

CHAPTER 3

Fraud

3.1 This chapter examines the topic of fraud within the Prospective Marriage visa program and covers:

- the risk and incidence of fraud, including the number of cases where prospective marriages did not occur;
- protections against fraud; and
- the policies and practices that could strengthen protections against fraud.

Risk and incidence

3.2 Fraud is a ground for rejecting a Prospective Marriage visa application, but the Department of Immigration and Citizenship's (Department) electronic database only records whether or not an applicant has met the legal requirements for the grant of a visa. Therefore, the Department was not able to report statistically on the incidence of fraud within the program.¹

Alternative assessment measures

3.3 Notwithstanding the lack of empirical data, the Department submitted that there are a number of other assessment measures, which help to provide a picture of the level of integrity within the Prospective Marriage visa program: for example, refusal rates; the conduct of visa holders upon arrival in Australia; and Partner visa application outcomes for former Prospective Marriage visa holders.²

Refusal rates

3.4 At the 2011-12 Senate Additional Estimates public hearing for the Immigration and Citizenship portfolio, a departmental officer indicated that the incidence of fraud 'is likely to be much lower' than the total rejection rate for Prospective Marriage visa applications (9.3%).³ In its submission to this inquiry, the Department elaborated:

1 Dr Wendy Southern PSM and Mr Kruno Kukoc, Department of Immigration and Citizenship, *Estimates Hansard*, 13 February 2012, pp 42-43. Also see the Hon. Chris Bowen MP, Minister for Immigration and Citizenship, *House Hansard*, 9 February 2012, Question No. 751, p. 139 regarding the detection of fraud in applications lodged since 1 July 2007. The committee notes that statistical information would be available from a manual examination of the case files.

2 *Submission 2*, p. 18.

3 Mr Kruno Kukoc, Department of Immigration and Citizenship, *Estimates Hansard*, 13 February 2012, p. 43.

[The total rejection rate] covers refusals against the full range of criteria and the number refused as a result of false or misleading information would be a subset of this figure. A major reason for refusal is that the relationship is not considered genuine but the reasons for this assessment can vary and it can be difficult to identify which refusals should be classified as fraud.⁴

3.5 By way of example, the Department cited as a common concern cases in which couples have met over the Internet, or while the sponsor was on holiday, and become engaged very quickly after first meeting in person:

Such cases usually receive close attention and a number will be refused. While some of these cases might represent relationships deliberately contrived to achieve a migration outcome, others may be genuine relationships which have not yet developed sufficiently for the decision-maker to be satisfied that the visa criteria were met.⁵

Conduct of visa holders upon arrival in Australia

3.6 From 1 July 2006 to 31 December 2011, 93% of Prospective Marriage visa holders have applied onshore for a permanent visa (the temporary Partner (subclass 820) visa). Of the seven per cent of visa holders who did not apply for a permanent visa, six were persons granted a visa when they were under 18 years of age.⁶

3.7 As at 1 June 2012, the Prospective Marriage visa holders who had not applied for permanent residency by 31 December 2011 held the following status:

- 43 per cent were onshore and held a substantive visa;
- 43 per cent were offshore;
- 10 per cent were onshore and held a valid bridging visa;
- three per cent were unlawful in Australia (that is, they did not hold a valid visa);
- less than one per cent were Australian citizens; and
- two people were deceased.⁷

4 *Submission 2*, p. 18. Also see Mr Kruno Kukoc, Department of Immigration and Citizenship, *Committee Hansard*, 25 May 2012, p. 28.

5 *Submission 2*, p. 18.

6 Department of Immigration and Citizenship, *Submission 2*, p.18 and Attachment 1, p. 10. The committee did not receive any statistics regarding visa holders who have applied offshore for the temporary Partner (subclass 309) visa.

7 Department of Immigration and Citizenship, answer to question on notice, received 7 June 2012, p. 1. The sample size was 85% of the cohort and excluded cases where data error prevented the return of an automated data match.

Family violence issues

3.8 The Department cautioned that failure to marry an intended spouse is not necessarily indicative of fraud.⁸ It could, for example, indicate that family violence has occurred and the Prospective Marriage visa holder no longer plans to marry the intended spouse.

