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11th April 2011

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Family Violence and Commonwealth Laws
ISSUES PAPER
Immigration Submission

To Whom It May Concern:

We are pleased to have the opportunity to make comment on the Discussion Paper released by the Australian Law Reform Commission on Immigration Issues.

WEAVE (Inc) would be available to provide oral evidence or offer any other information as requested.

Yours sincerely,

Marie Hume
Secretary
WEAVE Inc



Women Everywhere Advocating Violence Elimination Inc (Australia)

Women Everywhere Advocating Violence Elimination Inc (WEAVE Inc), formed in 2009, is a National Women's Alliance that aims to eliminate gendered violence (including sexual assault, domestic violence, stalking, sexual exploitation and trafficking). As a non-partisan coalition WEAVE Inc brings together groupings that have sometimes worked separately from one another, such as sexual assault services, women's health services, women's legal services, domestic and family violence services, and organisations working against trafficking. In drawing together key stakeholders that make up the 'violence against women sector' as well as survivors, and activist and interest groups, WEAVE embeds a wealth and diversity of experience and expertise within a single body.

WEAVE Inc Vision

To ensure that all women and children are able to live free from all forms of violence and abuse.

WEAVE Inc Values and Principles

HUMAN RIGHTS

WEAVE Inc employs a human rights framework that recognises that gendered violence is one of the most serious and widespread violations of fundamental human rights, in particular, the right not to be treated in an inhuman and degrading way, the rights to respect, physical, sexual and psychological integrity.

FEMINIST FRAMEWORK

WEAVE Inc works within a feminist framework that recognises that gendered violence is both a consequence and cause of gender inequity, embedded deeply within all levels of our society, and that efforts to end such violence must be accountable to women and promote women's empowerment and gender equality.

EQUITY, DIVERSITY & INCLUSIVITY

WEAVE Inc is committed to representing and working respectfully with the diversity of women in Australia. WEAVE Inc recognises, and seeks to advocate and lobby for, the particular and urgent needs of Indigenous women, women from immigrant, refugee and/or non-English speaking backgrounds, women with disabilities, as well as the challenges faced by young women, older women and women in rural and remote areas.

WEAVE Objectives

- (a) To provide leadership and advocacy at state and national levels in relation to all aspects of gendered violence.
- (b) To bring together in a single body the key stakeholders concerned with all aspects of gendered violence in order to access and disseminate the wealth and diversity of knowledge within the sector as a whole.
- (c) To contribute to and monitor policies, legislation and programs which impact on women and children experiencing gendered violence.
- (d) To promote and prioritise equity of access to services for all women including Aboriginal women, Torres Strait Islander women, women from immigrant, refugee and/or non-English speaking background, women in rural and isolated areas, older women, young women and women with disabilities.
- (e) To promote greater community awareness of gendered violence and its personal and social consequences using community development and educational strategies.
- (f) To build and promote alliances and collaborative relationships with other key stakeholders and networks.
- (g) To promote, further develop and disseminate 'cutting edge' knowledge of gendered violence arising from practice, research, community and activism.
- (h) To connect with international developments in advocacy, research and practice concerning gendered violence.

Family Violence and
Commonwealth Laws
ISSUES PAPER

Immigration

ISSUES PAPER 37 (IP 37)
MARCH 2011

Question 1: What issues arise in the use of the ‘relevant family violence’ definition in the *Migration Regulations 1994* (Cth)? How does the definition operate in practice?

Question 2: Should the *Migration Regulations 1994* (Cth) be amended to insert a definition of family violence consistent with that recommended by the ALRC and New South Wales Law Reform Commission in *Family Violence—A National Legal Response* (ALRC Report 114)

WEAVE would argue that the current definition of family violence is too narrow and fails to consider the complexity of domestic and family violence. We would agree that there should be a “common interpretative framework in relation to family violence across state and territory family violence legislation” Consistency and comprehensiveness in the definition ensures victims of violence experience complete support and understanding.

The concept of “relevant” as it is included in the current legislation is questionable and we would argue that all forms of violence are relevant to decision-makers.

We are also concerned that ‘relevant’ family violence only covers violence inflicted by the sponsor of the victim. For example, we are aware of situations where women are victimized by extended family members of the sponsor. Therefore legislation needs to take this into account.

We are also suspicious of those views suggesting that allegations of violence are being made to circumvent the regulations with the aim of gaining permanent residence. It is our experience and research in the family law arena supports this contention, that allegations of family violence are rare. Such views only reinforce societal denial and discounting of family violence. Legislation and judicial decision-making should reflect the necessity of protecting women and children from ongoing violence and abuse and not place barriers to women and children achieving safety from such violence.

