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National Legal Aid

20 May 2011

Ms Sabina Wynn
Executive Director
Australian Law Reform Commission
GPO Box 3708
SYDNEY NSW 2001

Dear Ms Wynn,

Re: Family Violence and Commonwealth Laws: Immigration Law (IP) 37
National Legal Aid submission

About National Legal Aid (NLA) and Legal Aid Commissions (Commissions)

NLA represents the Directors of the eight State and Territory Legal Aid Commissions (Commissions) in Australia. The Commissions are independent statutory authorities established under respective State or Territory enabling legislation. They are funded by State or Territory and Commonwealth governments to provide legal assistance to disadvantaged people.

NLA aims to ensure that the protection or assertion of the legal rights and interests of people are not prejudiced by reason of their inability to:

- Obtain access to independent legal advice;
- Afford the appropriate cost of legal representation;
- Obtain access to the Federal and State and Territory legal systems; or
- Obtain adequate information about access to the law and the legal system.

Commissions have for many years provided legal services in the area of migration law. The number and extent of services provided varies between States and Territories, depending on funding arrangements, and the need which presents.

The services provided include the provision of legal advice and representation to clients in relation to visa applications lodged with the Department of Immigration and Citizenship (DIAC), review applications to the Migration Review Tribunal (MRT) and Refugee Review Tribunal (RRT), and judicial review proceedings following an adverse MRT or RRT decision. Commissions also provide services that are specifically for victims of family violence.

Introduction

This submission addresses the questions in relation to which Commission lawyers have experience. It also draws on the experience of social workers in the Legal Aid NSW Client Assessment and Referral Service (CARS) to whom clients are referred for assessment by a "competent person".

It is made in the context of NLA's submission to the consultation paper Family Violence: Improving Legal Frameworks, issued by the by the Australian Law Reform Commission (ALRC) and the New South Wales Law Reform Commission (NSWLRC) (July 2010); the Attorney-General's Department's public consultation on the Exposure Draft of the Family Law Amendment (Family Violence) Bill 2010 dated 14 January 2011 ('the Exposure Draft'); and the current inquiry by the Senate and Legal Constitutional Committee into the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011. A copy of each of the NLA submission to the Consultation Paper Family Violence: Improving Legal Frameworks, and to the Senate Committee inquiry into the Family Law Legislation Amendment (Family Violence and Other Measures Bill 2011, is enclosed.

Overview

NLA's view is that the definition/s of family violence used across Australia's geographic and legal jurisdictions, including in relation to immigration, should be consistent and should reflect appropriately informed contemporary understandings of family violence.

"The response that is required to ensure the safety of victims should be a systems response, rather than the responsibility of the victim".[1] Currently the responsibility is largely on the victim.

In addition to legislative reform, the following are required:

- improved/education/training for professionals and decision makers working with people affected by family violence about the nature, dynamics and effects of family violence including the cultural context/s;
- community education about the nature, dynamics and effects of family violence;
- improved systems for information sharing across agencies;
- collaborative professional approaches, and
- coordinated case management.

In relation to the above, the following recent initiatives have been announced or launched:

[1] p. 5 NLA submission to ALRC/NSWLRC Family Violence: Improving Legal Frameworks July 2010

1. A "new national training package [Avert Family Violence: Collaborative Responses in the Family Law System] to help professionals within the family violence system improve the way family violence is addressed".[2]

2. A national register for domestic and family violence orders has been agreed by the Standing Committee of Attorneys-General to "implement a national scheme for domestic and family violence orders that will improve protection for victims of family violence".[3]

3. A tender by the Commonwealth Attorney-General's Department for the development of a family violence screening and risk assessment tool has been recently released.

NLA envisages that each of the above developments will help to support the identification of family violence and appropriate responses to it, including generating support for victims. Whilst the focus of inquiries and developments to date in relation to responding to family violence has been on the family law system, NLA believes that the general approach to family violence by DIAC should not be any different provided that any other relevant circumstances are taken into account in any assessments.

