

Chapter 2

Key issues

2.1 During the course of this inquiry, a number of issues were raised. These included:

- the capacity of the proposed amendments to address family violence;
- Australia's obligations under international law;
- procedural fairness for both visa and sponsor applicants;
- privacy implications; and
- the impact of the proposed amendments on the processing of visa applications.

Addressing family violence

2.2 One of the key justifications for introducing these proposed amendments is to combat family violence in the context of the family visa scheme.¹ In its 2014-15 Annual Report, the Department of Immigration and Border Protection (DIBP) indicated that between 2012 and 2015 an average of approximately 690 family violence claims were made to the Department each year.²

2.3 Earlier this year the Victorian Royal Commission into Family Violence (VRC) found that people from culturally and linguistically diverse (CALD) backgrounds will be more likely to face barriers in obtaining help. It also found that the impact on those victims is particularly severe where they do not have permanent residency and consequently have limited access to support services, and are at risk of coercion and control from a sponsoring spouse and other family members.³ The Coalition Against Trafficking in Women Australia (CATWA) also noted that there have been numerous cases of Australian men 'facilitating forced and servile marriages with migrant women', and of men with violent histories sponsoring migrant women to come to Australia, and then being violent towards them, culminating in some instances in their murder.⁴

The extent of the proposed amendments

2.4 The committee heard evidence that the proposed amendments would only have an impact on some victims and potential victims of family violence, and only

1 The Hon Peter Dutton MP, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 16 March 2016, p. 8.

2 Department of Immigration and Border Protection (DIBP), *Annual Report 2014-15*, p. 68, <https://www.border.gov.au/ReportsandPublications/Documents/annual-reports/DIBP-Annual-Report-2014-15.pdf>.

3 Victorian Government, *Royal Commission into Family Violence* (Commissioner: The Hon. Marcia Neave AO), March 2016, p. 34.

4 Coalition Against Trafficking in Women Australia (CATWA), *Submission 2*, p. 1.

where those individuals engaged with Australia's migration framework as contemplated by this bill. Ms Erin Gillen of the Federation of Ethnic Communities' Councils of Australia (FECCA) argued that the proposed measures would only impact existing intimate relationships where the parties to that relationship choose to apply for a family visa, and that this needs to be considered when talking about the capacity of the proposed amendments to 'prevent' family violence. She explained that:

[T]o get a partner visa the requirement is that you are married or in a de facto relationship with an Australian citizen or permanent resident and that that relationship is genuine and ongoing. That may be happening in Australia. There may already be people in relationships in Australia applying for partner visas or they may be offshore applying for partner visas. Violence may already be happening. It may have happened previously in that relationship. So I think it is a little difficult to talk about prevention when we are talking about existing relationships. We are not talking about someone brand new, who has never been in a relationship with this person coming in. They are already there.⁵

2.5 Ms Gillen also argued that in a scenario where a non-citizen was in Australia on a different type of visa (such as a student visa), entered into a relationship and applied for a partner visa, but was unsuccessful due to the sponsor applicant having a criminal history, that relationship would not necessarily end simply because the sponsor application had been unsuccessful.⁶ That person could try and apply for another type of visa, therefore not allowing a person to sponsor a non-citizen does not necessarily mean the relationship will end, and that they will be protected from any violence by virtue of that sponsor refusal.⁷ CATWA agreed, arguing that 'it is...problematic to assume that the abusive nature of the relationship will end merely because the sponsor's application has been refused'.⁸

2.6 Both the McAuley Community Services for Women (MCSW) and the Settlement Council of Australia (SCA) noted that family violence is underreported.⁹ The SCA argued that the proposed measures would not help to exclude potential sponsors who had been violent in the past, but whose actions had not resulted in any criminal conviction.¹⁰ The Border Crossing Observatory, Monash Gender and Family Violence Focus Program, and InTouch Multicultural Centre Against Family Violence

5 Ms Erin Gillen, Acting Director, Federation of Ethnic Communities' Councils of Australia (FECCA), *Committee Hansard*, 5 October 2016, p. 12.

6 Ms Erin Gillen, Acting Director, FECCA, *Committee Hansard*, 5 October 2016, p. 13.

7 Ms Erin Gillen, Acting Director, FECCA, *Committee Hansard*, 5 October 2016, pp 13-14.

8 CATWA, *Submission 2*, p. 2.

9 McAuley Community Services for Women (MCSW), *Submission 13*, p. 1; Settlement Council of Australia (SCA), *Submission 10*, p. 2.

10 SCA, *Submission 10*, p. 2.

(BCO) agreed, noting that where family violence crimes are reported, there is a significant rate of attrition at each stage of the justice process.¹¹

2.7 The BCO also argued that:

To presume that women are empowered by knowledge of a violent history undermines all the emerging research that indicates that knowing about violence and experiencing violence is not enough to enable women to be safer. This is a particularly important point given the body of research in Australia and internationally which finds that separation is one of the leading risk factors for intimate partner killing or serious harm.¹²

2.8 Mr Hamish Hansford of the DIBP, stated that over the past five years there have been significant changes in general attitudes and approaches to family violence, and argued that the Department has a better awareness of the issues than it did previously.¹³ He also indicated that it is important to consider the proposed amendments in context, and explained that:

[T]here are a whole range of different pathways for people affected by domestic violence. I think the issue some of the people were raising earlier this morning was: what happens when there is a family onshore where there is domestic violence involved?...The department has an understanding about how we deal with that situation—as well as, of course, ministerial intervention, where the minister can consider individual cases. The department has a whole range of mechanisms that we can consider. We will accord with international convention and keeping families together where appropriate, and provide options where there is domestic violence or other factors at play.¹⁴

We are not saying that this is a complete solution for everything but, in the department that manages migration and immigration, we think this is a proportionate response that the government has put forward as a bill.¹⁵

2.9 Mr Hansford also emphasised that the proposed amendments are designed to help enhance the overall integrity of Australia's migration system.¹⁶ Mr David Drummond, Director of Visa Framework and Reform, emphasised in particular the importance of the proposed enforceable obligations on sponsors, stating that:

Right now there is only one real undertaking on the sponsor, and that is to support someone financially for two years and provide accommodation. The bill actually looks at the ability of a sponsor to provide information to

11 Border Crossing Observatory, Monash Gender and Family Violence Focus Program, and InTouch Multicultural Centre Against Family Violence (BCO), *Submission 11*, p. 5.

