



Australian Government

Government Response to the Senate Legal and Constitutional Affairs References Committee Report:

Prospective Marriage Visa program

June 2013

INTRODUCTION

On 23 November 2011, the Senate referred the following matter to the Legal and Constitutional Affairs Committee for inquiry and report by 1 March 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.

The Committee tabled the final report for the inquiry on 26 June 2012. The Committee found that there is a high level of integrity within the Prospective Marriage visa program, and concluded that no wide-scale reform of the program is needed. The Committee did however, make the following 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 minimize 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 exceptions, 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 member of the 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 '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.

BACKGROUND

The Prospective Marriage visa program allows prospective partners of Australian citizens, Australian permanent residents or Eligible New Zealand citizens to enter Australia, marry and apply for permanent residency in Australia.

The Prospective Marriage visa is a temporary visa that must be lodged and decided outside Australia. It is valid for nine months from the date it is issued, and there is no provision for its validity to be extended after the holder arrives in Australia.

To satisfy the requirements for a Prospective Marriage visa, the applicant and sponsor must, among other things, be:

- 18 years of age; or
- able to show that they will turn 18 at the date of intended marriage; or
- have an Australian court order authorizing the marriage;
- of the opposite sex to each other;
- known to each other personally and have met in person (as adults);
- in a genuine and mutually exclusive relationship;
- free to marry;
- genuine in their intent to marry and live together as husband and wife; and
- intending to enter into a marriage that is recognized under Australian law (the *Marriage Act 1961*)

In addition, Prospective Marriage visa applicants must meet certain health and character requirements. Where the application includes persons under the age of 18, the sponsor is also required to satisfy certain character requirements to support the protection of children.

The relationship between the applicant and sponsor is assessed via a range of measures including:

- requirement to provide evidence in support of their claims, including statutory declarations from third parties;
- scrutiny of evidence provided, including document verification, interviews and home visits;
- joint and/or separate interviews with sponsors and applicants; and
- country/culture specific risk matrices developed by individual overseas posts to assist with visa application risk management.

In addition, and as far as practicable, migration regulations requires the couple to demonstrate their commitment to the relationship through assessment of the following four factors:

- Financial aspects;
- Nature of the household;
- Social context of the relationship; and
- Nature of the couple's commitment to each other.

After the visa holder has entered Australia and married their prospective spouse, who is usually their sponsor, they are expected to lodge a combined Partner (Subclass 820/801) visa application before their Prospective Marriage visa ceases to be in effect.

The Australian Government's responses to the specific recommendations in the Report are set out below.

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 minimize the incidence of forced marriage and human trafficking in Australia.**

Response: Accept

The Government accepts the Committee's recommendation to formalise the policy in relation to interviewing all Prospective Marriage visa applicants under the age of 18 separate from their sponsor or family members.

The Government also accepts the recommendation to increase the minimum age of visa holders within the Prospective Marriage visa caseload to 18 years of age.

Whilst the Department of Immigration and Citizenship's (the Department) current policy does not require Prospective Marriage visa applicants under the age of 18 to be interviewed as part of the visa process, the current practice is that all applicants in this category are interviewed, either in person or by telephone.

The Department will amend the Procedures Advice Manual (PAM), which guides decision makers on how to process Prospective Marriage visa applications, to reflect the requirement to interview all visa applicants under the age of 18.

Current Prospective Marriage legislation mirrors the provisions of the Marriage Act by allowing a Prospective Marriage visa to be granted to a person under the age of 18, provided they demonstrate they will have turned 18 by the date of intended marriage or have an Australian court order. Similarly, a visa application can be refused if the relationship is assessed as one that does not have the consent of both parties. Nonetheless, the Government accepts that there are benefits to be gained in increasing the age of Prospective Marriage visa holders to 18, and that the advantages would outweigh the disadvantages.

The Government will take steps to amend the *Migration Regulations 1994* (the Regulations) to stipulate that a person must be at least 18 years of age when they apply for a Prospective Marriage visa.

Recommendation 2

5.25 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).

Response: Accept

The Government accepts the Committee's recommendation to enable reporting on incidents of fraud with the Prospective Marriage visa program.

The Government will pursue a regulation amendment to include a public interest criterion that relates specifically to fraud as a requirement for grant of a Prospective Marriage visa. The changes, which are expected to come into effect during 2013, would enable data relating to refusal on fraud grounds to be reported on statistically.

