Migration and Refugee Division Commentary

Partner

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FAMILY VIOLENCE

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Overview[1]

A number of visa subclasses include criteria in which evidence of family violence can provide a basis for an exception to a requirement of a continuing spouse or de facto partner relationship between the visa applicant (or a family member) and another person.[2]

This issue usually arises in the context of partner visa applications. All Partner visa classes and subclasses involve assessment of the partner relationship at specified points in time, including at the time of application and/or at the time of decision. However, there are limited exceptions to the requirement of a continuing relationship. A visa may still be granted despite the relationship ceasing in certain circumstances including where the sponsoring partner has committed family violence against the applicant or a member of the family unit of the applicant.

The family violence provisions have undergone a number of key changes over time. The applicable law differs in some instances depending upon when the visa application was made or when a claim of family violence was first made.[3] This commentary focusses on the provisions in effect from 9 November 2009.

The 'Special Provisions Relating to Family Violence' in div 1.5 of the *Migration Regulations 1994* (Cth) (the Regulations) specify what constitutes family violence, how claims are to be made and assessed, and who can decide whether family violence has occurred.

Regulation 1.22 provides that a reference to a person having suffered or committed family violence is a reference to a person being taken, under reg 1.23, to have suffered or committed family violence.

Regulation 1.23 provides for two broad circumstances in which a person is taken to have suffered or committed family violence:

1. 'Judicially determined' family violence, where there is a relevant court injunction, order, conviction, or finding of guilt.
2. 'Non-judicially determined claim' of family violence, where a person presents non-judicially determined evidence as specified in reg 1.23(8) or 1.23(9).[4] In these cases the Minister (or the Tribunal on review) is *either* satisfied that the alleged victim has suffered relevant family violence *or* is required to take as correct an opinion of an independent expert that the alleged victim has suffered relevant family violence.

Where a non-judicially determined claim of family violence is made the Minister (or the Tribunal on review) must consider whether the alleged victim has suffered relevant family

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[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] Specifically, partner/spouse Subclasses 100, 801, 820; Dependent Child Subclass 445; Resolution of Status Subclass 851; and Global Talent Subclass 858.
[3] See also Legislative History.
[4] Formerly regs 1.23(1A)(B), 1.24. Regulation 1.23 was repealed and replaced with new reg 1.23 on 9 November 2009. The amended version applies to visa applications made on or after 9 November 2009, as well as those made before, but not finally determined as at 9 November 2009 but only if the claim of family violence was made to Immigration on or after that date or to the Tribunal on or after 1 July 2011: *Migration Amendment Regulations 2009* (No 12) (Cth) (SLI 2009, No 273) reg 6, sch 4 and *Migration Legislation Amendment Regulations 2011* (No 1) (Cth) (SLI 2011, No 105) reg 12 and sch 10. Item 15AC, sch 9 of the *Tribunals Amalgamation Act 2015* (Cth) (Amalgamation Act) effectively preserves the validity of the SLI 2011, No 105 amendments as it applies to the Tribunal from 1 July 2015 after the tribunal's amalgamation.

violence, as defined in reg 1.21(1). [5] If the Tribunal is not satisfied on the materials before it that the alleged victim has suffered relevant family violence, the Tribunal must invite the applicant to a hearing. If still not satisfied following a hearing, the Tribunal must seek an opinion of an independent expert, and the opinion of the independent expert about whether the alleged victim suffered family violence must be taken as correct.[6]

The violence must have occurred when the married or de facto relationship was still in existence.[7]

As the issue arises most often in the context of Partner visa applications, that context will be the focus of much of the following discussion. However, the provisions of div 1.5 apply equally to all visa subclasses in which family violence is a criterion.

For a flowchart of the process where a family violence claim is made, click here.

Legislative history

There have been a number of key legislative changes affecting the family violence provisions.

A table summarising the amendments and containing links to the applicable version of div 1.5 according to the date of visa application, date of family violence claim, and date of provision of first statutory declaration, is available at Domestic/Family Violence – Table of Amendments.

15 October 2007 amendments – 'family violence'

Division 1.5 originally introduced special provisions relating to 'domestic violence'.[8] The provisions relating to domestic violence were amended on 15 October 2007 to reflect changes to the *Family Law Act 1975* (Cth) (Family Law Act). For visa applications made on or after this date, the term 'domestic violence' was replaced with 'family violence'.[9]

9 November 2009 amendments – family violence must have occurred during relationship

Further amendments were made with effect from 9 November 2009 that restructured and renumbered a number of key family violence provisions. Substantive amendments were also made to div 1.5 to make clear that the family violence must have occurred when the married or de facto relationship was in existence.[10] These changes only apply to (i) visa applications

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[5] reg 1.23(10)(a). See also Relevant Family Violence. For visa applications made on or after 9 November 2009, as well as those made before, but not finally determined as at 9 November where the claim of family violence was only made to Immigration on or after that date or to the Tribunal on or after 1 July 2011, the definition is found in reg 1.21(1) itself. For other visa applications, the term is defined in reg 1.21(1) to mean that contained in reg 1.23(2)(b).
[6] Current reg 1.23(10)(c), and former reg 1.23(1C).
[7] regs 1.23(3), (5), (7), (12), (14): for applications made on or after 9 November 2009 and those applications made between 15 October 2007 and 9 November 2009 but not finally determined at that date, where the applicant claimed to Immigration on or after 9 November 2009, or to the Tribunal on or after 1 July 2011 that family violence has been committed. The amendments made by SLI 2009, No 273, SLI 2011, No 105 and Amalgamation Act do not appear to extend to visa applications lodged before 15 October 2007 (i.e. cases involving 'domestic violence' claims). For applications made before 9 November 2009 and the application for family violence was made to Immigration before 9 November 2009, there is no requirement that the family violence have occurred before the spousal relationship ended: *Muliyana v MIAC* (2010) 183 FCR 170 at [36].
[8] *Migration Regulations (Amendment) 1995* (Cth) (SR 1995, No 117).
[9] SLI 2007, No 315.
[10] SLI 2009, No 273.

made on or after 9 November 2009,[11] and (ii) applications made before 9 November 2009 that were not finally determined at that date[12] *but only if* the applicant made the claim of violence either to Immigration on or after 9 November 2009[13] or to the Tribunal on or after 1 July 2011.[14]

24 November 2012 – evidence of non-judicially determined claim specified in instrument

On 24 November 2012, the evidentiary requirements for establishing a non-judicially determined claim of family violence were amended to make it easier for visa applicants who have suffered family violence to provide evidence of a 'non-judicially determined claim of family violence' when they apply for a visa.[15] The amendments apply to (i) visa applications made on or after 24 November 2012; and (ii) visa applications made on or after 15 October 2007, but not finally determined by 24 November 2012*, if* a statutory declaration under reg 1.25 was first lodged on or after 24 November 2012.[16]

22 March 2014 – minor technical changes

An exemption which applied to pre-1998 claims was removed for visa applications made on or after 22 March 2014[17] and the reference to Gazette Notice in the definition of independent expert was replaced by the term 'legislative instrument'.[18] Otherwise, the changes were technical in nature and did not substantively change the operation of the family violence provisions. It applies to all live visa applications.

20 August 2022– exceptions to continuing relationship requirements added for onshore Subclass 100 and 309 visa applicants

Access to the death of sponsoring partner, family violence and child exceptions to the continuing relationship requirements were extended for certain visa applicants on 20 August 2022. The amendments enable a Subclass 100 visa applicant who was granted their Subclass 309 visa in Australia under the Covid-19 consessional arrangements, or a

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[11] SLI 2009, No 273: reg 6.
[12] Although not free from doubt, it would appear that these amendments do not extend to visa applications lodged before 15 October 2007 (i.e. cases involving 'domestic violence' claims). See further the Domestic/Family Violence – Table of Amendments.
[13] SLI 2009, No 273, reg 6. 'Immigration' is defined in reg 1.03 of the Regulations as the Department administered by the Minister administering the Act.
[14] SLI 2011, No 105, reg 12 and sch 10. 'Claim' in this context should, consistently with the terms of the legislation, be taken to mean a claim which satisfied the evidentiary requirements. While the Court in *Singh v MIBP* [2014] FCCA 2670 appears to have suggested in *obiter (*at [17], [23]) that a 'claim' made in a letter from a migration agent would be sufficient for reg 6 of SLI 2009 No 273 to apply, it did not expressly consider whether such claim satisfied, or was required to satisfy the evidentiary requirements for those purposes.
[15] Explanatory Statement to SLI 2012, No 256, at 2.
[16] SLI 2012, No 256: schs 6, 7. The transitional provisions in SLI 2012, No 256 are not expressed to apply only to 'family violence' (rather than 'domestic violence') claims, but the relevant amendments are titled 'Amendments of *Migration Regulations 1994* (Cth) relating to evidentiary requirements for family violence claims'. The amendments insert new reg 1.24 which refers to evidence mentioned in reg 1.23(9)(c) and remove the definition of 'competent person'. As pre 15 October 2007 visa applications are not affected by SLI 2009, No 273 renumbering amendments, there is no reg 1.23(9)(c) and the pre 24 November 2012 version of reg 1.24, requiring statutory declarations by competent persons, is unchanged. The definition of 'competent person', however, is omitted by *Migration Amendment Regulation 2012* (No 5) (Cth) (SLI 2012, No 230). In the circumstances, to give effect to the amendments, the better view is that they do not apply to visa applications made before 15 October 2007.
[17] reg 1.23(4)(b), amended by *Migration Amendment (Redundant and Other Provisions) Regulation 2014* (Cth) (SLI 2014, No 30). This was an exemption from a court order needing to be made after the alleged perpetrator had the opportunity to be heard.
[18] reg 1.21, amended by SLI 2014, No 30.

Subclass 309 visa applicant who is in Australia, eligible to be granted their visa under the Covid-19 concessional arrangements and satisfies the Minister that they were the spouse or de-facto partner of their sponsoring partner at the time of the applicant, access to the continuing relationship exceptions whereas previously they did not.[19]

What is 'relevant family violence'?

The term 'relevant family violence' means:

> *…. conduct, whether actual or threatened, towards:*
>
> *(i) the 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.*[20]

This definition refers to conduct, rather than 'violence', which may be directed towards the alleged victim or a member of the alleged victim's family unit, or a member of the alleged perpetrator's family unit or the property of any of those persons.[21] This allows for a person to be found to have suffered relevant family violence even if the alleged perpetrator has not acted against the alleged victim directly. The conduct, whether directed at the alleged victim directly or at one of the other specified persons (or their property) must bring about the relevant state of mind in the alleged victim, namely a fear or apprehension about his or her wellbeing or safety. The definition has the added requirement that such fear or apprehension must be reasonable.[22]

The focus in the definition is not on any particular kind of conduct, but rather on its effect on the alleged victim.[23] The conduct may be in the form of actual or threatened physical

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[19] cll 100.221(4B), 100.221(4C), 309.211, 309.223 and 309.224 as amended by *Migration Amendment (Subclass 100 and 309 Visas) Regulations 2022* (Cth) SR 1994, No 268. The amendments made by Part 1 of Sch 1, which inserts exceptions to the continuing relation requirements, apply in relation to a decision to grant or not to grant a subclass 100 or 309 visa made on or after 20 August 2022, whether the application for the visa was made before, on or after that date: cl 11301 inserted by item 10 of Sch 1. The Covid-19 concession period is defined in reg 1.15N of the Regulations.

[20] For visa applications made before 9 November 2009 (where the claim of violence was made to Immigration before that date) reg 1.21(1) states that the term 'relevant family violence' has the meaning given by reg 1.23(2)(b). For visa applications made on or after 9 November 2009, and visa applications made between 15 October 2007 and 9 November 2009 where the applicant only claims to Immigration on or after 9 November 2009 or to the Tribunal on or after 1 July 2011 that family violence has occurred, 'relevant family violence' is defined in reg 1.21(1): SLI 2009 No 273, reg 6 and sch 4. In either case, the definition is the same.

[21] 'Member of the family unit' is defined in reg 1.12.

[22] In *KC v MIBP* [2015] FCCA 2349, the Court observed that the 'reasonableness' requirement provided an objective element to the test for family violence and found no error in the independent expert's opinion that even if it was the case that the applicant felt subjectively fearful, such concerns were 'unrealistic' ([38]; [40]–[41]).

[23] In *KC v MIBP* [2015] FCCA 2349, the independent expert noted that there was no evidence that the applicant's willingness to complete all of the home duties was from force or threat of violence. The Court rejected the argument that the independent expert worked on the basis that the applicant was obliged to prove some sort of physical violence, or threat of physical violence or intimidation: at [19]–[22]. In *Karsten v MIBP* [2019] FCCA 1560, the Court held that a threat by the sponsor to have the applicant deported to their home country in circumstances where the applicant is afraid or unwilling to return to their home

violence, economic or psychological harm. This definition is expressed in similar terms to the definition of 'family violence' in s 4(1) of the Family Law Act but the latter is not relevant for the purposes of the Tribunal's role.[24]

Who can be an alleged victim of family violence?

The criteria for the relevant visa subclass will identify who must have suffered family violence as defined, i.e. who is a relevant 'alleged victim' within the meaning of div 1.5 of the Regulations. For example, in relation to the onshore permanent Partner visa, cl 100.221(4)(c) of sch 2 refers to either the applicant, or a member of the family unit of the sponsoring partner, or a member of the family unit of the applicant (or of the sponsoring partner and applicant) having suffered family violence committed by the sponsoring partner. For the purposes of reg 1.23, this means the alleged victim can be the applicant, and/or a member of the family unit of the applicant, and/or a member of the family unit of the sponsoring partner.

Who can be an alleged perpetrator?

The criteria for the relevant visa subclass will also identify who must have committed family violence as defined (i.e. who is a relevant 'alleged perpetrator' within the meaning of div 1.5 of the Regulations). For example, in relation to the Partner visa subclasses, the applicable sch 2 'family violence' criterion refers to the applicant, or a member of the applicant's family unit, or a dependent child of the applicant and/or sponsoring partner, having suffered family violence '*committed by the sponsoring partner'* or '*committed by the sponsor'*.[25] For the purposes of reg 1.23, this means the alleged perpetrator must be the sponsoring partner.

Using Subclass 100 as an example, the combined effect of the visa criterion referring to family violence 'committed by the sponsoring partner' and the provisions of regs 1.23(1)(a)(b), 1.21(1), 1.25(1) is that the provisions are directed at violence committed or perpetrated by a sponsoring partner on his or her spouse and other family members.

The 'perpetrator' is usually understood to be the actor; that is, its meaning is narrower than acting by or through an agent.[26] However, as 'relevant family violence' is not restricted to physical violence, and the definition of 'relevant family violence' refers to 'conduct', a person's threats towards their partner where the direct *physical* harm may be carried out by a third party, could amount to 'relevant family violence'. In these circumstances, the conduct of the sponsoring partner would still need to be such as to have created the relevant fear or apprehension about the alleged victim's 'personal well-being or safety' in order for the partner to have committed family violence.[27]

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country and the sponsor is aware of the visa applicant's fear or unwillingness to return, is capable by itself of constituting 'relevant domestic violence' as defined in reg 1.23(2)(b) as in force at the time of the applicant's claim of domestic violence in 2013: at [54]–[55]. It is the fear of return that gives rise to the power in the sponsor to humiliate or coerce the applicant to do something they would otherwise be unwilling to do (at [57]).

[24] For a discussion of the distinction between these definitions see *Al-Momani v MIAC* [2011] FMCA 453.

[25] For example, cls 820.211(8)(d), 820.211(9)(d), 820.221(3)(b), 801.221(6)(c), 100.221(4)(c).

[26] *Cakmak v MIMIA* [2003] FCAFC 257 at [16]. This point was not disturbed in *Sok v MIMIA* [2005] FCAFC 56.

[27] See, for example, *Bhalla v MIBP* [2015] FCCA 2381, where the Court found no error in the independent expert's opinion that the sponsor's failure to act protectively was not the same as encouraging his brother to abuse the applicant or enlisting him to do so. It was held that the independent expert did take into account the conduct of the sponsor and did evaluate that passivity in determining whether there was the relevant family violence: [19] and [22] upheld on appeal in *Bhalla v MIBP* [2016] FCA 395 at [47].

Must the family violence occur during, or cause the end of, the relationship?

There is no express requirement in the Regulations that the family violence must cause the end of the relationship. The sch 2 visa subclass criteria relating to family violence require only that the relevant spouse or de facto partner relationship has ceased, *and* that the relevant person has suffered family violence committed by the sponsor. The only reference in sch 2 criteria as to when family violence has to occur is in relation to the Subclass 100 visa where it must have occurred after the visa applicant's entry into Australia as the holder of the relevant temporary visa.[28]

The Regulations explicitly require the family violence or part of it to have occurred while the spouse or de facto relationship was still in existence.[29] This applies to both judicially determined and non-judicially determined claims of violence, and means that violence experienced after the relationship has ended will not meet the criteria.[30] This assessment appears to require only that the family violence, or part of the violence, took place before the end of the relationship, not that the relationship ended because of the violence.[31]

There is no requirement that the visa applicant continue to suffer family violence up to the time of decision. The use of the perfect tense 'has suffered' in the relevant regulations indicates that it is sufficient that the applicant has, at some point after the relevant violence was committed, feared for, or been apprehensive about, his or her personal well-being or safety.[32]

Assessing whether there was ever a partner relationship

The family violence criteria require that 'the relationship between the applicant and the sponsoring partner has ceased'.[33] The relevant partner relationship (i.e. spouse or de facto, as defined in the legislation) must therefore have existed before it can be determined that the relationship 'has ceased'.[34] Accordingly, it may sometimes be necessary to consider

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[28] cl 100.221(4)(c).
[29] See regs 1.23(3), (5), (7), (12) (14), introduced by SLI 2009, No 273, as amended by SLI 2011, No 105. This requirement applies to visa applications made on or after 9 November 2009, or applications made between 15 October 2007 and 9 November 2009 where the claim of family violence was made to Immigration on or after 9 November 2009 or to the Tribunal on or after 1 July 2011. As noted above, while not free from doubt, it would appear that these amendments do not extend to visa applications lodged before 15 October 2007 (i.e. cases involving 'domestic violence' claims). Accordingly, for visa applications made before 15 October 2007, it will be immaterial that the violence occurred before or after 9 November 2009. In either case, pre 15 October 2007 visa applications should still be considered against the law in place at the time of application.
[30] See e.g. *Salonga v MIBP* [2014] FCCA 1173. Although this was not an issue before the court, the Tribunal's finding that the applicant did not satisfy the requirement in reg 1.23(12) because the relevant family violence occurred one week after the spousal relationship ceased between the parties was not disturbed by the Court; see also *Parvin v MIBP* [2015] FCCA 302 at [27].
[31] Even if the criteria didn't require that the family violence occurred during the existence of the relationship, it appears that there would be a point at which any violence between former spouse or de facto partners would not be considered as "domestic violence". See the judgment of *Muliyana v MIAC* [2010] FCAFC 24 where Siopis and Edmonds JJ noted "…there will be cases where the violence occurs between former spouses in circumstances, for example, many years after the relationship has ended, such that it would not qualify as "domestic violence" within the broader concept of a 'non-judicially determined claim for domestic violence'" at [35].
[32] *Baylouneh v MIMIA* [2005] FCA 360 at [31]. The Court was considering provisions referring to 'domestic violence' but the reasoning is not affected by the amendments changing the terminology to 'family violence'.
[33] Cll 100.221(4)(b), 801.221(6)(b), 820.221(3)(a).
[34] *MICSMA v Gupta* [2022] FCAFC 51 at [48]. See also *Hanna v MIBP* [2016] FCA 282 at [23]; *Kaur v Minister for Immigration and Border Protection* [2014] FCA 1251 at [43]–[44]; *MIAC v Zaouk* [2007] FCAFC 47 at [15], *Liu v Minister for Home Affairs* [2019] FCA 1925. While a conflicting line of authority developed earlier from the Federal Court judgment in *El Jejih v MICMSMA* [2020] FCA 1103 in relation to cl 100.221(4), essentially finding that that clause contained no requirement for the partner relationship to be a genuine one, this divergence has since been settled by the Full Federal Court in *Gupta*

whether a partner relationship ever existed before considering a claim of family violence. If the Tribunal determines that the partner relationship never existed, the family violence exception to the relationship continuing does not arise for consideration.[35]

Whether or not a relationship ever existed is ultimately a question of fact for the Tribunal. It is not bound to accept that a relationship did exist just because a delegate based their decision on the family violence criteria, nor, when reviewing a decision relating to a permanent partner visa, must it accept a previous decision to grant a provisional partner visa based on the relevant partner criteria being met, as being correct.[36] Rather, it is for the decision maker on the permanent partner visa application to make a decision by reference to their own assessment of the merits of the application, including the existence of the relationship, based on the materials before them.[37]

For guidance on assessing a partner (spouse/de facto) relationship see the commentary: "Spouse and De facto Partner".

If assessing whether or not a partner relationship ever existed, the decision-maker may need to consider family violence evidence where that evidence goes to the circumstances of the relationship.[38]

If a de facto relationship is claimed, the question of whether reg 2.03A is met is not relevant in deciding whether the relationship existed as the definition of 'de facto partner' is contained wholly within s 5CB. Accordingly, a person who was not in a de facto relationship for 12 months before the application could meet the relevant family violence criterion. However, in the absence of compelling and compassionate circumstances that person might not meet the additional criteria in reg 2.03A.[39]

Role of the Tribunal in relation to family violence

In deciding whether a person has suffered family violence in the relevant sense, reg 1.22 provides that in respect of both judicially and non-judicially determined claims of family violence, a reference to an applicant having suffered family violence is a reference to a person being taken, under reg 1.23, to have suffered family violence. Upon review, this becomes a question for the Tribunal and the Tribunal may exercise all of the powers and discretions conferred by div 1.5 of the Regulations on the Minister.[40]

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[35] *MICMSMA v Gupta* [2022] FCAFC 51 at [44], agreeing with Jagot J in *Hanna v MIBP* [2016] FCA 282.
[36] *MICMSMA v Gupta* [2022] FCAFC 51 where the Court accepted that there is no basis in the Migration Regulations for saying that the decision-maker must accept as correct a decision to grant a provisional visa (at [50]).
[37] *MICMSMA v Gupta* [2022] FCAFC 51, at [51].
[38] *Singh v MIBP & Anor* [2016] FCCA 114 in which the court stated in obiter that the statutory declarations about family violence tend to support a claim that there was a relationship between the parties, albeit one that ended badly at [45]. *Xing v MIBP* [2018] FCCA 208 is another example of the Federal Circuit Court finding no error for not considering evidence of family violence as also evidence of a genuine relationship as it accepted the Tribunal implicitly had. However, see *Chao v MIBP* [2018] FCA 858 where in obiter the court said that evidence of violence in a relationship does not establish the existence of a de facto relationship. Going on to say: "depending upon its nature, evidence of domestic violence may indicate that a relationship existed, but it does not go towards showing that the relationship was a de facto one under s 5CB of the Act, in particular at any given time" at [29].
[39] If the applicant does not meet reg 2.03A then they would not meet all the requirements for the grant of a temporary partner visa.
[40] *Sok v MIAC* [2008] HCA 50 at [28].

In relation to **judicially determined** family violence, the question for the Tribunal is whether there is a court determination of the kind specified in reg 1.23(2), (4) or (6),[41] whenever made, in respect of the persons specified in the relevant provisions of sch 2.

In relation to **non-judicially determined claims** of family violence, the Tribunal must assess whether the evidence adduced for the purpose of satisfying regs 1.23(8) or (9) meets the statutory requirements, in particular reg 1.25 and, where relevant, reg 1.26 in respect of statutory declarations. It is irrelevant whether or not the claim was made first to the Department or the Tribunal in accordance with the Regulations. The provisions of div 1.5 and the frequent references made in the Division to the Minister do not confine the relevant family violence criteria to those cases in which the visa applicant has made a claim of family violence *before* the initial consideration of the visa application.[42]

Evidentiary deficiencies

There is no general obligation on the Tribunal to point out what evidence is required to meet the family violence provisions, or to disclose its thought processes in advance of its decision as to why or whether evidence provided is deficient.[43]

As with other statutory discretions, whether it is reasonable to refuse additional time to provide the required evidence will depend on the circumstances.[44]

Judicially determined family violence

An applicant is taken to have suffered family violence if there is a judicial determination of a specified kind. The relevant determination may be made at any time, including during Tribunal review, and there is no restriction on the Tribunal's power to consider evidence of a judicial determination, whether provided to the Department during the primary decision-making process, or to the Tribunal during the review. Where there is evidence pointing to judicially determined family violence, the questions for the Tribunal include whether the evidence satisfies the applicable provision of reg 1.23(1), in respect of the persons specified in the relevant provisions of sch 2.

Where an applicant provides any of the below forms of acceptable evidence, the alleged victim must be taken to have suffered family violence and the alleged perpetrator must be

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[41] regs 1.23(2), (4), (6) apply to visa applications made on or after 9 November 2009, and those made between 15 October 2007 and 9 November 2009 where the claim of violence was only made to Immigration on or after 9 November 2009 or to the Tribunal on or after 1 July 2011.
[42] See *Sok v MIAC* ([2008] HCA 50 at [28], which while referring to cl 100.221 most likely extends to criteria for other relevant visa subclasses including cls 820.211(8)(d), 820.211(9)(d), 820.221(3)(b), 801.221(6)(c), 100.221(4)(c).
[43] See *MIAC v Pham* [2008] FCA 320 at [51]–[54], *Lawani v MIAC* [2013] FCCA 114, at [53] – [55]. In *Karsten v MIBP* [2015] FCCA 534 the Court rejected any suggestion that the Tribunal is required to notify or inform the applicant of the legislative effect of reg 1.23(1B) and found that a failure to do so where it is not satisfied the alleged victim has suffered the relevant domestic violence and has sought the opinion of an independent expert would not breach its obligations under s 359A, at [8], [15]–[16].
[44] In *Manga v Minister for Immigration* [2015] FCCA 501, the applicant was given 22 days from the hearing to provide the required evidence. Sixteen days later, the Tribunal received a reg 1.25 statutory declaration and a request for a further 12 weeks so a psychologist could make a total assessment in regards to the applicant's stress and anxiety and depression and produce a full report. The Tribunal denied the request, noting that a psychologist's report was not required. The Court found that the applicant was given a reasonable amount of time to present evidence, noting that only one statutory declaration had been supplied, notwithstanding an extension of 22 days, and there was no indication that the psychologist's report would be about family violence. The Court distinguished *MIAC v Li* [2013] HCA 18 and *NBMB v MIAC* [2008] FCA 149, finding that in the circumstances of this case, where the applicant was aware of the issues and had had a reasonable time to provide the evidence, the Tribunal's exercise of the discretion in s 363(1)(b) to refuse the adjournment request was reasonable.

taken to have committed family violence, regardless of any other evidence that is before the Tribunal, provided the violence occurred during the relationship.[45]

Acceptable evidence of a judicial determination

There are 3 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 granted on application by the alleged victim, against the alleged perpetrator.[46] These are injunctions for personal protection, or restraining parties from entering or remaining in a specified area, home, or workplace; *or*
- **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;[47] *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.[48]

  The following are the types of Court Orders you would expect from each State and Territory:

  - ACT – Protection Order[49]
  - NSW – Apprehended Domestic Violence Order[50]
  - Northern Territory – Domestic Violence Order[51]
  - Queensland – Domestic Violence Order[52]
  - South Australia – Intervention Order[53]

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[45] regs 1.23(3), (5), (7).
[46] reg 1.23(2).
[47] reg 1.23(6).
[48] reg 1.23(4) Note that regs 1.24(4) and 1.23(1)(d) (for visa applications made before 22 March 2014) do not require the order to be made after the court had given the alleged perpetrator an opportunity to be heard, or otherwise make submissions, where the alleged victim had claimed to Immigration to have suffered domestic violence before 1 January 1998.
[49] *Domestic Violence and Protection Orders Act 2008* (ACT). There are three types of protection orders: domestic violence, personal protection, and workplace orders: s 7(1). Orders may be interim, final, consent, or emergency. A final domestic violence order remains in force for 2 years, or a shorter period if stated, or for longer than 2 years if there are special or exceptional circumstances: s 55. An interim order can only be made on an application for final order, and end when revoked, or the application on which it is made is dismissed, or the final order is made or served on the respondent: ss 30,38. A court may order an interim order to become final after allowing the respondent an opportunity to object to its doing so (s 36) or otherwise considering the respondent's circumstances (s 47).
[50] *Crimes (Domestic and Personal Violence) Act 2007* (NSW). Apprehended violence orders comprise 2 types of Court Orders, namely apprehended domestic violence orders (pt 4), and apprehended personal violence orders (pt 5). Apprehended violence orders may be either final or interim (including provisional orders). An interim court order may be made whether or not a defendant is present at or has been given notice of the proceedings: s 22. Before a final order is made, the court must notify the defendant of the date, time, and place of the hearing: s 57.
[51] *Domestic and Family Violence Act* 2007 (NT). A domestic violence order (DVO) (other than an interim DVO) is in force for the period stated in it: s 27. A Court may make an interim DVO even if the defendant does not appear at the hearing, or before hearing the defendant's evidence, or even if the defendant objects to it being made: s 35. A DVO (other than an interim DVO): may be varied or revoked: s 47.
[52] *Domestic and Family Violence Protection Act 2012* (QLD). A domestic violence order means a protection order, or a temporary protection order. s 23. A court may make a temporary protection order despite the respondent not having been served with the application: s 47.
[53] *Intervention Orders (Prevention of Abuse) Act 2009* (SA). Section 21 allows the court to make an interim intervention order without summoning the defendant to appear, but the issuing of the interim intervention order requires the defendant to be summoned to appear before the court within 8 days in relation to the final intervention order. Section 23(2) allows the court to make a final intervention order in the absence of the defendant if he fails to appear after being summoned or in relation to a bail agreement. Section 26 allows for variation or revocation of intervention orders, including on application of the defendant.

- Tasmania – Family Violence Order[54]
- Victoria – Family Violence Intervention Order[55]
- Western Australia - Violence Restraining Order (Domestic and Family Violence)[56]

For such an order to be acceptable evidence of a judicial determination of family violence under reg 1.23(4), the order must have been made after the alleged perpetrator has had an opportunity to be heard or make submissions.[57] While there is nothing in the legislation which requires that the order be a final order, interim orders granted in the absence of the defendant may not meet the requirements of reg 1.23(4). [58] The decision maker (including the Tribunal on review) needs to consider whether there is evidence that the alleged perpetrator had the opportunity to be heard or make relevant submissions. The Tribunal should clearly identify any evidence that indicates the alleged perpetrator had such an opportunity (even if the perpetrator did not take up such opportunity) before finding that the evidence provided meets the requirements of reg 1.23(4).

Unacceptable evidence of a judicial determination

The phrase 'finding of guilt' in reg 1.23(6) is a reference to a curial determination of guilt when a person has been charged with a criminal offence involving family violence and has been brought before a court to answer that charge. A statement made in the course of civil law proceedings for a family violence order does not suffice.[59]

Normally the court orders made would be provided as evidence of the making of the orders.[60] Protection orders in which the alleged perpetrator was *not* given an opportunity to be heard or make submissions, such as an order granted *ex parte* without the alleged

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[54] *Family Violence Act 2004* (TAS). Family violence orders (FVOs) can be made after reasonable attempts have been made to serve a copy of the application to the respondent: s 31. An interim FVO may be made, varied, or extended in the absence of the person against whom it is made: s 23.
[55] *Family Violence Protection Act 2008* (VIC). Final family violence intervention orders may be made with the consent of the respondent, or after the respondent has had an opportunity to attend court on a mention date which is fair and just to all the parties: s 61. A hearing is not necessary for an interim intervention order, but in making an interim order, the court must ensure the hearing is listed for a decision about the final hearing as soon as practicable: ss 53–60.
[56] *Restraining Orders Act 1997* (WA). Orders may either be in the form of violence restraining orders or misconduct restraining orders. Misconduct restraining orders are should not be made where the person seeking to be protected and the person bound by the order are in a family and domestic relationship with each other: s 35A. A violence restraining order lasting 72 hours or less may be made without the respondent having had an opportunity to attend court: ss 26, 29. A violence restraining order of more than 72 hours duration is an interim order: s 29. Interim and final violence restraining orders may not be made unless the respondent has had an opportunity to object: pt 4.
[57] Note that reg 1.24(4), for visa applications made before 22 March 2014, does not require the order to be made after the court had given the alleged perpetrator an opportunity to be heard, or otherwise make submissions, where the alleged victim had claimed to Immigration to have suffered domestic violence before 1 January 1998.
[58] In *Alam v MIAC* [2012] FMCA 616 at [49], the Court commented in *obiter* that the former reg 1.23(1)(d) (current reg 1.23(4)) seeks to identify an order made after, not before, the defendant has in fact enjoyed procedural fairness by way of an 'opportunity to be heard' by providing rebutting evidence or mitigating submissions. A visa applicant seeking to satisfy this criterion must satisfy the Minister (or the Tribunal on review) that a court making an order would afford the defendant an opportunity to present a defence in a manner which procedural fairness would require under well understood principles of Australian justice, whether the resultant order was labelled as an 'interim' or 'final' order. The judgment was upheld in *Alam v MIAC* [2012] FCA 1371.
[59] *Russell v MIMIA* [2006] FCA 327 at [31]. In this case the applicant relied on the following statement by a Magistrate given in the context of *declining* to make a domestic violence order pursuant to the *Domestic Violence Family Protection Act 1989* (Qld): '*On the evidence I have accepted, I find that the actions by [the sponsor] towards [the applicant] during which I have referred to as the glass incident on 19th December 2003, was an act of domestic violence against [the applicant].'* The applicant unsuccessfully argued that the statement constituted a 'finding of guilt' for the purposes of reg 1.23(1)(e) (now reg 1.23(6)).
[60] In *Alam v MIAC* [2012] FMCA 616, the applicant provided statutory declaration evidence that three directions hearings were held in Apprehended Violence Order (AVO) proceedings, at which the alleged perpetrator was present, and that 'interim orders were continued' until the full hearing. The Court held at [46] that the statutory declarations did not provide evidence of the making of any court order at the directions hearings, and the Tribunal's conclusion that there was no evidence of relevant court orders for reg 1.23(1)(d) (or the current reg 1.23(4)) was correct.

perpetrator being offered the opportunity to attend or otherwise give evidence, may not comply with reg 1.23(4).[61]

Non - Judicially determined family violence

A person can only be determined to have claimed or suffered family violence where the claims and assessments satisfy the requirements of div 1.5.[62]

Regulation 1.23(10) provides that, where there is a non-judicially determined claim of family violence, the Minister (or the Tribunal on review) must consider whether the alleged victim 'has suffered relevant family violence' and then, if not satisfied that the alleged victim has suffered relevant family violence, seek the opinion of an independent expert.

Is there a non-judicially determined claim of family violence?

Whether there is a non-judicially determined claim of family violence requires consideration as to whether the evidence before the decision maker meets the statutory requirements contained in div 1.5, in particular regs 1.25 and 1.26 (where relevant) in respect of statutory declarations.[63]

For a claim of non-judicially determined family violence to be taken to be made under both the pre and post 24 November 2012 regulations, there must be either:

1. a joint undertaking as specified in reg 1.23(8); **or**
2. a reg 1.25 statutory declaration by the visa applicant.

Where there is a joint undertaking, no additional evidence is required.

Where a reg 1.25 statutory declaration is made:

- for visa applications made on or after 24 November 2012, or those made before that date where a statutory declaration under reg 1.25 was first provided *on or after* 24 November 2012, the applicant must also provide the type and number of items of evidence specified in an instrument.[64]
- for visa applications made before 24 November 2012 where a statutory declaration under reg 1.25 was first provided before that date, the applicant must also provide evidence in accordance with reg 1.24 as specified in reg 1.23(9). This can include either:

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[61] In *Alam v MIAC* [2012] FMCA 616 at [49], the Court commented in *obiter* that the former reg 1.23(1)(d) (or the current reg 1.23(4)) seeks to identify an order made after, not before, the defendant has in fact enjoyed procedural fairness by way of an 'opportunity to be heard' by providing rebutting evidence or mitigating submissions. A visa applicant seeking to satisfy this criterion must satisfy the Minister (or the Tribunal on review) that a court making and order would afford the defendant an opportunity to present a defence in a manner which procedural fairness would require under well understood principles of Australian justice, whether the resultant order was labelled as an 'interim' or 'final' order.
[62] See, e.g. *Alam v MIAC* [2012] FCA 1371 at [26]–[27].
[63] In *Pham v MIBP* [2018] FCCA 3272 the Court confirmed that the assessment of whether material falls within the prescribed evidence requirements for making a non-judicially determined claim of family violence is a jurisdictional fact that it can determine for itself.
[64] reg 1.24. For the relevant instrument, see the Register of Instruments – Partner visas.

- a statutory declaration from the alleged victim and a statutory declaration from a competent person with a copy of a record of an assault from a police service;[65] or
- a statutory declaration from the alleged victim together with 2 statutory declarations from competent persons (who must hold different qualifications from each other)[66]

Requirements for a valid statutory declaration

For all versions of the family violence provisions, a statutory declaration is defined to mean a statutory declaration under the *Statutory Declarations Act 1959* (Cth) (Statutory Declarations Act).[67] That Act sets out specific requirements as to the prescribed form of the declaration and prescribed persons before whom it must be made. For a statutory declaration to meet the definition of reg 1.21, it must have been properly made by the declarant and witnessed.[68]

Statutory declarations are required for reg 1.25 statements by or on behalf of the alleged victim; reg 1.26 competent persons' statements under the pre 24 November 2012 regulations, and for certain types of evidence specified by instrument under the post 24 November 2012 regulations.

Statutory declaration under reg 1.25 ('victim stat dec')

The statutory declaration under reg 1.25 may be made by the alleged victim, **or** by a person on behalf of the alleged victim. However, in either case the author must be the spouse or de facto partner of the alleged perpetrator.[69]

<u>Statutory Declaration by the alleged victim</u>

A statutory declaration made by the alleged victim must:

- set out the allegation of relevant family violence (that is, there must be an allegation of conduct against the relevant persons or their property that causes the alleged victim to reasonably fear for or reasonably be apprehensive about his or her wellbeing or safety[70]);
- name the person they allege has committed the family violence; and

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[65] regs 1.25, 1.26 and see reg 1.24(1)(a)(ii).
[66] Complying with regs 1.25 and 1.26 respectively.
[67] reg 1.21. For example, in *Morgan v MIMIA* [1999] FCA 1059 the applicant's statutory declaration was sworn under the *Oaths Act* 1900 (NSW) and not the *Statutory Declarations Act 1959* (Cth) as required by reg 1.24. While conceding that the claim of domestic violence must accordingly fail, Hill J stated that '*This is the sort of matter which tends to bring the law into some disrepute*'. However, this approach has been followed in subsequent cases with relevantly identical circumstances, the most recent being *Mohamed v MIMIA* [2007] FMCA 30, which was upheld on appeal *Mohamed v MIA*C [2007] FCA 1004 confirming that a statutory declaration made under State legislation is not a statutory declaration 'under' the Commonwealth Act.
[68] For example, in *McGuire v MIMIA* [2004] FMCA 1014 the Tribunal had treated a statutory declaration as valid even though it was signed on one day but witnessed on another. The Court held at [24] that this amounted to jurisdictional error stating that where a statutory declaration is invalid and has been treated by the Tribunal as being valid, then the effect is fundamental to the applicant's case as the applicant would no longer have the correct number of valid statutory declarations and without that number the Tribunal has no jurisdiction to make a decision favourable to the applicant.
[69] reg 1.25(1).
[70] reg 1.21. In *Cakmak v MIMIA* (2003) 135 FCR 183 the appeal failed because the Full Federal Court held that Mr Cakmak's declaration did not present evidence of such fear or apprehension for his well-being or safety by reason of violence or threat of violence from his spouse. The Full Federal Court decision in *Sok* overruled the aspect of the *Cakmak* decision relating to the meaning of violence, however, this did not affect/overrule the reasoning on the assessment of compliance with the requirements of reg 1.23.

- if the conduct of the person alleged to have committed the family violence was not towards the alleged victim:
  - name the person to whom the conduct was towards; and
  - identify the relationship between the statutory declarant and the person whom the conduct was towards.[71]

See also above, 'Requirements for a valid statutory declaration'.

Statutory Declaration by person on the alleged victim's behalf

If the declaration under reg 1.25 was made by the spouse or de facto partner of the alleged perpetrator on behalf of the alleged victim, it must:

- name the alleged victim;
- set out the allegation of relevant family violence;[72]
- identify the relationship of the maker of the statutory declaration to the alleged victim;
- name the person alleged to have committed the relevant family violence; and
- set out the evidence on which the allegation is based; and
- if the conduct of the person alleged to have committed the relevant family violence was not towards the alleged victim the statutory declaration must also:
  - name the person whom the conduct was towards;
  - identify the relationship between the alleged victim and the person whom the conduct was towards; and
  - identify the relationship between the statutory declarant and the person whom the conduct was towards.[73]

Visa application made or victim stat dec first provided after 24 November 2012

For visa applications made on or after 24 November 2012, or those made between 15 October 2007 and 23 November 2012 and not finally determined at 24 November 2012, where a statutory declaration under reg 1.25 was first provided on or after 24 November 2012, the applicant must either provide a joint undertaking to a court or a statutory declaration and a specified type of evidence.

Joint undertaking

A non-judicially determined claim of family violence is taken to be made where the Minister (or the Tribunal on review) has been provided with a joint undertaking to a court made by the alleged victim and alleged perpetrator in relation to proceedings in which an allegation is

[71] reg 1.25(2).
[72] As defined in reg 1.21. For example, in *Cakmak v MIMIA* [2003] FCAFC 257 the appeal failed because the Full Federal Court held that Mr Cakmak's declaration did not present evidence of such fear or apprehension for his well-being or safety by reason of violence or threat of violence from his spouse. The Full Federal Court decision in *Sok* overruled the aspect of the *Cakmak* decision relating to the meaning of violence, however, this did not affect/overrule the reasoning on the assessment of compliance with the requirements of reg 1.23.
[73] reg 1.25(3).

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before the court that the alleged perpetrator has committed an act of violence against the alleged victim.[74]

Statutory declaration of the alleged victim and evidence specified in instrument

A non-judicially determined claim of family violence is taken to be made where the Minister (or the Tribunal on review) has been provided with a statutory declaration under reg 1.25 *and* the type and number of items of evidence specified in the relevant instrument.[75]

Evidence specified in the applicable legislative instrument

The current instrument, IMMI12/116 specifies that a minimum of two different types of the following be given:[76]

- a medical report, hospital reports, discharge summary or statutory declaration made by a registered medical practitioner or nurse, acting in that capacity (see below);
- a report, record of assault, witness statement or statutory declaration made by a police officer;
- a witness statement made by someone other than the alleged victim or a police officer during the course of a police investigation;
- a report or a statutory declaration by a child welfare authority officer or a child protection authority officer;
- a letter or assessment report (on letterhead) from a women's refuge or a family violence crisis centre;[77]
- a statutory declaration made by a member, or person eligible to be a member of the Australian Association of Social Workers who has provided counselling in that role to alleged victim (see below);[78]
- a statutory declaration made by the alleged victim's treating registered psychologist (see below);
- a statutory declaration made by a family consultant appointed under the Family Law Act or a family relationship counsellor who works at a Family Relationship Centre listed on the Australian Government Family Relationships website;
- a statutory declaration or letter (on letterhead) made by a school counsellor or principal acting in that capacity.

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[74] reg 1.23(8) for visa applications made on or after 9 November 2009, and those made between 15 October 2007 and 9 November 2009 where the claim of violence was only made to Immigration on or after 9 November 2009 or to the Tribunal on or after 1 July 2011.
[75] reg 1.24, amended by SLI 2012, No 256. The relevant instrument is available on the 'Evidentiary tab' of the Register of Instruments – Partner visas.
[76] See the MRD Legal Services Register of Instruments – Partner visas to access the instrument.
[77] The letter must specify that the person was subjected to family violence, rather than merely record the allegations made: see *Sagwal v MIBP* [2014] FCCA 1794 at [41]. A letter from a domestic violence legal service that is essentially a lawyer's letter threatening proceedings, does not meet this category (or any other) for the purposes of IMMI12/116: see *Thaworn v MICMSA* [2021] FCCA 2133 at [7].
[78] These must be in form and substance a statutory declaration; and must indicate that the persons involved in providing the counselling or assistance were persons who were members of the Australian Association of Social Workers, or eligible to be so, and that whilst providing the counselling or assistance they were performing the duties of a social worker: see *Sagwal v MIBP* [2014] FCCA 1794 at [41].

For each type of evidence, the instrument specifies the information that must be included. Where a statutory declaration is required, it must be a statutory declaration under the Statutory Declarations Act (see above, "Requirements for a valid statutory declaration").

Medical or hospital report, or discharge summary or statutory declaration made by a registered medical practitioner or nurse

To satisfy IMMI12/116, a medical or hospital report, or discharge summary must clearly identify the author of the record and that they are a registered medical practitioner (or nurse) performing the duties of a medical practitioner (or nurse).[79] However, it may not be necessary that the medical practitioner be registered in Australia, and may meet the requirement if a registered medical practitioner elsewhere.[80] If the report/discharge summary/statutory declaration is prepared by a registered nurse, it is clear on the face of the instrument that "registered nurse" has the meaning as given in s 3 of the *Health Insurance Act* 1973 (Cth).[81]

A medical report which expresses an assessment of mood and an opinion that an applicant is not psychotic is enough to be considered a "medical opinion" and therefore a medical report. However, the requirement in the right hand column of sch 1 of IMMI 12/116 that the medical report details "treatment" requires details of what remedies were given. Remedies for mental health problems include such things as counselling, psychotherapy, and psychoactive drugs. If the report does not detail any remedy or treatment it will not satisfy IMMI12/116.[82]

Statutory declaration made by a Social worker or treating psychologist

The social worker must have 'provided counselling or assistance to the alleged victim while performing the duties of a social worker', and the psychologist must have 'treated the alleged victim while performing the duties of a psychologist' in the context of a therapeutic relationship.[83] While the 'assistance' or 'treatment' provided must be more than the mere provision of the statutory declaration, there is no requirement for the statutory declaration itself to set out what the assistance or treatment provided was.[84]

A psychologist's statutory declaration must state their opinion that the applicant has been subject to family violence and 'detail' the reasons for their opinion. [85] The term 'detail' can be

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[79] *Fu v MICMSMA* [2022] FedCFamC2G 161.
[80] In *Fu v MICMSMA* [2022] FedCFamC2G 161 at [89] the Court found, in obiter, that the requirement in Item 1 of Sch 1 of IMMI12/116 for registration of the medical practitioner who prepares a report is not constrained by the text of that instrument in a manner which limits the class of medical practitioners to those who are registered in Australia.
[81] Item 1, column 1 of sch 1 of IMMI12/116.
[82] *Pham v MIBP* [2018] FCCA 3272 at [23]–[24], [33]–[34].
[83] *Dang v MIBP* [2016] FCCA 1426 at [29]–[32], and *Thaworn v MICMSMA* [2021] FCCA 2133, where the Court distinguished *Dang* from the facts before it. The court found the Tribunal's finding the psychologist's report was created merely for provision to the Tribunal and that the social worker's report did not involve counselling or assistance was in error as the conclusions appeared to ignore the evidence of the applicant that she was consulting both the social worker and psychologist (having seen the psychologist on two occasions) because of her mental state and the applicant's evidence that the social worker referred her to the psychologist. The Court, at [31], found that was indicative of a social worker engaged in counselling or assistance and a psychologist engaged in a therapeutic approach to the applicant.
[84] For example by acceptable or appropriate evidence from the applicant themself. See *Thaworn v MICMSMA* [2021]FCCA 2133 at [24]-[25].
[85] In *Fu v MICMSMA* [2022] FedCFamC2G 161 at [48]-[49], the Court held, in obiter, that while a recitation of the history supplied to the psychologist by the applicant is to be expected, it is not a substitute for the practitioner's expression of opinion. It further found that as concerns the expression of a specialist opinion, there is a distinction between opinion evidence as to physical injuries and those which are psychological. In the former case the relative ease with which an opinion may be expressed is clearly connected to the fact that the physical injury is objectively observable. In the latter case, the expression of an opinion respecting psychological trauma will turn upon the specialist's observations and experience. In that case, the Court was prepared to accept that the psychologist had expressed her opinion the applicant had been subject to family violence given

given its ordinary meaning and the least that should be expected is that the psychologist provide a detailed narrative or description of particulars upon which the opinion is founded.[86] The same requirements that there be a statement of their opinion and detailed reasons for the opinion, is specified in column 2 of sch 1 of IMMI12/116 for a social worker's statutory declaration.

Visa application made and statutory declaration first provided before 24 November 2012

For visa applications made before 24 November 2012, where a statutory declaration under reg 1.25 was first provided before that date, a non-judicially determined claim of family violence is taken to be made if the applicant provides:

- a joint undertaking (see above, "Joint Undertaking"); or
- a police record of assault and 2 statutory declarations; or
- 3 statutory declarations.[87]

Police record of assault and 2 statutory declarations (alleged victim and competent person)

The two statutory declarations required with the police record of assault are:

1. a statutory declaration made under reg 1.25, usually a statutory declaration by the alleged victim, and
2. a statutory declaration of a competent person made pursuant to reg 1.26.

For further detail regarding the particular requirements of these statutory declarations see below.

Police record of assault

Regulation 1.24(1)(a)(ii) provides that a copy of a record of an assault kept by a State or Territory police service can be submitted where the assault is allegedly committed by the alleged perpetrator on:

- the alleged victim; or
- a member of the family unit of the alleged victim; or
- a member of the family unit *of the alleged perpetrator*.

However, the record kept must be something other than a statement by the alleged victim or by the person allegedly assaulted.

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the psychologist had stated the applicant was "*notably struggling with some basic functioning such as sleep and feeling safe and secure*", but was not satisfied that the psychologist had 'detailed' her reasons for such opinion (at [54]).

[86] *Fu v MICMSMA* [2022] FedCFamC2G 161 at [53]. While the Court recognised that the level of detail to be expected will necessarily depend upon the unique features of the particular case, in the absence of sufficient detailed reasoning, the bare expression of a requisite opinion will be little more than an assertion (see [53] and [57]).

[87] The evidentiary requirements in reg 1.24 were amended by SLI 2012, No 256. Consequential amendments were made to regs 1.21, 1.25 and 1.26 to remove the redundant definition of 'competent person' and requirements specific to a competent person's statutory declaration.

3 Statutory declarations (alleged victim and 2 competent persons)

A statutory declaration must be a statutory declaration under the Statutory Declarations Act .

Victim statutory declaration under reg 1.25

The statutory declaration under reg 1.25 may be made by the alleged victim, or by a person on behalf of the alleged victim. However, in either case the author must be the spouse or de facto partner of the alleged perpetrator.[88] The requirements are discussed in more detail above.

The statutory declaration of a competent person – reg 1.26

With limited exceptions for visa applications made before 24 November 2012 the statutory declaration/s must: [89]

- be a statutory declaration under the Statutory Declaration Act (see above, "Requirements for a valid statutory declaration");
- be made by a 'competent person';[90]
- set out the basis of the competent person's claim to be a competent person;[91]
- state that, in the competent person's opinion, relevant family violence has been suffered by a person;
- name the person who, in the opinion of the competent person, has suffered that relevant family violence;
- name the person who, in the opinion of the competent person, committed that relevant family violence; and
- set out the evidence on which the competent person's opinion is based.

