intellectually disabled, that they are feacally incontinent or so severely mentally unwell that they are violent. These women are forced to be the carers and partners and with complete control by the family members. Combined with a lack of English or literacy skills, they are trapped.

In our experience there have also been more extreme cases where clients with children from previous relationships have been targeted by sponsors for the purpose of gaining access to children to sexually exploit them.

Q17 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.

Yes, we agree that that DIAC should be required to bring to the attention of prospective spouses information about a sponsor’s past family violence history and any conviction (towards any victim, not
only previous souse applicants). This is essential to provide better protections to prospective spouses who frequently are uninformed about the sponsor's history of violence against women. We recommend that DIAC consider prohibiting sponsorship eligibility to men with a proven history of family violence.

In relation to privacy issues, they can be overcome by keeping all parties informed and getting the informed consent of the sponsor about whatever checks are required. It is important to find ways to overcome this as the state and the system will ultimately bear the responsibility of looking after yet another victim in cases where this could be prevented.

**Q18 What measures can be taken to improve the ability of decision makers in migration matters to obtain information about family court injunctions, state and territory protection orders, convictions and findings of guilt?**

Greater cooperation and information-sharing between state and federal courts, police services and DIAC are critical in order to ensure greater protections.

**Q19 Should the MRT and DIAC have access to any national register introduced in line with recommendations in *Family Violence—A National Legal Response* (ALRC Report 114)?**

Yes, we strongly support this proposal, providing that adequate privacy and security measures are put in place.

**Q20 What other reforms, if any, are needed to improve information sharing between the courts and decision makers in migration matters involving family violence?**

**Q21 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?**

Among clients of the Asylum Seeker Resource Centre (‘ASRC’), the vast majority of its female asylum seekers tend to have gender-based claims specific to their status as women, though they may have overlapping political and religious claims. While gender-based persecution does not necessarily prevent women from being successful in their refugee applications, the ASRC has observed that the process of determining a gender-based claim is unnecessarily difficult and inconsistent. Accepting a refugee claim on a gender basis is still culturally viewed as ‘controversial’ in the Department of Immigration and Citizenship (‘DIAC’) and in some cases at the Refugee Review Tribunal (‘RRT’). Often where there are overlapping claims decision-makers focus on the more readily accepted aspects of the refugee claim such as political opinion or religion in those circumstances where a favourable decision is reached and the gender aspect of the claim is not even addressed.
It is the experience of the Asylum Seeker Resource Centre’s Human Rights Law Program that there are three persisting problems in the presentation of women’s asylum claims:

1. Credibility issues are inferred by the decision maker due to the woman’s presentation of her claim during the interview or hearing.
2. There is a persisting view of violence against women including domestic violence and sexual assault as being a private matter and therefore outside the ambit of the refugee convention.
3. The issue of the availability of effective state protection often lets women down as decision-makers often view that governments in certain countries with high rates of violence against women are “trying”.

1. Credibility

The ASRC has often observed a lack of consistency in decision making at DIAC and at the RRT. Decisions on gender related claims for women in very similar situations from the same country are often different depending on the decision maker. Whilst we commend the Department of Immigration and the Refugee Review Tribunal for creating gender and vulnerability guidelines which are useful for the treatment of gender related claims, these guidelines are rarely applied in practice, particularly by delegates of the Minister for Immigration and Citizenship.

Most women who seek asylum have experienced severe, often ongoing physical or sexual violence. They generally come from countries in which they hold a lower position in staunchly patriarchal societies; they are usually extremely ashamed at what has happened to them and are often experiencing psychiatric or psychological symptoms as a result of the trauma they have experienced. The process of seeking asylum often heightens this trauma as a woman is forced to recount in detail what has happened to her. This makes regular and consistent application of gender and vulnerability guidelines essential. Given the rarity with which these guidelines are applied in practice, particularly at the DIAC stage, it is essential that these guidelines be adopted within the *Migration Act and Regulations* in order to mandate consideration of those guidelines in practice and create some accountability amongst decision-makers who fail to do so.

