

Immigration Advice and Rights Centre Inc.

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THE FAMILY VIOLENCE PROVISIONS*

(Reflects law as at 15 Oct 2007)

For visa applications lodged prior to 15 October 2007, victims of family violence (previously known as ‘domestic violence’) should refer to Information Sheet 14: *The Domestic Violence Provisions*.

The “Family Violence provisions” of the *Migration Regulations 1994* are designed to ensure that visa applicants do not remain in abusive relationships in order to get permanent residence in Australia. If someone falls within the provisions they are entitled to get permanent residence even if the relationship has broken down and the sponsor has withdrawn their support for the visa application.

WHO CAN APPLY?

The Family Violence provisions apply only to the following people:

- applicants for spouse and interdependency visas;
- holders of a prospective marriage visa where the visa holder and the sponsor have married; and
- spouses who are secondary applicants for:
 - employer-nominated permanent visas or
 - some permanent business skills visas.

There are some variations between how the provisions apply to each type of visa.

WHAT IS FAMILY VIOLENCE?

Family Violence is defined by the *Migration Regulations* as conduct, whether actual or threatened, towards:

- (i) the person claiming to be a victim of family violence (‘**alleged victim**’); or
- (ii) a member of the family unit of the alleged victim; or
- (iii) a member of the family unit of the alleged perpetrator; or
- (iv) the property of the alleged victim; or
- (v) the property of a member of the family unit of the alleged victim; or
- (vi) 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.

Importantly, the relevant conduct does not have to be directed towards the ‘alleged victim’, but it must cause the alleged victim to have a reasonable fear or apprehension regarding their own safety and wellbeing.

WHO CAN BE THE “ALLEGED VICTIM”?

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In broad terms, under the Migration Regulations, the “alleged victim” can only be one of the following people:

- the spouse of the alleged perpetrator
- a dependent child of:
 - the alleged perpetrator,
 - the spouse of the alleged perpetrator
 - both the alleged perpetrator and the spouse
 - a person in an interdependent relationship with the alleged perpetrator
- a member of the family unit of the spouse of the alleged perpetrator

However, each visa subclass may further limit which types of “alleged victims” can use the Family Violence provisions for that subclass. For example:

For Subclass 100, the regulations (cl 100.221(4)(c)(i)) provide:

either or both of the following:

(A) the applicant;

(B) **a member of the family unit** of the sponsoring spouse or of the applicant or of both of them; has suffered family violence committed by the sponsoring spouse

Whereas, for Subclass 801, the regulations (cl 801.221(6)(c)(i)) provide:

either or both of the following:

(A) the applicant;

(B) **a dependent child** of the sponsoring spouse or of the applicant or of both of them; has suffered family violence committed by the sponsoring spouse

CAN A PERSON APPLY UNDER THE “FAMILY VIOLENCE PROVISIONS” IF THEY ARE STILL LIVING WITH THEIR SPONSOR?

The Family Violence provisions only come into effect “when the relationship between the applicant and the nominating spouse has ceased”. If the applicant and spouse continue living together it will be very difficult (but not impossible) to prove that the relationship has ceased and the application may be unlikely to succeed.

WHAT APPLICANTS SHOULD DO IF THE RELATIONSHIP HAS ENDED AND THERE WAS FAMILY VIOLENCE

Where the relationship has ended, applicants have an obligation to inform the Department of Immigration of this “Change in Circumstance”. It is also essential for the applicant to tell the Department of Immigration of any change in address.

Applicants who have experienced Family Violence should inform the Department of Immigration as soon as possible so that the processing of the application can be suspended until a court order or other evidence of Family Violence can be obtained. The applicant can initially tell their case officer or ask to speak to one of the Family Violence liaison officers at each Department of Immigration office, but the Department of Immigration should be notified in writing of the breakdown of the relationship, the existence of Family Violence, and any change of address.

If the applicant doesn’t contact the Department the sponsor may withdraw the sponsorship and if the Department doesn’t know that Family Violence is present the application may be refused.

WHAT EVIDENCE IS REQUIRED?