Conduct that falls within the 'relevant family violence' definition may be towards a person other than the alleged victim.[92] In these circumstances, in addition to the above requirements, the competent person's statement must:

- name the person whom the conduct of the alleged perpetrator was towards; and
- identify the relationship between the alleged victim and the person whom the conduct was towards.[93]

To meet the statutory requirements, the evidence in the statutory declaration must:[94]

[88] reg 1.25(1). Broadly speaking, the content requirements of a reg 1.25 statutory declaration under the pre and post 24 November 2012 family violence provisions are the same in substance, except for those visa applications made before 15 October 2007. Otherwise the only variations relate to renumbered references to the definition of relevant family violence, and references to 'de facto partner' rather than 'interdependent'

[89] regs 1.26 (a)–(g).

[90] As defined in reg 1.21.

[91] This must be more than ticking the box on the form indicating a person is a competent person – the person must set out the basis for their claim to be a competent person: *Safatli v MIAC* [2009] FMCA 1191 at [14]. In the case of a psychologist, for example, this could include them stating they are a psychologist registered under a law of a State or Territory for the registration of psychologists, or by indicating the State or Territory law under which they are registered: *Safatli v MIAC* [2009] FMCA 1191 at [10].

[92] reg 1.23(2)(b) for visa applications made on or after 15 October 2007 but before 24 November 2012, where a statutory declaration was first provided before 24 November 2012. As amended by SLI 2007, No 315.

[93] reg 1.26(f) as amended by SLI 2007, No 315 for visa applications made on or after 15 October 2007.

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- state the competent person's opinion that relevant family violence has been suffered by a person as required by reg 1.26(c), that is, an opinion which reflects an assessment of the state of mind of the alleged victim by reference to the correct definition. [95] If such an opinion is not made expressly in those terms, the opinion may be implied, but it must be apparent from the declaration that the competent person attributes the same meaning to 'domestic violence' or 'family violence' (whichever is applicable) as in reg 1.21(1) although it is not necessary for the declarant to expressly refer to that definition.[96] It is not sufficient for the competent person to state that the victim's presentation is consistent with the claim of family violence.[97] It is not sufficient for the competent person to state that the alleged victim may have, or appears to have, suffered family violence.[98] Where the description of the nature of the violence or the statement of opinion (whether explicit or implicit) reveals that the competent person misconceived what the definition required for the formation of the requisite opinion, the statutory declaration will not be sufficient for the purposes of reg 1.26;[99]
- name the person who, in his or her opinion, committed the relevant family violence;[100]
- set out the evidence on which the competent person's opinion is based.[101] It is not sufficient for the competent person to simply recite the possession of an opinion that the alleged victim has suffered family violence.[102] This does not require the competent person to specifically identify which parts of a body of evidence are relied upon by them in forming the opinion that an applicant had suffered family violence.[103] However, if the competent person refers to 'evidence' which is unrelated to the issue of whether relevant family violence has been suffered by the applicant, the alleged

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[94] See *Cakmak v MIMIA* [2003] FCAFC 257 where the Full Federal Court held that the correct test for the decision maker to ask itself in applying the domestic violence provisions is: 'has evidence called for by regs 1.23(1)(g), 1.23(2)(b), 1.24, 1.25 and 1.26 (as in force for visa applications made before 15 October 2007) been presented?'

[95] It is not sufficient for the competent person to state that the victim's presentation is consistent with the claim of domestic/family violence, nor is it sufficient to state that the alleged victim may have, or appears to have, suffered domestic/family violence: see *MIAC v Ejueyitsi* [2007] FCAFC 289 at [34]. Where it is not clear that the competent person has stated that, in their opinion, relevant domestic/family violence has occurred, completion of a standard form directed to that question may support an inference that s/he has done so: *Alam v. MIBP* [2015] FCCA 702. In *Safatli v MIAC* [2009] FMCA 1191, however, the Court found, despite the use of the standard form, that there was nothing in the declaration that amounted to an express or implied opinion that the applicant suffered relevant domestic/family violence: at [20]–[25].

[96] *MIAC v Ejueyitsi* [2007] FCAFC 289 at [34]. In *Meroka v MIMA* [2002] FCA 482 Ryan J held that where the declaration is on Form 1040, the opinion may be implied from the way in which the form directs the attention of the competent person to the definition of domestic violence. However, even if the declaration is on Form 1040, *Ejueyitsi* states at [33] that it must be clear from the declaration itself that the declarant is expressing his or her opinion that the visa applicant has suffered domestic violence within the meaning of reg 1.23(2)(b). The Court's reasoning appears equally applicable in relation to the amended definition of 'relevant family violence'.

[97] *MIAC v Ejueyitsi* [2007] FCAFC 289 at [34].

[98] *MIAC v Ejueyitsi* [2007] FCAFC 289 at [34], citing with approval *Alin v MIMA* [2002] FCA 979 at [12]; *Lawani v MIAC* [2013] FCCA 114 at [38]–[44].

[99] *MIAC v Ejueyitsi* [2007] FCAFC 289 at [33]–[34]. See also *Meroka v MIMA* [2002] FCA 482 at [35].

[100] reg 1.26(e). Where more than one person has been named in the statutory declaration as having committed domestic violence, in order to establish the relevant causal connection between the violence and the alleged perpetrator/sponsor, the statutory declaration must identify who has done what: *Theunissen v MIMIA* [2005] FCA 1097. This judgment was based on legislation before the introduction of the process of referral to an independent expert and before judgments in relation to the ability to imply the relevant opinions in terms of the statutory declaration requirements and before the amended provisions introducing the definition of 'relevant family violence'.

[101] For example, see *MIAC v Ejueyitsi* [2007] FCAFC 289 at [35]–[36], citing the example of *Ibrahim v MIMIA* [2002] FCA 1279 at [43] where Wilcox J found that the statement by a doctor in the following terms 'Based on my full clinical assessment, I am of the opinion that Mr [Ibrahim] has most likely suffered from domestic violence', was no more than a 'trust me' statement which did not meet reg 1.26(f). For visa applications made on or after 15 October 2007, the requirement to set out the evidence is in reg 1.26(g).

[102] *MIAC v Ejueyitsi* [2007] FCAFC 289 at [34], citing with approval *Meroka v MIMA* [2002] FCA 482 at [32].

[103] *Kozel v MIMIA* [2004] FCA 658 at [14]. The Court was considering 'domestic violence' provisions. The reasoning appears equally applicable in relation to the 'family violence' provisions.

victim cannot be 'taken' pursuant to reg 1.23 to have suffered family violence (in effect, leading to the inference that the competent person was not considering the relevant definition of family violence).[104]

- be made by a 'competent person' (as specified in reg 1.21).[105]

Who is a 'competent person'?

A 'competent person' for the purposes of these applications, is defined in reg 1.21.[106] Who a competent person is differs slightly depending on whether the alleged victim is an adult or a child. The applicant must supply 2 statutory declarations by competent persons from 2 differently qualified competent people.[107]

Determining if the alleged victim has suffered relevant family violence

If the application is taken to include a non-judicially determined claim of family violence the Minister, or the Tribunal on review, must consider *whether the alleged victim has suffered relevant family violence.*[108] This involves making a subjective assessment having regard to all of the evidence before the Tribunal. This evidence includes the statutory declarations or judicial undertaking provided by the applicant and any other evidence provided by the applicant or anyone else (including the former sponsor) and any evidence obtained at the hearing or during the review process. The Tribunal may also have regard to any opinion of an independent expert obtained by the Department (see further discussion below).[109] If satisfied that relevant family violence has been suffered, the Tribunal must consider the application on that basis,[110] and, if the Tribunal is satisfied that part of the relevant family violence occurred while the claimed partner relationship existed,[111] the alleged victim is taken to have suffered family violence.[112]

If the Tribunal is not satisfied on the material before it that it should decide the review in the applicant's favour, it must invite the applicant to the hearing required by s 360(1).[113]

If, after inviting the applicant to attend a hearing under s 360(1) and considering any evidence provided at that hearing,[114] the Tribunal is still **not** satisfied that the alleged victim

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[104] *Meroka v MIMA* [2002] FCA 482 at [33], 'Operation can be denied to Reg 1.23 only if the description of the nature of the violence experienced or the evidence set out by the competent person is incapable, as a matter of law, of affording a basis for an opinion that relevant domestic violence has been suffered by an applicant and has been committed by the person identified by the competent person as the perpetrator'. *Meroka* was considering the domestic violence provisions before the introduction of the process for referral to the independent expert.
[105] In relation to a person within a women's refuge or a crisis and counselling service that specialises in domestic/family violence, the 'competent person' must identify their decision-making capacity with some specificity in order to satisfy the requirements of regs 1.21(2)(a) or (b): *MIAC v Pham* [2008] FCA 320 at [33]–[39]. In this case the claimed 'competent person' was a social worker employed by a crisis and counselling service who claimed to have decision-making responsibilities for *case management* in her organisation. The Court found that the term 'Manager or coordinator' in reg 1.21(2) meant that the person 'must hold a management position in respect of the general operations or direction of the women's refuge or the crisis and counselling service as an institution' – at [35], and that the person had not claimed, nor could it be implied from their statements that the service had a collective decision-making structure.
[106] The definition of 'competent person' in reg 1.21 was omitted by SLI 2012, No 256 for (i) visa applications made on or after 24 November 2012; and (ii) visa applications made on or after 15 October 2007, but not finally determined by 24 November 2012, *if* a statutory declaration under reg 1.25 was first lodged on or after 24 November 2012.
[107] reg 1.24(2).
[108] reg 1.23(10).
[109] Although the Tribunal is not bound by the opinion of an independent expert obtained by the Department, the Tribunal may have regard to it when forming its own determination of whether the applicant has suffered relevant family violence; see *Sirimanne v MIBP* [2021] FCCA 1291 at [46].
[110] reg 1.23(10).
[111] reg 1.23(12).
[112] reg 1.23(11).
[113] *Sok v MIAC* [2008] HCA 50 at [38].

has suffered family violence, the Tribunal **must** seek the opinion of an independent expert.[115] This process involves the Tribunal referring the matter to the independent expert. Once the matter has been referred, the independent expert assesses the case based on the material provided and interviews with the alleged victim, and then provides an opinion. The Tribunal must then take this opinion to be correct.[116] If the expert's opinion is favourable, the alleged victim is taken to have suffered family violence under reg 1.23(13).

There is no explicit requirement that the Tribunal provide reasons for why it is not satisfied and is referring the matter to an independent expert.[117]

Opinion of the Independent Expert

'Independent expert' (often called an 'IE') 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 in a relevant legislative instrument, for the purpose of making independent assessments of non-judicially determined claims of family violence. The instruments specifying the relevant organisations are available at Register of Instruments - Partner visas.

Referral to an independent expert

There is little judicial guidance in relation to what is required for referral to the independent expert. In *Victorino v MIAC,* Riethmuller FM commented that the referral could only form a basis for jurisdictional error if the request of the expert was so deficient that it could be said that it was an effective failure to properly request an opinion.[118] His Honour stated that the power to seek an opinion must contain implied terms requiring the request to:

- identify the matter upon which the opinion is sought;
- provide details of the claim; and
- provide reasonable details of the evidence before the Tribunal that appears relevant to the issue.[119]

It is open to the Tribunal to include in the referral the opinion of a previous independent

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[114] Requests for further time to provide additional evidence of family violence must be considered in a procedurally fair manner: see *Zhoory v MIBP* [2015] FCCA 2699.
[115] reg 1.23(10)(c)(i) applies to visa applications made on or after 9 November 2009, and those made between 15 October 2007 and 9 November 2009 where the claim of violence was only made to Immigration on or after 9 November 2009 or to the Tribunal on or after 1 July 2011. In *Bhalla v MIBP* [2016] FCA 395 the Court endorsed the views in *Maman* and *Sok* that the 'powers and discretions' in reg 1.23 are exercisable by the Tribunal including to obtain an independent expert report: [38]–[39]. In *MIAC v Maman* [2012] FCAFC 13, the Full Federal Court queried in *obiter* whether the Tribunal was required or empowered to take this step where a valid opinion had already been obtained by the delegate. The High Court's reasons in *Sok v MIAC* [2008] HCA 50 suggest that it may be required but that judgment was concerned with circumstances in which no opinion was obtained by the delegate as the domestic violence claim was raised for the first time before the Tribunal.
[116] regs 1.23(10)(c)(ii), 1.23(13) for visa applications made on or after 9 November 2009, and those made between 15 October 2007 and 9 November 2009 where the claim of violence was only made to Immigration on or after 9 November 2009 or to the Tribunal on or after 1 July 2011.
[117] See *Kocakaya v MIAC* [2013] FCA 55 at [29] following *Hadchity v MIAC* [2010] FCA 144 at [20].
[118] *Victorino v MIAC* [2007] FMCA 1294 at [55]. Whilst this decision was given before the decision of the Full Federal Court in *MIAC v Sok* and related to a referral by the Tribunal to an independent expert, the views expressed may form useful guidance on the proper referral by a delegate.
[119] *Victorino v MIAC* [2007] FMCA 1294 at [57]. The Court commented that '[j]ust as it is clear that not every piece of evidence before a Tribunal member must be referred to in the reasons for decision, nor would it be necessary to burden the expert with every item of evidence before the Tribunal'.

expert.[120]

Separate procedures, guidelines and letter templates have been developed relating to the process of referral of an applicant to an independent expert. See the National Registry Procedures - Investigations.

Dealing with the opinion of the independent expert

Regulation 1.23(10)(c)(ii)[121] provides that the Minister (or the Tribunal on review) must take an independent expert's opinion on whether the alleged victim has suffered relevant family violence as correct for the purposes of deciding whether the alleged victim satisfies a prescribed criterion for a visa that requires the applicant for the visa, or another person mentioned in the criterion, to have suffered family violence.[122] Once the Tribunal has determined that the expert's opinion was properly made it is bound to accept it and find in accordance with it.[123]

Where the independent expert opinion concludes that the applicant has suffered relevant family violence, and the Tribunal is satisfied that part of the violence occurred while the claimed partner relationship existed,[124] the alleged victim is taken to have suffered relevant family violence.[125] Where the independent expert opinion concludes that the applicant has not suffered relevant family violence, the Tribunal must invite the applicant under s 359A to comment or respond to the opinion. In sending such an invitation to an applicant, the Tribunal is not required to put anything more than the independent expert's opinion itself.[126] However, in order for that opportunity to be meaningful, s 359A may require the Tribunal refer an applicant's comments back to the independent expert if the independent expert's report is based upon material or assertions which the applicant has not seen and which he or she contests.[127]

If the validity of the report is contested, this will be a new determinative issue and requires inviting the applicant to another hearing.[128]

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[120] See *Sirimanne v MIBP* [2021] FCCA 1291 where the Court held that the Tribunal did not err in providing the opinion of the first independent expert to the second independent expert and that doing so is entirely consistent with the scheme established by reg 1.23 for the second independent expert to have that report as part of the information made available to him or her (at [47]).
[121] reg 1.23(10)(c)(ii) applies to visa applications made on or after 9 November 2009, and those made between 15 October 2007 and 9 November 2009 where the claim of violence was only made to Immigration on or after 9 November 2009 or to the Tribunal on or after 1 July 2011. Repealed reg 1.23(1C) applies to visa applications made before 9 November 2009 where the claim of domestic/family violence was made before 9 November 2009.
[122] Validity of reg 1.23 upheld on the basis of s 505 of the Act in *Sok v MIAC* [2007] FMCA 1525 at [9]. This was not disturbed on appeal.
[123] *Alameddine v MIAC* [2010] FMCA 313 at [25].
[124] reg 1.23(14). For visa applications made on or after 9 November 2009 and those made between 15 October 2007 and 9 November 2009 where the claim of violence was only made to Immigration on or after 9 November 2009 or to the Tribunal on or after 1 July 2011. See also *Minister for Immigration v Mo* [2018] FCCA 1893 where the Court found the Tribunal erred by not making a finding as to when the relationship ended and then whether the family violence as found by the Independent Expert occurred while the relationship existed in accordance with reg 1.23(14) (at [20] and [26]).
[125] reg 1.23(13), for visa applications made on or after 9 November 2009 and those made between 15 October 2007 and 9 November 2009 where the claim of violence was only made to Immigration on or after 9 November 2009 or to the Tribunal on or after 1 July 2011.
[126] In *Wu v MIAC* [2011] FMCA 14 at [44]–[48] the Court held that in the context of domestic/family violence referrals to an independent expert under reg 1.23(1B)(b), the Tribunal will not fall foul of s 359A for not providing to an applicant the information that was given to the expert, because the information underpinning the expert's opinion could not be a reason for affirming the decision. While the Court was not asked to consider whether a failure to provide such information could constitute a breach of the hearing obligation, it found no error in the Tribunal's procedures.
[127] *Al-Momani v MIAC* [2011] FMCA 453 at [50] and [57].
[128] s 360 the Act and see *Haque v Minister for Immigration and Border Protection* [2015] FCCA 1765 at [34].

The Tribunal's reliance on an independent expert opinion which is not made in accordance with the law may be jurisdictional error. Recent authority suggests that there is an obligation on the Tribunal to consider the legal validity of the expert's opinion, including the process of making that opinion, in circumstances where there is material before the Tribunal to suggest that the report may not have been properly made.[129] However, if no issue as to the validity of the report has been raised, the Tribunal may not be in error for failing to consider if the report was properly made.[130]

Was the independent expert's opinion properly made?

A valid independent expert's opinion must be taken as correct, and once the Tribunal has determined that the expert's opinion was properly made it is bound to accept it and find in accordance with it.[131] In considering the issue of validity of an independent expert opinion, Courts have applied authority which is applicable to assessing an expert opinion in matters involving opinions of Medical Officers of the Commonwealth (MOCs) in the context of the health criteria, holding that only an independent expert's opinion which is 'authorised by the Regulations' must be taken as correct.[132] In general terms, a MOC opinion will not be valid if the expert has asked the wrong question, or has denied an applicant procedural fairness.

In deciding whether the opinion is one that is authorised by the Regulations, the relevant considerations include whether:

- it is 'an opinion';
- of an 'independent expert', i.e. a person who meets the definition in reg 1.21(1), being 'suitably qualified' and an 'employee' of, or contracted to provide services to, the agency specified in a legislative instrument; and
- that the alleged victim has suffered 'relevant family violence'.

Who can be an 'independent expert'?

There is little guidance as to what would constitute appropriate qualifications for a person to be 'suitably qualified' to provide an expert opinion in relation to domestic violence. To make a finding as to whether a person was 'suitably qualified' within reg 1.21 the Tribunal would need to obtain appropriate information about the author of the opinion, their formal qualifications, experience, and position in the specified organisation (or if contracted by that

[129] Although the Court's reasoning in *Karsten v MIBP* [2015] FCCA 534 at [11], that 'some non-compliance in relation to the family violence [opinion or assessment process] by that expert,' would be an error within jurisdiction and would not be jurisdictional error by the Tribunal, as it must apply reg 1.23(1C), is not entirely clear, these *obiter* comments do not displace authority that reliance by the Tribunal on a report that is not made in accordance with the law for the purposes of reg 1.23(1C) may lead to jurisdictional error. In *Martinaj v MIBP* [2016] FCCA 217 the Court held that as the Tribunal's reasons demonstrated it had considered the material before indicating possible bias on the part of the independent expert, the Court would not consider the merits of the Tribunal's decision that the independent expert report was not affected by bias. In *Martinaj v MIBP* [2016] FCA 868 the Court rejected the appellant's argument that the independent expert misapplied the test by assuming that family violence could not be established unless the applicant perceived 'during the course of the relationship', that the sponsor's conduct had 'a deleterious effect on his well-being', as it did not infer such an assumption arose on the face of the independent expert report.

[130] *Wu v MIAC* [2011] FMCA 14 at [78] where the Court held that although a consideration of the legal validity of the expert's opinion may be of some practical benefit to the Tribunal's decision-making, the ultimate decision on the question of legal validity of the independent expert opinion is one for a court on review. It went on to state that while the Tribunal will be in error if it relies on an independent expert opinion which is vitiated by bias, it does not err by not considering whether the opinion might be void on that account, If that were to be so, the Tribunal's decision could be vitiated by failing to ask that question in respect of a perfectly valid expert opinion.

[131] *Alameddine v MIAC* [2010] FMCA 313 at [25].

[132] *Silva v MIAC* [2007] FMCA 1955 at [31] citing *MIMA v Seligman* [1999] FCA 117. See also *Victorino v MIAC* [2007] FMCA 1294 at [25] citing *Seligman* and *Robinson v MIMIA* [2005] FCA 1626.

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agency to provide such services). [133] The independent expert need not be "independent", in any absolute sense, from the government or anyone else.[134]

Has the independent expert asked the right question?

If the independent expert opinion is not made in relation to the applicable definition of 'relevant family violence', it may not be an opinion 'authorised by the Regulations' and the Tribunal may not be entitled to take that opinion as correct. The fact that an independent expert opinion refers to the definition in reg 1.21(1) will not be sufficient to support the conclusion that the opinion is valid if the content of the opinion does not reflect that the independent expert has asked the correct question.[135]

Merely incorrectly referring to 'domestic violence' when required to apply the definition of 'relevant family violence' may not necessarily mean that the report is invalid. The question is whether the independent expert applied the correct relevant 'family violence' definition. However, if this happens, it may be appropriate to seek clarification from the expert.

The independent expert must consider whether the applicant has suffered relevant family violence and should not exclude consideration of any claimed family violence which may have occurred after the end of the relationship.[136] The question as to when the relationship ended and if the relevant family violence occurred while the relationship existed is for the Tribunal.[137]

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[133] It appears that the person only needs to meet the definition of 'independent expert': *Ali v MIAC* [2007] FMCA 1405 at [27]; *Silva v MIAC* [2007] FMCA 1955 at [35] finding there is no warrant for reading into the definition of 'independent expert' the qualifications of a 'competent person'. Note however the contrary position - *Sok v MIAC* [2007] FMCA 1525 at [14], Federal Magistrate Riley commented that a 'suitably qualified' person within the definition in reg 1.21 would be, for example, a person who fell within the definition of a 'competent person', such as a social worker. See also *El Darwich v MIAC* [2007] FMCA 1350 at [14]–[15], where the Court held that the same opinion, expressed by two independent experts, does not prevent the opinion from being the opinion of 'an independent expert' in reg 1.23. This judgment was followed on this point in *Bolat v MIAC* [2007] FMCA 1640 at [66], an assessment prepared by more than one person will qualify as an independent expert's opinion provided that each of the authors is suitably qualified and the assessment is unanimous and unequivocal.

[134] See *Sok v MIAC* [2007] FMCA 1525 at [14]. Similar claims that the independent expert was not 'independent' of the government and so the opinion was invalid were also rejected in *Victorino v MIAC* [2007] FMCA 1294 at [49]–[50] although the Court in that case was considering whether there was evidence that the expert carried out her task otherwise than with independence.

[135] For example, in *Silva v MIAC* [2007] FMCA 1955, at [28], [31], the Court found the independent expert opinion was not valid because, in finding the applicant had not suffered relevant domestic violence, the expert only considered whether the applicant was fearful about his well-being or safety and did not consider whether he was apprehensive. In many cases the reference to safety, without mention of apprehension, may be sufficient, but in the case of Silva it was found not to be an opinion authorised by the Regulations (at [30)]. However, in *Al-Momani v MIAC* [2011] FMCA 453 at [43] the Court rejected the applicant's argument that the independent expert had misconstrued the definition of 'relevant family violence' by concluding that situational couple violence between the parties in the absence of a power imbalance did not support the contention that the applicant experienced 'relevant family violence', holding that this may be 'family violence' but it was not 'relevant family violence' within the meaning of the Regulations. In *Karsten v MIBP* [2019] FCCA 1560 the Court held that a threat by a sponsor to have the holder of a Subclass 820 visa deported to his or her country of origin in circumstances where the holder is afraid or otherwise unwilling of returning to his or her own country of origin, and the sponsor is aware of the holder's fear or unwillingness to return, is capable by itself of constituting 'relevant domestic violence' as that expression was defined in reg 1.23(2)(b): at [54]. It found that the independent expert manifested a misunderstanding of the meaning of 'relevant domestic violence' by stating, and implicitly proceeding on the view, that threats of being deported could not by themselves constitute sufficient evidence of 'domestic violence': [55] and [57]. The Court held at [59], that the independent expert's incorrect understanding of the expression 'relevant domestic violence' meant the opinion was not one authorised by reg 1.23(1C).

[136] *Perez v MIBP* [2017] FCAFC 180 at [9]. The Full Federal Court found that the Tribunal's decision based upon an independent expert opinion involved jurisdictional error because the opinion was based on the independent expert's incorrect belief that the only relevant family violence to be considered was that which occurred during the relationship when the correct question was whether the appellant had suffered family violence the whole or part of which occurred during the relationship. See also *Lin v MICMSMA* [2021] FCCA 1197 where the Court followed *Perez* and, in obiter, commented that it was likely the Independent Expert erred by stating that the question as to whether the relevant family violence occurred during the relationship is a question for the Tribunal as that did not reflect the correct consideration of the temporal condition imported by reg 1.23(14) and is inconsistent with the correct question the IE should have been considering (as it was expressed in *Perez*) (at [14] and [74]).

[137] reg 1.23(14).

An independent expert does not necessarily fail in its task by not making specific findings with respect to certain allegations because of inconsistencies within the allegations.[138] Nor does it necessarily fall into error by making a reference to statements being made 'post separation'.[139]

The Tribunal may need to consider whether the independent expert used an appropriate evidentiary standard in formulating his or her opinion. In *Liu v MIAC*[140] the expert found that she had not been able to 'establish conclusively' that the applicant was the victim of domestic violence. The Court held that the use of the verb 'establish' reflects the appropriate standard in respect of any of the matters being considered by the expert and by using the term 'establish conclusively' the expert erred by applying a higher standard than the applicant was obliged to reach.[141] The Court further held it was a jurisdictional error on the part of the Tribunal to accept this expert's opinion as leading it to conclude that the applicant had not suffered relevant domestic violence.[142]

There is also no general requirement for the independent expert to engage in a clinical analysis of an applicant's alleged psychological disorder.[143]

Has the independent expert afforded procedural fairness?

To satisfy the requirements of reg 1.23(10)(c)(ii), an 'opinion' must have been one that was formed in accordance with law, including the common law requirement to comply with the rules of procedural fairness. The Tribunal, having been made aware of a possible failure by the expert to provide procedural fairness, is required to assess whether or not the applicant had received procedural fairness from the independent expert.[144]

The Courts have found that procedural fairness includes:

- putting adverse information considered to be credible, relevant, and significant to the applicant for comment[145] and
- referring matters raised by an applicant in response to a s 359A invitation back to an independent expert for consideration.[146]

A denial of procedural fairness is not established if the independent expert refuses to permit the applicant to be accompanied by a legal representative or to record the interview.[147]

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[138] See *KC v MIBP* [2015] FCCA 2349 at [57].
[139] See *KC v MIBP* [2015] FCCA 2349 at [62], where the Court found that the independent expert was referring merely to a particular point in time, not dismissing the issue because it was 'post separation'.
[140] *Liu v MIAC* [2011] FMCA 601.
[141] *Liu v MIAC* [2011] FMCA 601 at [34]–[35].
[142] *Liu v MIAC* [2011] FMCA 601 at [44].
[143] See *Bhalla v MIBP* [2015] FCCA 2381 at [15].
[144] *MIAC v Maman* [2012] FCAFC 13 at [64]. In *Al-Momani v MIAC* [2011] FMCA 453 at [45]–[47] the Court stated that the obligation on an independent expert to observe procedural fairness would be minimal given the confined nature of the inquiry, the necessity for the independent expert to be free to obtain information in confidence and given that the Tribunal itself under its procedural code must accord procedural fairness to an applicant. However, to the extent of any inconsistency, the view of the Full Court in *Maman* should be preferred.
[145] *Maman v MIAC* [2011] FMCA 426 at [46] and upheld by the Full Federal Court on appeal in *MIAC v Maman* [2012] FCAFC 13 at [24]–[27], [88]. The Full Court further held that procedural fairness most probably required the entirety of a confidential letter to be disclosed to the applicant, not just its key points (at [46], [51]–[62]).
[146] *Al-Momani v MIAC* [2011] FMCA 453 at [50] and [57]. The Court, at [51], characterised this obligation as arising from s 359A – where the expert's report is put to the applicant under s 359A, in order for the applicant to have a meaningful opportunity to comment, the Tribunal would need to refer back to the independent expert a challenge to the merits of the opinion that was not available before the independent expert because the independent expert did not disclose relevant material to the applicant. The Court also held at [50] that there may be an obligation on the Tribunal to refer matters back to an independent expert where the matters raised by the applicant cast doubt upon the validity of the report such that the Tribunal could not be satisfied that it was bound by the report.

Further, there is no general obligation for the independent expert to engage in consultation with other experts who have provided information to the independent expert, nor is there necessarily a denial of procedural fairness by reason of the independent expert being a particular gender given the cultural sensitivities of the applicant.[148]

In cases where there is information before the Tribunal to suggest that the independent expert may *not* have afforded the applicant procedural fairness or may not have given a valid opinion, it would be of practical benefit to the Tribunal's decision-making to take any further steps that may be appropriate (for example, referring any concerns back to the expert to consider) and to demonstrate consideration of the legal validity of the opinion in the Tribunal's written reasons. If additional material of sufficient materiality,[149] or any truly new evidence[150] arises the Tribunal may need to refer it back to the independent expert. However, new information in the form of submissions may not need to be referred to the expert, particularly where the submissions relate to an issue of which the applicant was aware and already had an opportunity to make submissions to the expert.[151] Nor is the Tribunal obliged to refer back representations made by the applicant that do no more than seek a further merits review of the independent expert's decision.[152]

Previous independent expert opinions

In conducting a merits review of a case where the matter has already been referred to an independent expert at the primary stage by the delegate, the Tribunal is not bound by that opinion, but it may take it into consideration when forming its own determination of whether the applicant has suffered relevant family violence.[153] If it is not satisfied on the papers, then the Tribunal must hold a hearing and consider further if it is satisfied that the family violence has occurred before seeking an (further) independent expert opinion.[154] If the Tribunal is still not satisfied following a hearing then the rest of the procedure in div 1.5 is to be followed again.

Where the Tribunal is reviewing a decision remitted from the Courts in which the provisions of div 1.5 were previously considered by the Tribunal, there is a question as to whether it is

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[147] *Bhalla v MIBP* [2015] FCCA 2381 at [11], [13], undisturbed on appeal in *Bhalla v MIBP* [2016] FCA 395.
[148] *Abulibdeh v MIBP* [2015] FCCA 2797 at [22], [27].
[149] *Armstrong v MIBP (No 2)* [2017] FCCA 2058 at [42]. Photographs of the applicant's injuries supplied in response to a s 359A letter were not provided to the independent expert. The fact that the applicant had the opportunity to provide these photographs at the interview with the expert, was found to be an insufficient answer to why the additional material was not forwarded to the expert. The photographs were of sufficient materiality to give rise to a requirement of procedural fairness to provide the additional material to the independent expert.
[150] *Gungor v MIAC* [2011] FMCA 516 at [17]–[18]. The Court held that when considering any comments received in response to a s 359A letter putting an independent expert's report to an applicant, the Tribunal is only obliged to act upon two categories of matters: First, the Tribunal should provide any truly new evidence to the independent expert to consider; Secondly, the Tribunal must take into account any submissions that the report was not 'properly made' and either refer the matter back to the independent expert or explain in its reasons why it did not do so. In *Bolat v MIAC* [2007] FMCA 1640, the Court held that an opinion from a neuropsychologist provided in response to a s 359A letter was clearly relevant evidence that the independent experts may or may not have considered would alter their opinion. The Tribunal's decision not to refer this evidence to the experts constituted jurisdictional error: at [80]–[83].
[151] In *Alameddine v MIAC* [2010] FMCA 313 at [19]–[24], the Court rejected the applicant's argument that the Tribunal erred in failing to refer a submission to the expert. The expert's opinion that the applicant had not suffered domestic violence was based in part upon the fact that the applicant had not sought intervention from police or professionals. In response to a s 359A letter, the applicant provided a submission that his reasons for not seeking intervention were related to his cultural background, not the quality of the violence. The Court held that the expert's opinion was valid because the applicant was on notice that his failure to seek police intervention was in issue and had an opportunity throughout the review process to explain this failure, and the expert had considered the case as put to her by the applicant.
[152] *Gungor v MIAC* [2011] FMCA 516 at [18].
[153] *Sirimanne v MIBP* [2021] FCCA 1291 at [46].
[154] *Sok v MIAC* [2008] HCA 50.

bound by an independent expert's opinion obtained by the previous Tribunal. In *Hadchity v MIAC,*[155] the Tribunal considered itself bound by the independent expert's opinion obtained by the previous Tribunal (constituted by the same Member). Justice Edmonds found that the opinion had been validly obtained by the Tribunal and that, on remittal, '[a]bsent some identified non-compliance in the obtaining of the independent expert's opinion, the existence of that opinion continued to impose an obligation on the Tribunal under reg 1.23(1C)'.[156] This suggests that, at least where the same Member constitutes the Tribunal on remittal, the Tribunal would be bound by an expert opinion properly sought under the procedure set out in div 1.5.

The situation is less clear where the Tribunal is differently constituted.[157] If it is differently constituted, or it appears that there was a defect in the earlier process, or there is additional evidence, the Tribunal may want to consider afresh whether it is satisfied that family violence has occurred, and potentially seek a further opinion.[158] In doing so, referral to the same independent expert would not of itself give rise to any reasonable apprehension of bias, nor would it in itself be an error for an independent expert to take into account an earlier independent expert opinion which had been found to be invalid.[159] Where an earlier impugned independent expert is later taken into account, the Tribunal should ensure that any outstanding procedural fairness obligations with the respect to the impugned report have been fulfilled.

Relevant amending legislation

Title	Reference Number	Legislation Bulletin
Migration Amendment Regulations 2005 (No 4) (Cth)	SLI 2005, No 134	No.1/2005
Migration Amendment Regulations 2007 (No 13) (Cth)	SLI 2007, No 315	No.14/2007
Migration Amendment Regulations 2009 (No 7) (Cth)	SLI 2009, No 144	No.9/2009
Migration Amendment Regulations 2009 (No 12) (Cth)	SLI 2009, No 273	No.16/2009
Migration Legislation Amendment Regulations 2011 (No 1) (Cth)	SLI 2011, No 105	No.3/2011
Migration Legislation Amendment Regulation 2012 (No 5) (Cth)	SLI 2012, No 256	No.10/2012

[155] *Hadchity v MIAC* [2010] FCA 144 .
[156] *Hadchity v MIAC* [2010] FCA 144 at [28]. In that case, the Tribunal had referred the matter for assessment by an independent expert; however, following the Full Federal Court's decision in *MIAC v Sok* [2008] FCAFC 18, it had affirmed the delegate's decision finding that the appellant's claim of domestic violence could not be considered. The Tribunal's decision was set aside by consent because in the meantime, the decision in *Sok* had been reversed by the High Court. In those circumstances, the Court in *Hadchity* drew an inference that the Tribunal had reached the requisite state of non-satisfaction for reg 1.23(1B)(a).
[157] The decision in *Hadchity v MIAC* did not consider the situation in which the Tribunal is differently constituted following a remittal. It is therefore uncertain whether in such a case the Tribunal could consider itself bound by an opinion obtained by an earlier, differently constituted Tribunal, particularly when considering the procedural requirement to hold another hearing (*SZHKA v MIAC* [2008] FCAFC 138) and that the requisite state of satisfaction can only be reached after a hearing has been conducted (*Sok v MIAC* [2008] FCAFC 18).
[158] In this situation, the earlier opinion may be considered as evidence which the differently constituted Tribunal may take into account.
[159] *Gounder v MIBP* [2015] FCCA 1658 at [36] – [50], upheld in *Gounder v MIBP* [2015] FCA 1476 at [28].

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Migration Amendment (Redundant and Other Provisions) Regulation 2014 (Cth)	SLI 2014, No 30	No.2/2014
Tribunals Amalgamation Act 2015 (Cth)	No 60, 2015	No.5/2015
Migration Amendment (Subclass 100 and 309 Visas) Regulations 2022 (Cth)	SR 1994, No 263	No.03/2022

Relevant case law

Judgment	Judgment Summary
Abulibdeh v MIBP [2015] FCCA 2797	
Al-Momani v MIAC [2011] FMCA 453	Summary
Alam v MIAC [2012] FMCA 616	Summary
Alam v MIBP [2015] FCCA 702	Summary
Alameddine v MIAC [2010] FMCA 313	Summary
Ali v MIAC [2007] FMCA 1405	
Alin v MIMA [2002] FCA 979	Summary
Armstrong v MIBP (No 2) [2017] FCCA 2058	Summary
Bhalla v MIBP [2015] FCCA 2381	Summary
Bhalla v MIBP [2016] FCA 395	
Baylouneh v MIMIA [2005] FCA 360	Summary
Cakmak v MIMIA [2003] FCA 257	Summary
Chaichian v MIBP [2016] FCA 646	
Chao v MIBP [2018] FCA 858	
Dang v MIBP [2016] FCCA 1426	Summary
Du v MIMIA [2000] FCA 1115	Summary
MIAC v Ejueyitsi [2007] FCAFC 89	Summary
El Jejieh v MICMSMA [2020] FCA 1103	Summary

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Fu v MICMSMA [2022] FedCFamC2G 161	Summary
Gungor v MIAC [2011] FMCA 516	Summary
MICMSMA v Gupta [2022] FCAFC 51	Summary
Gupta v MICMSMA [2021] FCCA 1646	Summary
Gounder v MIMIA [2003] FMCA 487	Summary
Gounder v MIBP [2015] FCCA 1658	
Gounder v MIBP [2015] FCA 1476	
Hadchity v MIAC [2010] FCA 144	Summary
Hanna v MIBP [2016] FCA 282	
Hanna v MIBP [2015] FCCA 2856	
Haque v MIBP [2015] FCCA 1765	Summary
Karsten v MIBP [2015] FCCA 534	
Karsten v MIBP [2019] FCCA 1560	Summary
Kaur v MIBP [2014] FCCA 1282	
KC v MIBP [2015] FCCA 2349	
Kocakaya v MIAC [2013] FCA 55	
Kozel v MIMIA [2004] FCA 658	Summary
Lawani v MIAC [2013] FCCA 114	Summary
Liu v MIA [2011] FMCA 601	Summary
Liu v MHA [2019] FCA 1925	
Manga v MIBP [2015] FCCA 501	
McGuire v MIMIA [2004] FMCA 1014	Summary
Maman v MIAC [2011] FMCA 426	Summary
Martinaj v MIBP [2016] FCA 868	
Martinaj v MIBP [2016] FCCA 271	

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MIAC v Maman [2012] FCAFC 13	Summary
Meroka v MIMIA [2002] FCA 482	Summary
Minister for Immigration v Mo [2018] FCCA 1893	
Morgan v MIMIA [1999] FCA 1059	
Muliyana v MIAC [2010] FCAFC 24	Summary
Pham v MIBP [2017] FCCA 3272	Summary
Parvin v MIBP [2015] FCCA 302	
Perez v MIBP [2017] FCAFC 180	Summary
MIAC v Pham [2008] FCA 320	Summary
Russell v MIMIA [2006] FCA 327	Summary
Safatli v MIAC [2009] FMCA 1191	Summary
Sagwal v MIBP [2014] FCCA 1794	Summary
Salonga v MIBP [2014] FCCA 1173	Summary
Sharma v MICMSMA [2020] FCCA 3372	Summary
Singh v MIBP [2014] FCCA 2670	
Singh v MIBP [2016] FCCA 114	
Singh v MIBP [2021] FCA 480	
Silva v MIAC [2007] FMCA 1955	Summary
Sirimanne v MIBP [2021] FCCA 1291	Summary
Sok v MIAC [2008] HCA 50	Summary
MIAC v Sok [2008] FCAFC 18	Summary
Sok v MIAC [2007] FMCA 1525	Summary
Sok v MIMIA [2005] FCAFC 56	Summary
Thaworn v MICMSMA [2021] FCCA 2133	Summary
Theunissen v MIMIA [2005] FCA 1097	

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Wu v MIAC [2011] FMCA 14	Summary
Victorino v MIAC [2007] FMCA 1294	Summary
Xing v MIBP [2018] FCCA 208	
MIAC v Zaouk [2007] FCAFC 47	Summary
Zaouk v MIMA [2006] FMCA 1607	Summary
Zhoory v MIBP [2015] FCCA 2699	Summary

Available decision templates / precedents

There is a decision template/precedent available on CaseMate for partner cases where the domestic/family violence exception is in issue:

- **Decision - Partner Cases - Family Violence -** suitable for Subclasses 100, 801 or 820 visa applications made on or after 15 October 2007 where the applicant is claiming family violence. Different evidentiary requirements are set out depending on user input as to dates of visa application, family violence claim, provision of statutory declaration, and types of evidence provided to establish the claim.

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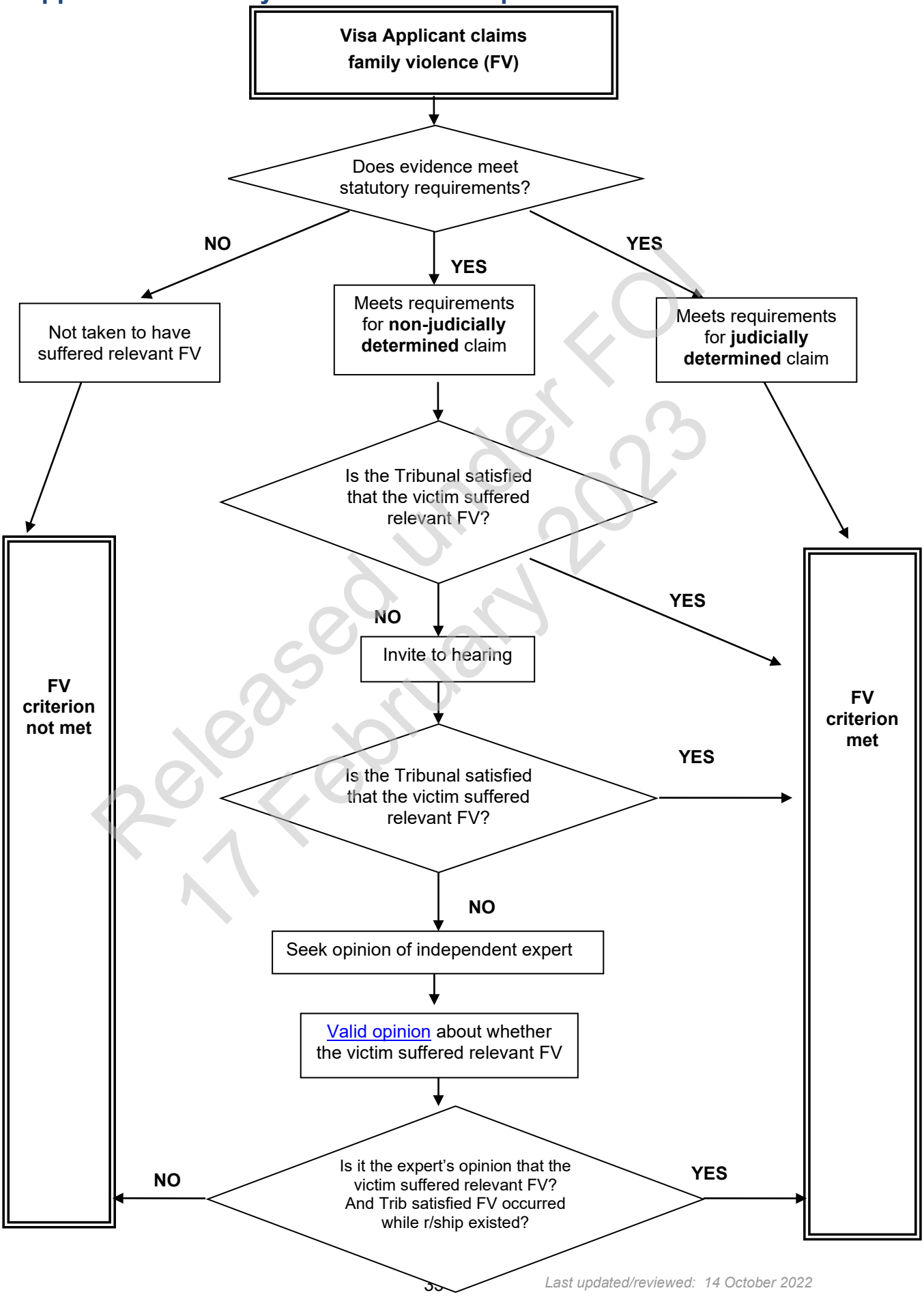
Appendix A – Family Violence – review process flowchart



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Domestic / Family Violence Amendments Table

Primary Visa Application Date	Was the claim of family violence made to DIBP on or after 9/11/09, OR to Tribunal on or after 1/07/11?	Was a statutory declaration under reg 1.25 1st lodged on or after 24/11/12?	Applicable version of Division 1.5, Migration Regulations 1994
On or after 22/03/14	N/A	N/A	Version 8[1]
24/11/12 – 21/03/14	N/A	N/A	Version 7[2]
9/11/09 – 23/11/12	N/A	Yes	Version 7[3]
	N/A	No	Version 6[4]
1/07/09 – 8/11/09	Yes	Yes	Version 7[5]
	Yes	No	Version 6[6]
	No	Yes	Application uncertain[7]
	No	No	Version 5[8]
15/10/07 – 30/06/09	Yes	Yes	Version 4[9]
	Yes	No	Version 3[10]
	No	Yes	Application uncertain[11]
	No	No	Version 2[12]
Before 15/10/07	N/A	Yes	Version 1[13]
	N/A	No	Version 1[14]

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[1] Division 1.5 of Part 1 as amended by *Migration Amendment (Redundant and Other Provisions) Regulation 2014* (legislative instrument and removal of pre 1 January 1998 exception). Applies to visa applications on or after 22 March 2014. Incorporates *Migration Legislation Amendment Regulation 2012* (No 5) (evidentiary changes), *Migration Amendment Regulations 2009* (No 12) amendments (renumbering, FV must be during relationship), *Migration Amendment Regulations 2009* (No 7) amendments (same-sex), and *Migration Amendment Regulations 2007* (No 13) amendments (family violence) and *Migration Amendment Regulations* (2005) (No 4) (independent expert) amendments.

[2] Division 1.5 of Part 1 as amended by *Migration Legislation Amendment Regulation 2012* (No 5) (evidentiary changes). Applies to visa applications on or after 24 November 2012, or (generally speaking) where r 1.25 statutory declaration first provided on/after 24/11/12. Incorporates *Migration Amendment (Redundant and Other Provisions) Regulation 2014* (legislative instrument), *Migration Amendment Regulations 2009* (No 12) (renumbering, FV must be during relationship), *Migration Amendment Regulations 2009* (No 7) (same-sex), *Migration Amendment Regulations 2007* (No 13) (family violence) and *Migration Amendment Regulations* (2005) (No 4) (independent expert) amendments.

[3] Division 1.5 of Part 1 as amended by *Migration Legislation Amendment Regulation 2012* (No 5) (evidentiary changes). Applies to visa applications on or after 24 November 2012, or (generally speaking) where reg 1.25 statutory declaration first provided on/after 24/11/12. Incorporates *Migration Amendment (Redundant and Other Provisions) Regulation 2014* (legislative instrument), *Migration Amendment Regulations 2009* (No 12) (renumbering, FV must be during relationship), *Migration Amendment Regulations 2009* (No 7) (same-sex), *Migration Amendment Regulations 2007* (No 13) (family violence) and *Migration Amendment Regulations* (2005) (No 4) (independent expert) amendments.

[4] Division 1.5 of Part 1 as amended by *Migration Amendment Regulations 2009* (No 12) (renumbering, FV must be during relationship) if the applicant claimed family violence to Immigration on/after 9/11/09, or (by *Migration Legislation Amendment Regulations 2011* (No 1)) to the Tribunal on/after 1/7/11). Incorporates *Tribunals Amalgamation Act 2015* (No 60, 2015) (tribunals amalgamation), *Migration Amendment (Redundant and Other Provisions) Regulation 2014* (legislative instrument), *Migration Amendment Regulations 2009* (No 7) (same-sex), *Migration Amendment Regulations 2007* (No 13) (family violence), and *Migration Amendment Regulations* (2005) (No 4) (independent expert) amendments.

[5] Division 1.5 of Part 1 as amended by *Migration Legislation Amendment Regulation 2012* (No 5) (evidentiary changes). Applies to visa applications on or after 24 November 2012, or (generally speaking) where reg 1.25 statutory declaration first provided on/after 24/11/12. Incorporates *Migration Amendment (Redundant and Other Provisions) Regulation 2014* (legislative instrument), *Migration Amendment Regulations 2009* (No 12) (renumbering, FV must be during relationship), *Migration Amendment Regulations 2009* (No 7) (same-sex), *Migration Amendment Regulations 2007* (No 13) (family violence) and *Migration Amendment Regulations* (2005) (No 4) (independent expert) amendments.

[6] Division 1.5 of Part 1 as amended by *Migration Amendment Regulations 2009* (No 12) (renumbering, FV must be during relationship) if the applicant claimed family violence to Immigration on/after 9/11/09, or (by *Migration Legislation Amendment Regulations 2011* (No 1)) to the Tribunal on/after 1/7/11). Incorporates *Tribunals Amalgamation Act 2015* (No 60, 2015) (tribunals amalgamation), *Migration Amendment (Redundant and Other Provisions) Regulation 2014* (legislative instrument), *Migration Amendment Regulations 2009* (No 7) (same-sex), *Migration Amendment Regulations 2007* (No 13) (family violence), and *Migration Amendment Regulations* (2005) (No 4) (independent expert) amendments.

[7] *Migration Amendment Regulation 2012* (No 5) (evidentiary changes) amendments purport to insert new reg 1.24 which refers to evidence mentioned in reg 1.23(9)(c) and remove definition of 'competent person'. As these applications are not affected by the *Migration Amendment Regulations 2009* (No 12) renumbering amendments, there is no reg 1.23(9)(c) and the pre 24/11/12 version of reg 1.24, referring to competent persons, is unchanged. The definition of "competent person", however, is purportedly omitted by *Migration Amendment Regulation 2012* (No 5) (evidentiary changes).

[8] Division 1.5 of Part 1 as amended by *Migration Amendment Regulations 2009* (No 7) (same-sex). Incorporates *Migration Amendment (Redundant and Other Provisions) Regulation 2014* (legislative instrument), *Migration Amendment Regulations 2007* (No 13) (family violence) and *Migration Amendment Regulations* (2005) (No 4) (independent expert) amendments.

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[9] Division 1.5 of Part 1 as amended by *Migration Legislation Amendment Regulation 2012* (No 5) (evidentiary changes). Applies to visa applications on or after 24 November 2012, or (generally speaking) where reg 1.25 statutory declaration first provided on/after 24/11/12. Incorporates *Migration Amendment (Redundant and Other Provisions) Regulation 2014* (legislative instrument), *Migration Amendment Regulations 2009* (No 12) (renumbering, FV must be during relationship), *Migration Amendment Regulation 2007* (No 13) (family violence) and Migration Amendment Regulations (2005) (No 4) (independent expert) amendments. Does not include 1/7/09 same-sex amendments.

[10] Division 1.5 of Part 1 as amended by *Migration Amendment Regulations 2009* (No 12) (renumbering, FV must be during relationship) if the applicant claimed family violence to Immigration on/after 9/11/09, or (by *Migration Legislation Amendment Regulations 2011* (No 1)) to the Tribunal on/after 1/7/11). Incorporates *Tribunals Amalgamation Act 2015* (No 60, 2015) (tribunals amalgamation), *Migration Amendment (Redundant and Other Provisions) Regulation 2014* (legislative instrument), *Migration Amendment Regulations 2007* (No 13) (family violence) and *Migration Amendment Regulations* (2005) (No 4) (independent expert) amendments.