2. Public/Private Dichotomy of Domestic Violence

One reason for this difficulty is that the current Act does not explicitly permit decision makers to consider the elements of gender-based persecution as falling within the category of conventional refugee claims or embrace a broader interpenetration of claims. Scholars such as Susan Kneebone argue that decision makers need to acknowledge the religious or political issues involved in a gender-based claim. This characterisation creates the idea that a victim’s claim is ‘prima facie personal and not political’ when in reality there are often various political elements that result in family violence. This can exclude a number of legitimate claims. Accordingly, the test in section 91R(1)(a) for ‘essential and significant reasons’ could be modified to specifically allow a gender-based claim to be considered in

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light of all relevant contributing circumstances. This would empower decision makers to confidently include gender based persecution as a reason for favourable decisions in women's asylum claims, including family violence and sexual assault.

The definition of 'serious harm' under s91R(2) of the Migration Act provides a non exhaustive list of instances which may be considered serious harm. Gender based persecution can be read into several aspects of the s91R(2) definition, however there remain barriers to decision makers doing so. In these circumstances given the particular vulnerability of women seeking asylum and the particular difficulties they face doing so, the definition of serious harm under s91R(2) should be expanded to explicitly include gender based persecution.

Furthermore, to properly encompass family violence as a form of 'serious harm' under s 91R(2) of the Act, psychological harm should be identified as a 'serious harm'. This is particularly important given the learned helplessness inculcated in women as a result of family violence. McKay recognises that family violence is used as a tool of psychological torture and that the psychological impacts can be far more detrimental than the physical harm.

3. Effective State Protection

Additionally, the Act does not make reference to the failure of state protection as constituting an element of persecution, which particularly disadvantages women in societies where state inaction may effectively sanction widespread violence of private citizens and unofficial community rules regarding the acceptability of family violence. In the UK, Canada and the US, domestic violence is recognised as a 'public matter' that can be grounds for persecution. A nexus can be demonstrated in many cases of family violence between the actual harm and a well founded fear of persecution.

Decision-makers in practice often point to examples of what the state has done towards the eradication of violence against women, despite the often overwhelming inadequacy of those responses, in making a finding that the state is trying and therefore finding that effective state protection exists. Specifically allowing for gender based persecution under s91R of the Migration Act would help to overcome this hurdle for women seeking asylum.

Merits Review at the Judicial Review Stage

Judicial review of RRT decisions is based on errors of law. This restriction means that a Court cannot consider the substance of the claim nor can it reconsider the particular interpretation or opinion of the decision-maker in its decision. If the Court could assess the case as a whole in coming to its decision it could help to ensure that gender based claims are properly considered.

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7 Ibid.

8 Ibid.
Q22 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

The organisations responsible for this submission support the initiative of introducing a complementary protection regime. The Migration Amendment (Complementary Protection) Bill 2011 will introduce necessary changes to better ensure the safety of those seeking protection in Australia with claims not easily categorised as refugee grounds, but who seek protection from serious harm from human rights breaches in their countries of origin. We call on the Commonwealth parliament to pass the Bill to introduce a codification of Australia’s non-refoulement obligations to protect women who have been subject to cruel, inhumane and degrading treatment in their countries of origin on the basis of their gender.

Currently, the protection visa system in operation in Australia does not adequately cover those suffering gendered harms which would constitute torture under the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (‘CAT’) but for the absence of state agents who have committed the acts, and those who suffer degrading, cruel and inhumane treatment but do not fit into a neat ‘social group’ for the purposes of their protection visa application. The applicants who are unfairly impacted by this gap in protection are women whose treatment, whilst often not perpetrated by the governments of their country of origin, may be effectively sanctioned by government inaction or lack of power to act. Ministerial discretion to allow applicants to remain in Australia is not a sufficient, consistent guarantee of protection. The introduction of a formal complementary protection system is therefore vital.

The CAT provides a definition of torture under Article 1, which is limited to acts of public officials or those acting in an official capacity. We therefore commend the current Bill for expanding the definition of torture to include acts committed by private individuals.