In immigration matters the difficulties with identifying family violence and/or responding appropriately can be compounded by the victim's circumstances. Such circumstances include unfamiliar surroundings, language barriers, no income, no alternative accommodation, no support person/network, the prospect of separation from child/ren, and lack of access to services such as medical treatment and legal help by reason of location, lack of money, language barriers and fear.

Paragraph 26 of the IP states that "DIAC statistics show that only a small percentage of partner visa cases involve family violence claims", and that the "ALRC understands that in cases where the family violence exception was not claimed before a DIAC delegate, but made for the first time before the MRT, that this is not recorded in the MRT's official statistics". This indicates that there is under-reporting and recording of family violence. We suggest that this is reflective of the situation generally.

[2] Attorney-General media release 17 March 2011, *New national training to improve responses to family violence*
[3] Joint Media Release Hon. Robert McClelland MP, Attorney-General, and Hon. Kate Ellis MP, Minister for the Status of Women, 4th March 2011.

Recommendations

1. That the current definition of "relevant family violence" in the migration context be amended to reflect the definition of family violence proposed by the ALRC and NSWLRC (Question 2) with the addition of "(j) threats to carry out the behaviours referred to in (a) - (h) above or to commit suicide or self harm." (Question 2)

2. That dependants reliant on partner temporary visas upon establishing family violence be able to stay in Australia at least until the visa that they were reliant on expires. (Question 3)

3. That the holder of a Subclass 300 visa who is subject to family violence and who has not married the sponsor be able to access the family violence exception, as well as the other exceptions available to temporary partner visa holders (Question 3-4).

4. That where an application for family violence orders has been made and/or a criminal prosecution in relation to alleged conduct which would constitute family violence has been made, then the immigration process should be suspended until finalisation of the court processes, unless the delegate is satisfied that family violence has been established by way of non-judicially determined evidence (Question 5).

5. That the Migration Regulations 1994 be amended to make it clear that a family violence protection order granted even after the parties have separated is sufficient evidence that 'relevant family violence' has occurred (Question 6).

6. That Reg 1.26 of the Migration Regulations be permitted to be interpreted on a substantial compliance basis, so that errors in form are not fatal to the application (Question 7-8).

7. That there should not be a requirement for the competent person to give evidence about who has allegedly committed the ("relevant") family violence although this detail should be included where in the judgement of the competent person it is appropriate to do so. (Question 9)

8. That consistent education/training for "competent persons" independent experts, the legal profession, decision makers and the community, is provided so that the nature of family violence is better understood, and so that appropriately informed understanding can be applied in assessments that need to be made in relation to the family violence provisions (Question 1,10, 12),

9. That competent persons and independent experts be encouraged to work collaboratively and with appropriate consents and associated safeguards seek and use information from other sources with whom the victim is likely to have confided (Question 10).

10. That applicants be provided with the independent expert's full reasons for decision at primary and merits review stages (Question 11-13).

11. That the Regulations be amended to remove the provision that requires a decision maker to take an independent expert's opinion as correct (Question 11-13).

Response to questions raised in the Issues Paper

Q 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?

Improved and consistent education/training, including in cultural contexts, for decision makers/assessors, and also for others working in the area of family violence, as well as the community generally, in relation to what constitutes family violence and the dynamics of abusive relationships, is required.

One issue arising in the use of the "relevant family violence" definition is the reliance on the presence of fear. It is not uncommon for victims of family violence to return to the family home several times before making the final decision that they can no longer continue to live with their partner, or to assert themselves in relation to the family violence and to state the intention to leave, and/take other appropriate action in relation to leaving/ending the relationship. However, returns home and assertive behaviour can be misinterpreted as evidence that the victim is not reasonably fearful/apprehensive and so the victim fails to meet the definition of "relevant family violence".

The emphasis on fear also places an onus on the victim to not only provide evidence of the family violence but also of their mental state at the relevant time. There can be practical implications given the length of time which is sometimes involved in assessing applications and claims. A woman who is now enjoying better health because she is no longer in fear could be potentially disadvantaged as to her credibility.

