

Inquiry into marriage visa classes

Legal Aid NSW submission

to the

Senate Standing Committee on Legal and Constitutional Affairs

March 2011

About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are economically or socially disadvantaged. Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 35 community legal centres and 28 Women's Domestic Violence Court Advocacy Services.

Legal Aid NSW provides immigration advice and assistance at the primary and merits review stages for disadvantaged people in the community pursuant to the Immigration Advice and Application Assistance Scheme (IAAAS). Representation is also undertaken at the judicial review stage in line with Legal Aid NSW Policies and Guidelines. The immigration law work is predominantly undertaken by lawyers in the Government Law section of Civil Law.

Legal Aid NSW welcomes the opportunity to provide these submissions. Should you require further information, please contact _____ Civil Law Division on _____ or by email at _____ or _____ Strategic Policy, Planning and Management Reporting on _____ or email _____

Introduction

The focus of the terms of reference of the Inquiry into marriage visa classes (Inquiry) appears to be fraudulent, forced and arranged marriages. This reflects concerns raised in the consultation undertaken by the Commonwealth Attorney-General's Department in relation to the Exposure draft of the *Crimes Legislation Amendment (Slavery, Slavery Like Conditions & People Trafficking) Bill 2012*, and in relation to the Forced and Servile Marriage Discussion Paper (November 2010).

Legal Aid NSW supports the need for proper scrutiny of relationships in the migration context, particularly scrutiny of cases of forced marriage, which are a real and genuine concern.

However, care must be taken in dealing with the issues of fraudulent, forced and arranged marriages in the migration context. Blurring the distinction between the three issues may lead to insensitivity in assessing a relationship for the purposes of determining eligibility for a prospective marriage visa, especially if it leads to an association (even if inadvertent) of arranged marriage with forced marriage when, in fact, the two issues are quite different.

Care must also be taken not to blame and penalise victims of forced marriage who are invariably women.

This submission makes some general observations on current laws and procedures and then addresses terms (b) to (g) of the Inquiry, areas within the expertise of Legal Aid NSW.

Current law and practice

Legal Aid NSW is of the view that the current law and procedures for assessing relationships for visa purposes are rigorous enough to achieve the aim of detecting cases of fraudulent or forced marriages. The current law on prospective marriage visas emphasises the genuineness of the relationship. The relevant regulations provide that:

- the applicant must intend to marry their fiancé (Reg 300.211)
- the applicant and sponsor have met and are known to each other personally (Reg 300.214)
- the parties have a genuine intention to marry within the visa period and live together as spouses (Reg 300.215 and 300.216).

These requirements, coupled with policy advice given to decision makers in the Department's Procedures Advice Manual (PAM), provide ample safeguards against granting visas in cases where there are proposed fraudulent or forced marriages.

The PAM provides extensive guidance to decision makers on:

- assessing the intention to marry
- assessing the genuineness of the intended spouse relationship

- what to do if a decision maker has integrity concerns about the relationship, (including referral to specialist Bona Fides Units (BFUs), established with the aim of improving the integrity of family stream visa processing in general and, in particular, partner category visa applications)
- assessing real consent, especially in the context of arranged marriages.

These safeguards are underscored by offences under Division 12, Subdivision B of the *Migration Act 1958* (Cth) [*Offences relating to abuse of laws allowing spouses etc of Australian citizens or of permanent residents to become permanent residents*]. The offences include:

- arrange a marriage for the purposes of obtaining permanent residence (sections 240-243)
- Make false, misleading or unsupported statements in relation to whether or not other persons have a genuine and continuing marital relationship between them (section 245).

In light of these factors, Legal Aid NSW is of the view that changes to migration law with the aim of specifically addressing the issues of fraudulent or forced marriages, are unnecessary and 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.

It is submitted that the issues of forced marriage in particular are better dealt with in legislation and policies outside the migration law framework.

The National Legal Aid (NLA) submission to the Criminal Division, Attorney- General's Department in response to the Forced and Servile Marriage Discussion Paper dated 7 February 2011 is attached. That submission addresses the complexities surrounding forced and servile marriages and recommends a broad strategy to address forced marriage beyond criminal sanctions, for example, through community education strategies and civil measures. The desirability of a broad strategy has been suggested by other agencies, such as the Women's Legal Service NSW submission on the *Crimes Legislation Amendment (Slavery, Slavery Like Conditions & People Trafficking) Bill 2012*, 23 January 2012 - http://www.womenslegalnsw.asn.au/downloads/law-reform/2012WLSNSW_AGD_Slavery-likeConditionsBill.pdf, accessed 27 February 2012).