However, more could be done to expand and articulate the Bill’s coverage of applicants with gender-related claims. For example, the Bill could also refer to the objectives of the Convention on the Elimination of all forms of Discrimination against Women to make more explicit its coverage of gender-based claims and so that violence by family members would be more easily recognised as constituting torture or degrading, cruel and inhumane treatment in appropriate cases.

If the Bill is intended to assist those with gender-based claims of persecution, it is vital that the Bill does not replicate current problems relating to the Act’s lack of direction as to what will constitute a risk of serious harm. The current provision in the Bill that the real risk of serious harm does not constitute ‘one faced by the population generally’ but requires a risk faced the applicant personally will not adequately protect those mentioned in Laurie Ferguson’s second reading speech on 9 September 2009 when the Bill was first introduced into Parliament, such as girls and young women facing genital mutilation. It does not appear to seriously contemplate the situation in countries where women, in general, are at a high risk of family violence.
Furthermore without explicitly providing for gender based claims under the new complementary regime women seeking protection in Australia are likely to experience the same difficulties they experience under the current regime in fitting what is persistently viewed as “private” harm into a definition which does not explicitly allow for gender based persecution and harm.

Other comments

Dependence on Financial Assurers

We understand that there is significant risk to women experiencing family violence posed by the sponsor commonly also being the assurer of financial support. In instances where a relationship breaks down due to family violence and the victim is eligible for Centrelink Special Benefits the assurer has to agree to pay the money back to Centrelink. If the assurer does not agree to repay Centrelink the allowance, but does agree to an independent arrangement whereby he provides a regular payment to the victim, then Centrelink steps out of the matter. This leaves the victim of family violence at significant risk by putting the onus upon her to make contact with the violent perpetrator in the event that he misses or ceases making the payments. Many women will not follow up the missed payments in these instances for fear of contact with the perpetrator, leaving them in extremely precarious financial situations. Our recommendation is that Centrelink should retain oversight of cases in order to protect clients from having to make contact with their assurers.

Women seeking asylum as secondary applicants

Furthermore, women who arrive in Australia with their partners and seek asylum as part of the family unit may experience particular difficulties as a result of family violence occurring once they arrive in Australia. Women in this position are often the secondary applicant on their husband’s protection visa application and are therefore vulnerable to ongoing violence. They may be at risk of harm upon return due to their husband’s activity but may not be able to speak to that risk without their husband as the primary applicant. This can leave a woman feeling compelled to remain in a situation of family violence due to the precariousness of her visa situation.

A woman who has applied for protection as a secondary applicant with her husband is barred from applying for protection again by s48A of the Migration Act. However separating from her husband due to experiences of family violence may actually give rise to an independent refugee claim for a woman from certain religious and cultural groups in certain countries. As it currently stands a woman in this position whose claims may arise as a result of family violence occurring who has already applied for protection as part of her husband’s application in Australia is reliant on the Minister exercising his non compellable and non reviewable discretion under s48B of the migration act in order to be allowed to apply for protection again.

It may be that certain exceptions in the case of family violence could be added to s48A of the Migration Act to account for circumstances of family violence occurring in Australia which may give rise to an independent refugee claim for a woman who has already applied for protection as part of her husband’s application.
Scope of the Inquiry

Finally, the scope of the current inquiry only covers situations in which family violence has already occurred. However, there is a range of legislative measures that could be considered in order to focus attention on the primary prevention of violence before it occurs. For example, the very nature of temporary visas contributes to women’s vulnerability and dependence on their sponsors (spouses and employers). The threat of deportation, either real or imagined, particularly for women with low English proficiency, creates a climate of fear that perpetuates women’s dependence and thus vulnerability to violence. Perpetrators of violence are encouraged and protected by this climate of fear, which can be easily used to exploit women’s lack of knowledge of the system and of their legal protections, and their lack of access to information and services. Further investigation should be made into the potential for legislative change, with specific reference to immigration, to prevent violence against women before it occurs.