

## 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.

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## 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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14 *Submission 2*, p. 19.

15 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**