Response to the terms of reference

(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

This term of reference indirectly identifies an area of migration law which requires change to accommodate cases where the relationship was genuine in the first place but the marriage did not take place because of family violence.

The current legislation does not allow women access to the family violence exceptions available to married or defacto spouses if they do not marry the sponsoring prospective spouse after arrival in Australia due to family violence.

National Legal Aid has previously submitted to the Australian Law Reform Commission Inquiry into Family Violence and Commonwealth Laws (submissions dated 20 May 2011 and 27 October 2011) that the Migration Regulations 1994 (Cth) should be amended to allow a former or current Prospective Marriage (Subclass 300) visa holder to access the family violence exception in circumstances where he or she has not married the Australian sponsor.

(c) The incidence of Prospective Marriage (subclass 300) visa applicants and sponsors who entered into an arranged marriage

Legal Aid NSW is not in possession of any data on the incidence of prospective marriage visa applicants and sponsors who enter into an arranged marriage. However, arranged marriage should be clearly distinguished from forced marriage.

Some Australians may choose to adhere to the cultural norms of their country of origin, where arranged marriage is acceptable. However, if a cultural practice relating to marriage effectively overbears the mind and will of a prospective spouse so that there is no true consent, cultural practice must give way to the need for consent. Arranged marriages must not carry with them lack of consent: *Kreet v Sampir* [2011] FamCa 22.

(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

As outlined above, it is the view of Legal Aid NSW that the administration, application and effectiveness of eligibility criteria in relation to the Prospective Marriage (subclass 300) visa program are comprehensively covered by the current law, the guidance in the PAMs and a decision maker's obligation to make the correct decision in light of the evidence.

There is no need to change the subclass 300 visa criteria, nor their administration or application, in order to effectively tackle the problem of fraudulent or forced marriages.

(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

The way this term of reference is framed seems to conflate forced marriages with arranged marriages. This is not desirable. As detailed above, Legal Aid NSW considers that the current procedures are sufficient to assess genuineness and, by extension, the issue of consent. It is difficult to see what further legislative changes can be made to address these issues in the migration context.

Importantly, if a case of forced marriage is made out after arrival in Australia, the victim should not be penalised. This point is raised in the attached NLA's submission in response to the Forced and Servile Marriage Discussion Paper, as highlighted by the statement:

Some victims of forced and servile marriage are in a similar position to people who are trafficked to Australia (see p. 9).

Legal Aid NSW reiterates NLA's submissions that there needs to be legislative amendment to provide for better visa options for victims of forced marriage who arrive on prospective marriage visas and do not marry. Return to the country of origin is not a realistic option for most victims, usually for cultural and other social reasons. As indicated above, these women do not have the legislative protections available to victims of family violence given to those visa applicants who do marry.

(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

Legal Aid NSW is not aware of any evidence which indicates that current policies and practices of the Australian Government in relation to subclass 300 visas 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

As has been indicated, Legal Aid NSW considers the current law and practice in the migration context is sufficient to deal with this issue of forced marriages.

Concluding remarks

Legal Aid NSW supports the need for proper scrutiny of relationships in the migration context, but is of the view that care must be taken not to blur the distinction between fraudulent, forced and arranged marriages when determining eligibility for a prospective marriage visa. Legal Aid NSW is of the view that the current law and procedures, which emphasise the genuineness of the relationship, are sufficiently rigorous to achieve the aim of detecting cases of forced or fraudulent marriages. The issue of forced marriage is better dealt with in legislation and policies outside the migration law framework and as part of a broad strategy including community education strategies and civil measures.

However, migration law should be amended to allow a former or current Prospective Marriage (Subclass 300) visa holder to access the family violence exception in circumstances where he or she has not married the Australian sponsor.

Legal Aid NSW is of the view that it would be appropriate to widely disseminate information, and to make community education widely available, which assists applicants and their sponsors to understand the concept of forced marriage, and services which might be available to assist newly arrived migrants experiencing family violence or sexual assault.