

# Domestic Violence and Immigration: The Family Violence Provisions



*This fact sheet summarises the Ask LOIS webinar on this topic, presented Xanthe Emery, Senior Solicitor, Registered Migration Agent, Immigration Advice & Rights Centre (IARC) on 25 February 2016.*

*This webinar can be viewed for free at [www.asklois.org.au/webinars/past-webinars](http://www.asklois.org.au/webinars/past-webinars).*

This factsheet looks at:

- Who are IARC?
- What are the domestic and family violence provisions in Australian Immigration Law?
- Which visas do the provisions apply to?
- How is domestic and family violence proven?
- Where can your client get help?

## Who are IARC?

Immigration Advice & Rights Centre (IARC) is a Community Legal Centre in Sydney helping asylum seekers and vulnerable migrants navigate Australian immigration law.

### IARC Services

- Telephone Advice
- Face to Face Advice
- Case Work
- Policy & Law Reform
- Education

### IARC can provide advice about these visa types

- Family visas including de facto, spouse, fiancé, interdependency, child, parent, carer, remaining relative and aged dependent relative visas
- Refugee and humanitarian visas, including onshore Protection visas, or proposing family members who are outside Australia for a humanitarian visa
- Temporary visas including bridging, visitor/tourist, electronic travel authorities (ETA) and working holiday
- Visas for New Zealand citizens and their family members
- Resident Return visas

### IARC can provide advice on these circumstances

- Conditions attached to visas, including condition 8503 (“no further stay”) and 8101 (“no work”)
- Visa criteria e.g. health, character, assurance of support
- Visa cancellation
- Advice to people who do not hold a visa/“unlawful”
- Procedural issues – forms, VAC, evidence etc
- Lodging visas in Australia
- Avenues for merits review – Migration and Refugee Division of the Administrative Appeals Tribunal
- Requests for ministerial intervention
- Citizenship
- Domestic/family violence provisions
- FOI requests and complaints

## Who do the ‘family violence’ provisions apply to?

- Holders or applicants for the following visas:
  - Partner subclasses 309, 100, 820, 801
  - Prospective marriage (Fiancé) subclass 300, in limited circumstances
  - Dependent Child subclass 445
  - Distinguished Talent subclass 858



## Family visas – Partner Visas

- De facto spouse
  - 12 months de facto relationship prior to lodgment, or registration of the relationship at the NSW Office of Births, Deaths and Marriages
  - Genuine and continuing relationship; mutual commitment to a shared life; exclusive; do not live separately and apart on a permanent basis
- Spouse
  - Legally married
  - Genuine and continuing relationship; mutual commitment to a shared life; exclusive; do not live separately and apart on a permanent basis
- Prospective Marriage
  - Intend to get married in Australia and live together as spouses
  - Must have met in person as adults and be known to each other
  - Is a 9 month visa then lodge spouse application in Australia

### Two stage visas

- First, a temporary visa.
- If still together after 2 years move to permanent visa.

### Exceptions

- Can get PR where no longer in relationship with sponsoring partner:
  - Family violence
  - Child from relationship where sponsor and visa holder have shared responsibility, care or financial maintenance of child
  - Sponsor dies

NOTE: Under the exceptions, the applicant doesn't have to wait the 2 years to obtain their PR

## Family Violence & Immigration

### Definitions

- Termed "family violence" in immigration context, rather than "domestic violence"
- Family Violence means:

*conduct, whether actual or threatened...that causes the alleged victim to reasonably fear for, or to be reasonably apprehensive about, his or her own wellbeing or safety.*

*"violence" includes a threat of violence.*

- The family violence can be towards:

*(a) the alleged victim; or*

*(b) a member of the family unit of:*

*the alleged victim; or*

*the alleged perpetrator;*

*(c) the property of*

*the alleged victim; or*

*a member of the family of the alleged victim/perpetrator;*

Note that "property" can include pets.