12 BCO, *Submission 11*, p. 5.

13 Mr Hamish Hansford, First Assistant Secretary (FAS), Immigration and Citizenship Policy Division (ICPD), DIBP, *Committee Hansard*, 5 October 2016, p. 23.

14 Mr Hamish Hansford, FAS, ICPD, DIBP, *Committee Hansard*, 5 October 2016, p. 23.

15 Mr Hamish Hansford, FAS, ICPD, DIBP, *Committee Hansard*, 5 October 2016, p. 24.

16 Mr Hamish Hansford, FAS, ICPD, DIBP, *Committee Hansard*, 5 October 2016, p. 20.

the department to support their application—and that is an important part of the bill—to provide notification of key changes and to make sure that the information is not false and misleading. So it really gets back to the point that I mentioned in the opening statement about transparency between all three partners. Where someone who is a sponsor does try to hide something, it damages the integrity of the migration system, of the process and of the relationship between those three individuals.¹⁷

'Punishing' visa applicants

2.10 The Immigration Advice and Rights Centre (IARC) argued that the proposed sanctions for sponsors who fail to comply with statutory obligations under the scheme could serve to punish visa holders. It stated that the two most common circumstances in which a sponsor may fail to fulfil their undertaking is due to financial hardship or manipulative and controlling behaviour over an applicant. It concluded that imposing sanctions in either circumstance is inappropriate because:

If the failure to comply with the undertaking is because of family violence...then sanctioning a sponsor may place the applicant at a greater risk of harm and if the failure is because of severe financial hardship then imposing a sanction will only add to the existing hardship and will deter people from seeking aid and assistance.¹⁸

2.11 Mr Ali Mojtahedi, Principal Solicitor of the IARC argued that sanctions involving a monetary fine would be inappropriate and ineffective:

If you are going to impose a fine on a sponsor in circumstances of family violence, that would...put the visa applicant at risk. It would get them offside...[I]f someone is struggling, two questions arise. Firstly, why would you impose a fine on them? Why would you make the circumstance worse? Secondly, if they are struggling, that would make them feel reluctant to go out and actually ask for help. If they are struggling, if they cannot afford to pay their bills and cannot afford to feed the children, they would be reluctant to go out and say, 'Help me,' because, if they do, they could be facing a fine.¹⁹

2.12 The BCO stated that it is not clear how the proposed statutory obligations on visa sponsors would be monitored.²⁰ It argued that in the work-related visa scheme, there is a 'clear absence of comprehensive review of the upholding of visa conditions and/or sponsor obligations'. It questioned how the proposed statutory obligations would be monitored and enforced in this context, and like the IARC, raised concerns that the failure to meet these obligations was likely to come to the attention of authorities during challenging financial circumstances.²¹

17 Mr David Drummond, Director, Visa Framework and Reform (VFR), DIBP, *Committee Hansard*, 5 October 2016, p. 22.

18 Immigration Advice and Rights Centre (IARC), *Submission 7*, p. 4.

19 Mr Ali Mojtahedi, Principal Solicitor, IARC, *Committee Hansard*, 5 October 2016, p. 8.

20 BCO, *Submission 11*, p. 4.

21 BCO, *Submission 11*, p. 4.

2.13 The BCO also submitted that the proposed amendments:

[S]end a message that [culturally and linguistically diverse] women are expected to leave and/or end their relationship if they are aware of their partner/potential sponsor's previous history of violence, specifically violence in the familial setting.²²

2.14 They argued that:

[T]his runs counter to the recognition that women should be supported and empowered to know what their options are, and to provide multiple supports to enable women to make the best decision for themselves and their children without judgment'.²³

2.15 The IARC also submitted that the proposed amendment enabling an approved sponsorship to subsequently be cancelled may also punish visa applicants:

The explanatory memorandum...provides that an approved sponsorship may be cancelled where there is inappropriate use of the program or where serious offences are detected...[This punishes] a visa applicant for the conduct of a sponsor and will deter applicants from disclosing a serious offence (including family and domestic violence). This amendment will not serve to protect visa applicants and is counterproductive to the National Plan to Reduce Violence Against Women and Children.²⁴

2.16 The BCO agreed, noting that while a protection order is a civil remedy, breach of a protection order becomes a criminal matter which would be found on a police check.²⁵ They argued that women living in situations of partner and familial abuse may choose to stay silent while their application is being processed, and not to pursue any avenue of support.²⁶

2.17 The DIBP advised the committee that some of the content of concern to submitters is not yet drafted. Mr Hansford stated that the detail of the proposed sponsorship obligations, while established under the bill, would need to be fleshed out and examined in relevant regulations.²⁷

2.18 The Department also emphasised that the test for refusing a sponsorship application would be set at a high level. Mr Drummond explained that for a sponsorship application to be refused, the Department would need to be concerned that there was a 'significant risk' to the applicant, and that they would be in physical danger if the visa were to be granted.²⁸

22 BCO, *Submission 11*, p. 2.

23 BCO, *Submission 11*, p. 2.

24 IARC, *Submission 7*, p. 3.

25 BCO, *Submission 11*, p. 5.

26 BCO, *Submission 11*, p. 5.

27 Mr Hamish Hansford, FAS, ICPD, DIBP, *Committee Hansard*, 5 October 2016, p. 26.

28 Mr David Drummond, Director, VFR, DIBP, *Committee Hansard*, 7 October 2016, p. 29.

2.19 As set out at paragraph 2.8, the Department explained that there are a range of pathways for victims of family violence in the family visa program, and indicated that the Department has the ability to deal with individual cases appropriately.²⁹

Initiating the visa application process

2.20 Several submitters raised concerns about the addition of a new sponsorship application process preventing visa applicants from commencing their engagement with the visa application process, and gaining access to corresponding family violence protections.

