

The Senate

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Legal and Constitutional Affairs  
References Committee

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Prospective Marriage visa program

June 2012

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# RECOMMENDATIONS

## Recommendation 1

### 5.14 The committee recommends that:

- the Department of Immigration and Citizenship institute a formal requirement for Prospective Marriage visa program decision-makers to separately interview all applicants and sponsors under the age of 18; and
- the Australian Government increase the minimum age of visa holders within the Prospective Marriage visa program to 18 years of age to help minimise the incidence of forced marriage and human trafficking in Australia.

## Recommendation 2

5.22 The committee recommends that the Department of Immigration and Citizenship consider modifying its electronic database to enable statistical reporting on the incidence of fraud within the Prospective Marriage visa program (noting that this information is collected but not centrally recorded by the Department of Immigration and Citizenship).

## Recommendation 3

### 5.23 The committee recommends that:

- the Australian Government amend the Migration Regulations 1994 to allow Prospective Marriage visa holders to have access to the family violence exception, as recommended by the Australian Law Reform Commission in its report, *Family Violence and Commonwealth Laws – Improving Legal Frameworks*; and
- the Department of Immigration and Citizenship investigate and implement appropriate integrity measures to facilitate the application of the family violence exception to Prospective Marriage visa holders.

## Recommendation 4

5.24 The committee recommends that the Australian Government should develop a specific prosecution policy for the offences contained in Subdivision B of Division 12 of Part 2 of the *Migration Act 1958* and, after implementation, continue to update the policy as necessary.

## **Recommendation 5**

**5.34 The committee recommends that the Department of Immigration and Citizenship:**

- **investigate and implement a way in which to record the non-consent of one party to a Prospective Marriage visa application, which takes into account the safety and well-being of that party should the other party or the members of either party's family become aware of the disclosure of a forced marriage; and**
- **amend the Procedures Advice Manual to expressly require Prospective Marriage visa program decision-makers to investigate and assess the 'real consent' of applicants and sponsors as far as possible.**

## **Recommendation 6**

**5.35 The committee recommends that the Australian Government consider establishing a working group to investigate the incidence of forced marriages in Australia and to explore relevant options for assisting victims.**

## **Recommendation 7**

**5.36 The committee recommends that the Department of Immigration and Citizenship develop an information package for newly arrived migrants on a Prospective Marriage visa or Partner visa, which informs such migrants about:**

- **the law in Australia with respect to family violence and forced marriages, including factors which might indicate the existence of a forced marriage; and**
- **how migrants experiencing family violence or a potential or actual forced marriage can seek assistance.**



# CHAPTER 1

## Introduction

### Referral of the inquiry

1.1 On 24 November 2011, the Senate referred the following matters to the Legal and Constitutional Affairs References Committee (committee) for inquiry and report by 3 May 2012:

- (a) the number of Prospective Marriage (subclass 300) visa applications and grants by post, officer, nationality, age of applicant and sponsor;
- (b) the risk and incidence of fraud under the Prospective Marriage (subclass 300) visa program, including the incidence of cases where prospective marriages did not occur;
- (c) the incidence of Prospective Marriage (subclass 300) visa applicants and sponsors who entered into an arranged marriage;
- (d) the administration, application and effectiveness of eligibility criteria in relation to the Prospective Marriage (subclass 300) visa program, with a special focus on, but not limited to, protections against fraud, age differences, regard for cultural practices and relationship criteria;
- (e) the sufficiency and suitability of assessment procedures to protect against fraud and to ascertain the reliability of consent of an applicant for a Prospective Marriage (subclass 300) visa, where it is believed the applicant will be entering into an arranged marriage;
- (f) whether current policies and practices of the Australian Government with regard to the Prospective Marriage (subclass 300) visa or other visa categories are facilitating forced marriages;
- (g) the policies and practices that could strengthen protections against fraud and for women in other countries applying for a Prospective Marriage (subclass 300) visa, from entering into a forced marriage; and
- (h) any other related matters.<sup>1</sup>

1.2 On 13 March 2012, the Senate extended the reporting date to 7 June 2012,<sup>2</sup> and, on that date, the committee presented an interim report, advising the Senate that the committee intended to table its final report by 25 June 2012.<sup>3</sup>

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1 Journals of the Senate, No. 71-24 November 2011, pp 1938-1939.

2 Journals of the Senate, No. 80-13 March 2012, p. 2210.

3 Senate Legal and Constitutional Affairs References Committee, *Interim report for the inquiry into Marriage Visa Classes*, 7 June 2012.

## **Prospective Marriage (subclass 300) visa**

1.3 The Prospective Marriage (subclass 300) visa (Prospective Marriage visa) is a temporary, nine-month visa which enables the visa holder to travel to Australia to marry an intended spouse.<sup>4</sup> An applicant must be at least 17 years and three months old, so that the applicant will be able to legally marry in Australia upon reaching 18 years of age before the visa expires.<sup>5</sup> Applicants must be sponsored by a fiancé(e) over the age of 18 years,<sup>6</sup> and that sponsor must be an Australian citizen, Australian permanent resident or eligible New Zealand citizen.<sup>7</sup>

1.4 In 2006-07, 6,309 Prospective Marriage visas were granted. During the period 2010-11, the number of visa grants slightly decreased to 5,926.<sup>8</sup> From 1 July 2011 to 22 May 2012, 5,734 visas have been granted.<sup>9</sup>

1.5 After marrying the intended spouse, a Prospective Marriage visa holder is expected to apply for permanent residence in Australia through a two-stage Partner visa process: first, the temporary Partner (subclass 820) visa; and, second, the permanent Partner (subclass 801) visa.<sup>10</sup>

1.6 If a Prospective Marriage visa holder does not marry the intended spouse, the visa expires after nine months and, unless an application is made for another type of visa, the visa holder would be required to return to their country of origin.<sup>11</sup>

## **Statistics on applications and grants of Prospective Marriage visas**

1.7 Statistical information relating to the number of Prospective Marriage visa applications and grants by Australian mission (post), officer, nationality, age of applicant and sponsor is set out below.

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4 Department of Immigration and Citizenship, *Partner Migration* (1127), p. 30. The visa holder may also marry the intended spouse overseas, provided there has been at least one entry to Australia on the visa: see p. 32.

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

6 If the fiancé(e) is under the age of 18 years, the visa applicant must be sponsored by the fiancé(e)'s parent or guardian. Statistics on the number of cases in which this has occurred do not appear to be available: see Department of Immigration and Citizenship, answer to question on notice, received 7 June 2012, p. 6.

7 Migration Regulations 1994, Schedule 2, Part 300, clause 300.213.

8 Department of Immigration and Citizenship, *Submission 2*, Attachment 1, p. 3.

9 Mr Kruno Kukoc, Department of Immigration and Citizenship, *Estimates Hansard*, 22 May 2012, p. 61.

10 If the visa holder applies offshore for permanent residence in Australia, the relevant visa process is the temporary Partner (subclass 309) visa and permanent Partner (subclass 100) visa.

11 Dr Wendy Southern PSM, Department of Immigration and Citizenship, *Committee Hansard*, 25 May 2012, p. 22.

### **By post**

1.8 A Prospective Marriage visa application can only be made from outside Australia at the applicant's nearest post.<sup>12</sup> The application itself is a prescribed form (currently, *Form 47SP: Application for migration to Australia by a partner*),<sup>13</sup> together with all necessary supporting documentation. There is a non-refundable application fee, which varies from time to time.<sup>14</sup>

1.9 From 1 July 2006 to 22 May 2012, 36,512 Prospective Marriage visas have been granted at 49 posts.<sup>15</sup> The number of visa grants has fluctuated marginally from year to year, peaking at 6,354 in 2008-09 and falling to 5,926 in 2010-11.<sup>16</sup>

1.10 From 1 July 2006 to 31 December 2011, the following 10 posts have granted the highest number of Prospective Marriage visas: Manila; Ho Chi Minh City; Shanghai; London; Bangkok; Beirut; Berlin; Moscow; Washington; and New Delhi (the top 10 posts). More than 64% of all Prospective Marriage visas were granted at these posts.<sup>17</sup>

1.11 Not all Prospective Marriage visa applications have resulted in the grant of a visa. For the period 1 July 2006 to 31 December 2011, 3,635 applications (9.3%) have been refused and 1,450 applications (3.7%) have been withdrawn or otherwise finalised.<sup>18</sup> Included in these figures are 2,990 visa applications lodged at a top 10 post (58.9% of all unsuccessful applications).<sup>19</sup>

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12 The Department of Immigration and Citizenship's website provides an up-to-date list of all immigration offices outside Australia: see <http://www.immi.gov.au/contacts/overseas/> (accessed 15 June 2012).

13 The form is available online at: <http://www.immi.gov.au/allforms/pdf/47sp.pdf> (accessed 15 June 2012).

14 Current Partner Category Visa Charges are advised online at: <http://www.immi.gov.au/allforms/990i/partner.htm> (accessed 15 June 2012). The current application fee is AUD\$1,995.00.

15 Department of Immigration and Citizenship, *Submission 2*, Attachment 1, p. 3; Mr Kruno Kukoc, Department of Immigration and Citizenship, *Estimates Hansard*, 22 May 2012, p. 61. The 49 posts are identified in Attachment 1 of the submission.

16 Department of Immigration and Citizenship, *Submission 2*, p. 14.

17 Department of Immigration and Citizenship, *Submission 2*, Attachment 1, p. 3. Precise numbers for each of the top 10 posts are provided in Attachment 1.

18 Department of Immigration and Citizenship, *Submission 2*, Attachment 1, p. 10. Also see Mr Kruno Kukoc, Department of Immigration and Citizenship, *Estimates Hansard*, 22 May 2012, p. 61 regarding statistics for the financial year 2011-2012.

19 Department of Immigration and Citizenship, *Submission 2*, Attachment 1, pp 2-35 (percentage calculated by the committee).

**By officer**

1.12 Approximately 221 departmental employees decide Prospective Marriage visa applications: the majority (126) are Australian-based employees, with the remaining 95 employees engaged at overseas posts. This division is largely driven by the level of risk associated with any particular caseload.<sup>20</sup>

**Table 1.1 – Decision-makers at the top 10 posts**

	Australian-based	Locally engaged	Total number of decision-makers	Total number of staff at the post
Manila	6	10	16	54
Ho Chi Minh City	4	2	6	42
Shanghai	6	3	9	90
London	5	9	14	76
Bangkok	8	1	9	42
Beirut	2	0	2	18
Berlin	3	7	10	41
Moscow	3	0	3	18
Washington	2	4	6	20
New Delhi	9	2	11	144
Total	48	38	86	545
Percentage of staff at the post	9%	7%	16%	100%

*Source: Department of Immigration and Citizenship, Submission 2, p. 17; Department of Immigration and Citizenship, answer to question on notice, received 7 June 2012, p. 8.*

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20 Department of Immigration and Citizenship, *Submission 2*, p. 17. Also see Mr Stephen Allen, Department of Immigration and Citizenship, *Committee Hansard*, 25 May 2012, pp 23-24 for a further description of the allocation of decision-makers to a post.