- The family violence must be committed by:
  - the sponsoring partner; or
  - in Distinguished Talent visas, the primary applicant.
- **Additional Criteria:**
  - Relationship must have existed when violence occurred
  - Relationship must have been "genuine and continuing"
  - The alleged victim must form the view that the family violence occurred
  - If victim holds a subclass 300 visa ("fiancé" visa), they must have married the sponsor



## What to do if relationship has ended and there is violence

- Client should notify Dept of Immigration and Border Protection (“DIBP”) of change of address and change in circumstances (i.e. relationship breakdown and existence of DV/FV)
- Use Form 929 - Change of address and Form 1022 – change of circumstances or write a letter
- If they do not notify, DIBP could refuse their permanent visa application without seeking further information
- If possible, get legal advice **before** talking to DIBP

## Proving Family Violence

- Judicial Evidence:
  - DIBP must accept that FV occurred
- Non-Judicial Evidence:
  - DIBP has discretion to accept if FV occurred
- Independent Expert:
  - DIBP must accept the findings of the IE

## Judicial Evidence

- A court injunction under the *Family Law Act 1975* against the alleged perpetrator
  - A final apprehended violence order where alleged perpetrator had opportunity to appear
  - Alleged perpetrator has been convicted of an offence of violence against the alleged victim
- Note: an Interim AVO would be accepted if the defendant had the opportunity to attend court

## Non-Judicial Evidence (Post 24 November 2012)

- A joint undertaking

OR

- A statutory declaration by the visa applicant; AND
- A minimum of **two** items from a list of acceptable evidence that includes:
  - A medical report/hospital report/discharge summary or statutory declaration by a registered medical practitioner;
  - A report/record of assault/witness statement or a statutory declaration that is made by a federal or state police officer OR a witness statement that is made by someone other than the alleged victim during the course of a police investigation;
  - Report or statutory declaration made by an officer of a child welfare or child protection authority;
  - A letter or assessment report made by a women’s refuge, or family/domestic violence crisis centre on the organisation’s letterhead;
  - Statutory declaration made by a social worker who has provided counselling or assistance to the alleged victim while performing the duties of a social worker;
  - Statutory declaration made by a registered psychologist who has treated the alleged victim while performing the duties of a psychologist;
  - Statutory declaration made by a family consultant appointed under the *Family Law Act 1975*;
  - and
  - Statutory declaration or a letter on the school’s letterhead made by a school counsellor or school principal acting in their professional capacity.

The list of evidence can also be found at [www.comlaw.gov.au/Details/F2012L02237/Download](http://www.comlaw.gov.au/Details/F2012L02237/Download)

## Important points about Non-Judicial Evidence

- Where a statutory declaration is required by a professional, the form 1040 is no longer to be used. A standard Commonwealth statutory declaration will suffice;
- The visa applicant uses Form 1410 for their statutory declaration;
- You must submit a piece of evidence from at least two categories; and
- With regard to evidence from a women’s refuge, there is no requirement that the manager should sign the letter or the assessment report.



Remember.....

**FORM 1040 NOT VALID FOR CLAIMS ON OR AFTER 24 NOVEMBER 2012!**

### Visa Applicant's Statutory Declaration

- The visa applicant's statutory declaration must:
  - set out the allegation of family violence, including the effect on the 'alleged victim'; and
  - name the alleged perpetrator; and
- If the visa applicant is not the alleged victim, it must also:
  - name the person to whom the conduct was directed
  - identify the relationship between the 'alleged victim' and the visa applicant; and
  - set out the evidence on which the allegation of family violence is based.

### Evidence of professionals

Generally, each piece of acceptable evidence will establish:

- the opinion of the professional that the 'alleged victim' has experienced family violence;
- the basis for that opinion;
- the name of the victim;
- the name of the perpetrator;
- if the conduct of the alleged perpetrator was not specifically directed towards the 'alleged victim':
  - name the person to whom the conduct was directed; and
  - state the relationship between the 'alleged victim' and that person.

