Family violence and women on temporary visas: the case for reform

*Glen Cranwell**

In its *Path to Nowhere* report,[1] the National Advocacy Group on Women on Temporary Visas Experiencing Violence ('National Advocacy Group') noted that women on temporary visas and their children experiencing domestic and family violence often face significant barriers to seeking support. These barriers include the following:[2]

- Women fear losing the right to remain in Australia. Perpetrators of domestic and family violence use the threat of losing the right to remain in Australia as a means of controlling women and compelling them to stay in violent relationships.
- For some culturally and linguistically diverse women, returning to their countries of origin carries the threat of strong disapproval and even violence from their families and communities.
- Other women fear having to leave Australia will result in losing custody of their children.

My focus in this article is on partner visa applications.[3] The *Migration Regulations 1994* ('Regulations') provide that a partner visa may still be granted despite the partner relationship ceasing in circumstances where the sponsoring partner has committed family violence against the visa applicant or a dependent child. However, there are significant limitations in the family violence provisions that pose serious risks for harm to women on temporary partner visas and their dependents who experience family violence.

I will begin by outlining the family violence provisions contained in the Regulations. I will then discuss the limitations of the family violence provisions, which arise from the application of the provisions often being incompatible with the reality faced by women on temporary partner visas experiencing family violence. Finally, I will set out proposals for reform developed by the National Advocacy Group, many of which were previously made by the Australian Law Reform Commission as far back as 2011.

I have used the term 'victim' in this article to reflect the language of the Regulations. However, I recognise that women who have experienced domestic and family violence are courageous and successful survivors. I have also referred to 'women' for simplicity, because men are the main perpetrators of domestic and family violence. This is not to diminish the seriousness of domestic and family violence against men.

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1 National Advocacy Group on Women on Temporary Visas Experiencing Violence, *Path to Nowhere: Women on Temporary Visas Experiencing Violence and Their Children* (2018) 10.

2 Department of Social Services, *Hearing Her Voice: Report from the Kitchen Table Conversations with Culturally and Linguistically Diverse Women on Violence Against Women and Their Children* (2015) 25.

3 Other visas subclasses to which the family violence provisions currently apply are dependent child visas (subclass 445) and distinguished talent visas (subclass 858).

Types of partner visas

Partner visas are designed for people who are spouses, de facto partners and fiancé(e)s of Australian citizens, Australian permanent residents and eligible New Zealand citizens who seek to enter and remain in Australia temporarily or permanently.

There are two types of partner visas prescribed by the Regulations:

- partner visas — subclasses 820 and 801 (onshore) and 309 and 100 (offshore); and
- prospective marriage visas — subclass 300.

Generally, there is a two-stage process before a permanent partner visa is granted. First, a temporary visa is granted and then, usually after two years, if the relationship is ongoing the permanent visa may be granted.

For prospective marriage visas, there is effectively a three-stage process. An applicant applies offshore for a temporary prospective marriage visa and then, after entering Australia and marrying their prospective spouse, applies for a partner visa onshore in accordance with the two-stage process.

Outline of the family violence provisions

Definition of family violence

The term 'relevant family violence' is defined in reg 1.21 of the Regulations to mean:

> conduct, whether actual or threatened, towards:
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> (a) the alleged victim; or
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> (b) a member of the family unit of the alleged victim; or
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> (c) a member of the family unit of the alleged perpetrator; or
>
> (d) the property of the alleged victim; or
>
> (e) the property of a member of the family unit of the alleged victim; or
>
> (f) the property of a member of the family unit of the alleged perpetrator;
>
> that causes the alleged victim to reasonably fear for, or to be reasonably apprehensive about, his or her own wellbeing or safety.

The definition refers to conduct rather than 'violence'. The conduct may be in the form of actual or threatened physical violence, economic or psychological harm.[4] The focus in the definition is on whether the conduct reasonably causes the alleged victim to reasonably fear or be apprehensive about his or her wellbeing or safety.

4 See *Sok v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 56.

The alleged perpetrator must be the sponsoring partner

In relation to partner visas, the alleged perpetrator must be the sponsoring partner. The applicable visa criteria refer to family violence 'committed by the sponsoring partner' or 'committed by the sponsor'.[5] The alleged victim can be the visa applicant, or a member of the family unit/dependent child of the visa applicant and/or the sponsoring partner.[6]

The family violence must have occurred during the course of the relationship

Regulation 1.23 explicitly requires the family violence to have occurred when the married or de facto relationship was still in existence.