Another issue that arises is that in some instances family violence is not recognised as such. For example, instances of emotional and social abuse can be perceived as relatively minor or trivial if the context and/or pattern/s of behaviour are not recognised. A sponsoring partner "gossiping", including by saying adverse things, about the victim may appear not to constitute "relevant family violence" but the result, intended by the perpetrator, might be that the victim is ostracised within their community as a consequence of it. Currently, such behaviour by the perpetrator might not be perceived to be within the definition even though the behaviour is controlling and it may also cause/contribute to the victim reasonably fearing for her safety.
Please also refer to the answer to Q. 12.

Q 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)?

Yes.

"NLA considers that the appropriate definition of family violence in subsection 4AB should be that contained in Recommendation 6–4 of the ALRC and NSWLRC report Family Violence - A National Legal Response (October 2010), with the addition of a further item as set out in (j) below.

The recommendation was that the Family Law Act 1975 (Cth) should adopt the same definition as recommended to be included in state and territory family violence legislation (Rec 5–1). That is, 'family violence' should be defined as violent or threatening behaviour, or any other form of behaviour, that coerces or controls a family member or causes that family member to be fearful. Such behaviour may include but is not limited to:

(a) physical violence;
(b) sexual assault and other sexually abusive behaviour;
(c) economic abuse;
(d) emotional or psychological abuse
(e) stalking;
(f) kidnapping or deprivation of liberty;
(g) damage to property, irrespective of whether the victim owns the property;
(h) causing injury or death to an animal, irrespective of whether the victim owns the animal;
(i) behaviour by the person using violence that causes a child to be exposed to the effects of behaviour referred to in (a) – (h), and
(j) threats to carry out the behaviours referred to in (a) - (h) above or to commit suicide or self harm."[4]

The suggested definition provides a clearer explanation of what behaviour constitutes family violence and better enables the decision maker to assess the family violence claims when limited independent evidence exists apart from competent persons' reports. It will also assist "competent persons" in forming their professional opinion.

Recommendation 1: That the current definition of "relevant family violence" in the migration context be amended to reflect the definition of family violence proposed by the ALRC and NSWLRC (Question 2) with the addition of "(j) threats to carry out the behaviours referred to in (a) - (h) above or to commit suicide or self harm."

[4] p. 3 NLA submission - Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011

Q 3. Should the application of the family violence exception under the Migration Regulations 1994 (Cth) be expanded to cover other visa categories?

Yes.

We are of the view that family violence should be a factor capable of consideration in other categories. Situations can potentially arise in relation to any kind of visa.
For example, family violence clients who are dependent on the primary applicant's, Temporary Business (Long Stay) visa (ie 457) or Student visa, sub-class 570-576, often a wife in Australia with her husband and children on his visa.

Whilst these work and student visas are temporary they may lead to permanent visas at some point. Our experience is that the primary visa applicant may use the conditions of the temporary visa to perpetrate what is in effect further family violence on the dependents of the visa by threatening to remove the spouse from the visa and keep the children on the visa. Towards the end of the temporary visa when an application is to be made for permanent residency, it is also not uncommon for an application to be made for permanent residency on behalf of the primary visa applicant and the children leaving the spouse of the visa applicant without legal status upon the expiration of the temporary visa.

Currently proceedings might be initiated in the Family Court to obtain spousal maintenance if possible and in relation to children's matters with the "dependent" reliant on bridging visa/s (eg on a month to month basis). Because these secondary applicants are unable to work they find themselves financially and socially dependent upon services such as women's refuges with a continuing precarious legal status in Australia. They may be successful in an application for their own work visa.

Case Study 1[5]

"Jamille" from a non-English speaking background, came to Australia on her husband "Toby's" Student Visa together with their young children. The Visa was granted for 3 years. Upon completion of his PhD they were intending to apply for a permanent visa.

The children are attending the local school. Jamille had found work. She is responsible for the rent, food and the children's school fees. She is really struggling financially.