In order to fall within the provisions, the applicant must provide evidence of the Family Violence to the Department of Immigration. The following can be used:

- a restraining order or protection order or injunction issued by a court against the sponsor (e.g. an Apprehended Violence Order). This must be a final court order, made after a hearing. An interim order is not sufficient.
- evidence that the sponsor was convicted of assault or some other violent offence against the “alleged victim”;
- joint undertakings filed in court proceedings where there was an allegation of violence;
- the visa applicant and two “competent people” sign statutory declarations that Family Violence has been experienced; or
- the visa applicant and one “competent person” provide statutory declarations and submit them together with a copy of a police record of an assault allegedly committed by the alleged perpetrator on the “alleged victim” (note the police record cannot be a statement by the alleged victim or the person allegedly assaulted).

IF STATUTORY DECLARATIONS ARE USED, WHAT THEY SHOULD CONTAIN

(1) Statutory Declaration made by the visa applicant

This Statutory Declaration must be made by the visa applicant who is the spouse or interdependent partner of the alleged perpetrator (whether or not they are the person identified as the “alleged victim”).

The requirements for the statutory declaration made by the visa applicant vary, depending on who is identified as the “alleged victim” of Family Violence.

(a) **If the spouse or interdependent partner is the “alleged victim” of Family Violence**, the statutory declaration must:

- set out the allegation of Family Violence (including the effect that it had on the “alleged victim”); and
- name the person alleged to have committed the relevant Family Violence; and
- if the conduct was not directed towards the “alleged victim” (the maker of the Statutory Declaration, in this case), also name the person that the conduct was directed towards, and identify the relationship between the maker of the statutory declaration and the person whom the conduct was towards.

(b) Where the spouse or interdependent partner provides a statutory declaration on behalf of **another person who is the “alleged victim”**, the statutory declaration must:

- name the “alleged victim” (e.g. ‘Bob Jones)
- identify the relationship between the maker of the statutory declaration and the “alleged victim” (e.g. I am the mother of Bob Jones.)
- name the person alleged to have committed the family violence (my ex-husband, Simon Jones committed the family violence)
- set out the allegation of family violence (including the affect that it had on the “alleged victim”)
- if the conduct of the alleged perpetrator was not directed towards the “alleged victim”, also:
 - name the person that the conduct was directed towards (e.g. if the conduct was directed towards a member of Bob’s family unit, such as his biological father, David, you need to name David), and

- identify the relationship between the “alleged victim” and the person to whom the conduct was directed (e.g. using the above scenario, state “David is the biological father of Bob Jones”).
 - identify the relationship between the maker of the statutory declaration (ie the spouse/ interdependent partner) and the person to whom the conduct was directed. (e.g. using the above scenario, state “David was my former partner and is the father of my biological child Bob”).
- Set out the evidence on which the allegation of family violence is based.

(2) A Statutory Declaration made by a “competent person”

“Competent people” making statutory declaration in support of an allegation of Family Violence must be from one or more of the following professions:

- doctor;
- registered psychologist;
- registered nurse;
- social worker (who is a member of, or recognised by, the Australian Association of Social Workers);
- ‘Family Consultant’ under the *Family Law Act 1975*;
- child protection worker (for violence against children);
- manager or coordinator of a women’s refuge or Family Violence crisis or counselling service or worker within one of these types of service which has a flat structure, whose position involves responsibility for Family Violence cases.

If you are providing two statutory declarations from ‘competent people’, each statutory declaration must come from a different sort of competent person. For example, it is not acceptable to have two refuge workers, but it is possible to use one refuge worker and one nurse.

A statutory declaration from a “competent person” must contain:

- the opinion of the “competent person” that the “alleged victim” has experienced family violence (as defined in the *Migration Regulations* and set out on page 1 of this information sheet)
- the basis on which that opinion is formed, eg examples of instances of family violence which the victim has described to them, the psychological, physical or emotional state of the victim and whether this is consistent with the reaction of victims of family violence, the experience of the competent person with other victims of family violence
- the name of the victim,
- the name of the perpetrator of the violence, and
- **if** the conduct of the alleged perpetrator was not specifically directed towards the “alleged victim” (e.g. it was directed towards a member of the family unit):
 - name the person who the perpetrator’s conduct was towards; and
 - state the relationship between the “alleged victim” and the person who the conduct was towards.