[11] *Migration Amendment Regulation 2012* (No 5) amendments purport to insert new reg 1.24 which refers to evidence mentioned in reg 1.23(9)(c) and remove definition of 'competent person'. As these applications are not affected by the *Migration Amendment Regulations 2009* (No 12) renumbering amendments, there is no reg 1.23(9)(c) and the pre 24/11/12 version of reg 1.24, referring to competent persons, is unchanged. The definition of 'competent person", however, is purportedly omitted by *Migration Amendment Regulation 2012* (No 5).

[12] Division 1.5 of Part 1 as amended by *Migration Amendment Regulation 2007* (No 13) (family violence). Incorporates *Migration Amendment (Redundant and Other Provisions) Regulation* 2014 (legislative instrument) and *Migration Amendment Regulations* (2005) (No 4) (independent expert) amendments.

[13] The transitional provisions in *Migration Legislation Amendment Regulation* 2012 (No 5) are not expressed to apply only to 'family violence' (rather than 'domestic violence' claims), but the relevant amendments are titled 'Amendments of *Migration Regulations 1994* relating to evidentiary requirements for family violence claims'. The amendments purport to insert new reg 1.24 which refers to evidence mentioned in reg 1.23(9)(c) and remove definition of "competent person". As these applications are not affected by the MAR 2009 (No 12) renumbering amendments, there is no reg 1.23(9)(c) and the pre 24/11/12 version of reg 1.24, referring to competent persons, is unchanged. The definition of "competent person", however, is purportedly omitted by *Migration Amendment Regulation 2012* (No 5) (evidentiary changes). In the circumstances, to give effect to the amendments, the better view is that they do not apply to visa applications made before 15 October 2007.

[14] Division 1.5 of Part 1 as amended by *Migration Amendment Regulations* (2005) (No 4) (independent expert). Applies to visa applications made on or after 15/10/07 and visa applications not finally determined at that date. Incorporates *Migration Amendment (Redundant and Other Provisions) Regulation 2014* (legislative instrument) amendment.

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Version 8

Division 1.5—Special provisions relating to family violence

1.21 Interpretation

In this Division:

independent expert means a person who:

(a) is suitably qualified to make independent assessments of non-judicially determined claims of family violence; and

(b) is employed by, or contracted to provide services to, an organisation that is specified, in a legislative instrument made by the Minister, for the purpose of making independent assessments of non-judicially determined claims of family violence.

non-judicially determined claim of family violence has the meaning given by subregulations 1.23(8) and (9).

relevant family violence means conduct, whether actual or threatened, towards:

(a) the alleged victim; or

(b) a member of the family unit of the alleged victim; or

(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.

statutory declaration means a statutory declaration under the *Statutory Declarations Act 1959*.

violence includes a threat of violence.

1.22 References to person having suffered or committed family violence

(1) A reference in these Regulations to a person having suffered family violence is a reference to a person being taken, under regulation 1.23, to have suffered family violence.

(2) A reference in these Regulations to a person having committed family violence in relation to a person is a reference to a person being taken, under regulation 1.23, to have committed family violence in relation to that person.

1.23 When is a person taken to have suffered or committed family violence?

(1) For these Regulations, this regulation explains when:

(a) a person (the ***alleged victim***) is taken to have suffered family violence; and

(b) another person (the ***alleged perpetrator***) is taken to have committed family violence in relation to the alleged victim.

Note: Schedule 2 sets out which visas may be granted on the basis of a person having suffered family violence. The criteria to be satisfied for the visa to be granted set out which persons may be taken

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to have suffered family violence, and how those persons are related to the spouse or de facto partner of the alleged perpetrator mentioned in this regulation.

Circumstances in which family violence is suffered and committed—injunction under Family Law Act 1975

(2) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if, on the application of the alleged victim, a court has granted an injunction under paragraph 114(1)(a), (b) or (c) of the *Family Law Act 1975* against the alleged perpetrator.

(3) For subregulation (2), the violence, or part of the violence, that led to the granting of the injunction must have occurred while the married relationship between the alleged perpetrator and the spouse of the alleged perpetrator existed.

Circumstances in which family violence is suffered and committed—court order

(4) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if:
   (a) a court has made an order under a law of a State or Territory against the alleged perpetrator for the protection of the alleged victim from violence; and
   (b) the order was made after the court had given the alleged perpetrator an opportunity to be heard, or otherwise to make submissions to the court, in relation to the matter.

(5) For subregulation (4), the violence, or part of the violence, that led to the granting of the order must have occurred while the married relationship or de facto relationship existed between the alleged perpetrator and the spouse or de facto partner of the alleged perpetrator.

Circumstances in which family violence is suffered and committed—conviction

(6) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if a court has:
   (a) convicted the alleged perpetrator of an offence of violence against the alleged victim; or
   (b) recorded a finding of guilt against the alleged perpetrator in respect of an offence of violence against the alleged victim.

(7) For subregulation (6), the violence, or part of the violence, that led to the conviction or recording of a finding of guilt must have occurred while the married relationship or de facto relationship existed between the alleged perpetrator and the spouse or de facto partner of the alleged perpetrator.

Circumstances in which family violence is suffered and committed—non-judicially determined claim of family violence

(8) For these Regulations, an application for a visa is taken to include a ***non-judicially determined claim of family violence*** if:
   (a) the applicant seeks to satisfy a prescribed criterion that the applicant, or another person mentioned in the criterion, has suffered family violence; and
   (b) the alleged victim and the alleged perpetrator have made a joint undertaking to a court 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.

(9) For these Regulations, an application for a visa is taken to include a ***non-judicially determined claim of family violence*** if:

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(a) the applicant seeks to satisfy a prescribed criterion that the applicant, or another person mentioned in the criterion, has suffered family violence; and

(b) the alleged victim is:

(i) a spouse or de facto partner of the alleged perpetrator; or

(ii) a dependent child of:

(A) the alleged perpetrator; or

(B) the spouse or de facto partner of the alleged perpetrator; or

(C) both the alleged perpetrator and his or her spouse or de facto partner; or

(iii) a member of the family unit of a spouse or de facto partner of the alleged perpetrator (being a member of the family unit who has made a combined application for a visa with the spouse or de facto partner); and

(c) the alleged victim or another person on the alleged victim's behalf has presented evidence in accordance with regulation 1.24 that:

(i) the alleged victim has suffered relevant family violence; and

(ii) the alleged perpetrator committed that relevant family violence.

(10) If an application for a visa includes a non-judicially determined claim of family violence:

(a) the Minister must consider whether the alleged victim has suffered relevant family violence; and

(b) if the Minister is satisfied that the alleged victim has suffered the relevant family violence, the Minister must consider the application on that basis; and

(c) if the Minister is not satisfied that the alleged victim has suffered the relevant family violence:

(i) the Minister must seek the opinion of an independent expert about whether the alleged victim has suffered the relevant family violence; and

(ii) the Minister must take an independent expert's opinion on the matter to be correct for the purposes of deciding whether the alleged victim satisfies a prescribed criterion for a visa that requires the applicant for the visa, or another person mentioned in the criterion, to have suffered family violence.

(11) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if:

(a) an application for a visa includes a non-judicially determined claim of family violence; and

(b) the Minister is satisfied under paragraph (10)(b) that the alleged victim has suffered relevant family violence.

(12) For subregulation (11), the Minister must be satisfied that the relevant family violence, or part of the relevant family violence, occurred while the married relationship or de facto relationship existed between the alleged perpetrator and the spouse or de facto partner of the alleged perpetrator.

(13) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if:

(a) an application for a visa includes a non-judicially determined claim of family violence; and

(b) the Minister is required by subparagraph (10)(c)(ii) to take as correct an opinion of an independent expert that the alleged victim has suffered relevant family violence.

(14) For subregulation (13), the violence, or part of the violence, that led to the independent expert having the opinion that the alleged victim has suffered relevant family violence

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must have occurred while the married relationship or de facto relationship existed between the alleged perpetrator and the spouse or de facto partner of the alleged perpetrator.

1.24 Evidence

The evidence mentioned in paragraph 1.23(9)(c) is:

(a) a statutory declaration under regulation 1.25 (which deals with statutory declarations by or on behalf of alleged victims); and

(b) the type and number of items of evidence specified by the Minister by instrument in writing for this paragraph.

1.25 Statutory declaration by alleged victim etc

(1) A statutory declaration under this regulation must be made by the spouse or de facto partner of the alleged perpetrator.

(2) A statutory declaration under this regulation that is made by a person mentioned in subregulation 1.25(1) who alleges that he or she is the victim of relevant family violence (within the meaning of regulation 1.21) must:

(a) set out the allegation; and

(b) name the person alleged to have committed the relevant family violence; and

(c) if the conduct of the person alleged to have committed the relevant family violence was not towards the alleged victim:

(i) name the person whom the conduct of the alleged perpetrator was towards; and

(ii) identify the relationship between the maker of the statutory declaration and the person whom the conduct was towards.

(3) A statutory declaration under this regulation that is made by a person mentioned in subregulation 1.25(1) who alleges that another person is the victim of relevant family violence (within the meaning of regulation 1.21) must:

(a) name that other person; and

(b) set out the allegation; and

(c) identify the relationship of the maker of the statutory declaration to that other person; and

(d) name the person alleged to have committed the relevant family violence; and

(e) if the conduct of the person alleged to have committed the relevant family violence was not towards the alleged victim:

(i) name the person whom the conduct of the alleged perpetrator was towards; and

(ii) identify the relationship between the alleged victim and the person whom the conduct was towards; and

(iii) identify the relationship between the maker of the statutory declaration and the person whom the conduct was towards; and

(f) set out the evidence on which the allegation is based.

1.27 Documents not admissible in evidence

A document mentioned in the table is not admissible in evidence before a court or tribunal otherwise than in:

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(a) an application for judicial review of a decision to refuse to grant a visa the application for which included the non-judicially determined claim of family violence to which the document relates; or

(b) an application for merits review of a decision to refuse to grant a visa the application for which included the non-judicially determined claim of family violence to which the document relates; or

(c) a prosecution of a maker of the statutory declaration under section 11 of the *Statutory Declarations Act 1959*.

Item	Document
1	A statutory declaration that is a type of evidence specified by the Minister under paragraph 1.24(b)
2	A statutory declaration under regulation 1.25
3	An opinion of an independent expert mentioned in subparagraph 1.23(10)(c)(i)

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Division 1.5—Special provisions relating to family violence

1.21 Interpretation

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independent expert means a person who:

(a) is suitably qualified to make independent assessments of non-judicially determined claims of family violence; and

(b) is employed by, or contracted to provide services to, an organisation that is specified, in a legislative instrument made by the Minister, for the purpose of making independent assessments of non-judicially determined claims of family violence.

non-judicially determined claim of family violence has the meaning given by subregulations 1.23(8) and (9).

relevant family violence means conduct, whether actual or threatened, towards:

(a) the alleged victim; or

(b) a member of the family unit of the alleged victim; or

(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.

statutory declaration means a statutory declaration under the *Statutory Declarations Act 1959*.

violence includes a threat of violence.

1.22 References to person having suffered or committed family violence

(1) A reference in these Regulations to a person having suffered family violence is a reference to a person being taken, under regulation 1.23, to have suffered family violence.

(2) A reference in these Regulations to a person having committed family violence in relation to a person is a reference to a person being taken, under regulation 1.23, to have committed family violence in relation to that person.

1.23 When is a person taken to have suffered or committed family violence?

(1) For these Regulations, this regulation explains when:

(a) a person (the ***alleged victim***) is taken to have suffered family violence; and

(b) another person (the ***alleged perpetrator***) is taken to have committed family violence in relation to the alleged victim.

Note: Schedule 2 sets out which visas may be granted on the basis of a person having suffered family violence. The criteria to be satisfied for the visa to be granted set out which persons may be taken to have suffered family violence, and how those persons are related to the spouse or de facto partner of the alleged perpetrator mentioned in this regulation.

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Circumstances in which family violence is suffered and committed—injunction under Family Law Act 1975

(2) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if, on the application of the alleged victim, a court has granted an injunction under paragraph 114(1)(a), (b) or (c) of the *Family Law Act 1975* against the alleged perpetrator.

(3) For subregulation (2), the violence, or part of the violence, that led to the granting of the injunction must have occurred while the married relationship between the alleged perpetrator and the spouse of the alleged perpetrator existed.

Circumstances in which family violence is suffered and committed—court order

(4) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if:
   (a) a court has made an order under a law of a State or Territory against the alleged perpetrator for the protection of the alleged victim from violence; and
   (b) unless the alleged victim had, before 1 January 1998, claimed to Immigration to have suffered domestic violence committed by the alleged perpetrator—that order was made after the court had given the alleged perpetrator an opportunity to be heard, or otherwise to make submissions to the court, in relation to the matter.

(5) For subregulation (4), the violence, or part of the violence, that led to the granting of the order must have occurred while the married relationship or de facto relationship existed between the alleged perpetrator and the spouse or de facto partner of the alleged perpetrator.

Circumstances in which family violence is suffered and committed—conviction

(6) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if a court has:
   (a) convicted the alleged perpetrator of an offence of violence against the alleged victim; or
   (b) recorded a finding of guilt against the alleged perpetrator in respect of an offence of violence against the alleged victim.

(7) For subregulation (6), the violence, or part of the violence, that led to the conviction or recording of a finding of guilt must have occurred while the married relationship or de facto relationship existed between the alleged perpetrator and the spouse or de facto partner of the alleged perpetrator.

Circumstances in which family violence is suffered and committed—non-judicially determined claim of family violence

(8) For these Regulations, an application for a visa is taken to include a ***non-judicially determined claim of family violence*** if:
   (a) the applicant seeks to satisfy a prescribed criterion that the applicant, or another person mentioned in the criterion, has suffered family violence; and
   (b) the alleged victim and the alleged perpetrator have made a joint undertaking to a court 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.

(9) For these Regulations, an application for a visa is taken to include a ***non-judicially determined claim of family violence*** if:

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(a) the applicant seeks to satisfy a prescribed criterion that the applicant, or another person mentioned in the criterion, has suffered family violence; and

(b) the alleged victim is:

(i) a spouse or de facto partner of the alleged perpetrator; or

(ii) a dependent child of:

(A) the alleged perpetrator; or

(B) the spouse or de facto partner of the alleged perpetrator; or

(C) both the alleged perpetrator and his or her spouse or de facto partner; or

(iii) a member of the family unit of a spouse or de facto partner of the alleged perpetrator (being a member of the family unit who has made a combined application for a visa with the spouse or de facto partner); and

(c) the alleged victim or another person on the alleged victim's behalf has presented evidence in accordance with regulation 1.24 that:

(i) the alleged victim has suffered relevant family violence; and

(ii) the alleged perpetrator committed that relevant family violence.

(10) If an application for a visa includes a non-judicially determined claim of family violence:

(a) the Minister must consider whether the alleged victim has suffered relevant family violence; and

(b) if the Minister is satisfied that the alleged victim has suffered the relevant family violence, the Minister must consider the application on that basis; and

(c) if the Minister is not satisfied that the alleged victim has suffered the relevant family violence:

(i) the Minister must seek the opinion of an independent expert about whether the alleged victim has suffered the relevant family violence; and

(ii) the Minister must take an independent expert's opinion on the matter to be correct for the purposes of deciding whether the alleged victim satisfies a prescribed criterion for a visa that requires the applicant for the visa, or another person mentioned in the criterion, to have suffered family violence.

(11) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if:

(a) an application for a visa includes a non-judicially determined claim of family violence; and

(b) the Minister is satisfied under paragraph (10)(b) that the alleged victim has suffered relevant family violence.

(12) For subregulation (11), the Minister must be satisfied that the relevant family violence, or part of the relevant family violence, occurred while the married relationship or de facto relationship existed between the alleged perpetrator and the spouse or de facto partner of the alleged perpetrator.

(13) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if:

(a) an application for a visa includes a non-judicially determined claim of family violence; and

(b) the Minister is required by subparagraph (10)(c)(ii) to take as correct an opinion of an independent expert that the alleged victim has suffered relevant family violence.

(14) For subregulation (13), the violence, or part of the violence, that led to the independent expert having the opinion that the alleged victim has suffered relevant family violence

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must have occurred while the married relationship or de facto relationship existed between the alleged perpetrator and the spouse or de facto partner of the alleged perpetrator.

1.24 Evidence

The evidence mentioned in paragraph 1.23(9)(c) is:

(a) a statutory declaration under regulation 1.25 (which deals with statutory declarations by or on behalf of alleged victims); and

(b) the type and number of items of evidence specified by the Minister by instrument in writing for this paragraph.

1.25 Statutory declaration by alleged victim etc

(1) A statutory declaration under this regulation must be made by the spouse or de facto partner of the alleged perpetrator.

(2) A statutory declaration under this regulation that is made by a person mentioned in subregulation 1.25(1) who alleges that he or she is the victim of relevant family violence (within the meaning of regulation 1.21) must:

(a) set out the allegation; and

(b) name the person alleged to have committed the relevant family violence; and

(c) if the conduct of the person alleged to have committed the relevant family violence was not towards the alleged victim:

(i) name the person whom the conduct of the alleged perpetrator was towards; and

(ii) identify the relationship between the maker of the statutory declaration and the person whom the conduct was towards.

(3) A statutory declaration under this regulation that is made by a person mentioned in subregulation 1.25(1) who alleges that another person is the victim of relevant family violence (within the meaning of regulation 1.21) must:

(a) name that other person; and

(b) set out the allegation; and

(c) identify the relationship of the maker of the statutory declaration to that other person; and

(d) name the person alleged to have committed the relevant family violence; and

(e) if the conduct of the person alleged to have committed the relevant family violence was not towards the alleged victim:

(i) name the person whom the conduct of the alleged perpetrator was towards; and

(ii) identify the relationship between the alleged victim and the person whom the conduct was towards; and

(iii) identify the relationship between the maker of the statutory declaration and the person whom the conduct was towards; and

(f) set out the evidence on which the allegation is based.

1.27 Documents not admissible in evidence

A document mentioned in the table is not admissible in evidence before a court or tribunal otherwise than in:

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(a) an application for judicial review of a decision to refuse to grant a visa the application for which included the non-judicially determined claim of family violence to which the document relates; or

(b) an application for merits review of a decision to refuse to grant a visa the application for which included the non-judicially determined claim of family violence to which the document relates; or

(c) a prosecution of a maker of the statutory declaration under section 11 of the *Statutory Declarations Act 1959*.

Item	Document
1	A statutory declaration that is a type of evidence specified by the Minister under paragraph 1.24(b)
2	A statutory declaration under regulation 1.25
3	An opinion of an independent expert mentioned in subparagraph 1.23(10)(c)(i)

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Division 1.5 Special provisions relating to family violence

1.21 Interpretation

(1) In this Division:

competent person means:

(a) in relation to family violence committed against an adult:

(i) a person registered as a medical practitioner under a law of a State or Territory providing for the registration of medical practitioners; or

(ii) a person registered as a psychologist under a law of a State or Territory providing for the registration of psychologists; or

(iii) a person who:

(A) is a registered nurse within the meaning of section 3 of the *Health Insurance Act 1973*; and

(B) is performing the duties of a registered nurse; or

(iv) a person who:

(A) is a member of the Australian Association of Social Workers or is recognised by that Association as a person who is eligible to be a member of that Association; and

(B) is performing the duties of a social worker; or

(v) a person who is a family consultant under the *Family Law Act 1975*; or

(vi) a person holding a position of a kind described in subregulation (2); or

(b) in relation to family violence committed against a child:

(i) a person referred to in paragraph (a); or

(ii) an officer of the child welfare or child protection authorities of a State or Territory.

independent expert means a person who:

(a) is suitably qualified to make independent assessments of non-judicially determined claims of family violence; and

(b) is employed by, or contracted to provide services to, an organisation that is specified, in a legislative instrument made by the Minister, for the purpose of making independent assessments of non-judicially determined claims of family violence.

non-judicially determined claim of family violence has the meaning given by subregulations 1.23 (8) and (9).

relevant family violence means conduct, whether actual or threatened, towards:

(a) the alleged victim; or

(b) a member of the family unit of the alleged victim; or

(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.

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statutory declaration means a statutory declaration under the *Statutory Declarations Act 1959*.

violence includes a threat of violence.

(2) The positions referred to in subparagraph (a) (vi) of the definition of ***competent person*** in subregulation (1) are:

(a) manager or coordinator of:

(i) a women's refuge; or

(ii) a crisis and counselling service that specialises in family violence; or

(b) a position with:

(i) decision-making responsibility for:

(A) a women's refuge; or

(B) a crisis and counselling service that specialises in family violence;

that has a collective decision-making structure; and

(ii) responsibility for matters concerning family violence within the operations of that refuge or crisis and counselling service.

1.22 References to person having suffered or committed family violence

(1) A reference in these Regulations to a person having suffered family violence is a reference to a person being taken, under regulation 1.23, to have suffered family violence.

(2) A reference in these Regulations to a person having committed family violence in relation to a person is a reference to a person being taken, under regulation 1.23, to have committed family violence in relation to that person.

1.23 When is a person taken to have suffered or committed family violence?

(1) For these Regulations, this regulation explains when:

(a) a person (the ***alleged victim***) is taken to have suffered family violence; and

(b) another person (the ***alleged perpetrator***) is taken to have committed family violence in relation to the alleged victim.

Note Schedule 2 sets out which visas may be granted on the basis of a person having suffered family violence. The criteria to be satisfied for the visa to be granted set out which persons may be taken to have suffered family violence, and how those persons are related to the spouse or de facto partner of the alleged perpetrator mentioned in this regulation.

Circumstances in which family violence is suffered and committed — injunction under Family Law Act 1975

(2) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if, on the application of the alleged victim, a court has granted an injunction under paragraph 114 (1) (a), (b) or (c) of the *Family Law Act 1975* against the alleged perpetrator.

(3) For subregulation (2), the violence, or part of the violence, that led to the granting of the injunction must have occurred while the married relationship between the alleged perpetrator and the spouse of the alleged perpetrator existed.

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Circumstances in which family violence is suffered and committed — court order

(4) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if:

(a) a court has made an order under a law of a State or Territory against the alleged perpetrator for the protection of the alleged victim from violence; and

(b) unless the alleged victim had, before 1 January 1998, claimed to Immigration to have suffered domestic violence committed by the alleged perpetrator — that order was made after the court had given the alleged perpetrator an opportunity to be heard, or otherwise to make submissions to the court, in relation to the matter.

(5) For subregulation (4), the violence, or part of the violence, that led to the granting of the order must have occurred while the married relationship or de facto relationship existed between the alleged perpetrator and the spouse or de facto partner of the alleged perpetrator.

Circumstances in which family violence is suffered and committed — conviction

(6) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if a court has:

(a) convicted the alleged perpetrator of an offence of violence against the alleged victim; or

(b) recorded a finding of guilt against the alleged perpetrator in respect of an offence of violence against the alleged victim.

(7) For subregulation (6), the violence, or part of the violence, that led to the conviction or recording of a finding of guilt must have occurred while the married relationship or de facto relationship existed between the alleged perpetrator and the spouse or de facto partner of the alleged perpetrator.

Circumstances in which family violence is suffered and committed — non-judicially determined claim of family violence

(8) For these Regulations, an application for a visa is taken to include a ***non-judicially determined claim of family violence*** if:

(a) the applicant seeks to satisfy a prescribed criterion that the applicant, or another person mentioned in the criterion, has suffered family violence; and

(b) the alleged victim and the alleged perpetrator have made a joint undertaking to a court 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.

(9) For these Regulations, an application for a visa is taken to include a ***non-judicially determined claim of family violence*** if:

(a) the applicant seeks to satisfy a prescribed criterion that the applicant, or another person mentioned in the criterion, has suffered family violence; and

(b) the alleged victim is:

(i) a spouse or de facto partner of the alleged perpetrator; or

(ii) a dependent child of:

(A) the alleged perpetrator; or

(B) the spouse or de facto partner of the alleged perpetrator; or

(C) both the alleged perpetrator and his or her spouse or de facto partner; or

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(iii) a member of the family unit of a spouse or de facto partner of the alleged perpetrator (being a member of the family unit who has made a combined application for a visa with the spouse or de facto partner); and

(c) the alleged victim or another person on the alleged victim's behalf has presented evidence in accordance with regulation 1.24 that:

(i) the alleged victim has suffered relevant family violence; and

(ii) the alleged perpetrator committed that relevant family violence.

(10) If an application for a visa includes a non-judicially determined claim of family violence:

(a) the Minister must consider whether the alleged victim has suffered relevant family violence; and

(b) if the Minister is satisfied that the alleged victim has suffered the relevant family violence, the Minister must consider the application on that basis; and

(c) if the Minister is not satisfied that the alleged victim has suffered the relevant family violence:

(i) the Minister must seek the opinion of an independent expert about whether the alleged victim has suffered the relevant family violence; and

(ii) the Minister must take an independent expert's opinion on the matter to be correct for the purposes of deciding whether the alleged victim satisfies a prescribed criterion for a visa that requires the applicant for the visa, or another person mentioned in the criterion, to have suffered family violence.

(11) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if:

(a) an application for a visa includes a non-judicially determined claim of family violence; and

(b) the Minister is satisfied under paragraph (10) (b) that the alleged victim has suffered relevant family violence.

(12) For subregulation (11), the Minister must be satisfied that the relevant family violence, or part of the relevant family violence, occurred while the married relationship or de facto relationship existed between the alleged perpetrator and the spouse or de facto partner of the alleged perpetrator.

(13) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if:

(a) an application for a visa includes a non-judicially determined claim of family violence; and

(b) the Minister is required by subparagraph (10) (c) (ii) to take as correct an opinion of an independent expert that the alleged victim has suffered relevant family violence.

(14) For subregulation (13), the violence, or part of the violence, that led to the independent expert having the opinion that the alleged victim has suffered relevant family violence must have occurred while the married relationship or de facto relationship existed between the alleged perpetrator and the spouse or de facto partner of the alleged perpetrator.

1.24 Evidence

(1) The evidence referred to in paragraph 1.23 (9) (c) is:

(a) a statutory declaration under regulation 1.25 (which deals with statutory declarations by or on behalf of alleged victims) together with:

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(i) a statutory declaration under regulation 1.26 (which deals with statutory declarations by competent persons); and

(ii) a copy of a record of an assault, allegedly committed by the alleged perpetrator, on:

(A) the alleged victim; or

(B) a member of the family unit of the alleged victim; or

(C) a member of the family unit of the alleged perpetrator;

that is a record kept by a police service of a State or Territory (other than a statement by the alleged victim or by the person allegedly assaulted); or

(b) a statutory declaration under regulation 1.25, together with 2 statutory declarations under regulation 1.26.

(2) A person must not submit, for the purposes of an application that relies on this Division, 2 statutory declarations by competent persons who both have a qualification specified in:

(a) the same subparagraph of paragraph (a) of the definition of ***competent person***; or

(b) subparagraph (b) (ii) of that definition.

1.25 Statutory declaration by alleged victim etc

(1) A statutory declaration under this regulation must be made by the spouse or de facto partner of the alleged perpetrator.

(2) A statutory declaration under this regulation that is made by a person mentioned in subregulation 1.25 (1) who alleges that he or she is the victim of relevant family violence (within the meaning of subregulation 1.21 (1)) must:

(a) set out the allegation; and

(b) name the person alleged to have committed the relevant family violence; and

(c) if the conduct of the person alleged to have committed the relevant family violence was not towards the alleged victim:

(i) name the person whom the conduct of the alleged perpetrator was towards; and

(ii) identify the relationship between the maker of the statutory declaration and the person whom the conduct was towards.

(3) A statutory declaration under this regulation that is made by a person mentioned in subregulation 1.25 (1) who alleges that another person is the victim of relevant family violence (within the meaning of subregulation 1.21 (1)) must:

(a) name that other person; and

(b) set out the allegation; and

(c) identify the relationship of the maker of the statutory declaration to that other person; and

(d) name the person alleged to have committed the relevant family violence; and

(e) if the conduct of the person alleged to have committed the relevant family violence was not towards the alleged victim:

(i) name the person whom the conduct of the alleged perpetrator was towards; and

(ii) identify the relationship between the alleged victim and the person whom the conduct was towards; and

(iii) identify the relationship between the maker of the statutory declaration and the person whom the conduct was towards; and

(f) set out the evidence on which the allegation is based.

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1.26 Statutory declaration by competent person

A statutory declaration under this regulation:

(a) must be made by a competent person; and

(b) must set out the basis of the competent person's claim to be a competent person for the purposes of this Division; and

(c) must state that, in the competent person's opinion, relevant family violence (within the meaning of subregulation 1.21 (1)) has been suffered by a person; and

(d) must name the person who, in the opinion of the competent person, has suffered that relevant family violence; and

(e) must name the person who, in the opinion of the competent person, committed that relevant family violence; and

(f) if the conduct of the person alleged to have committed the relevant family violence was not towards the alleged victim:

(i) must name the person whom the conduct of the alleged perpetrator was towards; and

(ii) must identify the relationship between the alleged victim and the person whom the conduct was towards; and

(g) must set out the evidence on which the competent person's opinion is based.

1.27 Statutory declaration or statement not admissible in evidence

A statutory declaration made under regulation 1.25 or 1.26, or an opinion of an independent expert mentioned in subparagraph 1.23 (10) (c) (i), is not admissible in evidence before a court or tribunal otherwise than in:

(a) an application for judicial review or merits review of a decision to refuse to grant a visa the application for which included the non-judicially determined claim of family violence to which the statutory declaration or opinion relates; or

(b) a prosecution of the maker of the statutory declaration under section 11 of the *Statutory Declarations Act 1959*.

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Division 1.5 Special provisions relating to family violence

1.21 Interpretation

(1) In this Division:

competent person means:

(a) in relation to family violence committed against an adult:

(i) a person registered as a medical practitioner under a law of a State or Territory providing for the registration of medical practitioners; or

(ii) a person registered as a psychologist under a law of a State or Territory providing for the registration of psychologists; or

(iii) a person who:

(A) is a registered nurse within the meaning of section 3 of the *Health Insurance Act 1973*; and

(B) is performing the duties of a registered nurse; or

(iv) a person who:

(A) is a member of the Australian Association of Social Workers or is recognised by that Association as a person who is eligible to be a member of that Association; and

(B) is performing the duties of a social worker; or

(v) a person who is a family consultant under the *Family Law Act 1975*; or

(vi) a person holding a position of a kind described in subregulation (2); or

(b) in relation to family violence committed against a child:

(i) a person referred to in paragraph (a); or

(ii) an officer of the child welfare or child protection authorities of a State or Territory.

independent expert means a person who:

(a) is suitably qualified to make independent assessments of non-judicially determined claims of family violence; and

(b) is employed by, or contracted to provide services to, an organisation that is specified, in a legislative instrument made by the Minister, for the purpose of making independent assessments of non-judicially determined claims of family violence.

non-judicially determined claim of family violence has the meaning given by subregulation 1.23 (1A).

relevant family violence has the meaning given by paragraph 1.23 (2) (b).

statutory declaration means a statutory declaration under the *Statutory Declarations Act 1959*.

violence includes a threat of violence.

(2) The positions referred to in subparagraph (a) (vi) of the definition of ***competent person*** in subregulation (1) are:

(a) manager or coordinator of:

(i) a women's refuge; or

(ii) a crisis and counselling service that specialises in family violence; or

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(b) a position with:

(i) decision-making responsibility for:

(A) a women's refuge; or

(B) a crisis and counselling service that specialises in family violence;

that has a collective decision-making structure; and

(ii) responsibility for matters concerning family violence within the operations of that refuge or crisis and counselling service.

1.22 References to person having suffered or committed family violence

(1) A reference in these Regulations to a person having suffered family violence is a reference to a person being taken, under regulation 1.23, to have suffered family violence.

(2) A reference in these Regulations to a person having committed family violence in relation to a person is a reference to a person being taken, under regulation 1.23, to have committed family violence in relation to that person.

1.23 When is a person taken to have suffered or committed family violence?

(1) For the purposes of these Regulations:

(a) a person (***the alleged victim***) is taken to have suffered family violence; and

(b) another person (***the alleged perpetrator***) is taken to have committed family violence in relation to the alleged victim;

if:

(c) on the application of the alleged victim, a court has granted an injunction under paragraph 114 (1) (a), (b) or (c) of the *Family Law Act 1975* against the alleged perpetrator; or

(d) a court has made an order under a law of a State or Territory against the alleged perpetrator for the protection of the alleged victim from violence and, unless the alleged victim had, before 1 January 1998, claimed to Immigration to have suffered domestic violence committed by the alleged perpetrator, that order was made after the court had given the alleged perpetrator an opportunity to be heard, or otherwise to make submissions to the court, in relation to the matter; or

(e) a court has convicted the alleged perpetrator of, or has recorded a finding of guilt against the alleged perpetrator in respect of, an offence of violence against the alleged victim; or

(f) the Minister is satisfied, for paragraph (1B) (a), that the alleged victim has suffered relevant family violence; or

(g) the Minister is required by subregulation (1C) to take as correct an opinion of an independent expert that the alleged victim has suffered relevant family violence.

(1A) For these Regulations, an application for a visa is taken to include a ***non-judicially determined claim of family violence*** if:

(a) the applicant seeks to satisfy a prescribed criterion that the applicant, or another person mentioned in the criterion, has suffered family violence; and

(b) either of the following circumstances exists:

(i) the alleged victim and the alleged perpetrator have made a joint undertaking to a court 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;

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(ii) for an alleged victim who is a person referred to in subregulation (2) — the alleged victim or another person on the alleged victim's behalf has presented evidence in accordance with regulation 1.24 that:

(A) the alleged victim has suffered relevant family violence; and

(B) the alleged perpetrator has committed that relevant family violence.

(1B) If an application for a visa includes a non-judicially determined claim of family violence, the Minister must consider whether the alleged victim has suffered relevant family violence (whichever of the circumstances mentioned in paragraph (1A) (b) exists) and:

(a) if satisfied that the alleged victim has suffered relevant family violence — consider the application on that basis; or

(b) if not satisfied that the alleged victim has suffered relevant family violence — seek the opinion of an independent expert about whether the alleged victim has suffered relevant family violence.

(1C) The Minister must take an independent expert's opinion on the matter mentioned in paragraph (1B) (b) to be correct for the purposes of deciding whether the alleged victim satisfies a prescribed criterion for a visa that requires the applicant for the visa, or another person mentioned in the criterion, to have suffered family violence.

(2) In subparagraph (1A) (b) (ii):

(a) the persons referred to are the following:

(i) a spouse or de facto partner of the alleged perpetrator;

(ii) a dependent child of:

(A) the alleged perpetrator; or

(B) the spouse or de facto partner of the alleged perpetrator; or

(C) both the alleged perpetrator and his or her spouse or de facto partner;

(iii) a member of the family unit of a spouse or de facto partner of the alleged perpetrator (being a member of the family unit who has made a combined application for a visa with the spouse or de facto partner); and

(b) a reference to relevant family violence is a reference to conduct, whether actual or threatened, towards:

(i) the 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.

1.24 Evidence

(1) The evidence referred to in subparagraph 1.23 (1A) (b) (ii) is:

(a) a statutory declaration under regulation 1.25 (which deals with statutory declarations by or on behalf of alleged victims) together with:

(i) a statutory declaration under regulation 1.26 (which deals with statutory declarations by competent persons); and

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(ii) a copy of a record of an assault, allegedly committed by the alleged perpetrator, on:

(A) the alleged victim; or

(B) a member of the family unit of the alleged victim; or

(C) a member of the family unit of the alleged perpetrator;

that is a record kept by a police service of a State or Territory (other than a statement by the alleged victim or by the person allegedly assaulted); or

(b) a statutory declaration under regulation 1.25, together with 2 statutory declarations under regulation 1.26.

(2) A person must not submit, for the purposes of an application that relies on this Division, 2 statutory declarations by competent persons who both have a qualification specified in:

(a) the same subparagraph of paragraph (a) of the definition of ***competent person***; or

(b) subparagraph (b) (ii) of that definition.

1.25 Statutory declaration by alleged victim etc

(1) A statutory declaration under this regulation must be made by the spouse or de facto partner of the alleged perpetrator.

(2) A statutory declaration under this regulation that is made by a person mentioned in subregulation 1.25 (1) who alleges that he or she is the victim of relevant family violence (within the meaning of paragraph 1.23 (2) (b)) must:

(a) set out the allegation; and

(b) name the person alleged to have committed the relevant family violence; and

(c) if the conduct of the person alleged to have committed the relevant family violence was not towards the alleged victim:

(i) name the person whom the conduct of the alleged perpetrator was towards; and

(ii) identify the relationship between the maker of the statutory declaration and the person whom the conduct was towards.

(3) A statutory declaration under this regulation that is made by a person mentioned in subregulation 1.25 (1) who alleges that another person is the victim of relevant family violence (within the meaning of paragraph 1.23 (2) (b)) must:

(a) name that other person; and

(b) set out the allegation; and

(c) identify the relationship of the maker of the statutory declaration to that other person; and

(d) name the person alleged to have committed the relevant family violence; and

(e) if the conduct of the person alleged to have committed the relevant family violence was not towards the alleged victim:

(i) name the person whom the conduct of the alleged perpetrator was towards; and

(ii) identify the relationship between the alleged victim and the person whom the conduct was towards; and

(iii) identify the relationship between the maker of the statutory declaration and the person whom the conduct was towards; and

(f) set out the evidence on which the allegation is based.

Released under FOI 17 February 2023

1.26 Statutory declaration by competent person

A statutory declaration under this regulation:

(a) must be made by a competent person; and

(b) must set out the basis of the competent person's claim to be a competent person for the purposes of this Division; and

(c) must state that, in the competent person's opinion, relevant family violence (within the meaning of paragraph 1.23 (2) (b)) has been suffered by a person; and

(d) must name the person who, in the opinion of the competent person, has suffered that relevant family violence; and

(e) must name the person who, in the opinion of the competent person, committed that relevant family violence; and

(f) if the conduct of the person alleged to have committed the relevant family violence was not towards the alleged victim:

(i) must name the person whom the conduct of the alleged perpetrator was towards; and

(ii) must identify the relationship between the alleged victim and the person whom the conduct was towards; and

(g) must set out the evidence on which the competent person's opinion is based.

1.27 Statutory declaration or statement not admissible in evidence

A statutory declaration made under regulation 1.25 or 1.26, or an opinion of an independent expert mentioned in paragraph 1.23 (1B) (b), is not admissible in evidence before a court or tribunal otherwise than in:

(a) an application for judicial review or merits review of a decision to refuse to grant a visa the application for which included the non-judicially determined claim of family violence to which the statutory declaration or opinion relates; or

(b) a prosecution of the maker of the statutory declaration under section 11 of the *Statutory Declarations Act 1959*.

Released under FOI
17 February 2023

Division 1.5 Special provisions relating to family violence

1.21 Interpretation

In this Division:

independent expert means a person who:

(a) is suitably qualified to make independent assessments of non-judicially determined claims of family violence; and

(b) is employed by, or contracted to provide services to, an organisation that is specified, in a legislative instrument made by the Minister, for the purpose of making independent assessments of non-judicially determined claims of family violence.

non-judicially determined claim of family violence has the meaning given by subregulations 1.23 (8) and (9).

relevant family violence means conduct, whether actual or threatened, towards:

(a) the alleged victim; or

(b) a member of the family unit of the alleged victim; or

(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.

statutory declaration means a statutory declaration under the *Statutory Declarations Act 1959*.

violence includes a threat of violence.

1.22 References to person having suffered or committed family violence

(1) A reference in these Regulations to a person having suffered family violence is a reference to a person being taken, under regulation 1.23, to have suffered family violence.

(2) A reference in these Regulations to a person having committed family violence in relation to a person is a reference to a person being taken, under regulation 1.23, to have committed family violence in relation to that person.

1.23 When is a person taken to have suffered or committed family violence?

(1) For these Regulations, this regulation explains when:

(a) a person (the ***alleged victim***) is taken to have suffered family violence; and

(b) another person (the ***alleged perpetrator***) is taken to have committed family violence in relation to the alleged victim.

Note Schedule 2 sets out which visas may be granted on the basis of a person having suffered family violence. The criteria to be satisfied for the visa to be granted set out which persons may be taken to have suffered family violence, and how those persons are related to the spouse or de facto partner of the alleged perpetrator mentioned in this regulation.

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Circumstances in which family violence is suffered and committed — injunction under Family Law Act 1975

(2) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if, on the application of the alleged victim, a court has granted an injunction under paragraph 114 (1) (a), (b) or (c) of the *Family Law Act 1975* against the alleged perpetrator.

(3) For subregulation (2), the violence, or part of the violence, that led to the granting of the injunction must have occurred while the married relationship between the alleged perpetrator and the spouse of the alleged perpetrator existed.

Circumstances in which family violence is suffered and committed — court order

(4) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if:

(a) a court has made an order under a law of a State or Territory against the alleged perpetrator for the protection of the alleged victim from violence; and

(b) unless the alleged victim had, before 1 January 1998, claimed to Immigration to have suffered domestic violence committed by the alleged perpetrator—that order was made after the court had given the alleged perpetrator an opportunity to be heard, or otherwise to make submissions to the court, in relation to the matter.

(5) For subregulation (4), the violence, or part of the violence, that led to the granting of the order must have occurred while the married relationship or de facto relationship existed between the alleged perpetrator and the spouse or de facto partner of the alleged perpetrator.

Circumstances in which family violence is suffered and committed — conviction

(6) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if a court has:

(a) convicted the alleged perpetrator of an offence of violence against the alleged victim; or

(b) recorded a finding of guilt against the alleged perpetrator in respect of an offence of violence against the alleged victim.

(7) For subregulation (6), the violence, or part of the violence, that led to the conviction or recording of a finding of guilt must have occurred while the married relationship or de facto relationship existed between the alleged perpetrator and the spouse or de facto partner of the alleged perpetrator.

Circumstances in which family violence is suffered and committed — non-judicially determined claim of family violence

(8) For these Regulations, an application for a visa is taken to include a ***non-judicially determined claim of family violence*** if:

(a) the applicant seeks to satisfy a prescribed criterion that the applicant, or another person mentioned in the criterion, has suffered family violence; and

(b) the alleged victim and the alleged perpetrator have made a joint undertaking to a court 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.

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(9) For these Regulations, an application for a visa is taken to include a ***non-judicially determined claim of family violence*** if:

(a) the applicant seeks to satisfy a prescribed criterion that the applicant, or another person mentioned in the criterion, has suffered family violence; and

(b) the alleged victim is:

(i) a spouse or de facto partner of the alleged perpetrator; or

(ii) a dependent child of:

(A) the alleged perpetrator; or

(B) the spouse or de facto partner of the alleged perpetrator; or

(C) both the alleged perpetrator and his or her spouse or de facto partner; or

(iii) a member of the family unit of a spouse or de facto partner of the alleged perpetrator (being a member of the family unit who has made a combined application for a visa with the spouse or de facto partner); and

(c) the alleged victim or another person on the alleged victim's behalf has presented evidence in accordance with regulation 1.24 that:

(i) the alleged victim has suffered relevant family violence; and

(ii) the alleged perpetrator committed that relevant family violence.

(10) If an application for a visa includes a non-judicially determined claim of family violence:

(a) the Minister must consider whether the alleged victim has suffered relevant family violence; and

(b) if the Minister is satisfied that the alleged victim has suffered the relevant family violence, the Minister must consider the application on that basis; and

(c) if the Minister is not satisfied that the alleged victim has suffered the relevant family violence:

(i) the Minister must seek the opinion of an independent expert about whether the alleged victim has suffered the relevant family violence; and

(ii) the Minister must take an independent expert's opinion on the matter to be correct for the purposes of deciding whether the alleged victim satisfies a prescribed criterion for a visa that requires the applicant for the visa, or another person mentioned in the criterion, to have suffered family violence.

(11) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if:

(a) an application for a visa includes a non-judicially determined claim of family violence; and

(b) the Minister is satisfied under paragraph (10) (b) that the alleged victim has suffered relevant family violence.

(12) For subregulation (11), the Minister must be satisfied that the relevant family violence, or part of the relevant family violence, occurred while the married relationship or de facto relationship existed between the alleged perpetrator and the spouse or de facto partner of the alleged perpetrator.

(13) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if:

(a) an application for a visa includes a non-judicially determined claim of family violence; and

(b) the Minister is required by subparagraph (10) (c) (ii) to take as correct an opinion of an independent expert that the alleged victim has suffered relevant family violence.

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(14) For subregulation (13), the violence, or part of the violence, that led to the independent expert having the opinion that the alleged victim has suffered relevant family violence must have occurred while the married relationship or de facto relationship existed between the alleged perpetrator and the spouse or de facto partner of the alleged perpetrator.

1.24 Evidence

The evidence mentioned in paragraph 1.23 (9) (c) is:

(a) a statutory declaration under regulation 1.25 (which deals with statutory declarations by or on behalf of alleged victims); and

(b) the type and number of items of evidence specified by the Minister by instrument in writing for this paragraph.

1.25 Statutory declaration by alleged victim etc

(1) A statutory declaration under this regulation must be made by:

(a) the spouse of the alleged perpetrator; or

(b) if the alleged perpetrator is in an interdependent relationship with a person — that person.

(2) A statutory declaration under this regulation that is made by a person mentioned in subregulation 1.25 (1) who alleges that he or she is the victim of relevant family violence (within the meaning of regulation 1.21) must:

(a) set out the allegation; and

(b) name the person alleged to have committed the relevant family violence; and

(c) if the conduct of the person alleged to have committed the relevant family violence was not towards the alleged victim:

(i) name the person whom the conduct of the alleged perpetrator was towards; and

(ii) identify the relationship between the maker of the statutory declaration and the person whom the conduct was towards.

(3) A statutory declaration under this regulation that is made by a person mentioned in subregulation 1.25 (1) who alleges that another person is the victim of relevant family violence (within the meaning of regulation 1.21) must:

(a) name that other person; and

(b) set out the allegation; and

(c) identify the relationship of the maker of the statutory declaration to that other person; and

(d) name the person alleged to have committed the relevant family violence; and

(e) if the conduct of the person alleged to have committed the relevant family violence was not towards the alleged victim:

(i) name the person whom the conduct of the alleged perpetrator was towards; and

(ii) identify the relationship between the alleged victim and the person whom the conduct was towards; and

(iii) identify the relationship between the maker of the statutory declaration and the person whom the conduct was towards; and

(f) set out the evidence on which the allegation is based.

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1.27 Documents not admissible in evidence

A document mentioned in the table is not admissible in evidence before a court or tribunal otherwise than in:

(a) an application for judicial review of a decision to refuse to grant a visa the application for which included the non-judicially determined claim of family violence to which the document relates; or

(b) an application for merits review of a decision to refuse to grant a visa the application for which included the non-judicially determined claim of family violence to which the document relates; or

(c) a prosecution of a maker of the statutory declaration under section 11 of the *Statutory Declarations Act 1959*.

Item	Document
1	A statutory declaration that is a type of evidence specified by the Minister under paragraph 1.24(b)
2	A statutory declaration under regulation 1.25
3	An opinion of an independent expert mentioned in subparagraph 1.23(10)(c)(i)

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Division 1.5 Special provisions relating to family violence

1.21 Interpretation

(1) In this Division:

competent person means:

(a) in relation to family violence committed against an adult:

(i) a person registered as a medical practitioner under a law of a State or Territory providing for the registration of medical practitioners; or

(ii) a person registered as a psychologist under a law of a State or Territory providing for the registration of psychologists; or

(iii) a person who:

(A) is a registered nurse within the meaning of section 3 of the *Health Insurance Act 1973*; and

(B) is performing the duties of a registered nurse; or

(iv) a person who:

(A) is a member of the Australian Association of Social Workers or is recognised by that Association as a person who is eligible to be a member of that Association; and

(B) is performing the duties of a social worker; or

(v) a person who is a family consultant under the *Family Law Act 1975*; or

(vi) a person holding a position of a kind described in subregulation (2); or

(b) in relation to family violence committed against a child:

(i) a person referred to in paragraph (a); or

(ii) an officer of the child welfare or child protection authorities of a State or Territory.

independent expert means a person who:

(a) is suitably qualified to make independent assessments of non-judicially determined claims of family violence; and

(b) is employed by, or contracted to provide services to, an organisation that is specified, in a legislative instrument made by the Minister, for the purpose of making independent assessments of non-judicially determined claims of family violence.

non-judicially determined claim of family violence has the meaning given by subregulations 1.23 (8) and (9).

relevant family violence means conduct, whether actual or threatened, towards:

(a) the alleged victim; or

(b) a member of the family unit of the alleged victim; or

(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;

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

statutory declaration means a statutory declaration under the *Statutory Declarations Act 1959*.

violence includes a threat of violence.

(2) The positions referred to in subparagraph (a) (vi) of the definition of ***competent person*** in subregulation (1) are:

(a) manager or coordinator of:

(i) a women's refuge; or

(ii) a crisis and counselling service that specialises in family violence; or

(b) a position with:

(i) decision-making responsibility for:

(A) a women's refuge; or

(B) a crisis and counselling service that specialises in family violence;

that has a collective decision-making structure; and

(ii) responsibility for matters concerning family violence within the operations of that refuge or crisis and counselling service.

1.22 References to person having suffered or committed family violence

(1) A reference in these Regulations to a person having suffered family violence is a reference to a person being taken, under regulation 1.23, to have suffered family violence.

(2) A reference in these Regulations to a person having committed family violence in relation to a person is a reference to a person being taken, under regulation 1.23, to have committed family violence in relation to that person.

1.23 When is a person taken to have suffered or committed family violence?

(1) For these Regulations, this regulation explains when:

(a) a person (the ***alleged victim***) is taken to have suffered family violence; and

(b) another person (the ***alleged perpetrator***) is taken to have committed family violence in relation to the alleged victim.

Note Schedule 2 sets out which visas may be granted on the basis of a person having suffered family violence. The criteria to be satisfied for the visa to be granted set out which persons may be taken to have suffered family violence, and how those persons are related to the spouse or de facto partner of the alleged perpetrator mentioned in this regulation.

Circumstances in which family violence is suffered and committed — injunction under Family Law Act 1975

(2) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if, on the application of the alleged victim, a court has granted an injunction under paragraph 114 (1) (a), (b) or (c) of the *Family Law Act 1975* against the alleged perpetrator.

(3) For subregulation (2), the violence, or part of the violence, that led to the granting of the injunction must have occurred while the married relationship between the alleged perpetrator and the spouse of the alleged perpetrator existed.

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Circumstances in which family violence is suffered and committed — court order

(4) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if:

(a) a court has made an order under a law of a State or Territory against the alleged perpetrator for the protection of the alleged victim from violence; and

(b) unless the alleged victim had, before 1 January 1998, claimed to Immigration to have suffered domestic violence committed by the alleged perpetrator — that order was made after the court had given the alleged perpetrator an opportunity to be heard, or otherwise to make submissions to the court, in relation to the matter.

(5) For subregulation (4), the violence, or part of the violence, that led to the granting of the order must have occurred while the married relationship or de facto relationship existed between the alleged perpetrator and the spouse or de facto partner of the alleged perpetrator.

Circumstances in which family violence is suffered and committed — conviction

(6) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if a court has:

(a) convicted the alleged perpetrator of an offence of violence against the alleged victim; or

(b) recorded a finding of guilt against the alleged perpetrator in respect of an offence of violence against the alleged victim.