2.21 The IARC noted the 'family violence exception' contained in Division 1.5 of the *Migration Regulations 1994*. This enables some visa applicants to continue with their visa application and obtain a permanent visa, even if the relationship with their partner/sponsor has ended.³⁰ The IARC argued that, 'The provisions, no doubt, exist to ensure that visa applicants do not feel compelled to remain in abusive and violent relationships in order to obtain a visa'.³¹

2.22 Submitters raised concerns about the addition of an initial sponsor application process and the capacity of this addition to help victims of family violence. The Law Council of Australia (LCA) stated:

Under the proposed amendments, if an approved sponsor is refused, then a visa applicant will be prevented from applying for a visa, potentially leaving the visa applicant in a vulnerable position – for example, women (typically) being forcibly returned to their country of origin.³²

2.23 It argued that under the existing scheme, those women may have been entitled to a permanent partner visa via the existing family violence exception, or have had gender-based claims for protection.³³ CATWA agreed that the addition of a new sponsor approval process could leave migrant women without recourse to the legal remedies and support services to which they may otherwise be afforded, had the application for a partner visa been processed.³⁴

2.24 Ms Clare Hughes of the LCA echoed these concerns, stating:

[I]f an Australian sponsor was refused under the proposed amendments it would be the non-citizen visa applicant who would be the one prevented from applying for an Australian visa, and this would potentially leave them in quite a vulnerable position...typically women—who might be forcibly returned to their country of origin without appropriate consideration of their circumstances...They might have already personally sustained a number of years of violence at the hands of their sponsor prior to the application being

29 Mr Hamish Hansford, FAS, ICPD, DIBP, *Committee Hansard*, 5 October 2016, p. 23.

30 *Migration Regulations 1994*, Division 1.5.

31 IARC, *Submission 7*, pp 1-2.

32 Law Council of Australia (LCA), *Submission 9*, pp 8-9.

33 LCA, *Submission 9*, p. 9.

34 CATWA, *Submission 2*, p. 2.

made but have been unable or unwilling to properly seek legal redress. By these amendments they would be then placed in a really difficult situation in which they were unable to stay in Australia but were also unable to return to their home country because of social or cultural stigma and more serious risks to their lives, like honour killings, ostracism and homelessness. If the person comes to Australia to get married and the marriage ends and they are forced to return as a divorced or 'broken' women, it is quite shameful and in some countries they do face a real risk of being killed or otherwise seriously harmed by their families and communities.³⁵

2.25 The BCO likewise flagged the potentially serious consequences for a woman returning to the country in which they were married. It highlighted a case in which a client told their case worker that they would rather die than have to return home after having been married in front of their whole community.³⁶ It also stated that some married women who are not able to live with their husband because of visa processing issues, may be shamed by their family, abandoned by their society, and be unable to re-marry or re-establish themselves in their community.³⁷

2.26 As set out in detail in paragraph 2.8, the DIBP noted that the family visa framework includes 'a range of different pathways' for victims of family violence, that both the Department and the minister have an understanding of how to deal with cases, and that the minister retains the discretion to intervene and consider individual cases.³⁸

2.27 The Department also pointed out that the extra time associated with a sponsor application, while varying from case to case, could be very minimal. It explained that to date, police checks received from the CrimTrac system have been obtained in a timely manner, and that in some cases the time for processing those sponsor applications could take mere weeks.³⁹

Previous inquiries into family violence and the family visa program

2.28 A number of submitters drew attention to previous inquiries into the intersection between family violence and Australia's migration system. In 2012, having considered the implementation of a sponsorship application process, the Australian Law Reform Commission (ALRC) concluded that the safety of victims of family violence would be better promoted via targeted education and the dissemination of information.⁴⁰ It recommended the use of independent experts, better

35 Ms Clare Hughes, Member, Migration Law Committee, LCA, *Committee Hansard*, 5 October 2016, p. 2.

36 BCO, *Submission 11*, p. 4.

37 BCO, *Submission 11*, p. 5.

38 Mr Hamish Hansford, FAS, ICPD, DIBP, *Committee Hansard*, 5 October 2016, p. 23.

39 Mr Hamish Hansford, FAS, ICPD, DIBP, *Committee Hansard*, 5 October 2016, pp 21, 27.

40 Australian Law Reform Commission (ALRC), *Family Violence and Commonwealth Laws – Improving Legal Frameworks*, ALRC Report 117, 2012, p.508.

dissemination of information about legal rights in Australia, and the provision of information about family violence support services both prior to and on arrival in Australia.⁴¹ This was a sentiment echoed by a number of submitters.⁴²

2.29 Ms Hughes of the LCA explained that:

[T]he ALRC recommended things like dissemination of information to these applicants about their rights, about family violence services and about what is acceptable in Australia and what is not. It is so that, when they come to Australia, if they see signs that they might be vulnerable to violence or that their husband or partner might be abusive then they know how to go about it: how to contact the department of immigration and how to access social services and other people who might help before it is too late.⁴³

2.30 The IARC noted Action Item 11 of the National Plan to Reduce Violence Against Women and their Children: 'development of resource material to inform and support these overseas spouses including information about essential services and emergency contacts in Australia'.⁴⁴

2.31 Both the LCA and MCSW commended the development of a series of factsheets for new arrivals to Australia entitled the 'Family Safety Pack'.⁴⁵ This pack includes factsheets dealing with domestic and family violence, sexual assault, and family violence and partner visas. It is currently available in 46 languages.⁴⁶ The LCA noted that the Family Safety Pack includes factsheets for interpreters dealing with family violence situations,⁴⁷ a move consistent with a recommendation of the 2016 VRC into Family Violence.⁴⁸ Echoing the sentiments of both the LCA and IARC, the MLP stated:

41 ARLC, *Family Violence and Commonwealth Laws – Improving Legal Frameworks*, ALRC Report 117, 2012, recommendations [20-5], [20-6] and [20-79].

42 ALRC, *Submission 1*, p. 1; FECCA, *Submission 4*, p. 3; IARC, *Submission 7*, p. 4; Australian National University College of Law Migration Law Program (MLP), *Submission 8*, p. 9; LCA, *Submission 9*, p. 11; SCA, *Submission 10*, p. 2; BCO, *Submission 11*, p. 6; AWAVA, *Submission 12*, p. 4; MCSW, *Submission 13*, p. 3.

