Committee Secretary
House of Representatives
Standing Committee on Social Policy and Legal Affairs
PO Box 6100
Parliament House
Canberra

23 July 2020

Dear Committee Secretary

We welcome the opportunity to make a submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs 'Inquiry into Family, Domestic and Sexual Violence'.

We work with people seeking asylum, most of whom hold bridging visas and are therefore ineligible for most forms of social support including COVID-19 safety nets, many of whom also face the double disadvantage of being victims of family and sexual violence. Our submission highlights how our clients, many of whom have pre-existing backgrounds of torture and trauma in their countries of origin then also often face very specific and concerning barriers to accessing legal, social and economic protection against family violence and sexual exploitation in Australia.

Many of these barriers are not only caused by general social or economic disadvantage they face, but rather emanate directly as a consequence of migration law and policies, which intentionally place people in situations of status insecurity and acute social and economic hardship in order to deter them from pursuing their asylum claims in Australia. Most of our clients who are victims of family violence are ineligible for any form of income or housing support and may not even have access to Medicare or emergency accommodation in women's refuges and shelters.

Our submission highlights the lack of coherence in federal government policy which one hand, seeks to provide better protection, especially of women and children, from family and sexual violence, but on the other, creates migration law systems which make victims of family violence who hold bridging and other temporary visas much more vulnerable to such abuse and less able to access effective state protection from such violence. Some victims face dire consequences for reporting family violence such as consequential cancellation of their visas and deportation from Australia due to the perpetrator's acts.

Such incoherence cannot be addressed unless overarching national goals to effectively tackle family and sexual violence are prioritised and elevated above conflicting migration-related goals which need to be brought into alignment to achieve any effective protection from family violence for these victims.

Please feel free to contact me on kon.k@asrc.org.au. We would welcome the opportunity to appear before the Committee.

Yours faithfully

Kon Karapanagiotidis OAM
CEO Asylum Seeker Resource Centre

Introduction

Founded in 2001, the Asylum Seeker Resource Centre (ASRC) is a place and part of a movement. We are Australia's largest independent aid and advocacy organisation for people seeking asylum and refugees, supporting and empowering people at the most critical junctures of their journey. We are a multi-disciplinary centre which provides an integrated legal service model including counselling, health services, emergency assistance, food, employment, education and other empowerment services intended to holistically address the needs of each person seeking asylum through internal referral in our 'one stop shop' model of wrap-around support.

The ASRC's Human Rights Law Program (HRLP) runs a Gender Clinic and provides other specialised legal representation to people seeking asylum whose refugee claims are based on a fear of gender-based violence including family violence (often experienced in Australia as well as feared in the home country), sexual exploitation, abuse or trafficking, or fear of persecution due to their sexual orientation or gender identity. We work exclusively with people seeking asylum and refugees, most of whom are on bridging or other temporary visas, many of whom also face the double disadvantage of being victims of family and sexual violence. The specialisation provided by the Gender Clinic within our law program gives us particular insight into the complex intersectional challenges faced by people facing acute hardship as asylum seekers, who are also victims of family and sexual violence.

Overview of concerns: toxic mix of family violence and seeking asylum

Our submission highlights how our clients face very specific and concerning barriers to accessing legal protection from family violence and sexual exploitation. Many of these barriers are not only caused by general social exclusion or economic disadvantage, but rather emanate directly as a consequence of migration law and policies, which intentionally place people in situations of visa status insecurity and acute social and economic hardship in order to deter them from pursuing their asylum claims in Australia.

There is a clear lack of coherence in Government policy, which on one hand, seeks to provide better protection to all people in Australia from family and sexual violence, but on the other, carves out groups of victims, most of them being women and children, who cannot in effect access this protection due to migration policy overlays. Government policy deliberately places people seeking asylum under acute legal, social and economic pressure to dissuade them from pursuing their claims in Australia. Not only due these privations fail to achieve their stated objective of dissuading protection visa applicants from pursuing their claims in Australia, they also cause immense human suffering and make women and children on bridging/temporary visas much more vulnerable to family and sexual violence, and less able to access help. It is imperative that the impacts of migration law and policy on family violence victims are carefully examined so that they can then be brought into alignment with overarching national goals to effectively tackle family and sexual violence, irrespective of the visa status of the victims. The failure to do so in effect would amount to a continuing denial of such victims' basic human rights to equality before Australian law and equal access to state protection.

There are many protection visa applicants who have or are experiencing family violence, either in their country of origin, in Australia, or both.[1] However, for those protection visa applicants who experience family violence in Australia, seeking safety here comes with complex additional challenges. This is because some aspects of current law create specific disincentives for people seeking asylum to report family violence, as reporting can result in the cancellation or refusal of the victim's own visa and those of her children. In addition, the refugee determination process as a whole is largely blind to the barriers faced by family violence victims to engaging in the process on an equal footing as other applicants. Physical, financial, emotional or sexual abuse can hinder a person's participation in the visa application process, yet decision makers have inadequate sensitisation, tools, powers and guidelines for taking family violence into account, or for making necessary adjustments to ensure that family violence victims are not disadvantaged and that they are granted the protection they are entitled to. In addition, decision makers often fail to give proper weight to assessing the effectiveness of state protection from family or other gender-based violence provided in the applicant's home country; another way in which family violence victims can slip between the cracks and be denied the protection they may be owed by Australia.

[1] Family violence can form the basis of a person's claims for protection under the Refugee Convention and the *Migration Act 1958* (Cth) but only if the claimant can show that they cannot be effectively protected from family violence in their home country and that they face a real chance of serious harm as a result.

