

CHAPTER 2

Eligibility criteria

2.1 This chapter discusses the administration, application and effectiveness of the eligibility criteria for the Prospective Marriage visa program, including integrity measures, age differences, regard for cultural practices and relationship criteria.

2.2 The Prospective Marriage visa program has several eligibility criteria, which are set out in Part 300 of Schedule 2 of the Migration Regulations 1994 (Migration Regulations). Some of these criteria must be satisfied at the time of application, whereas other criteria must be satisfied at the time a decision is made in relation to the application.

2.3 At the time of application, for example, a Prospective Marriage visa applicant must establish that the parties genuinely intend to marry within the nine-month visa period (the marriage requirement).¹ In addition, the parties must have met and be known to each other personally,² and the Minister for Immigration and Citizenship (Minister) must be satisfied that the parties genuinely intend to live together as spouses (collectively, the relationship criteria).³ There is also a requirement for there to be no legal impediment to an applicant and intended spouse's marriage.⁴

Administration and application

2.4 Prospective Marriage visa applications are processed and decided offshore, usually in the applicant's home country or region of residence where the application was lodged.⁵ If an applicant does not satisfy all the eligibility criteria, the application will be refused.⁶

1 Migration Regulations 1994, Schedule 2, Part 300, clause 300.215.

2 Migration Regulations 1994, Schedule 2, Part 300, clause 300.214. It is departmental policy that the visa applicant and sponsor must have met as adults: see Department of Immigration and Citizenship, *Submission 2*, p. 7.

3 Migration Regulations 1994, Schedule 2, Part 300, clause 300.216.

4 Migration Regulations 1994, Schedule 2, Part 300, clause 300.221A-B. A legal impediment would include, for example, one of the parties already being married or not being of 'marriageable age' – 18 years-old – within the visa period.

5 Department of Immigration and Citizenship, *Submission 2*, p. 7. Also see Department of Immigration and Citizenship, answer to question on notice, received 7 June 2012, pp 7-8 describing for which country, or countries, each top 10 post is responsible for deciding applications.

6 Department of Immigration and Citizenship, *Submission 2*, p. 8.

2.5 In deciding whether a Prospective Marriage visa applicant satisfies the criteria and is eligible to be granted a visa, decision-makers use a range of assessment measures, including:

- evidence provided in support;
- scrutiny of the evidence provided;
- joint and/or separate interviews; and
- country/culture-specific risk matrices.⁷

Evidence provided in support

2.6 As part of the application, Prospective Marriage visa applicants must supply supporting documentation, which confirms their eligibility for a visa grant. For example: proof of identity and age; and evidence that the applicant and sponsor satisfy the marriage requirement and the relationship criteria.⁸

Procedures Advice Manual

2.7 Decision-makers decide Prospective Marriage visa applications using an internal policy manual called the Procedures Advice Manual (PAM). Some submissions to the committee's inquiry referred to PAM, with one submitter particularly commenting on the direction to decision-makers to assess the relationship criteria with reference to Regulation 1.15A.⁹ This regulation sets out the circumstances for assessing the genuineness of a spousal relationship.

2.8 Ms Jannaha Schillaci from Hall & Wilcox Lawyers stated that, in her experience, departmental officers frequently reject Prospective Marriage visa applications, citing concerns about the genuineness of the applicant and sponsor's relationship.¹⁰ The Department of Immigration and Citizenship (Department) acknowledged that this was a common reason for the rejection of applications¹¹ but submitted:

The primary focus for Prospective Marriage visa applicants is on their *intent* to live together as spouses.¹²

7 Department of Immigration and Citizenship, *Submission 2*, p. 7. In addition to the eligibility criteria, a number of integrity measures are contained in visa processing arrangements. For example, Regulation 120J (limitations on sponsorship) and 120KB (mandatory police checks and restrictions on child sex offences): see Department of Immigration and Citizenship, *Submission 2*, p. 22.

8 Department of Immigration and Citizenship, *Submission 2*, p. 21; Department of Immigration and Citizenship, *Partner Migration* (1127), p. 32.

9 See Ms Jannaha Schillaci, Hall & Wilcox Lawyers, *Submission 3*, p. 2.

10 See Ms Jannaha Schillaci, Hall & Wilcox Lawyers, *Submission 3*, p. 2.

11 *Submission 2*, p. 3.