(7) For subregulation (6), the violence, or part of the violence, that led to the conviction or recording of a finding of guilt must have occurred while the married relationship or de facto relationship existed between the alleged perpetrator and the spouse or de facto partner of the alleged perpetrator.

Circumstances in which family violence is suffered and committed — non-judicially determined claim of family violence

(8) For these Regulations, an application for a visa is taken to include a ***non-judicially determined claim of family violence*** if:

(a) the applicant seeks to satisfy a prescribed criterion that the applicant, or another person mentioned in the criterion, has suffered family violence; and

(b) the alleged victim and the alleged perpetrator have made a joint undertaking to a court 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.

(9) For these Regulations, an application for a visa is taken to include a ***non-judicially determined claim of family violence*** if:

(a) the applicant seeks to satisfy a prescribed criterion that the applicant, or another person mentioned in the criterion, has suffered family violence; and

(b) the alleged victim is:

(i) a spouse or de facto partner of the alleged perpetrator; or

(ii) a dependent child of:

(A) the alleged perpetrator; or

(B) the spouse or de facto partner of the alleged perpetrator; or

(C) both the alleged perpetrator and his or her spouse or de facto partner; or

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(iii) a member of the family unit of a spouse or de facto partner of the alleged perpetrator (being a member of the family unit who has made a combined application for a visa with the spouse or de facto partner); and

(c) the alleged victim or another person on the alleged victim's behalf has presented evidence in accordance with regulation 1.24 that:

(i) the alleged victim has suffered relevant family violence; and

(ii) the alleged perpetrator committed that relevant family violence.

(10) If an application for a visa includes a non-judicially determined claim of family violence:

(a) the Minister must consider whether the alleged victim has suffered relevant family violence; and

(b) if the Minister is satisfied that the alleged victim has suffered the relevant family violence, the Minister must consider the application on that basis; and

(c) if the Minister is not satisfied that the alleged victim has suffered the relevant family violence:

(i) the Minister must seek the opinion of an independent expert about whether the alleged victim has suffered the relevant family violence; and

(ii) the Minister must take an independent expert's opinion on the matter to be correct for the purposes of deciding whether the alleged victim satisfies a prescribed criterion for a visa that requires the applicant for the visa, or another person mentioned in the criterion, to have suffered family violence.

(11) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if:

(a) an application for a visa includes a non-judicially determined claim of family violence; and

(b) the Minister is satisfied under paragraph (10) (b) that the alleged victim has suffered relevant family violence.

(12) For subregulation (11), the Minister must be satisfied that the relevant family violence, or part of the relevant family violence, occurred while the married relationship or de facto relationship existed between the alleged perpetrator and the spouse or de facto partner of the alleged perpetrator.

(13) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if:

(a) an application for a visa includes a non-judicially determined claim of family violence; and

(b) the Minister is required by subparagraph (10) (c) (ii) to take as correct an opinion of an independent expert that the alleged victim has suffered relevant family violence.

(14) For subregulation (13), the violence, or part of the violence, that led to the independent expert having the opinion that the alleged victim has suffered relevant family violence must have occurred while the married relationship or de facto relationship existed between the alleged perpetrator and the spouse or de facto partner of the alleged perpetrator.

1.24 Evidence

(1) The evidence referred to in paragraph 1.23 (9) (c) is:

(a) a statutory declaration under regulation 1.25 (which deals with statutory declarations by or on behalf of alleged victims) together with:

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(i) a statutory declaration under regulation 1.26 (which deals with statutory declarations by competent persons); and

(ii) a copy of a record of an assault, allegedly committed by the alleged perpetrator, on:

(A) the alleged victim; or

(B) a member of the family unit of the alleged victim; or

(C) a member of the family unit of the alleged perpetrator;

that is a record kept by a police service of a State or Territory (other than a statement by the alleged victim or by the person allegedly assaulted); or

(b) a statutory declaration under regulation 1.25, together with 2 statutory declarations under regulation 1.26.

(2) A person must not submit, for the purposes of an application that relies on this Division, 2 statutory declarations by competent persons who both have a qualification specified in:

(a) the same subparagraph of paragraph (a) of the definition of ***competent person***; or

(b) subparagraph (b) (ii) of that definition.

1.25 Statutory declaration by alleged victim etc

(1) A statutory declaration under this regulation must be made by:

(a) the spouse of the alleged perpetrator; or

(b) if the alleged perpetrator is in an interdependent relationship with a person — that person.

(2) A statutory declaration under this regulation that is made by a person mentioned in subregulation 1.25 (1) who alleges that he or she is the victim of relevant family violence (within the meaning of subregulation 1.21 (1)) must:

(a) set out the allegation; and

(b) name the person alleged to have committed the relevant family violence; and

(c) if the conduct of the person alleged to have committed the relevant family violence was not towards the alleged victim:

(i) name the person whom the conduct of the alleged perpetrator was towards; and

(ii) identify the relationship between the maker of the statutory declaration and the person whom the conduct was towards.

(3) A statutory declaration under this regulation that is made by a person mentioned in subregulation 1.25 (1) who alleges that another person is the victim of relevant family violence (within the meaning of subregulation 1.21 (1)) must:

(a) name that other person; and

(b) set out the allegation; and

(c) identify the relationship of the maker of the statutory declaration to that other person; and

(d) name the person alleged to have committed the relevant family violence; and

(e) if the conduct of the person alleged to have committed the relevant family violence was not towards the alleged victim:

(i) name the person whom the conduct of the alleged perpetrator was towards; and

(ii) identify the relationship between the alleged victim and the person whom the conduct was towards; and

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(iii) identify the relationship between the maker of the statutory declaration and the person whom the conduct was towards; and

(f) set out the evidence on which the allegation is based.

1.26 Statutory declaration by competent person

A statutory declaration under this regulation:

(a) must be made by a competent person; and

(b) must set out the basis of the competent person's claim to be a competent person for the purposes of this Division; and

(c) must state that, in the competent person's opinion, relevant family violence (within the meaning of subregulation 1.21 (1)) has been suffered by a person; and

(d) must name the person who, in the opinion of the competent person, has suffered that relevant family violence; and

(e) must name the person who, in the opinion of the competent person, committed that relevant family violence; and

(f) if the conduct of the person alleged to have committed the relevant family violence was not towards the alleged victim:

(i) must name the person whom the conduct of the alleged perpetrator was towards; and

(ii) must identify the relationship between the alleged victim and the person whom the conduct was towards; and

(g) must set out the evidence on which the competent person's opinion is based.

1.27 Statutory declaration or statement not admissible in evidence

A statutory declaration made under regulation 1.25 or 1.26, or an opinion of an independent expert mentioned in paragraph 1.23 (10) (c) (i), is not admissible in evidence before a court or tribunal otherwise than in:

(a) an application for judicial review or merits review of a decision to refuse to grant a visa the application for which included the non-judicially determined claim of family violence to which the statutory declaration or opinion relates; or

(b) a prosecution of the maker of the statutory declaration under section 11 of the *Statutory Declarations Act 1959*.

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Division 1.5 Special provisions relating to family violence

1.21 Interpretation

(1) In this Division:

competent person means:

(a) in relation to family violence committed against an adult:

(i) a person registered as a medical practitioner under a law of a State or Territory providing for the registration of medical practitioners; or

(ii) a person registered as a psychologist under a law of a State or Territory providing for the registration of psychologists; or

(iii) a person who:

(A) is a registered nurse within the meaning of section 3 of the *Health Insurance Act 1973*; and

(B) is performing the duties of a registered nurse; or

(iv) a person who:

(A) is a member of the Australian Association of Social Workers or is recognised by that Association as a person who is eligible to be a member of that Association; and

(B) is performing the duties of a social worker; or

(v) a person who is a family consultant under the *Family Law Act 1975*; or

(vi) a person holding a position of a kind described in subregulation (2); or

(b) in relation to family violence committed against a child:

(i) a person referred to in paragraph (a); or

(ii) an officer of the child welfare or child protection authorities of a State or Territory.

independent expert means a person who:

(a) is suitably qualified to make independent assessments of non-judicially determined claims of family violence; and

(b) is employed by, or contracted to provide services to, an organisation that is specified, in a legislative instrument made by the Minister, for the purpose of making independent assessments of non-judicially determined claims of family violence.

non-judicially determined claim of family violence has the meaning given by subregulation 1.23 (1A).

relevant family violence has the meaning given by paragraph 1.23 (2) (b).

statutory declaration means a statutory declaration under the *Statutory Declarations Act 1959*.

violence includes a threat of violence.

(2) The positions referred to in subparagraph (a) (vi) of the definition of ***competent person*** in subregulation (1) are:

(a) manager or coordinator of:

(i) a women's refuge; or

(ii) a crisis and counselling service that specialises in family violence; or

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(b) a position with:

(i) decision-making responsibility for:

(A) a women's refuge; or

(B) a crisis and counselling service that specialises in family violence;

that has a collective decision-making structure; and

(ii) responsibility for matters concerning family violence within the operations of that refuge or crisis and counselling service.

1.22 References to person having suffered or committed family violence

(1) A reference in these Regulations to a person having suffered family violence is a reference to a person being taken, under regulation 1.23, to have suffered family violence.

(2) A reference in these Regulations to a person having committed family violence in relation to a person is a reference to a person being taken, under regulation 1.23, to have committed family violence in relation to that person.

1.23 When is a person taken to have suffered or committed family violence?

(1) For the purposes of these Regulations:

(a) a person (***the alleged victim***) is taken to have suffered family violence; and

(b) another person (***the alleged perpetrator***) is taken to have committed family violence in relation to the alleged victim;

if:

(c) on the application of the alleged victim, a court has granted an injunction under paragraph 114 (1) (a), (b) or (c) of the *Family Law Act 1975* against the alleged perpetrator; or

(d) a court has made an order under a law of a State or Territory against the alleged perpetrator for the protection of the alleged victim from violence and, unless the alleged victim had, before 1 January 1998, claimed to Immigration to have suffered domestic violence committed by the alleged perpetrator, that order was made after the court had given the alleged perpetrator an opportunity to be heard, or otherwise to make submissions to the court, in relation to the matter; or

(e) a court has convicted the alleged perpetrator of, or has recorded a finding of guilt against the alleged perpetrator in respect of, an offence of violence against the alleged victim; or

(f) the Minister is satisfied, for paragraph (1B) (a), that the alleged victim has suffered relevant family violence; or

(g) the Minister is required by subregulation (1C) to take as correct an opinion of an independent expert that the alleged victim has suffered relevant family violence.

(1A) For these Regulations, an application for a visa is taken to include a ***non-judicially determined claim of family violence*** if:

(a) the applicant seeks to satisfy a prescribed criterion that the applicant, or another person mentioned in the criterion, has suffered family violence; and

(b) either of the following circumstances exists:

(i) the alleged victim and the alleged perpetrator have made a joint undertaking to a court 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;

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(ii) for an alleged victim who is a person referred to in subregulation (2) — the alleged victim or another person on the alleged victim's behalf has presented evidence in accordance with regulation 1.24 that:

(A) the alleged victim has suffered relevant family violence; and

(B) the alleged perpetrator has committed that relevant family violence.

(1B) If an application for a visa includes a non-judicially determined claim of family violence, the Minister must consider whether the alleged victim has suffered relevant family violence (whichever of the circumstances mentioned in paragraph (1A) (b) exists) and:

(a) if satisfied that the alleged victim has suffered relevant family violence — consider the application on that basis; or

(b) if not satisfied that the alleged victim has suffered relevant family violence — seek the opinion of an independent expert about whether the alleged victim has suffered relevant family violence.

(1C) The Minister must take an independent expert's opinion on the matter mentioned in paragraph (1B) (b) to be correct for the purposes of deciding whether the alleged victim satisfies a prescribed criterion for a visa that requires the applicant for the visa, or another person mentioned in the criterion, to have suffered family violence.

(2) In subparagraph (1A) (b) (ii):

(a) the persons referred to are the following:

(i) a spouse of the alleged perpetrator;

(ii) a dependent child of:

(A) the alleged perpetrator; or

(B) the spouse of the alleged perpetrator; or

(C) both the alleged perpetrator and his or her spouse; or

(D) a person in an interdependent relationship with the alleged perpetrator;

(iii) a member of the family unit of a spouse of the alleged perpetrator (being a member of the family unit who has made a combined application for a visa with the spouse);

(iv) a person who is in an interdependent relationship with the alleged perpetrator; and

(b) a reference to relevant family violence is a reference to conduct, whether actual or threatened, towards:

(i) the 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.

1.24 Evidence

(1) The evidence referred to in subparagraph 1.23 (1A) (b) (ii) is:

(a) a statutory declaration under regulation 1.25 (which deals with statutory declarations by or on behalf of alleged victims) together with:

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(i) a statutory declaration under regulation 1.26 (which deals with statutory declarations by competent persons); and

(ii) a copy of a record of an assault, allegedly committed by the alleged perpetrator, on:

(A) the alleged victim; or

(B) a member of the family unit of the alleged victim; or

(C) a member of the family unit of the alleged perpetrator;

that is a record kept by a police service of a State or Territory (other than a statement by the alleged victim or by the person allegedly assaulted); or

(b) a statutory declaration under regulation 1.25, together with 2 statutory declarations under regulation 1.26.

(2) A person must not submit, for the purposes of an application that relies on this Division, 2 statutory declarations by competent persons who both have a qualification specified in:

(a) the same subparagraph of paragraph (a) of the definition of ***competent person***; or

(b) subparagraph (b) (ii) of that definition.

1.25 Statutory declaration by alleged victim etc

(1) A statutory declaration under this regulation must be made by:

(a) the spouse of the alleged perpetrator; or

(b) if the alleged perpetrator is in an interdependent relationship with a person — that person.

(2) A statutory declaration under this regulation that is made by a person mentioned in subregulation 1.25 (1) who alleges that he or she is the victim of relevant family violence (within the meaning of paragraph 1.23 (2) (b)) must:

(a) set out the allegation; and

(b) name the person alleged to have committed the relevant family violence; and

(c) if the conduct of the person alleged to have committed the relevant family violence was not towards the alleged victim:

(i) name the person whom the conduct of the alleged perpetrator was towards; and

(ii) identify the relationship between the maker of the statutory declaration and the person whom the conduct was towards.

(3) A statutory declaration under this regulation that is made by a person mentioned in subregulation 1.25 (1) who alleges that another person is the victim of relevant family violence (within the meaning of paragraph 1.23 (2) (b)) must:

(a) name that other person; and

(b) set out the allegation; and

(c) identify the relationship of the maker of the statutory declaration to that other person; and

(d) name the person alleged to have committed the relevant family violence; and

(e) if the conduct of the person alleged to have committed the relevant family violence was not towards the alleged victim:

(i) name the person whom the conduct of the alleged perpetrator was towards; and

(ii) identify the relationship between the alleged victim and the person whom the conduct was towards; and

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(iii) identify the relationship between the maker of the statutory declaration and the person whom the conduct was towards; and

(f) set out the evidence on which the allegation is based.

1.26 Statutory declaration by competent person

A statutory declaration under this regulation:

(a) must be made by a competent person; and

(b) must set out the basis of the competent person's claim to be a competent person for the purposes of this Division; and

(c) must state that, in the competent person's opinion, relevant family violence (within the meaning of paragraph 1.23 (2) (b)) has been suffered by a person; and

(d) must name the person who, in the opinion of the competent person, has suffered that relevant family violence; and

(e) must name the person who, in the opinion of the competent person, committed that relevant family violence; and

(f) if the conduct of the person alleged to have committed the relevant family violence was not towards the alleged victim:

(i) must name the person whom the conduct of the alleged perpetrator was towards; and

(ii) must identify the relationship between the alleged victim and the person whom the conduct was towards; and

(g) must set out the evidence on which the competent person's opinion is based.

1.27 Statutory declaration or statement not admissible in evidence

A statutory declaration made under regulation 1.25 or 1.26, or an opinion of an independent expert mentioned in paragraph 1.23 (1B) (b), is not admissible in evidence before a court or tribunal otherwise than in:

(a) an application for judicial review or merits review of a decision to refuse to grant a visa the application for which included the non-judicially determined claim of family violence to which the statutory declaration or opinion relates; or

(b) a prosecution of the maker of the statutory declaration under section 11 of the *Statutory Declarations Act 1959*.

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Division 1.5 Special provisions relating to domestic violence

1.21 Interpretation

(1) In this Division:

competent person means:

(a) in relation to domestic violence committed against an adult:

(i) a person registered as a medical practitioner under a law of a State or Territory providing for the registration of medical practitioners; or

(ii) a person registered as a psychologist under a law of a State or Territory providing for the registration of psychologists; or

(iii) a person who:

(A) is a registered nurse within the meaning of section 3 of the *Health Insurance Act 1973*; and

(B) is performing the duties of a registered nurse; or

(iv) a person who:

(A) is a member of the Australian Association of Social Workers or is recognised by that Association as a person who is eligible to be a member of that Association; and

(B) is performing the duties of a social worker; or

(v) a person who is a court counsellor under the *Family Law Act 1975*; or

(vi) a person holding a position of a kind described in subregulation (2); or

(b) in relation to domestic violence committed against a child:

(i) a person referred to in paragraph (a); or

(ii) an officer of the child welfare or child protection authorities of a State or Territory.

independent expert means a person who:

(a) is suitably qualified to make independent assessments of non-judicially determined claims of domestic violence; and

(b) is employed by, or contracted to provide services to, an organisation that is specified, in a legislative instrument made by the Minister, for the purpose of making independent assessments of non-judicially determined claims of domestic violence.

non-judicially determined claim of domestic violence has the meaning given by subregulation 1.23 (1A).

relevant domestic violence has the meaning given by paragraph 1.23 (2) (b).

statutory declaration means a statutory declaration under the *Statutory Declarations Act 1959*.

violence includes a threat of violence.

(2) The positions referred to in subparagraph (a) (vi) of the definition of ***competent person*** in subregulation (1) are:

(a) manager or coordinator of:

(i) a women's refuge; or

(ii) a crisis and counselling service that specialises in domestic violence; or

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(b) a position with:

(i) decision-making responsibility for:

(A) a women's refuge; or

(B) a crisis and counselling service that specialises in domestic violence;

that has a collective decision-making structure; and

(ii) responsibility for matters concerning domestic violence within the operations of that refuge or crisis and counselling service.

1.22 References to person having suffered or committed domestic violence

(1) A reference in these Regulations to a person having suffered domestic violence is a reference to a person being taken, under regulation 1.23, to have suffered domestic violence.

(2) A reference in these Regulations to a person having committed domestic violence in relation to a person is a reference to a person being taken, under regulation 1.23, to have committed domestic violence in relation to that person.

1.23 When is a person taken to have suffered or committed domestic violence?

(1) For the purposes of these Regulations:

(a) a person (***the alleged victim***) is taken to have suffered domestic violence; and

(b) another person (***the alleged perpetrator***) is taken to have committed domestic violence in relation to the alleged victim;

if:

(c) on the application of the alleged victim, a court has granted an injunction under paragraph 114 (1) (a), (b) or (c) of the *Family Law Act 1975* against the alleged perpetrator; or

(d) a court has made an order under a law of a State or Territory against the alleged perpetrator for the protection of the alleged victim from violence and, unless the alleged victim had, before 1 January 1998, claimed to Immigration to have suffered domestic violence committed by the alleged perpetrator, that order was made after the court had given the alleged perpetrator an opportunity to be heard, or otherwise to make submissions to the court, in relation to the matter; or

(e) a court has convicted the alleged perpetrator of, or has recorded a finding of guilt against the alleged perpetrator in respect of, an offence of violence against the alleged victim; or

(f) the Minister is satisfied, for paragraph (1B) (a), that the alleged victim has suffered relevant domestic violence; or

(g) the Minister is required by subregulation (1C) to take as correct an opinion of an independent expert that the alleged victim has suffered relevant domestic violence.

(1A) For these Regulations, an application for a visa is taken to include a ***non-judicially determined claim of domestic violence*** if:

(a) the applicant seeks to satisfy a prescribed criterion that the applicant, or another person mentioned in the criterion, has suffered domestic violence; and

(b) either of the following circumstances exists:

(i) the alleged victim and the alleged perpetrator have made a joint undertaking to a court in relation to proceedings in which an allegation is before the court that

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the alleged perpetrator has committed an act of violence against the alleged victim;

(ii) for an alleged victim who is a person referred to in subregulation (2) — the alleged victim or another person on the alleged victim's behalf has presented evidence in accordance with regulation 1.24 that:

(A) the alleged victim has suffered relevant domestic violence; and

(B) the alleged perpetrator has committed that relevant domestic violence.

(1B) If an application for a visa includes a non-judicially determined claim of domestic violence, the Minister must consider whether the alleged victim has suffered relevant domestic violence (whichever of the circumstances mentioned in paragraph (1A) (b) exists) and:

(a) if satisfied that the alleged victim has suffered relevant domestic violence — consider the application on that basis; or

(b) if not satisfied that the alleged victim has suffered relevant domestic violence — seek the opinion of an independent expert about whether the alleged victim has suffered relevant domestic violence.

(1C) The Minister must take an independent expert's opinion on the matter mentioned in paragraph (1B) (b) to be correct for the purposes of deciding whether the alleged victim satisfies a prescribed criterion for a visa that requires the applicant for the visa, or another person mentioned in the criterion, to have suffered domestic violence.

(2) In subparagraph (1A) (b) (ii):

(a) the persons referred to are the following:

(i) a spouse of the alleged perpetrator;

(ii) a dependent child of:

(A) the alleged perpetrator; or

(B) the spouse of the alleged perpetrator; or

(C) both the alleged perpetrator and his or her spouse; or

(D) a person in an interdependent relationship with the alleged perpetrator;

(iii) a member of the family unit of a spouse of the alleged perpetrator (being a member of the family unit who has made a combined application for a visa with the spouse);

(iv) a person who is in an interdependent relationship with the alleged perpetrator; and

(b) a reference to relevant domestic violence is a reference to violence against the alleged victim or his or her property that causes the alleged victim, or a member of the alleged victim's family, to fear for, or to be apprehensive about, the alleged victim's personal well-being or safety.

1.24 Evidence

(1) The evidence referred to in subparagraph 1.23 (1A) (b) (ii) is:

(a) a statutory declaration under regulation 1.25 (which deals with statutory declarations by or on behalf of alleged victims) together with:

(i) a statutory declaration under regulation 1.26 (which deals with statutory declarations by competent persons); and

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(ii) a copy of a record of an assault on the alleged victim allegedly committed by the alleged perpetrator, being a record kept by a police service of a State or Territory (other than a statement by the alleged victim); or

(b) a statutory declaration under regulation 1.25, together with 2 statutory declarations under regulation 1.26.

(2) A person must not submit, for the purposes of an application that relies on this Division, 2 statutory declarations by competent persons who both have a qualification specified in:

(a) the same subparagraph of paragraph (a) of the definition of ***competent person***; or

(b) subparagraph (b) (ii) of that definition.

1.25 Statutory declaration by alleged victim etc

(1) A statutory declaration under this regulation must be made by:

(a) the spouse of the alleged perpetrator; or

(b) if the alleged perpetrator is in an interdependent relationship with a person — that person.

(2) A statutory declaration under this regulation that is made by a person who alleges that he or she is the victim of relevant domestic violence (within the meaning of paragraph 1.23 (2) (b)) must:

(a) set out the allegation; and

(b) name the person alleged to have committed the relevant domestic violence.

(3) A statutory declaration under this regulation that is made by a person who alleges that another person is the victim of relevant domestic violence (within the meaning of paragraph 1.23 (2) (b)) must:

(a) name that other person; and

(b) set out the allegation; and

(c) identify the relationship of the maker of the statutory declaration to that other person; and

(d) name the person alleged to have committed the relevant domestic violence; and

(e) set out the evidence on which the allegation is based.

1.26 Statutory declaration by competent person

A statutory declaration under this regulation:

(a) must be made by a competent person; and

(b) must set out the basis of the competent person's claim to be a competent person for the purposes of this Division; and

(c) must state that, in the competent person's opinion, relevant domestic violence (within the meaning of paragraph 1.23 (2) (b)) has been suffered by a person; and

(d) must name the person who, in the opinion of the competent person, has suffered that relevant domestic violence; and

(e) must name the person who, in the opinion of the competent person, committed that relevant domestic violence; and

(f) must set out the evidence on which the competent person's opinion is based.

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1.27 Statutory declaration or statement not admissible in evidence

A statutory declaration made under regulation 1.25 or 1.26, or an opinion of an independent expert mentioned in paragraph 1.23 (1B) (b), is not admissible in evidence before a court or tribunal otherwise than in:

(a) an application for judicial review or merits review of a decision to refuse to grant a visa the application for which included the non-judicially determined claim of domestic violence to which the statutory declaration or opinion relates; or

(b) a prosecution of the maker of the statutory declaration under section 11 of the *Statutory Declarations Act 1959*.

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PARTNER VISAS:

SUBCLASSES 309/100 AND 820/801

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Overview[1]

The Partner Subclass 820 and 801 (onshore) and 309 and 100 (offshore) visas are designed for people who are spouses or de facto partners of Australian citizens, Australian permanent residents or eligible New Zealand citizens and who seek to enter and remain in Australia permanently.

The key requirement of Partner visas is that the visa applicant is in a 'spouse' or 'de facto' relationship with his or her sponsoring partner. See the 'Spouse and de facto partner' commentary.

There is a two-stage process before a permanent visa is granted, for both onshore and offshore applicants. Applicants apply for temporary and permanent visas at the same time and are initially assessed against the temporary visa criteria. The relevant subclasses are:

Onshore:

- Subclass 820 (Partner) (Temporary)
- Subclass 801 (Partner) (Residence)

Offshore:

- Subclass 309 (Partner) (Provisional)
- Subclass 100 (Partner) (Migrant)

This commentary examines these four subclasses. For more information on other subclasses see: Partner Visas Overview.

This commentary examines the post 1 July 2009 requirements. For visa applications lodged before 1 July 2009 please contact MRD Legal Services.

Tribunal's jurisdiction

A decision to refuse to grant a Subclass 820 and 801 visa is a Part 5 reviewable decision under s 338(2) of the *Migration Act 1958* (Cth) (the Act). The visa applicant has standing to apply for review if they are onshore at the time of application for review.[2]

A decision made on or after 27 February 2021 to refuse to grant a subclass 309 visa is reviewable under s 338(9) of the *Migration Act 1958* (Cth) (the Act), if the visa was applied for before the end of the concession period in reg 1.15N(1)[3] the applicant was outside Australia when the visa application was made but was in Australia at any time during the concession

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[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] ss 347(2)(a), 347(3).
[3] As at the date of publication the Minister has not yet prescribed under reg 1.15N(2) the end date for the concession period.

period (which commenced on 1 February 2020) and at the time the decision was made.[4] It is the sponsor who has standing to bring the review application.[5]

Where the decision to refuse the Subclass 309 visa was made before 27 February 2021, or any one of the circumstances in relation to the time of applying for the visa and/or the location of the applicant described above do not apply, the decision is reviewable under s 338(5) provided the visa applicant was sponsored in accordance with s 338(5)(b).[6] The sponsor has the review right in these cases.[7]

A decision to refuse to grant a Subclass 100 visa is only a Part 5 reviewable decision under s 338(7A) of the Act where the visa applicant was onshore at the time of the refusal decision and at the time of the review application.[8] Only the visa applicant has standing to apply for review in these cases.[9] Accordingly if the holder of the Subclass 309 visa is outside Australia at the time of the refusal decision on their Subclass 100 visa, there is no merits review right for that decision.

Where the visa applicant specifies in the same review application that he/she is seeking review of both the Subclass 820 and 801 refusal decisions, there is no capacity to combine review applications of these two reviewable decisions in respect of the one individual in a single review application.[10] In those circumstances the Tribunal must make a finding of fact as to which decision is reviewable. There is, however, no impediment to a person lodging a separate review application in respect of each decision provided each application meets the requirements for a valid review application.[11]

Requirements for a valid visa application

Onshore applications – Subclasses 820 and 801

The requirements for a valid application for Subclass 820 and 801 visas are contained at Items 1214C and 1124B of Schedule 1 to the *Migration Regulations 1994* (Cth) (the

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[4] s 338(9) and reg 4.02(4)(s). If the review is of the refusal of a Subclass 309 visa which is a converted application from a Subclass 300 visa under reg 2.08E(2), i.e. the applicant applied for a Subclass 300 visa and, after the visa application was made but before it was decided by the delegate, the parties married and notified Immigration of the marriage, then under reg 2.08E(2) the application is taken to be a valid application for a Subclass 309 visa, and the visa applicant is onshore at the time they notified Immigration of the marriage (i.e. the day the visa application for the Subclass 309 visa is taken to have been made); and the visa applicant applied for the visa before the end of the concession period in reg 1.15N(1) and was in Australia at any time during the concession period described in reg 1.15N(1), then the decision to refuse the Subclass 309 in those circumstances, is a reviewable decision under s 338(2). The visa applicant has standing to bring the review application (s 347(2)(a)).

[5] reg 4.02(5)(r).

[6] s 338(5). This is because cls 300.412(2) and 309.412(2), as inserted by F2021L00136 and which allows for the visa to be granted onshore, does not apply in these circumstances, meaning that the visa can only be granted offshore. Although cls 300.412(2)(c)(ii) and 309.412(2)(c(ii) refer to the visa applicant being 'in Australia… when the visa is *granted*', for the purposes of the Tribunal determining its jurisdiction it is necessary to read this as requiring the visa applicant to be 'in Australia… when the visa is *refused*'. As the Tribunal does not review decisions to grant a visa, a literal interpretation would render a decision to refuse the visa un-reviewable in the MRD and would be contrary to the intention of the amendments: Explanatory Statement to F2021L00136, p.13.

[7] s 347(2)(b).

[8] s 347(3A).

[9] s 347(2)(a).

[10] reg 4.12. Combining applications would also be inapplicable for Subclass 309 and 100 refusal decisions as the same person does not have standing to apply for review of each decision under s 347.

[11] See *Basra v MIBP* [2018] FCA 422 at [35]–[41] where Moshinsky J held that the Tribunal dealing with a Subclass 801 visa did not have jurisdiction to also review a Subclass 820 visa decision, as this had already been dealt with by another Tribunal. While this contrasts with another decision of the Federal Court in *Bojanovic v MIMA* [2002] FCA 113, where Mansfield J was of the view that the single application to the Tribunal identifying both decisions 'obliged' the Tribunal to consider both, *Basra* is a much more recent authority and it has been followed by the Federal Circuit Court in *Mohammed v MIBP* [2018] FCCA 2893 and *Tam & Anor v MIBP* [2018] FCCA 328 as the correct approach.

Regulations). These include that the application must be made on a specified form, the applicant must be in Australia, but not in immigration clearance and holders of certain subclasses of visa must have held those for at least 2 years.

At the same time and place as making the 820 visa application the applicant must also apply for a Partner (Residence) (class BS) visa (the Subclass 801 visa). The 801 visa application must also be accompanied by the applicable application charge.

When applying for the subclass 801, if the applicant holds a Subclass 820 or Subclass 309 visa at the time of making the application, the applicant must not have had a Partner visa (Subclass 100, 110, 309, 310, 801, 814, 820, 826) refused in the 21 days immediately before making the application for the Subclass 801 visa.[12]

From 14 September 2009, a person who has had a visa refused or cancelled onshore and would otherwise be unable to make a further visa application onshore where s 48 of the Act applied, may be able to make an application for an onshore partner visa.[13] However, these persons are required to meet further Schedule 1 requirements as follows:

- that she/he has not been refused a Partner visa (Subclass 100, 110, 309, 310, 801, 814, 820, 826) since last entering Australia;[14]
- that she/he has provided with the application a signed sponsorship form by the sponsoring partner who is an Australian citizen, Australian permanent resident or eligible New Zealand citizen who claims to be the spouse or de facto partner and two statutory declarations from Australian citizens, permanent residents or eligible New Zealand citizens who are not the partner declaring the applicant and the partner are in a married or de facto relationship.[15]

Offshore applications – Subclasses 309 and 100

The requirements for a valid application for Subclass 309 and Subclass 100 visas are contained at Items 1220A and 1129 respectively of sch 1 to the Regulations. These include that the application be made on the approved form and the applicant be outside Australia (for subclass 100 certain visa holders may apply inside or outside Australia). The Subclass 309 application must be made at the same time and place as the Subclass 100 visa and the Subclass 100 visa application must be accompanied by the application charge.

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[12] Item 1124B(3)(d)
[13] reg 2.12(1)(a), (b), inserted by *Migration Amendment Regulations 2009* (No 10) (Cth) (SLI 2009, No 229). The amendments apply to applications for a visa made on or after 14 September 2009.
[14] This requirement is in item 1124B(3)(e), inserted by SLI 2011, No 105 for applications made on or after 1 July 2011; for applications between 14 September 2009 and 30 June 2011 the requirement in item 1214C(3)(h) (as in force) was only that they had not been subject to visa refusal or cancellation under s 501. Alternatively, a person will be taken to have met the requirement in item 1124B(3)(e) if they claim to be a dependent child of someone who has met the requirement: item 1124B(3A) (or for applications made between 14 September 2009 and 30 June 2011, in item 1214C(3)(i)). For applications made on or after 1 July 2011, an applicant who has left and re-entered the migration zone while holding a bridging visa is taken to have been continuously in the migration zone: item 1124B(3A)(b).
[15] Item 1124B(3)(e). Alternatively, a person will be taken to have met the requirement in item 1124B(3)(e) if they claim to be a dependent child of someone who has met the requirement: item 1124B(3A). For applications made on or after 1 July 2011, the Regulations also require that the statutory declarations were declared no more than 6 weeks before the day on which the application for the Partner (Residence) (Class BS) was made: item 1124B(3)(e)(iii)(C), and an applicant who has left and re-entered the migration zone while holding a bridging visa is taken to have been continuously in the migration zone: item 1124B(3A)(b).

Visa criteria

Temporary visas - Subclass 309 and 820

For both the Subclass 309 and 820 visas there are time of application and time of decision criteria.

Time of Application

Both Subclass 309 and 820 visas have the following time of application criteria:[16]

- **spouse or de facto partner of an Australian citizen, permanent resident, eligible NZ citizen or intention to marry**
    - the applicant must be the spouse or de facto partner of an Australian citizen, Australian permanent resident or eligible New Zealand citizen.[17]
    - 'Spouse' is defined in s 5F or the Act and 'de facto relationship' is defined in s 5CB of the Act and supplemented by regs 1.15A and 1.09A respectively. These definitions are discussed below.
    - *For Subclass 309*, alternatively, he or she must intend to marry such a person under a marriage that is a valid marriage under the Act.[18]
    - *For Subclass 820* there are two exceptions to this requirement:

      (i) If the applicant holds a Subclass 300 visa, validly married the sponsoring partner and the sponsoring partner has died, the applicant would otherwise have continued to be the spouse of the sponsoring partner, and has developed close business, cultural or personal ties in Australia;[19] or

      (ii) If the applicant holds or held a Subclass 300 visa, validly married the sponsoring partner (while on that visa, if not the holder of a substantive visa) but that relationship has ceased and the applicant, a family unit member of the applicant and/or a dependent child of the applicant or sponsoring partner has suffered family violence;[20]
- **not a prohibited sponsor (woman at risk)** - the spouse, de facto partner or intended spouse of the applicant is prohibited from being a sponsoring partner if she is a woman who was granted a Subclass 204 (Woman at Risk) visa within the 5 years immediately preceding the application; and on the date of grant of that visa the applicant is a male person and was a former spouse or de facto partner of that woman, having been divorced or permanently separated from that woman, or the applicant was the spouse

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[16] Note that prior to 1 January 2012, for a Subclass 309 visa, it was also a criterion for the grant of the visa that an Assurance of support, if requested, had been accepted: cl 309.227. Clause 309.227, and its secondary criterion equivalent, cl 309.325, were omitted by *Migration Legislation Amendment Regulations 2011* (No 2) (Cth) (SLI 2011, No 250) in respect of visa applications made, but not finally determined by 1 January 2012, as well as those made on or after that date.
[17] cls 309.211(2), 820.211(2)(a)(i).
[18] cl 309.211(3). See Valid Marriage for the Purpose of the Act.
[19] cl 820.211(7). For guidance on the 'death exception', see Partner Visas – Exceptions to Relationship Requirement – Death/Child.
[20] cls 820.211(8), (9). See: Family Violence

or de facto partner of that woman and that relationship had not been declared to Immigration;[21]

- **sponsored -** the Australian citizen, permanent resident, or eligible New Zealand citizen with whom the applicant is in a spouse /de facto relationship, or, in the case of a Subclass 309, who the applicant intends to marry, must have sponsored the applicant.[22] Note that if the applicant's spouse (or intended spouse) is under 18, the (intended) spouse's guardian or parent must be the sponsor.[23]

Additional time of application criteria for Subclass 820:

- **visa status** - the applicant must not hold a Subclass 771 (Transit) Visa;[24]
- **additional requirements if no substantive visa** - if the applicant does not hold a substantive visa, the applicant must either:
    - satisfy Schedule 3 criteria (3001, 3003, 3004) unless the Minister is satisfied there are compelling reasons or must have entered Australia on a diplomatic (Subclass 995) or special purpose visa under the SOFA forces agreement and satisfy Schedule 3 criterion 3002;[25] or
    - have entered Australia as the holder of a Subclass 300 visa or while engaged to, or intending to marry, an Australian citizen or permanent resident and have subsequently married him or her;[26]
- **Subclass 300 holders** - if the applicant holds a Prospective Marriage (Subclass 300) visa, and cannot meet the spouse/de facto, sponsorship and visa or Schedule 3 requirements of cl 820.211(2), he or she must have validly married the sponsoring partner;[27]
- **complied substantially with previous visa conditions** - applicants who hold certain visas must have also substantially complied with conditions to which the visa was subject.[28]

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[21] cls 309.212, 820.211(2)(a)(ii). The purpose of this clause is to maintain the integrity of the 'Woman at Risk' component of the offshore humanitarian program.
[22] cls 309.213, 820.211(2)(c)(i), 820.211(5)(f)(i), 820.211(6)(c).
[23] cls 309.213(1)(b), (2)(b), 820.211(2)(c)(ii), 820.211(5)(f)(ii), 820.211(6)(c)(ii). The parent / guardian must be over 18 and be an Australian citizen, permanent resident or eligible New Zealand citizen. For visa applications made on or after 1 July 2009, this requirement only applies to 'spouses' as defined in s 5F (i.e. married) as de facto partners must be at least 18 years for the purposes of a visa application: reg 2.03A.
[24] cl 820.211(1)(a).
[25] cl 820.211(2)(d). Clause 820.211(2A) applies to applicants who are SOFA members or civilian component members or dependent children of such members with a valid national passport and dependent child certificate of a SOFA member. Regulation 1.03 defines Status of Forces Agreement (SOFA) forces members and SOFA forces civilian component members
[26] cl 820.211 (5), (9), and, for visa applications made before 22 March 2014, cls 820.211(3), (4). Clauses 820.211(3), (4) were repealed for visa applications made on or after 22 March 2014: SLI 2014, No 30.
[27] cl 820.211(6)(b).
[28] cl 820.212 applies in certain circumstances where the applicant has held one of the following visas: Skilled – Independent Regional (Provisional) (Class UX); Subclass 475 (Skilled – Regional Sponsored); Subclass 487 (Skilled – Regional Sponsored); Skilled – Regional Sponsored (Provisional) (Class SP).

Time of Decision

- **Continue to meet certain time of application requirements**
  - The visa applicant must continue to be the spouse or de facto partner of the sponsoring partner;[29]
  - *For Subclass 309* where the application was based upon an intended marriage, the intended marriage must have taken place;[30]
  - There are three exceptions to continuing to meet the partner relationship requirements in cl 820.211(2), (5) or (6) and in certain circumstances, exceptions that also apply to the requirements in cl 309.211(2) or (3).[31] The exceptions are:
    - (i) the sponsoring partner has died and the applicant would have continued to be the spouse or de facto partner of the sponsoring partner if the sponsoring partner had not died.[32] Additionally, for a Subclass 820 visa, the applicant must also have developed close business, cultural or personal ties in Australia;[33]
    - (ii) the relationship has ceased and the applicant and/or a dependent child of the applicant or sponsoring partner has suffered domestic/family violence committed by the sponsoring partner;[34]
    - (iii) the relationship has ceased and the applicant has custody of or access to, or a residence or contact order relating to a child in respect of whom the sponsoring partner has a child maintenance obligation, or has been granted custody or access, or has a residence or contact order.[35]
- **sponsorship approved** - the sponsorship must be approved by the Minister and still be in force.[36]
- **disclosure of convictions for relevant offence(s)** - for visa applications lodged on or after 18 November 2016 the sponsor has consented to the disclosure to each applicant included in the sponsorship of any conviction for a relevant offence[37] unless

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[29] cls 309.221, 820.221 which requires that the applicant continue to meet the applicable requirements of cl.820.211.
[30] cl 309.224, which also requires that the spouse relationship is continuing.
[31] Additional requirements apply to a Subclass 309 visa that do not apply to a Subclass 820. These are that the applicant is in Australia and cl 309.412(4) would apply (i.e. that the decision to grant the visa is made after 26 February 2021 while the applicant was onshore and they were onshore at any time during the concession period defined in reg 1.15N(1)). The exceptions were inserted into Part 309 of Schedule 2 to the Regulations by Part 1 of Schedule 1 to the *Migration Amendment (Subclass 100 and 309 visas) Regulations 2022* (Cth) (F2022L01093) and apply in relation to a decision to grant or not to grant a Subclass 100 or 309 visa made on or after 20 August 2022, whether the application for the visa was made before, on or after that date: item 10 of F2022L01093
[32] cl 820.221(2) and, if the applicant is in Australia and cl 309.412(4) would apply, cl 309.221(2). See also below Exceptions – Death.
[33] cl 820.221(2)(c).
[34] cl 820.221(3) and, if the applicant is in Australia and cl 309.412(4) would apply, cl 309.221(3). . See also below, Exceptions-Family Violence
[35] cl 820.221(3) and, if the applicant is in Australia and cl 309.412(4) would apply, cl 309.221(3). See also below, Exceptions - Child.
[36] cls 309.222, 820.221(4). Regulations 1.20J, 1.20KA, 1.20KB, 1.20KC limit the Minister's power to approve certain Sponsorships. For a discussion of the limitations on sponsorships, see Limitation on Sponsorship - Partner Visas.
[37] cls 309.222(2). The meaning of 'relevant offence' is set out in reg 1.20KC(2); for further discussion see Limitation on Sponsorship – Partner Visas.

the conviction has been quashed or otherwise nullified or the sponsor has been pardoned in relation to the conviction and the effect of that pardon is that the sponsor is taken never to have been convicted of the offence.[38]

- **public interest criteria / special return criteria**
  - the applicant and family members must satisfy certain public interest criteria relating to considerations including health, character, security, foreign relations, debt to the Commonwealth, Australian values, child welfare, intends to live permanently, passports, and the provision of false or misleading information.[39]
  - Subclass 309 applicants and family members who have previously been in Australia, must also satisfy special return criteria;[40]
- Note that even members of the applicant's family unit who are **not** applicants for the visa must satisfy certain public interest criteria.[41]
- **passport**
  - the applicant must meet certain passport requirements. The content and the source of this requirement differ depending upon the date of visa application.[42]

Permanent visas - Subclasses 100 and 801

There are no time of application criteria for Subclasses 100 and 801. This is because, with limited exceptions, the applicant will have already been assessed against the time of application criteria for the provisional temporary visa.

The primary criteria for the grant of a Subclass 100 and 801 permanent partner visa are:[43]

- **holder of a provisional partner visa**
  - with exceptions, the applicant must hold a temporary partner visa;[44]

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[38] cls 309.222(2), (3), 820.221(4), (5). The meaning of 'relevant offence' is set out in reg 1.20KC(2); for further discussion see Limitation on Sponsorship – Partner Visas.
[39] cls 309.225, 309.228, 820.223 – 820.225, requiring compliance with PIC 4001 – 4004, 4007, 4009, 4015, 4016, 4019 – 4021.
[40] Special return criteria 5001 and 5002: cls 309.226, 309.228(1)(b).
[41] Members of the applicant's family unit who are not applicants for a Subclass 309 visa must satisfy PIC 4001 – 4004 and, unless it is unreasonable, PIC 4007: cls 309.228(2), 820.224(1A).
[42] For visa applications made on or after 1 July 2005 but before 24 November 2012, the requirement was contained in cls 309.230, 820.226 (inserted by *Migration Amendment Regulations 2005* (No 4) (Cth) (SLI2005, No 134) and omitted by SLI 2012, No 256). For visa applications made on or after 24 November 2012, PIC 4021, which was inserted into cls 309.225, 820.226 by SLI 2012, No 256 applies.
[43] Note that prior to 1 January 2012, it was also a criterion for the grant of a Subclass 100 and 801 visa that an Assurance of support, if requested, had been accepted. (cls 100.223, 801.222). Clauses 100.223, 801.222, and their secondary criteria equivalent, cls 100.323, 801.322, were omitted by SLI 2011, No 250 in respect of visa applications made, but not finally determined by 1 January 2012, as well as those made on or after that date.
[44] cls 100.221(2), 100.221(2A), 801.221(2), 801.221(2A), 801.221(3), 801.221(4), 801.221(5), 801.221(6). For visa applications made before 22 March 2014, certain Subclass 100 visa applicants who had held a Subclass 309 visa but subsequently departed Australia do not need to be current temporary partner visa holders: cl 100.221(2)(a)(ii), amended from 22 March 2014 by SLI 2014, No 30. An applicant is not required to hold a temporary partner visa if he or she previously held one which ceased on notification of the decision to refuse the permanent visa, the decision was reviewed by a Tribunal, and the Tribunal remitted the primary decision, or decided that all the other criteria for the grant of the permanent visa have been satisfied except for the requirement that the applicant hold a temporary visa: cls 100.221(4A), 801.221(8). For further information, see Requirement to hold a temporary partner visa.

- **spouse / de facto partner**
  - the applicant must be the spouse or de facto partner of the sponsoring partner,[45] except where the sponsoring partner has died,[46] or where the relationship has ceased and the applicant (or a member of the applicant or sponsoring partner's family unit) has suffered relevant family/domestic violence committed by the sponsoring partner, or the child exception applies;[47] and
- **two years since application**
  - at least two years must generally have passed since the application was made.[48] The 'two year requirement' does not apply to an applicant if:
  - the applicant meets the child, death, or family violence exemptions;[49]
  - the applicant and sponsoring partner were in a long-term partner relationship at the time of application;[50]
  - *for Subclass 100*, the Department was informed that the applicant was in a married or de facto relationship with his or her sponsoring partner who later held a permanent humanitarian visa;[51]
  - the Tribunal has previously remitted the primary decision, or decided that all the other criteria for the grant of the permanent visa have been satisfied except for the requirement that the applicant hold a temporary visa;[52] or
  - *for visa applications made before 22 March 2014*, the applicant was granted specified entry permits under the 1989 or 1993 versions of the Migration Regulations.[53]
- **nomination**
  - *for Subclass 100*, the applicant must be nominated by the sponsoring partner in certain circumstances. These are: if at least two years have passed since the application was made and the applicant does not meet cl 100.221(2A)

[45] cls 100.221(2)(b), 100.221(2A)(b), 801.221(2)(c), 801.221(2A)(b).
[46] cls 801.221(5), 100.221(3) (which also requires that the sponsor died after the applicant first entered Australia as the holder of a subclass 309 visa), 100.221(4B) (which applies for those Subclass 309 visa holders who were granted on the basis of the covid concessional arrangements (cl 309.412(2)). Clause 100.221(4B) was inserted into Schedule 2 to the Regulations by Part 1 of Schedule 1 to F2022L01093 and apply in relation to a decision to grant or not to grant a Subclass 100 or 309 visa made on or after 20 August 2022, whether the application for the visa was made before, on or after that date: item 10 of F2022L01093.
[47] Where the applicant holds a Subclass 820 visa: cl 801.221(6); where the applicant entered Australia on a Subclass 309 visa and still holds or, in certain circumstances for pre 22 March 2014 visa applications, held that visa: cls 100.221(4); where the applicant was granted a Subclass 309 on the basis of the covid concessional arrangements (cl 309.412(2), i.e. that the visa was granted after 26 February 2021, the application was made before the end of the concession period in reg 1.15N(1), and the applicant was in Australia at any time during the concession period and in Australia at the time the visa was granted): cl 100.221(4C). Clause 100.221(4C) was inserted into Schedule 2 to the Regulations by Part 1 of Schedule 1 to F2022L01093 and apply in relation to a decision to grant or not to grant a Subclass 100 or 309 visa made on or after 20 August 2022, whether the application for the visa was made before, on or after that date: item 10 of F2022L01093.
[48] or two years since the date of Ministerial intervention, if applicable. Cls 100.221(2)(c), 100.221(2A)(c), 801.221(2)(d), 801.221(2A)(c).
[49] cls 100.221(3), (4), (4B), (4C), (7), 801.221(3), (4), (5), (6), (7). Cls 100.221(4B) and (4C) were inserted into Schedule 2 to the Regulations by Part 1 of Schedule 1 to F2022L01093 and apply in relation to a decision to grant or not to grant a Subclass 100 or 309 visa made on or after 20 August 2022, whether the application for the visa was made before, on or after that date: item 10 of F2022L01093. See also below in relation to the Exceptions.
[50] cls 100.221(5), 801.221(6A).
[51] cls 100.221(6).
[52] cls 100.221(4A), 801.221(8).
[53] The specified entry permits were: extended eligibility (spouse) (code number 820) under the 1989 Regulations; or Class 820 (extended eligibility (spouse)) under the 1993 Regulations: cls 801.221(7)(b), (c). These sub-clauses were repealed on 22 March 2014: SLI 2014, No 30.

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(applicant holds a Subclass 309 visa as a result of Ministerial intervention), or cl 100.221(3) or (4B) (death exception), or cl.100.221(4) or (4C) (child and domestic/family violence exceptions);[54]

- **public interest criteria -** the applicant and family members must satisfy certain public interest criteria relating to considerations including health, character, and the provision of false or misleading information.[55]
- **passport** - the applicant must meet certain passport requirements. The content and source of this requirement differ depending upon the date of visa application.[56]

Both a Subclass 801 and 100 visa can be granted either whilst the applicant is in Australia, but not in immigration clearance, or whilst the applicant is outside Australia.[57]

Legal issues

Relationship requirements

The most common issue in Subclass 309/100 and 820/801 visa cases is whether the visa applicant meets the requirement that he or she is the spouse or de facto partner of the relevant Australian citizen, permanent resident or eligible New Zealand citizen.

For these applications:

- the definition of 'spouse' is contained in s 5(1) of the Act. It provides that 'spouse' has the meaning given by s 5F. Section 5F of the Act provides that a person is the spouse of another only where those two people are in a married relationship. Additional considerations are contained in reg 1.15A of the Regulations.
- 'de facto partners' is separately defined in s 5CB of the Act, with additional criteria and considerations contained in regs 2.03A and 1.09A.

See: 'Spouse' and 'de facto partner' and Valid Marriage.

Exceptions to the continuing relationship requirement

There are exceptions to the continuing relationship requirement in certain cases involving death, children, or family violence.