43 Ms Clare Hughes, Member, Migration Law Committee, LCA, *Committee Hansard*, 5 October 2016, p. 10.

44 Department of Social Services (DSS), *Second Action Plan 2013-2016, Moving Ahead of the National Plan to Reduce Violence against Women and their Children 2010-2022*, p. 27.

45 LCA, *Submission 9*, p. 10; MCSW, *Submission 13*, p. 2.

46 DSS, Family Safety Pack, <https://www.dss.gov.au/family-safety-pack>, (accessed 30 September 2016).

47 LCA, *Submission 9*, p. 10.

48 Victorian Government, *Royal Commission into Family Violence* (Commissioner: The Hon. Marcia Neave AO), March 2016, p. 34.

We support these recommendations not only on the basis that they are sensible, but that they resulted from extensive community consultation, which is the hallmark of best law reform practice.⁴⁹

2.32 CATWA argued that 'far greater resources and initiatives are required to genuinely improve the management of family violence in the visa program, and these must go *beyond* the refusal of the sponsor's application'.⁵⁰

2.33 The Department emphasised that the proposed amendments do not purport to be a complete solution to the problems which it is designed to help address, and noted that the purpose of the Department is to manage migration and immigration.⁵¹

Defining 'family violence'

2.34 A number of submitters recommended that, in keeping with the recommendations of the ALRC,⁵² and the 2016 VRC,⁵³ the definition of 'family violence' contained in the *Migration Regulations 1994* be broadened to be consistent with the definition in other pieces of Commonwealth legislation.⁵⁴ The *Migration Regulations 1994* does not define the term 'family violence', but rather outlines the circumstances in which a person will be deemed to have suffered family violence.⁵⁵ These include where a court has granted an injunction against an alleged perpetrator,⁵⁶ and where a court has made a protection order for an alleged victim in relation to an alleged offender.⁵⁷ In circumstances where a non-judicially determined claim of family violence is made, the minister must consider whether the alleged violence took place, and must seek the opinion of an independent expert if they are not satisfied.⁵⁸

2.35 The 2016 VRC considered the way in which 'family violence' is defined. It highlighted the definition contained in the *Family Violence Protection Act 2008* (Victoria) as being a sound model.⁵⁹ The Act defines both 'family member' and 'family violence' broadly.⁶⁰ 'Family member' is defined to include a range of individuals living

49 MLP, *Submission 8*, p. 9.

50 CATWA, *Submission 2*, p. 2.

51 Mr Hamish Hansford, FAS, ICPD, DIBP, *Committee Hansard*, 5 October 2016, p. 24.

52 ARLC, *Family Violence and Commonwealth Laws – Improving Legal Frameworks*, ALRC Report 117, 2012.

53 Victorian Government, *Royal Commission into Family Violence* (Commissioner: The Hon. Marcia Neave AO), March 2016.

54 MLP, *Submission 8*, p.9; LCA, *Submission 9*, p.11; SCA, *Submission 10*, p.3; FECCA, *Submission 4*, p.3; MCSW, *Submission 13*, p. 2.

55 *Migration Regulations 1994*, Division 1.5.

56 *Migration Regulations 1994*, r.1.23(2).

57 *Migration Regulations 1994*, r.1.23(4).

58 *Migration Regulations 1994*, rr.1.23(8)-(14).

59 Victorian Government, *Royal Commission into Family Violence* (Commissioner: The Hon. Marcia Neave AO), March 2016, pp15-16.

60 *Family Violence Protection Act 2008* (Victoria), Part 2.

in a family environment, not merely biological relatives. It also defines 'family violence' to include physical, sexual, emotional, psychological and/or economic conduct which is abusive, or behaviour which is threatening or coercive, or 'in any other way controls or dominates the family member and causes that family member to feel fear'.⁶¹ It also states that 'behaviour may constitute family violence even if they behaviour would not constitute a criminal offence'.⁶²

2.36 FECCA argued that by expanding the definition of family violence, family members other than a spouse would be able to seek protection under the current family violence exception, where they had experienced violence from a family member.⁶³

2.37 The Department explained that it has developed a better awareness of family violence over time,⁶⁴ emphasising the importance of the checks which the Department undertakes where a claim of violence is made in the course of a visa application:

[T]he pathway to permanent residency involves a whole range of checks, and the genuineness of the domestic violence suffered is one component of that assessment. So we would have to look at the individual case. It is not as if someone can claim it and then immediately gain permanent residency in Australia. There has to be a basis and evidence behind some of the claims.⁶⁵

Existing limitations on sponsors

2.38 A number of submitters discussed the existing limitations on visa sponsors, and the capacity of these limitations to help address family violence.

2.39 The MLP noted that family visa sponsors already have limitations placed upon them, which are designed to protect visa applicants.⁶⁶ Australian citizens or permanent residents cannot sponsor more than two people in a lifetime, and sponsorships must be at least five years apart,⁶⁷ unless the minister decides to waive these limitations due to compelling and compassionate circumstances affecting the sponsor.⁶⁸ Sponsors cannot sponsor applicants under the age of 18 if they have been charged with or convicted of a 'registrable offence' (which includes offences against child protection legislation),⁶⁹ although the minister retains the discretion to approve sponsorship for charges or convictions which occurred more than five years prior, or if

61 *Family Violence Protection Act 2008* (Victoria), s.5.

62 *Family Violence Protection Act 2008* (Victoria), s.5(3).

63 FECCA, *Submission 4*, p. 4.

64 Mr Hamish Hansford, FAS, ICPD, DIBP, *Committee Hansard*, 5 October 2016, p. 24.

65 Mr Hamish Hansford, FAS, ICPD, DIBP, *Committee Hansard*, 5 October 2016, p. 26.

66 MLP, *Submission 8*, p. 4.

67 *Migration Regulations 1994*, r.1.20J.

68 *Migration Regulations 1994*, r.1.20J(2).