12 *Submission 2*, p. 21.

2.9 Ms Schillaci pointed out, however, that the genuineness of an applicant and sponsor's relationship is not a criterion of the Prospective Marriage visa program under Part 300 of Schedule 2 of the Regulations.¹³ In her view, decision-makers should focus on the intentions of the couple, as set out in the eligibility criteria for the program:

If it were the intention of Parliament that subclass 300 applicants should be subjected to rigorous assessment of the "genuineness" of their claimed relationship, it is submitted that this should be reflected explicitly in the legislation. In the absence of such an intention, it stands to reason that officers should assess subclass 300 applications primarily against the criteria for the visa that appear in the [Migration] Regulations.¹⁴

Scrutiny of the evidence provided

2.10 In considering a Prospective Marriage visa application, the *Migration Act 1958* (Migration Act) provides for the Minister to 'get any information that he or she considers relevant'.¹⁵ For example, further information can be sought directly from the applicant, including by way of interview with a departmental officer,¹⁶ or through document verification or home visits.¹⁷

2.11 While the Department considers home visits to be among the strongest integrity measures available to decision-makers, it advised that the use of home visits in conjunction with the Prospective Marriage visa program is limited:

Typically, home visits in the Prospective Marriage visa caseload are reserved for cases where there is strong concern that the visa applicant or sponsor may be living in a relationship with another person and these concerns cannot be resolved by other means.¹⁸

2.12 Within Australia, home visits are conducted by the Department's Bona Fides Units.¹⁹ Since January 2011, there have been seven referrals to the Bona Fides Units. The Department advised that consolidated statistical information on the number of home visits undertaken outside Australia is not available.²⁰

13 This can be contrasted to the Partner visa program to which Regulation 1.15A applies where 'genuineness' is a specific criterion.

14 *Submission 3*, p. 2.

15 Subsection 56(1) of the *Migration Act 1958*.

16 Subsections 56(2) and 58(1) of the *Migration Act 1958*.

17 Department of Immigration and Citizenship, *Submission 2*, p. 22.

18 *Submission 2*, p. 23.

19 The Bona Fides Units were established in early 2002 to conduct intensive investigations in cases of suspected fraud: see Department of Immigration and Multicultural and Indigenous Affairs, Annual Report 2004-05, pp 46-47.

20 *Submission 2*, p. 23.

Joint and/or separate interviews

2.13 The Department advised that decision-makers frequently conduct interviews in the Prospective Marriage visa caseload, particularly in high risk cases:

Separate interviews are useful where there are concerns about the degree of consent or commitment to an intended marriage as they give the applicant an opportunity to speak freely. Separate interviews also provide an opportunity to confirm that both applicant and sponsor have the same understanding of their future and provide consistent information about the nature of their relationship. Interviews also allow for adverse information, such as third party allegations, to be tested.²¹

2.14 Some submitters questioned the Department's interview policy, commenting primarily on the extent to which departmental officers conduct, or do not conduct, interviews. For example, the Coalition Against Trafficking in Women Australia (CATWA) submitted that the Department should interview all Prospective Marriage visa applicants under the age of 18, as well as all women applicants, and applicants whose sponsors are substantially older.²²

2.15 Responding in a question on notice to the issue of interviewing Prospective Marriage visa applicants under the age of 18-years, the Department informed the committee that, as a matter of internal policy, Australian posts have confirmed that decision-makers interview all such applicants 'as they would be flagged as medium- to high-risk'.²³

Location of interview

2.16 Committee members asked some witnesses whether Prospective Marriage visa applicants should be separately interviewed at the Australian post or upon arrival in Australia prior to clearing immigration and customs. There were mixed responses to this line of questioning.

2.17 Ms Kaye Quek from CATWA expressed a preference for any interview to take place in Australia where the potential victim could receive support, rather than being deported back to her country of origin where her family would likely 're-traffick' the victim to another country.²⁴

21 *Submission 2*, p. 23.

22 *Submission 4*, pp 8-9 and p. 11. Also see, for example, Immigration Advice & Rights Centre, *Submission 9*, p. 3 in relation to interviewing sponsors as part of the application process.

23 Answer to question on notice, received 7 June 2012, p. 1. Also see Dr Wendy Southern PSM and Mr Stephen Allen, Department of Immigration and Citizenship, *Committee Hansard*, 25 May 2012, pp 18-19.