3.9 The issue of family violence as it relates to Prospective Marriage visa holders has been raised on a number of occasions, most notably by the Australian Law Reform Commission (ALRC) in its 2012 report, *Family Violence and Commonwealth Laws – Improving Legal Frameworks*, and also in some submissions to this inquiry.

3.10 In its submission, the ALRC summarised the legal position of temporary visa holders as follows:

If [a] relationship breaks down during the temporary visa period, the visa holder is no longer entitled to stay in Australia, and must return home. However, the *Migration Regulations 1994* (Cth) provide for an exception, which allows a person who has suffered family violence committed by their sponsor, to be considered for permanent residence despite the breakdown of the relationship. The family violence exception was inserted to alleviate concerns that 'some partners may remain in an abusive relationship because they believe that they may be forced to leave Australia if they end the relationship'. That is, the policy intention is to ensure that persons do not have to remain in violent relationships in order to obtain permanent residence.⁹

3.11 In their submissions to this inquiry, the ALRC, NSW Legal Aid and the Immigration Advice and Rights Centre (IARC) all noted that Prospective Marriage visa holders cannot access the family violence exception unless they have married their sponsor and applied for a permanent visa.¹⁰

3.12 These submitters supported the ALRC's recommendation to the Australian Government to amend the Migration Regulations 1994 (Migration Regulations) to allow Prospective Marriage visa holders to have access to the family violence

8 *Submission 2*, p. 18. Failure to marry an intended spouse could also reflect one party's lack of intent to marry the other party such as would occur in the case of a sham marriage used to facilitate the trafficking in persons: see Australian Law Reform Commission, *Submission 1*, p. 2. *R v Kovacs* [2008] QCA 417 (23 December 2008) illustrated such a case.

9 *Submission 1*, p. 1. Also see Coalition Against Trafficking in Women Australia, *Submission 4*, p. 9.

10 *Submission 1*, p. 1, *Submission 7*, pp 3-4, and *Submission 9*, pp 4-5, respectively.

exception,¹¹ which Ms Schillaci from Hall & Wilcox Lawyers submitted would represent 'an overdue response to a gap in the existing law'.¹²

3.13 The committee heard from the IARC that not being able to access the family violence exception continues to inhibit the ability of Prospective Marriage visa holders who are the victims of family violence to seek legal recourse:

...we see a lot of clients who are the holders of 300 visas. They have been the victims of family violence and they are seeking assistance from women's refuges or other community or religious organisations. They might be living between accommodation and they are trying to rectify their status. Unfortunately...they are not able to access the family violence provisions under the [Migration Regulations]. So we are seeing those types of clients accessing our services for representation, and there is limited assistance that we can give them because they do not have the recourse or the protection under the [Migration Regulations].¹³

3.14 In its submission to the ALRC's inquiry, the Department indicated that appropriate integrity measures could be enacted to facilitate the extension of the family violence exception to Prospective Marriage visa holders:

There is a risk...that some applicants may perceive the requirements of a Prospective Marriage visa as easier to pass and seek to use this, and the family violence claim to quickly obtain permanent residence. [However], this risk can be mitigated if appropriate integrity measures are in place for the Prospective Marriage visa and the family violence provisions.¹⁴

3.15 The Department advised that it is currently reviewing the ALRC's report, and the Attorney-General's Department, which is co-ordinating a whole-of-government response, informed the committee that the Australian Government is currently considering the ALRC's recommendation, with a response to follow in due course.¹⁵

3.16 In relation to Prospective Marriage visa holders who are the victim of pre-marital abuse, the Coalition Against Trafficking in Women Australia (CATWA) also suggested that such women should be viewed and dealt with by the Australian Government as victims of people trafficking, rather than as illegal immigrants, in

11 Australian Law Reform Commission, *Family Violence and Commonwealth Laws – Improving Legal Frameworks*, Report 117 (2012), Recommendation 20-1.

12 *Submission 3*, pp 3-4.