### Doubtful Cases: Reference to Independent Expert

May occur if:

- Evidence is ambiguous or vague
- Evidence is conflicting, e.g. dismissed or lost court cases; conflicting statements or information
- Length of the relationship
- When the family violence claim is raised
- Where the sponsor has court orders against the applicant for family violence
- Claims by a male will be referred unless there is 'strong evidence' that the claim is genuine.
- Police record of assault does not convince DIBP that alleged victim fearful

Once referred to independent expert:

- The applicant will be notified
- All relevant information provided to the Department will be passed on to independent expert
- Further information required by independent expert will be arranged between independent expert and he applicant directly
- Assessment made by independent expert is only in relation to the question of whether or not 'relevant family violence' has occurred



- Independent expert finding is final and binding on DIBP

## Refusal by DIBP

If refused by DIBP:

- Appeal can be made to the Administrative Appeals Tribunal (AAT)
- Application fee is \$1673
  - The fee may be reduced to \$836.50 if the Tribunal is satisfied that payment of \$1673 has caused, or is likely to cause, severe financial hardship to the review applicant
- Very strict time frames to appeal
  - Will depend on where applicant was located when decision made and how decision was conveyed

## What if the family violence provisions don't apply?

Depending on the circumstances of the person, there may be other permanent visa options to consider:

- Protection visa:
  - *Refugee* – well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group, or political opinion, and unable or unwilling to obtain protection from home country.
  - *Complementary protection* – substantial grounds for believing that, as a necessary and foreseeable consequence of being removed from Australia a receiving country, there is a real risk the person will suffer significant harm.
- Witness Protection (Trafficking) visa
  - Can also contact Anti-Slavery Australia, UTS – (02) 9514 9662
- Skilled visas
  - Seek advice from a private migration lawyer – IARC can refer to reputable agent
- Student visas
  - Seek advice from a private migration lawyer – IARC can refer to reputable agent

### Case Study – part 1

Rana is 25 years old and from Iran. She came to Australia on a Prospective Marriage/Fiancé visa (Subclass 300) in December 2014. She was sponsored by her fiancé Amir who is an Australian citizen.

When Rana arrives in Australia, the relationship with Amir begins to deteriorate. Amir is very controlling. He does not allow Rana to meet new friends or attend English classes. He monitors her phone calls to her family back in Iran. He criticizes her contributions to the household, including her cooking and cleaning. He verbally abuses her and calls her names. He threatens to have her “kicked out of Australia”. Rana comes to you for help in February 2015 and says she is worried about her visa.

**Question:** *Could Rana rely on the “family violence provisions” to obtain permanent residency in Australia?*

**Answer:**

Issues to consider:

- Rana and Amir must have married for Rana to be able to rely on the family violence provisions. Unfortunately for those who come to Australia on the Prospective Marriage visa, the family violence provisions are not available if the marriage did not take place.
- Rana must also decide to leave the relationship. The family violence provisions only apply if the relationship has ended.
- Assuming Rana can get the required evidence, it is possible the Department of Immigration will have doubts about her case because of the short length of the relationship i.e. from arrival in December 2014 to Feb 2015

Remember: Rana can still get legal advice about her immigration situation, even if the relationship has not yet ended.

### Case Study – part 2

Lets assume the relationship between Rana and Amir continues and that they were married in Australia in January 2015. In March 2015, Rana and Amir lodge an onshore Partner visa application (Subclass 820/801).

Amir becomes progressively more violent towards Rana, with his verbal abuse and threats escalating to physical assaults. On one occasion the police are called and they decide to take out an AVO for Rana's protection. The hearing for the final AVO is in two months time. Rana contacts you and tells you she is leaving their home and ending the relationship. She is seeking your help. She wants to know what to do about her immigration situation.



**Question:** *What can you help Rana to do, now that the relationship has ended?*

**Answer:**

Get legal advice before contacting the Department!

- Advise the Department of a change in circumstances i.e. breakdown of relationship with sponsor/husband and that intend to apply under the family violence provisions – can use Form 1022.
- It is helpful to advise the Department that there is an AVO application on foot and when the next court date is, if known.
- Advise the Department of her new address and contact details – can use Form 929. This is very important.
- Possible FOI – Form 424A

### Case Study – part 3

Rana is now living in a women’s domestic violence refuge and is getting ongoing counselling from a social worker outside the refuge. Amir hires a Barrister for the AVO hearing and unfortunately the AVO application is dismissed.