69 *Migration Regulations 1994*, r.1.20KB.

there are other compelling circumstances.⁷⁰ The MLP argued that the bill 'represents a significant departure from these arrangements'.⁷¹

2.40 The Department explained that, despite these current restrictions, there is still a need for the introduction of the proposed sponsor application. Mr Hansford emphasised that under the current system a visa sponsor is subject to very few checks, and no police checks.⁷² He also stated that while there are only a small proportion of visa sponsors who sponsor people for non-genuine purposes, 'it is very difficult for a departmental officer to provide that information to the applicant'.⁷³

The committee's view

2.41 The committee believes that given the importance of addressing family violence, it is vital that the Government endeavour to address and alleviate its effects wherever possible. In saying that, the committee recognises that family violence can be very challenging to address because it can manifest in very different ways, and often goes unreported. The committee commends the DIBP for its efforts to address family violence where it intersects with Australia's family visa program.

2.42 The committee recognises that newly-arrived migrants, and potential new migrants, who may have limited English skills, few personal connections, a lack of understanding about Australian law and social norms, and who come from a society very different from that of modern Australia, are extremely vulnerable.

Australia's obligations under international law

2.43 Several submitters raised concerns about the potential for the proposed measures to conflict with Australia's obligations under international law. The MLP drew attention to the ALRC's 2012 *Family Violence and Commonwealth Laws – Improving Legal Frameworks* report.⁷⁴ In that report, the ALRC stated that it made no recommendations with regards to amending the sponsorship requirements 'in light of the difficulties in implementing a separate sponsorship criterion without breaching Australia's international obligations'.⁷⁵ At that time the then Department of Immigration and Citizenship (DIAC) itself submitted to the ALRC that:

Such measures could lead to claims that the Australian Government is arbitrarily interfering with families, in breach of its international obligations. It could also lead to claims that the Australian government is interfering with relationships between Australian and their overseas

70 *Migration Regulations 1994*, r.1.20KB(5), (9), (10).

71 MLP, *Submission 8*, p. 4.

72 Mr Hamish Hansford, FAS, ICPD, DIBP, *Committee Hansard*, 5 October 2016, p. 20.

73 Mr Hamish Hansford, FAS, ICPD, DIBP, *Committee Hansard*, 5 October 2016, p. 20.

74 MLP, *Submission 8*, p. 7.

75 ALRC, *Family Violence and Commonwealth Laws – Improving Legal Frameworks*, ALRC Report 117, 2012, p. 506.

partners in a way it would not interfere in a relationship between two Australians.⁷⁶

2.44 The MLP maintained that a separate sponsorship criterion does amount to arbitrary interference with family life, and is in breach of Article 17 of the International Covenant on Civil and Political Rights (ICCPR).⁷⁷ It also submitted that the proposed amendments may breach Article 23 of the ICCPR, which states that 'family is the fundamental unit of society and is entitled to protection by the society and the State'. It noted the United Nations Human Rights Committee's observation that while the ICCPR does not recognise the right of an alien to reside in the territory of a State party, in certain circumstances an alien may enjoy the protection of the covenant when 'considerations of non-discrimination...and respect for family life arise'.⁷⁸ The LCA argued that where one party is a non-citizen, the proposed amendments may discriminate against families on the basis of national or social origin.⁷⁹

2.45 Ms Hughes of the LCA argued that the proposed measures could be discriminatory because:

[T]here is no similar or equivalent law that says [an Australian citizen] cannot then form a violent relationship with an Australian partner. So there is potential for discrimination against those families who have one member who is from a non-Australian background.⁸⁰

2.46 Mr Hoang of the MLP stated that the sponsorship and character considerations also have the potential to discriminate against non-citizens. He argued, in relation to the *Migration Legislation Amendment (2016 Measures No. 3) Regulation 2016*, already before parliament:

[S]ponsorship can be refused on the basis of someone having – according to what is here – a significant criminal record. That is defined to include cumulative sentences that add up to 12 months or more. That can include quite minor things...[Y]ou could have instances where someone could have committed quite a minor offence and could then be precluded from sponsorship their overseas partner in a way in which you would not impose these kinds of obligations on an Australian citizen who wishes to enter a relationship with another Australia citizen.⁸¹

76 ALRC, *Family Violence and Commonwealth Laws – Improving Legal Frameworks*, ALRC Report 117, 2012, p. 507.

77 MLP, *Submission 8*, p. 8.

78 UN Human Rights Committee, *General Comments 15, The position of aliens under the Covenant* (Twenty-Seventh Session, 1986), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1 at 18 (1994), at [5], in MLP, *Submission 8*, p. 8.

79 LCA, *Submission 9*, p. 7.

80 Ms Clare Hughes, Member, Migration Law Committee, LCA, *Committee Hansard*, 5 October 2016, p. 3.

81 Mr Khanh Hoang, Associate Lecturer, MLP, *Committee Hansard*, 5 October 2016, p. 9.

2.47 Ms Gillen of the FECCA likewise submitted that the types of relationships in question involve two consenting adults 'who both have the capacity to voluntarily enter into relationships'. She argued that in light of this, the government should not be able to interfere with their relationships in a way that it cannot interfere with a relationship between two Australian citizens.⁸²

2.48 AWAVA argued that the proposed amendments enliven the operation of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).⁸³ It noted that the Explanatory Memorandum (EM) did not discuss Australia's obligations under the CEDAW, and raised concerns about aspects of the proposed amendments not complying with the instrument.⁸⁴

2.49 The EM statement of compatibility with human rights identified that the provisions of the bill have implications with regards to human rights.⁸⁵ It concluded that where there are limits to human rights pursuant to the provisions of the bill, 'those limitations are reasonable, necessary, proportionate and rationally connected to achieve a legitimate objective'.⁸⁶

2.50 The DIBP argued that the proposed amendments are justifiable because

[New migrants] are a much more vulnerable group, and the support structures around an individual coming to the country – particularly in terms of language; knowledge of the country; access to services, family and friends – are very different.⁸⁷

2.51 In response to submissions noting the Department's previous statements in relation to the problem of implementing a separate sponsorship application process, the DIBP stated:

In 2011, the department was concerned that a separate sponsorship assessment could be seen to be in conflict with our international obligations. At that time, the registrable offences had only been in place for about 12 months and it was too soon to assess their impact. So, over the past five years, we have continued to look at the impact. We believe the model is entirely consistent with our international obligations, and there is no mandatory refusal proposal in the bill...The convention people were talking about is the right to form a family, but there are also other international conventions around human rights and domestic violence that we have to trade off and look at as well.⁸⁸

