

Introduction

1. The Immigration Advice & Rights Centre ("IARC") was established in 1986 as a specialist immigration law community legal centre. Due to its extensive knowledge of Australia's immigration law and policy, IARC has made contributions to law reform discussions enhancing the operation of migration and refugee law.
2. As an organisation that advocates on behalf of foreign nationals seeking to remain in Australia, on both family and humanitarian grounds, we recognise the need for scrutiny into relationships under Australia's migration program. IARC is concerned, however, that increased scrutiny should not disadvantage genuine visa applicants.
3. The position of IARC is that the practices used to assess an applicant's eligibility for a Prospective Marriage visa are rigorous enough to prevent fraud and ascertain consent. In the alternative, if stringent methods are proposed, IARC would support a proposal to enable the Australian sponsor to be interviewed about his or her intentions for the prospective marriage.

Fraud (TOR: b, d, g)

4. To be eligible for a Prospective Marriage visa (subclass 300) an applicant is required to establish that he, or she, has met the sponsor and that they are known to each other personally.¹ Further, the applicant must establish that the couple genuinely intend to get married within the visa period and live together as spouses.²
5. The 'Procedures Advice Manual' ("PAM 3"), available to all Australian immigration officials, places the evidentiary burden on the applicant, rather than the sponsor. The applicant is interviewed to ascertain the extent to which the sponsor and applicant are known to each other.³ Further, the onus is also on the applicant to provide evidence that arrangements have been made for the marriage ceremony to take place in Australia.⁴ Finally, it is the applicant who must prove the couple intend to live together as spouses in Australia.⁵
6. If Australian immigration officials have any further concerns about the veracity of the applicant's relationship, the case can be referred to the 'Bona Fides Unit' of the Department of Immigration and Citizenship (DIAC) for further investigation.⁶
7. IARC does provide visa applicants and sponsors with limited assistance in the preparation of visa applications. However, IARC does not have any experience with cases where prospective marriage visa applicants or sponsors have claimed to be the victim of fraud.
8. IARC also provides assistance to visa holders who have had their visa cancelled for reasons that may include fraud. To the best of our knowledge fraud, in the Prospective Marriage visa context, can be caused by a combination of the heavy evidentiary burden on the applicant and their often limited English skills. These factors combine to render the applicant reliant on the sponsor for evidence to support their eligibility for a Prospective Marriage visa. This point is illustrated by a case study of fraud in the context of a Prospective Marriage visa application, after the applicant has arrived in Australia.

¹ *Migration Regulations 1994* (Cth) Sch 2, 300.214, 300.215, 300.216.

² *Ibid* Sch 2, 300.215, 300.216.

³ PAM 3: Sch2Visa300 - Prospective Marriage: Eligibility.

⁴ *Ibid*.

⁵ *Ibid*.

⁶ *Ibid*.

Hypothetical Case Study:

- Manita is a 32 year-old woman, from the Philippines, who met her Australian fiancée online. She is desperate to secure her three-year old son a better life in Australia. For her son's sake, Manita agrees to marry her new partner, despite knowing very little about him.
 - Manita relies on her Australian sponsor to gather evidence of their relationship to show Australian consulate officials in the Philippines. Manita does not speak English very well, and signs the statutory declaration about her relationship written by her partner, when requested, without question.
 - Manita is granted a Prospective Marriage visa and she travels to Australia with her son.
 - Shortly after her arrival in Australia, Manita experiences episodes of family violence perpetrated by her partner. Manita eventually leaves her partner.
 - Manita's visa is then cancelled by DIAC because they receive adverse information, from the sponsor, that the evidence contained in her statutory declaration is false.
 - Manita then approaches a service similar to ours for advice.
9. This case study illustrates that fraud can result from the applicant's vulnerability rather than positive intent. The eligibility criteria places a heavy evidentiary burden on the applicant, and his or her vulnerability as the person seeking relocation, and as a non-English speaker, will render the applicant reliant on the sponsor for the gathering of evidence to meet the eligibility criteria.
10. IARC recommends that the eligibility criteria should remain the same for the Prospective Marriage visa. The applicant already bears a significant evidentiary burden to prove the veracity of his, or her, relationship. 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 who speak little English.
11. In the alternative, IARC suggests there is scope to interview the sponsor during the application process for a Prospective Marriage visa. Interviewing the sponsor about his or her intentions would give officials a greater opportunity to uncover issues of fraud, consent and 'family violence'.