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[54] cl 100.226.
[55] cls 100.222–100.225, 801.223–801.226, requiring compliance with PIC 4001 – 4004, 4007, 4009, 4019 - 4021. For a discussion of Public Interest Criterion (PIC) 4001 (character test), see Public Interest Criterion 4001. For a discussion of PIC 4005 and 4007 (health criteria), see Public Interest Criteria 4005 & 4007. For a discussion of PIC 4020, see PIC 4020 and other statutory requirements relating to 'bogus documents' and 'false or misleading information'. PIC 4020 was added as a requirement to cls 100.222(a), 100.224(1)(a), 801.224(1) and 801.226 by SLI 2013, No 146. PIC 4020 applies to cls 100.222(a), 100.224(1)(a), 100.322(a), 801.224(1) for visa applications made on or after 1 July 2013, and visa applications made from15 October 2007 but not finally determined at 1 July 2013; and to cl 801.226 and secondary criterion cl 801.325 for visa applications made on or after 24 November 2012 but not finally determined at 1 July 2013.
[56] For Subclass 100 visa applications made on or after 1 July 2005 but before 24 November 2012, the requirement was contained in cl 100.227 (inserted by SLI2005, No 134. That criterion was omitted, and the content broadly transferred to new PIC 4021, which was inserted into cl 100.222 for visa applications made on or after 24 November 2012 by SLI 2012 No 256. For Subclass 801 visa applications made on or after 1 July 2005 but before 24 November 2012, the terms of the requirement was expressly set out in cl 801.226 (inserted by SLI 2005, No 134). That criterion was substituted, and the content broadly transferred to PIC 4021, which was inserted into the same clause for visa applications made on or after 24 November 2012 by SLI 2012 No 256.
[57] cls 100.411, 801.411 as amended SLI 2010, No 38. Grant where the applicant is outside Australia applies to all visa applications made but not finally determined as at 27 March 2010, and all visa applications made on or after 27 March 2010. For applications decided prior to this date, the Subclass 801 applicant must have been in Australia but not in immigration clearance when the visa was granted.

Death

An applicant may satisfy time of decision criteria where the sponsoring partner has died. The Tribunal must be satisfied the applicant would continue to meet the spouse or de facto relationship requirement except that the sponsoring partner has died.[58] For a Subclass 309 visa applicant, the exception only applies to an applicant in Australia and to whom cl 309.412(4) would apply (i.e. that the decision to grant the visa is made after 26 February 2021 while the applicant was onshore and they were onshore at any time during the concession period defined in reg 1.15N(1)).[59] For a Subclass 100 visa applicant who first entered Australia as the holder of a subclass 309 visa, the exception only applies if the sponsoring partner has died *after the applicant first entered Australia*.[60]

In addition to the above requirements, for Subclass 801, the applicant must also satisfy the Tribunal that they has developed close business, cultural or personal ties in Australia.[61] For detailed commentary on the death exceptions in partner cases, please refer to ' Exceptions to Relationship Requirement for partner visa - Death or child'.

Child

At the time of decision, there is also a 'child' exception available in the Partner visa Subclasses 820, 801 and 100[62] and, in more limited circumstances, Subclass 309.[63] In brief, the exception requires the applicant to have custody or joint custody, or access to, or a residence or contact order under the *Family Law Act 1975* (Cth) (Family Law Act) relating to at least 1 child in respect of whom the sponsoring partner has joint custody or access or a residence order made under the Family Law Act, or an obligation under a child maintenance order or any other formal maintenance obligations.

If this exception potentially applies please refer to ' Exceptions to Relationship Requirement for partner visa - Death or child' for a detailed commentary.

Domestic or family violence

An applicant for a Subclass 100/801/820 visa and in in more limited circumstances, Subclass 309 visa[64] may also satisfy the time of decision relationship criteria where the spouse or de

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[58] cls 820.221(2), 801.221(5), 309.221(2), 100.221(3), 100.221(4B). Clause 309.221(2) and 100.221(4B) were inserted into Parts 309 and 100 of Schedule 2 to the Regulations (respectively) by Part 1 of Schedule 1 to F2022L01093 and apply in relation to a decision to grant or not to grant a Subclass 100 or 309 visa made on or after 20 August 2022, whether the application for the visa was made before, on or after that date: item 10 of F2022L01093.
[59] cl 309.221(1)(b) as inserted by Part 1 of Schedule 1 to F2022L01093 and applies in relation to a decision to grant or not to grant a Subclass 309 visa made on or after 20 August 2022, whether the application for the visa was made before, on or after that date: item 10 of F2022L01093.
[60] cl 100.221(3)(b)
[61] cl 801.221(5).
[62] cls 820.221(3), 801.221(6), 100.221(4), 100.221(4C). Clause100.221(4C) was inserted into Part 100 of Schedule 2 of the Regulations by Part 1 of Schedule 1 to F2022L01093 and apply in relation to a decision to grant or not to grant a Subclass 100 or 309 visa made on or after 20 August 2022, whether the application for the visa was made before, on or after that date: item 10 of F2022L01093.
[63] These are that the applicant is in Australia and cl 309.412(4) would apply (i.e. that the decision to grant the visa is made after 26 February 2021 while the applicant was onshore and they were onshore at any time during the concession period defined in reg 1.15N(1)). The exceptions were inserted into Part 309 of Schedule 2 to the Regulations by Part 1 of Schedule 1 to F2022L01093 and apply in relation to a decision to grant or not to grant a Subclass 100 or 309 visa made on or after 20 August 2022, whether the application for the visa was made before, on or after that date: item 10 of F2022L01093.
[64] These are that the applicant is in Australia and cl 309.412(4) would apply (i.e. that the decision to grant the visa is made after 26 February 2021 while the applicant was onshore and they were onshore at any time during the concession period defined in reg 1.15N(1)). The exception was inserted into Part 309 of Schedule 2 to the Regulations by Part 1 of Schedule 1 to F2022L01093

facto relationship has ceased and the applicant or a member of the sponsoring partner's family unit has suffered relevant family violence.[65] For detailed commentary on family violence exception in partner cases, please refer to Domestic/Family violence.

'Long-term partner relationship'– reg 1.03

Criteria for the grant of a permanent spouse visa include a requirement that at least two years have passed since the application was made. An applicant need not be in a spouse or de facto relationship for two years after the time of application if he or she has been in a 'long-term partner relationship' at the time of application.[66]

'Long-term partner relationship' is defined at reg 1.03 of the Regulations in relation to an applicant for a visa to mean a relationship between the applicant and another person, each as the spouse or de facto partner of the other, that has continued, if there is a dependent child (other than a step-child) of both the applicant and the other person — for not less than two years; or in any other case if the visa application was made on or after 27 March 2010, for not less than three years.[67]

Whether the relationship has continued for the required time is a question of fact when considering all the circumstances of the parties' relationship. For example, the decision maker may be satisfied that the relationship has continued for at least the required number of years even where there have been periods of separation between the parties, but the decision maker may be satisfied the separation was not a final breakdown of the relationship. For a detailed commentary see 'Spouse' and 'de facto partner'.

12-month rule for de facto relationships

Partners claiming to be in a de facto relationship, generally must demonstrate that their relationship was ongoing for the 12 months immediately prior to the visa application. The exceptions to the 12 month requirement are: compelling and compassionate circumstances are established for the grant of the visa, or the de facto partner is, or was, the holder of a permanent humanitarian visa and before it was granted the de facto relationship had been advised to immigration, or the partner is an applicant for a permanent humanitarian visa, or the de facto relationship is registered under a relevant State or Territory law.[68]

For further detail as to compelling and compassionate circumstances see Compelling and/or compassionate circumstances.

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and apply in relation to a decision to grant or not to grant a Subclass 309 visa made on or after 20 August 2022, whether the application for the visa was made before, on or after that date: item 10 of F2022L01093.

[65] cls 100.221(4), 100.221(4C), 801.221(6), 820.221(3), 309.221(3). Clauses 100.221(4C) and 309.221(3) were inserted into Parts 100 and 309 of Schedule 2 to the Regulations (respectively) by Part 1 of Schedule 1 to F2022L01093 and apply in relation to a decision to grant or not to grant a Subclass 309 visa made on or after 20 August 2022, whether the application for the visa was made before, on or after that date: item 10 of F2022L01093).

[66] cls 100.221(5), 801.221(6A).

[67] reg 1.03 definition of 'long-term partner relationship' as amended by SLI 2010, No 38. If the application was made before 27 March 2010, the spouse or de facto relationship must have been not less than five years.

[68] regs 2.03A(3), (4), (5). A de facto relationship is a relationship that is registered within the meaning of s.2E of the *Acts Interpretation Act* 1901 (Cth). The relevant State or Territory law of the purpose of s.2E is prescribed in the *Acts Interpretation (Registered Relationships) Regulations 2019* (Cth): reg 2.03A(5), as substituted by *Home Affairs Legislation Amendment (2019 Measures No.1) Regulations* 2019 (F2019L01423) (Cth).

Sponsored, sponsorship approved and sponsoring partner

The terms sponsored, sponsorship approved and sponsoring partner are used variously throughout the different visa subclasses. Generally speaking, they require the visa applicant's de facto partner or spouse to have given certain undertakings regarding support for the visa applicant, for those undertakings to be approved by the Minister, subject to any sponsorship limitations or exclusions that may apply, and, for a permanent visa, that the same sponsorship from the temporary visa has continued.

Sponsored and sponsorship approved

For a Subclass 309 or 820 visa, the visa applicant must be sponsored by their spouse or de factor partner at the time of application and have that sponsorship approved at the time of decision.[69] For a Subclass 801 visa, at time of decision the visa applicant must generally continue to be sponsored for the grant of the Subclass 820 visa.[70]

The sponsor of an applicant for a Subclass 309 or 820 visa is a person who undertakes the obligations to assist the visa applicant, to the extent necessary, financially and in relation to accommodation during the relevant 2 year period.[71] The question of whether sponsorship undertakings were given at time of application is an objective one, with the mere giving of the undertakings generally sufficient to satisfy this requirement.[72] While it does not involve a subjective assessment of the sponsor's ability to comply with or fulfil the undertakings, the mental or cognitive capacity of a person to give or enter into such undertakings may be a relevant consideration.[73]

With limited exceptions that only apply to a Subclass 820 visa, the sponsorship given at time of application must be approved and still be in force at the time of decision.[74] In reviewing a decision to refuse a Subclass 309 or 820 visa, the Tribunal may exercise all the powers of the delegate which include approving the applicant's sponsor at the time of its decision. See also sponsorship limitations below.

The question to be asked is whether the sponsorship is approved, not whether the partner or de facto was a sponsor or can meet the prescribed sponsorship undertakings.[75] While the Tribunal may have regard to the Departmental guidelines when considering sponsorship, to

[69] cls 309.213 and 820.213. Being 'sponsored' for a Subclass 309 or 820 visa is distinct from the requirement for a Subclass 100 or 801 visa which requires that there be a 'sponsoring partner' as defined in cls 100.111 and 801.111.
[70] cl 801.221(2)(b).
[71] reg 1.20(1), (2)(c). If the applicant is in Australia, the relevant period in relation to accommodation is during the 2 years immediately following the grant of the provisional or temporary visa; if the applicant is outside Australia, for the period of 2 years immediately following the applicant's first entry into Australia after the grant of the provisional or temporary visa: reg 1.20(2)(c)(i) and (ii).
[72] In *Babar v MICMSMA* [2020] FCAFC 38 at [35]-[36], the Court held that assessment of the sponsorship requirements in reg 1.20 did not involve an assessment of the purported sponsor's capacity to fulfil the undertakings, and that simply giving the undertakings was sufficient. While the Tribunal had not been satisfied of the sponsor's capacity to meet the financial obligations of sponsorship based on evidence that indicated the sponsor was affected by mental health conditions, was in receipt of a disability support pension, did not fully comprehend documents they had been requested to sign and a limited guardian had been appointment to manager their affairs, the Court did not expressly address the ability to consider mental capacity of a person to give undertakings in reg 1.20 in determining whether an applicant is sponsored.
[73] In *Lo v MICMSMA* [2020] FCA 895 at [27], the Court found no error in the Tribunal's finding that the applicant was not sponsored because the person purporting to give the sponsorship undertakings had dementia. While, objectively, the relevant sponsorship form and undertakings appeared to have been given, the Tribunal found the applicant was not in fact sponsored because the purported sponsor did not understand the nature of the sponsorship obligations that they had given. Although this judgment concerned sponsorship for a carer visa, partner visas share the same sponsorship framework in reg 1.20 and the reasoning would appear equally applicable.
[74] cls 309.222(1), 820.221(4)(a).
[75] *Babar v MICMSMA* [2020] FCAFC 38 at [32] – [34].

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the extent they require decision makes to consider the visa applicant's likely need for the sponsor's assistance they are not consistent with the terms of reg 1.20 and should not be applied.[76]

Sponsoring partner

The term sponsoring partner is used throughout the Subclass 100, 801 and 820 visa requirements and is distinct from the requirements in Subclass 309 or 820 visa to be sponsored or have a sponsorship approved.[77]

The definition of sponsoring partner in Subclass 100 and 801 differ slightly from each other, but generally relate to the Australian citizen, permanent resident or eligible New Zealand citizen who were specified as the applicant's spouse or de facto partner (or intended spouse for Subclass 100 only) in the application that resulted in the grant of the Subclass 309 or 820 visa.[78] In relation to a person granted a Subclass 309 or 820 visa because the Minister exercised his or her power under ss 345, 351, 417 or 501J, it means the Australian citizen, permanent resident or eligible New Zealand citizen who was the spouse or de facto partner of that person at the time the visa was granted.[79]

The definition in a Subclass 820 visa is also different, depending upon which particular subclause it is being used in and whether or not the applicant is, or was, the holder of a Subclass 300 visa.[80]

Sponsorship limitations

There are various sponsorship limitations that may apply if considering whether a sponsor is approved:

- Women at risk – for a male visa applicant who's spouse, de facto partner or intended spouse is a woman previously granted a Subclass 204 (Woman at Risk) visa, that woman is prohibited from being a sponsor if, within the 5 years immediately preceding the application, on the date the Subclass 204 visa was granted the applicant was a former spouse or former de facto partner of that woman having been divorced or permanently separated from that woman, or the applicant was the spouse or de facto partner of that woman and that relationship had not been declared to Immigration;[81]
- Serial sponsors – reg 1.20J restricts the ability of a sponsor who has successfully sponsored more than one partner from sponsoring any further partners (unless the Minister is satisfied there are compelling circumstances affecting the sponsor);
- Subclass 143 (Contributory Parent) or 864 (Contributory Aged Parent) visa holders are prevented by reg 1.20KA from sponsoring their previous partner for a Partner visa within 5 years of his or her Subclass 143 or 864 grant (unless compelling reasons exist);

[76] *Babar v MICMSMA* [2020] FCAFC 38 at [38] – [40].
[77] cls 100.221(2)(b), (2A)(b), (3)(c), (4)(b) and (c), and 801.221(2)(b), (2A)(b), (5)(b) and (c) and (6)(b) and (c).
[78] cls 100.111(a) and 801.111(a).
[79] cls 100.111(b) and 801.111(b).
[80] cls 820.111.
[81] cls 309.212 and 820.211(2B),

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- Sponsors of concern – reg 1.20KB requires that the Minister, or Tribunal on review, must refuse to approve a sponsorship where the sponsor has been charged with, or convicted of, a registrable offence. [82] In certain circumstances, if the Minister/Tribunal is satisfied there are compelling circumstances affecting the sponsor or applicant the Minister/Tribunal may approve the sponsorship;[83]
- Sponsors with a significant criminal record – reg 1.20KC requires that the Minister, or the Tribunal on review, refuse to approve a sponsorship where the sponsor has a significant criminal record in relation to a relevant offence (or offences) listed in reg 1.20KC(2). However, the sponsorship may be approved if the Minister or Tribunal considers it reasonable to do so having regard to certain matters.[84] The Minister/Tribunal may also refuse to approve a sponsorship if an applicant, following a request, fails to provide a police check within a reasonable time.[85]

For further detail on sponsorship limitations see: Limitation on Sponsorships - Partner Visas and Compelling and/or compassionate circumstances.

Can the sponsor change during the application process?

Generally, the sponsor for a Subclass 309 or 820 visa must continue to be the sponsor for the permanent visa.[86] There are exceptions where the sponsor has died, or where the applicant, or a member of the applicant's or sponsor's family unit has suffered domestic/family violence.

However, where an applicant holds, or held, a Subclass 300 (Prospective Marriage) visa, and has made their visa application on or after 27 March 2010, that person may be sponsored for the Subclass 820 visa by an Australian citizen, permanent resident or eligible New Zealand citizen who was **not** the original sponsor for the Subclass 300 visa, provided the applicant is in a relationship with this 'subsequent sponsor' at the time of applying for the Class UK visa.[87]

Secondary applicants – Subclasses 309 and 820 – Member of the family unit at time of decision and permissible directions on remittal

Where there is a valid application for review of a secondary applicant's visa application, the Tribunal will also need to consider the refusal of their visa application.[88] Generally a secondary applicant will have been refused on the basis that the primary applicant did not meet the primary criteria. However, that is not always the case and the starting point for consideration of the secondary applicant's review application will be the basis upon which the delegate refused the secondary applicant's visa application.[89]

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[82] reg 1.20KB, inserted by *Migration (4)Amendment Regulations 2010* (No 1) (Cth) (SLI 2010, No 50). Note that if none of the primary or secondary applicants are under 18 at the time of decision on the application for approval of the sponsorship, or where the charge has been withdrawn, dismissed or otherwise disposed of without the recording of a conviction, or the conviction has been quashed or otherwise set aside, reg 1.20KB will not apply: regs 1.20KB(2)–(3).
[83] regs 1.20KB(4), (5).
[84] reg 1.20KC(4).
[85] reg 1.20KC(5).
[86] See cls 100.221(2)(b), 100.111, 801.221(2)(b), (c), 801.111.
[87] cl 820.111. This also has the effect that an applicant may still satisfy the death or family violence exceptions even where they were in a spousal relationship with a subsequent sponsor when this event occurred rather than the original sponsor for the prospective marriage visa: SLI 2010 No 38 and Explanatory Statement to SLI 2010, No 38, p.41.
[88] If the review application is properly made for review of a Part 5 reviewable decision, the Tribunal must review the decision, s 348(1).
[89] See also the President's Direction on Conducting Migration and Refugee Reviews, in effect from 2 August 2018, at [8.2].

Refusal on basis found not to be a Member of the Family Unit at time of application

Where the secondary applicant has been refused on the basis that they were found not to be a member of the family unit at time of application, they may still be eligible for the grant of the visa if at the time of decision they have become a member of the family unit *and* the primary applicant has been granted the permanent visa (Subclass 100 or 801). The Federal Circuit Court remitted by consent the application in [redacted] (tribunal reference [redacted]) on the basis that the Tribunal, having found the applicant did not meet cl 309.311 as she was not a member of the family unit at time of application, failed to consider whether the applicant satisfied cl 309.321(b) (time of decision). If cl 309.321(b) was found to be met then the applicant would not be required to satisfy cl 309.311 having regard to the decision of the High Court in *Berenguel v Minister for Immigration and Citizenship* [2010] HCA8.[90] Consistent with the reasons for remittal endorsed by the Court, it appears open to the Tribunal to read cls309.311 and 309.321 as allowing for two alternatives: the applicant is a member of the family unit of the person who satisfies the primary criteria at the time of application, continues to be a member of the family unit at the time of decision, and the primary applicant holds a Subclass 309 visa (cls 309.211 and 309.321(a)), *or* the applicant is a member of the family unit at the time of decision (but not necessarily at the time of application) and the primary applicant has been granted the Subclass 309 and the Subclass 100 permanent visa (cl 309.321(b)).

Given that the secondary criteria in Subclass 820 is similarly worded, the above reasoning appears to be equally applicable to that Subclass.

Refusal solely on the basis the primary applicant has been refused

Where the secondary applicant's visa application has been refused on the basis that the primary applicant did not meet the primary criteria and the Tribunal has now found the primary applicant does meet one of the criteria, care should be taken as to which criteria the Tribunal finds the secondary applicant has met and the direction it makes. For example, the Subclass 309 time of application criteria for a secondary applicant requires the secondary applicant to be a member of the family unit of, and made a combined application with, a person who satisfies the primary criteria in sub-div 309.21.[91] That requires the Tribunal to be satisfied that not only is the secondary applicant a member of the family unit of the primary applicant but also that the primary applicant meets *all* applicable time of application criteria in sub-div 309.21.

The secondary criterion can only be met if there are findings to support all relevant parts of the criterion.

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[90] *Berenguel* considered the temporal application of a criterion for a Skilled (Residence) (Class VB) Subclass 885 visa (cl 885.213) which sat under the heading of 'time of application' and required the applicant to demonstrate they have 'competent English' as defined in reg 1.15C. This could be satisfied if the person had achieved a specified score, in a test conducted not more than 2 years before the day on which the application was lodged. The applicant in that case undertook the test and provided to the Department the scores from that test after the date of application. The High Court found that while the heading 'Criteria to be satisfied at time of application' may inform the construction of the criteria thereunder, the criteria in question did not speak exclusively to satisfaction at the time of application, and that the heading did not connect grammatically to the terms of the clause and did not support a general conclusion that the criteria could only be satisfied at time of application. It therefore found that cl 885.213 could be satisfied by evidence provided to the Minister after the application had been made.

[91] cl 309.311

The Tribunal has no power to remit a matter generally without any direction.[92] However, where the refusal of the secondary applicant's visa was on the basis that the primary applicant had been refused, it is open to the Tribunal to remit the secondary applicant by including reasoning in the decision that addresses them expressly, and indicates that they are being remitted and their visa application is to be reconsidered on the basis of the direction given for the primary applicant. [93]

Requirement to hold a temporary partner visa

The permanent partner visa criteria in cls 100.221 and 801.221 generally require an applicant to hold a temporary partner visa.[94] However, as the temporary visa ceases upon notification of the decision to refuse the permanent visa, an applicant for review of the permanent visa refusal generally would not meet this requirement.[95]

Clauses 100.221(4A) and 801.221(8) allow applicants for permanent visas who ceased to hold temporary visas on notification of a decision to refuse the grant of a permanent visa to nevertheless be eligible for the grant of a permanent visa after a successful decision following remittal by the Tribunal.[96] Each clause is an alternative way of satisfying the 100/801.221 criterion, and is met in the following circumstances:

(a) if the applicant held a 309/820 visa that ceased on notification of a decision of the Minister to refuse a 100/801 visa; and

(b) if the Tribunal:

  (i) has remitted that decision for reconsideration and, as a result, the Minister decides that the applicant satisfies the criteria for the grant of a 100/801 visa apart from the criterion that the applicant hold a 309/820 visa; or

  (ii) has determined that the applicant satisfies the criteria for the grant of a 100/801 visa apart from the criterion that the applicant hold a 309/820 visa.

The words at subparagraph (b)(i) 'if the Tribunal [ ] has remitted that decision' mean effectively that subparagraph (b)(i) can only be found to be met by the delegate after a remittal from the Tribunal.

On a plain reading of subparagraph (b)(ii) it appears that the Tribunal could only remit on the basis of meeting this subclause if the Tribunal had considered and was satisfied all of the remaining criteria for the grant of a 100/801 visa are met. This would include, for example, making findings against all of the public interest criteria.

An alternative reading of subparagraph (b)(ii) is that the reference to satisfying the criteria for the grant of a 100/801 visa apart from holding a 309/820 visa, is only referring to satisfying

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[92] See *MIAC v Dhanoa* [2009] FCAFC 153 at [53]–[62].
[93] This may also apply to a Subclass 100 or 801 visa refusal where the secondary applicant has been refused the permanent visa solely on the basis that the primary visa applicant had been refused the permanent visa.
[94] cls 100.221(2)(a), (2A)(a), (3)(a), (4)(a), 801.221(2)(a), (2A)(a), (3), (4), (5)(a), (6)(a).
[95] s 82(7) of the Act, provides that a visa to remain in Australia until a particular date (including the date of a specified event) ceases to be in effect at that date and cls 309.511/ 820.511 states that the temporary visa is in effect until there is notification of a decision on the permanent visa. While Subclass 820 is not in its terms a visa to remain in Australia (cl 820.511 refers only to permission to travel to and enter Australia) a Subclass 820 visa may cease on notification of a subclass 801 refusal on the basis that the Subclass 820 visa is in practice a visa to remain in Australia (compare cl 309.511, which expressly refers to permission to remain in Australia).
[96] Explanatory Statement to SR 1999 No 68.

one of the alternative subclauses in cls 100.221 or 801.221. This alternative interpretation is based on the fact that the requirement to hold a temporary visa is only found in each of the various alternative subclauses of cls 100.221 or 801.221.[97]

The effect of the alternative interpretation of this provision is that the Tribunal, if satisfied that an alternative subclause of cls 100.221 or 801.221 is met, may remit the decision with the direction that cls 100.221(4A) or 801.221(8) is met.

In any event, and in the absence of direct judicial consideration as to which interpretation is correct, it is open to the Tribunal (on either interpretation), if satisfied one of the alternative subclauses of cls 100.221 or 801.221 is met apart from the holding of the temporary visa, to remit with the direction that a specific sub-subclause is met, for example cls 100.221(2)(b).

Concurrent Subclass 820 and 801 review applications

Where an applicant has validly sought review of both the Subclass 820 and 801 visa refusals, a decision on each will be required.[98]

Generally, at the primary decision level, the Subclass 801 visa is refused on the basis that the applicant does not hold a Subclass 820 visa. Where the Tribunal remits the Subclass 820, it can only remit the Subclass 801 by making a direction that a relevant criterion for Subclass 801 is met. The applicant is not the holder of a Subclass 820 visa until it is granted by the delegate. Therefore, unless at the time of the Tribunal's decision the delegate has made that decision, the Subclass 801 could not be remitted on the basis of a criterion that requires that the applicant is the holder of a Subclass 820. It may be possible to remit the Subclass 801 on another criterion, or on an independent subclause of a criterion which includes holding a Subclass 820 visa, depending on the findings made by the Tribunal. For example, if the Subclass 820 was remitted on the basis that the Tribunal found the applicant is the spouse or de facto partner of the sponsoring partner, then the Subclass 801 might be remitted on the basis that at the time of the Tribunal's decision the applicant meets cl 801.221(2)(c).[99]

If the Tribunal affirms the refusal of the Subclass 820, it follows that the Subclass 801 will also be affirmed on the basis that the applicant does not hold a Subclass 820 visa. However, in this circumstance, the decision on the Subclass 820 visa would be the reason or part of the reason for affirming the Subclass 801 refusal and so the Tribunal would need to put this to the applicant under s 359A.[100]

An applicant may apply for judicial review of the Tribunal's decision on the Subclass 820 and where at that point the Tribunal has not yet determined the Subclass 801 review application, the applicant may request the Tribunal adjourn its decision on the Subclass 801 pending the outcome of the judicial review. There is no obligation on the Tribunal to delay its decision of the 801, however, the request should be considered in accordance with usual principles,

[97] So for example, the applicant could meet cl 801.221(8) if they met the requirements of cl 801.221(2) other than holding the temporary visa, i.e. that the applicant is sponsored, is the spouse/de facto of the sponsoring partner, and at least 2 years have passed since the application.
[98] To note, concurrent review applications for refusal of Subclasses 309 and 100 visas will not likely be valid due to the differing location requirements of the visa applicant for each. If the visa applicant is offshore at the time the Subclass 309 and 100 are refused, then their sponsoring partner may bring the review on the Subclass 309 but the decision on the Subclass 100 is not a Part 5 reviewable decision. See above the Tribunal's Jurisdiction.
[99] cl 801.221(2)(c) is a time of decision criterion requiring that the applicant be the spouse or de facto partner of the sponsoring partner.
[100] For further guidance on s 359A please see the Procedural Law Guide at Chapter 10 – Statutory duty to disclose adverse information.

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taking account of all relevant circumstances, including when the Court is likely to make a decision.[101]

Relevant case law

Judgment	Judgment Summary
Babar v MICMSMA [2020] FCAFC 38	Summary
Basra v MIBP [2018] FCA 422	
Berenguel v MIAC [2010] HCA8	Summary
MIAC v Dhanoa [2009] FCAFC 153	Summary
Lo v MICMSMA [2020] FCA 895	Summary

Relevant amending legislation

Title	Reference Number	Legislation Bulletin
Migration Regulations (Amendment) 1995 (Cth)	SR 1995, No 38	
Migration Regulations (Amendment) 1996 (Cth)	SR 1996, No 276	
Migration Amendment Regulations 1999 (No 4) (Cth)	SR 1999 No 68	
Migration Amendment Regulations 2002 (No 2) (Cth)	SR 2002, No 86	
Migration Amendment Regulations 2005 (No 4) (Cth)	SLI 2005, No 134	No.1/2005
Migration Amendment Regulations 2009 (No 7) (Cth)	SLI 2009, No 144	No.09/2009
Migration Amendment Regulations 2009 (No 10) (Cth)	SLI 2009, No 229	No.15/2009
Migration Amendment Regulations 2009 (No 12) (Cth)	SLI 2009, No 273	No.16/2009
Migration Amendment Regulations 2010 (No 1) (Cth)	SLI 2010, No 38	No.1/2010
Migration Amendment Regulations 2010 (No 2) (Cth)	SLI 2010, No 50	No.02/2010
Migration Legislation Amendment Regulations 2011 (No 1) (Cth)	SLI 2011, No 105	No.03/2011

[101] For further guidance on adjourning or rescheduling a hearing see the Procedural Law Guide at Chapter 22 – Rescheduling or adjourning the hearing.

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Migration Legislation Amendment Regulations 2011 (No 2) (Cth)	SLI 2011, No 250	No.01/2012
Migration Legislation Amendment Regulation 2012 (No 5) (Cth)	SLI 2012, No 256	No.10/2012
Migration Amendment (Internet Applications and Related Matters) Regulation 2013 (Cth)	SLI 2013, No 252	
Migration Legislation Amendment Regulation 2013 (No 3) (Cth)	SLI 2013, No 146	No.10/2013
Migration Amendment (Redundant and Other Provisions) Regulation 2014 (Cth)	SLI 2014, No 30	No.02/2014
Migration Legislation Amendment (2015 Measures No 2) Regulation 2015 (Cth)	SLI 2015, No 103	No.7/2015
Migration Legislation Amendment (2016 Measures No 3) Regulation 2016 (Cth)	F2016L01390	No.3/2016
Marriage Amendment (Definition and Religious Freedoms) Act 2017 (Cth)	No 129 of 2017	No.6/2017
Home Affairs Legislation Amendment (2018 Measures No 1) Regulations 2018 (Cth)	F2018L00741	
Migration Amendment (2021 Measures No 1) Regulations 2021	F2021L00136	No.2/2021
Migration Amendment (Subclass 100 and 309 Visas) Regulations 2022 (Cth)	F2022L01093	No.03/2022

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Available decision templates / precedents

There is a range of decision templates/precedents available on CaseMate for Subclasses 309, 100, 820 and 801. These are:

- **Subclass 100 Visa Refusal – General (post 1 July 2009) -** for all post 1 July 2009 Subclass 100 visa applications including where the issue in dispute is satisfaction of the criteria relating 'spouse' or other criteria.
- **Subclass 309 Visa Refusal – General (post 1 July 2009) –**suitable for all post 1 July 2009 Subclass 309 visa applications, including where the issue in dispute is satisfaction of the criteria relating to 'spouse/de facto', intention to marry, woman at risk, sponsorship or other criteria.

- **Subclass 801 Visa Refusal - General - (post 1 July 2009) -** suitable for all post 1 July 2009 Subclass 801 visa applications, including where the issue in dispute is satisfaction of the criteria relating to 'spouse/de facto', or other criteria.
- **Subclass 820 – General - (post 1 July 2009) -** suitable for all post 1 July 2009 Subclass 820 visa applications, including where the issue in dispute is satisfaction of the criteria relating to 'spouse/de facto', woman at risk, sponsorship, Schedule 3, or other criteria.
- **Subclass 100/801/820 – Family Violence (post 15 October 2007) -** for use in review of a decision to refuse a Subclass 100, 801 or 820 visa where the applicant is claiming family violence.

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PARTNER VISAS

EXCEPTIONS TO RELATIONSHIP REQUIREMENT – DEATH/CHILD

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Overview[1]

The Partner visa scheme requires an assessment of the partner relationship at three distinct points in time:

1. to be granted a provisional (temporary) visa, the visa applicant must be in a spouse or de facto relationship at the time of application;[2]
2. the visa applicant must continue to be in this relationship at the time of decision on the provisional visa application; and
3. for the grant of a permanent visa, the visa applicant must continue to be in a spouse or de facto relationship at the time of decision on the permanent visa application, which is usually a period of at least two years after the application is made.

There are limited exceptions to the requirement of a continuing relationship. A Subclass 100, 309,[3] 801 or 820 Partner visa may still be granted despite the relationship ceasing in circumstances where:

- the relationship has ceased because the sponsoring partner has died;
- the sponsoring partner has committed domestic/family violence against the applicant or a member of the family unit of the applicant; or
- both the applicant and the sponsoring partner have an ongoing connection to a child.

This commentary discusses the requirements for the 'death of sponsor' and 'child' exceptions for Partner visas, including distinctions in the requirements for the exceptions for onshore and offshore temporary and permanent visa subclasses. The 'domestic/family violence' exception is discussed in detail in the Domestic/Family Violence commentary.

In this commentary, reference is made to the post 1 July 2009 Partner visa criteria that refer to 'spouse' or 'de facto partner' as defined in s 5F of the *Migration Act 1958* (Cth) (the Act) (spouse), and in s 5CB (de facto partner). For further guidance see the Spouse and de facto partner commentary.

Child exception

The 'child' exception is available in the Partner visa Subclasses 820, 801 and 100 and, in more limited circumstances, Subclass 309 as well.[4] For all subclasses it is available only as

[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] An applicant for a Subclass 309 Partner (Provisional) visa who is not in a spouse or de facto relationship may alternatively meet time of application criteria on the basis of an intention to marry: cl 309.211(3).
[3] Additional requirements apply to a subclass 309 visa that do not apply to subclasses 100, 801 and 820. These are that the applicant is in Australia and cl 309.412(4) would apply (i.e.that the decision to grant the visa is made after 26 February 2021 while the applicant was onshore and they were onshore at any time during the concession period defined in reg 1.15N(1)). The exceptions were inserted into Part 309 of Schedule 2 to the Regulations by Part 1 of Schedule 1 to the *Migration Amendment (Subclass 100 and 309 visas) Regulations 2022* (Cth) (F2022L01093) and apply in relation to a decision to grant or not to grant a subclass 100 or 309 visa made on or after 20 August 2022, whether the application for the visa was made before, on or after that date: item 10 of F2022L01093.
[4] These are that the applicant is in Australia and cl 309.412(4) would apply (i.e. that the decision to grant the visa is made after 26 February 2021 while the applicant was onshore and they were onshore at any time during the concession period defined in reg 1.15N(1)). The exceptions were inserted into Part 309 of Schedule 2 to the Regulations by Part 1 of Schedule 1 to F2022L01093 and apply in relation to a decision to grant or not to grant a subclass 100 or 309 visa made on or after 20 August 2022, whether the application for the visa was made before, on or after that date: item 10 of F2022L01093.

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a time of decision criterion. The exception is in identical terms for each of these visa subclasses.[5]

The key requirements for the 'child' exception are discussed below.

Partner relationship has ceased

The requirement in each of the Partner visa classes containing the child exception is that the applicant would meet the requirement that they are the spouse or de facto partner of the sponsoring partner, except that the relationship has ceased[6] *and* they meet the other requirements in relation to a child. This means there is a threshold requirement that a genuine partner relationship as relevantly defined in the Act must have existed and that relationship has ceased. If the relevant spousal or de facto relationship never existed, the child exception cannot be made out.

Legal obligations in respect of a child

Where a spousal or de facto relationship has ceased and both the visa applicant and the sponsoring partner have ongoing legal rights or obligations in respect of a child, the visa applicant may be eligible for the Partner visa despite the relationship having ceased.[7]

To meet the requirements for this exception, the visa applicant must:

(A) have custody, joint custody of, *or* access to; *or*

(B) have a residence *or* contact order made under the *Family Law Act 1975* relating to:

at least one child, in respect of whom the sponsoring partner has:

(C) been granted joint custody or access by a court, *or*

(D) a residence *or* contact order made under the *Family Law Act 1975*, *or*

(E) a child maintenance order made under the *Family Law Act 1975 or* any formal maintenance obligation.

The terminology used in paragraphs (A) and (C) relate to the *Family Law Act 1975* (Cth) (Family Law Act) as it was before 11 June 1996, while the terminology used in paragraphs (B) and (D) relate to the Family Law Act after 11 June 1996.[8]

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[5] cls 820.221(3), 801.221(6), 309.221(3), 100.221(4), 100.221(4C). Note that cl 100.221(4)(c) adds that the child exception applies only after the applicant first entered Australia as the holder of a subclass 309 visa. If the applicant did not first enter Australia as the holder of a Subclass 309 but is the holder of a subclass 309 visa to which cl 309.412(2) applies, (i.e. that the visa was granted after 26 February 2021, the application was made before the end of the concession period in reg 1.15N(1), and the applicant was in Australia at any time during the concession period and in Australia at the time the visa was granted), they may meet the exception in cl 100.221(4C) instead. These versions of cl 309.221(3) and cl 100.221(4C) were inserted into Schedule 2 to the Regulations by Part 1 of Schedule 1 to F2022L01093 and apply in relation to a decision to grant or not to grant a subclass 100 or 309 visa made on or after 20 August 2022, whether the application for the visa was made before, on or after that date: item 10 of F2022L01093.

[6] cls 820.221(3)(a), 801.221(6)(b), 309.221(3)(a), 100.221(4)(b), 100.221(4C)(b) (for those applicants who were granted a subclass 309 on the basis of the covid concessional arrangements). These versions of cl 309.221(3) and cl 100.221(4C) were inserted into Schedule 2 to the Regulations by Part 1 of Schedule 1 to F2022L01093 and apply in relation to a decision to grant or not to grant a subclass 100 or 309 visa made on or after 20 August 2022, whether the application for the visa was made before, on or after that date: item 10 of F2022L01093.

[7] cls 820.221(3)(b)(ii), 801.221(6)(c)(ii), 100.221(4)(c)(ii), 100.221(4C)(iii).This version of cl 100.221(4C)(iii) was inserted into Part 100 of Schedule 2 to the Regulations by Part 1 of Schedule 1 to F2022L01093 and applies in relation to a decision to grant or not to grant a subclass 100 or 309 visa made on or after 20 August 2022, whether the application for the visa was made before, on or after that date: item 10 of F2022L01093.

[8] The dates here reflect changes to the *Family Law Act 1975* (Cth) (Family Law Act) when it was amended by the *Family Law Reform Act 1995* (Cth).

Custody is defined in reg 1.03 as '(a) the right to have the daily care and control of the child; and (b) the right and responsibility to make decisions concerning the daily care and control of the child.'

Biological and adoptive parents

There appears to be no requirement for formal court orders as evidence of 'custody or joint custody, or access to' the child where the applicant is the biological parent of the child.[9]

In relation to the child exception, a visa applicant can have a right to custody as a result of the statutory imposition of parental responsibility by operation of the Family Law Act in relation to a biological child, and the sponsoring partner can have a formal maintenance obligation (by operation of the *Child Support (Assessment) Act 1989* (Cth) (Assessment Act) rather than the Family Law Act).[10] Consequently, the applicant can meet the requirement in (A) to have custody of the child and the sponsoring partner can meet the requirement in (E) of having a 'formal maintenance obligation' in respect of the child by virtue of the general law obligations of a biological parent to his/her child, provided there is no Court order granting sole custody to the other parent.

The same applies where the visa applicant and sponsoring partner are the adopted parents of the child, since adoption, in general terms, extinguishes the parental obligations and rights of the biological parents and vests them in the adopter(s). (See 'The effect of adoption on existing familial relationships' in the Definition of Adoption commentary). As such an applicant who is recognised as a biological or adoptive parent will meet the criteria even without the Tribunal having to be satisfied that the visa applicant has any current ongoing interest in or relationship with the child.

Where there is no evidence of court-ordered 'access' rights for the purpose of Item (A), Dowsett J's judgment in *Fitch* provides some guidance as to what may constitute 'access.' His Honour's *obiter* comments suggest that 'access' was traditionally used to describe *contact arrangements* between a non-custodial parent and his or her child.[11] Further, 'access' in Item (A) contemplated some form of continuing access, rather than one previous incident of contact.[12]

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[9] The case of *Srour v MIMA* [2006] FCA 1228 is arguably the leading authority for this proposition. In *Srour*, Moore J reviewed the conflicting judgments of *Yazbeck v MIMA* [2002] FCA 980, in which Sundberg J found that the failure to include a reference to court orders in Item (A) was the result of bad drafting, and *Fitch v MRT* [2004] FCA 1673, where Dowsett J found the absence of reference to court orders in Item (A) to be deliberate. His Honour considered that because item (B) applied to orders under the Family Law Act, item (A) must have been intended to deal with custody and access arrangements not arising under that Act (at [36]). Moore J in *Srour* found Dowsett J's judgment in *Fitch* more recent and marginally more compelling (at [56]). In *Ortiz v MIAC* [2011] FMCA 432 at [20] the Court summarised the principles arising from *Yazbeck, Fitch and Srour* as including that a party has a right to custody as an incident of the statutory imposition for parental responsibility by operation of the Family Law Act and accordingly an applicant who is the biological parent of the child may satisfy item (A) even where there is no court ordered custody or maintenance arrangement. Burnett FM held that, when determining whether a person is the biological father of a child for this purpose, the Tribunal is not bound to take into account the legal presumption of paternity in s 69Q of the Family Law Act (at [45]). An appeal from this judgment was successful, but this issue was not considered in detail on appeal, both Courts proceeded on an assumption that if paternity was established, the 'child exception' would apply (see [2011] FMCA 432 at [48] and (2011) 224 FCR 583 at [33]): *Ortiz v MIAC* (2011) 224 FCR 583, at [41] and [55].

[10] *Srour v MIMIA* [2006] FCA 1228 at [57]. Moore J in *Srour* was considering cl 100.221(4)(c)(ii) and the conflicting Federal Court decisions of *Fitch v MRT* [2004] FCA 1673 and the earlier decision in *Yazbeck v MIMA* (2002) 124 FCR 458.

[11] *Fitch v MRT* [2004] FCA 1673 at [30].

[12] *Fitch v MRT* [2004] FCA 1673 at [31].

Non-biological and non-adoptive parents

There is no requirement in the visa criteria that the child be the biological or adopted child of the visa applicant and/or sponsor. Australian family law does not limit custody/access and obligations to the biological parents or adopted parents only.[13] The applicant and/or sponsoring partner may be non-parents (under family law).

However, where the applicant is not the biological (or adopted) parent of the child, formal court orders or custody/access arrangements will be necessary to satisfy the criteria for the child exception. If an applicant seeks to satisfy the custody/access element of the child exception as a non-biological parent, he or she will need to demonstrate that they have either custody or joint custody of, or access to the child (under the Family Law Act);[14] or a residence order or contact order made under the Family Law Act.[15]

For example, if the visa applicant is the step-parent, he/she can satisfy the custody/access element of the child exception if there is evidence of 'access arrangements' made under the Family Law Act and the sponsor, as the biological parent, satisfies sub-paragraph (E) on the basis of his/her legal obligation to maintain the child as the biological parent (which does not require court orders).[16]

Where the visa applicant is the biological parent and the sponsoring partner is the step-parent, then the sponsoring partner would require court orders to meet either of sub-paragraphs (C) or (D).

For sub-paragraph (E), it would appear that in some circumstances, a step-parent could have a formal maintenance obligation under the Assessment Act, and therefore satisfy the second of the two alternate requirements in paragraph (E).[17]

Orders under the Family Law Act 1975

The terms ‘custody’, ‘access’ ‘residence order’ and ‘contact order’ are used in the *Migration Regulations 1994* (Cth) (the Regulations) with reference to the Family Law Act, however, they are no longer used in the Family Law Act itself.

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[13] See, for example, Family Law Act s 65C.
[14] cl 801.221(6)(c)(ii)(A). In *Le v MIAC* (2009) 111 ALD 460, Turner FM found the comments made in *Srour v MIMIA* [2006] FCA 1228 and *Fitch v MRT* [2004] FCA 1673 (see FN 9 above) that to meet Item (A) no court order is required, to be obiter in regard to ‘access’ as those cases turned on the question of ‘custody’. The Court went on to find that the Tribunal was correct in saying that ‘access’ required there to be orders made under that Act, unless the applicant is a biological parent of the child, in which case custody is assumed by operation of the Family Law Act. This construction requires the relevant clause to be read with a semi-colon after the word ‘made’ in cl 801.221(6)(c)(ii)(B) so that both paragraphs (A) and (B) must be ‘under the Family Law Act 1975’.
[15] cl 801.221(6)(c)(ii)(B).
[16] See *Fitch v MRT* [2004] FCA 1673 at [32], [38].
[17] See, for example, *Srour v.MIMA* (2006)155 FCR 441, at [29], [52], [57]. *Srour* did not consider the obligations of step-parents specifically, but parents generally, and considered the judgment in *Fitch v MRT* [2004] FCA 1673, in which Dowsett J held that a biological parent had a ‘formal maintenance obligation’ to their child by virtue of s 66C of the Family Law Act, under common law and Queensland legislation. Dowsett J commented in *obiter* that the terms of s 66D (s 66D(1) states: ‘The step-parent of a child has, subject to this Division, the duty of maintaining a child if, and only if, a court, by order under section 66M, determines that it is proper for the step-parent to have that duty.’) suggested that the word ‘parents’ in s 66C excluded step-parents and, inferentially, all but biological or adoptive parents. Addressing the custody or access requirement in paragraph (A), Dowsett J relied on s 61C of the Family Law Act (s 61C(1) states: ‘Each of the parents of a child who is not 18 has parental responsibility for the child’). In *Srour,* the sponsoring spouse was the mother of the visa applicant’s child. Counsel for Mr Srour submitted that the sponsoring spouse had a ‘formal maintenance obligation’ by operation of s 3(1) of the *Child Support (Assessment) Act 1989* (Cth) (Assessment Act). The Court agreed that the sponsor had a formal maintenance obligation through operation of the Assessment Act rather than the Family Law Act. Although not spelt out in the judgment in *Srour*, the argument appears to rely on s 111CS(2) of the Family Law Act, which states: ‘The circumstances in which parental responsibility for a child is attributed to a person, or extinguished, by operation of law (without the intervention of a court or appropriate authority) are governed by the law that applies in the country of the child's habitual residence.’

'Parenting orders' replaced 'custody' and 'access' orders following major reforms to the Family Law Act in 1996. From 1996 until 2006, parenting orders included residence orders, which dealt with the person or persons with whom a child is to live,[18] and contact orders, which dealt with contact between a child and another person or other persons.[19]

Further changes to the Family Law Act came into effect on 1 July 2006 which removed references to 'residence' and 'contact'.[20] Today, a parenting order is an order dealing with any aspect of parental responsibility for a child and can be applied for by any person concerned with the care, welfare, and development of a child. Section 64B(2) now sets out matters with which parenting orders may deal, including the person or persons with whom a child is to live, the time a child is to spend with another person or persons, and the communication a child is to have with another person or other persons.[21] While the terminology changes do not make any change of substance, to date, the Migration Regulations have not been amended to reflect the change in terminology. Orders made under the Family Law Act post 1 July 2006, using the new terminology can be accepted as meeting the requirements of this criterion as the reference in the criterion is to 'a residence order or a contact order made under the Family Law Act 1975' and it is reasonably open to the Tribunal to find that a parenting order or a parenting plan[22] that deals with whom a child lives or spends time or has communication with is 'a residence order' or 'contact order' respectively.[23]

To the extent that a parenting order deals with the maintenance of a child, it is a child maintenance order.[24] A child maintenance order includes arrangements regarding who is to provide financial support for the child. Maintenance obligations can be formalised in forms other than a parenting order, for instance a private child support agreement which is registered with the Child Support Agency or a child support agreement, registered and administered by the Child Support Agency. The existence of maintenance obligations in determining if the requirements for the child exception are met is only relevant to the extent that the sponsoring partner has such obligations.

Generally, only the Family Court of Australia or the Federal Circuit Court under the Family Law Act can make orders which affect the rights relating to 'custody' as defined in reg 1.03 of the Regulations.[25] If there are any orders made under the Family Law Act, the effect of those orders in relation to both the applicant and the sponsoring partner and to what extent the orders remove or alter the subsisting general law rights/obligations in respect of the child are relevant considerations.[26] Certain State and Territory courts may issue orders (e.g.

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[18] Family Law Act (repealed) Sections 64B(2)(a), (3).
[19] Family Law Act (repealed) Sections 64B(2)(b), (4).
[20] *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) (No 46, 2006).
[21] Family Law Act ss 64B(2)(a), (b), (e).
[22] s 63C(6) provides that a registered parenting plan is a parenting plan that was registered in a court under s 63E as in force any time before the commencement of the *Family Law Amendment Act 2003* (Cth) and that continued to be registered immediately before the commencement of that Act. The *Family Law Amendment Act 2003* (Cth) relevantly commenced on 14 January 2004.
[23] This is because these terms are not specifically defined for the purposes of the Regulations.
[24] Family Law Act, ss 64B(2)(f), (5).
[25] Legislative and judicial powers in relation to the adoption of children, child protection and child welfare remain with the States/Territories. It may, therefore, be possible that a State Court make a custody or maintenance order using those powers. Such orders may be enough to fulfil the requirements of Item (A) and Item (E). For an example see *Fitch v MRT* [2004] FCA 1673.
[26] See, for example, *Ortiz v MIBP* [2014] FCCA 2994. The Court found that the visa applicant could not establish that he came within the exception outlined in cl 820.221(3)(b)(ii), given the existence of a Family Court of Australia order that the applicant was only permitted to communicate with the child by cards and letters addressed to the childcare of the mother. This judgment was upheld on appeal in *Ortiz v MIBP* [2015] FCA 427.

restraining orders or Apprehended Violence Orders, which affect or restrict access to children, known as 'family violence orders' in div 11 of the Family Law Act). An order in relation to *access* does not, of itself, affect the parental rights referred to in the definition of custody in reg 1.03, although it may make those rights very difficult to exercise in practice.

Death of sponsor exception

The 'death of sponsor' exception is available in the Partner visa Subclasses 820, 801 and 100 and, in more limited circumstances,[27] Subclass 309 as well.