Jamille was referred to the local Legal Aid Commission for legal advice by a social worker at her work place. She presented at work on one occasion with a black eye and bruising on one arm, and on another with bruising on her arm. She missed work for some days and is very worried that she will lose her job.

Toby's behaviour towards Jamille includes financial abuse, name calling and threats to kill her if she ever tells anyone about his behaviour. Jamille is very afraid about

[5] Pseudonyms used

what her husband will do to her particularly when he finds out she told people about his violent behaviour.

Jamille is concerned for the children, who are exhibiting behavioural issues, such as nightmares, bed wetting, and aggressive behaviour with each other. They say that they are afraid of their dad.

Toby has told Jamille he is telling the DIAC that that are no longer together and she will be taken off his visa and deported. He has met Mary and she will be moving in to the house to live with him and look after the children.

We propose that the dependants, upon establishing family violence, be permitted to stay in Australia at least until the visa upon which they were reliant expires. This would allow them to regularise their lives, perhaps make applications for their own visas, and to attend to matters in the Family Court without concerns that they may be immediately removed.

Recommendation 2: That dependants reliant on partner temporary visas upon establishing family violence be able to stay in Australia at least until the visa that they were reliant on expires.

Q 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?

Yes. Please refer to our response to question 3.

The Commissions receive requests for assistance from women who came to Australia as holders of Subclass 300 visas where the relationship has broken down before marriage and where there has been family violence. Sometimes there is an Australian citizen child of the relationship. The possibilities for remaining in Australia for such visa holders are extremely limited and sometimes their only option is to apply for a visa for which they cannot qualify, and to then seek Ministerial intervention following the decision of a review tribunal.

Case study 2[5]

Lisa a young woman from the Philippines met an Australian man when she was working in Manila. She became pregnant to him and he sponsored her to come to Australia on a prospective marriage visa. Their baby, who is an Australian citizen, was born in 2009 in the Philippines. After she arrived in Australia in 2010 he treated her very differently. He would become drunk and throw her out of the house with her belongings. He refused to marry her. Lisa was forced to flee the home with her child.

Lisa was referred to the Legal Aid Commission by the workers at the crisis accommodation service where she and her daughter were living. There was no visa for which she could qualify but she feared returning to the Philippines where she would have no support for herself and her Australian citizen child. Her only hope in that situation was to request that the Minister for Immigration exercise discretion to allow her to remain, taking into account the best interests of her child and the harm to that child by reason of their separation if she was not allowed to remain in Australia. She applied for a protection visa and is now waiting for a hearing at the Refugee Review Tribunal, prior to making a request to the Minister.

We consider that the holder or former holder of a Subclass 300 visa should also be able to access the exceptions which apply:

- where the relationship ceased because the sponsoring partner died; or
- where the relationship ceased and the visa holder and the sponsor have parental responsibilities for a child of the relationship.

Recommendation 3: That the holder of a Subclass 300 visa who is subject to family violence and who has not married the sponsor be able to access the family violence exception, as well as the other exceptions available to temporary partner visa holders.

Q 5. What issues arise for applicants in making judicially determined claims of family violence under the Migrations Regulations 1994 (Cth)?

Regulation 1.23(4) (b) of the *Migration Regulations* provides:

The alleged victim is taken to have suffered family violence and the alleged perpetrator is taken to have committed family violence if……(the) order was made after the court had given the alleged perpetrator an opportunity to be heard or otherwise to make submissions to the court, in relation to the matter.

This regulation establishes a requirement that the perpetrator has an opportunity to make submissions to the court. The policy guidelines stress that it is the opportunity to respond that is important, and that it is irrelevant whether the alleged perpetrator took advantage of that opportunity. Issues arising include:

1. Where applications to the court for family violence protective orders have been made, and/or a criminal charges for the behaviour constituting the alleged family violence have been brought, it is not uncommon for there to be a number of adjournments and a substantial period of time can elapse before a matter is listed for hearing and/a final order is made.

2. Where a perpetrator has pleaded guilty but the court has not recorded a conviction, there can be confusion about whether or not there has been a finding of guilt.