Consent (TOR: c, d, e, f, g)

12. The Prospective Marriage visa requires that the applicant and sponsor demonstrate a genuine intention to live together as husband and wife after they are married. The Procedures Advice Manual directs Department of Immigration and Citizenship decision makers, on this basis, to be satisfied that both parties have given 'real consent' to the relationship.⁷
13. Decision makers have the opportunity to interview the applicant regarding the veracity of the relationship, but speak to the sponsor only if 'appropriate'.⁸ It is at this time Australian officials can ascertain whether the applicant has freely consented to the prospective marriage. IARC suggests the issue of consent is not confined to the applicant but should also be tested against the sponsor's intentions.
14. IARC is unaware of cases, within our Centre's practice, where consent has been an issue. However we use Sanchi's story, from the *Four Corners* episode 'Without Consent',⁹ as an illustration of the possible link between 'family violence' and the absence of the sponsor's consent to marriage.

⁷ Ibid.

⁸ Ibid.

⁹ Australian Broadcasting Corporation, 'Without Consent'. *Four Corners*, 16 April 2012.

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Case Study:

- The applicant married her partner in a traditional Hindu ceremony in India. She knew very little about her partner but perceived him to be very happy about their marriage and the life they would lead in Australia.
- The applicant then travelled to Australia, on a temporary Partner visa, to begin her new life. Her husband picked her up at the airport, seemingly very happy about their new life together.
- However, almost immediately, her husband began to hit her. He told her that his parents pressured him into marriage and that he did not want to be married to her.
- The abuse continued until she left him.

15. This case study illustrates how the sponsor's absence of consent to marriage could be relevant to the exposure of the applicant to 'family violence'.

16. IARC submits that the sponsor being interviewed to determine whether they have given 'real consent' to the marriage could prevent the applicant's exposure to family violence.

Family Violence (TOR: b, d)

17. The *Migration Regulations 1994* provide that conduct, which is actual or threatened, toward the victim, which can be the applicant, dependent child, or member of the family unit of the applicant or sponsor (depending on the visa subclass), that causes the victim to reasonably fear for, or be reasonably apprehensive about his or her own wellbeing or safety will be an exception to the eligibility criteria for a permanent Partner visa, despite relationship breakdown.¹⁰ However, the 'family violence exception' is only available to applicants who have married their Australian partner.

18. The vulnerability of the applicant, who has not married their Australian partner, but experienced 'family violence', is a situation within the particular knowledge of our Centre. It is our Centre's experience that familial and cultural considerations can mean the applicant will stay in an abusive relationship until marriage occurs, rather than return home. We provide the following case study of a Prospective Marriage visa holder who has experienced 'family violence' to illustrate our point.

Hypothetical Case Study:

- Wei is a 25 year-old Chinese national who has come to Australia, on a Prospective Marriage visa, to marry her Australian partner. She is to be married on 9 October 2012 but arrives in Australia 1 May 2012. Wei moves in with her partner, ready to begin her new life. During May she experiences 10 different episodes of physical and verbal abuse that cause her to fear for her safety.
- Wei approaches our Centre for advice regarding her visa options to remain in Australia permanently, should she decide to leave her partner. She has no other living relatives in Australia. Wei is told that she cannot access the 'family violence exception' to the Partner visa because she has not married her partner. Further, Wei is told she is not eligible for any other family visa in Australia.
- Wei tells our advisor it would be very difficult for her to go home because she is pregnant to her partner and, for this reason, she would be dishonoured in the eyes of friends and family.
- Further, Wei says she could not support her child in China because she does not work.
- Wei advises us that, for these reasons, she wishes to remain in the relationship.

19. This case study illustrates that Prospective Marriage visa holders cannot obtain protection under Australia's migration program where they have experienced 'family violence' prior to their marriage. In addition, this case study illustrates that cultural and familial considerations can operate to prevent a Prospective Marriage visa holder from leaving an abusive relationship.

¹⁰ *Migration Regulations 1994* (Cth) Division 1.5, Sch 2.

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20. IARC recommends that Prospective Marriage visa holders should be able to access the 'family violence exception' to the eligibility criteria for permanent residence.

Conclusion

21. As an organisation that advocates on behalf of foreign nationals seeking to remain in Australia, on both family and humanitarian grounds, we recognise the need for scrutiny into relationships under Australia's migration program.
22. Our Centre's position is that the eligibility criteria, for the Prospective Marriage visa, are strong enough. The applicant already bears a significant evidentiary burden, in order to meet the eligibility criteria. IARC submits any change to the eligibility criteria would place the applicant in a position of even greater vulnerability than currently exists.
23. In contrast, our Centre recommends that the sponsor should be interviewed, during the application process, about their intentions for the prospective marriage.
24. IARC's position is that current immigration practices are sufficient enough to determine whether the applicant has given 'real consent' to the marriage. However, our Centre recommends that more should be done to determine whether the sponsor has given 'real consent' to the marriage because the absence of consent can lead to 'family violence'.
25. Finally, IARC recommends that Prospective Marriage visa holders, who have not married their partner, should be able to access the 'family violence exception' to the eligibility criteria for permanent residence.