We would agree that the definition of family violence should include:
Violent or threatening behaviour or any other form of behaviour that coerces or controls a family member or causes a family member to be fearful.
Such behaviour may include but is not limited to:
(a) physical violence, and the broad arrange of acts which constitute 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; and
- (i) behaviour by the person using the violence that causes a child to be exposed to the effects of behaviour referred to in (a)–(h) above.

Consideration also needs to be given to the increased barriers for women from culturally and linguistically diverse backgrounds face in escaping from domestic violence. Those making assessments of domestic violence therefore not only need to be trained and experienced in the dynamics of domestic violence but also have a broad understanding of these cultural and linguistic barriers.

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

Question 4 Should the *Migration Regulations 1994* (Cth) be amended to allow a former or current Prospective Marriage (Subclass 300) visa holder to access the family violence exception when applying for a temporary partner visa in circumstances where he or she has not married the Australian sponsor?

WEAVE believes that the current application of the family violence exception under the *Migration Regulations 1994* (Cth) should be expanded to cover other visa categories.

Case Study:

A woman and her children came to Australia as secondary holders of her partner's temporary, regional skilled visa. The child protection authorities removed her and the children from the family home due to his physical and sexual abuse of the children. The woman and her children were placed in domestic violence accommodation. Whilst there she received a letter from the Immigration Department telling her she was in breach of her visa conditions that could lead to her deportation. Further trauma on top of her and the children's devastating experience.

This woman had no access to the family violence provisions because of the visa type. Family Violence provisions were not covered in her visa type.

The option of applying for a visa in her own right was not possible given the financial cost (\$2,000) of making such an application.

She had no access to Medicare, income support, Red Cross or NGO emergency moneys. Neither was she eligible for a health care card or pension card.

She had to rely on the support of the local domestic violence service. Not all domestic violence services have the resources to provide such long term financial and accommodation services to such women. It was only after an appeal, and many years of living under such conditions, that she was granted a protection visa and became eligible for Centrelink support.

Responses to family violence should occur across all sectors in the same way, so that the protection of all women and children from violence is acted upon, regardless of citizenship or residential status.

Marital status should not be used as criteria to include or exclude those women who have suffered from domestic violence in being able to access permanent status and protection from violence.

There are a number of other categories of temporary residents who may also be subjected to family violence which should be taken into account. There are instances where women may have come to Australia on other conditions, such as student visas, tourist visas or skilled migrant visas who may enter into relationships with Australians and become victims of domestic violence. Threats of deportation only create further pain and suffering on those already victimized by family violence.

Women can not only be dependent on their partner in relation to their visa status but may also be dependent on visas where they are contracted to a specific employer for a period of time. This leaves these women vulnerable to exploitation and abuse.

We agree with the ALRC recommendation that the family violence exception should apply to partners who have been sponsored on a Prospective Marriage Visa (Subclass 300), whether the breakdown occurred at any time before the marriage, or after marriage, but before an application for permanent residence has been lodged.

It is argued that the genuineness of the relationship should not be used as criteria for assessment at the stage where women are attempting to escape family violence. Such assessment would have taken place when the visa for temporary residence was approved. Responses to all allegations of family violence should be met with support and protection.

WEAVE is aware that there are situations where women come to Australia on prospective marriage visas with the understanding that the men who sponsor them are genuine in their desire to marry. Unfortunately there are instances where men have no such intentions but use this opportunity to sexually exploit the women, sometimes prostituting them. Once the nine month period has

finished such men are happy for the women to be deported back to their country of origin. Such behaviour is regularly repeated in a serial fashion.

WEAVE would also like to note the incredible barriers that women on temporary visas face when escaping from abusive relationships. It is very difficult for women to access crisis accommodation. These women are particularly vulnerable with no access to income and they are not entitled to public and community housing. This makes it very difficult for domestic violence services to support women who have not got Australian residency. WEAVE recommends that the Social Security Act should also be amended to enable all women experiencing domestic violence to access income support regardless of their visa type.

We support the Australian Association of Social Workers' submission which recommends the insertion of a preamble to the Migration Regulations Act providing a set of principles guiding the interpretation of the legislation.

Question 5 What issues arise for applicants in making judicially determined claims of family violence under the *Migration Regulations 1994* (Cth)?

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

It has been identified that domestic violence is seriously under-reported, particularly by immigrant and refugee women. There are a number of reasons for this including fear of authorities based on their experiences in their country of origin; lack of awareness of Australian laws relating to domestic violence; language and cultural barriers to accessing help and support networks. We would agree that many immigrant and refugee women would have difficulty meeting the judicial evidence requirement of the regulations.

Research shows quite clearly that separation is often the most dangerous time for women leaving a violent relationship, as violence often escalates at this time.

We believe that the *Migration Regulations 1994* (Cth) should 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.

Mutual Undertakings, which are often taken out instead of Family Violence Protection Orders, also should be recognized as evidence in judicial decision making in family violence exception cases.