24 *Committee Hansard*, 25 May 2012, p. 4.

2.18 Departmental officers expressed several reservations about interviewing Prospective Marriage visa applicants upon their arrival in Australia. For example:

[I]t would be a very peculiar environment in which to undertake this sort of interview...[On the journey] people have been cooped up, they are not necessarily prepared for a form of interview. It would also be a very invasive process for someone who, at that point, is lawfully in Australia to be taken aside and then interviewed on the presumption that there might be something wrong with the way that they had got the visa.

...

[The proposal to not interview until the applicant arrives in the country] would be contrary to what we do in most visa caseloads where, of course, we do have an interest in ensuring that visas are not provided on a fraudulent basis...[I]f there was a suggestion that we should somehow hold back, issue a visa, and allow a person to come to Australia for the purposes of undertaking some form of rescue, that is a big change in terms of the way that we generally work for the migration program and for visas. We are not set up to pick people who should be brought here to be subsequently rescued from peril. Our purpose is to ensure that the program itself maintains its integrity.²⁵

Country/culture-specific risk matrices

2.19 The Department submitted that there are different levels of risk within the Prospective Marriage visa program. Risk matrices developed by each Australian post – taking the local environment into account – assist with risk assessment.²⁶

2.20 High risk factors for the Prospective Marriage visa program include:

- either the applicant or the sponsor having been in a previous relationship which ended shortly before lodgement of the application;
- the couple providing inconsistent information about their relationship;
- the applicant having an adverse immigration history;
- the sponsor having an adverse immigration history; or
- there being significant differences – such as age – between the couple.²⁷

2.21 The high risk factors for the Prospective Marriage visa program do not appear to include the applicant being under 18 years of age,²⁸ nor do they include arranged

25 Mr Stephen Allen, Department of Immigration and Citizenship, *Committee Hansard*, 25 May 2012, p. 20. Also see Dr Wendy Southern PSM, Department of Immigration and Citizenship, *Committee Hansard*, 25 May 2012, pp 19-20 for additional comments on the proposal.

26 *Submission 2*, p. 20.

27 *Submission 2*, p. 20.

marriages.²⁹ According to departmental representatives, however, incidences of known forced marriage are part of the country/culture-specific risk matrices,³⁰ as are age differences between a couple and the young age of applicants.³¹

2.22 Risk assessment provides decision-makers with suggestions about the level of scrutiny that should be afforded to a Prospective Marriage visa application. For example, in a high risk case both the applicant and sponsor will be interviewed.³² Further:

In some overseas posts where there is considered to be a high risk of non-genuine relationships all couples are interviewed. Specifically, the Department's offices in Amman, Belgrade, Beirut, Guangzhou, Hanoi, Phnom Penh, and Shanghai interview all Prospective Marriage visa applicants. In addition, offices in Moscow, Nairobi, Tehran, Tel Aviv and Ho Chi Minh City will interview applicants except in rare or exceptional circumstances.³³

2.23 Officers from the Department noted that the top 10 posts represent volume, not risk.³⁴ Based on information provided in the Department's submission, the low risk top 10 posts would appear to be Manila, London, Bangkok, Berlin, Washington, and New Delhi.³⁵ In relation to these posts:

...you might have a high volume, but it would be a country where you had, for example, confidence in the evidentiary information that you are looking at. You had good outcomes in terms of the prospective visas turning into permanent relationships. Those would be the sorts of factors. It is where you do not have those, where you have had a relatively high incidence of rejected cases or cases that turn out to be in some way fraudulent or bad that you apply a more intensive approach in terms of the use of interviews and other techniques.³⁶

28 Mr Stephen Allen, Department of Immigration and Citizenship, *Committee Hansard*, 25 May 2012, p. 19.

29 *Submission 2*, p. 26.

30 Mr Stephen Allen, Department of Immigration and Citizenship, *Committee Hansard*, 25 May 2012, p. 25.

31 Mr Kruno Kukoc, Department of Immigration and Citizenship, *Committee Hansard*, 25 May 2012, p. 24.

32 Department of Immigration and Citizenship, *Submission 2*, p. 20.

33 Department of Immigration and Citizenship, *Submission 2*, p. 20.

34 Mr Stephen Allen, Department of Immigration and Citizenship, *Committee Hansard*, 25 May 2012, p. 25.

35 *Submission 2*, p. 20.