13 Ms Andrea Christie-David, Immigration Advice and Rights Centre, *Committee Hansard*, 25 May 2012, p. 14.

14 See *Submission 1*, p. 2, quoting Australian Law Reform Commission, *Family Violence and Commonwealth Laws – Improving Legal Frameworks*, Report 117 (2012), Department of Immigration and Citizenship, Submission CFV 121.

15 Department of Immigration and Citizenship, answer to question on notice, received 7 June 2012, p. 8; Attorney-General's Department, answer to question on notice, received 4 June 2012, p. 1.

accordance with Australia's obligations under the United Nations *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*.¹⁶

3.17 Officers from the Department informed the committee that provision is currently made for persons in those circumstances: in addition to a human trafficking visa, '[there is] a separate pathway for cases of domestic violence, and that applies even at the temporary or provisional partner visa stage'.¹⁷ One officer noted, however, that being able to access these arrangements is contingent on a person identifying themselves as a victim of forced marriage.¹⁸

Partner visa application outcomes

3.18 The Department advised that the vast majority of Partner visa applications lodged by Prospective Marriage visa holders are granted, with 0.84% of temporary Partner (subclass 820) visa applications refused and 1.99% of permanent Partner (subclass 801) visa applications refused.¹⁹

3.19 Further, from 1 July 2006 to 31 December 2011, 17 Prospective Marriage visa holders have been directly granted a permanent Partner (subclass 801) visa. This would usually occur if, after a couple had married: the sponsor had died; the relationship had broken down and there was a child of the relationship; or the applicant had suffered family violence.²⁰

Protections against fraud

3.20 As discussed in chapter 2 of this report, there are a number of specific measures designed to ensure the integrity of the Prospective Marriage visa program in the context of assessing individual applications. There are also several broad and overarching measures which seek to ensure program integrity and to address fraud.²¹

16 *Submission 4*, pp 9-10.

17 Mr Kruno Kukoc, Department of Immigration and Citizenship, *Committee Hansard*, 25 May 2012, p. 21. Also see Dr Wendy Southern, Department of Immigration and Citizenship, *Committee Hansard*, 25 May 2012, p. 21.

18 Mr Kruno Kukoc, Department of Immigration and Citizenship, *Committee Hansard*, 25 May 2012, p. 21.

19 *Submission 2*, pp 18-19 (percentages calculated by the committee). The committee did not receive any statistics regarding visa holders who have applied offshore for the temporary Partner (subclass 309) visa and permanent Partner (subclass 100) visa.

20 Department of Immigration and Citizenship, *Submission 2*, pp 18-19.

21 *Submission 2*, p. 24.

Three of the broader measures – fraud detection, statutory offences and the power to cancel visas – are discussed below.²²

Fraud detection

3.21 In its submission, the Department referred to two types of fraud within Australia's migration program: one-off instances (which are investigated, with adverse outcomes recorded in departmental systems and offshore Local Warning Record and Safeguards alerts); and instances involving organised and systemic fraud.²³

3.22 Cases involving organised and systemic fraud are recorded in departmental systems, further analysed by integrity officers, and/or referred to the Department's National Investigations Team for potential prosecution. Departmental integrity officers may also formally report to the program area on their findings and make recommendations as appropriate, such as shifting policy settings, and introducing standard checks for profiles of clients or documents.²⁴

3.23 At one of the 2012-13 Senate Budget Estimates public hearings for the Immigration and Citizenship portfolio, two publically reported cases of alleged organised and systemic fraud were referred to departmental officers for comment.²⁵ The Department was not able to immediately provide a response to the committee's questions,²⁶ and the Department's evidence to this inquiry did not otherwise comment on instances of known fraud within the Prospective Marriage visa program.

Statutory offences

3.24 The *Migration Act 1958* (Migration Act) sets out a number of general offences relating to entry into, and remaining in, Australia.²⁷ For example, section 234 provides for the offences of presenting forged or false documents; making a statement which is false or misleading in a material particular; and delivering or furnishing a document containing a statement or information that is false or misleading in a material particular.²⁸

22 Other integrity measures identified in the Department's submission include the Operational Integrity Network, integrity officers, and ongoing risk monitoring: see *Submission 2*, p. 24. For further information regarding the role of integrity officers, see Mr Stephen Allen, Department of Immigration and Citizenship, *Committee Hansard*, 25 May 2012, pp 18-19.