In relation to the subclass 100 visa, the family violence must also have occurred after the visa applicant's entry into Australia as the holder of a subclass 309 visa.[7]

An assessment of whether there was ever a partner relationship is required

Before considering a claim of family violence, a decision-maker is required to consider whether the partner relationship existed prior to the claimed family violence. The requirement in each of the partner visa subclasses containing the family violence exception is that 'the relationship between the applicant and sponsoring partner has ceased'.[8] The relevant partner relationship must therefore have existed before it can be determined that the relationship has 'ceased'. There is no requirement that the family violence must have caused the cessation of the relationship.

Evidence of family violence

Regulation 1.23 provides for two categories of situation in which a person is taken to have suffered or committed family violence. The first may be termed 'judicially determined' family violence. There are three kinds of acceptable evidence of a judicial determination of family violence that may be provided:

- an injunction under s 114(1)(a), (b) or (c) of the *Family Law Act 1975* granted on application by the alleged victim, against the alleged perpetrator;[9]
- a conviction of the alleged perpetrator, or finding of guilt against the alleged perpetrator, in respect of an offence of violence against the alleged victim;[10] or
- a court order under state or territory law against the alleged perpetrator for the protection of the alleged victim from violence made after the court had given the alleged perpetrator an opportunity to be heard, or otherwise make submissions.[11]

5 Clauses 820.211(8)(d), 820.211(9)(d), 820.221(3)(b), 801.221(6)(c) and 100.221(4)(c) of Schedule 2 to the Regulations.
6 Ibid.
7 Clause 100.221(4)(c) of Schedule 2 to the Regulations.
8 Clauses 820.221(3)(a), 801.221(6)(b) and 100.221(4)(b) of Schedule 2 to the Regulations.
9 Regulation 1.23(2).
10 Regulation 1.23(6).
11 Regulation 1.23(4).

In Queensland, for example, a court order would include a protection order or a temporary protection order made under the *Domestic Violence Family Protection Act 2012* (Qld).[12] Note that temporary protection orders made ex parte may not comply with reg 1.23(4).

The second category is where a person makes a 'non-judicially determined claim' of family violence. Regulation 1.23(10) provides that in these cases the decision-maker is required either to be satisfied that the alleged victim has suffered relevant family violence or to take as correct an opinion of an 'independent expert'[13] that the alleged victim has suffered relevant family violence.

The Regulations set out the various combinations of evidence which may be supplied in order to make a valid claim of non-judicially determined family violence:

- a joint undertaking to a court made by the alleged victim and alleged perpetrator in relation to proceedings in which an allegation is before the court that the alleged perpetrator has committed an act of violence against the alleged victim;[14] or
- a statutory declaration under reg 1.25 by or on behalf of the alleged victim, and the type and number of items of evidence specified in an instrument under reg 1.24.

The statutory declaration under reg 1.25 must set out the allegation of relevant family violence as defined in reg 1.21 and name the person alleged to have committed the family violence.

The current instrument[15] under reg 1.24 specifies that a minimum of two different types of evidence must be given. These include certain evidence from:

- a registered medical practitioner or nurse;
- a police officer;
- a witness other than the alleged victim or a police officer;
- a child welfare authority officer or a child protection authority officer;
- a women's or a domestic and family violence crisis centre;
- a social worker who has provided counselling to the alleged victim;
- the alleged victim's treating registered psychologist;

12 See also *Crimes (Domestic and Personal Violence) Act 2007* (NSW); *Family Violence Protection Act 2008* (Vic); *Family Violence Act 2004* (Tas); *Intervention Orders (Prevention of Abuse) Act 2009* (SA); *Restraining Orders Act 1997* (WA); *Domestic and Family Violence Act 2007* (NT); *Domestic Violence and Protection Orders Act 2008* (ACT).

13 'Independent expert' is defined in reg 1.21 to mean a person who is suitably qualified to make independent assessments of non-judicially determined claims of family violence and is employed by, or contracted to provide services to, an organisation that is specified by a *Gazette* notice.

14 Regulation 1.23(8).

15 IMMI12/166.

- a family consultant by a family consultant appointed under the *Family Law Act 1975* or a family relationship counsellor who works at a Family Relationship Centre listed on the Australian Government Family Relationships website; or
- a school counsellor or principal.

For each type of evidence, the instrument specifies the information that must be included. Note that the information must include sufficient 'details' of the claimed family violence, and that the requirements will not be satisfied by evidence which is in 'essentially conclusory terms'.[16]

Limitations of the family violence provisions

While the family violence provisions enable some women on temporary partner visas to proceed with their application for a permanent visa, a number of the requirements set out above place practical limitations on the protection available to many victims of family violence. These include the following.