36 Mr Stephen Allen, Department of Immigration and Citizenship, *Committee Hansard*, 25 May 2012, p. 25.

Age differences

2.24 In Australia, Part II of the *Marriage Act 1961* (Marriage Act) establishes 'marriageable age' as 18 years.³⁷ Part II of the Marriage Act also makes special provision for persons over the age of 16 years but who have not yet attained the age of 18 years: namely, in exceptional circumstances, a judge or magistrate of a state or territory may make an order authorising such a person to marry a particular person of marriageable age.³⁸

2.25 Consistent with Australian law, the Prospective Marriage visa program allows applications to proceed if, at the time of decision, either the applicant or intended spouse is under 18 years of age, provided:

- the Minister is satisfied that the applicant or the intended spouse, as the case requires, will turn 18 within the nine-month visa period; or
- a judge or magistrate has made an order under section 12 of the Marriage Act and the Minister is satisfied that the marriage will take place while the order is in force.³⁹

2.26 Therefore, in the absence of an Australian court order, the minimum age at which a Prospective Marriage visa applicant can lodge an application is 17 years and three months.⁴⁰ The applicant must be 18 years old at the time of the intended marriage.

2.27 As noted in chapter 1, the majority of Prospective Marriage visa applicants (99.4%) are over the age of 18 years. It is therefore only a small percentage of applicants (0.6%) who need to establish that there will be no impediment to the intended marriage on account of one, or both, of the parties being under 18 years of age. The Prospective Marriage visa program does not require there to be any maximum difference in age between an applicant and intended spouse.

Consent

2.28 In Australia, Part III of the Marriage Act voids a marriage if the consent of either party was not real consent because it was obtained by duress or fraud.⁴¹ A Prospective Marriage visa application where either the applicant or the intended spouse did not fully and freely consent to the marriage would not therefore satisfy a

37 Section 11 of the *Marriage Act 1961*.

38 Subsections 12(1) and 12(2) of the *Marriage Act 1961*. A court order made in accordance with these provisions is valid for three months: see subsection 12(5).

39 Migration Regulations 1994, Schedule 2, Part 300, clause 300.221B.

40 Dr Wendy Southern PSM, Department of Immigration and Citizenship, *Estimates Hansard*, 13 February 2012, p. 44.

41 Sub-paragraph 23(1)(d)(i) of the *Marriage Act 1961*.

criterion of the visa program⁴² and, if identified, the application would have to be rejected.

Effectiveness of eligibility criteria

2.29 Some submissions commented on the effectiveness of the Prospective Marriage visa program eligibility criteria. With reference to fraudulent and forced marriages, NSW Legal Aid stated:

[The Migration Regulations] coupled with policy advice given to decision makers in the Department's [PAM] provide ample safeguards against granting visas in cases where there are proposed fraudulent or forced marriages.⁴³

2.30 NSW Legal Aid did not support migration law reform to address the issue of fraudulent or forced marriages because:

...[such reforms] may have the effect of refusing visas to (mainly) women in circumstances where cultural considerations are relegated in weighing up factors indicating a genuine relationship.⁴⁴

2.31 The Immigration Advice and Rights Centre agreed:

...the practices used to assess an applicant's eligibility for a Prospective Marriage visa are rigorous enough to prevent fraud and ascertain consent...To further tighten the, already rigorous, eligibility criteria may cause the pendulum to swing too far, in favour of fraud prevention, so as to disadvantage genuine applicants[.]⁴⁵

2.32 Ms Schillaci also considered the current eligibility criteria for the Proposed Marriage visa to be appropriate, although:

...administration of the subclass 300 visa would benefit from a renewed focus on assessment of the intention of the parties (as prescribed in the legislation), rather than the practical focus on the perceived "genuineness" of the relationship.⁴⁶

42 Migration Regulations 1994, Schedule 2, Part 300, clause 300.221A.

43 *Submission 7*, p. 2.

44 *Submission 7*, p. 3. Also see Mr Bill Gerogiannis, NSW Legal Aid, *Committee Hansard*, 25 May 2012, p. 14.

45 *Submission 9*, pp 2-3.

46 *Submission 3*, p. 3.