### ***By nationality***

1.13 Prospective Marriage visa applications have been made by the citizens of 175 countries from 1 July 2006 to 31 December 2011. A small number of applicants (88) have presented themselves as stateless persons in their applications.<sup>21</sup>

1.14 The top 10 countries from which Prospective Marriage visa holders claim citizenship are: the Philippines; Vietnam; the People's Republic of China; Lebanon; Thailand; the United Kingdom; the United States of America; India; Indonesia; and the Kingdom of Cambodia (the top 10 countries). In total, citizens of these countries account for 61.9% of all Prospective Marriage visa holders.<sup>22</sup>

### ***By age of applicant and sponsor***

1.15 From 1 July 2006 to 31 December 2011, approximately 39,100 Prospective Marriage visa applications have been lodged at an Australian post. The vast majority of applicants have been over the age of 18 years (99.4%), with 253 applications (0.6%) received from persons under the age of 18 years.<sup>23</sup>

#### ***Applicants over the age of 18 years***

1.16 Prospective Marriage visa applicants' ages vary widely. For applicants over the age of 18 years, the range extends to the 84 years age bracket, with certain age categories – such as the 25-29 year age bracket – showing the highest numbers of applications.<sup>24</sup>

1.17 At the lower end of the scale, in the 18-24 year age bracket, Prospective Marriage visa grants were made to 5,224 applicants at the top 10 posts from 1 July 2006 to 31 December 2011. A breakdown of these grants is shown in Table 1.2 below.

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21 Department of Immigration and Citizenship, *Submission 2*, Attachment 1, pp 4-7. Attachment 1 of the submission details visa holders' nationalities and the years in which applications were received.

22 Department of Immigration and Citizenship, *Submission 2*, Attachment 1, p. 4 (percentage calculated by the committee).

23 Department of Immigration and Citizenship, *Submission 2*, Attachment 1, p. 10. There are, however, some cases in which age is indeterminate for applicants and/or sponsors: see Dr Wendy Southern PSM and Mr Stephen Allen, Department of Immigration and Citizenship, *Committee Hansard*, 25 May 2012, p. 24.

24 Department of Immigration and Citizenship, *Submission 2*, Attachment 1, pp 11-35.

**Table 1.2 – Visa holders aged 18-24 years at the top 10 posts, 1 July 2006 to 31 December 2011**

Post	18 years	19 years	20-24 years
Manila	27	70	897
Ho Chi Minh City	28	62	737
Shanghai	9	28	462
London	-	6	282
Bangkok	14	28	369
Beirut	195	126	793
Berlin	6	21	223
Moscow	5	8	206
Washington	5	8	250
New Delhi	5	11	343

*Source: Department of Immigration and Citizenship, Submission 2, Attachment 1, pp 11-35.*

### *Applicants under the age of 18 years*

1.18 From 1 July 2006 to 31 December 2011, 227 Prospective Marriage visas have been granted to applicants under the age of 18 years. Twenty-one applications (8.3%) have been refused and five applications (2%) have been withdrawn or otherwise finalised.<sup>25</sup>

1.19 At the top 10 posts:

- Manila and London did not grant, refuse or finalise any Prospective Marriage visa applications for applicants under the age of 18 years;<sup>26</sup>
- Ho Chi Minh City, Shanghai, Bangkok, Berlin, Moscow, Washington and New Delhi each granted fewer than three Prospective Marriage visas to applicants under the age of 18 years, with one application refused in Ho Chi Minh City;<sup>27</sup> and
- Beirut granted 118 Prospective Marriage visas to applicants under the age of 18 years, with 14 applications refused, withdrawn or otherwise finalised.<sup>28</sup>

1.20 At other posts, the Former Yugoslavian Republic of Macedonia (23), Iraq (16), Turkey (13) and Syria (9) accounted for the highest number of Prospective Marriage visa grants to applicants under the age of 18 years for the period from 1 July 2006 to 31 December 2011.<sup>29</sup>

### *Age of sponsors*

1.21 From 1 July 2006 to 31 December 2011, 192 Prospective Marriage visas were granted to applicants aged between 17 years and three months and 18 years, where the sponsors' ages ranged from 18 to 64 years.<sup>30</sup>

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25 Department of Immigration and Citizenship, *Submission 2*, Attachment 1, p. 10. These rates are slightly lower than those for all Prospective Marriage visa applications – see paragraph 1.11.

26 Department of Immigration and Citizenship, *Submission 2*, Attachment 1, pp 11 and 15-18.

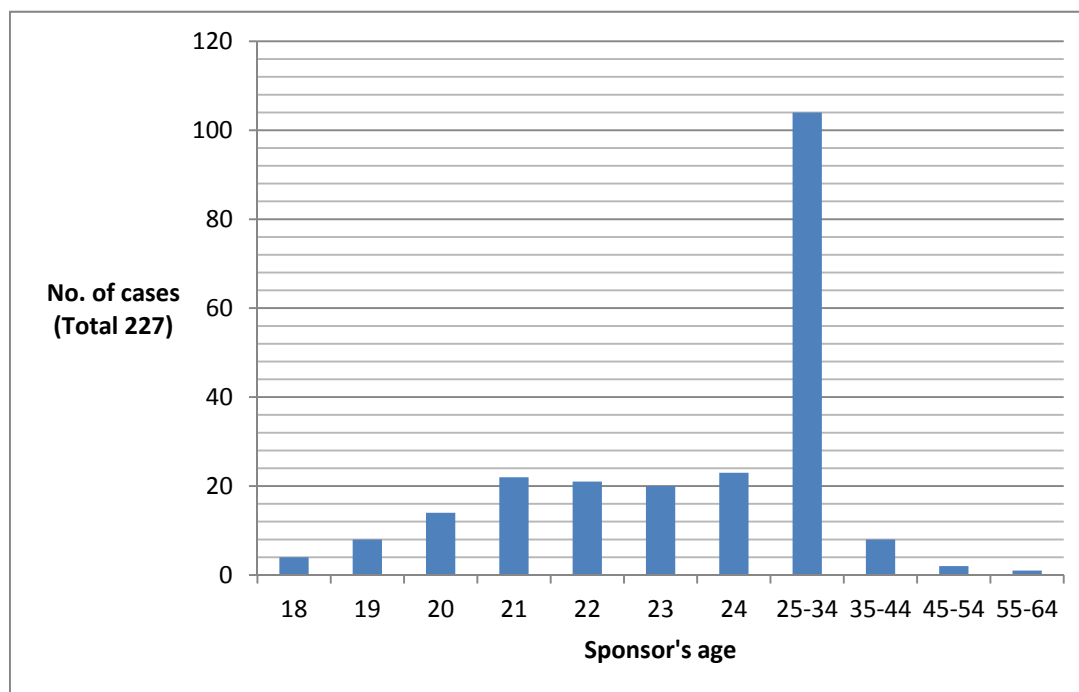
27 Department of Immigration and Citizenship, *Submission 2*, Attachment 1, pp 12-14, pp 19-20 and pp 28-35.

28 Department of Immigration and Citizenship, *Submission 2*, Attachment 1, pp 21-22.

29 Department of Immigration and Citizenship, *Submission 2*, Attachment 1, p. 8.

30 Department of Immigration and Citizenship, *Submission 2*, Attachment 1, p. 8; Department of Immigration and Citizenship, answer to question on notice, received 7 June 2012, p. 6.

**Graph 1.1 – Visa holders aged between 17 years and three months and 18 years of age, and sponsors over 18 years of age, 1 July 2006 to 31 December 2011**



Source: Based on figures supplied by Department of Immigration and Citizenship, Submission 2, Attachment 1, p. 8; Department of Immigration and Citizenship, answer to question on notice, received 7 June 2012, p. 6.

1.22 As shown in Graph 1.1, the majority of sponsors for Prospective Marriage visa applicants who are aged 17 years or less were less than 34 years of age in the period 1 July 2006 to 31 December 2011.<sup>31</sup> However, sponsors more than eight years older than a 17 year-old applicant comprised at least 50% of sponsors, with 11 sponsors being more than twice the age of the applicant. For these 11 sponsors:

- in the 35-44 years age range – four applicants were from Lebanon and there was one applicant each from the People's Republic of China; the Arab Republic of Egypt; and the Palestinian Authority, with one unknown;
- in the 45-54 years age range – there was one applicant each from Iraq and Vietnam;
- in the 55-64 years age range – there was one applicant from Thailand.<sup>32</sup>

1.23 In relation to Prospective Marriage visa applicants aged 18 years or more, from 1 July 2006 to 31 December 2011, sponsors' ages varied widely from

<sup>31</sup> A large proportion of these persons sponsored applicants from Lebanon: see Department of Immigration and Citizenship, Submission 2, Attachment 1, p. 8.

<sup>32</sup> Department of Immigration and Citizenship, Submission 2, Attachment 1, p. 8.



18 to 95 years at the top 10 posts.<sup>33</sup> For applicants in the 18 to 24 years age bracket, nine of the top 10 posts granted visas where sponsors were aged upward of 45 years (potentially more than twice the age of the applicant):

**Table 1.3 – Visa holders aged 18-24 years and sponsors over 45 years at the top 10 posts, 1 July 2006 to 31 December 2011**

Sponsors' age ranges:	45-54	55-64	65-74	75-84
Manila	147	82	10	3
Ho Chi Minh City	48	5	1	1
Shanghai	15	3	1	-
London	-	-	-	-
Bangkok	48	7	-	-
Beirut	2	1	-	-
Berlin	1	-	-	-
Moscow	5	1	1	-
Washington	4	-	-	-
New Delhi	4	-	-	-
Total				390

Source: Department of Immigration and Citizenship, *Submission 2, Attachment 1*, pp 11-13, 19, 21, 23, 29, 31 and 35.

## Conduct of the inquiry

1.24 The committee advertised the inquiry in *The Australian* newspaper on 7 December 2011, 1 February 2012, 15 February 2012 and 29 February 2012. The committee also wrote to 73 organisations and individuals, inviting submissions by 2 March 2012. The closing date for submissions was subsequently extended to 5 April 2012 and submissions continued to be accepted after the official closing date. Details of the inquiry were also placed on the committee's website at [www.aph.gov.au/senate/legal](http://www.aph.gov.au/senate/legal).

<sup>33</sup> Department of Immigration and Citizenship, *Submission 2, Attachment 1*, pp 11-13, 15, 19, 21, 23, 29, 31 and 35.