3. Some court records do not name the victim. In these situations further documentation can be necessitated to clarify that the evidence relates to the applicant and their partner.

Unrepresented applicants, particularly those with non-English speaking backgrounds can be expected to have difficulties responding to various requirements upon them in relation to establishing the exception particularly if they are attempting to do so without any legal advice.

Recommendation 4: That where an application for family violence orders has been made and/or a criminal prosecution in relation to alleged conduct which would constitute family violence has been made, then the immigration process should be suspended until finalisation of the court processes, unless the delegate is satisfied that family violence has been established by way of non-judicially determined evidence.

Q 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?

Yes.

The regulations in relation to family violence came into force to address concerns that some migrants might remain in abusive relationships in Australia until the visa is granted.

The focus should be on whether the violence occurred in the context of the relationship, even when the violence happened after if it appears that separation has occurred. We understand and studies indicate that the time around and after separation are the most dangerous for women[6].

Recommendation 5: That the Migration Regulations 1994 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.

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?

[6] Australian Bureau of Statistics (1996),*Women's Safety Australia* (cat.no.4128.0) Canberra: Australian Bureau of Statistics and DeKeseredy,WS,Rogness,M & Schwartz,MD (2004), Separation/divorce sexual assault: 'The current state of social scientific knowledge', *Aggression and Violent Behavior*; 9,675-691

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 to Questions 7 and 8.

Substantial compliance with the regulations should suffice.

It is suggested that it is contrary to the proper administration of the legislation that strict compliance with form is required for evidence to be accepted. The current requirement for strict compliance can lead to unjust and unintended outcomes by excluding evidence which could competently be given. For example, an expert in family violence is no less an expert for not having used a 1040 form or for having provided an uncertified copy of their qualifications.

The Procedures Advice Manual (PAMS) or similar manual/guidelines could include further support for DIAC case officers tasked with making assessments/decisions in relation to evidence. For example the PAMS could include a list, which should be expressed to be non-exhaustive, of examples which would constitute substantial compliance with the regulations such that the minor error/omission should not be taken to be fatal.

Evidence by competent persons is relied on by Commissions in assisting clients with immigration issues. Competent persons are often busy professionals who commonly have many other people that they are trying to assist whilst sometimes also running their own business. Overly strict provisions may deter competent persons who were prepared to provide their assistance, including on a pro-bono basis, from doing so. This is because of the time and resources consumed by the need to correct what might be perceived to be minor errors/omissions occurring in documents prepared by the competent person. In our view it would be helpful if processes were as simple and flexible as possible in all the circumstances.

Case Study 3[5]

A general practitioner was unwilling to provide a certified copy of her practising certificate because to do so would have involved travelling some distance and time away from her patients and practice to have a Justice of the Peace certify the copy. Another practitioner able to provide the report was fortunately located.

Case Study 4[5]

Legal Aid NSW acted for an applicant in the MRT seeking review of the decision of DIAC that the applicant had not suffered relevant family violence.

In proceedings before the MRT Legal Aid NSW submitted a statutory declaration by one of its social workers employed in the Client Assessment and Referral Service (CARS) of Legal Aid NSW. The jurat section of her statutory declaration noted her

occupation as "social worker" but in her introduction to herself at the beginning of the statutory declaration she described herself consistent with the contract of employment as a "consultant" at the Client Assessment and Referral Unit for Legal Aid NSW and attached her curriculum vitae which included her qualifications and work experience.

The Tribunal member viewed the statutory declaration as defective because it did not contain the words "social worker" in the introduction. The social worker produced her registration card as member of the Association of Social Workers of Australia. The matter had to be adjourned for other reasons and a further statutory declaration amending qualifications was then submitted together with other supportive evidence and the matter was resolved in favour of the applicant.

In the recent decision of the Administrative Appeals Tribunal in Gallagher and MIAC [2011] AATA 10, Deputy President Groom concluded that substantial compliance with the Regulations was intended when interpreting the provision dealing with the requirements of lodging an application for review. In that case, an application lodged without the required $100 filing fee, which was paid after lodgement but before hearing, was held to be a valid application.