Summary of recommendations

1. *Strengthen legal protection and visa security for victims of family violence by:*

- Expanding and strengthening the existing family violence provisions available to some partner visa categories to protect all temporary visa categories
- Creating a new subclass of temporary visa to protect victims of family violence who have their visas cancelled as a result of the actions of the perpetrator, or are dependents on a visa/application but cease to be a family member of the perpetrator.
- Amending the *Migration Act 1958* (Cth) to prevent 'consequential visa cancellation' where a victim of family violence has their visa cancelled due to the domestic violence perpetrated against them by the primary visa holder.
- Amending the *Migration Act 1958* (Cth) to include an overarching guiding principle that all decisions taken under the Act will guarantee family unity in compliance with Australia's international obligations to ensure that victims of family violence and their children are not separated through removal, having received different visa outcomes.

2. *Strengthen laws and policies regarding assessment of family violence claims by:*

- Issuing guidance to primary and merits review decision makers regarding assessment of family violence claims giving greater weight to country information evidence limited state protection in practice, challenges for victims in documenting family violence overseas and as an 'acceptable reason for delay' in putting forward claims or applying for work rights.
- Amending Ministerial guidelines to include grounds of family violence and protection of family unity as grounds for intervention and to include all protection visa applicants.
- Abolishing 'Fast Track' processing of some protection visa applications in its entirety, or if not, re-channel 'Fast Track' applications where issues of family violence are raised, to the ordinary statutory refugee determination process.

3. *Allow flexibility in timelines and process to take into account barriers caused by family violence by:*

- Amending laws and policies to provide discretions for valid 'out of time' lodgement or reinstatement of applications for review or for extensions of time for other visa processing deadlines.
- Creating a waiver for victims of family violence to the requirement for third party consent to access documents in their own file under FOI.
- Reviewing the impact of the shift to online visa applications on family violence victims including protection of their confidentiality and ability of abusing partners to control visa application processes.
- Creating an exception to the Departmental requirement that a residential address is required to lodge a valid protection visa application, where the applicant is in crisis or temporary accommodation.

4. *Provide adequate social support by:*

- Providing time-limited access to Special Benefit for those family violence victims who are seeking asylum; amending criteria for Status Resolution Support Service (SRSS) to include family violence as a ground for eligibility, and restoring SRSS to all family violence victim/families already cut off.
- Amending law and policy to provide a bridging visa by right with work rights, Medicare and study rights to all protection visa applicants who experience family violence in Australia at all stages of the refugee determination process.
- Providing targeted 'top up' funding to women's safe houses and refuges when they provide services to women and children who are seeking asylum.
- Provide free specialised legal assistance (through the *National Partnership Agreement on Legal Assistance*) to all protection visa applicants who face family violence either in Australia or their home country, at all stages of the refugee determination process.

Background

Victims of family violence who are also seeking asylum in Australia, face a myriad of additional barriers and challenges both throughout all stages of the protection visa application process, as well as in family violence and family law processes. This is because there is no coherence in the policy objectives of both migration law and family violence protection systems. In essence, there is currently no commitment to elevate Government policies to protect people from family violence as the overarching priority above other Government policies to discourage people from seeking asylum or pursuing their claims from within Australia. In addition, the refugee determination (protection visa) process is largely blind and unresponsive to the additional, sometimes life threatening challenges faced by asylum seekers experiencing family violence in Australia.

On top of these pre-existing challenges, the current health pandemic has further worsened the situation due to exclusion of temporary visa holders from all Federal Government COVID-19 support packages, rendering many more people seeking asylum homeless, destitute and forced onto the street or into insecure accommodation where they face much higher risks of physical and sexual violence. In addition, for those who do have stable accommodation, lockdown policies requiring people to stay at home during COVID-19 has increased anxiety and stress in families already very stressed by experiences of previous trauma, the harsh asylum seeker process, economic hardship, and insecure and cramped housing, which all combine to further increase the risk of family violence occurring.

Lack of support and accessible information in relevant languages on family violence protection mechanisms, prevent victims from seeking help. In addition, there is a dire lack of free specialised legal assistance to help those on bridging visas to navigate their specific visa issues, namely, the challenge of seeking protection from family violence without jeopardising their longer term protection needs and visa status. Unfortunately due to current laws, victims of family violence who are seeking protection in Australia may find themselves in the invidious position of having to choose between their immediate need for protection from family violence versus their longer term needs for visa security and safety from being forced to return to countries where they would face persecution and other serious harm.

The majority of our clients seeking asylum who have experienced family violence are women and children. While they demonstrate incredible resilience, they also typically have many vulnerabilities due to previous experiences of sexual abuse and/or family violence, human trafficking, underage or forced marriage, female genital mutilation or persecution due to their sexual orientation or gender identity in their home countries. They are often women who have been brought to Australia by their partners or other family members with little to no understanding of the dangers and circumstances that lead to them leaving their country of origin. Often their children have been born in Australia but still have no secure visa status, which still depends on the visa status of the mother and the father. Women are often 'kept in the dark' and are simply added as dependents on a Protection Visa application once in Australia. Many of them have never had experience in navigating legal or bureaucratic processes or advocating for themselves. They typically lack knowledge of the content of their visa application and the process.

Family violence and these other types of gender-based violence feared in the country of origin can form the basis of a person's claims for protection under the Refugee Convention and the Migration Act providing there is strong evidence of ineffective state protection available in that country and where the harm feared meets the threshold of 'serious harm'. Similarly, a person who has suffered family violence in Australia and, as a result, faces severe discrimination, hardship, or further family violence if returned to their home country, can also seek protection in Australia on that basis.

For protection visa applicants who are experiencing family violence, seeking safety from family violence in Australia comes with complex additional challenges. The current law creates major disincentives for people seeking asylum to report family violence, as reporting can result in the cancellation or refusal of the victim's own visa and those of her children. As a whole, the refugee determination process is largely blind to the effects of family violence on protection visa applicants. Physical, financial, emotional or sexual abuse can hinder a person's participation in the visa application process in many ways, yet decision makers have inadequate tools, powers and guidelines for taking family violence into account, or for making necessary adjustments to the application process.