1.25 The committee received nine submissions, and these are listed at Appendix 1. All submissions were published on the committee's website. The committee held a public hearing in Canberra on 25 May 2012. A list of witnesses who appeared at the hearing is at Appendix 2, and copies of the *Hansard* transcript are available through the committee's website.

### **Acknowledgement**

1.26 The committee thanks those organisations and individuals who made submissions and gave evidence at the public hearing.

### **Structure of the report**

1.27 The committee's report is structured in the following way:

- chapter 2 discusses the eligibility criteria of the Prospective Marriage visa program, including the issues of administration, application and effectiveness of the criteria;
- chapter 3 examines the topic of fraud within the Prospective Marriage visa program;
- chapter 4 discusses the topics of arranged and forced marriages within the Prospective Marriage visa program; and
- chapter 5 sets out the committee's views in relation to the key issues raised during the course of the inquiry, as well as the committee's recommendations.

### **Note on references**

1.28 References to the committee *Hansard* are to the proof *Hansard*: page numbers may vary between the proof and the official *Hansard* transcript.

# 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).<sup>1</sup> In addition, the parties must have met and be known to each other personally,<sup>2</sup> 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).<sup>3</sup> There is also a requirement for there to be no legal impediment to an applicant and intended spouse's marriage.<sup>4</sup>

### 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.<sup>5</sup> If an applicant does not satisfy all the eligibility criteria, the application will be refused.<sup>6</sup>

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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.<sup>7</sup>

### ***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.<sup>8</sup>

### ***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.<sup>9</sup> 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.<sup>10</sup> The Department of Immigration and Citizenship (Department) acknowledged that this was a common reason for the rejection of applications<sup>11</sup> but submitted:

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

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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.<sup>13</sup> 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.<sup>14</sup>

### *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'.<sup>15</sup> For example, further information can be sought directly from the applicant, including by way of interview with a departmental officer,<sup>16</sup> or through document verification or home visits.<sup>17</sup>

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.<sup>18</sup>

2.12 Within Australia, home visits are conducted by the Department's Bona Fides Units.<sup>19</sup> 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.<sup>20</sup>

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.<sup>21</sup>

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.<sup>22</sup>

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'.<sup>23</sup>

### ***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.<sup>24</sup>

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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.<sup>25</sup>

### ***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.<sup>26</sup>

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.<sup>27</sup>

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,<sup>28</sup> nor do they include arranged

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

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.<sup>32</sup> 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.<sup>33</sup>

2.23 Officers from the Department noted that the top 10 posts represent volume, not risk.<sup>34</sup> 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.<sup>35</sup> 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.<sup>36</sup>

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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.<sup>37</sup> 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.<sup>38</sup>

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.<sup>39</sup>

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.<sup>40</sup> 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.<sup>41</sup> 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

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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 program<sup>42</sup> 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.<sup>43</sup>

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.<sup>44</sup>

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[.]<sup>45</sup>

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.<sup>46</sup>

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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.

# 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.<sup>1</sup>

### *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.<sup>2</sup>

### *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%).<sup>3</sup> In its submission to this inquiry, the Department elaborated:

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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.<sup>4</sup>

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.<sup>5</sup>

#### *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.<sup>6</sup>

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.<sup>7</sup>

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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.

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*Family violence issues*

3.8 The Department cautioned that failure to marry an intended spouse is not necessarily indicative of fraud.<sup>8</sup> 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.<sup>9</sup>

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.<sup>10</sup>

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

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

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].<sup>13</sup>

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.<sup>14</sup>

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.<sup>15</sup>

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

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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*.<sup>16</sup>

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'.<sup>17</sup> One officer noted, however, that being able to access these arrangements is contingent on a person identifying themselves as a victim of forced marriage.<sup>18</sup>

### *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.<sup>19</sup>

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.<sup>20</sup>

## **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.<sup>21</sup>

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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.<sup>22</sup>

### ***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.<sup>23</sup>

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.<sup>24</sup>

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.<sup>25</sup> The Department was not able to immediately provide a response to the committee's questions,<sup>26</sup> 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.<sup>27</sup> 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.<sup>28</sup>

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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).<sup>29</sup> These offences were enacted to prevent persons from attempting to get permanent residence by entering into non-genuine relationships.<sup>30</sup>

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.<sup>31</sup>

### ***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.<sup>32</sup>

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

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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.<sup>33</sup>

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'.<sup>34</sup>

### ***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,<sup>35</sup> which the committee will examine in chapter 4 of this report.

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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*.

# CHAPTER 4

## Arranged and forced marriages

4.1 This chapter discusses the topics of arranged and forced marriages within the Prospective Marriage visa program, including :

- the incidence of arranged marriages, including the sufficiency and suitability of assessment procedures to ascertain the reliability of consent in potential cases of arranged marriages;
- the incidence of forced marriages;
- whether current policies and practices are facilitating forced marriages; and
- policies and practices that could provide stronger protections against forced marriages.

4.2 An arranged marriage is one in which the families of both spouses play a dominant role in arranging the marriage but the spouses have the right to accept or reject the arrangement.<sup>1</sup> It is distinguishable from a forced marriage in which one or both spouses do not (or, in the case of some adults with learning or physical disabilities, cannot) consent to the marriage, and duress is a factor. The duress can be physical, emotional, psychological, or financial.<sup>2</sup>

### Incidence of arranged marriages

4.3 As with cases of fraud, the Department's electronic database does not store information regarding the incidence of arranged marriages within the Prospective Marriage visa program in such a fashion as to allow for statistical reporting.<sup>3</sup> It is not possible therefore to accurately gauge how many visa holders have actually entered into an arranged marriage after arrival in Australia.

4.4 Nevertheless, the Department acknowledges that arranged marriages are a part of normal cultural practice in a number of countries and feature prominently in the caseload of some Australian posts. Two of these posts – Beirut and New Delhi – are

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1 Attorney-General's Department, *Discussion Paper – Forced and Servile Marriage*, 2010, p. 4. The committee acknowledges that this definition does not take into account the pressure that can be placed upon a party to accept the arrangements: see Coalition Against Trafficking in Women Australia, *Submission 4*, pp 7-8; NSW Legal Aid, *Submission 7*, Attachment, p. 2.

2 UK Government, Forced Marriage Unit, *What is a Forced Marriage?*, February 2011, p. 1. Also see Coalition Against Trafficking in Women Australia, answer to question on notice, received 31 May 2012, p. 3.

3 *Submission 2*, p. 19.

top 10 posts,<sup>4</sup> which have granted 9.57% of all Prospective Marriage visas from 1 July 2006 to 31 December 2011.<sup>5</sup>

### *Ascertaining the reliability of consent*

4.5 The Department advised that it generally accepts arranged marriages which have the consent of both parties as 'culturally appropriate'. Unless there is information to suggest that a marriage has been contrived (a sham marriage), or at least one of the parties has been forced to enter into the marriage (a forced marriage), a Prospective Marriage visa application involving an arranged marriage is processed in the same manner as any other application.<sup>6</sup>

4.6 NSW Legal Aid agreed that it is appropriate to respect migrants' cultural practices (such as arranged marriages), provided these practices do not breach Australian laws. Its submission cited the case of *Kreet v Sampir*<sup>7</sup> in which the Family Court of Australia held:

Cultural practices are sensitive issues but...the law to be applied is that of Australia. If a cultural practice relating to a marriage gives rise to the overbearing of a mind and will so that it is not a true consent, the cultural practice must give way. Arranged marriages...must not carry with them lack of consent.<sup>8</sup>

### *Procedures Advice Manual*

4.7 Where it appears that at least one of the parties in an arranged marriage might not have fully consented to an intended marriage, the Department's Procedures Advice Manual (PAM) provides guidance to decision-makers on how to assess the Prospective Marriage visa application:

#### **10.2 Assessing real consent**

...because [the] 300.216 [criterion] requires officers to be satisfied that 'the parties genuinely intend to live together as spouses', officers are in effect obliged to be satisfied that 'real consent' has been given by both parties to the impending marriage.

Officers should, however, exercise care and sensitivity if there are indications that real consent has not been given. There may be serious implications for the safety and well being of the prospective spouse should

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4 *Submission 2*, p. 19.

5 Department of Immigration and Citizenship, *Submission 2*, Attachment 1, p. 2 (percentage calculated by the committee).

6 *Submission 2*, p. 25.

7 [2011] FamCa 22 (18 January 2011).

8 [2011] FamCa 22 (18 January 2011) at 41 per Cronin J. Also see NSW Legal Aid, *Submission 7*, p. 4.

that person's unwillingness to marry become known to persons other than the decision maker, or be disclosed within a decision record.

Officers may consider confining the decision record to an appropriate 'time of application' criterion. As examples:

- 300.214 (met and known) – applicant and the prospective spouse might have met as children but are unable to demonstrate that their relationship has developed to a point where the decision to marry was mutual or
- 300.215 (genuine intent to marry within visa period) – applicant and the prospective spouse might be unable to satisfy the decision maker that they have made firm plans to marry or
- 300.216 (genuine intent to live together as spouses) – applicant and the prospective spouse may not be able to demonstrate that they have formed or will form a lasting relationship consistent with the requirements of regulation 1.15A.

Care should also be taken to ensure that potentially sensitive material on file is properly labelled to ensure that the information provided by the applicant or the prospective spouse is not released.<sup>9</sup>

4.8 On the issue of whether there should be a specific requirement for decision-makers to assess the 'real consent' of a Prospective Marriage visa applicant, representatives from the Department responded that the *Migration Act 1958* (Migration Act), the Migration Regulations 1994 (Migration Regulations) and the PAM collectively provide decision-makers with advice and information 'about what might constitute duress or lack of real consent that they take into account'.<sup>10</sup>

4.9 Some submissions commented directly on the sufficiency and suitability of the Department's 'real consent' assessment procedures. For example, Ms Schillaci from Hall & Wilcox Lawyers, NSW Legal Aid, and the Immigration Advice and Rights Centre submitted that the current procedures are adequate.<sup>11</sup>

4.10 In contrast, the Coalition Against Trafficking in Women Australia (CATWA) argued that the procedures are not sufficient and suitable. CATWA referred to recent media articles in which girls who reported being threatened by their families unless they consented to a 'family-arranged marriage' were granted Prospective Marriage visas,<sup>12</sup> and concluded:

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9 Department of Immigration and Citizenship, *Submission 2*, pp 26-27. Also see Migration Regulations 1994, Schedule 2, Part 300, clauses 300.214-300.216.

10 Dr Wendy Southern PSM and Mr Robert Day, Department of Immigration and Citizenship, *Committee Hansard*, 25 May 2012, p. 27.