Recommendation 6: That Reg 1.26 of the Migration Regulations be interpreted on a substantial compliance basis so that errors in form are not fatal to the application.

Q 9. Is it appropriate for competent persons to give evidence about who has allegedly committed 'relevant family violence'?

It is appropriate for the competent person to state they have concluded family violence has occurred. The victim's statutory declaration will state who is alleged to have committed the family violence. As the competent person will not usually have witnessed the behaviour constituting the family violence, their evidence about identity could usually be expected to be no more than a recount of what s/he was told by the victim. For the competent person to not include a statement about identity should not adversely affect the application for exemption.

We have experience of extreme reluctance on the part of some competent persons about making statements in relation to the identity of the perpetrator for fear of being subjected to litigation.

Recommendation 7: That there should not be a requirement for the competent person to give evidence about who has allegedly committed the ("relevant") family violence" although this detail should be included where in the judgement of the competent person it is appropriate to do so.

Q 10. What training do competent persons receive about the nature and dynamics of family violence?

Training to competent persons currently appears to depend on what training is made available to them by their employer or the professional body to which they belong.

People who do not have an appropriately informed understanding of the nature and dynamics of family violence can sometimes have a narrow view of what constitutes domestic/family violence and how a victim of domestic/family violence 'should' look and act.

Many decisions made by women in violent relationships are based upon securing their safety by appeasing the perpetrator, rather than by overt resistance. A competent person or other professional who has not attended appropriate education/training, may not recognise behaviour/s as family violence or that the victim is fearful or suffering the effects of family violence. Education/training should be as consistent as possible across the community and people working with family violence, including competent persons. It should address the dynamics and impact of violence and, in particular, its impact upon psychological functioning. It should address the cultural context/s. We note the recently released "Avert Family Violence" Package, and suggest that such resources are available to all those involved in working with family violence and immigration.

In relation to competent persons, we suggest that training should also address the value of seeking information from other service providers and/or significant others with whom the alleged victim has discussed the experience of violence. In many cases, the people to whom a victim first discloses violence are not "competent persons".

It can be difficult to find two differently qualified competent persons, particularly in rural and remote Australia. We would therefore suggest that consideration be given to expanding the list of competent persons. For example, perhaps English language teachers might be appropriate for inclusion on the list.

Data from competent person's reports produced by the CARS Legal Aid NSW indicates that clients were more likely to disclose domestic violence to family members, friends or neighbours than to medical staff or Centrelink social workers. In non-judicially determined matters, if competent persons, with appropriate consents and safeguards, were also to seek this supporting information and include that as informing their opinion, then the decision maker might have more evidence to consider.

Case study 5[5]

Jasmine met her husband in Turkey at a relative's wedding. The couple married within a week and migrated to Australia in 2004 with her parents' blessing.

When Jasmine arrived in Australia, she lived in the family home with her husband, his parents and other relatives. She said they had their own bedroom, but slept on a

mattress on the floor and her husband's excuse was that the reason they did not have bedroom furniture was because he had spent too much money on her.

Jasmine reported that she was cautioned by her parents-in-law to refrain from speaking to anyone outside of the home, and she was also informed that she would not be allowed to go out. She was also told that she would be allowed to phone her parents once every seven weeks only, and that it would be best for her to forget about them. She said she was not allowed to go to school to learn English.

She recounted that three days after her arrival in Australia, her husband became very angry with her because she questioned his reasons for wanting to go out to a nightclub. Jasmine said her husband was often absent and lived life as a single man. When she questioned him, he would physically assault her, and he said, "I brought you here as a servant. Your job is to serve me."

She said one day she broke a glass whilst washing up and she was reprimanded for doing so by her mother-in-law while her brother-in-law and his wife laughed at her. She said that others often shouted at her and that whenever visitors arrived, she was not allowed to sit in their company.