Question 7 Are the provisions governing the statutory declaration evidence of competent persons in the *Migration Regulations 1994* (Cth) too strict? If so, what amendments are necessary?

WEAVE is of the view that the current provisions governing the statutory declaration of evidence of competent persons places unnecessary barriers to women's ability to seek protection and permanent residency.

In particular we have concerns about staff making additional assessments of family violence, despite statutory declarations being already presented as evidence of domestic violence.

The necessity of women who have experienced abuse having to re-tell their story adds a further layer of traumatising to their experiences.

We would also question whether all staff have the ability or specialized experience in domestic violence, awareness of gender issues and cross-cultural understandings to safely and provide the necessary support and understanding to women in these situations.

Staff should recognize the importance of women being able to access both interpreters and support people during interviews. We understand that this has not always been the case.

It is important that competent persons be those who have adequate training and experience in the gendered nature of domestic violence, and the specific needs of culturally and linguistically diverse women, to make reliable assessments. WEAVE are aware of women who have sought such reports being refused a service on the grounds that "it was only domestic violence". This highlights the need for competent persons to be specialist domestic violence providers. It is also important that women attempting to gain statutory declarations from competent persons be provided with support and time to access such people.

WEAVE recommends that the range of competent persons should be extended. Bilingual workers and domestic violence workers are often the first contact for women escaping violence and often have a clear understanding and intimate knowledge of the women's experiences. They therefore should be included in the range of competent persons and be provided with the appropriate training.

Consideration also needs to be given to the financial costs of being able to access competent person reports. Women are often required to pay a fee for such reports, at a time when they have no access to income support and are unlikely to have the financial resources to pay such a fee.

Question 8 Should the *Migration Regulations 1994 (Cth)* be amended to provide that minor errors or omissions are not fatal to the statutory evidence of a competent person?

Yes this part of the regulations should be amended so that a woman's allegations of violence are not impeded by bureaucratic and minor errors or omissions. We want to ensure that women's protection is not impeded by procedural technicalities.

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

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

WEAVE is of the view that competent persons should not have to name the perpetrator of violence. Women themselves may be unwilling to name the perpetrator out of fear, or that the perpetrator is known to the competent person.

WEAVE understands that the current training provided in regard to the nature and dynamics of family violence is insufficient. Training in family violence should be provided by accredited trainers and such training should be standardized across Australia and meet accredited standards. Such training needs to be constantly updated and monitored. Such training also needs to understand the specific barriers facing women from culturally and linguistically diverse backgrounds.

Question 11: What issues arise in relation to the use of independent experts in the determination of non-judicially determined claims of family violence made under the *Migration Regulations 1994 (Cth)*? For example:

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

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

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

Legislation should require decision makers to give reasons for referring the matter to an independent expert.

It is WEAVE's view that where decision makers refer matters to an independent expert, that the independent expert should be highly qualified in the area of domestic violence. It is our experience that many independent experts are not fully qualified or experienced in the area of domestic violence and often hold views and attitudes that are contrary to the well-being and protection of victims of abuse.

It is also important that such experts have knowledge and experience of the cultural issues which are specific and relevant to each case.

Independent experts should be required to give full reasons for their decisions to the applicant.

**Question 12: Should the requirement that, an opinion of the independent expert is automatically to be taken as correct, be reconsidered?
Should there be a method for review of such opinions?**

It is WEAVE's view that in order for cases to be transparent and open that the opinions of independent experts should be open to review.

Question 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?

There are a number of difficulties that applicants face in meeting evidentiary requirements in making claims of non-judicially determined claims of family violence. To satisfy the Department's requirements, an applicant has to provide two competent person reports. The writer of each report has to satisfy the qualification requirements of the department. For an applicant who cannot speak English and is socially isolated, to obtain two such reports seems particularly onerous. In WEAVE's experience applicants are often charged a fee for such a report and this is a further barrier to access. In addition, it can take considerable time for such reports to be prepared and processed, meaning that the applicant is left in a position of uncertainty, adding to her trauma. WEAVE recommends that only one competent person's report be required and that funding is provided to appropriate agencies (such as domestic violence services) to enable better access to these applicants.

Question 14: In what ways, if any, should the evidentiary process for giving evidence in migration-related family violence cases be streamlined?

For example, would there be merit in:

- (a) streamlining the system to allow victims of family violence to obtain an opinion of an independent expert, without the need to first seek evidence from a competent person? or**
- (b) requiring the Migration Review Tribunal to be bound by an existing independent expert's opinion obtained by the primary decision maker?**

WEAVE strongly urges that the evidentiary process should be streamlined to avoid the need for victims to re-tell their story on numerous occasions. As pointed out this can re-traumatize victims.