11 *Submission 3*, p. 3, *Submission 7*, p. 4 and *Submission 9*, p. 2, respectively.

12 See Padraic Murphy, 'Child bride shame prompts call for inquiry', *The Advertiser*, 7 November 2011; Simon Lauder, 'Hundreds of girls brought to Australia by older men', *ABC News*, 8 November 2011.

There is enough evidence to suggest, from the limited information made available to the media by the Department of Immigration and Citizenship in November 2011, that current procedures used to assess the reliability of the consent of an applicant are vastly inadequate.<sup>13</sup>

4.11 CATWA identified two primary concerns:

- first, the primary focus on the detection and prevention of fraud does not adequately allow for processes that prioritise human rights of women; and
- second, a focus purely on ascertaining the reliability of an applicant's 'consent' to a marriage disregards research illustrating that, although a victim may publicly agree to an arranged marriage, in reality a forced marriage is occurring.<sup>14</sup>

4.12 As a solution, CATWA recommended:

- involving the Minister for the Status of Women in the development of new procedures that aim to integrate concerns regarding the human rights of migrant women;
- developing processes that meaningfully take into account the different types of coercion that victims of forced marriage experience, and the violation of their human rights that this involves; and
- in suspected cases of forced marriage, offering alternative options as a means of assisting women who may otherwise be reluctant to speak out about the abuse they are experiencing.<sup>15</sup>

## **Incidence of forced marriages**

4.13 In general, submitters and witnesses agreed that the incidence of forced marriages in Australia is an unknown factor. In particular, the Department submitted that there is a shortage of empirical information, both generally and in an immigration context.<sup>16</sup> According to the Department, this is partly due to the difficulty in identifying cases of forced marriage:

...the coercion which characterises a forced marriage will in most circumstances also deter victims from reporting their situation to immigration or other officials.<sup>17</sup>

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13 *Submission 4*, p. 7.

14 *Submission 4*, pp 7-8.

15 *Submission 4*, pp 7-8.

16 *Submission 2*, pp 3 and 27. See Attorney-General's Department, *Discussion Paper – Forced and Servile Marriage*, 2010, p. 6 for similar comments.

17 *Submission 2*, p. 3.

4.14 However, there are anecdotal reports of forced marriages occurring in Australia, as well as instances of young Australians being forced into marriages while overseas.<sup>18</sup> The committee notes that there have been two recent prosecutions in relation to forced marriage in Australia – the Family Court of Australia cases of the *Department of Human Services & Brouker and Anor*<sup>19</sup> and *Kandal & Khyatt & Ors.*<sup>20</sup>

4.15 In relation to Australia's Migration Program, the Department advised that cases of forced marriage are not a frequent occurrence, with only a small number of posts having reported either isolated incidents or the occasional case involving forced marriage.<sup>21</sup>

### **Facilitation of forced marriages**

4.16 Some submitters and witnesses addressed the issue of whether the current policies and practices of the Prospective Marriage visa program are facilitating forced marriages. NSW Legal Aid, for example, was not aware of any evidence of such facilitation,<sup>22</sup> whereas CATWA considered that several aspects of current policies and practices are facilitating forced marriages in Australia.

4.17 Referring to statistics released by the Department in November 2011, CATWA argued that there is an urgent need for the Australian Government to immediately review the Prospective Marriage visa program:

The use of these visas to enable the marriage of young women from overseas to much older Australian men...suggests that trafficking for marriage is occurring in Australia, and is being aided by the Commonwealth Government through a lack of meaningful oversight.<sup>23</sup>

4.18 CATWA called on the Australian Government to fund new research into the problem of marriage trafficking in Australia:

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18 See, for example, Rev. Peter Curtis, *Submission 6*; Ms Emma Davidson, *Submission 8*; ABC Four Corners, 'Without Consent', 29 March 2012; Padraic Murphy, 'Hundreds of teens flown in to marry older Australians', *Herald Sun*, 7 November 2011; Dr Adam Tomison, Australian Institute of Criminology, *Committee Hansard*, 25 May 2012, p. 11; Ms Louisa McKimm, Immigration Advice and Rights Centre, *Committee Hansard*, 25 May 2012, p. 15.

19 [2010] FamCA 742 (24 August 2010).

20 [2010] FMCAfam 508 (6 May 2010).

21 *Submission 2*, p. 27. Also see Mr Bill Gerogiannis, NSW Legal Aid, *Committee Hansard*, 25 May 2012, p. 15 regarding the incidence of forced marriage encountered by NSW Legal Aid.

22 *Submission 7*, p. 5. Also see Ms Jannaha Schillaci, Hall & Wilcox Lawyers who submitted that the eligibility criteria can effectively distinguish between legitimate applications and those based on forced marriages, provided decision-makers focus on the parties' intentions: *Submission 3*, p. 3.

23 *Submission 4*, p. 5.

It is likely that the use of the Prospective Marriage visa program to facilitate forced marriages forms only one part of a larger problem of trafficking for the purposes of marriage that is taking place in Australia. In the last ten years, there have been reports not only of women being brought into Australia for forced marriage, but also of girls being taken out of the country and to overseas destinations...There is also a long history in Australia of the abuse of migrant women who have entered the country as 'mail-order' brides, through similar fiancée visas.<sup>24</sup>

4.19 The Australian Institute of Criminology (AIC) informed the committee that it is currently researching the role of marriage in trafficking and related exploitation in Australia, with a comprehensive report detailing its study and findings to be published in 2012.<sup>25</sup> However, preliminary results suggest that, in the eight cases examined for the purposes of its study:

...marriage visa classes have been used to facilitate trafficking-related exploitation or associated risky scenarios in two ways. First, marriages have been identified where there was no intention on the part of the husband for the marriage to be genuine (for example, where the 'husband' is already in a de facto relationship with another person)...Second, marriages have been identified where the marriage is genuine but the husband has the intention of seriously exploiting his wife in their relationship, for example by forcing her into domestic servitude.<sup>26</sup>

4.20 In its submission, the AIC also referred to the Australian case of *R v Kovacs*,<sup>27</sup> as well as to the cases of *R v FAS*,<sup>28</sup> and *Columbia & Columbia*,<sup>29</sup> to illustrate the problem that:

...the partner visa system (consisting of visas available to enable spouses, de facto partners and fiancés to migrate to Australia) has been misused for the purpose of human trafficking or for related serious exploitation.<sup>30</sup>

### ***Identification of cases***

4.21 The Department informed the committee that the identification of Prospective Marriage visa applications involving forced marriages presents a challenge to departmental officers. This is primarily due to victims remaining silent

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24 *Submission 4*, p. 12.

25 *Submission 5*, p. 3.

26 *Submission 5*, p. 7.

27 [2008] QCA 417 (23 December 2008).

28 [2008] NSWDC 53 (20 March 2008).

29 [2009] FamCA 311.

30 *Submission 5*, p. 5. The three cases cited are briefly discussed in Australian Institute of Criminology, *Submission 5*, p. 6.



about their situation for fear of retribution, and the simple fact that most supporting documentation is found to be genuine even if a degree of coercion is present.<sup>31</sup>

4.22 In addition, the Department advised:

Fear of retribution against the victim also presents challenges in deciding visa applications where one of the parties indicates they do not consent to the relationship but are afraid to make such a statement publicly. It is very difficult for the Department to refuse a visa application without specifying the reason. This is especially the case when decision-making is subject to merits and judicial review.<sup>32</sup>

4.23 The most frequent concern for decision-makers determining Prospective Marriage visa applications is that family pressure may have played a role in an applicant's decision to accept an arranged marriage. As the Department noted in its submission:

...this can be a grey area given that it can be difficult to determine the point at which family or cultural expectations become coercive rather than influencing factors in a person's decision to marry.<sup>33</sup>

### ***Creating opportunities for disclosure***

4.24 Some witnesses indicated that, while often reluctant to report their circumstances, victims of forced marriages need to be given the opportunity to do so. For example, Dr Adam Tomison, Director of the AIC, suggested compulsory attendance and completion of English courses as an opportunity for victims to seek informal help:

In [our] study, women were denied access to English courses or community centres by their spouse because they were prevented from leaving their homes or only allowed to leave if they were escorted by other family members. If there was a requirement to attend such courses and for agencies to report back to immigration or to provide evidence that the women had attended and completed their course, this might provide a greater opportunity for women in an exploitative situation to have contact with people that could assist them.<sup>34</sup>

4.25 Dr Tomison emphasised that the focus should be on presenting forced marriage victims with opportunities to acquire information and assistance:

It is creating that opportunity that is the vital element. The English classes were one vehicle that was mentioned in the study...A broader issue is just

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31 *Submission 2*, p. 28.

32 *Submission 2*, p. 28.

33 *Submission 2*, p. 28.

34 *Committee Hansard*, 25 May 2012, p. 8. Also see Ms Kaye Quek, Coalition Against Trafficking in Women Australia, *Committee Hansard*, 25 May 2012, pp 2-3 in relation to separate interviews as a means of encouraging voluntary disclosure.

around having some community based organisation of some sort having access to a person without the spouse and other family members present to see how they are settling in and to make sure that they are okay and do not need to be provided with information to assist them to escape exploitative situations.<sup>35</sup>

4.26 On the other hand, CATWA argued that it is the responsibility of the Australian Government to advise victims of alternatives apart from going through with the marriage (for example, access to women's refuges and legal assistance), which might empower victims to reveal the existence of a forced marriage before it occurs.<sup>36</sup>

### **Strengthening protections against forced marriages**

4.27 Some submitters and witnesses indicated that there are current policies and practices that could be revised to provide stronger protections for potential victims of forced marriages in the Prospective Marriage visa program.<sup>37</sup> These measures include: the program's 18-years age requirement; enhanced scrutiny of sponsors; special training for decision-makers; an enhanced legislative response; and further research, education and support measures.

#### ***18-years age requirement***

4.28 CATWA submitted that the 18-years age requirement is not effective in preventing forced marriages in Australia, as evidenced by cases reported in the media of young women coerced into marrying much older men.<sup>38</sup> CATWA therefore recommended raising the minimum age at which a Prospective Marriage visa can be granted to at least 18 years old, rather than the minimum of 17 years and three months:

[R]aising the age at which the visa is granted may afford some victims of forced marriage extra time in which to make decisions about their future.<sup>39</sup>

4.29 A departmental officer informed the committee that the 18-years age requirement is consistent with the *Marriage Act 1961*:

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35 *Committee Hansard*, 25 May 2012, p. 10.

36 *Submission 4*, p. 11.

37 Although evidence to the committee mainly referred to female victims, and the language of the report reflects this evidence, the committee acknowledges that forced marriage is gender neutral and may also affect male victims. In relation to male victims, see, for example, Ms Louisa McKimm, Immigration Advice and Rights Centre, *Committee Hansard*, 25 May 2012, p. 15.