1. Lack of legal protection from adverse visa consequences resulting from family violence

1.1 Need for expansion and strengthening of existing 'family violence' Migration Regulations

Under current law, holders of (or applicants for) partner, prospective spouse or distinguished talent visas can still be granted or retain permanent visas if their relationship with their partner sponsor breaks down due to family violence. The family violence provisions enabling this were introduced into Schedule 2 of the *Migration Regulations 1994* in recognition that victims of family violence should not feel compelled to remain in violent relationships by fear that their visa will be refused or cancelled if they leave. However, these provisions are only available to a very narrow cohort of victims/survivors of domestic, family and sexual violence. They do not cover people on bridging visas, including protection visa applicants, as well as others.[2]

The consequence of this regime is that we currently have two classes of family violence victims who have varying levels of legal protection based on their visa status: the minority who can potentially access family violence provisions and preserve their right to a visa despite breakdown of a relationship caused by family violence, and the majority, who cannot, and are much more likely to remain exposed to ongoing risks of family violence. Those who cannot, are often left with the only option of applying for protection visas where they must establish they are owed protection obligations as a refugee or under complementary protection provisions, which is a very difficult threshold to meet and can take up to a decade in processing time, leaving victims on bridging visas with no support for a protracted period.

Where a relationship between protection visa applicants breaks down, the family's combined visa application is split into individual applications for each adult (with dependent children often remaining on the mother's application). Each adult applicant must then separately demonstrate that they satisfy the definition of a refugee, whereas if the family remains together, only one person needs to meet that threshold. Where a family's reason for fleeing their country of origin relates primarily to the persecution of one person, another family member's application will be much weaker on its own, and is likely to be refused if she has no claims specific to her own circumstances. This can encourage women seeking asylum to remain in violent relationships rather than compromise the family's visa application, which could result in them losing the opportunity to remain in Australia and expose them to risk of deportation. Consequently, many women and their children remain exposed to ongoing abuse in Australia.

For victims of family violence, there are even lower prospects of obtaining a visa if a relationship breaks down in the later stages of the determination process. At the merits review stage, there are often penalties or restrictions on raising new claims or information. At the judicial review stage, it is not possible to raise new claims or separate visa applications at all. For these reasons, it is essential that laws and policies are changed to ensure that dependent family members face no visa status disadvantage due to breakdown of the family unit due to family violence, and should the primary visa applicant be granted protection, then other former 'dependents' on his application should also be granted protection visas.

Case Study: Impact of family breakdown caused by family violence on victims' visa status

Mya* is a Burmese woman married to Kyl*, a stateless Rohingya man. Their village in Rakhine state in Myanmar was attacked and they were forced to flee. They arrived in Australia by sea and are subject to the 'Fast Track' process. Kyl lost his labouring job and began drinking. He started verbally abusing and controlling Mya, not letting her see her friends and only allowing her to work from home. The violence worsened and became physical in nature. Mya approached our office seeking advice about the implications for her protection application and her future visa status if she seeks an intervention order or separates from her husband.

Mya is ethnic Burmese and has significantly weaker claims for protection than her Rohingya husband. Under current law, her application for protection will be more likely to be refused if she separates from her husband

[2] Including 457 spouse visas; student visas; people whose temporary visas ae cancelled due to actions of the perpetrator; or those who breached conditions of their temporary visa due to domestic abuse; or who are no longer 'dependent' or have ongoing family court matters related to children, and many other circumstances.

as she will no longer be considered a dependent on his application, and will not be granted a visa when he is granted a visa. Instead, she would need to put forward her own claims and be able to establish that she is owed protection in her own right. There would be higher chance that her and her children's visas will be refused. Therefore we cannot reassure Mya that her visa status will not be adversely affected by her leaving the violent relationship.
We also have to advise her that even if she stays with him but seeks an intervention order requiring him to cease his violence towards her, or if he were to breach this order, this could trigger a process where the Department may seek to cancel her husband's visa on character grounds due to him having breached the intervention order or committed offences of family violence against her. If his visa is cancelled, her visa, and her children's visas will also be cancelled even though she has been the victim of these crimes. Mya decides that she will try to stay in the violent relationship and not seek an intervention order in order not to jeopardise her visa status in Australia.
*All names and other identifying details changed in case studies to protect client confidentiality.

1.2 Need for legislative amendments to end 'consequential visa cancellation' for dependents

A further disincentive to temporary visa holders reporting family violence is the risk of visa refusal or cancellation on character grounds. This has become an increasing concern with the progressively draconian amendment of laws lowering the thresholds for visa cancellation on character grounds.[3] These ill-thought through provisions can have manifestly unjust consequences for victims of family violence, including giving the perpetrator more leverage and control over victims by threatening adverse consequences for their visa status if they report family violence.

Unfortunately these kinds of threats by perpetrators are not only bluff. If, for example, a woman seeking asylum (or a third party) reports family violence by her husband, his visa may be cancelled or refused for failing the character test. This can be on the basis there is an intervention order (IVO) against him or charges relating to a breach or other crime of domestic violence, including even if he is ultimately acquitted or receives no conviction or receives a non-custodial sentence. The point being that it is not only very serious crimes of family violence which can trigger visa cancellation, but any engagement with the family violence protection system whatsoever can now be sufficient to trigger such cancellation.

If the perpetrator is the primary applicant or visa holder and his visa is cancelled, then under current law the visas of the dependent wife and children will also be consequentially refused or cancelled, despite those family members being the victims of the behaviour that triggered the cancellation decision. This means that a wife and child who have suffered family violence will have their visas cancelled and they will be removed from Australia together with the perpetrator. This creates a perverse situation where victims of family violence are in effect punished for seeking help to address the violence committed against them. It also creates an impossible conflict of interest, as the prospect of losing their visa and that of their children deters victims of family violence from seeking the essential protection from violence that they need, exposing both women and children to ongoing risk.

This situation where victims face adverse legal consequences for reporting family violence is completely out of step with national initiatives to encourage reporting and use of available legal mechanisms to provide victims of family violence with effective protection, irrespective of their visa status. Due to the operation of cancellation provisions, we find ourselves unable to reassure victims of family violence that their migration status will not be disadvantaged because they have sought help and protection from family violence.