The requirement to prove the existence of the partner relationship

The requirement to prove the existence of the partner relationship does not account for the complex dynamics of domestic and family violence. Domestic and family violence can greatly impact the nature of the relationship and the types of evidence that may be available.[17]

In essence, the definitions of 'spouse' and 'de facto partner' are satisfied where the couple have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, and they live together or do not live separately and apart on a permanent basis.[18] When considering whether the requirements for a spouse or de facto are satisfied, the decision-maker must consider all of the circumstances of the relationship, including the following matters:[19]

- the financial aspects of the relationship;
- the nature of the household;
- the social aspects of the relationship; and
- the nature of the persons' commitment to each other.

16 See *Fu v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FedCFamC2G 161 [50].

17 National Advocacy Group on Women on Temporary Visas Experiencing Violence, *Blueprint for Reform: Removing Barriers to Safety for Victims/Survivors of Domestic and Family Violence who are on Temporary Visas* (2019) 3.

18 'Spouse' is defined in s 5F and 'de facto partner' is defined in s 5CB of the *Migration Act 1958* (Cth).

19 See regs 1.15A(3) and 1.09A.

The visa applicant is therefore required to produce evidence of matters such as joint assets and liabilities, the sharing of day-to-day household expenses and responsibilities, the undertaking of joint social activities and the opinion of friends and family about the nature of the relationship.

The Immigration Advice and Rights Centre has noted that the sorts of abuse it encounters daily include denying independent access to bank accounts and/or the freedom to earn an income, and restrictions on contact with people outside the perpetrator's family. Such abuse inevitably means there is great difficulty producing the necessary evidence to satisfy the requirements that the relationship was genuine and continuing.[20]

The requirement for the family violence to have occurred during the course of the relationship

The requirement that the family violence must have occurred during the course of the relationship does not reflect the reality of relationships, where violence may escalate or begin at the point at which the relationship ends.

Prior to 9 November 2009, there was no requirement that the family violence occur before the spousal relationship had ended. In *Muliyana v Minister for Immigration and Citizenship*, Siopsis and Edmonds JJ (with whom Moore J agreed) referred to the 'obvious policy' behind the legislation as it was then expressed, and stated:

> In short, the policy is intended to cover both situations: not to force a person to stay in an abusive relationship; and not to force a person to go back into an abusive relationship, in either case without compromising his or her immigration status. If that is the correct identification of the policy, then it matters not whether the domestic violence occurred before or after the cessation of the spousal relationship; just that the domestic violence occurred and the spousal relationship has ceased …[21]

The requirement that the sponsor be the perpetrator

A further limitation of the family violence provisions is that violence that is perpetrated by family members other than the sponsoring partner is not recognised. This fails to recognise that living with extended family is the norm for some cultural groups, and it is often the sponsor's family that is perpetrating family violence. For example, a woman subject to dowry abuse by family members other than the sponsor may be compelled to stay in a violent situation when it is neither safe nor appropriate to do so.[22]

20 Immigration Advice and Rights Centre, Submission No 98 to House of Representatives Standing Committee on Social Policy and Legal Affairs, I*nquiry into Family, Domestic and Sexual Violence* (24 July 2020) 8.

21 [2010] FCAFC 24, [34].

22 See Senate Legal and Constitutional Affairs Committee, *Practice of Dowry and the Incidence of Dowry Abuse in Australia* (2019).

Evidentiary requirements for family violence

The rigidity of the evidentiary requirements can be a substantial barrier to accessing the family violence provisions, particularly for women who cannot speak English. Other barriers include social isolation, lack of financial resources, and difficulties in accessing services and support in remote and regional areas.

An example of the difficulties in obtaining evidence faced by women who do not speak English can be found in *Applicant SIL v Scheme Manager, Victim Assist Queensland, Department of Justice and Attorney-General,*[23] a decision I made as a member of the Queensland Civil and Administrative Tribunal. In that case, the applicant called the police to report that her husband wanted to kill her. When the police arrived, they asked the applicant a single question: whether she could speak English. The applicant answered words to the effect of 'yes, but not very well'. The police did not speak to her any further, and at no point was she asked whether she wanted an interpreter. As I wrote in my decision:

> [I]t appears to me that the applicant was effectively denied a voice … due to her very limited English skills. In particular, the Queensland Police Service did not speak to her, but their report of the incident nevertheless proceeded to characterise her as 'the offender'. While Logan Hospital obtained an interpreter to interview the applicant, key elements of the information contained in the discharge letter were drawn from information provided by the Queensland Police Service and not from the applicant.[24]

The absence of a family violence provision for subclass 300 holders

There is no family violence provision for subclass 300 visa applicants. For example, if a subclass 300 visa is granted and the visa holder fiancée suffers family violence before the partner visa application is made, she has no recourse to the family violence provisions. She would need to go through with the marriage and wait to lodge a partner visa application onshore (subclasses 820 and 801) before being able to access the family violence provisions.