Onshore – Subclasses 820 and 801

The key requirements for the 'death of the sponsor' exception for the onshore Partner visas are that the applicant:

- would continue to meet the spouse or de facto partner requirement except that the sponsoring partner has died; and
- satisfies the decision-maker that he/she would have continued to be the spouse or de facto partner of the sponsoring partner if the sponsoring partner had not died; and
- has developed close business, cultural or personal ties in Australia.[28]

Offshore – Subclasses 100 and 309

For the Subclass 100 permanent Partner visa and, in certain circumstances where the applicant for a Subclass 309 provisional Partner visa is in Australia and cl 309.412(2) would apply to the visa if granted[29], the key requirements for the 'death of sponsor' exception are that the applicant:

- would continue to meet the relevant spouse or de facto partner requirement except that the sponsoring partner has died;[30] and
- satisfies the decision-maker that the applicant would have continued to be the spouse or de facto partner of the sponsoring partner if the sponsoring partner had not died.[31]

Unlike for the Subclass 801 and 820 discussed above, the 'death of a sponsor' exception in Subclass 100 or 309 does not require that the spouse or de facto partner of the sponsoring

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[27] For a Subclass 309 visa, the applicant must be in Australia and cl 309.412(4) would apply (i.e. that the decision to grant the visa is made after 26 February 2021 while the applicant was onshore and they were onshore at any time during the concession period defined in reg 1.15N(1)). The exceptions were inserted into Part 309 of Schedule 2 to the Regulations by Part 1 of Schedule 1 to F2022L01093 and apply in relation to a decision to grant or not to grant a subclass 100 or 309 visa made on or after 20 August 2022, whether the application for the visa was made before, on or after that date: item 10 of F2022L01093.
[28] cl 820.221(2) and cl 801.221(5).
[29] cl 309.221(1)(b), inserted by item 7 of F2022L01093 and applying apply in relation to a decision to grant or not to grant a subclass 100 or 309 visa made on or after 20 August 2022, whether the application for the visa was made before, on or after that date: item 10 of F2022L01093.
[30] cl 309.221(2)(a), cl 100.221(3)(b) (which also requires that the sponsor died after the applicant first entered Australia as the holder of a temporary visa) and cl 100.221(4B)(b) (which applies for those subclass 309 visa holders who were granted on the basis of the covid concessional arrangements (cl 309.412(2)). These versions of cl 309.221(a) and cl 100.221(4B) were inserted into Schedule 2 to the Regulations by Part 1 of Schedule 1 to F2022L01093 and apply in relation to a decision to grant or not to grant a subclass 100 or 309 visa made on or after 20 August 2022, whether the application for the visa was made before, on or after that date: item 10 of F2022L01093.
[31] cl 309.221(2)(b), cl 100.221(3)(c), cl 100.221(4B)(c)(ii). An applicant for a subclass 100 visa to who cl 309.221(2) applied for the grant of their subclass 309 visa (the death exception for the subclass 309) may also meet the death exception at time of decision for a subclass 100: cl 100.221(4B)(c)(i)).

partner have close business, cultural or personal ties in Australia. However, for Subclass 100 visa applicants who first entered Australia as the holder of a subclass 309 visa, the exception only applies if the sponsoring partner has died *after the applicant first entered Australia.*[32]

Threshold assessment of spouse or de facto relationship

In the context of the 'death of a sponsor' exception there is a specific requirement in the clause containing the exception that the Minister (or Tribunal on review) be satisfied that the applicant would have continued to be the spouse or de facto partner (as relevant) of the sponsor if the sponsoring partner had not died.[33] This means that the applicant must satisfy the decision-maker that the relationship was, until the death of the sponsoring partner, a spousal or de facto relationship as defined in the Act and Regulations as they stood at the relevant time.[34]

Generally, the death exception is a time of decision criterion only, with the exception of the Subclass 820 Spouse visa. For the holder or former holder of a Subclass 300 (Prospective Marriage) visa, where the applicant has married the sponsoring partner, the death of sponsoring partner exception can be invoked at time of application.[35] Clause 820.211(7)(d) requires that the applicant satisfy the Minister that he/she would have continued to be the spouse of the sponsoring partner if the sponsoring partner had not died. Therefore, the Tribunal must still assess the relationship in that context at the time of application.

Close business, cultural or personal ties

The 'close ties' requirement only applies to onshore provisional and permanent Partner visa Subclasses 820 and 801,[36] and, except for Subclass 820 visa applications where the applicant is the holder of a Subclass 300 visa,[37] only as a time of decision criterion. The requirement is that the applicant 'has developed close business, cultural or personal ties in Australia'.[38].

Department guidelines include an opinion on the meaning of this requirement.[39] While the Tribunal may consider Departmental guidelines regarding the interpretation of a legislative provision, it should not treat the Department's opinion as determinative in such matters.[40]

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[32] cl 100.221(3)(b).
[33] cls 309.221(2)(b),100.221(3)(c), 100.221(4B)(c)(ii), 801.221(5)(c), 820.211(7)(d), 820.221(2)(b) – although note the slightly different language between the offshore and onshore visa subclasses discussed above. These versions of cl 309.221(2)(b) and cl 100.221(4B)(c)(ii) were inserted into Schedule 2 to the Regulations by Part 1 of Schedule 1 to F2022L01093 and apply in relation to a decision to grant or not to grant a subclass 100 or 309 visa made on or after 20 August 2022, whether the application for the visa was made before, on or after that date: item 10 of F2022L01093.
[34] Generally speaking, the time of application. For further discussion on which definition is relevant to a particular matter, see the Spouse and de facto partner commentary.
[35] cl 820.211(7).
[36] cls 820.221(2)(c), 801.221(5)(d).
[37] cl 820.211(7)(e).
[38] In *SZUPD v MICMSMA* [2020] FCCA 2274 at [33], the Court confirmed that as there is no definition or mandatory consideration in relation to the meaning of 'close business, cultural or personal ties' in cl 820.221(2)(c), the ordinary and natural meaning applies in assessing whether an applicant has 'close personal ties' in Australia. The Court found it was open for the Tribunal to have regard to circumstances which included that the applicant had few friends and no family in Australia and that there was no evidence that anyone was dependant on her or would face any detriment resulting from her departure, in its assessment of whether the applicant had close personal ties in Australia.
[39] Procedural Instruction - Sch2 Visa 820 - Partner – The UK-820 primary applicant - 19.5 Must have developed close ties (re-issue date 19/11/16).
[40] For further information and relevant case law, see the Application of Policy commentary, 'The status of the Department's policy'

The guidelines suggest that in assessing whether an applicant has *developed* close ties, officers should consider the extent to which ties have *formed* and/or *strengthened* over time. However, it is important to note that nothing in the words of the regulation suggests any specific temporal requirement, or degree of strength of the tie beyond the requirement that it be 'close', and it would be an error of law to impose more stringent standards than the language of the Regulations requires. As it is a time of decision criterion, it is sufficient if the applicant has satisfactory evidence of relevant ties as at the date of the Tribunal's decision.

Common law presumption of death

There may be cases where the applicant alleges his or her sponsoring partner is dead but cannot produce evidence of the death. In these circumstances the common law presumption of death may be relevant in determining if the sponsoring partner has died or is in fact still alive. However, care should be taken not to apply the presumption too strictly as s 353 of the Act provides that, in reviewing a decision, the Tribunal is not bound by technicalities, legal forms or rules of evidence.[41]

The common law presumption of death is commonly expressed as follows:

> *If, at the time when the issue whether a man is alive or dead must be judicially determined, at least seven years have elapsed since he was last seen or heard of, by those who in the circumstances of the case would according to the common course of affairs be likely to have received communication from him or have learned of his whereabouts, were he living then, in the absence of evidence to the contrary, it should be found that he is dead.*[42]

When having regard to the presumption, all of the surrounding circumstances of the case and the respective probabilities that life has ceased or is continuing need to be balanced accordingly.

Where the circumstances in which the person (who is claiming that the relevant relative is presumed to be dead) last saw that relative were such that it could be concluded that there would be no expectation that he or she would 'naturally hear' from that relative, the common law presumption would not apply in favour of that applicant.[43]

The common law presumption of death is discussed in detail in the Remaining Relative commentary.

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[41] The Court's approach in *Ortiz v MIAC* [2011] FMCA 432, where it held that the presumption of paternity in the Family Law Act did not bind the Tribunal, would appear equally applicable to other legal presumptions, such that while it would be open to the Tribunal to have regard to the common law presumption of death, it would not be required to apply that presumption. An appeal against this judgment was successful, but on procedural grounds: *Ortiz v MIAC* (2011) 224 FCR 583.
[42] *Axon v Axon* (1937) 59 CLR 395 at 405.
[43] *Goodreau v MIAC* [2009] FMCA 35 at [28] citing *Axon v Axon* (1937) 59 CLR 395 at 401. The circumstances in that case in which the applicant last saw her father involved a physical and verbal altercation, such that, in the Court's opinion clearly led to the conclusion that there would be no expectation that she would 'naturally hear' from her father after that incident.

Relevant amending legislation

Title	Reference Number	Legislation Bulletin
Migration Amendment (Subclass 100 and 309 Visas) Regulations 2022 (Cth)	F2022L01093	No.03/2022

Relevant case law

Judgment	**Judgment Summary**
Axon v Axon (1937) 59 CLR 395	
Fitch v MRT [2004] FCA 1673	Summary
Goodreau v MIAC [2009] FMCA 35	Summary
Le v MIAC [2009] FMCA 948; (2009) 111 ALD 460	Summary
Ortiz v MIAC [2011] FMCA 432	Summary
Ortiz v MIAC [2011] FCA1498; (2011) 224 FCR 583	Summary
Ortiz v MIBP [2014] FCCA 2994	Summary
Ortiz v MIBP [2015] FCA 427	
Srour v MIMA [2006] FCA 1228; (2006) 155 FCR 441	Summary
SZUPD v MICMSMA [2020] FCCA 2274	Summary
Yazbeck v MIMA [2002] FCA 980; (2002) 124 FCR 458	Summary

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Available decision templates/precedents

Optional standard paragraphs for the child and death of sponsoring partner exceptions are available on the intranet, see the Decision Templates/Precedents Index.

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SUBCLASS 300 – PROSPECTIVE MARRIAGE VISAS

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Overview[1]

Subclass 300 (Prospective Marriage) is the only subclass in the Prospective Marriage (Temporary) Visa (Class TO) class. It is a temporary visa for people outside Australia who intend to marry, in Australia, the Australian citizen, Australian permanent resident or eligible New Zealand citizen who is their prospective spouse (fiancée).

Depending upon when the visa was granted, it allows the visa holder to travel to, enter and remain in Australia for a period between 9 and 15 months from the date of the visa grant, subject to certain exceptions.[2] It is a condition of the visa that the visa holder marries their intended spouse within the period of the visa.[3]

The visa category is designed so that after marrying their prospective spouse (within the period that their visa is in effect) the visa holder can make a combined application for temporary and permanent partner visas. In other words, the process to achieve a permanent partner visa involves three visa applications: a Prospective Marriage (Temporary) Visa (Class TO) – Subclass 300 (Prospective Marriage), followed by a combined application for Partner (Temporary) (Class UK) – Subclass 820 (Partner) and Partner (Residence) (Class BS) – Subclass 801 (Partner).

Tribunal's jurisdiction

A decision made on or after 27 February 2021 to refuse to grant a Subclass 300 visa is reviewable under s 338(9) of the *Migration Act 1958* (Cth) (the Act) if the visa was applied for before the end of the concession period in reg 1.15N(1),[4] the applicant was outside Australia when the visa application was made but was in Australia at any time during the concession period (which commenced on 1 February 2020) and at the time the decision was made.[5] It is the sponsor who has standing to bring the review application.[6]

Where the decision to refuse the visa was made before 27 February 2021, or any one of the circumstances in relation to the time of applying for the visa and/or the location of the applicant described above do not apply, the decision is reviewable under s 338(5) provided the visa

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[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] For a visa granted before 27 February 2021, the visa is in effect for 9 months from the date of the visa grant: cl 300.511. For a visa granted on or after 27 February 2021, the visa is in effect for the date specified by the Minister, which must be at least 9 but not more than 15 months from the date of the visa grant, or, if no date is specified, 9 months from the date of grant: cl 300.511 as amended by the *Migration Amendment (2021 Measures no.1) Regulations 2021* (Cth) (F2021L00136). See also cl 300.512 as inserted by the *Migration Amendment (Prospective Marriage Visas) Regulations 2020* (Cth) (F2020L01577) which extends the validity of the visa until 31 March 2022 if the visa was in effect at any time during the period 6 October 2020 and 10 December 2020 and the holder was outside Australia on 10 December 2020 and cl 300.513 as inserted by the *Migration Amendment (Prospective Marriage Visas) Regulations 2021*(Cth) (F2021L01481) further extending the validity of the visa to 31 December 2022 if the visa was in effect on 15 September 2021 and the holder was outside Australia on 15 September 2021.
[3] cl 300.612, condition 8519 of sch 8 to the Regulations.
[4] As at the date of publication the Minister has not yet prescribed under reg 1.15N(2) the end date for the concession period.
[5] s 338(9) and reg 4.02(4)(s).
[6] reg 4.02(5)(r).

applicant was sponsored in accordance with s 338(5)(b).[7] It is the sponsor who has standing to bring the review application.[8]

Requirements for a valid visa application

The requirements for making a valid application for a Subclass 300 visa are set out in Item 1215 of Schedule 1 to the *Migration Regulations 1994* (Cth) (the Regulations). These include that the application must be made on a specified form, the visa application charge must be paid and the applicant must be outside Australia.[9]

An application by a person claiming to be a member of the family unit of an applicant may be made at the same time and place as, and combined with, the application by that person.[10]

Visa criteria

The criteria for the grant of a Subclass 300 visa are set out in Part 300 of Schedule 2 to the Regulations. The primary criteria to be satisfied at time of application and time of decision are detailed at Subdivisions 300.21 and 300.22 respectively.

The applicant must be outside Australia when the visa is granted unless the visa is granted after 26 February 2021, and the application for the visa was made before the end of the concession period in reg 1.15N(1), and the applicant was in Australia at any time during the concession period and is in Australia when the visa is granted.[11]

Legal issues

There is limited judicial consideration of the Subclass 300 criteria. This may be attributable to the nature of this Subclass, as where the application is refused it would generally be easier for the applicant to reapply or marry offshore and apply for a spouse visa.

The parties must have turned 18 (cls 300.212A, 300.213)

For visa applications made on or after 1 July 2013, the visa applicant and sponsor must have turned 18 at the time of the visa application.[12] These age requirements were introduced to help

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[7] s 338(5); items 1215(3)(a), (b). This is because cl 300.412(2), as inserted by F2021L00136 and which allows for the visa to be granted onshore, does not apply in these circumstances, meaning that the visa can only be granted offshore. Although cl 300.412(2)(c)(ii) refers to the visa applicant being 'in Australia… when the visa is *granted'*, for the purposes of the Tribunal determining its jurisdiction it is necessary to read this as requiring the visa applicant to be 'in Australia… when the visa *refused'*. As the Tribunal does not review decisions to grant a visa, a literal interpretation would render a decision to refuse the visa un-reviewable in the MRD and would be contrary to the intention of the amendments: Explanatory Statement to F2021L00136, p.13.
[8] s 347(2)(b).
[9] Items 1215(1), (2) and (3) as in force at the time of application. If an applicant holds a Subclass 303 visa, they need not be outside Australia at the time of application. Subclass 303 visa was repealed on 22 March 2014 by F2014L00272, pt 4.
[10] Item 1215(3)(c).
[11] cl 300.412. The concession period prescribed in reg 1.15N(1) commenced on 1 February 2020. No end date is yet prescribed under reg 1.15N(2).
[12] cls 300.212A, 300.213(2).

ensure there was genuine consent to the marriage, noting that young age was a risk factor for forced marriages.[13]

Met and know each other personally (cls 300.214, 300.221)

For visa applications made on or after 1 July 2013, the parties must have met in person since each of them turned 18.[14] According to the Explanatory Statement which accompanied this amendment, the previous criteria allowed 'for persons who only met in person as children to apply for and be granted the visa'.[15] The change is one of a range of measures designed 'to provide greater protections to applicants, who, on account of their young age, could become victims of forced marriage and/or people trafficking.'[16]

Clause 300.214 further requires the parties to be 'known to each other personally'. This requirement is independent of the requirement that the parties 'have met'.[17] Although the meaning of this has not been the subject of specific judicial consideration, there appears to be no reason why the parties could not come to 'know each other personally' through letters, phone, fax, email or internet, provided the couple has met in person.[18] Hence, to meet this criterion the parties may have met only briefly, but come to know each other through other means of contact.

Intention to marry / Intention to marry within the visa period (cls 300.215, 300.221)

The Tribunal must be satisfied that at both the time of application, and at the time of decision, the parties have a genuine intention to marry.[19] This may be evidenced by a letter from a marriage celebrant, a Notice of Intended Marriage, or other relevant evidence (e.g. evidence of wedding plans, bookings etc).[20] Oral evidence provided by the parties would also be relevant to the Tribunal's examination of these criteria.

Intention to live together as spouses (cls 300.216, 300.221)

Clauses 300.216 and 300.221 require the Minister's (or Tribunal's on review) satisfaction of the parties' intention to live together as spouses – it looks at the parties' aspirations. It is not an assessment of whether the parties are actually spouses at the time of application or time of

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[13] *Migration Legislation Amendment Regulation 2013 (No 3)* (Cth) (SLI 2013, No 146). The Explanatory Statement to SLI 2013, No 146 explained the intention behind the change as follows: "…to ensure that both parties to a Prospective Marriage Visa application genuinely consent to a marriage by ensuring that both visa applicant and sponsor are of marriageable age and legally able to consent to the marriage before they are able to lodge a valid visa application. Evidence presented to the [Senate Legal and Constitutional Affairs] Committee also suggested that even a slight increase in the minimum age would increase the likelihood of applicants and sponsors being more mature and so better able to respond to pressure from family members to enter an unwanted marriage.": at p.17.
[14] cls 300.214(1), 300.221. This requirement in cl 300.214 was amended for visa applications made on or after 1 July 2013: SLI 2013, No 146. For applications made before 1 July 2013, the requirement in cl 300.214 was that the parties had met and were known to each other personally.
[15] Explanatory Statement to SLI 2013, No 146 at p.17.
[16] Explanatory Statement to SLI 2013, No 146 at p.2.
[17] *MIAC v Yucesan & Anor* [2008] FCAFC 110 at [16].
[18] *MIAC v Yucesan & Anor* [2008] FCAFC 110 at [28].
[19] cls 300.215, 300.221.
[20] Notice of Intended Marriage' forms are available through the Attorney-General's Department at https://www.ag.gov.au/FamiliesAndMarriage/Marriage/Pages/get-married.aspx (accessed 13 May 2021, XX December 2022).

decision. The question is whether they intend to live together as spouses, after they are married. Therefore, while the definition of spouse at s 5F of the Act, supplemented by the matters in reg 1.15A of the Regulations, may be a useful tool to assist the Tribunal in considering the relationship that the parties intend to have in the future, it would be an error of law to apply the definition to their current circumstances.[21] In referring to the reg 1.15A(3) matters, care should be taken that the Tribunal is asking the right question of itself (i.e. that the parties genuinely intend to live together as spouses in the sense that term is used in the Regulations (i.e. with reference to the applicable definition)). In addition to stating the correct test, the Tribunal must properly apply that test.[22] Jurisdictional error may arise if the focus of the Tribunal is entirely on past events and not upon the future intentions of the parties.[23]

Cultural/religious factors may also affect the type/amount of evidence available regarding future intentions. In addition, discussion of the definition of Spouse and the reg 1.15A matters may not be appropriate where the parties present their relationship as an engagement and an intention to cohabit in the future only - in this instance to look at the current or past circumstances of the parties in terms of the definition of spouse and reg 1.15A matters may indicate jurisdictional error.[24]

The following examples of matters may be a useful guide to relevant lines of enquiry:[25]

- What the incidents of the proposed relationship would be: whether it was intended to be monogamous, what relationship either has with others, what role the visa applicant was to play with the sponsor's child, etc.
- What arrangements the parties intended to make to live together, if any. Whether they intend to stay with friends, obtain a house or flat together. Where they intended to live.
- What roles each would take in the relationship? Would the visa applicant work full time? Was it intended the sponsor would work or be a homemaker? Do they intend to have children in the near future?
- Who would do the housework and how would it be divided?
- The extent of emotional support.
- Whether the parties see the relationship as long term.

All of these are matters arising from reg 1.15A when applied to *the future*. The current nature of the relationship may be relevant but it is only one factor and may not be determinative. [26]

No impediment to the marriage in Australian law (cl 300.221A)

Clause 300.221A requires that there be no impediments to the marriage under Australian law.

[21] For a discussion of s 5F of the Act and reg 1.15A of the Regulations, refer to the Spouse and de facto partner commentary.
[22] *Habbebe v MIMIA* [2006] FMCA 163 at [24]. See also *Pham v MIAC* [2009] FMCA 287 at [14].
[23] *Habbebe v MIMIA* [2006] 163 at [24].
[24] *Bui v MIAC* [2009] FMCA 1096 at [34]. Not disturbed on appeal: *Bui v MIAC* [2010] FCA 234.
[25] *Habbabe v MIMIA* [2006] FMCA 163 at [25].
[26] *Habbabe v MIMIA* [2006] FMCA 163 at [25]–[26].

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There is no judicial authority on the meaning of 'legal impediment to the marriage'. Consistent with the ordinary meaning, the approved form for a 'Declaration of no legal impediment to marriage'[27] indicates that a legal impediment encompasses those circumstances of the type set out in s 23B of the *Marriage Act 1961* (Cth) (Marriage Act) which would render a marriage void[28] (i.e. a marriage between the parties never existed), such as where:

- *One of the parties is already married to someone else* – i.e. whether the parties are free to marry and any former marriages have been properly dissolved.
- *The parties are in a prohibited relationship* – such as a person and their parent, child, brother, or sister.[29]
- *The consent to marriage is not real consent* – because of duress or fraud, mistaken identity, or a party is mentally incapable of understanding the nature and effect of the marriage ceremony.
- *One of the parties is not of marriageable age* – The Marriage Act requires the parties to be of marriageable age,[30] but as there are separate requirements relating to the age of the parties in the Subclass 300 visa criteria, age as an impediment to a marriage is unlikely to arise as a separate issue.[31]

For further commentary on the above see the Valid Marriage commentary.

Sponsorship and approval of the sponsorship (cls 300.213, 300.222)

The visa applicant must be sponsored at the time of application by their prospective spouse, who must be over 18 years of age.[32]

A sponsorship is evidenced by the sponsorship form or undertaking in the visa application form, signed by the sponsor. The question of whether sponsorship undertakings were given at time of application is an objective one, with the mere giving of the undertakings generally sufficient to satisfy this requirement.[33] While it does not involve a subjective assessment of the sponsor's ability to comply with or fulfil the undertakings, the mental or cognitive capacity of a person to

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[27] In accordance with s 42(1)(c)(ii) of the *Marriage Act 1961* (Cth), couples must complete a 'Declaration of no legal impediment to marriage' form. The parties are required to declare that neither is married to another person, that they are not in a prohibited relationship, that they are both of marriageable age, and that there is no other circumstance that would be a legal impediment to the marriage. These forms are available through the Attorney-General's Department at https://www.ag.gov.au/FamiliesAndMarriage/Marriage/Documents/Declaration%20of%20no%20legal%20impediment%20to%20marriage.PDF (accessed 24 May 2021).
[28] Marriage Act s 23B. Section 100 of the Marriage Act appears consistent with the notion that a legal impediment is similar to a basis on which the marriage would be void – it provides that a person shall not solemnise a marriage, or purport to solemnise a marriage, if the person has reason to believe that *there is a legal impediment to the marriage or* if the person has reason to believe *the marriage would be void*.
[29] Marriage Act ss 23B(2), 23(2).
[30] They must generally be 18 years old, but a court may authorise a person who is 16 or 17 years old to marry in exceptional circumstances: ss 11–12 of the Marriage Act.
[31] See discussion above under 'The parties must have turned 18 (cls 300.212A, 300.213)'.
[32] cl 300.213 as amended by SLI 2013, No 146, for visa applications made on or after 1 July 2013.
[33] In *Babar v MICMSMA* [2020] FCAFC 38 at [35]-[36], the Court held that assessment of the sponsorship requirements in reg 1.20 did not involve an assessment of the purported sponsor's capacity to fulfil the undertakings, and that simply giving the undertakings was sufficient.

give or enter into such undertakings may be a relevant consideration.[34] At the time of decision, that sponsorship must have been approved by the Minister (or the Tribunal on review) and must still be in force.[35]

The discretion to approve a sponsorship is subject to the limitations on sponsorship contained in regs 1.20J, 1.20KA, 1.20KB and 1.20KC. These are designed to limit serial sponsorship, prevent 'split applications' in the Parent visa stream, prevent sponsorship of a child by persons convicted of child sex offences, and prevent sponsorship by sponsors who have a significant criminal record or fail to provide a police check.

For more detail about these provisions refer to: Limitation on Sponsorships – Partner Visas commentary.

Where the visa applicant and sponsor marry after the visa application (reg 2.08E)

Special provisions apply where the visa applicant and sponsor marry in the period *after* the visa application is made but *before* it is determined by the Minister/delegate, or *after* the Minister has refused the visa but *before* the Tribunal makes a decision on the review application. These provisions are found in reg 2.08E.

Marriage after visa application but before Minister's decision

Where the visa applicant marries the prospective spouse after the visa application was made but *before* it is decided by the Minister, and the marriage is recognised as valid, the visa applicant is taken also to have applied for a Partner (Migrant) (Class BC) visa and a Partner (Provisional) (Class UF) visa on the day the Department receives notice of the marriage.[36] This means that in addition to the Prospective Marriage visa application, there are also Partner visa applications, but as the fee is taken to be paid against the Partner visa applications (reg 2.08E(3)), the Prospective Marriage application would need to be withdrawn.[37]

Under normal circumstances, the Department would deal with the deemed applications for those visa classes. However, where the delegate has not taken the marriage into account in

[34] In *Lo v MICMSMA* [2020] FCA 895 at [27], the Court found no error in the Tribunal's finding that the applicant was not sponsored because the person purporting to give the sponsorship undertakings had dementia. While, objectively, the relevant sponsorship form and undertakings appeared to have been given, the Tribunal found the applicant was not in fact sponsored because the purported sponsor did not understand the nature of the sponsorship obligations that they had given. Although this judgment concerned sponsorship for a carer visa, the prospective marriage visa shares the same sponsorship framework in reg 1.20, and the reasoning would appear equally applicable.

[35] cl 300.222. See also *Babar v MICMSMA* [2020] FCAFC 38, where the Federal Court confirmed that determining whether the sponsorship should be approved is an exercise of discretion. In that case, however, the Departmental guidelines referred to and considered by the Tribunal included whether the sponsor could afford, and provide, sufficient support for the applicant so as to prevent the applicant from becoming a cost to the Australian taxpayer. The Court held that a sponsor within the meaning of the Regulations was defined as a person who gives particular undertakings to support the visa applicant 'to the extent necessary, financially and relation to accommodation', with no other requirements specified. As the Tribunal's decision was reached taking those Departmental guidelines into account, it's decision was infected with jurisdictional error. Tribunal decision makers should therefore exercise caution when considering Departmental guidelines in this respect, as the guidelines found to be unlawful in *Babar* are still in effect as at 13 May 2021. Despite this, and although the Court in *Babar* did not refer to any matters which would be relevant to this criterion, the judgment does not appear to exclude from consideration the ability to fulfill the undertakings.

[36] reg 2.08E(2).

[37] Procedural Instruction: Regulation 2.08E - Certain applicants taken to have applied for Partner (Migrant) and Partner (Provisional) visas at 3.9.2 The Visa Application Charge (VAC) (reissued 16 November 2019).

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error and has only dealt with the Prospective Marriage visa application, the Tribunal has no power to deal with the deemed applications and must make a decision on the application for review of the Prospective Marriage visa refusal. Given that cl 300.221 requires the applicant to continue to satisfy cl 300.215 at the time of the decision, i.e. 'the parties genuinely intend to marry', the Tribunal may be bound to affirm the decision as the parties are already married. The Tribunal would appear to have no power to remit the application for reconsideration with a reg 2.08E(2B) direction (see below).[38] However, it may be appropriate in cases of this kind for the Tribunal to make findings on the timing and validity of the marriage and the timing of notice to the Department, noting the effect of reg 2.08E (i.e. the applicant appears to have valid Class BC and UF visa applications before the Department).

Similarly, where the marriage took place before the primary decision, but the Department was not notified, notifying the Tribunal at the review stage does not engage reg 2.08E(2B) and the Tribunal must make a decision on the application for review of the Prospective Marriage visa refusal.[39]

Marriage after Minister's decision but before Tribunal decision

Where the visa applicant notifies the Tribunal that they have married the prospective spouse *after* the Minister has refused the visa but before the Tribunal finally determines the review application, and the marriage is recognised as valid, then reg 2.08E(2B) applies.[40] Under reg 2.08E(2B), the Tribunal must remit the application to the Minister with a direction that the application be taken also to be an application for a Partner (Migrant) (Class BC) visa and a Partner (Provisional) (Class UF) visa; and that the Class BC/UF applications are taken to be made on the day the visa application is remitted to the Minister.

It appears that the function of reg 2.08E(2B) is to dispose of the merits review application, as the remittal of the visa application by the Tribunal marks the end of the merits review. Where this happens, although it is not entirely clear, it appears the deemed Class BC and UF visa applications are created by reg 2.08E(2), which is engaged upon remittal to the Department, and not by the remittal direction itself.[41]

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[38] This is because the specific remittal power in reg 2.08E(2B) only applies where reg 2.08E(2A) is first engaged, and a marriage which takes place between the visa application and the Minister's decision engages reg 2.08E(2), not reg 2.08E(2A).
[39] This is because reg 2.08E(2A)(e) specifically limits the operation to marriages in the period after the primary decision is made. see also the Procedural Instruction: Regulation 2.08E- Certain applicants taken to have applied for Partner (Migrant) and Partner (Provisional) visas at 3.10.2 Ineligible cases (reissued 16 November 2019).
[40] reg 2.08E(2A). The review application must also be valid: reg 2.08E(2A)(d).
[41] The Act and Regulations only allow for a valid visa application where a visa application is made in accordance with the relevant requirements (such as sch 1 requirements), or where it is a deemed application for a prescribed class of visa that is taken under the regulations to be validly made: ss 46(1) and (2). Regulation 2.08E(1) prescribes Class BC and UF for the purposes of s 46(2), and reg 2.08E(2) provides the circumstances that give rise to a deemed application being made. In contrast, reg 2.08E(2B) does not of itself specify in terms that appear to meet s 46(2) that an application is taken to have been made; rather, it specifies that the Tribunal give a direction of that kind, and the legal effect of such a direction is unclear. However, where the Tribunal has remitted the application to the Department, it would normally be the case that the preconditions for a valid deemed application in regs 2.08E(2)(a), (b) and (c) are met, as these essentially match the requirements in regs 2.08E(2A)(a), (e) and (g) respectively. In contrast, the Procedural Instruction suggests that the operation of r 2.08E(2B)(b) enlivens the Class BC and UF visa applications, but the statutory basis for this is unclear: Procedural Instruction: Regulation 2.08E - Certain applicants taken to have applied for Partner (Migrant) and Partner (Provisional) visas at 3.13 How Partner visa application validity requirements are met after AAT remit(reissued 16 November 2019).

In these cases the Tribunal will need to make findings on the timing of the marriage and the validity of the marriage. Where the applicant appears to have undergone a 'traditional' marriage ceremony but the marriage was not registered, or where the Tribunal otherwise has concerns about the validity of the applicant's claimed marriage, it may still be appropriate for the parties to be considered against the Subclass 300 criteria. For further information on the validity of marriages see the Valid marriage for the purposes of the Act commentary.

Secondary applicants

The text of reg 2.08E does not expressly deal with the position of secondary applicants, and the provisions appear to be drafted with only the primary visa applicant in mind. Both regs 2.08E(2)(b) and (2A)(e) refer to circumstances where *the applicant for the Prospective Marriage visa* marries the prospective spouse (a secondary applicant would not marry the prospective spouse).

On a technical reading, arguably a combined visa application by a secondary applicant would not give rise to a deemed application under reg 2.08E(2) or a remittal direction by the Tribunal under reg 2.08E(2B). On this reading, once the primary applicant who married the prospective spouse was deemed to have validly applied for the Class BC and UF visas, any secondary applicants who are dependent children would be able to apply to be added to those applications under the provisions of regs 2.08A and 2.08B (for the permanent Class BC visa and provisional Class UF visa respectively). Although the primary applicant's visa application charge is taken to have been paid for the Class BC visa under reg 2.08E(3), additional applicant charges may be payable for the secondary applicants: regs 2.08A(1)(d) and 2.08B(1)(d).[42] If there was a merits review application by a secondary applicant before the Tribunal, it would be open to the Tribunal to affirm the visa refusal decision in respect of the secondary applicants, for example on the basis that cl 300.321 (which requires the primary applicant to hold a Subclass 300 visa) was not met.[43]

However, on a less technical reading that arguably gives better effect to the function of reg 2.08E(2B) in disposing of the merits review proceeding, once the primary visa applicant marries, the 'application' in respect of which the Tribunal must give a remittal direction is the 'combined application' involving the secondary applicants.

Relevant decision templates/precedents

There are two decision templates/precedents specific to Subclass 300 reviews. These are:

[42] Procedural Instruction: Regulation 2.08E – Certain applicants taken to have applied for Partner (Migrant) and Partner (Provisional) visas at 3.9.3 Secondary Applicants (reissued 16 November 2019). There is no visa application charge for the provisional Class UF visa (Sch.1 Item 1220A(2)), but there is for the combined Class BC visa (Sch.1 Item 1129(2)).
[43] Procedural Instruction: Regulation 2.08E – Certain applicants taken to have applied for Partner (Migrant) and Partner (Provisional) visas at 3.12.3 Secondary visa applicants at merits review (reissued 16 November 2019).

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- **Subclass 300 - general** – This template/precedent is suitable for most Subclass 300 cases as it addresses most criteria. There is one version of this template/precedent (1 July 2000 - present).
- **Subclass 300 - reg 2.08E cases** – This template/precedent is suitable for reviews of decisions to refuse a Subclass 300 visa where the visa applicant and sponsor have married since primary decision. It should only be used where reg 2.08E applies. Where the marriage is not valid, and reg 2.08E does not apply, use the Subclass 300 Visa Refusal - General template/precedent instead. There is one version of the template/precedent (1 November 1999 - present).

Relevant case law

Judgment	Judgment Summary
Babar v MICMSMA [2020] FCAFC 38	Summary
Bui v MIAC [2009] FMCA 1096	
Bui v MIAC [2010] FCA 234	
Habbabe v MIMIA [2006] FMCA 163	Summary
Lo v MICMSMA [2020] FCA 895	Summary
MIAC v Yucesan [2008] FCAFC 110; (2008) 169 FCR 202	Summary
Pham v MIAC [2009] FMCA 287	

Relevant amending legislation

Title	Reference Number	Legislation Bulletin
Migration Regulations (Amendment) 1996 (Cth)	SR 1996, No 276	
Migration Amendment Regulations 1999 (No 13) (Cth)	SR 1999, No 259	
Migration Amendment Regulations 2002 (No 2) (Cth)	SR 2002, No 86	
Migration Amendment Regulations 2005 (No 3) (Cth)	SLI 2005, No 133	No.2/2005
Migration Amendment Regulations 2005 (No 4) (Cth)	SLI 2005, No 134	No.1/2005

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Migration Amendment Regulations 2007 (No 12) (Cth)	SLI 2007, No 314	No.15/2007
Migration Legislation Amendment Regulations 2009 (No 2)	SLI 2009, No 116	No.7/2009
Migration Amendment Regulations 2009 (No 7) (Cth)	SLI 2009, No 144	No.9/2009
Migration Amendment Regulations 2010 (No 2) (Cth)	SLI 2010, No 50	No.2/2010
Migration Legislation Amendment Regulations 2011 (No 2) (Cth)	SLI 2011, No 250	No.1/2012
Migration Legislation Amendment Regulation 2012 (No 5) (Cth)	SLI 2012, No 256	No.10/2012
Migration Legislation Amendment Regulation 2013 (No 3) (Cth)	SLI 2013, No 146	No.10/2013
Migration Legislation Amendment (2015 Measures No 2) Regulation 2015 (Cth)	SLI 2015, No 103	No.7/2015
Migration Legislation Amendment (2016 Measures No 3) Regulation 2016 (Cth)	F2016L01390	No.3/2016
Migration Amendment (Prospective Marriage Visas) Regulations 2020	F2020L01577	
Migration Amendment (2021 Measures No.1) Regulations 2021	F2021L00136	No.2/2021
Migration Amendment (Prospective Marriage Visas) Regulations 2021	F2021L01481	

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PARTNER VISA OVERVIEW

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Overview[1]

Partner visas are designed for people who are spouses, de facto partners and prospective spouses of Australian citizens, Australian permanent residents and eligible New Zealand citizens who seek to enter and remain in Australia temporarily or permanently. There are currently two types of Partner visas prescribed by the *Migration Regulations 1994* (Cth) (the Regulations): Prospective Marriage visas and Partner visas.

Visa classes and subclasses

There are five classes of Partner visa. Each Partner visa class currently contains only one visa subclass:

- Prospective Marriage (Temporary) (Class TO) – *offshore temporary*
  - Subclass 300 (Prospective Marriage)
- Partner (Provisional) (Class UF) – *offshore temporary*
  - Subclass 309 (Partner (Provisional))
- Partner (Migrant) (Class BC) – *offshore permanent*
  - Subclass 100 (Partner)
- Partner (Temporary) (Class UK) – *onshore temporary*
  - Subclass 820 (Partner)
- Partner (Residence) (Class BS) – *onshore permanent*
  - Subclass 801 (Partner).

For further information as to the Prospective Marriage visa, see the Subclass 300 – Prospective Marriage visas commentary and for further information as to the Partner 309/100 and 820/801 visas, see the Partner Visas: subclasses 309/100 and 820/801 commentary.

Tribunal's Jurisdiction

A decision made on or after 27 February 2021 to refuse to grant a subclass 300 or 309 visa is reviewable under s 338(9) of the *Migration Act 1958* (Cth) (the Act), if the visa was applied for before the end of the concession period in reg 1.15N(1)[2] the applicant was outside Australia when the visa application was made but was in Australia at any time during the concession period (which commenced on 1 February 2020) and at the time the decision was made.[3] It is the sponsor who has standing to bring the review application.[4]

[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] As at the date of publication the Minister has not yet prescribed under reg 1.15N(2) the end date for the concession period.
[3] s 338(9) and reg 4.02(4)(s). If the review is of the refusal of a subclass 309 visa which is a converted application from a subclass 300 visa under reg 2.08E(2), i.e. the applicant applied for a subclass 300 visa and, after the visa application was made but before it was decided by the delegate, the parties married and notified Immigration of the marriage, then under reg 2.08E(2) the application is taken to be a valid application for a subclass 309 visa, and the visa applicant is onshore at the time they notified Immigration of the marriage (i.e. the day the visa application for the Subclass 309 visa is taken to have been

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Where the decision to refuse the subclass 300 or 309 visa was made before 27 February 2021, or any one of the circumstances in relation to the time of applying for the visa and/or the location of the applicant described above do not apply, the decision is reviewable under s 338(5) provided the visa applicant was sponsored in accordance with s 338(5)(b).[5] The sponsor has the review right in these cases.[6]

Visa subclasses 820 and 801 are reviewable under s 338(2) of the Act. Subclass 100 is generally reviewable under s 338(7A) of the Act.[7] The visa applicant has the review right in these cases.[8]

For subclass 820 and 801 decisions, the Tribunal only has jurisdiction if the visa applicant is physically present in the migration zone at the time the application for review is made.[9] For Subclass 100 decisions an application for review can only be made by a visa applicant who was physically present in the migration zone at the time when the decision was made **and** who is physically present in the migration zone when the review application is made.[10]

There is no location requirement relevant to the sponsor who has a review right in respect of a subclass 300 or 309 visa refusal.

Due to the two-stage nature of the partner visa scheme discussed below, a delegate may refuse both a Subclass 820 (temporary) and Subclass 801 (permanent) visa at the same time. In these circumstances, while both decisions are reviewable under Part 5 of the Act, there is no capacity to apply for review of both decisions in a single review application form even where the decisions are in one singular decision letter.[11] Two separate applications are required as the statutory scheme establishes two different visas with separate criteria and the delegate's decision is to be treated as two decisions, one for each visa.[12] If an applicant applies for review of both decisions on one form, it is an invalid application for at least one of those decisions, and the Tribunal must make a finding of fact as to which decision is reviewable. If there is any ambiguity about which decision, or decisions, the application for

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made); and the visa applicant applied for the visa before the end of the concession period in reg 1.15N(1) and was in Australia at any time during the concession period described in reg 1.15N(1), then the decision to refuse the subclass 309 in those circumstances, is a reviewable decision under s 338(2). The visa applicant has standing to bring the review application (s 347(2)(a)).

[4] reg 4.02(5)(r).

[5] s 338(5). This is because cls 300.412(2) and 309.412(2), as inserted by F2021L00136 and which allows for the visa to be granted onshore, does not apply in these circumstances, meaning that the visa can only be granted offshore. Although cls 300.412(2)(c)(ii) and 309.412(2)(c(ii) refer to the visa applicant being 'in Australia… when the visa is *granted'*, for the purposes of the Tribunal determining its jurisdiction it is necessary to read this as requiring the visa applicant to be 'in Australia… when the visa is *refused*'. As the Tribunal does not review decisions to grant a visa, a literal interpretation would render a decision to refuse the visa un-reviewable in the MRD and would be contrary to the intention of the amendments: Explanatory Statement to F2021L00136, p.13.

[6] s 347(2)(b).

[7] An exception applies to Subclass 445 (Dependent Child) visa holders, or people granted Subclass 309 or 310 visas under s 345, 351, 391, 417, 454 or 501J (Ministerial intervention powers), or their family members, who may apply onshore (Item 1129(3)). In these circumstances, the visa refusal is reviewable under s 338(2) and the visa applicant has standing to apply for review under s 347(2)(a).

[8] s 347(2)(a).

[9] s 347(3).

[10] s 347(3A). Note, however, that the requirement to be onshore when the decision was made does not apply to Subclass 445 (Dependent Child) visa holders, or people granted Subclass 309 or 310 visas under s 345, 351, 391, 417, 454 or 501J (Ministerial intervention powers), or their family members, who have applied onshore for their visa (Item 1129(3)). In these circumstances, the visa refusal is reviewable under s 338(2), the visa applicant has standing to apply for review under s 347(2)(a), and the review application may only be made when the applicant is onshore under s 347(3).

[11] reg 4.12.

[12] *Basra v MIBP* [2018] FCA 422 at [35]–[41], Mohinsky J held that the Tribunal dealing with a Subclass 801 visa did not have jurisdiction to also review a Subclass 820 visa decision, as this had already been dealt with by another Tribunal. While this contrasts with another decision of the Federal Court in *Bojanovic v MIMA* [2002] FCA 113, where Mansfield J was of the view that the single application to the Tribunal identifying both decisions 'obliged' the Tribunal to consider both, *Basra* is a much more recent authority and it has been followed by the Federal Circuit Court in *Mohammed v MIBP* [2018] FCCA 2893 and *Tam v MIBP* [2018] FCCA 328 as the correct approach.

review is being made in respect of, it may be necessary to seek clarification from the applicant about that.[13]

Two Stage Processing

Generally, there is a two-stage process before a permanent visa is granted in the partner migration stream. First, a provisional (temporary) visa is granted and then, usually after two years[14] (some exceptions apply),[15] and if the relationship is ongoing (some exceptions apply),[16] the permanent visa may be granted.[17]

The applicant applies for the provisional and permanent visas at the same time and place, and the visa application charge is only payable on the permanent visa application.[18] If the criteria for the provisional visa are met, the visa is granted to allow travel to, and stay in, Australia until a decision on the permanent visa is made.[19]

Two-stage processing will not prevent the permanent visa being decided less than 2 years after the application is made where the visa is refused[20] or where the exceptions to the ongoing relationship requirement apply.[21] The requirement for at least 2 years to have passed does not apply to a Partner visa applicant who at time of application was in a 'long-term partner relationship'[22] with the sponsoring partner.[23] Similarly, the requirement does not apply in certain circumstances where the sponsoring partner held a permanent humanitarian visa.[24]

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.

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[13] In SYG566/2020 (Tribunal reference [redacted] the delegate's decision to refuse the applications for a Partner Subclass 820 (Temporary) (Class UK) and Partner Subclass 801 (Residence) (Class BS) visas were contained in a single decision record. When applying for review, the applicant conflated these two decisions by stating, in the review application form, it was an application for review of a decision refusing a Subclass 801 (Class UK) visa. The Tribunal proceeded with the review on the basis of it being an application to review the refusal of a Subclass 820 (Class UK) visa. The Federal Circuit Court remitted the matter by consent on the basis that the Tribunal had failed to correctly identify and determine the application for review which the applicant had made, being an application seeking review of a decision to refuse to grant a Partner (Residence) (Class BS) Subclass 801 (Partner) visa.

[14] Generally, the two-stage processing rule operates for ongoing relationships through a requirement that a person hold a provisional or temporary partner visa, and that at least 2 years have passed since the application for that visa was made: cls 100.221(2)(c), .801.221(2)(d). Also see cls 100.221(2A)(c), 801.221(2A)(c).

[15] cls 100.221(3) – (4), (5) – (7), 801.221(5)–(6A).

[16] cls 100.221(3)–(4), 801.221(3)–(6). For guidance on the 'child exception' and 'death exception', see 'Partner Visas – Exceptions to Relationship Requirement – Death/Child'.

[17] cls 100.221, 801.221.

[18] See Items 1124B(2), 1129(2), 1214C(2), (3)(a), 1220A(2), (3)(c).

[19] cls 309.511, 820.511, 300.511.

[20] cls 100.221(7)(a), 801.221(7)(a).

[21] cls 100.221(3), (4), (7)(b), 801.221(3)–(6), (7). For guidance on the 'child exception' and 'death exception', see 'Partner Visas – Exceptions to Relationship Requirement –Death/Child'.

[22] As defined in reg 1.03.

[23] cls 100.221(5), 801.221(6A).

[24] cl 100.221(6).

Legal issues

Relationship requirements

The key issue in Partner visa cases is generally whether the visa applicant meets the requirement that he or she is the spouse or de facto partner or, in the case of prospective marriages, genuinely intends to live together as the spouse, of the relevant Australian citizen, permanent resident or eligible New Zealand citizen.

For these applications:

- the definition of 'spouse' is contained in s 5(1) of the Act. It provides that 'spouse' has the meaning given by s 5F and is limited to married relationships of the same or different sex.[25] Relevant considerations to be taken into account are contained in reg 1.15A.
- 'de facto partner' is separately defined in s 5CB of the Act, with additional criteria and relevant considerations contained in regs 2.03A and 1.09A of the Regulations.

For guidance on the meaning of spouse and de facto partner, see 'Spouse' and 'de facto partner'.

For guidance on assessing a genuine intention to live together as spouses in the future, see Subclass 300- Prospective Marriage visas.

Exceptions to the relationship requirement

There are a few exceptions to the relationship requirement for a Partner visa: death of the partner, family violence and circumstances where there is a child in respect of whom the applicant and sponsor have certain rights and obligations. Separate commentary materials discuss these issues: 'Partner Visas – Exceptions to Relationship Requirement – Death/Child' and 'Family Violence'.

Sponsorship

The other criteria for Partner visas generally relate to sponsorship. There are specific limitations on sponsorship for the purposes of Partner visa applications which are set out in regs 1.20J, 1.20KA, 1.20KB, 1.20KC and 1.20KD of the Regulations. The limitations are:

- Serial sponsors – reg 1.20J imposes a limit on the number of people that a person can sponsor in a lifetime (two), and a minimum time period that must elapse between each sponsorship (five years). A five year limitation also applies to those who themselves were sponsored for a partner visa.
- Parent visa holder (Subclasses 143/864) – reg 1.20KA prohibits the holder of a contributory parent, Subclass 143 or Contributory Aged parent, Subclass 864 from sponsoring a partner within 5 years of being granted a parent visa where the partner

[25] The definition of 'spouse' in s 5F was amended with effect from 9 December 2017 by the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) to include same-sex relationships. Before this change, s 5F(2)(b) required parties to 'have a mutual commitment to a shared life as husband and wife to the exclusion of all others'. This meant that same-sex couples previously could only be granted a Partner Visa on the basis of satisfying the definition of 'de facto partner' in s 5CB.

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was their spouse or de facto partner on or before the date of the grant of the parent visa.

- Serious offenders/child sex offenders – reg 1.20KB prevents those convicted of a child sex offence or a serious offence indicating the person may pose a significant risk to a child from sponsoring a child for a Partner visa or Child visa.[26]
- Significant criminal record – reg 120KC prevents those convicted of a relevant offence and with a significant criminal record in relation to the relevant offence/s from sponsoring a partner for a Subclass 820,309 or 300 visa.[27]

For further information on sponsorship limitations, see 'Limitation on Sponsorships - Partner Visas'.

Health criteria

Another issue which may arise in Partner cases is the health criteria set out in Schedule 4 to the Regulations. The health criterion generally in dispute is Public Interest Criterion 4007, which contains a waiver provision. Where the issue under consideration is the public interest health criterion, the Tribunal may or may not also address the issue of the genuineness of the relationship. In some cases, this may not be in dispute. In others, evidence concerning the relationship may be inextricably linked with submissions for waiver of the health test, and it may be appropriate to address all these criteria. In other cases, the Tribunal may decide to remit on the health criteria only. Information on the health criteria can be found in: Health Criteria – PIC 4005, 4006A and 4007 .

Compelling and/or compassionate

Several criteria in the Partner visa stream require the visa applicant and/or sponsor to demonstrate that compelling and/or compassionate circumstances apply in their case. This can be an issue in dispute where:

- the relationship between de facto partners was not ongoing for the 12 months immediately prior to the visa application, **unless** the applicant can establish *compelling and compassionate circumstances for the grant of the visa*;[28]
- in the case of onshore applicants, certain Schedule 3 criteria must be met – including requirements that the visa application was made within a specified period of the last substantive visa held, **unless** the Minister is satisfied there are *compelling reasons for not applying those criteria*;[29]
- approval of sponsorships for all subclasses of Partner visas is subject to certain limitations on sponsorships contained in regs 1.20J and 1.20KA. Regulation 1.20J allows sponsorship approval in circumstances where a sponsor has successfully sponsored more than one partner, only if the Minister is satisfied that there are *compelling circumstances affecting the sponsor.*[30] Here, the compelling

[26] This limitation applies to applications for certain Partner and Child visas made on or after 27 March 2010 – *Migration Legislation Amendment Regulations 2010* (No 2) (Cth) (SLI 2010, No 50)
[27] reg 1.20KC(2) sets out what is a relevant offence and reg 120KD defines 'significant criminal record'.
[28] reg 2.03A(3)(b).
[29] For example, cl 820.211(2)(d)(ii).
[30] reg 1.20J(2).

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circumstances must specifically affect the sponsor. In the case of the sponsorship limitation contained in reg 1.20KA, which relates to sponsorship by Contributory Parent visa holders, the compelling circumstances must specifically affect the applicant;[31]

- Public Interest Criterion 4007 (health requirements) may be waived if the Minister is satisfied that the granting of the visa would be unlikely to result in undue cost to the Australian community or undue prejudice to access to health care or community services.[32] To properly consider this, it has been held that decision makers may need to consider compassionate and/or compelling circumstances.[33]

For further detail see: Compelling and/or Compassionate Circumstances/Reasons.

Relevant case law

Judgment	Judgment Summary
Basra v MIBP [2018] FCA 422	
Bojanovic v MIMA [2002] FCA 113	Summary
Bui v MIMA (1999) 85 FCR 134	

Relevant amending legislation

Title	Reference Number	Legislation Bulletin
Migration Regulations (Amendment) 1996 (Cth)	SR 1996, No 211	
Migration Legislation Amendment Regulations 2009 (No 2) (Cth)	SLI 2009, No 116	No 7/2009
Migration Amendment Regulations 2009 (No 7) (Cth)	SLI 2009, No 144	No 9/2009
Migration Amendment Regulations 2010 (No 2) (Cth)	SLI 2010, No 50	No 2/2010
Migration Legislation Amendment (2015 Measures No 2) Regulation 2015 (Cth)	SLI 2015, No 103	No 7/2015
Migration Legislation Amendment (2016 Measures No 3) Regulation 2016 (Cth)	F2016L01390	No 3/2016
Marriage Amendment (Definition and Religious Freedoms) Act 2017 (Cth)	No 129 of 2017	No 6/2017

[31] reg 1.20KA(3)(b).
[32] cl 4007(2)(b)(i)–(ii).
[33] *Bui v MIMA* (1999) 85 FCR 134.