What is urgently needed to address this incoherent legal framework is for a separate provision be included in the *Migration Act 1958* (Cth) to afford legal protection from visa cancellation to victims of family violence who are dependent on the visa of a person whose visa has been cancelled on that basis. We further recommend that amendments be made to s140 of the Act, which provides for 'consequential cancellation' of the visas of dependents where the primary applicant's visa has been cancelled under section 109 (incorrect information), s116 (general power to cancel), s128 (when holder outside Australia), s133A (Minister's personal powers to

[3] In 2014 the *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth) was introduced which substantially lowered the failure threshold of the character test and expanded the Minister's powers to cancel or revoke an individual's visa. See also *Migration Amendment (Strengthening the Character Test) Bill 2019* which sought to further broaden the scope of visa cancellation processes through 'designating offences.

cancel visas on section 109 grounds), 133C (Minister's personal powers to cancel visas on section 116 grounds) or 137J (student visas).

It is inherently unfair that a person who has themselves done nothing wrong, should have their visa cancelled, due only to the acts of the primary applicant, triggering the cancellation of their visa. We have represented clients in this situation, where the wife and child of the primary applicant, whose visa was cancelled on character grounds, also had their visas consequentially cancelled. Ironically, even after the primary applicant overcame the character issue and later had his visa reinstated, this did not result in the wife and child's visas also being reinstated. This required a further appeal process in order to achieve reinstatement of the wife and child's visas, and then an argument with the Minister's representatives regarding who should bear the costs for that process.

It must surely not have been the intention of the legislature to ignore a basic tenet of justice, being the principle of individual responsibility, by punishing innocent family members for the crimes of their relatives. These 'consequential visa cancellation' provisions of the Migration Act requires urgent amendment to prevent this ongoing injustice.

Case Study: Threat of visa cancellation prevents victim from reporting family violence

Maryam* arrived in Australia 2 years ago as a dependent on her husband. Abdul's student visa. Shortly after arriving in Australia, Abdul started physically, verbally and emotionally abusing Maryam. When Maryam threatened to go to the police in Australia, Abdul told her that if she did that he would have her visa cancelled and she would be detained and sent back to Bangladesh.

Case Study: Perpetrator's violence results in consequential cancellation of dependent victims' visas

Anvi* is a national of India. She travelled to Australia as a dependent on her husband's visa with their three children. A few months after arriving in Australia, their daughter began a relationship with a boy at school. The client's husband discovered this while he was overseas on a business trip. He sent text messages to his wife (our client) threatening to kill her and the children. He also threatened to have them sent back to their home country. When he returned home, he assaulted the daughter and the client for not maintaining proper discipline over their children.

Anvi's husband was charged with domestic violence offences against the wife and daughter. As a result of these charges, the Department cancelled his visa under section 116 of the Migration Act, on the basis that he posed a risk to an individual or individuals in the Australian community. As the wife and children were dependents on his visa, their visas were automatically cancelled by law under section 140 of the Act. The Department of Immigration has reached out to these family members in order to advise them of their immigration options, but at law can only grant them Bridging Visa Es while they await the outcome of any subsequent visa application.

2. Blindness of the refugee determination process to the effects of family violence

Below are some further examples of how Australia's refugee determination processes fail to take into account the effects of family violence on applicants, resulting in serious disadvantage or exclusion from the process and which can result in them remaining exposed to family violence or being deported to other countries and facing family or sexual violence there.

2.1 Difficulties accessing legal assistance

Many victims of family violence who are asylum seekers struggle to access specialist migration legal assistance. Often their partners control and monitor their movements, making it difficult for victims to attend appointments without putting themselves at risk. Partners may also control family income, limiting victims to free legal services, which are in short supply due to drastic cuts to government funding for legal services for people seeking asylum. A legal service may be unable to assist a victim after separation due to a conflict of interest if they have previously represented the family, which further limits the services available to victims.

2.2 Bridging visa chaos: The struggle to survive over the many years of visa processing

Refugee determination processes typically take several years, up to a decade, to be finalised and victims of family violence must cope with years of living on temporary bridging visas with no certainty about their future. People seeking asylum are already amongst the poorest and most socially excluded in our community due to their ineligibility for Centrelink and recent Government cuts to the meagre Status Resolution Support Services (SRSS) payments, which have rendered many vulnerable families ineligible. During the current pandemic environment these concerning issues of social inequality have been further exposed and compounded by Government decisions to exclude those on temporary visas from Government safety nets during this period, making it especially difficult for people on temporary visas to even subsist.

Those on bridging visas, including most people seeking asylum, form an even more vulnerable sub-set within the already at-risk 'temporary visa' category. Within this subset, victims of family violence are at the 'rock- bottom' of this hierarchy with soaring levels of vulnerability. This is because their access to critical entitlements, such as work rights, Medicare or SRSS, depend on three further factors: the type of bridging visa held by a person seeking asylum; the conditions attached to their bridging visa; and also often the stage they are at in the refugee determination process. No account is taken of their needs based on their experiences of family or sexual violence in determining the conditions on their bridging visas.

For those without work rights, an application for permission to work will only be granted if the applicant can show both financial hardship and an 'acceptable reason' for any delay in the lodgement of their protection visa application. The Department of Home Affairs ('the Department') has no policy recognising family violence or vulnerability to economic or sexual exploitation as a valid reason for delay in lodging a protection visa application. Even where compelling evidence of family violence is put forward (Intervention orders, police reports and medical evidence), victims are often still refused work rights.

Case study: Manita: Lack of work rights leads to continuing economic and sexual exploitation

Manita* is a 26 year old woman from Malaysia. As a child, she was sold into debt bondage by her father to settle a business debt. She suffered physical and emotional abuse for many years as part of that debt bondage arrangement. The Malaysian authorities were unwilling to assist her due to her ethnicity and corruption. To help her escape this horrific situation, her mother assisted her to travel to Australia on a temporary visa.