38 *Submission 4*, pp 9 and 12.

39 *Submission 4*, p. 10. Also see Ms Kaye Quek, Coalition Against Trafficking in Women Australia, *Committee Hansard*, 25 May 2012, p. 5; Coalition Against Trafficking in Women Australia, answer to question on notice, received 31 May 2012, pp 1-3.

It would therefore be unreasonable to [impose age restrictions] for the purpose of a visa that enables a person to enter Australia and marry lawfully...[M]ost applicants under the age of 18 were sponsored by people aged 29 or younger, and it is incorrect to infer that the Prospective Marriage Visa program is used by older men to prey on young women.<sup>40</sup>

### *Experience in the United Kingdom*

4.30 In this context, the committee notes that in November 2008 the UK Government increased the minimum age for partner visa applicants and their sponsors in the United Kingdom from 18 to 21 years, by amending the Immigration Rules 1994 (UK).<sup>41</sup> The policy objective was to tackle the problem of forced marriage in light of evidence suggesting that those in the age group 17-20 are most affected by forced marriage.<sup>42</sup>

4.31 In its *Eighth Report of Session 2010-2012 on Forced Marriage*, the United Kingdom's House of Commons Home Affairs Select Committee concluded that the amended age requirement 'undoubtedly helped a number of young people to resist forced marriage'. However, that committee also received evidence from the Crime Prosecution Service that the amendment resulted in an increase in birth certificate fraud, with some individuals trying to pretend that they met the new criterion.<sup>43</sup>

4.32 In 2011, the legality of the new age requirement was successfully challenged in the British Supreme Court, which found that the changes breached Article 8 of the European Convention on Human Rights and Fundamental Freedoms 1950 (providing the right to respect for private and family life).<sup>44</sup>

4.33 Accordingly, the Immigration Rules 1994 (UK) were amended to reinstate a minimum age of 18 years for a spouse, civil partner, fiancé(e), proposed civil partner,

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40 Dr Wendy Southern PSM, Department of Immigration and Citizenship, *Committee Hansard*, 25 May 2012, p. 17.

41 UK Immigration Rules 1994 (HC395), Rule 277 (spouse or civil partner), Rule 289AA (fiancé(e) or proposed civil partner), and Rule 295AA (unmarried or same-sex partner), available at: <http://www.official-documents.gov.uk/document/hc9394/hc03/0395/0395.pdf> (accessed 15 June 2012).

42 UK Government, Explanatory Memorandum to The Statement of Changes In Immigration Rules Presented to Parliament on 7 November 2011, p. 2. Also see UK Government, Home Office and UK Border Agency, *Marriage visas: the way forward*, July 2008, p. 13, available at: <http://michaeljameshall.files.wordpress.com/2011/03/marriagevisasthewayforward.pdf> (accessed 15 June 2012).

43 UK House of Commons, Home Affairs Select Committee, *Eighth Report of Session 2010-2012 on Forced Marriage*, May 2011, paras 17-18.

44 *R (on the application of Quila and another) (FC) v Secretary of State for the Home Department* and *R (on the application of Bibi and another) (FC) v Secretary of State for the Home Department* [2011] UKSC 45. The judgment is available at: [http://www.supremecourt.gov.uk/decided-cases/docs/UKSC\\_2011\\_0024\\_Judgment.pdf](http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2011_0024_Judgment.pdf) (accessed 15 June 2012).

unmarried partner or same-sex partner, and sponsor to qualify for entry clearance, leave to enter, leave to remain or variation of leave on the basis of the applicant's relationship.<sup>45</sup> The committee also notes that Norway requires persons applying for a fiancé permit (a residence permit for six months to get married in Norway) to be of lawful marriageable age (18 years).<sup>46</sup>

### ***Enhanced scrutiny of sponsors***

4.34 Dr Tomison from the AIC informed the committee that, in the AIC's exploratory research, 'the partner's behaviour was such that there were concerns about the use of deception and the recruitment of the woman for the purposes of serious exploitation'.<sup>47</sup> Dr Tomison suggested that it might be beneficial for there to be more intensive scrutiny of a Prospective Marriage visa sponsor, however:

...criminal checks alone are [not] going to be the answer. Perhaps, a more detailed assessment of the sponsor, rather than just a strong focus on the overseas partner, or would-be partner coming in, may go some way to reduce risk by identifying potentially risky situations...You might want to look at, obviously, the marriage history and other relationships and get referee reports from other members of the community.<sup>48</sup>

4.35 The Immigration Advice and Rights Centre (IARC) supported a proposal for Prospective Marriage visa sponsors to be interviewed and questioned about their intentions.<sup>49</sup> At the public hearing, Ms Louisa McKimm from the IARC expressed particular concern with those cases in which the sponsor does not freely consent to an intended marriage:

The discussion about [forced marriage] seems to focus on the applicant. ...[T]he sponsor's consent to the marriage is also relevant. They can also experience duress and be subject to a family situation that they have no control over that may result in them being a party to a marriage that they are not entirely happy with.<sup>50</sup>

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45 UK Government, *Statement of Changes in Immigration Rules*, 7 November 2011, p. 4. Also see UK Home Office, UK Border Agency, *Fiancé or proposed civil partner of a British citizen or settled person*, available at: <http://www.ukba.homeoffice.gov.uk/visas-immigration/partners-families/citizens-settled/fiancee-proposed-cp/> (accessed 15 June 2012).

46 Department of Immigration and Citizenship, Additional Information, received 7 June 2012.

47 *Committee Hansard*, 25 May 2012, p. 7.

48 *Committee Hansard*, 25 May 2012, p. 9. Also see Ms Andrea Christie-David, Immigration Advice and Rights Centre, *Committee Hansard*, 25 May 2012, p. 16 for similar comments.

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

50 *Committee Hansard*, 25 May 2012, p. 15.

### *Special training for decision-makers*

4.36 In the United Kingdom, the issue of forced marriages has been the subject of considerable attention, including by the Home Office and the Foreign and Commonwealth Office which formed the Forced Marriage Unit (FMU) in 2005. The policy role of the FMU is to work with other government departments, statutory agencies and voluntary organisations to develop effective policy for tackling forced marriages.<sup>51</sup>

4.37 In January 2010, the FMU published statutory guidelines, outlining the responsibilities of certain chief executives, directors and senior managers to develop and maintain local procedures and practice arrangements to enable front-line workers to handle cases of forced marriage effectively. The guidelines also set out how cases of forced marriage should be responded to using existing frameworks.<sup>52</sup>

4.38 The FMU has also published practice guidelines for front-line workers in government departments and agencies. The practice guidelines provide advice and support, including a description of the potential indicators of a forced marriage.<sup>53</sup>

4.39 CATWA recommended that the Australian Government consider the work of government agencies and organisations based in the United Kingdom:

...it is clear that specialist training is required for the relevant immigration officers to improve their capacity to detect prospective forced marriages, and other marriage practices that may be harmful to women.<sup>54</sup>

4.40 In response to such a suggestion, a representative from the Department advised:

We do provide a level of general training, particularly to integrity officers, in terms of interview techniques, analysis, and document examination—so that they can go behind the documents—and they do receive training in terms of the particular countries and cultures they will be dealing with. But

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51 Forced Marriage Unit, *Multi-agency practice guidelines: Handling cases of Forced Marriage*, June 2009, p. 18. Also see subsection 63Q(1) of the *Forced Marriage (Civil Protection) Act 2007* (UK) allowing the UK Secretary of State to prepare and publish guidance, available at: <http://www.legislation.gov.uk/ukpga/2007/20/contents> (accessed 15 June 2012).

52 UK Government, Forced Marriage Unit, *The Right to Choose: Multi-agency statutory guidance for dealing with forced marriage*, January 2010, pp 6-7. The statutory guidance covers a wide range of issues – for example: staff training and awareness-raising; effective inter-agency working and information-sharing; monitoring and evaluation; and risk assessment.

53 UK Government, Forced Marriage Unit, *Multi-agency practice guidelines: Handling cases of Forced Marriage*, June 2009, p. 15.

54 *Submission 4*, p. 12.

we have identified that there is a need for more specific training in this area.<sup>55</sup>

4.41 The Department's submission referred to the current development of a training package for Prospective Marriage visa decision-makers, which draws on the work of the FMU:

It is hoped that this training package will assist decision makers in identifying risk factors of forced marriage and appropriate steps which they should take where there are concerns that a forced marriage may be occurring.<sup>56</sup>

### *An enhanced legislative response*

4.42 In its submission, the Department stated that the FMU 'appears to be the most advanced' response to forced marriage.<sup>57</sup> The UK Government has also responded to the issue of forced marriages in the United Kingdom by introducing civil legislation, and has foreshadowed the introduction of legislation to criminalise forced marriages.<sup>58</sup>

#### *Civil legislation*

4.43 In 2007, the UK Government enacted the *Forced Marriage (Civil Protection) Act 2007* (UK) to protect potential and actual victims of forced marriage. This legislation provides for the High Court and designated county courts to make Forced Marriage Protection Orders to prevent an apprehended forced marriage, or provide practical assistance to the victim of a forced marriage.<sup>59</sup>

4.44 According to the British Home Office, the rising number of applications for Forced Marriage Protection Orders and reported cases reflects:

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55 Mr Stephen Allen, Department of Immigration and Citizenship, *Committee Hansard*, 25 May 2012, p. 22.

56 *Submission 2*, p. 29.

57 *Submission 2*, p. 28.

58 PM David Cameron, *Forced Marriage to become a criminal offence*, Number 10 Downing Street Press Release, 8 June 2012, available at: <http://www.number10.gov.uk/news/forced-marriage-to-become-criminal-offence/> (accessed 15 June 2012); Alan Travis, 'Forced marriage to become criminal offence: David Cameron confirms', *The Guardian*, 8 June 2012.

59 The *Forced Marriage (Civil Protection) Act 2007* (UK) is available at: <http://www.legislation.gov.uk/ukpga/2007/20/contents> (accessed 15 June 2012). It now comprises Part 4A of the *Family Law Act 1996* (UK).