The competent person must also give the basis on which they are competent to make the statutory declaration. It is recommended that the competent person attach a copy of their relevant qualifications showing their competency.

Migration agents, lawyers, counselors, church officials or community workers, who do not have a social work degree, are not considered “competent people” for the purpose of the *Migration Regulations*.

FORM 1040

Form 1040 is a Department of Immigration form which the applicant and the competent people can use for making their statutory declarations. This form does not have to be used although it is useful because it leads the person who is making the declaration through the types of things they should be addressing. If the form is not used it is important that the statutory declaration complies with the federal *Statutory Declarations Act 1959* (Cth).

If an assault has been reported to the police, the police record can be substituted for one of the statutory declarations, but a police officer can't sign a statutory declaration. A victim's statement to the police cannot be used as a police record for the purposes of the Family Violence provisions.

EVIDENCE OF A GENUINE RELATIONSHIP

The applicant may still need to provide evidence that the relationship was genuine at the time the application is lodged and up until the breakdown of the relationship. See IARC Client Information Sheets about spouse and interdependent visa applications for further information about the type of evidence required.

IF FAMILY VIOLENCE IS PROVEN

If family violence is proven, and the Department of Immigration is satisfied that the relationship was genuine prior to the breakdown, the applicant will be granted a permanent visa. Spouse visa applicants will be granted the permanent visa even if it has not been two years since the temporary spouse visa application was made. Secondary applicants in business/employer-nominated visas can only be granted a permanent visa if the main applicant is granted a permanent visa.

IF FAMILY VIOLENCE IS NOT ADEQUATELY PROVEN

The case officer must accept any "judicially determined" evidence of Family Violence as being satisfactory proof (eg *Family Law Act* injunctions, court orders and convictions against the perpetrator) but does not have to accept any "non-judicially determined" evidence (eg statutory declarations or police records).

If the case officer from the Department of Immigration is not satisfied that the evidence provided adequately demonstrates that there was Family Violence then they can refer the case to Centrelink for independent assessment.

What cases are likely to be considered doubtful?

Case officers will make an assessment in relation to a case after overall assessment of the case and the evidence provided by the applicant. The following factors may influence this:

- whether the information in the statements is vague or ambiguous
- whether there is any conflicting evidence, such as:
 - dismissed or lost court cases
 - conflicting statements within or between the statutory declarations
 - conflicting information provided previously or by third parties
- the length of time that the parties had been in the relationship
- the length of time after the alleged violence that the applicant lodges their claim of Family Violence
- whether the information in the statements is not sufficiently detailed or appears to lack individual detail
- whether the sponsor has court orders against the applicant for Family Violence, and
- if the applicant is a male – under the Department of Immigration's policy it is considered reasonable to refer a non-judicially determined claim of Family Violence made by a male unless there is "strong evidence" that the claim is genuine.

To counteract any doubts of the case officers it can also be useful to provide additional evidence which supports the claims, eg medical or psychological reports, as the case officer will consider these in their overall assessment.

What happens if my case is referred to Centrelink?

If your Family Violence claims are referred to Centrelink for independent assessment then you will be notified of this. All relevant information which you have provided to the Department of Immigration will be passed on to Centrelink to assist them to make an assessment. Any further arrangements required by Centrelink will be made between Centrelink and you directly.

The assessment made by Centrelink is final and binding on the case officer. Therefore if Centrelink determines that Family Violence has not occurred the case officer must accept this decision.

Can I appeal if the Department of Immigration rejects my case?

If the Department of Immigration rejects your application to remain in Australia, you are most likely eligible to seek review of that decision at the Migration Review Tribunal (“MRT”). Strict time limits apply to lodging MRT applications, so you should make sure you obtain further professional advice from a registered migration agent and lodge your review application quickly. See IARC’s information sheet 22 *MRT Review*.

CONTACT INFORMATION

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