Recommendation 3

5.26 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 exceptions, 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.**

Response: Noted

The Government notes the Committee's support of the Australian Law Reform Commission's (ALRC) recommendation to extend the family violence provisions to Prospective Marriage visa holders who have not married their sponsor.

The Government is currently considering the ALRC's recommendations in relation to family violence and Prospective Marriage visa holders.

In considering this recommendation, the Department is exploring what options, if any, would support their implementation while maintaining program integrity. For example, the Department is considering the option of requiring additional checks for sponsors who have a history of family violence as an added protection measure in the Prospective Marriage caseload, or requiring the visa holder to have traveled to Australia and lived with their sponsoring partner in a spouse-like relationship before allowing them access to the family violence provisions.

Furthermore, the Department is considering how the recommendations will impact on other areas of migration law. For example, implementing the recommendation would require changing the family violence definition to allow family violence to occur outside the relationship, and amending the Partner visa (Subclass 820 and 801) regulations to enable Prospective Marriage visa holders who have not married their sponsoring partner to apply for the visa.

Recommendation 4

5.27 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.

Response: Noted

The Department notes the Committee's recommendation to develop a specific prosecution policy for the offences contained in Subdivision B of Division 12 of Part 2 of the *Migration Act 1958* (the Act).

The Act contains a number of provisions relating to contrived relationship offences. Section 240 and 241 of the Act focus on organizers who seek to arrange a marriage or a de facto relationship in support of a visa application. These offences carry a penalty of \$100,000 or imprisonment for 10 years, or both.

Section 243 prohibits a party to a marriage or de facto relationship from lodging a visa for permanent stay in Australia when the applicant does not intend to live permanently with the other party in that relationship. This offence carries a penalty of up to two years imprisonment.

Section 245 of the Act prohibits third parties from intentionally providing false or misleading statements and information to the department concerning whether or not other persons are in a de facto or married relationship. This carries a penalty of up to 12 months imprisonment.

The above provisions are underpinned by section 234 of the Act which prohibits the supply of false or misleading information and documents to the Department.

Based on its experience, the Department is of the view that, where possible, administrative action such as visa cancellation or refusal, is a more practical option for dealing with cases involving fraud, as opposed to considering prosecution.

The Department also has preventative measures in place, as detailed in its submission, to identify and respond to sham relationships.

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 member of the 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 'real consent' of applicants and sponsors as far as possible.**

Response: Accept

The Department already has arrangements in place which allow its officers to record the non-consent of one of the parties to a Prospective Marriage visa application in such a way that enables this information to be prevented from being disclosed to a third party.

The Government agrees to investigate and implement ways of utilizing this 'non-disclosable' information to refuse a visa application without compromising the safety of the non-consenting party. This will include canvassing ways of working with the Migration Review Tribunal to ensure consistency in approach and decision making.

The Government also accepts the recommendation to amend the Procedures Advice Manual to expressly require Prospective Marriage visa program decision makers to investigate and assess 'real consent' of applicants and sponsors as far as possible.

The Marriage Act 1961 (the Marriage Act) stipulates that the legal age for marriage in Australia is 18. The Marriage Act does allow persons under the age of 18 to marry, however, sufficient safeguards have been put in place in relation to underage and forced marriage. These provisions meet Australia's obligations under Article 16(2) of the Convention of the Elimination of All Forms of Discrimination against women, which require State parties, among

other things, to specify a minimum age for marriage, and states that the marriage of a child has no legal effect.

Section 23B of the Marriage Act provides that a marriage is also void where the consent of either of the parties is not real consent because:

- (i) it was obtained by duress or fraud;
- (ii) that party is mistaken as to the identity of the other party or as to the nature of the ceremony performed; or
- (iii) that party is mentally incapable of understanding the nature and effect of the marriage ceremony.

There are adequate legal grounds to refuse a Prospective Marriage visa if there is no 'real consent' as the intended marriage would not be valid in Australia. The proposed PAM update will guide decision makers accordingly.

The Department has already commenced a number of measures to highlight the issue of 'real consent' and provide guidance to decision makers on detecting and dealing with cases where this may be of concern. These measures include the introduction of a specific question in the visa and sponsorship application forms from November 2012 which will require both applicant and sponsor to declare if they have entered into the relationship freely and without any force or coercion.

This will be followed by the development of specific guidelines to be included in the Procedures Advice Manual on how to detect and assess 'real consent' of applicants and sponsors while processing a Prospective Marriage visa application, as well as what action to take if it is established that consent has not been given. It must, however, be acknowledged that consent is an abstract concept and so, while decision makers should turn their minds to it, there will continue to be practical difficulties in assessing the genuineness of consent.