**Question:** *What can Rana do now that the AVO has been dismissed?*

**Answer:**

- Rana can still rely on ‘non-judicial’ evidence of family violence.
- Consult the list of evidence that can be provided. In Rana’s case, a letter from the women’s refuge (on letterhead) and a Statutory Declaration from the social worker can be provided, together with a Form 1410 and statement from Rana.
- Remember, there are different requirements for each piece of evidence, but generally, evidence from professionals should name Rana as the victim and Amir as the perpetrator; state that the person believes in their professional opinion that Rana is a victim of family violence; and detail the evidence on which the opinion is based.

ISSUE: an AVO application that is dismissed can be considered as “conflicting evidence” and may lead the Department to think that Rana’s case is doubtful. It is important to get legal advice if you can.

### Case Study – part 4

Let’s go back...

What if Rana leaves the relationship while Amir is at work one day, without any police intervention. A week after Rana leaves the relationship, Amir finds her and physically assaults her. The police are called and they make an AVO application. The case goes to court and the final AVO is granted.

**Question:** *Are there any problems?*

**Answer:**

Issue: the violence which led to the grant of the AVO must have taken place during the relationship. In Rana’s case, the Department of Immigration may conclude that the violence which led to the AVO occurred after the relationship ended, and therefore cannot be relied upon. Rana would still need to obtain ‘non-judicial’ evidence.

**Question:** *If Rana and Amir had a child together, would this make a difference to Rana’s case?*

**Answer:**

- Could rely on “child of the relationship” rather than, or as well as, family violence provisions.
- Would need to provide a birth certificate, as well as evidence that there is ongoing care, contact, parental responsibility, and/or financial responsibility for the child by both parents. DIBP seems to be flexible with this in practice, where FV is also alleged.

### Case Study – part 5

For the purpose of this discussion, let’s say the Department of Immigration doesn’t accept that Rana has been a victim of family violence. Because she no longer has a sponsor for her partner visa and doesn’t meet any of the other exceptions, her visa is refused.

Rana’s father and brothers arranged her marriage and have threatened that if she returns to Iran as a divorced woman, she will have shamed the family and that she is not welcome in their house. They have threatened to harm her if she returns to Iran.

**Question:** *Could Rana have any other options?*

**Answer:**

- Possible Protection option
- Appeal to the AAT on the refusal
- Application to the Minister for Immigration if unsuccessful at the AAT



## Contacting IARC or referring a person for advice:

- Face to face advice: By appointment only - Call (02) 8234 0700
- Telephone advice: Tues & Thurs 2-4pm - Call (02) 8234 0799
- For any other information or enquiry, contact our admin number on (02) 8234 0700
- Email us: [iarc@iarc.asn.au](mailto:iarc@iarc.asn.au)

## Further information

- IARC Family Violence Guide: [www.iarc.asn.au](http://www.iarc.asn.au)
- IARC Information Sheets: [www.iarc.asn.au/information](http://www.iarc.asn.au/information)
- IARC Advice Services
- DIBP Booklets: [www.immi.gov.au](http://www.immi.gov.au)

## Where else to get help

- Legal Aid Commission of NSW: [www.legalaid.nsw.gov.au](http://www.legalaid.nsw.gov.au)
- Law Access NSW: [www.lawaccess.nsw.gov.au](http://www.lawaccess.nsw.gov.au)
- Community legal centre: [www.naclc.org.au/directory](http://www.naclc.org.au/directory)
- Domestic Violence Line: 1800 656 463 (toll free)
- Women's Health Centres: [www.whnsw.asn.au](http://www.whnsw.asn.au)
- Victims Support Line – Sydney: (02) 9374 3000
- Emergency services (Fire, police, Ambulance): 000
- Relationships Australia: 1300 364 277
- Mensline: 1300 789 978
- Anti-Slavery Australia, UTS – (02) 9514 9662