Jasmine explained that in their religion it was "against God's will to get a divorce". Jasmine was subjected to physical violence, ridicule by her husband's family and enforced social isolation, including not being allowed to learn English. Jasmine was also subjected to sexual abuse by her husband and suffered injuries from this. The regular verbal denigration and physical violence escalated over time.

Ultimately Jasmine's husband rang her relatives and told them to pick her up. She said that her relatives were told that she was crazy. Her relatives came to collect her and when she told them about her experiences, they rang the police and she made a statement.

Members of the family of the perpetrator was aware of the violence yet did nothing to assist, or were in fact co-abusers. The woman was subjected to physical, verbal, financial, sexual violence and psychological control. The victim was ultimately helped by relatives, and professionals.

Recommendation 8: That consistent education/training for "competent persons" independent experts, the legal profession, decision makers and the community, is provided so that the nature of family violence is better understood, and so that appropriately informed understanding can be applied in assessments that need to be made in relation to the family violence provisions. (Question 10),

Recommendation 9: That competent persons and independent experts be encouraged to work collaboratively and with appropriate consents and associated safeguards seek and use information from other sources with whom the victim is likely to have confided. (Question 10).

Q 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?

Q 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 Regulations establish a procedure for non-judicially determined claims of family violence, which involves referral to an "independent expert" if the decision maker is not satisfied that an applicant has suffered relevant family violence. The independent expert's opinion about whether the applicant has suffered relevant family violence, if lawfully made, is then binding on the decision maker.

The concerns about the need for appropriate education and training in relation to family violence, articulated above in relation to competent persons, apply equally to independent experts, and others.

We are aware of situations in which independent experts have formed an opinion based on the expert's own notion of what constitutes family violence rather than by applying the definition of 'relevant family violence' set out in the Regulations.

Case study 6[5]

Legal Aid NSW acted for an applicant in Federal Magistrates Court proceedings seeking review of the decision of the MRT that the applicant had not suffered relevant family violence. The applicant had been unrepresented in the Tribunal proceedings. The Tribunal had referred the matter to an independent expert who concluded that the applicant had not suffered relevant family violence. The MRT decided that it was bound to accept the independent expert's opinion as correct, and therefore found that the applicant had not suffered relevant family violence.

Legal Aid NSW assisted the applicant to make a request pursuant to the Freedom of Information Act 1982 (Cth) for access to the independent expert's full reasons for decision. These revealed that the expert's opinion had been formed on the basis, inter alia, that there was no evidence that the alleged perpetrator had intended to intimidate or cause ongoing fear or trepidation; that there was no "cycle of violence", and that the applicant did not hold ongoing fears at the time of the independent

expert's assessment (which occurred a long time after the parties had separated). This indicated that the independent expert had taken irrelevant matters into account and/or misunderstood or misconstrued the relevant legal standard.

The judicial review proceedings settled in the applicant's favour prior to hearing. The Minister for Immigration and Citizenship conceded that the Tribunal had erred by taking the independent expert's opinion as correct in circumstances where the expert's opinion was not given in accordance with the Regulations. Consent orders were made remitting the matter to the Tribunal for redetermination according to law.

This case illustrates that there is limited transparency and accountability in relation to decisions of independent experts, despite the fact that they are accorded considerable power in the decision-making process. Applicants are not generally provided with the expert's full reasons for a decision unless a specific request for access is made. This case also illustrates issues arising in the use of the current definition.

Although in some cases it may be possible to seek judicial review of decisions on the basis that the independent expert's opinion was not given in accordance with the Regulations, many applicants (and particularly unrepresented applicants) are unlikely to be aware of this. Judicial review is also a costly option for both the applicant and the Government.

Recommendation 10: That applicants be provided with the independent expert's full reasons for decision (not just an extract of those reasons) at primary and merits review stages.

Recommendation 11: That the Regulations be amended to remove the provision that requires a decision maker to take an independent expert's opinion as correct.

See also Recommendation 7

Q 13. 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?

Yes, please see above.