She was sent to live with an acquaintance of her mother in regional Victoria where she was forced to work for the family in exploitative conditions. Her passport and other documents were taken from her and an application for a Protection visa was lodged on her behalf without her being given the opportunity to express her true claims for Protection. She was subsequently granted a Bridging visa C with no work rights and, as a result of being unable to lawfully work, felt trapped. After over a year living in these conditions she fled and obtained work on a fruit farm, also in regional Victoria, where she faced further exploitation including sexual exploitation. She felt unable to leave this farm and approach authorities or support organisations for assistance due to her immigration status as a person with no right to work.

It has only been through extensive assistance provided by the Human Rights Law Program at the Asylum Seeker Resource Centre to assist her with an application for Work Rights that Manita has been able to begin lawful work. Without this legal assistance, it is unlikely Manita would have been able to navigate the difficult processes involved in requesting work rights and she would have remained highly vulnerable to further exploitation and abuse.

The other consequence of denial of work rights is that it also means they have no access to Medicare, leaving some victims of family violence in the alarming situation of being without access to health care during a pandemic, also creating wider community health risks. Some family violence victims who had work rights at an earlier processing stage may then lose them if they proceed to seek review of their decisions in the courts. Therefore large numbers of family violence victims whose cases are at the judicial review stage may have no work rights or access to Medicare. In addition, some who hold bridging visas for set periods, rather than linked to a particular stage of visa processing, have struggled to apply for renewal within relevant time frames due to the COVID 19 movement restrictions, and have consequently become unlawful.

For those at later stages of the refugee determination process, the grant of a bridging visa is at the Minister's personal discretion. In recent times, the Minister is choosing to grant bridging visas less frequently, and more victims of family violence and their children are left without any visa through years of court processes. Without a visa, these families have an unlawful status and are liable to mandatory immigration detention and removal from Australia, even if they have an ongoing case before the courts. While in practice, the Department does not comply with the law to detain every person without a visa, however people in this situation still live in constant fear that they may be detained if they come to the attention of authorities, including if they seek protection from family or sexual violence.

This obviously acts as a further deterrent to victims of family violence who have no visa status from seeking police protection, as approaching the police may trigger their detention and removal from Australia. Without a bridging visa, victims also have no work rights, no access to Medicare, and their children cannot attend public primary or secondary schools, also affecting fundamental child rights to education.[4]

In effect, those denied bridging visas are consigned to an underclass existence. They cannot complain about their treatment, seek to enforce their rights or even enrol their primary school-aged children in public schools, without risking being detained and removed from Australia. This makes them particularly vulnerable to economic and sexual exploitation, especially during a pandemic which has caused mass unemployment and made life for those on the margins all the more precarious and difficult.

2.3 Barriers to accessing family violence services including women's safe houses and refuges

Despite increased government funding, there remains a major shortage of emergency and ongoing secure accommodation for victims of family violence and their children. Women's safe houses and refuges can provide accommodation only for limited periods and after that, more sustainable accommodation arrangements need to be made and usually paid for by the victim.

As many people seeking asylum have no eligibility for government support, no work rights and no other source of income, they have no capacity to pay rent and therefore cannot be readily transitioned out of emergency/short term housing into more durable housing. This results in them frequently staying well beyond the standard accommodation periods. Refuges are also often required to provide asylum seeking women and their children with day to day essentials, as they frequently lack even the most basic requirements regarding toiletries, clothing and help with public transport costs. In addition, women's safe houses may struggle to absorb the additional costs of providing interpreting services and accommodating food and other cultural preferences needed to properly support asylum seekers. In short, women's safe houses and refuges cannot possibly manage the additional financial burden these needs create, making the few available refuge places not easily accessible for women asylum seekers with no income. In addition, women's safe houses and refuges also struggle to accommodate larger families and cannot admit families with boys older than 16 years.

Because of all these difficulties in accessing refuge-type accommodation and their lack of income, many women in this situation end up with homelessness agencies, or worse, on the street, sometimes also with their children. This has become a critical situation, especially during the pandemic period when many charities such as to the ASRC have been simply unable to meet the sky rocketing levels of need for housing, food and other essentials. Due to lack of targeted resourcing, at present, many women and their children who are seeking asylum are in effect unable to access family violence services. This needs to be urgently addressed through targeted funding so that services can assist typically, destitute asylum seekers.

Alternatively, victims of family violence without income often have no choice but to remain cohabiting with a violent partner, trapping both the victim and often her children at very high risk of continuing violence. The problem of having no support and no safe housing can also result in breaches of intervention orders creating new legal problems for both parties, which again become problematic, especially if the family do end up remaining together in their migration process and the perpetrator is also an asylum seeker, resulting in possible cancellation on character grounds of any eventual visas they may secure. Breaches of intervention orders due to destitution and lack of support for victims not only impact individual victims but also clearly undermine the application of the rule of law as well as the public purpose and utility of intervention orders.

[4] See Article 28(1)(a) of the *Convention on the Rights of the Child* recognizing the right to primary education which is 'compulsory, free and available to all.'

Case study: Lack of support results in continued cohabitation with perpetrator and breaches of orders

Leila* experienced violence by her husband before they came to Australia. She travelled to Australia in 2013 after her husband abducted their two children to Australia and hid her passport. The client reunited with her husband in Australia and they lodged a joint protection visa application together, but as a result of family violence the relationship broke down. The joint protection visa application was refused, and so Leila and her former husband both lodged separate applications at the Administrative Appeals Tribunal.