...the continued efforts of the [FMU] to raise awareness among victims and potential victims that forced marriage is unacceptable and help is available.<sup>60</sup>

4.45 During this inquiry, only two participants commented on the United Kingdom's civil legislation. CATWA supported the introduction of similar legislation in Australia but argued that such legislation should not comprise the sole legislative response to the problem of forced marriage:

[Such an approach] requires victims to take responsibility for the crime that is being committed against them. It places the burden on the victim to seek out a protection order, whereas the criminal law would put the responsibility on authorities.<sup>61</sup>

4.46 Further:

[Civil legislation] is likely to be ineffectual and inaccessible to victims if, as is often the case, they are only made aware at the last minute of the impending marriage.<sup>62</sup>

4.47 The Department's submission described the FMU's casework – at home, abroad and in the immigration context – as well as the *Forced Marriage (Civil Protection) Act 2007* (UK). However, the submission did not indicate whether the Australian Government is, or would be, exploring the possible introduction of similar legislation in Australia.<sup>63</sup>

### *Criminalising forced marriage*

4.48 In 2005, the FMU consulted the British public on whether forced marriage should be criminalised in the United Kingdom. The majority of respondents in the consultation did not support criminalising forced marriage (37%),<sup>64</sup> considering that the disadvantages of any such legislation would outweigh the advantages (for

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60 UK Home Office, Forced Marriage Consultation, December 2011, p. 5. Also see Ministry of Justice, Court Statistics Quarterly, October to December 2011, Ministry of Justice Statistics Bulletin, 29 March 2012, p. 42, available at: <http://www.justice.gov.uk/downloads/statistics/courts-and-sentencing/court-stats-quarterly-q4-2011.pdf> (accessed 15 June 2012).

61 Ms Kaye Quek, Coalition Against Trafficking in Women Australia, *Committee Hansard*, 25 May 2012, p. 5.

62 Coalition Against Trafficking in Women Australia, answer to question on notice, received 31 May 2012, p. 4.

63 See Department of Immigration and Citizenship, *Submission 2*, pp 28-29.

64 The FMU received 157 responses from across the United Kingdom, with 34% of respondents supporting the criminalisation of forced marriage: see Foreign & Commonwealth Office and Home Office, *Forced Marriage: A wrong not a right, Summary of responses to the consultation on the criminalisation of forced marriage*, 7 June 2006, p. 11, available at: <http://www.scotland.gov.uk/Resource/Doc/1137/0079812.pdf> (accessed 15 June 2012).



example, potentially driving forced marriage underground, preventing reconciliation and isolating victims).<sup>65</sup>

4.49 The UK Government decided not to proceed with the creation of a criminal offence but instead enacted the *Forced Marriage (Civil Protection) Act 2007* (UK), which came into force on 25 November 2008.<sup>66</sup>

4.50 In May 2011, the United Kingdom's Home Affairs Select Committee questioned the effectiveness of the *Forced Marriage (Civil Protection) Act 2007* (UK), based on 'inadequacies in the monitoring of compliance with [a protection] order...and a lack of effective action in cases of breach'. While it considered that the civil legislation should continue to be used, that committee also stated:

...it would send out a very clear and positive message to communities within the UK and internationally if it becomes a criminal act to force – or to participate in forcing – an individual to enter into a marriage against their will.<sup>67</sup>

4.51 The UK Government responded as follows:

While the Committee's Report states that criminalisation would send out a 'very clear and positive message', it does not define how this would be achieved above and beyond what is already achieved by the general criminal offences (assault, kidnap, people trafficking etc) that might apply in circumstances of forced marriage. However, if the Committee can provide evidence that a criminal offence and sanction would be more effective in encouraging the reporting of cases, or that it would deter perpetrators, we would be happy to consider it.<sup>68</sup>

4.52 In December 2011, the British Home Office released a Discussion Paper seeking views on whether a specific criminal offence would help combat forced marriage and, if so, how the offence should be formulated.<sup>69</sup> The closing date for responses to that inquiry was 30 March 2012 and, on 8 June 2012,

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65 Foreign & Commonwealth Office and Home Office, *Forced Marriage: A wrong not a right, Summary of responses to the consultation on the criminalisation of forced marriage*, 7 June 2006, p. 11, available at: <http://www.scotland.gov.uk/Resource/Doc/1137/0079812.pdf> (accessed 15 June 2012).

66 UK Government, Forced Marriage Unit, *The Right to Choose: Multi-agency statutory guidance for dealing with forced marriage*, January 2010, p. 5.

67 UK House of Commons, Home Affairs Select Committee, *Eighth Report of Session 2010-2012 on Forced Marriage*, May 2011, para 12.

68 UK Government, *The Government's response to the Eighth Report from the Home Affairs Committee, Session 2012-12 HC 880*, p. 3, available at: <http://www.official-documents.gov.uk/document/cm81/8151/8151.pdf> (accessed 15 June 2012).

69 UK Government, Home Office, *Forced Marriage Consultation*, December 2011, p. 4. The consultation also covers the issue of how the Government might approach the criminalisation of breaches of the *Forced Marriage (Civil Protection) Act 2007* (UK).



UK Prime Minister David Cameron announced the outcome of the consultation process: namely, that forcing someone to marry will become a criminal offence in England and Wales.<sup>70</sup>

4.53 The committee notes, in this context, the response to the Home Office's inquiry from the Ashiana Network, the only dedicated refuge network for British victims of forced marriages:

In our consultation with residents across our three refuges (two specifically for women at risk of forced marriage) all 20 women responded. 7 out of 20 women said that criminalisation may help in raising the issue with communities and therefore may deter families from engaging in this practice. Further exploration of this indicated that this perception is misguided as there is an assumption that this will act as a deterrent and their parents would not go ahead with it. This may in fact put the woman at greater risk, as she feels a false sense of security and fails to take any protective measures e.g. failing to tell someone about the possibility, not contacting agencies, not having a safety plan.

**19 of the 20 said that if forced marriage were to be a criminal offence they would not report it.** They cited feelings of guilt, not wanting to see parents going through the courts or imprisoned, being ostracised from the family/community, being disowned from the family, fear of reprisals, that they still loved their parents and would not be able to deal with the emotional heartache. Women were also more inclined to say that rather than go through a prosecution, they would get married and later seek divorce. This is worrying, as women may be vulnerable to other abuses, including rape.<sup>71</sup>

4.54 Submitters and witnesses to the current inquiry did not refer to developments in the United Kingdom, apart from a brief reference in the Department's submission.<sup>72</sup>

#### *Proposed legislation on slavery and people trafficking*

4.55 On 30 May 2012, the Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012 (bill) was introduced into the House of Representatives by the Attorney-General.<sup>73</sup>

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70 PM David Cameron, *Forced Marriage to become a criminal offence*, Number 10 Downing Street Press Release, 8 June 2012, available at: <http://www.number10.gov.uk/news/forced-marriage-to-become-criminal-offence/> (accessed 15 June 2012).

71 Ashiana Network, *Response to Forced Marriage Consultation*, March 2012, pp 9-10 (emphasis in the original), available at: <http://www.ashiana.org.uk/attachments/article/5/Ashiana%20Network%20Response%20to%20Forced%20Marriage%20Consultation%202012.pdf> (accessed 15 June 2012).

72 *Submission 2*, p. 29.

73 House of Representatives, *Votes and Proceedings*, No. 111- 30 May 2012, p. 1521.

4.56 The bill proposes to better combat slavery and people trafficking by capturing and criminalising a broad range of exploitative behaviour.<sup>74</sup> Some of the proposed amendments include amending the *Criminal Code Act 1995* to: legally define the meaning of forced marriage (proposed new section 270.7A); create two new offences of forced marriage (proposed new section 270.7B); and broaden the definition of 'exploitation' (proposed new section 271.1A).

4.57 As explained by the AIC in its submission, marriage is related to people trafficking and slavery in two ways:

First, marriage can be used as a way of recruiting a person into a situation of serious exploitation, using deception and/or coercion as the means of achieving this (i.e. fraudulent or sham marriages). Second, 'servile marriage' is itself recognised in international law as a 'practice similar to slavery' under the United Nations' *Supplementary convention on the abolition of slavery, the slave trade, and institutions and practices similar to slavery*.<sup>75</sup>

4.58 According to a representative from the Attorney-General's Department, the results of consultation on an exposure draft of the bill were 'overwhelmingly supportive' of the criminalisation of forced marriage.<sup>76</sup>

4.59 A Department of Immigration and Citizenship representative advised:

[T]he [D]epartment has genuine concern regarding forced marriage practices and the consequences for victims of forced marriage. We therefore welcome the recent announcement by the Attorney-General on the criminalisation of forced marriage[.]<sup>77</sup>

4.60 However, in evidence to the committee, Mr Bill Gerogiannis from NSW Legal Aid did not agree with the introduction of a criminal offence in this area:

...the annexure to our submission included the National Legal Aid discussion paper on forced and servile marriages...The sorts of issues that were addressed there were non-legal avenues such as greater community legal education and greater access for women, in particular, who are having difficulties in this area and should be supported. [In] that submission, under the heading 'Non-Legislative Measures', we think that those sorts of measures that are mentioned in that earlier National Legal Aid submission ought to be looked at. Also in the National Legal Aid submission there was concern about further criminalising these areas. National Legal Aid's

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74 Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012, Explanatory Memorandum, p. 1.

75 *Submission 5*, p. 5.

76 Ms Sarah Chidgey, Attorney-General's Department, *Committee Hansard*, 25 May 2012, p. 23. The committee notes that the responses to the consultation process were not published.

77 Dr Wendy Southern PSM, Department of Immigration and Citizenship, *Committee Hansard*, 25 May 2012, p. 18.

position, which we support, is that the introduction of new criminal offences should again be resisted.<sup>78</sup>

4.61 Other submitters and witnesses did not comment specifically on this proposed legislation. However, in answer to a question on notice, CATWA expressed its support for the bill.<sup>79</sup>

### ***Research, education and support measures***

4.62 The committee heard from a number of submitters and witnesses that addressing forced marriage in Australia will require a broad response. The Department's view was that it might be necessary to adopt a wider focus than the Prospective Marriage visa program because:

- forced marriage could be present across Australia's Migration Program;
- forced marriage could also occur where an Australian party is made to travel overseas for the purpose of entering into a marriage; and
- victims of forced marriage would require support that goes well beyond the Department's portfolio responsibilities.<sup>80</sup>

4.63 In general, submitters and witnesses agreed that there is a need for further research, education and support for prospective or actual victims of forced marriage in Australia.

### ***Need for further research***

4.64 At the public hearing, CATWA referred to the United Kingdom's Forced Marriage Working Group (Working Group).<sup>81</sup> The Working Group was appointed in August 1999 to determine the extent of forced marriages in the United Kingdom,<sup>82</sup> and its recommendations ultimately led to the establishment of the FMU.

4.65 Ms Kaye Quek advised that CATWA would support the establishment of a similar working group aimed at providing quantitative and qualitative research into the extent of forced marriage in Australia:

We would like to see this type of quantitative and qualitative research conducted where [women's shelters and refuges] are asked to give evidence of their experience of forced marriage and then, based on that, expanding it

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78 *Committee Hansard*, 25 May 2012, p. 14. Also see NSW Legal Aid, *Submission 7*, Attachment, p. 6.