82 Ms Erin Gillen, Acting Director, FECCA, *Committee Hansard*, 5 October 2016, p. 13.

83 AWAVA, *Submission 12*, pp 3-4.

84 AWAVA, *Submission 12*, p. 4.

85 Explanatory Memorandum (EM), Attachment A, pp 23-25.

86 EM, attachment A, p. 25.

87 Mr Hamish Hansford, FAS, ICPD, DIBP, *Committee Hansard*, 5 October 2016, p. 22.

88 Mr Hamish Hansford, FAS, ICPD, DIBP, *Committee Hansard*, 5 October 2016, p. 23.

Committee view

2.52 The committee agrees with a number of submitters who have raised that the proposed amendments in this bill do indeed enliven many of Australia's obligations under international law. The committee does not, however, agree that the proposed amendments are in breach of the international legal obligations discussed in this report. The committee believes that, where the proposed amendments do affect the rights contained under international legal instruments outlined in this report, that impact is both reasonable and proportionate.

Privacy

2.53 Under the proposed amendments, the Minister may disclose 'prescribed personal information' about both visa applications and applicants for approval as a family sponsor. This personal information would include the results from Police checks, and details of relevant migration-related activities.⁸⁹ Sponsorship applicants would have to agree that this information could be shared with other parties to the application.⁹⁰ Currently, police checks for visa sponsors are only conducted where the visa application includes a minor.⁹¹

2.54 A number of submitters raised concerns about the proposed enhanced disclosure of personal information. The IARC argued that it is not justifiable for information sharing to extend to an applicant's prior migration-related activities or matters not relevant to the safety and welfare of the visa applicant.⁹² It also stated that it is unclear 'why it is reasonable or necessary for the information to be disclosed to other agencies'.⁹³ The MLP stated that it saw merit in disclosing information where doing so would help a visa applicant to make an informed decision about whether or not to proceed, however, it argued that provisions would need to undergo 'rigorous scrutiny' to ensure that the relevant 'prescribed information' would not infringe on the privacy of either party.⁹⁴

2.55 The LCA highlighted the cases of *Elias & Elias* [2014] FCCA 457 and *Dalton & Dalton* [2016] FamCA 174, in which the courts held that spouses and domestic partners cannot obtain private or confidential information about each other without the other party's consent (albeit in the area of a family law property settlement).⁹⁵ It argued that the proposed amendments, enabling the Minister to disclose the results of

89 DIBP, *Submission 3*, p. 7.

90 EM, p. 24.

91 DIBP, *Submission 3*, p. 3.

92 IARC, *Submission 7*, p. 4.

93 IARC, *Submission 7*, p. 4.

94 MLP, *Submission 8*, p. 7.

95 LCA, *Submission 9*, p. 6.

a potential sponsor's police check to other parties to the application, would be a deviation from the current legal position in Australia, as detailed in these cases.⁹⁶

2.56 The Office of the Australian Information Commissioner (OAIC) noted that the right to privacy is not absolute and may give way where there is a compelling public interest reason, provided the solution implemented 'minimises the privacy intrusion to the fullest extent possible in the circumstances'.⁹⁷ Both the OAIC and LCA recommended undertaking a Privacy Impact Assessment (PIA) to determine the potential privacy impacts of the proposed framework.⁹⁸ Noting that the types of private information in question would be set out in regulations, the LCA argued that a PIA would serve as an 'additional safeguard and scrutiny mechanism'.⁹⁹

2.57 The Department advised that it had commenced a PIA during the early stages of drafting the amendment, but following a discussion with the OAIC a decision was made to defer the PIA and provide with the consequential amendments to the *Migration Regulations 1994*.¹⁰⁰

2.58 It explained that 'the fundamental aspect of the bill is trying to create transparency between the applicant, the sponsor and the department'.¹⁰¹ Mr Drummond of the DIBP noted that an Australian Criminal Intelligence Commission (ACIC) CrimTrac criminal history search only provides a list of convictions and no detail behind those convictions.¹⁰² He explained that if the Department found an issue in a sponsor applicant's criminal history they would start to engage with that sponsor to find out what the background was.¹⁰³ In terms of the procedure of sharing that information, Mr Drummond stated that:

[T]he sponsor would be well aware of the fact that we have the information and that they had been given the opportunity to comment, and part of that information exchange with these sponsors would be advising them that we will be passing the information to the visa applicant.¹⁰⁴

Committee view

2.59 The committee is of the view that the information sharing contemplated by the proposed amendments is both reasonable and appropriate considering the seriousness of conduct the amendments are designed to address. The committee encourages the DIBP to ensure that its staff has both the knowledge and training to assess both

96 LCA, *Submission 9*, p. 6.

97 Office of the Australian Information Commissioner (OAIC), *Submission 6*, p. 2

98 OAIC, *Submission 6*, p. 2; LCA, *Submission 9*, p. 6.

99 LCA, *Submission 9*, p. 6.

100 DIBP, *Answer to question on notice*, 5 October 2016 (received 7 October 2016).

101 Mr Hamish Hansford, FAS, ICPD, DIBP, *Committee Hansard*, 5 October 2016, p. 20.

102 Mr David Drummond, Director, VFR, DIBP, *Committee Hansard*, 5 October 2016, p. 25.

103 Mr David Drummond, Director, VFR, DIBP, *Committee Hansard*, 5 October 2016, p. 25.

104 Mr David Drummond, Director, VFR, DIBP, *Committee Hansard*, 5 October 2016, p. 25.

sponsor and visa applications on a case-by-case basis, and apply sound judgement in the handling of personal information.