A 2015 Family Law order granted the client with primary responsibility for the children with some time to be spent with the father. At the end of 2019, the client moved back in with her husband because she could not afford to support herself and her two children on her own. She and her former husband now lie together in breach of the Family Law Order. As soon as the client moved in with her ex-husband she wrote to the Department of Immigration and Centrelink to inform them of her change in residential address, as she is obligated to do under the Migration Act. She informed Centrelink that she had not reconciled with her ex-husband, but was purely living under the same roof as him out of necessity in order to meet her living expenses. As a result of this information, the client's SRSS payments were cut off because she was deemed to be part of her former partner's family unit and supported by his salary. The client cannot afford to look for new independent accommodation, and has a bag packed ready if she needs to flee the home with her children again. Because the client was previously receiving SRSS payments, she does not have work rights on her bridging visa E.

2.4 Difficulties accessing essential documents under Freedom of Information and barriers for victims remaining engaged in visa processing due to missed correspondence and missed deadlines

It is not uncommon for victims of family violence to have been brought to Australia by their partners with limited understanding of why they have fled their country of origin. Victims often lack knowledge about the content of their visa application and the legal process. Often their partner controls pertinent documents such as identity documents and copies of visa applications, or sometimes victims have to flee the family home without gathering such documents.

A protection visa applicant needs these essential documents in order to progress their case, especially if they have commenced a separate application to their former partner. However, victims are often unable to obtain copies of protection visa applications previously submitted on their behalf under Freedom of Information processes, or they are eventually provided but heavily redacted because the Department requires the consent of their partner to release the information. The person who is seeking access to the documents is responsible for obtaining the consent of the other person. Requiring a victim to make contact with the perpetrator of family violence, who may well refuse access to the file, is evidently problematic and simply not legally possible where intervention orders are in place.

Given the heavy emphasis in the refugee determination process on consistency of information, a victim of family violence who is unable to obtain a complete copy of the documents already submitted to the Department is at an enormous disadvantage as she continues with her separate application. Her prospects of securing a protection visa are greatly reduced, increasing the chances she will face removal to her home country, where she may well face gender-based violence and other forms of persecution.

Victims of family violence may experience interference with their postal mail or email by controlling partners and may be unable to receive communication from the Department or lawyers without putting themselves at risk. People seeking asylum who have left the family home due to violence are likely to experience periods of time without a fixed address, if they are moving between temporary accommodation or living in a refuge with a confidential address. Often controlling partners simply do not share any information about visa processes. In these situations, victims of family violence are at heightened risk of missing important correspondence about their case such as invitations to interviews, hearings or decisions on their application, all of which come with strict, usually non-extendable deadlines. Some statutory deadlines allow no discretion for extensions of time for any reason, including family violence. Even where authorities have discretion to extend a deadline, family

violence is not specifically recognised at a policy level as a ground for providing extensions of time.

Case study part 1: Difficulties accessing relevant documents under FOI, disadvantaging victims of family violence

A year after arriving in Australia Ahmad* informed Amala* that they could not return to Bangladesh but he did not explain why. One day Ahamd gave Amala some documents to sign, he did not explain what they were and did not read them to her. Amala does not read or speak English but was too afraid to question Ahmad or to refuse. About a year later Amala was able to escape from Abdul with the help of her neighbour. She has since obtained an Intervention Order (IVO).

Amala approached the Asylum Seeker Resource Centre (ASRC) for assistance. She did not know if she held a visa at this time, she did not have any documents, not even her passport which Ahamd kept locked away from her, as she had to flee from Ahmad's home quickly and without much notice. Without her passport we were unable to check what her current migration status is. We assisted Amala to complete a Freedom of Information request in order to access her migration file from the Department of Home Affairs (Department) but because Amala was a dependent on her husband's student visa, and it was suspected that she was included in his protection visa application, she required Ahmad's signature in order to obtain the documents. Amala was unable to obtain Ahmad's signature given the family violence and the IVO. This lead to a delay in the release of her documents.

Three months later, Amala's file was released but many of the documents were heavily redacted as they contained information relating to Ahmad. From the limited information available we were able to determine that Ahamd had lodged a protection visa application in which Amala was listed as a dependent.

Case study part 2: Victims miss legal process deadlines which are incurable

Further review of Amala's file indicated that Ahmad had not attended the scheduled interview in relation to the protection visa application nor had he informed Amala about the interview. The application had been refused and the notification letter had been sent to Ahamd as he was the primary applicant on the application. He had not provided Amala with a copy of the refusal notification and Ahmad did not lodge an application for review with the Administrative Appeals Tribunal (AAT) within the designated timeframe. Therefore, Amala was also not able to lodge an application with the AAT. The deadline for lodgement with the AAT is a statutory deadline and there is no discretion for the AAT to accept an application out of time, irrespective of the circumstances.

Amala now has very limited options in relation to her protection visa application or to otherwise remain in Australia. She must either apply to the High Court of Australia (HCA) for review of the primary decision, which is a very costly and complex process or she can lodge a request for Ministerial Intervention to request the chance to lodge a new protection visa application, which is only very rarely successful. Meanwhile, Amala's Bridging Visa has also expired and she is now unlawful. Without a bridging visa she is unable to work or access Medicare. Her ability to access housing support is also limited due to her unlawful status. She is living in insecure housing and is contemplating returning to her relationship with Ahmad as she does not know how she will support herself. She will likely be forced to return to Bangladesh with him when he either leaves Australia voluntarily or is deported.

2.5 Barriers caused by the approach taken to assessing family violence claims by visa decision makers

Decision makers in the refugee determination process are often poorly equipped to deal with claims relating to family violence. When considering claims based on family violence in the applicant's home country, the Department or merits review body (the Administrative Appeals Tribunal (AAT) or Immigration Assessment Authority (IAA) will first decide whether or not they accept the victim's account of having suffered family violence. Often victims do not have evidence of their experiences of family violence such as medical or police reports, images or witness statements. They may not have reported their experiences to police due to shame or fear of authorities. In the absence of evidence, decision makers often find that claims of family violence lack credibility, especially where the applicant has not had legal assistance in presenting their claims. Even when presented with judicially determined evidence of family violence in Australia, the Department or the AAT/IAA may conclude that

this is not sufficient to establish the occurrence of family violence. Adverse findings of credibility are often insurmountable and determinative to the victim's case.