Q 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 IE without the need to first seek evidence from a competent person?

Yes, subject to the independent expert having received appropriate education/training, and a means of providing further evidence (by competent persons perhaps) in the event of a negative finding.

Or

(b) requiring the MRT to be bound by an existing IE's opinion obtained by the primary decision maker?

We would have some concerns about such a proposal. A matter is likely to proceed to the MRT only in those instances where the Independent Expert makes a negative finding. If the MRT is then bound by the Independent Expert's opinion this affords no benefit to the victim as there is no avenue for review.

Q 15. Would the family violence provisions – including the definition of 'relevant family violence' – currently in the Migration Regulations be more appropriately placed in the Migration Act?

Yes. This would be consistent with the approach to family violence in the family law system.

Q 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?

Yes, as a matter of principle. We suggest that this is a matter which requires further consideration. In particular, this question raises whether the police are to be required to identify out of a person's prior convictions which of those relate to family violence. In many cases this will not be immediately obvious. In principle we see no reason why all prior convictions should not be made available to the decision maker.

Training for decision makers should address that a police check which produces no record which suggests family violence should not be taken to be evidence that the person has not engaged in family violence.

Q 17. Should DIAC 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

(c) the sponsor's privacy

See Q. 16 above.

It is acknowledged that the release of information about a sponsor's past family violence history raises issues about procedural fairness and privacy. However, safety should be paramount.

In relation to procedural fairness, we suggest that one possibility for consideration could be whether the sponsor should be given the opportunity to make submissions to DIAC in relation to any offences disclosed and provide further information about the surrounding circumstances. Release of the information to the prospective spouse should be subject to consent, with an understanding clearly communicated at the outset of the process that refusal to submit to a police check/to consent to the release of result (with the opportunity for any appropriate explanation) will be likely to have adverse consequences for the application.

The regulations currently provide for the disclosure of information in relation to offences against children as the policy issue of child protection is viewed as sufficiently serious to outweigh other concerns. Experts agree that family violence can also be a child protection issue and that where children are witnesses to the violence this has a harmful effect on them. Disclosures required to protect children should be extended to require disclosure of family violence also.

Q 18. 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?

Q 19. 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)?

Q 20. What other reforms, if any, are needed to improve information sharing between the courts and decision makers in migration matters involving family violence?

Registers of orders, memoranda of understanding, and protocols between agencies working in the area of family violence should be developed.

In addition to legislative reform, the following are required:

- improved/education/training for professionals and decision makers working with people affected by family violence about the nature, dynamics and effects of family violence including the cultural context/s;
- community education about the nature, dynamics and effects of family violence;
- improved systems for information sharing across agencies;
- collaborative professional approaches, and

- coordinated case management.

In principle we agree that MRT and DIAC specialist staff who have received appropriate training should have access to a national register. It must be understood that because a person's name does not appear on the register that this does not mean that they have not committed family violence.

Q 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?

Q 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?

Yes.

NLA supports the enhancement of complementary protection because it would increase opportunities for asylum seekers with valid fears of persecution to be granted permanent residence. Unlike the Refugee Convention, which stresses the reason behind the feared persecution, the proposed s36 (2A) is concerned with the nature of the persecution. (Many of the persecutory acts referred to above would fall under "cruel or inhuman treatment or punishment" and "degrading treatment or punishment'.

The contentious issue of state protection remains in the Bill as the proposed s36 (2B) requires an assessment of whether the asylum seeker could obtain protection from an "authority of the country". This could, however be resolved by including an amendment requiring that the protection be non-discriminatory, accessible and effective.

NLA welcomes legislative reform but remains concerned that the circumstances in which Australia will provide complementary protection under the current Bill are narrowly defined. There are concerns that the definitions contained in the Bill might be perceived by decision makers as not covering situations of family violence.

NLA would support education and training for decision makers at all levels.

Conclusion

NLA appreciates the opportunity to provide these comments.

Should you require further information, please do not hesitate to contact us.

Yours sincerely,

Andrew Crockett
Chair
National Legal Aid