WEAVE believes that the use of an independent expert should not be the first step in providing evidence for abuse and violence. Often competent persons are those who have some knowledge and history of working with the woman and therefore are able to collect information in a sensitive way with a specific level of understanding of each particular woman's experience. We would suggest that when competent persons' reports require further clarification by the system that the Immigration Department seek further information from the competent person

who completed the report. This may avoid the necessity of women needing to be assessed and interviewed on multiple occasions, often by people who are strangers to the women. This can only create further trauma for women.

Question 15: 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)?

WEAVE is of the opinion that an improved definition of family violence and family violence provisions as a whole should be placed in primary legislation.

Question 16: Should sponsors be obliged to submit to a police check in relation to past family violence convictions or protection orders when making an application for sponsorship?

Question 17 Should the Department of Immigration and Citizenship bring to the attention of prospective spouses information about a sponsor’s past family violence history? If so, how and what safeguards should be put in place, in particular to address:

- (a) procedural fairness to the sponsor;
- (b) discrimination on the basis of a criminal record; and
- (c) the sponsor’s privacy.

WEAVE agrees with the proposal that sponsors should be required to submit to a police check in relation to past family violence convictions or protection orders when making an application for sponsorship and information about a sponsor’s past family violence history should be brought to the attention of prospective spouses. This would provide an important safety measure for potential victims of family violence.

This would not require any additional intrusion into private lives as there are checks which sponsors are required to go through such as health checks.

Question 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?

WEAVE strongly urges a greater level of cooperation and information-sharing across all state and territory jurisdictions to ensure better responses to victims of family violence.

Question 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)?

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

WEAVE believes that the MRT and DIAC should have access to any national register introduced in line with the recommendations.

Family violence and the definition of a refugee

Question 21: What, if any, legislative changes are necessary to the *Migration Act 1958* (Cth) to ensure the safety of those seeking protection in Australia as victims of family violence?

The Discussion paper highlights the difficulties that women have in claiming refugee status when harm is done to them because of their gender.

“Gender-related claims and the public/private dichotomy

First, family violence claims have tended to exist within the wider context of gender-specific harm, including: sexual violence, forced marriage, female genital mutilation, and honour killings.¹¹¹ These types of harms—generally experienced by women—are not afforded protection because neither gender, nor sex, is an enumerated Refugees Convention ground. As such, courts have traditionally failed to consider whether such gender-related claims may fall under the ground of particular social group, or other Convention reasons.¹¹²”

It is of significant concern that the gender harms highlighted in the discussion paper are not afforded protection as refugees both nationally and internationally. Given the widespread use of violence against women in all its forms, and that these harms are inflicted specifically because of women’s status as women, and that this is an international form of discrimination and abuse of women as a class, Refugees Convention needs to address this problem. We urge the Federal Government to take a lead in seeing that this issue is addressed both nationally and internationally.

Gender-based persecution should explicitly be highlighted as falling within the category of refugee claims. The current system is ambiguous in recognizing this as a claim for refugee status. It is imperative that this is addressed in improved legislation and guidelines.

The public/private dichotomy as explained by the Discussion paper is also of urgent concern. The argument of intrusion into private lives is one that has historically been used by the state to deny women the protection that the state should offer all people. By using the argument of the public/private dichotomy the State is encouraging or failing to act to prevent the private persecution of a woman. Legislation should reflect that the state is implicated, by its failure to act and provide protection, in the infliction of harm.

In the landmark decision of the High Court of Australia in *Minister for Immigration and Multicultural Affairs v Khawar* (Khawar).¹¹⁹, the High Court found that *“persecution may result where the criminal conduct of private individuals is tolerated or condoned by the state in circumstances where the state has the duty to provide such protection against harm.¹²”*

Such judgments need to be enforced by clear legislation which indicates that the state has a responsibility to protect women from both private and public harm and that when it fails to do so, refugee status can be claimed.

Question 22 Are legislative reforms, such as those proposed in the Migration Amendment (Complementary Protection) Bill 2011 (Cth), necessary to protect the safety of victims of family violence, to whom Australia owes *non-refoulement* obligations, but whose claims may not be covered by the United Nations *Convention Relating to the Status of Refugees*?

WEAVE would support the view expressed by Amnesty International:

“The requirement that the risk faced must not be ‘faced by the population of the country generally’ may provide, for example, for an applicant fleeing domestic violence to be excluded from [complementary] protection on the grounds that the applicant originates from a country where domestic violence is widespread and where perpetrators are not generally brought to justice. Additionally, the stipulation that the risk must be ‘faced by the non-citizen personally’ has the potential to exclude, for example, applicants who have not been directly threatened with female genital mutilation but due to their age and gender, face a probable risk that they will be subjected to the practice upon return.”

Further we agree with the Committee’s recommendation that *“the provision be reviewed ‘with a view to ensuring it would not exclude from protection people fleeing genital mutilation or domestic violence from which there is little realistic or accessible relief available in their home country’”*

The Bill should give force to this recommendation.