Where the occurrence of family violence is accepted, the Department or the AAT/IAA will then assess whether the applicant would receive effective protection from family violence in their home country. This involves a review of laws, policies and services available to protect victims of family violence in the home country. More countries now have specialised laws to address family violence, but typically do not have resources nor capacity to robustly implement or enforce such laws. Often decision makers rely on the existence of such laws, or the existence of a small number of poorly resourced NGOs or shelters, to make findings that effective protection is available.

People seeking asylum under the so-called 'Fast Track' process have even fewer opportunities to put forward their claims and evidence. Some are denied access to any merits review process at all. Those who are eligible for review by the IAA usually have no opportunity for an interview and can only put forward further information 'in exceptional circumstances'.

2.6 Ministerial Intervention assessments and principle of family unity

The Minister has personal, non-compellable powers to intervene in individual cases involving 'unique or exceptional' humanitarian circumstances. The Minister has established Guidelines for exercise of these powers, which do not currently specify family violence or family separation as grounds for Ministerial intervention. Yet this is often the only power under which a victim of family violence can avoid separation from Australian citizen or resident children if her refugee case has failed. This is so even where she is the primary carer of those children.

Furthermore, 'Fast Track' applicants are not eligible to seek the Minister's intervention under this power, and have no remedy at all to the above circumstances. While Australia has ratified several human rights treaties which recognise the obligation to prioritise 'the best interests' of any affected child and their right not to be separated from their parents[5] and, separately, the right to family unity,[6] there are no overarching domestic laws to ensure that decisions of the Department or Minister comply with these rights, and this is an issue which arises more often in cases involving family violence.

Case study: Lack of legally enforceable rights to family unity, impact on rights of Australian citizen child.

Kamharida* is from Nigeria and had a long history of gender-based persecution including FGM as a child, then 15 years in a violent relationship, followed by sexual assault by another relative after she left her husband and sought shelter with extended family. After her arrival in Australia she applied for a protection visa on the basis that she would be at continuing risk of family and sexual violence if she was forced to return there. Her case was refused at primary and review stages because she was expected to be able to provide evidence (reports) that she had received medical treatment for her injuries and had reported the family violence she had experienced to the police. Her testimony was not considered sufficient and she was disbelieved and refused a protection visa. In the meanwhile, she met an Australian citizen and had a child with him. They later broke up due to family violence.

While her child is a recognised Australian citizen, Kamharida's only legal option at this stage is to request that the Minister intervene under non-compellable, discretionary powers to grant her a visa. Based on our experience in similarly compelling cases, this is unlikely to occur, and Kamharida may face the terrible choice

[5] Article 3(1) of the *Convention on the Rights of the Child* states that: 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'. Article 9(1) states that: 'States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.'

[6] Under international human rights law, the family is recognized as the fundamental group unit of society and as entitled to protection and assistance in Article 23(1) of the *International Covenant on Civil and Political Rights 1966* (ICCPR); and in Article 10(1) of the *International Covenant on Economic, Social and Cultural Rights* 1966 (ICESCR). The preambles to the *Convention on the Rights of the Child 1989* (CRC) and the *Convention on the Rights of Persons with Disabilities 2007* (CRPD) contain similar language. Australia has ratified all of these Conventions.

of having to leave her Australia citizen son in state care in Australia (as she is the sole carer of him and his father has no continuing involvement in his life), or take him back to Nigeria with her where he faces persecution as a mixed-race child born out of wedlock, who has a single mother who is herself at risk of further violence and lacks economic and social support. While Australia has ratified the *Convention on the Rights of the Child,* which requires state parties to make a primary consideration 'the best interests of the child' in any legal or administrative process that affects them and provides for a right not to be separated from parents against a child's will, there is no legal mechanism available for him to enforce his rights to remain with his mother in Australia or for her to be granted a visa on the basis that she is in effect the sole parent of an Australian citizen child and has a right to family unity.

3. Conclusion

This submission has highlighted some of the many barriers facing victims of family violence who are also seeking protection from Australia as refugees or under complementary protection provisions. A full analysis of the varied impacts of family violence upon those seeking protection in Australia highlights an urgent need for a range of legislative and procedural reforms to ensure that victims of family violence who are seeking asylum do not remain in a ghetto where they are denied legal protection from family violence, excluded from vital means of economic support and access to services, and disadvantaged or unable to remain engaged in the processing of their protection visa applications at all stages of the refugee determination process, resulting in them being denied protection from removal from Australia to situations of harm.

We urge the Committee to use the opportunity of this Inquiry to come to grips with the complex and deeply concerning interaction between family violence protection and asylum processes. These currently create enormous harm and suffering to those most vulnerable members of our community who in dire need of Australia's protection.

We strongly recommend that the Committee instigate a process of wide-ranging 'mainstreamed' changes as suggested, to bring policies and laws into alignment to address these critical gaps in our protection of family violence victims. These amendments would significantly assist victims of family violence facing barriers in seeking protection, both from family violence and from *refoulement* to countries where they may face persecution. Such amendments would go a long way to creating the much needed alignment of migration laws and policies with the overarching priority to ensure that victims of family violence who are asylum seekers can also secure protection from police and the courts when they need it, irrespective of their visa status. These proposed changes would also very likely enjoy strong community and stakeholder support.

4. Full recommendations

1. Strengthen legal protection and visa security for victims of family violence

1.1 *Expand the existing family violence provisions of Schedule 2 of the Migration Regulations 1994 to protect all individual who are dependent applicants who experience family violence and are on temporary visas* (including bridging visas and temporary protection visas). Protections should be built into time-of-decision requirements to ensure victims of violence who experience violence during a relationship that ends while a protection visa is being processed have access to that visa, in the same that Partner visa applicants currently do. Applicants can evidence family violence using the same mechanisms as already exist in the legislation.