Procedural fairness

2.60 A number of submitters raised questions about procedural fairness for both visa applicants and sponsor applications. CATWA stated that the proposed amendments would leave affected visa applicants without access to the legal resource which they can currently access where a visa application has been denied, or where family violence is deemed to have occurred.¹⁰⁵ The MLP agreed, stating that the bill's silence on the consequences for visa holders should the visa be cancelled:

...would leave the visa holder vulnerable to exercise of the general visa cancellation power, on the grounds that the circumstances for the grant of the visa no longer exist. It may be an unintended consequence of the Bill that [an] innocent person is liable for visa cancellation. Unless the person can make an application for another visa, they would be liable for detention and removal from Australia. This perpetuates the vulnerability of visa holders in family violence situations...¹⁰⁶

2.61 The IARC also argued that allowing for an approved sponsorship to be cancelled where there has been 'inappropriate use' of the program, or where a serious offence is detected, will punish the visa applicant for the conduct of their sponsor, as well as deterring applicants from disclosing serious offences out of fear that they will no longer have secure sponsorship.¹⁰⁷ The SCoA agreed, stating that this will likely have the opposite effect to that intended by the bill.¹⁰⁸

2.62 The LCA raised concern about an aspect of the family visa scheme which, despite not being the subject of proposed amendment, is central to the bill's intended purpose: situations in which family violence will be deemed to have occurred for the purpose of the family visa scheme. The LCA referred to situations in which a non-judicially determined claim of violence had been made and the minister had referred the matter to an independent expert. It stated that legal practitioners had made anecdotal comments about 'instances in which the DIBP has refused access to lawyers and migration agents during interviews between victims of family violence and independent experts'.¹⁰⁹ It argued that this constituted a 'denial of the victim's right to legal advice and assistance and possible subsequent prejudice', and noted that the expert opinions based on that process could later be relied upon by the Department in its decision-making.¹¹⁰

105 CATWA, *Submission 2*, p. 2.

106 MLP, *Submission 8*, p. 6.

107 IARC, *Submission 7*, p. 3.

108 SCA, *Submission 10*, p. 2.

109 LCA, *Submission 9*, pp 10-11.

110 LCA, *Submission 9*, p. 11.

2.63 Submitters also raised concerns about the capacity for past conduct to adversely impact a sponsor's application. In 2012 the then Department of Immigration and Citizenship (DIAC) itself submitted to the ALRC that regulating sponsorship could lead to 'a risk that Australian sponsors could be disadvantaged by previous conduct that occurred a long time ago'.¹¹¹ The LCA particularly questioned the way the proposed amendments would operate in relation to the Commonwealth Spent Conviction Scheme.¹¹² The Spent Conviction Scheme, contained in Part VIIC of the *Crimes Act 1914*, sets out the circumstances in which an offender does not have to disclose convictions for less serious offences.¹¹³ The LCA argued that 'a disclosure exception should apply to spent convictions unless there are reasonable grounds for waiving the exception'.¹¹⁴

2.64 The LCA argued that the bill should be amended to state explicitly that a person whose sponsor application has been refused will be able to appeal that decision to the Administrative Appeals Tribunal (AAT) for merits review.¹¹⁵ It highlighted the case of *Ahmed v Minister for Immigration and Border Protection* [2015] FCAFC 182, in which the Federal Court of Australia (FCA) held that a right of review can be affected by provisions contained in regulations.¹¹⁶ The LCA submitted that until the relevant regulations have been amended, it is not clear whether merits review will actually be available.¹¹⁷

2.65 The DIBP advised the committee that the only situation in which merits review is not available is where 'the minister makes a personal decision under a particular power of the Migration Act' and that this scenario is not contemplated in regards to this bill.¹¹⁸

2.66 A number of submitters agreed that the fact much of the substance of these amendments would be contained in regulations is problematic. As the DIBP stated, to implement the proposed framework, the *Migration Regulations 1994* would need to be amended to set out information including sponsorship approval criteria, the processes and terms for approval, sponsorship obligations, circumstances where the Minister can take action against a sponsor, and the kinds of personal information which may be disclosed.¹¹⁹ The MLP stated that

111 ALRC, *Family Violence and Commonwealth Laws – Improving Legal Frameworks*, ALRC Report 117, 2012, p. 507.

112 LCA, *Submission 9*, p. 7.

113 *Crimes Act 1914*, Part VIIC.

114 LCA, *Submission 9*, p. 7.

115 LCA, *Submission 9*, p. 8.

116 LCA, *Submission 9*, p. 8.

117 LCA, *Submission 9*, p. 8.

118 Mr Hamish Hansford, FAS, ICPD, DIBP, *Committee Hansard*, 5 October 2016, p. 27.

119 DIBP, *Submission 3*, p. 5.

It is most concerning to us that the Bill does not specify at all what the obligations of the sponsors might be, what the sanctions for breaching sponsorship are, or under what circumstances a person would have their sponsorship status cancelled or barred.¹²⁰

2.67 The OAIC stated that while setting out the definition of 'prescribed information' in regulations for the purposes of information sharing may provide future flexibility, greater certainty could be achieved about privacy impacts if more detail was contained within the bill itself.¹²¹

2.68 The DIBP explained that the migration framework provides the Department and the Minister with options for assisting visa applicants and visa holders who have been the victim of family violence. As set out previously in paragraph 2.8, Mr Hansford stated:

[T]here is potentially a pathway for people to a permanent visa because of their domestic violence issues. There is also potential for the department to provide individuals with bridging visas in circumstances, and of course there is ministerial intervention, where the minister can intervene in individual cases to give people visas to Australia in Australia.¹²²

2.69 The DIBP further explained that governing legislation is required in order to establish a level of detail in regulations, and noted that those regulations are disallowable instruments.¹²³

The committee's view

2.70 The committee is of the view that the bill would afford both visa applicants and sponsor applicants due procedural fairness. In relation to the availability of merits review, the committee notes that the EM states explicitly that where the DIBP refuses a sponsorship application, 'refused applicants will have access to merits review by the Administrative Appeals Tribunal.¹²⁴ The committee regards this as a sufficient assurance that relevant decisions will be appealable, except in the rare circumstances that the Minister makes a personal decision under the Act.

2.71 The committee also notes the recent *Migration Legislation Amendment (2016 Measures No. 3) Regulation 2016*, which provides detail as to the limitations on approval for sponsorship, including information about police checks and what constitutes a 'significant criminal record.'¹²⁵ The committee notes that the provisions of this regulation are consistent with the indications made by the DIBP in relation to the proposed family visa scheme.