79 Answer to question on notice, received 31 May 2012, p. 4.

80 *Submission 2*, p. 29.

81 Ms Kaye Quek, Coalition Against Trafficking in Women Australia, *Committee Hansard*, 25 May 2012, p. 3.

82 UK Home Office, Report of the working group on forced marriage, *A choice by right*, June 2000, pp 11 and 28.

out to schools and religious organisations to begin to put together a mapping exercise of where the practice is occurring. That would be a good first step in terms of getting some hard evidence.<sup>83</sup>

4.66 The AIC advised that its current research program began four years ago when it perceived a need to further investigate the role of marriage in people trafficking. The program is one in a series of projects exploring a wide range of elements of human trafficking into Australia. The committee understands that, as at 2011, the research is funded by an ongoing appropriation and, in future, the AIC intends to further examine the connection between marriage and people trafficking in Australia.<sup>84</sup>

4.67 With reference to CATWA's call for further research, Dr Tomison told the committee:

...it reminds me a bit of the consciousness-raising era of the seventies around sexual assault and domestic violence against women in Australia and other Western countries. It started slowly and it built. We learned a lot more over the last 30 years around what happens in terms of violence towards women, children and others in this society...

In my view, human trafficking research in this country is in a similar infancy stage and we will be looking at doing more work to actually expand on what we do not know and improving our knowledge over the next few years. A number of agencies are starting to explore this issue...I do not think that human trafficking and the issue of human trafficking for Australia will ever rival the nature of community based violence that we have in this country. But it is an important issue, and if people are being exploited and trafficked into this country we need to make sure we are on top of it and that we know as much as we can about it.<sup>85</sup>

### *Education and support measures*

4.68 In a personal submission, Ms Emma Davidson argued that the community, public servants, teachers and health care professionals all need to be better educated on the distinction between an arranged marriage and a forced marriage. Further:

We also need to know what to do if someone does talk about being in a forced marriage – who can they be referred to for support that best meets their needs?<sup>86</sup>

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83 *Committee Hansard*, 25 May 2012, p. 6.

84 Dr Adam Tomison and Ms Laura Beacroft, Australian Institute of Criminology, *Committee Hansard*, 25 May 2012, pp 7, 10 and 11-12.

85 *Committee Hansard*, 25 May 2012, p. 11.

86 *Submission 8*, p. 2.

4.69 Dr Tomison from the AIC agreed:

With regard to help-seeking behaviour, both mainstream and migrant community centres play a critical role in assisting women to leave exploitative or violent situations. It is these less formal sources that often provide a first point of contact for seeking help. The women in our study did not seek formal help from the police or through immigration channels, but they reached out to people in the community. How the community responds is therefore really important.<sup>87</sup>

4.70 NSW Legal Aid and CATWA emphasised the importance of providing information to migrants and the community more generally, to assist in the understanding of what constitutes a forced marriage, the rights of victims, and available services to assist in cases of family violence or sexual assault. For example, Ms Quek from CATWA noted:

Legislation was brought in in America in the mid-2000s to try to target the international marriage broker or mail order bride industry which provided women who entered the country through such fiancée visas with basically an information pack explaining to them that domestic violence is illegal in the United States, with access to refuges, telephone numbers and those types of things.<sup>88</sup>

4.71 CATWA also submitted that, in its view, the way in which the FMU in the United Kingdom has addressed, or sought to address, the issue of forced marriage exemplifies best practice:

Through the FMU, information and guidance is provided to individual victims, professional, voluntary and statutory agencies, and schools about the problem of forced marriage...In addition, the FMU itself provides examples of what it considers best practice in relation to forced marriage. These include measures such as the establishing of dedicated regional helplines to provide advice to victims of the practice, and the appointing of specially trained police officers to schools to educate and raise awareness amongst teachers and students of the problem of forced marriage.<sup>89</sup>

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87 *Committee Hansard*, 25 May 2012, p. 8. Also see Ms Laura Beacroft, Australian Institute of Criminology, *Committee Hansard*, 25 May 2012, p. 10.

88 *Committee Hansard*, 25 May 2012, p. 4. Also see NSW Legal Aid, *Submission 7*, p. 5.

89 Answer to question on notice, received 31 May 2012, pp 4-5.



# CHAPTER 5

## Committee view and recommendations

5.1 In general, the committee considers that there is a high level of integrity within the Prospective Marriage visa program. Statistical information provided to the committee showed that, from 1 July 2006 to 31 December 2011, 13% of applications have not been successful for one reason or another.<sup>1</sup> Of the 87% of successful applications, 93% of visa holders subsequently applied for a permanent Partner visa.<sup>2</sup> These statistics indicate to the committee that the integrity measures for the program are robust and that most Prospective Marriage visa applicants utilise the program for its intended purpose.

5.2 The statistical information also shows that, for the same five year period, Prospective Marriage visa applicants were primarily over the age of 18 years (99.4%), with only a small number of applicants under the age of 18 years granted a visa (0.6%).<sup>3</sup> Nearly half of Prospective Marriage visa holders under the age of 18 years were no more than six years younger than their sponsor,<sup>4</sup> and a high proportion of visa holders under the age of 18 years married their intended spouse.<sup>5</sup> In view of these statistics, the committee considers that it would be inaccurate to conclude that the visa program is used primarily by older men to prey on younger women.

5.3 The committee also notes the submissions and evidence received from NSW Legal Aid, the Immigration Advice and Rights Centre, Ms Jannaha Schillaci from Hall & Wilcox Lawyers and the Department that the legal requirements for the Prospective Marriage visa program are sufficient to maintain its integrity.

5.4 The committee does not therefore consider that there is a need for wide-scale reform of the Prospective Marriage visa program. Notwithstanding this view, evidence presented to the committee suggests that some aspects of the program could be improved to provide greater protections to applicants, who, on account of their young age, could become victims of forced marriage and/or people trafficking.

### Eligibility criteria

5.5 Submitters and witnesses provided the committee with information regarding the eligibility criteria for the Prospective Marriage visa program. The committee

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1 Department of Immigration and Citizenship, *Submission 2*, Attachment 1, p. 10.

2 Department of Immigration and Citizenship, *Submission 2*, p.18 and Attachment 1, p. 10.

3 Department of Immigration and Citizenship, *Submission 2*, Attachment 1, p. 10.

4 Department of Immigration and Citizenship, *Submission 2*, Attachment 1, p. 8; Department of Immigration and Citizenship, answer to question on notice, received 7 June 2012, p. 6.

5 Department of Immigration and Citizenship, *Submission 2*, p.18.

comments in particular on two of the criteria assessment measures: interviews and risk identification.

5.6 It is apparent that not all Prospective Marriage visa applicants are interviewed and the decision whether to interview an applicant depends upon the decision-maker and/or the level of risk associated with the application.

5.7 The committee accepts that the Department's country and cultural-specific risk matrices could result in a Prospective Marriage visa application being assessed as high-risk, thereby resulting in a higher level of scrutiny which is likely to include interviewing an applicant and possibly the applicant's sponsor.

5.8 However, the committee is concerned that the high-risk factors for the Prospective Marriage visa program do not expressly include applicants and sponsors who, on account of their young age and that factor alone, might be at greater risk of human rights abuses, whether by way of a forced marriage or human trafficking under the program. The committee is partially reassured by the fact that an applicant's young age, and significant age differences between a couple, might feature in the country and cultural-specific risk matrices.<sup>6</sup>

5.9 In that context, the committee notes that the Coalition Against Trafficking in Women Australia (CATWA) suggested that all applicants under the age of 18 should be interviewed separately from their sponsor, intended spouse and family members to accurately explore issues of intention and consent. CATWA also suggested that the age criterion for the Prospective Marriage visa program should be increased to at least 18-years to grant applicants more time in which to make decisions regarding their future.

5.10 In relation to the first of these suggestions from CATWA, the committee notes that the Department has an informal practice of interviewing all Prospective Marriage visa applicants under the age of 18<sup>7</sup> but considers that this practice should be formalised. Although there may continue to be instances where victims do not report the occurrence of forced marriages in an interview, the committee is of the view that every opportunity should be given to allow a disclosure to occur.

5.11 The committee also agrees with the suggestion from CATWA that the age criterion for the Prospective Marriage Visa program should be increased to at least 18 years. The committee notes that this might lead to an increase in documentation fraud<sup>8</sup> but is not of the view that it amounts to sufficient reason not to implement the

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6 Mr Kruno Kukoc and Mr Stephen Allen, Department of Immigration and Citizenship, *Committee Hansard*, 25 May 2012, pp 24-25.

7 Department of Immigration and Citizenship, answer to question on notice, received 7 June 2012, p. 1.

8 UK House of Commons, Home Affairs Select Committee, *Eighth Report of Session 2010-2012 on Forced Marriage*, May 2011, para 17.



change. In the committee's opinion, this risk can be addressed. It is also noted that the Department does not support this proposal on the basis that it would not be reasonable for the program to impose an age restriction for a visa which enables a person to enter Australia and marry lawfully.<sup>9</sup> The committee does not accept this rationale, considering it perfectly reasonable to require an applicant to be of lawful 'marriageable age' when granted a visa to enter Australia in order to marry an intended spouse. The committee notes that such an approach is consistent with that adopted in at least two other countries – the United Kingdom and Norway.

5.12 The committee understands that there is a shortage of empirical data regarding the incidence of forced marriages in Australia, both generally, and in relation to the Prospective Marriage visa program. The committee does not wish to speculate on how many Prospective Marriage visa applicants are affected by this abhorrent practice. However, anecdotal evidence suggests that the program could be contributing to the problem.

5.13 The Department expressed a genuine concern regarding the practice of forced marriage and the consequences for its victims.<sup>10</sup> The committee agrees that a single case of forced marriage constitutes a gross abuse of that victim's human rights. Such abuses should not be tolerated, and the committee considers that appropriate safeguards should be established within the Prospective Marriage visa program to provide as much protection as possible to visa applicants who could fall victim to this despicable practice.

## Recommendation 1

### 5.14 The committee recommends that:

- the Department of Immigration and Citizenship institute a formal requirement for Prospective Marriage visa program decision-makers to separately interview all applicants and sponsors under the age of 18; and
- the Australian Government increase the minimum age of visa holders within the Prospective Marriage visa program to 18 years of age to help minimise the incidence of forced marriage and human trafficking in Australia.

## Fraud

5.15 The committee considers it to be unfortunate that the Department's electronic database does not record certain information, including fraud, in such a way as to allow for statistical reporting. In the committee's view, the Department could improve

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9 Dr Wendy Southern PSM, Department of Immigration and Citizenship, *Committee Hansard*, 25 May 2012, p. 17.

10 Dr Wendy Southern PSM, Department of Immigration and Citizenship, *Committee Hansard*, 25 May 2012, p. 18.

its understanding of, and approach to, migration fraud if such statistics were able to be readily collated and analysed.