1.2 The *existing family violence provisions should be further enhanced* to address limitations in their current effectiveness.

- Violence by other family members, including extended family and not only the intimate/sponsoring partner, should also be recognised by the Department as a basis for enlivening the family violence provisions.
- The Department should first assess whether family violence has occurred before assessing the genuineness of the relationship, reversing current practice. This is important because at present many women are unable to get over the first hurdle of establishing a genuine relationship because they were in arranged marriages or relationships which were abusive from the outset.

- The family violence provisions should be applicable while the abusive relationship is continuing and not only when it has ceased. We know statistically that ending an abusive relationship is the most dangerous stage and can lead to escalation of violence.
- Adequate financial and social support should be provided throughout the duration of visa processing stages as many women are financially dependent and lack support, making it impossible for them to leave the family home.

1.3 *Create a new subclass of temporary visa to protect victims of family violence* who have their visa cancelled as a result of the actions of the perpetrator, or hold a dependent visa, but cease to be a family member of the perpetrator. This visa could provide for a limited period (two years) in which a victim could make the necessary arrangements for their and their family's protection and security. The visa would not entitle the holder to a permanent visa, but would permit them to apply for any further visa for which they were eligible. It should retain for the holder work, study and social security rights.

This visa would provide significant and necessary relief to victims of family violence and allow them security and dignity in which to rebuild their lives. It would go some way to addressing the disincentives for women seeking asylum to reporting family violence, and would demonstrate Australia's commitment to condemning violence in all its forms, and particularly against women.

1.4 Amend the *Migration Act 1958* (Cth) to *include a provision providing legal protection from visa cancellation to victims of family violence who are dependent on the visa of a person whose visa has been cancelled.* Also amend s 140 of the Act, which provides for 'consequential cancellation' of the visas of dependents where the primary applicant's visa has been cancelled under section 109 (incorrect information), s 116 (general power to cancel), s 128 (when holder outside Australia), s 133A (Minister's personal powers to cancel visas on section 109 grounds), 133C (Minister's personal powers to cancel visas on section 116 grounds) or 137J (student visas).

1.5 Amend the *Migration Act 1958* (Cth) to include an *overarching guiding principle that all decisions taken under the Act will guarantee family unity in compliance with Australia's international obligations* to ensure that victims of family violence and their children are not separated through removal, having received different visa outcomes.

2. Reform laws and policies

2.1 Issue Departmental policy and AAT/IAA guidelines regarding the assessment of family violence claims within the refugee determination process directing decision makers to give greater weight to states' incapacity to provide effective protection from family violence in practice. The Guidance should also direct decision makers not to reject claims of family violence solely due to lack of objective evidence, and require them to take into account family violence as an acceptable and genuine reason for why a victim was unable to put forward comprehensive and consistent claims from the earliest possible opportunity.

2.2 Amend the *Guidelines for Ministerial Intervention* under s 417 of the *Migration Act 1958* (Cth) to include grounds of family violence and protection of family unity.

2.3 Amend the *Migration Act 1958* (Cth) to ensure Ministerial Intervention under s 417 is available to all protection visa applicants including 'Fast Track' applicants.

2.4 Amend Departmental policy on 'acceptable reason for delay' to include family violence as a recognised valid reason for delay when assessing applications for work rights on bridging visas.

2.5 Abolish Fast Track processing in its entirety, or if not, re-channel Fast Track applications where issues of family violence are raised, to the ordinary statutory refugee determination process.

3. Allow flexibility in timelines and process to take into account barriers caused by family violence

3.1 Amend s 412(1)(b) of the *Migration Act 1958* (Cth) to provide the AAT with a discretion to allow valid lodgement of an application for review beyond the 28 day period on grounds of family violence.

3.2 Amend s 426A of the *Migration Act 1958* (Cth) to provide the AAT with greater discretion not to dismiss applications for review where applicants fail to attend their hearing or apply for reinstatement of their case within 14 days, due to family violence.

3.3 In relation to other, non-statutory deadlines, introduce Departmental and IAA/AAT policy guidance to grant extensions of time if deadlines are not met due to family violence. Sometimes victims become homeless or have only emergency housing and do not have a stable address at which to receive their mail, or they may be unable to continue to afford internet access or phone packages to receive notifications by email or telephone. Other times violent partners interfere with victims' access to post and notification of decisions, resulting in them missing important hearings or deadlines.

3.4 Create a waiver for victims of family violence to the requirement for third party consent to access documents in their own file under the *Freedom of Information Act 1982* (Cth). This is needed because sometimes the victim cannot get access to her application under FOI or even know the basis on which her partner applied for protection because it contains the information of a third party, the perpetrator, who does not consent in order to maintain control over the victim's visa status and pathway.

3.5 Create an exception to the Departmental requirement that a residential address is required to lodge a valid protection visa application, where the applicant is in crisis or temporary accommodation.

3.6 Review the impact of the shift to online visa applications on family violence victims. Online visa processing can make it easier for the abusing partner to control the whole visa application process and creates higher risks that the perpetrator can access all the private details of the victim, which can put them at higher risk.

4. Provide adequate social support

4.1 Provide time-limited access to Special Benefit for those family violence victims who are seeking asylum.

4.2 Alternatively, amend criteria for Status Resolution Support Service (SRSS) to include family violence as a ground for eligibility, and restore SRSS to all family violence victim/families already cut off.

4.3 Provide targeted 'top up' funding to women's safe houses and refuges when they provide services to women and children who are asylum seekers.

4.4 Provide free specialised legal assistance (through the *National Partnership Agreement on Legal Assistance*) to all protection visa applicants who face family violence either in Australia or their home country, at all stages of the refugee determination process.

4.5 Amend the *Migration Act 1958* (Cth) to provide a bridging visa by right with work rights, Medicare and study rights to all protection visa applicants who seek protection on grounds of family violence or experience family violence in Australia at all stages of the refugee determination process, including judicial review and Ministerial requests.