120 MLP, *Submission 8*, p. 6.

121 OAIC, *Submission 6*, p. 2.

122 Mr Hamish Hansford, FAS, ICPD, DIBP, *Committee Hansard*, 5 October 2016, p. 26.

123 Mr Hamish Hansford, FAS, ICPD, DIBP, *Committee Hansard*, 5 October 2016, p. 29.

124 EM, p. 24.

125 *Migration Legislation Amendment (2016 Measures No. 3) Regulation 2016*, Schedule 6.

Impacts on the visa application process

2.72 A number of submitters raised questions about the addition of a new level of processing in partner visa applications, and additional costs incurred as a result. The Migration Institute of Australia (MIA) stated that the waiting period for a partner visa currently stands at a minimum of 12-15 months and may take up to 24 months to be determined.¹²⁶ It strongly disputed the claim that the financial impact of the proposed changes will be low and could be met with existing resources, stating that:

The processing times for partner applications are already extremely slow and a large backlog exists. Adding an extra application to the process for each couple, will add around 50,000 extra sponsor applications in to the process per year. It is difficult to understand how the DIBP can claim the processing of such a large number of extra applications will be able to be met within the financial constraints of its current funding. Partner applicants are already paying almost twice the fees of other permanent residency applicants and receiving far slower service.¹²⁷

2.73 The DIBP confirmed that it receives approximately 50,000 partner visa applications annually,¹²⁸ and advised that at 31 August 2016 there were 53,334 partner visa first stage migration applications on hand.¹²⁹

2.74 Ms Julian-Armitage of the MIA argued that the proposed amendments could have a significant impact on visa applicants who apply onshore:

If a person is onshore in a de facto relationship with an Australian resident or citizen, they will not be, as they are now, entitled to a bridging visa until such time as their visa application is assessed. They will not be able to acquire a bridging visa to allow them to stay in Australia lawfully. Consequently, they will be required to go offshore and have extensive periods of time where they will be separated, because that bridging visa will not be applicable to them.¹³⁰

2.75 The MLP argued that for Australian citizens to be separated from their partners for prolonged periods of time (particularly where their partner applies offshore) is especially unfair considering the recent 72 per cent increase of partner visa application fees.¹³¹ The BCO likewise argued that an important consideration in regards to appealable decisions is the cost and time of pursuing such an appeal.¹³²

126 Migration Institute of Australia (MIA), *Submission 5*, p. 2.

127 MIA, *Submission 5*, p. 4.

128 Mr Hamish Hansford, FAS, ICPD, DIBP, *Committee Hansard*, 5 October 2016, pp 21-22.

129 DIBP, *Answer to question on notice*, 5 October 2016 (received 7 October 2016).

130 Ms Angela Julian-Armitage, National President, MIA, *Committee Hansard*, 5 October 2016, p. 16.

131 MLP, *Submission 8*, p. 5.

132 BCO, *Submission 11*, p. 4.

2.76 The SCA submitted that apart from the longer processing times and potential higher costs, the addition of a new layer of application could also place a greater evidentiary burden on applicants and their families.¹³³

2.77 Both the MIA and MLP highlighted the difficulties individuals can face when their visa status is uncertain. The MIA noted that from July 2014 applicants whose immigration status in Australia has become unlawful for some reason can no longer lodge a partner application from within Australia. They must leave Australia and their family, make an application from offshore, and await the outcome.¹³⁴ It also stated that temporary visa holders awaiting a permanent visa application outcome can face hardship in the areas of employment, loan applications, and purchasing property.¹³⁵

2.78 The MIA recommended that if the proposed extra sponsor application were to be introduced, extra financial resources and staff be allocated to the relevant partner visas processing sections.¹³⁶ The MLP agreed that extra funding and resources would be required.¹³⁷

2.79 The DIBP explained that its experience to date of obtaining criminal history checks from CrimTrac has been positive, and that results have been returned swiftly.¹³⁸ Mr Drummond stated that an assessment for a sponsor applicant with no criminal history could take weeks.¹³⁹ Mr Hansford further explained that in situations where criminal convictions were found and put to the visa applicant, the processing time could vary:

It could range from a very short time where the applicant says, 'Yes, I'm aware of those convictions and situation and I'm fine.' That scenario would be quite quick, whereas in another scenario for an applicant it might take a range of weeks to consider the offences and whether they would weigh the decision to put forward an application against those particular issues. It is a matter for an individual.¹⁴⁰

2.80 Mr Hansford also noted that, depending on the types of criminal convictions present on a sponsor applicant's criminal record, the Department may make further inquiries such as contacting the relevant police force for more information.¹⁴¹

133 SCA, *Submission 10*, p. 2.

134 MIA, *Submission 5*, p. 3.

135 MIA, *Submission 5*, p. 3.

136 MIA, *Submission 5*, p. 4.

137 MLP, *Submission 8*, p. 5.

138 Mr Hamish Hansford, FAS, ICPD, DIBP, *Committee Hansard*, 5 October 2016, p. 21.

139 Mr David Drummond, Director, VFR, DIBP, *Committee Hansard*, 5 October 2016, p. 24.

140 Mr Hamish Hansford, FAS, ICPD, DIBP, *Committee Hansard*, 5 October 2016, p. 28.

141 Mr Hamish Hansford, FAS, ICPD, DIBP, *Committee Hansard*, 5 October 2016, p. 30.

Committee view

2.81 The committee commends the efforts of the DIBP in seeking to address family violence where it intersects with the Australian family visa program. The committee notes that various issues which were raised in the course of this inquiry, and believes that provided those concerns are noted by the relevant agencies, the proposed amendments do have the capacity to help improve the welfare and safety of (primarily) women and children who are new to Australia.

2.82 The committee notes the concerns about the capacity of the proposed amendments to combat family violence, and the fact that the impact will be limited because the proposed amendments relate only to particular classes of visa. Nevertheless, the committee believes the proposed amendments will have a positive impact on the visa applicants in relation to whom it will operate.

2.83 On this basis, the committee recommends that the Senate pass the bill.

Recommendation 1

2.84 The committee recommends that the Senate pass the bill.

**Senator the Hon Ian Macdonald
Chair**