5.16 In the absence of empirical data, the Department submitted that the conduct of Prospective Marriage visa holders upon arrival in Australia provides one alternative assessment measure.<sup>11</sup> However, the committee considers that failure to marry an intended spouse is not necessarily indicative of fraud: it could, for example, indicate the existence of family violence.

5.17 The committee notes some submitters' and witnesses' comments regarding the Australian Law Reform Commission's (ALRC) report, titled *Family Violence and Commonwealth Laws – Improving Legal Frameworks*. The committee strongly endorses the ALRC's view that it is not acceptable for Prospective Marriage visa holders to remain in abusive relationships because they believe that they will be deported if a relationship is terminated.<sup>12</sup>

5.18 Noting the Department's response to the ALRC – namely, that appropriate integrity measures could be enacted – as well as the policy rationale for the provision of the family violence exception, the committee fully supports the ALRC's recommendation to extend the family violence exception to the Prospective Marriage visa program.

5.19 The Department provided substantial comments to the committee in respect of the broad and overarching protections against fraud within the Prospective Marriage visa program. The committee especially notes two of those protective measures: statutory offences and the power to cancel visas.

5.20 The *Migration Act 1958* provides the Minister for Immigration and Citizenship with a suite of powers to prosecute cases of fraud. The committee heard, however, that these statutory powers have not been significantly used in recent years and the Department did not provide any information on the extent to which it has prosecuted alleged offences.

5.21 The committee notes that a departmental focus on fraud prevention, or the difficulties of conducting a prosecution,<sup>13</sup> should not necessarily be determinative of whether or not a matter is referred to the Commonwealth Director of Public Prosecutions for prosecution. In the committee's view, a specific prosecution policy in relation to the offences contained in Subdivision B of Division 12 of Part 2 of the *Migration Act 1958* would help guide decision-making about the initiation and conduct of prosecutions relating to fraud within the Prospective Marriage visa program.

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11 *Submission 2*, p. 18.

12 *Submission 1*, p. 1.

13 Department of Immigration and Citizenship, *Submission 2*, p. 25.

## Recommendation 2

**5.22** The committee recommends that the Department of Immigration and Citizenship consider modifying its electronic database to enable statistical reporting on the incidence of fraud within the Prospective Marriage visa program (noting that this information is collected but not centrally recorded by the Department of Immigration and Citizenship).

## Recommendation 3

**5.23** The committee recommends that:

- the Australian Government amend the Migration Regulations 1994 to allow Prospective Marriage visa holders to have access to the family violence exception, as recommended by the Australian Law Reform Commission in its report, *Family Violence and Commonwealth Laws – Improving Legal Frameworks*; and
- the Department of Immigration and Citizenship investigate and implement appropriate integrity measures to facilitate the application of the family violence exception to Prospective Marriage visa holders.

## Recommendation 4

**5.24** The committee recommends that the Australian Government should develop a specific prosecution policy for the offences contained in Subdivision B of Division 12 of Part 2 of the *Migration Act 1958* and, after implementation, continue to update the policy as necessary.

## Arranged and forced marriages

**5.25** The committee accepts evidence from the Department indicating that arranged marriages are an unquantifiable part of the Prospective Marriage visa program,<sup>14</sup> and the committee agrees with NSW Legal Aid that it is appropriate to respect migrants' cultural practices, provided these practices comply with Australian law. However, as highlighted by some submitters and witnesses (including the Department), it can be difficult to determine whether a marriage is arranged or forced since the distinction is not always clear.

**5.26** The committee notes departmental officers' evidence that the legal and procedural requirements of the Prospective Marriage visa program sufficiently empower decision-makers to assess 'real consent'.<sup>15</sup> However, the committee is not entirely persuaded that this does in fact occur due to such factors as there being no express requirement for the assessment of 'real consent', the enduring difficulty of the under-reporting of forced marriages, anecdotal reports of forced marriages occurring

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<sup>14</sup> *Submission 2*, p. 19.

<sup>15</sup> Dr Wendy Southern PSM and Mr Robert Day, Department of Immigration and Citizenship, *Committee Hansard*, 25 May 2012, p. 27.

in Australia (which possibly involve Prospective Marriage visa holders), and the often misunderstood distinction between an arranged marriage and a forced marriage.

5.27 The committee is concerned to ensure that Prospective Marriage visa applicants and sponsors are truly entering into an arranged marriage, to which they both fully and freely consent. In cases where they do not consent, the committee endorses the Department's view that it is necessary to protect the safety and well-being of the non-consenting party to the application, should the disclosure become known to the other party or the members of either party's family.<sup>16</sup>

5.28 Closely related to the topic of arranged marriage is the topic of forced marriage. In evidence, the Australian Institute of Criminology (AIC) advised that awareness of forced marriages is at an infancy stage in Australia,<sup>17</sup> and the committee agrees that forced marriage is an evolving phenomenon which could, and should, be better understood by the Australian Government and the community.

5.29 The committee notes that the AIC's current research project provides an evidence base from which to expand knowledge and understanding of forced marriages in Australia. In addition, CATWA has highlighted the invaluable role that a working group, such as was employed in the United Kingdom, can play in the early identification of a significant social and cultural issue.<sup>18</sup>

5.30 While the committee recognises that funding is always an issue, it considers that there is merit in the establishment of a working group to ascertain the extent of the problem of forced marriage in Australia. Once determined, the Australian Government can consider an appropriate, whole-of-government response which best supports actual and potential victims. In this regard, the committee notes CATWA's view that the work of the Forced Marriage Unit (FMU) in the United Kingdom represents best practice.<sup>19</sup>

5.31 In relation to strengthening protections for Prospective Marriage visa applicants who might be victims of forced marriages, submitters and witnesses supported a number of further measures, including special training for decision-makers, an enhanced legislative response, and further research, education and support measures. The committee notes that these measures would help to address the concerns identified by the committee in paragraphs 5.10 and 5.11 above.

5.32 The committee understands that the Department is developing specialist training for Prospective Marriage visa program decision-makers and is taking into

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16 Department of Immigration and Citizenship, *Submission 2*, p. 28.

17 Dr Adam Tomison, Australian Institute of Criminology, *Committee Hansard*, 25 May 2012, p. 11.

18 Ms Kaye Quek, Coalition Against Trafficking in Women Australia, *Committee Hansard*, 25 May 2012, p. 6.

19 Answer to question on notice, received 31 May 2012, pp 4-5.

account the work of the FMU.<sup>20</sup> The committee also notes the recent introduction into the parliament of the Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012 which will criminalise forced marriages in Australia, an approach also being undertaken in the United Kingdom.

5.33 As a final point, the committee acknowledges submissions and evidence received from the AIC, Ms Emma Davidson, legal practitioners and CATWA, all of whom advocated the provision of further information and education to the wider Australian community and migrant women to empower potential and actual victims, and to maximise the opportunities for victim support. The committee agrees that this would be a worthwhile initiative for Prospective Marriage visa holders and other Partner visa holders, which could be instituted either at interview or upon arrival in Australia.

### **Recommendation 5**

**5.34 The committee recommends that the Department of Immigration and Citizenship:**

- **investigate and implement a way in which to record the non-consent of one party to a Prospective Marriage visa application, which takes into account the safety and well-being of that party should the other party or the members of either party's family become aware of the disclosure of a forced marriage; and**
- **amend the Procedures Advice Manual to expressly require Prospective Marriage visa program decision-makers to investigate and assess the 'real consent' of applicants and sponsors as far as possible.**

### **Recommendation 6**

**5.35 The committee recommends that the Australian Government consider establishing a working group to investigate the incidence of forced marriages in Australia and to explore relevant options for assisting victims.**

### **Recommendation 7**

**5.36 The committee recommends that the Department of Immigration and Citizenship develop an information package for newly arrived migrants on a Prospective Marriage visa or Partner visa, which informs such migrants about:**

- **the law in Australia with respect to family violence and forced marriages, including factors which might indicate the existence of a forced marriage; and**
- **how migrants experiencing family violence or a potential or actual forced marriage can seek assistance.**

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20 Department of Immigration and Citizenship, *Submission 2*, p. 29.

**The information package should be provided to migrants in an appropriate language, either their first language as indicated on their visa application form, or the official language of their country of origin.**

**Senator Penny Wright**

**Chair**

# **APPENDIX 1**

## **SUBMISSIONS RECEIVED**

<b>Submission Number</b>	<b>Submitter</b>
1	Australian Law Reform Commission
2	Department of Immigration and Citizenship
3	Ms Jannaha Schillaci, Hall & Wilcox Lawyers
4	Coalition Against Trafficking in Women Australia
5	Australian Institute of Criminology
6	Reverend Peter Curtis
7	Legal Aid New South Wales
8	Ms Emma Davidson
9	Immigration Advice and Rights Centre

## **ADDITIONAL INFORMATION RECEIVED**

1	Additional information provided by the Australian Institute of Criminology on 25 May 2012
2	Response to questions on notice provided by the Coalition Against Trafficking in Women Australia on 31 May 2012
3	Response to question on notice provided by the Attorney-General's Department on 4 June 2012
4	Response to questions on notice provided by the Department of Immigration and Citizenship on 7 June 2012
5	Additional information provided by the Department of Immigration and Citizenship on 15 June 2012





## **APPENDIX 2**

### **WITNESSES WHO APPEARED BEFORE THE COMMITTEE**

**Canberra, 25 May 2012**

ALLEN, Mr Stephen, First Assistant Secretary, Border, Refugee and Onshore Services, Department of Immigration and Citizenship

BEACROFT, Ms Laura, Research Manager, Australian Institute of Criminology

CHIDGEY, Ms Sarah, Assistant Secretary, Criminal Law and Law Enforcement Branch, Attorney-General's Department

CHRISTIE-DAVID, Ms Andrea, Principal Solicitor, Immigration Advice and Rights Centre

DAY, Mr Robert, Acting Assistant Secretary, Family and Health Policy, Department of Immigration and Citizenship

FIELD, Ms Rachel, Senior Legal Officer, Criminal Law Policy, Attorney-General's Department

GEROGIANNIS, Mr Bill, Senior Solicitor, Legal Aid NSW

KUKOC, Mr Kruno, First Assistant Secretary, Department of Immigration and Citizenship

McKIMM, Ms Louisa, Solicitor, Immigration Advice and Rights Centre

QUEK, Ms Kaye, Executive Committee Member and Researcher, Coalition Against Trafficking in Women Australia

SOUTHERN, Dr Wendy, Deputy Secretary, Policy and Program Management Group, Department of Immigration and Citizenship

TOMISON, Dr Adam, Director and Chief Executive, Australian Institute of Criminology