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Migration Amendment (2021 Measures No.1) Regulations 2021	F2021L00136	No.2/2021

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‘SPOUSE’ AND ‘DE FACTO PARTNER’

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Overview[1]

The terms 'spouse' and 'de facto partner' are used throughout the *Migration Act 1958* (Cth) (the Act) and the *Migration Regulations 1994* (Cth) (the Regulations) in a variety of contexts. The terms are central concepts for the various Partner visas as these visas generally require that the visa applicant be the spouse or de facto partner of the sponsoring partner.[2] The terms 'spouse' or 'de facto partner' are also relevant when determining various familial relationships which may form part of a criterion for a visa.[3] They are defined terms in ss 5F and 5CB of the Act, respectively, and are discussed in detail below.

For visa applications lodged before 1 July 2009, the requirements for a de facto relationship were defined within the pre 1 July 2009 definition of spouse contained in reg 1.15A.[4] This commentary examines the post 1 July 2009 requirements. For visa applications lodged before 1 July 2009 please contact MRD Legal Services.

Key requirements

Definition of spouse (s 5F) and de facto partner (s 5CB)

Section 5(1) of the Act provides that 'spouse' and 'de facto partner' have the meanings given by s 5F and s 5CB respectively.

Section 5F(1) provides that a person is the 'spouse' of another where those two people are in a 'married relationship'. Section 5CB(1) defines a person as the 'de facto partner' of another person if the person is in a 'de facto relationship' with the other person. Both definitions provide that the couple may be of the same sex or a different sex.[5]

Sections 5F(2) and 5CB(2) define 'married relationship' and 'de facto relationship' for the purposes of the Act. The definitions of spouse and de facto partner are supplemented by regs 1.15A and 1.09A which outline factors to consider when determining if these definitions are met. The key requirements of a de facto relationship are broadly similar to those relevant

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[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] Visa Subclasses 100, 309, 801 and 820 each contain criteria to the effect that the visa applicant is the 'spouse' or 'de facto partner' of an Australian citizen/permanent resident/eligible New Zealand citizen. The Subclass 300 prospective spouse visa for fiancées of such persons also involves a less direct consideration of the definition of 'spouse' – for further information see Prospective Marriage (Subclass 300) – Fiancé(e) visas.
[3] For example: the definition of 'member of the family unit' in reg 1.12 includes the term 'spouse' and 'de facto partner'; the definition of 'member of the immediate family' in reg 1.12AA includes reference to a 'spouse' and 'de facto partner'; the definition of orphan relative in reg 1.14 includes a requirement that the visa applicant 'does not have a spouse or de facto partner''; and the definition of remaining relative in reg 1.15 includes a requirement that 'the applicant, and the applicant's spouse or de facto partner (if any), have no near relatives…'.
[4] The definitions for partner relationships (including spouse, de facto and other interdependent relationships) were changed with effect from 1 July 2009 as part of a number of amendments to the Act made by the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* (Cth). The *Migration Amendment Regulations 2009* (No 7) (Cth) (SLI 2009, No 144) amended the Regulations to accompany the changes to the Act.
[5] The definition of 'spouse' in s 5F was amended with effect from 9 December 2017 (applicable to all live applications) by the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) (No 129, 2017) to include same-sex marriages. Before this change, same-sex married couples could only be granted a Partner Visa on the basis of satisfying the definition of 'de facto partner' in s 5CB.

to the determination of the existence of a spouse relationship. The requirements for spouse relationships contained in s 5F and de facto partner relationships in s 5CB are as follows:

Spouse – s 5F *reg 1.15A considerations*	**De facto – s 5CB** *reg 1.09A considerations*
Married to each other in a marriage that is recognised as valid under the Act[6]	Not in a married relationship with each other[7] and not related by family[8]
Mutual commitment to a shared life as a married couple to the exclusion of all others[9]	Mutual commitment to a shared life to the exclusion of all others[10]
Relationship is genuine and continuing[11]	
Live together or do not live separately and apart on a permanent basis[12]	

Considerations for determining whether the spousal relationship or de facto relationship exists – regs 1.15A(3) and 1.09A(3)

For Partner visa applications only, when considering whether the above requirements in s 5F or s 5CB for a 'spouse' or 'de facto' relationship are satisfied, regs 1.15A and 1.09A require that the Minister (or the Tribunal on review) **must** consider all of the circumstances of the relationship, including the matters specified concerning 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 (these are discussed in more detail below under Key Issues at Considerations for determining whether a spouse or de facto relationship exists).

For visa applications other than Partner visas the decision-maker **may** consider any of the circumstances specified in reg 1.15A or 1.09A when determining whether a person is the 'spouse' or 'de facto partner' of another but is not required to do so.[13]

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[6] s 5F(2)(a). See Valid marriage. While a literal reading of s 5F(3) would require the factors prescribed in reg 1.15A(3) to also be considered when determining whether a marriage is valid for the purposes of the Act, it is difficult to see how those matters could be relevant in relation to a marriage that is not valid under Part VA of the Marriage Act as per s 12 of the Migration Act. Accordingly, not considering the factors in reg 1.15A(3) for a marriage that was not valid under the Marriage Act would not appear to be a jurisdictional error.
[7] s 5CB(2).
[8] s 5CB(2)(d). 'Related by family' is defined in s 5CB(4)
[9] s 5F(2)(b).
[10] s 5CB(2)(a).
[11] ss 5F(2)(c), 5CB(2)(b).
[12] ss 5F(2)(d), 5CB(2)(d).
[13] regs 1.15A(4), 1.09A(4). In *Nguyen v MIAC* [2010] FMCA 847 the Court held, at [25]–[28], that the Tribunal erred by considering that reg 1.15A(3) imposed a mandatory series of conditions as the class of visa in consideration was a remaining relative visa. In spite of this, the Court held that this error made no difference to the outcome as all the matters referred to by the Tribunal were plainly matters properly relevant to the consideration of whether the visa applicant was in a spousal relationship.

For further information about what the consideration of the prescribed matters entails and how it relates to determining whether a relationship meets the s 5F or s 5CB definitions, see the discussion below under Key Issues.

Additional criteria for de facto partners – regs 2.03A

Regulation 2.03A provides for additional visa criteria that are not part of the s 5CB(2) definition, that apply where a person claims to be in a de facto relationship for the purposes of a visa application. The additional criteria are:

- the parties are both at least 18 years old;[14] and
- for certain applications,[15] the applicant must have been in the de facto relationship for at least the 12 months immediately before making the visa application, unless compelling and compassionate circumstances for the grant of the visa exist.[16]

The 12 month relationship requirement in reg 2.03A(2) does not apply in various circumstances,[17] which are discussed in more detail below.

Key issues

The issue of whether parties are in a spouse or de facto relationship within the meaning of the Act and Regulations involves a factual determination by the Tribunal. Specific issues relevant to determining whether a spouse or de facto relationship exists are considered below.

Mutual commitment to a shared life

The definition of 'spouse' and the definition of 'de facto partner' require that the parties 'have a mutual commitment to a shared life (as a married couple[18]) to the exclusion of all others'.[19] An assessment of whether the claimed relationship involves a 'mutual commitment to a shared life' requires an assessment of the subjective intentions of the parties.[20]

In considering this requirement in the context of married relationships the Full Federal Court held that people enter into marriages with a variety of purposes and motives. It is not necessarily inconsistent with a genuine marriage relationship that it was entered into by one or both parties with a view to material benefit or advancement, as for example with the hope

[14] reg 2.03A(2).
[15] reg 2.03A(3)(a). The 12 month requirement only applies in relation to applications for permanent, Business Skills (Provisional), Student (Temporary), Partner (Provisional), Partner (Temporary) or General Skilled Migration visas. Also see regs 2.03A(4) and 2.03A(5) for circumstances where reg 2.03A(3) does not apply.
[16] reg 2.03A(3).
[17] regs 2.03A(4), (5).
[18] In the case of a claimed spouse relationship, s 5F(2)(b).
[19] See ss 5F(2)(b), 5CB(2)(a).
[20] In *Singh v MIEA* [1996] FCA 1429 at [13] Branson J, found that 'consideration of the subjective intentions of the parties to the relationship' were relevant in considering reg 44 of the *Migration Regulations (1989)* (Cth) (requiring that the relationship is a genuine, continuing relationship between two spouses and the parties have a mutual commitment to a shared life as husband and wife to the exclusion of others).

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of becoming eligible to reside in a particular country.[21] Romantic involvement does not necessarily need to exist for a relationship to be genuine and for the parties to have the relevant commitment, nor is an absence of love and affection determinative.[22] The Tribunal should consider whether the parties' intentions or motives for entering into a relationship are consistent with having a mutual commitment to a shared life.[23] For this reason an arranged marriage, or a relationship entered into for the purposes of gaining entry into Australia or for some other purpose will not, of itself, fail to meet this requirement, provided both parties have a commitment to a shared life.

The level of commitment to the relationship does not need to be of equal strength or quality between the parties, although a reciprocal commitment, at some level, is required. A genuine relationship does not require parity of commitment between the parties, but rather a commitment by each to the other, to the exclusion of all others. There may be relationships where the parties have different levels or degrees of commitment to each other, or where the commitment of the parties to each other is of a different quality. Such differences do not matter in the application of this requirement as long as each party has a commitment of the kind described in the test.[24] The Tribunal will have asked the wrong question if it focuses upon the degree of commitment of the parties, rather than the mutuality of the commitment.[25]

To the exclusion of all others

Both the definition of spouse and de facto partner require that the parties have a mutual commitment *to the exclusion of all others*. Polygamous marital relationships (i.e. concurrent, ongoing *de jure* marital relationships, or an ongoing *de jure* marital relationship concurrent with an ongoing *de facto* marital relationship) cannot meet this requirement.

In order for the spouse or de facto partner definition requirements to be met, there can be only one genuine partner relationship. If there have previously been concurrent relationships, it must be shown that the other concurrent relationships have ended, either by death or permanent separation.

Where the evidence indicates that an applicant may be in a polygamous or bigamous marriage, this may raise a question as to the validity of the second or later marriage. For

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[21] *Re MILGEA and Dhillon* [1990] FCA 144, citing with approval Street CJ in *R v Cahill* (1978) 2 NSWLR 453 at 458. *Dhillon* involved judicial review of a decision to refuse to grant a permanent entry permit and to deport a person who had entered Australia on a temporary permit granted on the basis of marriage to an Australian citizen. In *Garcevic v MIAC* [2012] FMCA 931 at [34], the Court accepted that *Dhillon* and a number of other cases considering repealed provisions requiring a 'mutual commitment to a shared life as husband and wife to the exclusion of others' still represents the law as to what might constitute a married relationship within the meaning of s 5F.

[22] *MIBP v Angkawijaya* [2016] FCAFC 5 at [3]; *Harchandai v MIBP* [2017] FCA 1395 at [29]. See also *Goraya v Minister for Immigration* [2018] FCCA 2017 in which Judge McNab distinguished *Angkawijaya* [2016] FCAFC 5 and found the Tribunal's reference to an apparent absence of romantic love did not form the basis of the decision on consideration of the reasons as a whole at [32]. Accordingly, while romance/love/affection in the relationship is a consideration, a lack of it alone is not determinative.

[23] In *Harchandani v MIBP* [2017] FCA 1395, the Court stated that while motives may be examined, they are not mandatory considerations and s 5F does not *require* the finding of relevant motives on the part of the parties when considering they are in a *spouse* relationship.

[24] *Sevim v MIMA* (2001) 114 FCR 126 at [71]. See also *You v MIAC* [2007] FMCA 1064 in which Riethmuller FM stated at [35] that spouses demonstrate different levels of mutual commitment 'ranging from barely sufficient to enable a marriage to subsist to levels of commitment akin to devotion'.

[25] *Ndegwa v MIMIA* [2005] FMCA 74 at [7].

further detail, refer to Valid Marriage. However, if the marriage is not valid, it will then be necessary to consider the application in relation to the de facto provisions of s 5CB and reg 1.09A.[26] Both de facto and spouse relationships must be to the exclusion of all others,[27] which requires a factual assessment of whether any other spousal or de facto relationship is ongoing.

Sexual infidelity by one of the parties to the relationship does not necessarily take the relationship outside the definition of spouse or de facto. It will be a matter of fact and degree in the circumstances of the case, to be considered, along with all the other circumstances of the relationship, in determining whether the parties have or had the requisite commitment to a shared life to the exclusion of all others at the relevant time.[28]

Genuine and continuing relationship

Both the spouse and the de facto partner definitions require that the relationship is 'genuine and continuing'. Whether the relationship between the parties is a genuine and continuing relationship is a question of fact to be determined by the Tribunal as a matter of inference and conclusion to be derived from all relevant evidence.[29] 'Genuine' refers to a relationship which is, at the relevant time, neither a sham nor a false relationship.[30] For a relationship to be 'continuing', parties need not show that their relationship will last into the long-term or endure for a period beyond that which is reasonably foreseeable.[31] The focus of s 5F(2)(c) is on the relationship such as it is, and it is not to be qualified by whether the quality of the relationship otherwise answers the description of a married relationship of husband and wife.[32]

Similar to assessing mutual commitment, it should be recognised that people enter into partner relationships for a variety of purposes.[33] Because the test involves consideration of the subjective intentions of the parties to the relationship, issues of credibility of the parties to the relationship may assume particular importance.[34] Whilst the credibility of an applicant in asserting the existence and nature of the relationship is of very considerable importance it is not necessarily decisive.[35] For Partner visa applications, assessment against the spouse and de facto partner definitions must be made in light of a consideration of all the circumstances of the relationship, including the matters prescribed in regs 1.15A(3) and

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[26] or regs 1.15A(2) and (3) for pre-1 July 2009 visa applications
[27] See s 5CB(2)(a) for de facto relationships and s 5F(2)(b) for married relationships in respect of applications assessed under the post 1 July 2009 definition
[28] *Cao v MIAC* [2007] FMCA 225 at [36] and [42].
[29] *Chand v MIMA* [1997] FCA 530.
[30] *Malhi v MIBP* [2017] FCCA 119 at [37]
[31] *Malhi v MIBP* [2017] FCCA 119 at [38]
[32] *Malhi v MIBP* [2017] FCCA 119 at [35]. However, it is unclear how the genuineness of a relationship is to be assessed without having regard to the quality of the claimed relationship as a spouse or de facto relationship, and it remains to be seen how (or whether) this reasoning might be applied in future cases.
[33] See *Kumar v MIBP* [2015] FCCA 3161, where the Court accepted that a finding that a relationship is not genuine and continuing, essentially because one party has the intention to obtain financial gain, could give rise to a jurisdictional error (at [13]).
[34] See *Singh v MIEA* [1996] FCA 1429 at [13], [24], where Branson J considered reg 44 of the *Migration Regulations* (1989) (Cth) (requiring that the relationship is a genuine, continuing relationship between two spouses).
[35] *MIMA v Asif* [2000] FCA 228 at [20]. Depending on other relevant evidence, a claim may succeed although an applicant's evidence is rejected as lacking credibility. Objective evidence logically relevant to proving a party's state of mind on the issue is often available and relevant.

1.09A(3) respectively.[36] A variety of matters may be considered in relation to whether a relationship is genuine and continuing, but it is not necessarily appropriate to treat any single matter as determinative. For example, it would be wrong to presuppose some level of frequency of sexual activity within a relationship and impose that as a standard for determining whether the spousal relationship is genuine and continuing.[37]

Living together or not living separately and apart on a permanent basis

The definitions of 'spouse' and 'de facto partner' require that the parties 'live together or do not live separately and apart on a permanent basis'. There is no requirement that the parties have previously lived together to meet this requirement.[38] While cohabitation may satisfy the requirement that the parties live together, the alternative only requires that the parties do not live separately and apart on a permanent basis. This is commonly the situation for offshore cases where a visa applicant is living overseas whilst the sponsor is living in Australia and the separation is seen as temporary.

The words 'separately' and 'apart' are distinct terms. 'Separately' is a term of art referring to the breakdown of the relationship and 'apart' refers to residing at different places, though there may be a degree of overlap between them – for example, physical separation (living apart) is a constituent characteristic of living 'separately', but is not necessarily evidence of it in all instances.[39]

Consideration should also be given to the cultural and/or religious background of the applicant and sponsor, limitations on evidentiary material that might be available in light of such considerations and any other considerations put forward in relation to this issue if the parties are not living together. This may include, for example, any laws or cultural norms which prohibit or discourage unmarried and/or same sex couples from living together.

While parties to a spousal or de facto relationship may be separated for periods of time for a variety of reasons, the intentions of the parties throughout the separation may also be relevant in certain circumstances. If one party to the relationship intends the separation be

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[36] These considerations are mandatory only in the assessment of a spouse or de facto relationship for a Partner visa application: regs 1.15A(2), 1.09A(2). However, any evidence submitted going towards these considerations would likely be seen as relevant to any assessment of a spouse relationship under the Regulations.
[37] *Simpson v MIEA* (1994) 35 ALD 389 at [17] in which the Court stated '[m]arriage relationships can be genuine and continuing whether the spouses have frequent sex, little sex, or no sex at all.'. This case pre-dates reg 1.15A and considered reg 44 of the *Migration Regulations (1989)* which required a 'genuine, continuing relationship between the two spouses'.
[38] *SZOXP v MIBP* [2015] FCAFC 69 at [65], overturning the decision at first instance in *MIBP v SZOXP* [2014] FCCA 565. This case considered the definition of 'de-facto' in s 5CB, but the reasoning would be equally applicable to the definition of 'spouse'.
[39] *White v MIBP* [2014] FCCA 2486 at [22], in which the court appeared to accept submissions about this interpretation of the terms based on the judgments of *Main v Main* (1949) 78 CLR 636 at 641–642 and *Tulk v Tulk* (1907) 13 ALR 45. Upheld on appeal in *White v MIBP* [2015] FCA 1376, although the court did not consider the interpretation of these terms. In *SZOXP* v *v MIBP* [2015] FCAFC 69 at [59(1)] the Full Court found that the phrase "live separate and apart" involves both a physical and mental element which are concerned with a husband and wife who are living their lives separate and apart from each other as separate households; the phrase does not require that the parties live in a different home but rather focuses upon whether they have lived their lives separately as separate households (at [59(2)]). In *Nicolas v MICMSMA* [2022] FedCFamC2G 288 the Court at [49] rejected a claim that the Tribunal's lack of satisfaction that the applicant and sponsor did not live separately and apart on a permanent basis was illogical, irrational or unreasonable in circumstances where the applicant herself had given evidence that it was unlikely they would live together as a couple in the future because the sponsor had moved into a nursing home and the applicant lived elsewhere. The Court accepted, in *obiter* at [65], that there could be cases where an applicant and sponsor do not live separately and apart on a permanent basis notwithstanding that they not physically live together, but that this was not such a case...

permanent, for example, then the intentions or wishes of the other party are irrelevant (see also above, Mutual Commitment to a Shared Life).[40]

Considerations for determining whether a spouse or de facto relationship exists – regs 1.15A and 1.09A

For an application for a Partner visa, reg 1.15A(2) (spouse) and reg 1.09A(2) (de facto) requires that the decision-maker 'must consider' all of the circumstances of the relationship, including certain prescribed matters in regs 1.15A(3) and 1.09A(3). For other visa application types, where these considerations are not mandatory, regs 1.15A(4) and 1.09A(4) provide that the decision-maker 'may consider' any of the prescribed matters.

Failure to mention a relevant consideration in the reasons for decision can lead to an inference that it was not taken into account.[41] Similarly, a failure to consider the prescribed matters in Partner visa cases will generally give rise to jurisdictional error.[42] Considering all of the circumstances of a relationship, including the prescribed matters in regs 1.15A(3) and 1.09A(3), requires that the Tribunal[43]:

- identify the relevant circumstances of the relationship, including the prescribed matters and any other relevant circumstances revealed by the evidence and materials;[44]
- consider these circumstances by applying an active intellectual process and giving proper, genuine, and realistic consideration to them;[45]
- make findings upon each matter in the paragraphs ((a) to (d)) and subparagraphs (Roman numerals), even if the finding is that no conclusion can be reached upon it. Each prescribed matter poses a question for the Tribunal to answer, not merely think about;[46] and
- set out in its written statement of reasons findings concerning each prescribed matter, otherwise it may lead to an inference that the member made no such finding

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[40] *Li v MILGEA* (1992) 33 FCR 568 at 576. Considering the then definition of 'spouse' in reg 2(1) of the Regulations which required in reg 2(1)(a)(ii) that 'the parties are not living separately and apart on a permanent basis…' Hill J held that if the parties live separately, whether that separation is permanent depends on their mutual intention. 'It will not be to the point that the wife hopes or intends that the separation will be but temporary, if the husband has a different intention, the separation then will indeed be permanent.'
[41] *Li v MIAC* [2008] FCA 902 at [24]–[28] where the court considered an earlier version of reg 1.15A; and *Sun v MIBP* [2017] FCA 1270 at [61], [68].
[42] *Nassouh v MIMA* [2000] FCA 788 where the Court set aside a decision of the IRT for failure to consider the matters in reg 1.15A(3) in determining whether the applicant for a Spouse (Provisional) (Class UF) visa and the sponsor were in a married relationship; and *Tranv MIBP* [2016] FCCA 2723 where the court held that the Tribunal's jurisdiction to make a decision did not arise until the conditions precedent to its existence, which included consideration of the matters in reg 1.15A(3) were satisfied and that 'where a question vital to the existence of the Tribunal's jurisdiction to decide an issue is not expressly addressed, one must suspect that it has been overlooked': at [29]–[33].
[43] *He v MIBP* [2017] FCAFC 206.
[44] regs 1.15A(2), 1.09A(2). *He v MIBP* [2017] FCAFC 206 at [58]–[59]. See also *Sun v MIBP* [2017] FCA 1270 at [61] and *Li v MIAC* [2008] FCA 902 at [24]–[27].
[45] *He v MIBP* [2017] FCAFC 206 at [58], [73]. See also *Sun v MIBP* [2017] FCA 1270 at [41], [47].
[46] *He v MIBP* [2017] FCAFC 206 at [76]–[77].

as part of his or her mental process when making the decision and so failed to comply with the obligation to 'consider' the circumstances.[47]

While the prescribed matters must be considered in Partner visa cases, they are not criteria that must each be satisfied.[48] Rather, all relevant circumstances and evidence of the relationship must be considered in making a decision whether, on balance, the requirements of the definition in terms of a genuine and continuing relationship and a mutual commitment to a shared life (as a married couple) to the exclusion of all others are met where the parties are living together or not separately and apart on a permanent basis.[49] There could be genuine and continuing relationships with the appropriate mutual commitment where none of the matters set out in reg 1.15A(3) or 1.09A(3) were in evidence.[50] Appropriate consideration should be given to the cultural and/or religious background of the applicant and sponsor and the evidentiary proof that could be expected to be available in light of such considerations as well as the individual circumstances of the parties.[51] For example, some countries may prohibit same sex relationships, requiring couples to hide a genuine relationship or it may not be the norm in certain cultures for a wife to jointly own property with her husband or to have joint financial assets. In relation to a Subclass 309, the visa applicant will usually be overseas and the sponsoring partner may be in Australia, with limited ability to spend time with the other party. In these circumstances there is likely to be little evidence in relation to a shared household or joint finances.

Where the Tribunal is considering a criterion that requires the definition of spouse or de facto partner to be met at the time of the visa application, the information supplied in relation to the reg 1.15A(3) or 1.09A(3) matters may relate to circumstances after the time of application. The Tribunal must consider all relevant evidence, which may include evidence of events after the date of application insofar as it assists in the task of determining whether the applicant and the sponsor were in a partner relationship at the time of the application. Evidence of events after the visa application is relevant if it tends logically to show the existence or non-existence of facts relevant to the issue to be determined.[52] When drawing

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[47] *He v MIBP* [2017] FCAFC 206 at [79]. The Court found in that case that even though the Tribunal's reasons were not structured in a manner that formulaically addressed each of the prescribed matters in turn, there was no jurisdictional error because its reasons demonstrated it did make findings upon, and therefore, considered, the extent of pooling of financial resources under reg 1.15(3)(a)(iii), living arrangements under reg 1.15(3)(b)(ii) and evidence of others attesting to the relationship under reg 1.15(3)(c)(ii): at [83]–[86]; see also *Zhang v MIAC* [2005] FCAFC 30 at [20]–[21]. Although the Tribunal is not generally obliged to evaluate in detail and make findings on every item of *evidence* before it, when making its findings it should set out sufficient reasoning and refer to evidence submitted, including that which is relevant to the prescribed matters in reg 1.15A(3) or 1.09A(3) to reflect that the required consideration of all circumstances of the relationship (including the prescribed matters) has taken place.

[48] *Li v MIAC* [2007] FMCA 454 at [73]. The Court stated the Tribunal decision would have involved jurisdictional error 'if the Tribunal had taken the view that, to meet the criteria, the applicant must have pooled her financial affairs with the sponsor's…'. Decision upheld on appeal in *Li V MIAC* [2007] FCA 1098.

[49] See for example *Gurung v MIMA* [2006] FMCA 1493 where the court characterised a previous spouse visa application made by the parties as an integer of the claim which the Tribunal was required to consider, rather than a mere item of evidence, which could be rejected as irrelevant or misconceived: at [50]–[51], [62], [67].

[50] *Li v MIAC* [2007] FMCA 454 at [72]. The Court gave Romeo and Juliet as an example of such a relationship.

[51] See *Reddy v MIMIA* [2004] FMCA 516 at [21]–[22]. The Court considered a claim of jurisdictional error for failure to take account of submissions on cultural and religious factors affecting the sponsor to explain a matter relied upon by the Tribunal to conclude there was no mutual commitment to a shared life and found no error by the Tribunal.

[52] *Ally v MIAC* [2008] FCAFC 49 at [32]–[35]; *Jayasinghe v MIMA* [2006] FCA 1700 at [35], citing *MIEA v Pochi* (1980) 4 ALD 139 at [24] per Deane J which held that evidence of subsequent events may be taken into account if it 'tends to logically show the existence or non-existence of' the relationship at that particular time; and see also *Bretag v IRT* [1991] FCA 582 at [13]–[15].

such inferences, the Tribunal should be careful to relate that evidence to the earlier point in time.[53]

The following are examples of kinds of evidence that may be relevant to the reg 1.15A(3) or 1.09A(3) considerations, some of which are drawn from the Department's guidelines:[54]

- (a) financial aspects – joint loans, operation of joint bank accounts, pooling of financial resources, legally binding financial obligations and sharing day to day household expenses;

- (b) nature of the household – joint ownership or lease of residential property, joint rental receipts, joint utility accounts, correspondence addressed to both parties at the same address, shared responsibility for care and support of children and shared responsibility for housework;

- (c) social aspects of the relationship – evidence that the relationship has been declared to and accepted by other government and commercial/public institutions or authorities, statements of parents, family members, relatives, friends and other interested parties, joint membership of organisations or groups, joint participation in sporting, cultural, social or other activities, joint travel, plans for the future and whether the parties present themselves as a couple socially;

- (d) nature of the commitment – mutuality of commitment, the parties' knowledge of each other's personal circumstances, including background and family situation, evidence of intentions that the relationship be long term, e.g. extent to which the parties have combined their affairs and provided for each other, such as being beneficiary to each other's will and superannuation.

Not married (de facto)

Specific to the de facto partner definition, s 5CB(1) provides that for the purposes of the Act, a person is the de facto partner of another person whether of the same sex or a different sex if the parties are in a de facto relationship.

Section 5CB(2) requires that the parties are not in a married relationship (for the purpose of s 5F(2)) with each other. This does not, however, require a person in a de facto relationship to be unmarried. A person who is legally married, for example, may be in a de facto relationship where the person's married relationship does not satisfy the definition of spouse contained in s 5F, for example where the marriage is not recognised under Australian law or the person remains legally married but her or his married relationship has ended. For further discussion on the requirements of a valid marriage, see Valid marriage and above for further guidance on the definition of spouse.

[53] See e.g. *Truong v MIBP* [2014] FCA 1312.
[54] Policy instruction Reg 1.15A – Spouse - Assessing Spouse Relationships at 4 – 7 (re-issued date 1 July 2012). These are examples only and should not be treated as an evidentiary requirement for meeting the definition.

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Not related by family (de facto)

In relation to the de facto partner definition, s 5CB(2)(d) requires that the parties in a de facto relationship are not related by family. A person who is related by family to his or her partner cannot satisfy the definition of being in a de facto relationship with that person. Section 5CB(4) provides that two persons are related by family for the purpose of s 5CB(2)(d) where any of the following relationships is present:

- one is the child (including an adopted child) of the other, or
- one is another descendant of the other (even if the relationship between them is traced through an adoptive parent), or
- they have a parent in common (who may be an adoptive parent of either or both).

The definition of 'parent' in s 5(1) provides that someone is the parent of a person if the person is his or her child because of the definition of child in s 5CA of the Act, which refers to the meaning of a child contained in the *Family Law Act 1975* (Cth) and separately includes adoptive relationships. For the purposes of the regulations, the definition of 'parent' in this context would also include a 'step-parent'.[55] Section 5CB(4) further requires the Tribunal to disregard whether an adoption is declared void or has ceased to have effect for the purpose of considering if persons are related by family.

Additional criteria for de facto partners – reg 2.03A

Regulation 2.03A prescribes additional criteria that must be met if a person claims to be in a de facto relationship for the purposes of a visa application.[56] These additional criteria are supplementary to the relevant Schedule 2 criteria and not part of the de facto relationship definition in s 5CB or the factors listed in reg 1.09A. A person may therefore be in a de facto relationship for purposes other than their own visa application, despite not meeting reg 2.03A.

Duration of the relationship (12 month relationship requirement)

For certain visa applications, reg 2.03A(3) requires that the de facto relationship existed for at least 12 months before making the visa application. The 12 month relationship requirement only applies in respect of applications for permanent, Business Skills (Provisional), Student (Temporary), Partner (Provisional), Partner (Temporary) or General Skilled Migration visas.[57] It does not apply where an applicant for one of these visas is in a de facto relationship with a person who:

- is an applicant for a permanent humanitarian visa,[58] or

[55] reg 1.14A(1).
[56] reg 2.03A(1).
[57] reg 2.03A(3)(a).
[58] reg 2.03A(4)(b).

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- is or was a permanent humanitarian visa holder and was in the claimed de facto relationship before the permanent humanitarian visa was granted and advised the Department of that relationship.[59]

Further, the 12 month relationship requirement does not apply in the following circumstances:

- for visa applications made on or after 9 November 2009, where the de facto relationship is a relationship that is registered under a prescribed law of a State or Territory (see below for further details)

- if the applicant can establish compelling and compassionate circumstances for the grant of the visa.[60] For further information see Compelling and/or Compassionate Circumstances/Reasons.

Although the 12 month relationship requirement is not part of the de facto definition in s 5CB, the length of the relationship may be relevant in assessing whether the relationship is genuine and continuing under s 5CB(2)(b) and is a matter expressly listed at reg 1.09A(3)(d)(i) as a circumstance that may be relevant in considering the nature of the persons' commitment to each other.

Registered relationships

The 12 month relationship requirement does not apply for visa applications made on or after 9 November 2009 where the de facto relationship is a relationship that is registered within the meaning of s 2E of the *Acts Interpretation Act 1901* (Cth),[61] which defines a registered relationship as certain relationships prescribed under a law of a State or Territory. The relevant State or Territory law for the purpose of s 2E is prescribed in the *Acts Interpretation (Registered Relationships) Regulations 2019* (Cth).[62] Currently, the following laws and kinds of relationships are prescribed:

State / Territory	**Legislation**	**Kind of relationship**
Victoria	*Relationships Act 2008* (Vic)	A registerable domestic relationship that may be

[59] reg 2.03A(4)(a).
[60] reg 2.03A(3)(b). A decision-maker need not go on to consider whether there are compelling and compassionate circumstances for reg 2.03A(3)(b), if there was no de facto relationship at the time of application: see *Nepal v MIBP* [2015] FCCA 305. The Court said in *obiter* that the existence of 'compelling and compassionate' circumstances cannot exist without the de facto relationship, because whatever facts make up such circumstances, they would not be 'compelling and compassionate' if not related to a de facto relationship. While circumstances relating to a de facto relationship would generally be relevant to the grant of a *partner* visa, the language of reg 2.03A does not clearly state that the circumstances must be related to the relationship or, if so, how closely.
[61] reg 2.03A(5) as substituted by the *Home Affairs Legislation Amendment (2019 Measures No.1) Regulations 2019* (Cth) (F2019L01423). Previously, reg 2.03A(5) referred to relationships registered under laws prescribed in the *Acts Interpretation (Registered Relationships) Regulations 2008* (Cth).
[62] F2019L00280. These Regulations repealed the *Acts Interpretation (Registered Relationships) Regulations 2008* (Cth), and effectively remade the 2008 regulations to ensure their continued operation. Minor amendments were made to ensure their fitness for purpose and to incorporate changes which more accurately reflect the requirements of section 2E of the *Acts Interpretation Act 1901* (Cth) (see the Explanatory Statement to F2019L00280, page 1).

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		registered in accordance with Part 2.2 of that Act.
Tasmania	*Relationships Act 2003* (Tas)	A significant relationship in relation to which a deed of relationship may be registered in accordance with Part 2 of that Act.
Australian Capital Territory[63]	*Births, Deaths and Marriages Act 1997* (ACT)	A civil union that must be registered under section 32A of that Act.
	Domestic Relationships Act 1994 (ACT)	A civil partnership that may be entered into in accordance with sections 37C and 37D of that Act.
New South Wales	*Relationships Register Act 2010* (NSW)	A relationship that may be registered in accordance with Part 2 of that Act.
Queensland[64]	*Civil Partnerships Act 2011* (Qld)	A relationship that may be entered into in accordance with sections 4 and 5 of that Act.
South Australia	*Relationships Register Act 2016* (SA)	A relationship that may be registered in accordance with Part 2 of that Act.

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Whether a relationship is registered under a relevant law is a question of fact for the decision-maker. Unlike reg 2.03A(3) which explicitly refers to the applicant being in a de facto relationship *before the date of the application*, reg 2.03A(5) is silent on when the relationship must be registered. As reg 2.03A is supplementary to the relevant Schedule 2 criteria, and does not otherwise need to be met at time of application, it appears as long as

[63] The *Acts Interpretation (Registered Relationships) Regulations* 2008 (Cth) prescribed the *Civil Unions Act 2012* (ACT) and the type of relationship as being a civil union as described in s 6 of that Act. The *Acts Interpretation (Registered Relationships) Regulations* 2019 (Cth) has updated this to reflect that Civil unions as described in s 6(1) of the *Civil Unions Act* are registered under pt 5A of the *Births, Deaths and Marriages Act 1997* (ACT), not the *Civil Unions Act (*see the Explanatory Statement to F2019L00280, page 2). Prior to the *Civil Unions Act 2012* (ACT), civil partnerships could be registered under the now repealed *Civil Partnerships Act 2008* (ACT). Civil partnerships registered under that Act that have not been terminated, are taken to be civil partnerships under the *Domestic Relationships Act 1994* (ACT) (see the transitional provisions in pt 6 of the *Civil Union Act 2012* (ACT) (the version that was effective between 12/09/12-11/09/13: http://www.legislation.act.gov.au/a/2012-40/20120912-53673/pdf/2012-40.pdf).

[64] The *Relationships (Civil Partnerships) and Other Acts Amendment Act 2015* (Qld) (Act No 33 of 2015), effective on 22 March 2016, renamed the *Relationships Act 2011* (Qld) to the *Civil Partnerships Act 2011* (Qld). Section 52(1) of the *Civil Partnerships Act 2011* (Qld) provides that registered relationships in effect before the amendment are also taken to be civil partnerships: see the transitional provisions in pt 7 of *Civil Partnerships Act 2011* (Qld).

the de facto relationship is registered at the time the decision-maker is considering reg 2.03A, the 12 month requirement does not apply.[65]

Minimum age

Regulation 2.03A(2) additionally requires that persons claiming to be in a de facto relationship for the purposes of a visa application must be at least 18 years of age. It appears to be intended that this requirement must be met at the time of the visa application.[66] If either party is under 18 years of age when the application is made, the visa applicant will not be able to satisfy the additional criteria contained in reg 2.03A(2). Whereas a person between 16 years of age and 18 years of age may be allowed to marry where a court order has been made in accordance with s 12 of the *Marriage Act 1961* (Cth) in exceptional circumstances, no similar exception applies in the case of de facto relationships.

Marriage after lodgement of de facto application

Where the visa applicant lodged the visa application on the basis of being in a de facto relationship but notifies the Department or the Tribunal that they have since married their de facto partner, the de facto definition still applies for the time of application criteria, as does the additional criterion for de facto partners in reg 2.03A. This requires consideration of whether there are compelling and compassionate circumstances for the grant of the visa and if not, whether the Tribunal is satisfied the applicant had been in a de facto relationship for at least 12 months before the date of application or the exemption at regs 2.03A(4) or (5) applies. The time of decision criteria should be assessed against the spouse definition.

Assessing a permanent visa after a temporary visa has been granted

Temporary Partner visas (Subclasses 309 and 820) have both a time of application and time of decision requirement that the visa applicant be the spouse or de facto partner of the sponsor,[67] and a decision to grant a visa of these kind reflect that, at a particular point in time, a decision maker was satisfied the relevant criteria was met.

In contrast, the criteria for a permanent Partner visa (Subclasses 801 and 100) only apply at the time of decision and, with limited exceptions,[68] require that the visa applicant must be the

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[65] This is consistent with Departmental policy, which indicates that the registration of a relationship can satisfy reg 2.03A(5) if it takes place at any time up until the time of decision, as long as it continues at that time: PAM3 Reg 2.03A – Criteria applicable to de facto partners – If the relationship is registered under Australian State/Territory law (re-issued date 10 October 2015).
[66] The link to the time of the visa application is suggested by the wording 'If a person… applies for a visa' in reg 2.03A(2). This is also consistent with cl 309.213(1)(a) or cl 820.211(2)(c)(i) which require that the applicant is sponsored by a de facto partner who has turned 18 at the time of application (if the partner is under 18 years old they must be a spouse: cl 309.213(1)(b) and cl 820.211(2)(c)(ii)). See also PAM 3 Reg 2.03A – Criteria applicable to de facto partners – Minimum age requirement (re-issued date 10 October 2015).
[67] In the case of Subclass 309 applications, the visa applicant may be the intended spouse of the sponsor. For applications on or after 1 July 2009, the applicant may be the spouse, de facto partner or, in the case of Subclass 309 applications, the intended spouse of the sponsor.
[68] Exceptions to the requirement to be a in a spouse or de-facto relationship at time of decision are that the sponsoring partner has dies, there is a child (or children) of the relationship or there has been family violence. For more information on the exceptions please see Exceptions to Continuing Relationship – Death or Child or Domestic/Family Violence exception.

holder of a temporary visa[69] and be the spouse or de facto partner of the sponsor at time of decision. While consideration of a permanent Partner visa occurs after a temporary Partner visa has been granted, which by necessity means that a spouse or de facto relationship was previously accepted to exist, this earlier assessment does not bind or require a later decision maker to reach the same conclusion.[70] Rather, it is for the decision maker on the permanent Partner visa application to make a decision by reference to their own assessment of the merits of the application, including the existence of the relationship, based on the materials before them.[71] The Tribunal may have, and often will have, different and additional evidence bearing upon the parties' relationship, with the potential that this new evidence casts doubt over the relationship existing at an earlier point in time.

Where an applicant is seeking a permanent Partner visa after having already been granted a temporary Partner visa, they are generally entitled to consider that the requirement for a spouse or de facto relationship will not be in issue unless the delegate (or on review the Tribunal) specifies that it is.[72] If the existence of the spouse or de facto relationship at the time of application becomes a new issue before the Tribunal, procedural fairness obligations would generally require the Tribunal to give the applicant an opportunity to give evidence and present arguments in relation to that new issue.[73]

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[69] If the applicant does not hold the temporary visa at the time of the Tribunal's decision because it ceased on notification of the refusal of the permanent visa, they may still meet the time of decision criteria by meeting the alternative at cl 100.221(4A) or 801.221(2A).
[70] *Latt v MIAC* [2007] FMCA 766 at [31] – [32]. The Federal Magistrates Court found there was no legal basis upon which it could be suggested that the decision to grant a temporary visa should be automatically binding on another decision maker.
[71] *MICMSMA v Gupta* [2022] FCAFC 51, at [51]. The Federal Court was considering an argument that the requirement in cls 100.221(2), (2A), (3) and (4) that the applicant hold a subclass 309 visa created a presumption for the subclass 100 visa that a married or de facto relationship existed. This argument was rejected on the basis there is nothing in the Migration Regulations for saying that the decision-maker for the subclass 100 visa must accept as correct a decision to grant a provisional visa (at [50]).
[72] *Herft v MIAC* [2007] FMCA 756 at [11]. The Court was considering an applicant for a Subclass 100 visa. The reasoning in relation to the procedural obligation and the finding of jurisdictional error in this case relied upon the High Court judgment in *SZBEL v MIMIA* (2006) 228 CLR 152.
[73] See *SZBEL v MIMIA* (2006) 228 CLR 152.

Relevant case law

Judgment	Judgment Summary
Ally v MIAC [2008] FCAFC 49	
MIBP v Angkawijaya [2016] FCAFC 5	Summary
MIMA v Asif [2000] FCA 228	
Bretag v IRT [1991] FCA 582	
Cao v MIAC [2007] FMCA 225	
Chand v MIMA [1997] FCA 530	
Davis v MIMIA [2004] FCA 686	Summary
MILGEA v Dhillon [1990] FCA 144	Summary
Garcevic v MIAC [2012] FMCA 931	Summary
Goraya v Minister for Immigration [2018] FCCA 2017	
Gupta v MICMSMA [2021] FCCA 1646	Summary
Gurung v MIMA [2006] FMCA 1493	Summary
Hanna v MIBP [2016] FCA 282	
Harchandani v MIBP [2017] FCA 1395	
Herft v MIAC [2007] FMCA 756	Summary
He v MIBP [2017] FCAFC 206	Summary
Ho v MIMA [2006] FMCA 1285	Summary
Jayasinghe v MIMA [2006] FCA 1700	
Kumar v MIBP [2015] FCCA 3161	
Latt v MIAC [2007] FMCA 766	
Li v MILGEA [1992] FCA 14; (1992) 33 FCR 568	Summary

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Li v MIAC [2008] FCA 902	Summary
Li v MIAC [2007] FMCA 454	
Li v MIAC [2007] FCA 1098; 96 ALD 361	
Liu v MHA [2019] FCA 1925	
Malhi v MIBP [2017] FCCA 119	Summary
Nassouh v MIMA [2000] FCA 788	
Ndegwa v MIMIA [2005] FMCA 74	Summary
Nepal v MIBP [2015] FCCA 305	
Nguyen v MIAC [2010] FMCA 847	Summary
Nicolas v MICMSMA [2022] FedCFamC2G 288	
Reddy v MIMIA [2004] FMCA 516	
Sevim v MIMA [2001] FCA 1597	
Sharma v MICMSMA [2020] FCCA 3372	Summary
Simpson v MIEA (1994) 35 ALD 389	
Singh v MIEA [1996] FCA 1429	
SZBEL v MIMIA (2006) 228 CLR 152	Summary
SZOXP v MIBP [2015] FCAFC 69	Summary
MIBP v SZOXP [2014] FCCA 565	Summary
Truong v MIBP [2014] FCA 1312	Summary
Tran v MIBP [2016] FCCA 2723	
White v MIBP [2014] FCCA 2486	Summary
White v MIBP [2015] FCA 1376	
You v MIAC [2007] FMCA 1064	Summary
MIAC v Zaouk [2007] FCAFC 47	Summary
Zhang v MIMIA [2005] FCAFC 30	Summary

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Relevant amending legislation

Title	Reference Number	Legislation Bulletin
Home Affairs Legislation Amendment (2019 Measures No 1) Regulations 2019 (Cth)	F2019L01423	-
Marriage Amendment (Definition and Religious Freedoms) Act 2017 (Cth)	No 129, 2017	No 6/2017
Migration Amendment Regulations 2009 (No 7) (Cth)	SLI 2009, No 144	No 9/2009
Migration Amendment Regulations 2009 (No 12) (Cth)	SLI 2009, No 273	No 16/2009
Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008 (Cth)	No 144, 2008	No 1/2009

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VALID MARRIAGE

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Overview[1]

To determine whether a marriage is valid for the purpose of the *Migration Act 1958* (Cth) (the Act), consideration must be given to the *Marriage Act 1961* (Cth) (Marriage Act),[2] which is largely incorporated into the Act for this purpose by s 12.[3] The Marriage Act defines marriage as the union of 2 people (of any gender) to the exclusion of all others, voluntarily entered into for life.[4] The Marriage Act requires marriages to be solemnised,[5] and has other requirements for their validity depending on whether they were solemnised under Australian or foreign law.

Generally, a marriage solemnised in Australia (i.e. in compliance with the requirements in the Marriage Act) is valid, unless it is void. A marriage is void where:[6]

- either of the parties is lawfully married to someone else
- the parties are within a prohibited relationship
- the consent of either of the parties is not a real consent
- either of the parties is not of marriageable age, or
- by reason of s 48 of the Marriage Act, the marriage is not a valid marriage, namely, where the formal requirements for marriages solemnised in Australia are not met.

Part VA of the Marriage Act provides for the recognition of foreign marriages.[7] Essentially, foreign marriages that are recognised under the law of the country in which they are

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[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.

[2] While a literal reading of s 5F(3) would require the factors prescribed in reg 1.15A(3) to also be considered when determining whether a marriage is valid for the purposes of the Act, it is difficult to see how those matters could be relevant in relation to a marriage that is not valid under Part VA of the Marriage Act as per s 12 of the Migration Act. Accordingly, not considering the factors in reg 1.15A(3) for a marriage that was not valid under the Marriage Act would not appear to be a jurisdictional error.

[3] See *Li v MIAC* (2007) 96 ALD 361 at [10] where the Court held that by virtue of s 12 of the Migration Act, the requirement for a valid marriage calls for the application of the *Marriage Act 1961* (Cth) (Marriage Act*)*, subject to the one qualification in s 12. Although the Court was considering the definition of a 'married relationship' under reg 1.15A(1A) as it was in force for applications made pre 1 July 2009, its reasoning is equally applicable to s 5F(2)(a). The Marriage Act sets out the requirements for a valid marriage in Australia generally, but it does not purport to define words and phrases for the purposes of other Commonwealth legislation such as the Migration Act: *Li v MIAC* (2007) 96 ALD 361 at [12]–[14].

[4] Marriage Act s 5.

[5] Marriage Act ss 23A, 23B, 40, 41, 48, 73.
Marriage Act ss 23, 23(B) set out the grounds on which a marriage is void. Section 23B of the Marriage Act applies to all marriages solemnised in Australia after 7 April 1986 *Marriage Amendment Act 1985* (Cth) s 2(2), Gazette No S 153, 7 April 1986. Section 23 of the Marriage Act applies to all marriages that took place on or after 20 June 1977 and before 7 April 1986

[7] The object of pt VA is to give effect to Chapter II of the *Convention on Celebration and Recognition of the Validity of Marriages 1978*: see s 88A of the Marriage Act. This includes same-sex marriages solemnised outside of Australia and same-sex marriages solemnised by or in the presence of a foreign diplomatic or consular officer in Australia that are recognised as valid in the relevant overseas country. Section 88D(4), 88EA and the previous definition of *marriage* in s 5(1) of the Marriage Act as being a 'union of a man and a woman' prohibited the recognition in Australia of foreign same-sex unions. These provisions were repealed or amended by the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) (No 129, 2017) with effect from 9 December 2017 and applicable to all live applications at that date where it is necessary for the Tribunal to determine whether or not 2 persons are in a *spouse* relationship.

solemnised will be recognised in Australia as valid, subject to five basic exclusions which are similar to the grounds on which marriages solemnised in Australia are void, namely:[8]

- either of the parties was married to someone else and that other marriage was recognised in Australia as valid
- the parties are within a prohibited relationship
- the consent of either of the parties is not a real consent
- where one party was domiciled in Australia at the time of the marriage - either of the parties was not of marriageable age
- the marriage is voidable under the law under which the marriage took place.

However, the Act limits the scope of foreign marriages which are recognised in Australia as valid under the Marriage Act, by excluding the operation of s 88E of the Marriage Act in deciding whether a marriage is valid for the Act.

This Commentary begins by discussing the exclusion of s 88E for the purposes of the Act, then considers the key grounds for invalidity of Australian and foreign marriages, the validity of proxy marriages, and what kind of evidence a person can provide to show they have a valid marriage.

The validity of a marriage will usually be relevant when determining whether a person meets the definition of 'spouse'.[9] This issue arises most commonly in applications for partner visas, but can also arise in any case where a relationship through marriage is in issue.[10]

This Commentary deals with marriages solemnised (i.e. duly performed) in Australia under Australian law and the recognition in Australia of foreign marriages (i.e. marriages duly performed overseas under the law of a foreign country).[11] If you have a question about any other kind of marriage (e.g. a marriage solemnised in Australia by a diplomatic or consular officer of a foreign country under the laws of that country, or a marriage of a member of the Australian Defence Force overseas under Australian law), you can contact MRD Legal Services.

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[8] *See* Marriage Act ss 88B, 88C, 88D and 88E. If, in accordance with s 88D(2) of the Marriage Act, a marriage solemnised outside Australia is one which is required not to be recognised in Australia as valid, then it is 'void' within the meaning of that term as used in s 51 of the *Family Law Act 1975* (Cth) (Family Law Act): *In the Marriage of Teves III and Campomayor* (1994) 122 FLR 172 at [22]. Section 51 of the Family Law Act provides that an application for a decree of nullity of marriage shall be based on the ground that the marriage is void.

[9] The definition of spouse is contained in s 5F of the Act for applications made on or after 1 July 2009, or in reg 1.15A of the Regulations for applications made before that date.

[10] See for example, reg 1.12 of the Regulations which defines 'member of the family unit' and reg 1.12AA of the Regulations which defines 'member of the immediate family'. Both include reference to spouse, as defined in the legislation.

[11] In the Macquarie Dictionary Online, the meaning of 'solemnise' includes: 1. to observe or commemorate with rites or ceremonies. 2. to hold or perform (ceremonies, etc) in due manner. 3. to perform the ceremony of (marriage).

Key issues

…as if s 88E of the Marriage Act were omitted (foreign marriages)

Section 12 of the Act effectively provides that no foreign marriage which would be invalid under s 88C or s 88D will be recognised as valid in Australia for the purposes of migration legislation. It provides that a marriage is valid for the purposes of the Act, as if s 88E of the Marriage Act were omitted. Section 88E provides that in addition to marriages recognised under s 88C and s 88D, marriages that would be recognised as valid under the common law rules of private international law shall be recognised in Australia as valid.

The effect of s 12 of the Act is that only those foreign marriages to which s 88C applies, and which are not excluded by s 88D, may be recognised as valid. There is no scope to consider private international law to determine if foreign marriages which would be invalid under s 88D may nevertheless be recognised as valid. Any residual basis for recognition of foreign marriages does not apply for the purposes of the Act.