23 *Submission 2*, p. 24.

24 *Submission 2*, p. 24.

25 See *Estimates Hansard*, 22 May 2012, pp 60-61.

26 The Department has taken the relevant questions on notice and, as at the date of writing, answers to these questions have not been provided.

27 Division 12 of Part 2 of the *Migration Act 1958*.

28 The penalty is 10 years imprisonment or 1,000 penalty points (AUD\$110,000), or both.

3.25 Subdivision B of Division 12 of Part 2 of the Migration Act also sets out a number of specific offences relating to the abuse of laws allowing partners of Australian citizens or partners of Australian permanent residents to become permanent residents (Subdivision B offences).²⁹ These offences were enacted to prevent persons from attempting to get permanent residence by entering into non-genuine relationships.³⁰

3.26 The Department advised that, in recent years, the Subdivision B offences have not been utilised for significant criminal prosecution due to:

- a departmental focus on a range of administrative integrity measures to manage the issue of non-genuine relationships, as opposed to prosecutions;
- the significant investment of resources to conduct a prosecution; and
- the difficulty of proving an offence beyond reasonable doubt.³¹

Power to cancel visas

3.27 Under the Migration Act, the Minister also has the power to cancel visas based on the provision of incorrect information in an application (section 109), or pursuant to a general power provided in section 116. Some of the reasons for which the general power may be exercised include:

- that a circumstance which permitted the grant of the visa no longer exists;
- the visa holder has not complied with a condition of the visa;
- another person required to comply with a condition of the visa has not complied with that condition; or
- the visa should not have been granted because the application for it or its grant was in contravention of the Migration Act or another law of the Commonwealth.

3.28 The Department advised that, from 1 July 2006 to 29 February 2012, no Prospective Marriage visas have been cancelled on the basis of incorrect information or false documentation having been provided as part of the visa application.³²

3.29 However, at one of the 2012-13 Senate Budget Estimates public hearings for the Immigration and Citizenship portfolio, a departmental representative advised that, from 1 July 2007 to 31 December 2011, 473 Prospective Marriage visas have been

29 See sections 240-241 and 245 of the *Migration Act 1958* for offences committed by third parties and section 243 of the *Migration Act 1958* for offences committed by visa applicants and sponsors.

30 See section 237 of the *Migration Act 1958*.

31 *Submission 2*, p. 25. The submission provides additional commentary on the difficulties of proving an offence, namely, the credibility of witnesses who are a party to the alleged crime.

32 *Submission 2*, pp 19 and 24.

cancelled: one pursuant to section 109; 133 pursuant to section 116; and 318 pursuant to section 128 (the visa holder being outside Australia). Sixty-five of these visa cancellations occurred in the 2011-12 financial year to 31 December 2011.³³

3.30 During the current inquiry, the same departmental officer advised the committee that, if a Prospective Marriage visa were granted to a victim of forced marriage, the visa would be liable to cancellation under section 109 but, in any case, departmental officers 'have a lot of discretion around the cancellation of a visa in those circumstances'.³⁴

Strengthening protections against fraud

3.31 As noted above, the Department's submission described current policies and practices with respect to the prevention of fraud within the Prospective Marriage visa program but it did not suggest any additional measures to strengthen the existing protections. Submitters who recommended improvements to strengthen current policies and practices focussed not on the prevention of fraud but on the protection of visa applicants involved in cases of forced marriages,³⁵ which the committee will examine in chapter 4 of this report.

33 Dr Wendy Southern PSM, Department of Immigration and Citizenship, *Estimates Hansard*, 22 May 2012, pp 61-62. Dr Southern also described the legislative basis on which the 65 visas were cancelled in the 2011-12 financial year.

34 Dr Wendy Southern PSM, Department of Immigration and Citizenship, *Committee Hansard*, 25 May 2012, pp 20-21.

35 See Coalition Against Trafficking in Women Australia, *Submission 4*; Australian Institute of Criminology, *Submission 5*; Immigration Advice and Rights Centre, *Submission 9*.