When collecting and recording personal and sensitive information, departmental officers must comply with the Information Privacy Principles of the *Privacy Act 1988*, including information relating to non-consent to a marriage. The challenge the Department faces is therefore not in recording information that a party does not consent to an intended marriage, but rather using it as the reason for refusing a visa application. This is because the legislation requires decision makers to disclose to the visa applicant all adverse information that will form the reason or part of the reason for a refusal decision, except where the information is '*non-disclosable*'.

Section 5(1) of the Migration Act sets out the definition of non-disclosable information, that being:

'non-disclosable information' means information or matter:

- (a) whose disclosure would, in the Minister's opinion, be contrary to the national interest because it would:
 - prejudice the security, defence or international relations of Australia;
 - or

involve the disclosure of deliberations or decisions of the Cabinet or of a committee of the Cabinet; or

(b) whose disclosure would, in the Minister's opinion, be contrary to the public interest for a reason which could form the basis of a claim by the Crown in right of the Commonwealth in judicial proceedings; or

(c) whose disclosure would found an action by a person, other than the Commonwealth, for breach of confidence;

and includes any document containing, or any record of, such information or matter.

Despite the provision to exempt non-disclosable information from being included in a refusal decision record, the decision must, as a minimum, contain the legislative criteria that have not been met. Whilst this may protect the source that provided the information and reasons why the criteria have not been met, the mere fact that a specific criterion has not been met may still be enough to alert the sponsor and possibly third parties, such as the applicant's family, that the Department has become aware of the applicant (or sponsor's) non-consent, which may, in turn, compromise that person's safety.

The Department will continue to work in conjunction with the Migration Review Tribunal to develop sensitive and consistent approaches to cases where a party does not freely consent to a relationship.

Recommendation 6

5.37 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.

Response: Accept in principle

The Government accepts in principle the need to investigate instances of forced marriage in Australia and explore options for assisting victims. However, given that a number of Government agencies are currently working to address these and other issues through several forums and initiatives, the Government's view is that these matters are best addressed through existing forums rather than the creation of a new working group.

The Attorney General's Department is the lead agency on matters relating to the policy and legislation which govern forced marriage in Australia. New laws criminalising forced marriage were introduced in 2013. Under these laws, forced marriage offences will carry a maximum penalty of four years imprisonment or seven years imprisonment for an aggravated offence where the victim is under the age of 18, is subject to cruel or inhuman or degrading treatment, or is put at risk of death or serious harm.

Following passage of legislation criminalizing forced marriage, suspected victims of forced marriage may be eligible for access to the Support for Trafficked People Program, which is administered by the Department of Families, Housing, Community Services and Indigenous Affairs and delivered by the Australian Red Cross. However, under the existing legislative framework, a victim of forced marriage may already be eligible for the Support Program if he or she is also the victim of a slavery, slavery-like, or people trafficking offence.

The Australian Institute of Criminology is currently undertaking research on the role marriage plays in offences involving the trafficking of persons. In specific, the research related to investigations instances where marriage has been used to facilitate trafficking or related exploitations.

The Department of Immigration and Citizenship will undertake a research project during 2013 to collate existing literature on violence against migrant women and forced marriages among migrants. This will include working with stakeholders to identify options for further research and collaboration.

Recommendation 7

5.38 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.**

Response: Accept in principle

The Government accepts the recommendation, and the Department will work with other stakeholders to provide as much information as possible to potential visa applicants, newly arrived migrants and the wider community about the law in Australia with respect to family violence and forced marriages.

The Department has a number of publications which contain information for newly arrived migrants on the law in Australia with respect to family violence. The most comprehensive publication, entitled *Beginning Life in Australia*, is available on the Department's website in 37 community languages.

Evidence given at the Committee's public hearing of 25 May 2012 suggests that educating the wider community, particularly English language and settlement service providers, could be a more effective way of making information accessible to visa holders.

The Department will review the current information products, which include *Beginning a Life in Australia* and *Booklet 1: Partner Migration* to ensure they contain adequate information about support services and options available for victims of family violence or forced marriages.

In addition, the Department will ensure this information is available more widely than just through its website, for example, by disseminating it to settlement service providers and Adult Migrant English Language Program (AMEP) centres who are more likely to come in contact with potentially affected persons through the services they provide.

The Department will also consider engaging with non-government organizations, through the National Roundtable on People Trafficking, to distribute the information to a wider network to raise awareness within the community on forced marriage issues, particularly in the migration context.