This can effectively compel women to remain in those relationships, at significant risk to their own wellbeing and that of members of their family unit. In many cultures, once a woman leaves her family she is expected to stay with her partner and his family, and to return if the marriage does not take place is to bring shame to her family.

Reform of the family violence provisions

The National Advisory Group has developed a *Blueprint for Reform* ('Blueprint')[25] of the family violence provisions. The Blueprint is endorsed by over 50 state and national peak bodies, service providers and other organisations working to address violence against women across Australia.

23 [2021] QCAT 237.
24 Ibid [33].
25 National Advocacy Group on Women on Temporary Visas Experiencing Violence, *Blueprint for Reform: Removing Barriers to Safety for Victims/Survivors of Domestic and Family Violence who are on Temporary Visas* (2019).

Relevant to the issues raised in this in this article, the Blueprint made the following recommendations:[26]

- The definition of family violence should be broadened to include violence perpetrated by a family member other than the sponsoring partner.
- The Regulations should require family violence to be determined prior to assessing the existence of a partner relationship, and ensure that the evidence required is capable of being reasonably provided in the context of a violent relationship.
- The family violence provisions should be expanded to include any person experiencing family violence on a prospective marriage visa (subclass 300) who does not marry the sponsor prior to the relationship breakdown, and their children.

In 2011, the Australian Law Reform Commission previously recommended that:[27]

- The Regulations should be amended to allow prospective marriage visa (subclass 300) holders to have access to the family violence exception.
- The relevant provisions contained in reg 1.23 requiring that the violence must have occurred while the relationship existed should be repealed.
- The Regulations should be amended to provide that any form of evidence can be submitted to support a non-judicially determined claim of family violence.

The Blueprint also recommends the introduction of a new subclass of temporary visa for any survivor of domestic and family violence to allow them time to access support services and decide how to proceed without fear of removal from Australia. The National Advisory Group stated:

> Such a visa would provide for a limited period (three years) to allow time for Family Court and other matters to be addressed and to reduce the administrative burden. In this time, the victim/survivor could be supported to make the necessary arrangements for their own and their family's protection and security. The visa would not entitle the holder to a permanent visa, but would permit them to apply for any further visa for which they were eligible. It should include for the holder work, study, Medicare and social security rights. This visa should be able to be extended for a further period if there are ongoing matters in the Family Court related to children. Any final orders issued under the Family Court jurisdiction in relation to a child's residency in Australia should provide a permanent residency pathway.[28]

While making a similar recommendation, I note that the Australian Law Reform Commission did not express a view as to the appropriate period of time for which such a visa should be granted.[29]

26 Ibid 4. The Blueprint also contains other important recommendations beyond those canvassed in this article, including for secondary visa applicants who have applied onshore for permanent residency.

27 See also Australian Law Reform Commission, *Family Violence and Commonwealth Laws — Improving Legal Frameworks* (2011) Recommendations 20-1, 21-1 and 21-3.

28 National Advocacy Group on Women on Temporary Visas Experiencing Violence, *Blueprint for Reform: Removing Barriers to Safety for Victims/Survivors of Domestic and Family Violence who are on Temporary Visas* (2019) 5.

29 Australian Law Reform Commission, *Family Violence and Commonwealth Laws — Improving Legal Frameworks* (2011) Recommendation 20-3.

Conclusion

The family violence provisions contained in the Regulations are in need of long-overdue reform. This article has identified significant limitations in the application of the existing provisions, together with practical and realistic measures to address these issues. The recommendations contained in the Blueprint are not new and reflect the views of countless practitioners and experts working in the field of domestic and family violence. Reforming the Regulations is necessary to ensure that all women and their children have the right to be safe from domestic and family violence in Australia, regardless of visa status.

Of course, reforming the Regulations is only the first step contained in the Blueprint. Other steps — such as ensuring access to housing, health, legal, social security, education and interpreting services — are beyond the scope of this article.[30]

30 National Advocacy Group on Women on Temporary Visas Experiencing Violence, *Blueprint for Reform: Removing Barriers to Safety for Victims/Survivors of Domestic and Family Violence who are on Temporary Visas* (2019) 6–9.