An example of the operation of s 88E can be seen in *Nygh v Kasey,*[12] where an Australian permanent resident went through a form of marriage according to the normal Roman Catholic rites in a Catholic Church in Thailand. No civil registration of the marriage occurred. Under local (Thai) law, this meant that the marriage was not recognised as valid. The Court held that, in the circumstances of this case, the marriage was valid in accordance with the common law rules of private international law and in accordance with s 88E of the Marriage Act should be recognised as a valid marriage in Australia.[13] Nevertheless, the effect of s 12 of the Migration Act is that such a marriage would not be valid for the purposes of that Act, because the omission of s 88E means that the validity of a foreign marriage is to be determined by s 88C and s 88D of the Marriage Act. If, as in this case, the marriage was not recognised as valid:

- under local law[14] or
- under the law of a foreign country, a diplomatic or consular officer of which solemnised or attended the marriage ceremony[15]

the marriage could not be recognised for the purpose of the Act. There would be no scope to go on to consider whether the common law rules of private international law provided an alternative basis for recognition in Australia

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[12] *Nygh v Kasey* [2010] FamCA 145. The case considered pt VA of the Marriage Act, not migration legislation.
[13] *Nygh v Kasey* [2010] FamCA 145 at [89]. Note that the Court's reasoning in finding that the marriage was valid according to private international law has been described as 'problematic with regard to the requirements, as well as the consequences, of the common law exception to applying the *lex loci celebrationis* [law of the place of celebration] to the formal validity of a foreign marriage: Sirko Harder, 'Recent Judicial Aberrations in Australian Private International Law', *Australian International Law Journal*, Vol. 19 2012, p.177. Nevertheless, the facts are useful for illustrating the effect of that finding, if not the reasons for it.
[14] Marriage Act ss 88C(1)(a), (2)(a).
[15] Marriage Act ss 88C(1)(b), (2)(b).

Not lawfully married to some other person

For a person to be party to a marriage with a person, he or she must not be lawfully married to someone else.[16] If someone enters into a marriage while still lawfully married to another person, the new marriage will either be considered void or not be recognised in Australia as valid.[17] If a party has been validly and legally married to someone else, this earlier marriage can only be legally ended by the divorce or death of the previous spouse.[18] Generally, a foreign divorce is recognised as valid in Australia if it is a valid divorce under the law of that foreign country where the divorce was effected.[19]

This may be an issue when considering an application for a prospective marriage visa and one of the parties is still married to another person outside of Australia. In such a case it would be necessary to determine whether the previous marriage was considered to be valid under Australian law. If the previous marriage is not valid under Australian law the visa applicant and the sponsoring partner would be free to marry. If the marriage was valid, it would then be necessary to determine whether the previous marriage had legally ended by divorce or that the divorce would be legally effective by the time the parties intend to marry.

Polygamous marriage occurs where persons have two or more de jure marital relationships concurrently. Australian law does not permit polygamous marriage in Australia.[20] However, polygamous marriage is permitted in various other countries. For the purpose of the Migration Act, only the first marriage in a polygamous situation may be recognised as valid in Australia given the operation of s 88D(2)(a) of the Marriage Act. Any marriage concurrent with the first marriage is incapable of being recognised as valid even if it is the only on-going marital relationship (e.g. in circumstances where the 'first spouse' has died or divorced), because at the time the marriage took place one of the parties was legally married to another person.

Prohibited relationship

A marriage is either void or will not be recognised in Australia as valid if the parties are within a prohibited relationship.[21] A prohibited relationship is a marriage between:

- a person and an ancestor (e.g. a parent, grandparent) or descendant (e.g. child) of the person or
- a brother and a sister (including half-siblings).[22]

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[16] Marriage Act ss 23(1)(a), 23B(1)(a), 88D(2)(a).
[17] Marriage Act, ss 23(1)(a), 23B(1)(a) for marriages solemnised in Australia. Section 88D(2)(a) of the Marriage Act for foreign marriages that are recognised under the local law where the marriage was solemnised.
[18] See *The Laws of Australia* [17.4.10]: Family Law > Divorce > Introduction> Definition (Thomson Reuters Westlaw AU).
[19] Family Law Act s 104(3). Note, however, that certain residency, domicile, nationality, natural justice and public policy requirements must be met before a foreign divorce can be recognised: Family Law Act ss 104(3)–(4).
[20] Marriage Act s 94.
[21] Marriage Act ss 23(1)(b), (2) and 23B(1)(b), (2) for marriages solemnised in Australia and ss 88C and 88D for foreign marriages.
[22] Marriage Act ss 23B(2), 23(2).

Any relationship specified above includes a relationship created through adoption.[23] For example, an adopted child cannot marry their adoptive parent or siblings created by adoption. Where blended families have been created through the marriage of two adults who both have children from previous relationships, step-siblings are only prohibited from marrying each other if one of them was formally adopted by the spouse of their parent (i.e. their step parent). If there was never a legal adoption of step-children then the prohibited relationship does not arise.

An adoption will not have the effect of removing the prohibition on marrying a natural sibling[24] (i.e. where a legal adoption has the effect that a child ceases to be a legal child of her or his natural parents, the child is still prohibited from marrying her or his parent or sibling). Similarly, once a prohibited relationship has been established through adoption, it remains, even if the adoption ceases to be effective.[25]

A person marrying their cousin, niece, uncle, nephew, or aunt is not excluded under Australian law.

Real consent

A marriage is either void or will not be recognised in Australia as valid if the consent of either of the parties is not real consent because: [26]

- it was obtained by duress or fraud
- that party is mistaken as to the identity of the other party or as to the nature of the ceremony performed, or
- that party is mentally incapable of understanding the nature and effect of the marriage ceremony.

Duress must be oppression or coercion to such a degree that consent vanishes.[27] It need not necessarily involve a direct threat of physical violence so long as there is sufficient oppression, from whatever source, acting upon a party to vitiate the reality of their consent.[28]

A mistake as to the effect of the ceremony (where the parties understood that the ceremony was a marriage ceremony but however believed that the marriage was not a valid marriage

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[23] Marriage Act ss 23B(3), (5), 23(3), (5).
[24] Marriage Act s 23B(4), 23(4).
[25] Marriage Act s 23B(5), 23(5).
[26] Marriage Act ss 23(1)(d), 23B(1)(d) for marriages solemnised in Australia. Marriage Act s 88D(2)(d) for foreign marriages that are recognised under the local law where the marriage was solemnised.
[27] *Kreet and Sampir* (2011) 252 FLR 234, citing *In the Marriage of S* (1980) 42 FLR 94, at [39]. The Court considered duress in the context of an arranged marriage.
[28] *In the Marriage of Teves III and Campomayor* (1994) 122 FLR 172 at [44]. See also *Robert & Golden* [2011] FamCA 443 at [27]. In that case, duress was established on unchallenged facts involving a threat *not* to terminate a pregnancy unless the marriage occurred, although the Court noted it was a borderline case.

under Australian law) is not a mistake as to the nature of the ceremony.[29] Further, an arranged marriage will not, by virtue of the fact it has been arranged, be considered invalid.

The question of a person's capacity to marry is not a question that is determined solely by medical evidence, but is a question for the Tribunal to determine on the totality of the evidence before it, both medical and lay evidence.[30]

Marriageable age

Marriageable age in Australia is 18 years of age.[31] In addition, a person between 16 and 18 years of age may apply for a Court order authorising her or him to marry a particular person.[32]

Marriages solemnised in Australia are void where either of the parties is not of marriageable age.[33]

Certain marriages that become valid after a party reaches 16 years of age

Foreign marriages involving a person not of marriageable age may be valid in the country where the marriage was solemnised under the local law. Under the Marriage Act, a foreign marriage involving a person not of marriageable age can be recognised in Australia as valid in certain circumstances depending on whether any of the parties to the marriage were domiciled in Australia at the time of the marriage.

For foreign marriages involving a person not of marriageable age (i.e. under 18 years of age), if **one** of the parties was domiciled in Australia at the time of marriage, the marriage shall not be recognised as valid in Australia: s 88D(2)(b) of the Marriage Act.[34]

However, if **neither** party was domiciled in Australia at the time of marriage, the marriage shall not be recognised as valid 'at any time while either party is under the age of 16 years': s 88D(3) of the Marriage Act.[35] Moreover, the wording of s 88D(3) of the Marriage Act suggests that where both parties were domiciled outside Australia at the time of marriage,

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[29] *Official Trustee in Bankruptcy v Edwards* (1997) 139 FLR 104. It is also possible in Australia to have a second and valid marriage ceremony in limited circumstances: s 113 of the Marriage Act. See also *In the Marriage of V K and V Kapadia* (1991) 103 FLR 470, where the parties were married in Fiji, underwent a second marriage ceremony in Australia and it was held that the second marriage was not valid.
[30] See *Kumar v MIAC* [2009] FMCA 649 where the applicant argued that earlier marriages were void for lack of consent because he was 'mentally incapable of understanding the nature and effect of the marriage ceremony'. The applicant submitted a psychologist's opinion that the applicant had a level of disability that rendered him incapable of entering into a valid marriage. The Court held that the Tribunal was entitled to consult the Fact Sheet on Intellectual Disability and to inform itself on the matters as it saw fit. The Tribunal's attribution of limited weight to the psychologist's report was found not to be unreasonable, as there were several deficiencies with that report.
[31] Marriage Act s 11.
[32] Marriage Act s 12.
[33] Marriage Act ss 23(1)(e), 23B(1)(e).
[34] See also Marriage Act ss 10(2)(b), 11, 12.
[35] Marriage Act s 88D(3).

the marriage will be recognised as valid in Australia once both parties reach 16 years of age, notwithstanding that one or both parties was not 16 at the time of the marriage.[36]

The difference in wording between s 88D(2)(b) and s 88D(3) of the Marriage Act suggests that s 88D(2)(b) provides a stricter rule for where one party was domiciled in Australia at the time of marriage, such that unlike s 88D(3), where either of the parties was domiciled in Australia at the time of the marriage, the foreign marriage cannot be recognised as valid in Australia even where both parties subsequently reach the marriageable age.

Meaning of 'domicile'

'Domicile' is not defined under either the Marriage Act or the Act.[37] In considering the domicile of parties to divorce proceedings in *Ferrier-Watson v McElrath,*[38] Holden and Jerrard JJ discussed key principles identified in *Nygh's Conflict of Laws* that may be relevant when determining a person's domicile[39]. These principles include but are not limited to:

- the meaning of domicile is the pre-eminent headquarters that every person is compelled to have in order that certain rights and duties that have attached to it by the law may be determined;[40]
- two basic assumptions underlie the above statement: that every person must have a domicile and that a person cannot simultaneously have more than one;[41]
- different rules apply in common law to the acquisition and loss of domicile for different types of domicile: a domicile of origin is that which is ascribed to each individual at birth by force of law; a domicile of dependence is the domicile of a person who lacks the capacity to acquire domicile for themselves and is determined by reference to another person such as a husband or parent; and a domicile of choice is one which a person of independent capacity acquires as the result of a voluntary choice of a new place of residence;[42] and
- a person acquires a domicile of choice in a country by being lawfully present there with the intention of remaining in that country indefinitely. The two elements of physical presence and intention must occur at the same time.[43]

Their Honours considered as correct the point made in *Nygh's Conflict of Laws* that if the intention by a person to remain indefinitely exists when he or she is lawfully present in a

[36] See also Departmental policy which states that such a marriage will become recognised once the youngest party turns 16: PAM3 — *Migration Act* > PAM – Act-defined terms instructions > PAM – s 5F – Spouse - Underage marriages at [14.3] (re-issue date 23/11/2013).
[37] For guidance on the meaning of related, but different, concepts including 'usually resident' and 'settled' in Australia: see the Settled and "Usually Resident" commentaries.
[38] *Ferrier-Watson v McElrath* (2000) 155 FLR 311.
[39] *Ferrier-Watson v McElrath* (2000) 155 FLR 311 at [74]–[75].
[40] *Nygh's Conflict of Laws* at [13.5] citing *Williams v Osenton* 232 US 619 (1914) at 620.
[41] *Nygh's Conflict of Laws* at [13.5].
[42] *Nygh's Conflict of Laws* at [13.10].
[43] *Nygh's Conflict of Laws* at [13.19].

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country, then the length of that lawful presence is immaterial when determining whether they have acquired a domicile of choice. The requirement is one of presence, not residence.[44]

These principles should be considered along with relevant legislation when determining a person's domicile. The Commonwealth, States and Northern Territory have enacted uniform Domicile Acts.[45] These Acts are not a Code, and the common law applies as modified by them.[46]

The *Domicile Act 1982* (Cth) provides that a person's intention to establish a 'domicile of choice' in a country is the intention to make his/her home indefinitely in that country.[47] Residence in a country should be understood as the best, or very good, evidence of the required intention, but it is not the only means of establishing or proving it.[48] Furthermore, the domicile a person has at any time continues until he/she acquires a different domicile.[49] A person can have only one domicile at a time.[50]

Formal requirements for marriages solemnised in Australia

There are a number of formal requirements for marriages solemnised in Australia. These are identified in div 2 of Part IV of the Marriage Act, which applies to all marriages solemnised in Australia by an authorised celebrant.[51] An authorised celebrant is defined to mean a minister of religion, an authorised officer of State and Territory marriage registries or a (civil) marriage celebrant.[52] In general terms the formal requirements include:

- the marriage is solemnised by or in the presence of an authorised celebrant[53]
- a completed notice of intent to marry form to be given to the authorised marriage celebrant who is to conduct the marriage within 18 months of the proposed marriage and no later than one month before[54]
- certain documents such as birth certificates and declarations that there is no legal impediment to the marriage are required to be provided to the marriage celebrant[55]
- religious ceremonies may be solemnised in any form regarded as sufficient by the relevant religious organisation[56]

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[44] *Ferrier-Watson v McElrath* (2000) 155 FLR 311 at [80], referring to *Nygh's Conflict of Laws* at [13.19].
[45] *Domicile Act 1982* (Cth) (which also applies in the Australian Capital Territory: s 3(6)), *Domicile Act 1979* (NSW), *Domicile Act 1979* (NT), *Domicile Act 1981* (Qld), *Domicile Act 1980* (SA), *Domicile Act 1980* (Tas), *Domicile Act 1978* (Vic); *Domicile Act 1981* (WA).
[46] *Ferrier-Watson v McElrath* (2000) 155 FLR 311 at [5].
[47] *Domicile Act 1982* (Cth) s 10.
[48] *Ferrier-Watson v McElrath* (2000) 155 FLR 311 at [5].
[49] *Domicile Act 1982* (Cth) s 7.
[50] *Logue v Hansen Technologies Ltd* (2003) 125 FCR 590 at [28].
[51] Marriage Act s 40.
[52] Marriage Act s 5, pt IV.
[53] Marriage Act s 41.
[54] Marriage Act s 42(1)(a).
[55] Marriage Act ss 42(1)(b)–(c).
[56] Marriage Act s 45.

- if the marriage is not solemnised by or in the presence of a minister of religion, then vows must be made by both parties at the ceremony[57]
- at least 2 adult witnesses are to be present at the ceremony[58]
- the authorised marriage celebrant is required to explain the nature of marriage, with the exception of where the marriage is solemnised by or in the presence of a minister of religion.[59]

Section 48(1) of the Marriage Act provides that a marriage solemnised otherwise than in accordance with the preceding provisions of div 2 (that is, ss 40–47) is not a valid marriage.[60] However, s 48(2) provides that non-compliance with some requirements stated above will not invalidate the marriage.[61] For example, a marriage is not invalid for non-compliance with the requirements relating to giving notice and prescribed declarations under s 42.[62] Nor is it invalid by reason that the person solemnising it was not an authorised celebrant if, at the time the marriage was solemnised, either party to the marriage believed that person was lawfully authorised to solemnise it and both parties intended to become thereby the lawfully wedded spouse of the other.[63]

Proxy marriages

Proxy marriage is a marriage celebrated through an agent of the bride or groom, who acts as his or her proxy in a marriage ceremony, without the personal attendance of one or both of the parties.

In some countries marriage by proxy is permitted. If a proxy marriage is valid under the law of a foreign country where the marriage was solemnised and none of the exclusions in s 88D(2) apply, the proxy marriage could be recognised in Australia as valid.

Although the Marriage Act does not clearly state that proxy marriage is prohibited in Australia, there are indications throughout the relevant provisions in the Marriage Act that parties to a marriage must attend the ceremony and give their consent in person. For example, s 42(8) of the Marriage Act requires that an authorised celebrant (including a minister of religion) shall not solemnise a marriage unless he or she is satisfied that the parties are the parties referred to in the notice of intention to marry and s 50(2) requires that

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[57] Marriage Act s 45(2).
[58] Marriage Act s 44.
[59] Marriage Act s 46.
[60] By implication, non-compliance with the following sections of the Division (ss 49–51) has no impact on validity.
[61] Marriage Act s 48(2) essentially provides that a marriage is not invalid by reason of failure to give notice (s 42), failure to make a declaration, produce a certificate or any other contravention of s 42, failure to have the required witnesses or explanation of marriage by the celebrant (ss 44 & 46) or the failure to have the consent of parents for the marriage of a minor (s 13). Furthermore, s 48(3) provides that a marriage is not invalid by reason that the person solemnising it was not authorised to do so.
[62] Marriage Act ss 48(2)(a)–(d).
[63] Marriage Act s 48(3).

parties to the marriage sign the marriage certificate immediately after the solemnisation of the marriage, which suggests parties must sign personally.[64]

Evidence of a valid marriage

Generally, a marriage certificate establishes that a marriage has been properly solemnised. A duly solemnised marriage may nevertheless be void for one of a number of reasons set out in the Marriage Act (see above). A genuine marriage certificate, not fraudulently obtained, would, in the absence of information suggesting the marriage is void, generally be strong evidence of a valid marriage for the purposes of the Act.[65]

Foreign marriages

Section 88G of the Marriage Act provides that a document purporting to be either the original or certified copy of a certificate or record of a foreign marriage is, for all purposes, *prima facie* evidence of the facts stated in the document and of the validity of the marriage to which the document relates, provided that it is purported to have been issued by the relevant authority of that foreign country who has the authority to issue it. The effect of s 88G is that, unless there is evidence to suggest that the key requirements for a valid marriage are not met, a foreign marriage certificate issued by the relevant authority of that country is *prima facie* evidence that the marriage is valid under the local law. That is, a foreign marriage certificate creates a presumption upon which a decision-maker may act in the absence of other evidence directly addressing or rebutting this presumption.[66] However, s 88G(1) is concerned with the fact of and validity of marriage under foreign law; it is not directly concerned with the recognition of a marriage for the purposes of s 88D, i.e. whether the marriage is recognised as valid in Australia. [67] This means that not all foreign marriages will be recognised as valid for the purposes of the Migration Act, even where a foreign marriage certificate provides *prima facie* evidence that the marriage is valid under the laws of that foreign country. See 'key issues' above as to the exceptions to recognition of a marriage as valid in Australia.

In terms of customary or religious marriages where a certificate of marriage may be absent, if the marriage is considered valid under the law of that country where the marriage was

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[64] The Department's guidelines are based on an interpretation that a proxy marriage is not permitted in Australia. Specifically, PAM3 - *Migration Act* > PAM – Act-defined terms instructions > PAM – s5F - Spouse at [10] (re-issue date 23/11/2013) states that 'Australian law requires that consent be given by both parties in person'.
[65] Marriage Act s 88G sets out evidentiary considerations relating to foreign marriage certificates or records.
[66] *Tadese v MIBP* [2021] FCA 514 at [49].
[67] *Tadese v MIBP* [2021] FCA 514 at [45]. In *Tadese* the appellant sponsor had produced a marriage certificate issued by the City Government of Addis Ababa as evidence of a valid marriage to his claimed spouse. DNA evidence suggested that the appellant sponsor and his spouse are siblings which is a prohibited relationship under s 23B of the Marriage Act and excluded from being recognised as valid under s 88D(2)(c). Wheelahan J of the Federal Court held that the primary judge was correct in holding that s 88D of the Marriage Act prevailed. The evidentiary provision in s 88G(1) does not apply to the question of whether the marriage was invalid under Australian law because the parties were in a prohibited relationship for the purposes of ss 88D and 23B of the Marriage Act. Even if the Tribunal was required by s 88G(1) to treat the marriage certificate as prima facie evidence of the validity of the marriage for the purposes of recognition under s 88D, there was no material error in the Tribunal placing significant weight on the DNA evidence as there was nothing of substance in the marriage certificate to balance against the evidence of the DNA results, which it was open to the Tribunal to accept as having significant weight.

celebrated, and none of the exclusions in s 88D(2) apply, the foreign marriage is recognised in Australia.

If there is any doubt as to the validity of a foreign marriage certificate, enquiries can be made to the consular offices of that country in Australia. Enquiries in relation to the marriage laws of a particular country can also be directed to the Department's Country of Origin Information Services section.

Marriage solemnised in Australia

Section 50 of the Marriage Act requires that the marriage certificate shall be on the prescribed form and signed by the celebrant, the parties and the two witnesses.[68] If the marriage certificate is on the prescribed form, it is *prima facie* evidence that there is a valid marriage unless there is evidence to indicate otherwise. On the other hand, if the marriage certificate is not on the prescribed form, there is no *prima facie* evidence that there is a valid marriage under the Marriage Act, and the Tribunal should consider the issue further.

Relevant legislation

Title	Reference Number	Legislation Bulletin
Marriage Amendment (Definition and Religious Freedoms) Act 2017 (Cth)	No 129, 2017	No 06/2017

Relevant case law

Judgment	Judgment Summary
Official Trustee in Bankruptcy v Edwards (1997) 139 FLR 104	
Ferrier-Watson v McElrath [2000] FamCA 219; (2000) 155 FLR 311	
In the Marriage of V K and V Kapadia (1991) 103 FLR 470; 14 Fam LR 883	
Kreet and Sampir [2011] FamCA 22; (2011) 252 FLR 234	

[68] *Marriage Regulations 1963* (Cth) reg 40(1) of the specifies that Form 15 is the prescribed form. Form 15 contains wording to the effect that the marriage is solemnised in accordance with the provisions of the Marriage Act.

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Kumar v MIAC [2009] FMCA 649	Summary
Li v MIAC [2007] FCA 1098; (2007) 96 ALD 361	
Logue v Hansen Technologies Ltd [2003] FCA 81; (2003) 125 FCR 590;	
Nygh & Kasey [2010] FamCA 145	
Robert & Golden [2011] FamCA 443	
In the Marriage of S (1980) 5 Fam LR 831	
Tadese v MIBP [2021] FCA 514	Summary
In the Marriage of Teves III and Campomayor (1994) 18 Fam LR 844	
Williams v Osenton 232 *US 619* (1914)	

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LIMITATION ON SPONSORSHIPS – PARTNER AND FAMILY VISAS

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Overview[1]

There are a range of provisions in the *Migration Regulations 1994* (Cth) (the Regulations) that operate to limit sponsorship of visa applicants in certain circumstances. These are contained in div 1.4B (Limitations on certain sponsorships under div 1.4) of Part 1 to the Regulations. The most common kinds of sponsorship limitations arising before the Tribunal are dealt with in this commentary.

Regulations 1.20J, 1.20KA, 1.20KB, 1.20KC and 1.20KD operate to limit the approval of the sponsorship of visa applicants for specified Partner visa applications, and in the case of reg 1.20KB, certain family visas as well.[2]

Regulation 1.20J was introduced in 1996 to curtail perceived abuses of partner migration programs arising as a result of sponsors who had sponsored, or had been a party to, several successive sponsorships (i.e. serial sponsorship). Regulation 1.20J limits the approval of sponsorship of partners, so that the (Australian) sponsor is only able to successfully sponsor two partners within a lifetime and requires a period of at least five years between any two sponsorships. The sponsorship limitation also applies where a person was themselves sponsored for a partner visa and subsequently applies to sponsor another spouse or de facto partner.

Regulation 1.20KA was introduced on 1 July 2009 to prevent the practice known as "split applications" in the Parent visa stream. That is, where one member of a married or de facto couple applies for a contributory parent category visa claiming that their partner is not migrating, and once he or she is granted a permanent Contributory Parent visa, he or she sponsors their partner for a partner visa and effectively avoids paying the higher visa application charge for a Contributory Parent visa.

Regulation 1.20KB was introduced on 27 March 2010 and places limitations on sponsorship of a child by 'sponsors of concern', and is intended to prevent sponsorship of a child by a person who has been charged or convicted of a serious offence indicating that the person might pose a risk to a child.

Regulations 1.20KC and 1.20KD commenced 18 November 2016 as part of the Government's commitment to reduce the rates of family violence in Australia. Regulation 1.20KC permits the Minister to request that the sponsor provide a police check from an Australian jurisdiction or from a foreign country, and refuse the visa application if the sponsor fails to provide a requested police check or if the sponsor has a significant criminal record (which is defined in reg 1.20KD).

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[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.

[2] In this commentary a reference to partner is taken to include spouse, de facto (including same-sex), and fiancé (prospective marriage). A reference to a sponsor is taken to include a nominator.

Key requirements

Regulation 1.20J

Regulation 1.20J applies to applications for:[3]

- Partner (Provisional) (Class UF) visas;
- Prospective Marriage (Temporary) (Class TO) visas;
- Extended Eligibility (Temporary) (Class TK) visas; and
- Partner (Temporary) (Class UK) visas.[4]

Under reg 1.20J, sponsorship of an applicant for a partner visa listed above must not be approved unless the Minister, or the Tribunal on review, is satisfied that:

- the sponsor has not sponsored *more than one other person* who was granted a partner visa (or entry permit) as a result of sponsorship or nomination by the sponsor;[5] and
- at least years have passed since the date of making an earlier successful visa application in which:
  - the sponsor previously sponsored another person[6] as their spouse, de facto partner[7] or prospective spouse; or
  - the sponsor was previously sponsored by another person[8] as their spouse, de facto partner[9] or prospective spouse.

This means that in general, a maximum of two different persons can be sponsored by the same sponsor, and 5 years must pass between any two sponsorships.

However, the Minister, or Tribunal on review, may approve the sponsorship if there are compelling circumstances affecting the sponsor. This applies irrespective of whether a person has already entered into two approved sponsorships, or has attempted to sponsor a person within the prescribed prohibited time period.[10]

A person who has previously been sponsored may themselves sponsor up to two other people, but they are still subject to the 5-year limitation.

The provision does not prevent sponsorship of the same spouse/de facto partner on more than one occasion or limit the number of times a person can be sponsored by different spouses/de facto partners.[11]

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[3] It only applies to applications for these visas made on or after 1 November 1996. *Migration Regulations (Amendment) 1996* (Cth) (SR 1996, No 211): and Explanatory Statement to Statutory Rules 1996 No 211.
[4] reg 1.20J(1AA), inserted by *Migration Amendment Regulations 2009* (No 7) (Cth) (SLI 2009, No 144) on 1 July 2009. This sub reg replaced reg 1.20J(1), which although expressed in slightly different terms, essentially applied to the same visa classes.
[5] reg 1.20J(1)(a) for applications lodged on or after 1 July 2009; reg 1.20J(1)(c) for applications lodged before 1 July 2009.
[6] reg 1.20J(1)(b) for applications lodged on or after 1 July 2009; reg 1.20J(1)(d) for applications lodged before 1 July 2009.
[7] As defined in s 5CB(1).
[8] reg 1.20J(1)(c) for applications lodged on or after 1 July 2009; reg 1.20J(1)(e) for applications lodged before 1 July 2009.
[9] As defined in s 5CB(1).
[10] reg 1.20J(2).
[11] reg 1.20J(1)(a), or in the case of applications lodged before 1 July 2009, reg 1.20J(1)(c) states that 'not more than one *other* person' (emphasis added) has been sponsored by the same sponsor and granted a Partner visa. This regulation is read in conjunction with reg 1.20(1)(b), or in the case of applications lodged before 1 July 2009, reg 1.20J(1)(d), which provides that 'if

Which sponsorships are counted for the purpose of reg 1.20J?

Only sponsorships that actually result in the grant of a visa or entry permit are relevant for the purposes of reg 1.20J. If, for whatever reason, the visa or entry permit was not granted then this 'attempted' sponsorship is not counted.

Past visa grants on grounds of having ceased a partner relationship with the sponsor after suffering domestic / family violence are counted when determining whether the limitation on sponsorship under reg 1.20J applies.[12]

Although the limitations in reg 1.20J only apply where the current visa application was lodged on or after 1 November 1996, any previous sponsorships leading to the grant of a visa, entry permit or permission (even if they occurred before that time) may count towards the limit, depending on the date of the current visa application.[13] For visa applications made on or after 1 January 1998 all sponsorships that led to the grant of a visa, entry permit (whether permanent or temporary) or a permission (other than a visa or entry permit) granted under the Act to remain indefinitely in Australia are counted.[14]

A sponsorship for one of the two-stage Partner visa subclasses (309/100, 820/801, and formerly 310/110 and 826/814[15]) is counted once, not twice, even though the process results in the consecutive grant of two visas. This is because there is no separate sponsorship approval process for the permanent Subclass 100 and 801 (and previously 110 and 814) visas. The provisions in the time of decision criteria for these visas refer back to the sponsor who was approved as part of the process that resulted in the grant of the temporary visa.[16]

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another person' (emphasis added) has been granted such a visa then 'not less than 5 years has passed since the date of making the application' for that visa.

[12] reg 1.20J(1)(a)(ii), or in the case of applications lodged prior to 1 July 2009, reg 1.20J(1)(c)(ii). Regulation 1.20J(1)(c)(ii) was inserted with effect from 1 July 2005, including in relation to an application for a visa made, but not finally determined , before 1 July 2005: *Migration Amendment Regulations 2005* (No 4) (Cth) (SLI 2005, No 134). This amendment corrected an unintended outcome under the previous version of the regulation in that while limits were previously imposed on the number and frequency of Partner migration sponsorships, visas granted following cessation of the relationship as a result of domestic / family violence committed by the sponsor were not counted against the sponsor. As a result, perceived 'serial abusers' previously encountered no obstacle to continued sponsorships in multiple applications: Explanatory Statement to SLI 2005, No 134.

[13] *Wu v MIBP* [2016] FCCA 290 at [9] – [11]; followed in *Jiang v MIBP* [2016] FCCA 360 at [17]–[24]. This is due to amendments to this provision over time and the definition of 'relevant permission' in reg 1.20J(1A). Prior to 1 September 1994, spouse and interdependency applicants in Australia were granted entry permits rather than visas. Sponsorships for entry permits do not count under reg 1.20J as in force from 1 November 1996 to 30 June 1997. Under reg 1.20J as in force from 1 July 1997 to 31 December 1997, sponsorships and nominations leading to the grant of *temporary* visas and entry permits or other temporary permissions only were not counted, in deciding visa applications made on or after 1 July 1997. However, if the grant of that temporary visa, entry permit or permission *also* led to permission to remain indefinitely in Australia, then the sponsorship on the *permanent* visa or entry permit would be counted. See: Policy Instruction: Div 1.4B – Limitation on certain sponsorships under div 1.4 - Sponsorship limitations – Spouse, Partner, Prospective Marriage and Interdependency Visas (reissued 18/11/2016) at [2.2] to [2.4].

[14] Regulation 1.20J(1A(b) as amended by *Migration Regulations (Amendment)* (Cth) (SR 1997, No 354) (F1997B02843) from 1 January 1998.

[15] Note that the Interdependent visa Subclasses 310, 110, 814 and 826 were removed from 1 July 2009 by SLI 2009 No 144.

[16] Clauses 100.221, 100.226 and 801.221 refer to the '*sponsoring spouse'* [pre 1 July 2009 applications] or the '*sponsoring partner*, [post 1 July 2009 applications]. 'Sponsoring partner' is currently defined in cl 100.111 and cl 801.111 as an Australian citizen, Australian permanent resident or eligible New Zealand citizen specified as the visa applicant's spouse, intended spouse or de facto partner in the grant of the provisional visa or who was the spouse or de facto partner of a person to whom the Minister has decided under ss 345, 351, 391, 417 or 501J of the *Act* to grant a provisional visa. Note that cl 100.111 was amended, for visa applications made on or after 9 November 2009, to make clear that the sponsoring partner must be a current Australian citizen, Australian permanent resident or eligible New Zealand citizen, bringing this definition into line with the other definitions of sponsoring partner: *Migration Amendment Regulations 2009* (No 13) (Cth) (SLI2009, No 289). Clauses 110.221, 110.226 and 814.221 refer to the '*sponsor*', which is defined in cl 110.111 and cl 814.111 as the person who sponsored the visa applicant for the grant of the provisional visa or the person who was in an interdependent relationship with a person to whom the Minister has decided under ss 345, 351, 391, 417 or 501J of the Act to grant a provisional visa.

Departmental examples (policy instruction) of application of the sponsorship limitation in reg 1.20J

The below extract from the current policy instruction illustrates relevant examples of circumstances in which a sponsorship will 'count' for the purposes of reg 1.20J.[17] As with other references to policy instructions, the Tribunal should not rely on any policy interpretation or instruction that would unduly fetter, be inconsistent with or go beyond the scope of the wording of reg 1.20J itself.[18]

The relevant policy examples are:

- a sponsorship where the visa was granted but the applicant did not travel to Australia *counts*. The critical factor is visa grant. It does not matter what happens after this.
- a sponsorship where the visa application to which it was connected was refused does *not* count. The sponsorship must have resulted in the grant of a visa.
- a fiancé sponsorship where the visa was granted, the applicant travelled to Australia, but the marriage did not take place *counts.*[19]
- a spouse sponsorship where the visa was cancelled prior to the entry of the spouse in Australia *counts.*[20]
- a person who was themselves sponsored as a spouse and later sponsored a fiancé has *not* used up their two sponsorships. The fact that the person was sponsored as a spouse is a separate consideration to the number of sponsorships they can enter into.
- the applicant:
  - was previously granted a Subclass 300 visa;
  - after travelling to Australia, did not marry her sponsor; and
  - returned home and subsequently married another person

  and then applies for a Subclass 309/100 visa. This previous sponsorship does *not* count. The fact that the applicant has been sponsored before has no relevance to the current sponsor's ability to meet the reg 1.20J criteria. It is only if the *current* sponsor has previously sponsored a person or was themself sponsored that reg 1.20J would apply.
- a sponsorship where the applicant was granted a permanent spouse or interdependency visa on family violence grounds *counts*. Although the permanent visa was granted on family violence grounds and the relationship between the applicant and sponsoring spouse has ceased, it was granted as a result of the original sponsorship for the temporary visa.

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[17] Policy Instruction: Div 1.4B – Limitation on certain sponsorships under div 1.4 – Sponsorship limitations – Spouse, Partner, Prospective Marriage and Interdependency Visas (reissued 18/11/16) at [5].
[18] Further guidance can be found in the Application of Policy commentary.
[19] If the application currently being considered was lodged between 1 July 1997 and 31 December 1997, the fiancé would have had to have married and been granted a permanent visa in order for the sponsorship to count.
[20] If the application currently being considered was lodged between 1 July 1997 and 31 December 1997 and the previous visa granted was a provisional visa then the sponsorship won't count because it did not lead to the grant of a permanent visa.

- a sponsorship where the applicant was granted a Partner visa as a result of the sponsor having died *counts*. The sponsorship limitation would prevent the applicant from sponsoring another person within the 5 year period. However, this may be a situation where the decision maker would consider that compelling circumstances exist.

Regulation 1.20KA

Regulation 1.20KA applies to applications for the following temporary and provisional Partner visas:

- Partner (Provisional) (Class UF) visas;
- Partner (Temporary) (Class UK) visas; and
- Prospective Marriage (Temporary) (Class TO) visas.[21]

Regulation 1.20KA restricts approval of sponsors where:

- the sponsor was granted a Contributory Parent (Subclass 143) or Contributory Aged Parent (Subclass 864) visa on or after 1 July 2009; and
- the sponsor seeks approval to sponsor their partner for a Partner (Provisional or Temporary) or Prospective Marriage (Temporary) visa on or after 1 July 2009; and
- the sponsor was the partner of the applicant on or before the granting of the Contributory Parent or Contributory Aged Parent visa.

In such cases, the sponsorship must not be approved unless at least five years has passed since the sponsor was granted her or his Contributory Parent or Contributory Aged Parent visa.[22]

However, the decision-maker may approve the sponsorship if:

- there are compelling reasons, other than reasons related to the visa applicant's financial circumstances, for the visa applicant not applying for the Contributory Parent or Contributory Aged Parent visa at the same time as their sponsor;[23] or
- the Partner visa applicant originally applied with their sponsor for a Contributory Parent or Contributory Aged Parent visa but subsequently withdrew the application for compelling reasons, other than reasons related to the visa applicant's financial circumstances.[24]

Regulation 1.20KA applies in relation to applications for Partner visas made on or after 1 July 2009 and only affects sponsors who were granted a Subclass 143 or 864 visa on or after 1 July 2009.[25]

Regulation 1.20KB

Regulation 1.20KB applies to applications for:

[21] reg 1.20KA(4). It only applies to applications for these visas made on or after 1 July 2009: SLI2009, No 116.
[22] reg 1.20KA(1), (2),(4).
[23] reg 1.20KA(3)(a).
[24] reg 1.20KA(3)(b).
[25] reg 1.20KA was introduced by the *Migration Legislation Amendment Regulations 2009* (No 2) (Cth) (SLI 2009 No 11).

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- Child (Migrant) (Class AH) visas;
- Child (Residence) (Class BT) visas;
- Extended Eligibility (Temporary) (Class TK) visas;
- Partner (Temporary) (Class UK) visas;
- Prospective Marriage (Temporary) (Class TO) visas; and
- Partner (Provisional) (Class UF) visas.[26]

It only applies to applications for these visas made on or after 27 March 2010.[27]

Regulation 1.20KB restricts the capacity of the Minister, or the Tribunal, to approve a sponsorship for the purposes of Child (Migrant) (Class AH), Child (Residence) (Class BT), Extended Eligibility (Temporary) (Class TK), Partner (Temporary) (Class UK), Prospective Marriage (Temporary) (Class TO) and Partner (Provisional) (Class UF) visas, where the sponsor or, in the case of a Child visa, the sponsor or their spouse or de facto partner, has been charged or convicted of child sex offences or related serious offences. [28]

The sponsorship limitation in reg 1.20KB applies if:

- the sponsor or the sponsor's spouse or de facto partner has been charged with or convicted of a registrable offence (a child sex offence or related serious offence);[29] and
- any of the primary or secondary applicants are under 18 at the time of application.[30]

The sponsorship limitation does not apply if:

- none of the applicants is under 18 at *the time of the decision* for approval of the sponsorship,[31] or
- the relevant charge has been withdrawn, dismissed or otherwise disposed of without the recording of a conviction;[32] or the relevant conviction has been set aside.[33]

If the limitation applies, the Minister, or the Tribunal on review, nevertheless retains a discretion to approve the sponsorship if there are compelling circumstances affecting the sponsor or the applicant and:

- the sponsor or their spouse or de facto partner completed the sentence imposed for the registrable offence (including periods of release under recognisance, parole, or licence) more than 5 years before the date of the application for approval of the

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[26] reg 1.20KB(1).
[27] SLI 2010, No 50.
[28] For a child visa, whether a person is the spouse or de facto partner of the sponsor requires consideration of the statutory definition of spouse in s 5F or de facto partner in s 5CB (2) of the Act. See *Makhmudkhodjaeva v MICMSMA* [2020] FCAFC 88 where the Court held that the Tribunal's failure to have regard to the statutory definition of de facto partner in s 5CB(2) in considering whether at the time of its decision the sponsor was in a de facto relationship with Mr M, who was serving a 7 year prison sentence, was jurisdictional error. Although the Court was considering the Tribunal's power and discretion under reg 1.20KB(12) to request a police check for the sponsor's de facto partner, the Court's reasoning would appear to apply equally to reg 1.20KB more broadly.
[29] regs 1.20KB(2), (3), (7), (8), (13). The limitation may also apply where the Minster has requested a sponsor or a sponsor's spouse of de facto partner to provide a police check and he or she has not provided the police check within a reasonable time: reg 1.20KB(12).
[30] reg 1.20KB(1)(a).
[31] regs 1.20KB(2)(a), 1.20KB(3)(a), 1.20KB(7)(a), 1.20KB(8)(a).
[32] regs 1.20KB(2)(b), 1.20KB(7)(b).
[33] regs 1.20KB(3)(b), 1.20KB(8)(b).

sponsorship, and they have not been subsequently charged with a registrable offence;[34] or

- the sponsor or their spouse or de facto partner completed the sentence imposed for the registrable offence (including periods of release under recognisance, parole, or licence) more than 5 years before the date of the application for approval of the sponsorship, has subsequently been charged with a registrable offence but such charge has been withdrawn, dismissed or otherwise disposed of without the recording of a conviction. [35]

Calculating the five year limitation period - regs 1.20J, 1.20KA, 1.20KB

In the case of limitations under reg 1.20J, the five year period is calculated from the date the earlier visa application or entry permit was made until the time of decision.[36] This includes situations where the sponsor was previously sponsored, in which case the five year period is calculated from the date the sponsor's own visa application was made to the time of decision on the current sponsorship.[37] The five year period may cease whilst a matter is before the Tribunal as the time of decision in these circumstances is when the Tribunal makes its decision.

In the case of the limitation under reg 1.20KA (sponsors who are Subclass 143 or 864 visa holders), the period is calculated from the date the Contributory Parent visa was granted.[38]

In the case of the limitation under reg 1.20KB, where the sponsor or, in the case of a Child visa, the sponsor or their spouse or de facto partner, has been convicted of child sex offences, but has completed the sentence more than 5 years before the date of the application for approval of the sponsorship, the Minister, or Tribunal on review, may approve the sponsorship. This is provided that in the time since the sentence was completed, the sponsor has not been charged with another registrable offence, or if charged with such an offence, the charge has been withdrawn, dismissed or otherwise disposed of without the recording of a conviction. In addition, there must be compelling circumstances affecting the sponsor or the applicant. If these conditions are satisfied, the Minister, or Tribunal, may consider whether to exercise the discretion. Determining whether five years have passed since the completion of the sentence may sometimes be problematic – for example taking into account periods of parole. If you are unsure whether the five year period has been met, please contact MRD Legal Services.

Irrespective of whether a person has already entered into two approved sponsorships, or has attempted to sponsor a person within the prescribed prohibited time period, the sponsorship may still be approved where there are compelling circumstances affecting the sponsor (reg 1.20J only), or in the case of reg 1.20KA, where there are compelling circumstances affecting the applicant.[39] In the case of reg 1.20KB, the five year period is a precondition for the decision maker to exercise the discretion. These issues are discussed further under 'Legal Issues' below.

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[34] regs 1.20KB(4), (9).
[35] regs 1.20KB(5), (10).
[36] This is because reg 1.20J applies in the context of the time of decision criteria relating to the approval of the sponsorship (eg. cls 309.222, 820.221A).
[37] reg 1.20J(1)(c), or in the case of applications lodged prior to 1 July 2009, reg 1.20J(1)(e).
[38] reg 1.20KA(2).
[39] reg 1.20KA(3).

Regulations 1.20KC and 1.20KD

Regulation 1.20KC applies to applications for:

- Prospective Marriage (Temporary) (Class TO) visas;
- Partner (Provisional) (Class UF) visas;
- Partner (Temporary) (Class UK) visas.[40]

It applies to applications for these visas made on or after 18 November 2016.[41]

As part of the amendments which introduced regs 1.20KC and 1.20KD, new time of decision criteria for grant of the visa were also introduced for the above listed visa classes which require that the sponsor has consented to the Department disclosing to each visa applicant included in the sponsorship any conviction of the sponsor for a relevant offence.[42] However, relevant offences are to be disregarded for the purposes of disclosure to a visa applicant where the conviction has been quashed or otherwise nullified; or the sponsor has been pardoned in relation to the offence and the effect of that pardon is that the sponsor is taken to have never been convicted of the offence.[43] For discussion of these time of decision criteria see the Prospective Marriage (Subclass 300) – Prospective marriage visas and Partner visas: Subclasses 309/100 and 820/801 commentaries.

Regulation 1.20KC provides that the Minister (or Tribunal on review) must refuse to approve the sponsorship of each applicant for the visa if the sponsor has been convicted of a 'relevant offence' (or offences) and the sponsor has a 'significant criminal record' (defined in reg 1.20KD) in relation to the 'relevant offence' (or offences).[44]

However, even if the applicant has been convicted of a 'relevant offence' and has a 'significant criminal record' in relation to that offence, discretion still remains to approve the sponsorship in certain circumstances. See 'Approving sponsorship where reasonable to do so' below for further discussion.

To help facilitate the checking of convictions and criminal records, reg 1.20KC also permits the Minister to request, on one or more occasions, that the sponsor provide a police check relating to the sponsor from any or all of the following:

- a jurisdiction in Australia specified in the request;
- a foreign country specified in the request in which the sponsor has lived for a period, or a total period, of at least 12 months since the latest of either 10 years before the date of the request; or the date the sponsor turned 16.[45]

However, while a police check may ordinarily inform whether the sponsor satisfies the provision, it is not the only method by which a sponsor's criminal history may be revealed. For example, if the Tribunal becomes aware of a sponsor's criminal history through dob-ins or other material, it should consider whether it is satisfied on the available evidence that the offence(s) have taken place or whether any further enquiries are necessary.

[40] reg 1.20KC(1).
[41] Migration Legislation Amendment (2016 Measures No 3) Regulation 2016 (Cth) (F2016L01390), sch 7, pt 55, Item 5504.
[42] cls 300.222(2), 309.222(2), 820.221(4)(b) of sch 2 to the Regulations.
[43] cls 300.222(3), 309.222(3), 820.221(5) of sch 2 to the Regulations.
[44] reg 1.20KC(3).
[45] reg 1.20KC(5).

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If the sponsor has been requested to provide a police check(s) but fails to do so within a reasonable time, a decision may be made to refuse to approve the sponsorship for each applicant for the visa.[46]

Relevant offence

A 'relevant offence' is defined as an offence against a law of the Commonwealth, a State or a Territory of Australia, or a foreign country, involving any of the following matters:

- violence against a person, including (without limitation) murder, assault, sexual assault and the threat of violence;
- the harassment, molestation, intimidation or stalking of a person;
- the breach of an apprehended violence order, or a similar order, issued under a law of a State, Territory or a foreign country;
- firearms or other dangerous weapons;
- people smuggling;
- human trafficking, slavery or slavery-like practices (including forced marriage), kidnapping or unlawful confinement;
- aiding, abetting, counselling or procuring the commission of an offence involving any of the matters listed above;
- attempting to commit an offence involving any of the matters listed above.[47]

Significant criminal record

A sponsor has a 'significant criminal record' in relation to a 'relevant offence' or offences if, in relation to that offence or offences, the sponsor has been sentenced to:

- death;
- imprisonment for life;
- a term of imprisonment of 12 months or more; or
- two or more terms of imprisonment, where the total of those terms is 12 months or more.[48]

Where a sponsor has been sentenced to two or more terms of imprisonment to be served concurrently (whether in whole or in part), the whole of each term is to be counted in working out the total of the terms.[49] For instance, if a sponsor has been sentenced to two terms of nine months for two offences to be served concurrently, the total of the terms is 18 months. This would be a 'significant criminal record' if those sentences were in relation to relevant offences notwithstanding the person may only have spent nine months actually in prison.

Additionally, if a sponsor has been sentenced to periodic detention, the sponsor is taken to have been sentenced to a term of imprisonment equal to the number of days the sponsor is

[46] reg 1.20KC(6).
[47] reg 1.20KC(2).
[48] reg 1.20KD(1).
[49] reg 1.20KD(2).

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required under the sentence to spend in detention.[50] Similarly, if a sponsor has been convicted of a 'relevant offence' and the court orders that the sponsor participate in a residential drug rehabilitation scheme or a residential program for the mentally ill, the sponsor is taken to have been sentenced to a term of imprisonment equal to the number of days the sponsor is required to participate in the scheme or program.[51] By way of example, if a sponsor has been sentenced to periodic detention of 200 days and also ordered by a court to 200 days participation in a residential drug rehabilitation scheme and/or residential program for the mentally ill, they will be taken to have been sentenced to a total of 400 days, and therefore a term of imprisonment of 12 months or more. Where that sentence for periodic detention and/or court ordered participation in residential schemes or program was in relation to a conviction for a 'relevant offence' listed in reg 1.20KC(2), they will have a 'significant criminal record'.

A sentence imposed on a sponsor for a 'relevant offence', or the conviction of a sponsor for a 'relevant offence' is to be disregarded for the purpose of determining whether they have a 'significant criminal record' if:

- the conviction has been quashed or otherwise nullified; or
- the sponsor has been pardoned in relation to the conviction concerned and the effect of that pardon is that the sponsor is taken never to have been convicted of the offence.[52]

Legal issues

Compelling circumstances

Compelling circumstances affecting the sponsor – reg 1.20J

In most cases, the main legal issue that arises in regard to reg 1.20J relates to the waiver of the sponsorship limitations and the meaning of 'compelling circumstances' under reg 1.20J(2).

Regulation 1.20J(2) provides that the decision-maker may approve the sponsorship, despite the limitation, if satisfied that there are 'compelling circumstances *affecting the sponsor'*. The legislative intention of this provision can be found in the Explanatory Statement which accompanied the introduction of reg 1.20J. It indicates that 'compelling circumstances' affecting the sponsor includes: [53]

- the previous spouse or de facto partner has died;
- the previous spouse or de facto partner has abandoned the sponsor and there are children requiring care and support;
- the new relationship is long-standing;[54] or

[50] reg 1.20KD(3).
[51] reg 1.20KD(4).
[52] reg 1.20KD(5).
[53] Explanatory Statement to SR 1996, No 211 (see [reg 67 - New div 1.4B]).
[54] What is a 'long-standing' relationship will depend on the evidence, the circumstances of each case and the nature of the hardship/detriment that would occur if the sponsorship/nomination were not approved. Guidance may also be drawn from the

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- there are dependent children of the new relationship.

Departmental guidelines substantially reflect the policy intent contained in the Explanatory Statement.[55]

The above examples are not intended to be exhaustive. The Explanatory Statement emphasises that the purpose of the sponsorship limitation is to curtail abuse of the partner migration programs. Decision makers should be mindful of this when assessing whether to approve a sponsorship despite the limitation.

Departmental guidelines also emphasise that every aspect of the sponsor's circumstances could be relevant to the existence of compelling circumstances. While there is no definitive list, some general aspects that may be particularly important are:

- the nature of the hardship and/or detriment that would be suffered (by the sponsor) if the sponsorship were not approved; and
- the extent and importance of the ties the sponsor has to Australia, and the consequent hardship/detriment that would be suffered if the sponsorship were not approved and the sponsor were compelled to leave Australia to maintain their relationship with the applicant.

The appropriate approach to the exercise of the discretion has been found to be that '*the material reveal circumstances such that the Tribunal would be overwhelmingly inclined to exercise the discretion in favour of the applicant and would approve the sponsorship*'.[56]

'Compelling circumstances' is construed to mean circumstances which force or drive the decision-maker to decide whether or not the jurisdictional fact arises for the exercise of the discretion. The circumstances must be so powerful that they lead the decision-maker to make a positive finding that the prohibition should be waived.[57]

Further discussion of the case law which may be applicable can be found in the Compelling and/or Compassionate Circumstances/Reasons commentary.

Compelling reasons affecting the applicant – reg 1.20KA

The limitation on sponsorship contained in reg 1.20KA does not apply where the visa applicant had compelling reasons, other than reasons related to his or her financial circumstances, for:

- not applying for a Contributory Parent / Aged Parent visa at the same time as the proposed sponsor;[58] or
- withdrawing his or her application for a Contributory Parent / Aged Parent visa made at the same time as the proposed sponsor.[59]

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definition of 'long-term partner relationship' (previously 'long term spouse relationship') in reg 1.03, which is included in cls 100.221(5) and 801.221(6A). Relevant departmental guidelines are policy instruction: Div 1.2/reg 1.03 - Long-term partner relationship (reissued 14/02/2014).

[55] Policy instruction: Div 1.4B – Limitation on certain sponsorships under div 1.4 – Sponsorship limitations – Spouse, Partner, Prospective Marriage and Interdependency Visas (reissued 18/11/16) at [7.1 – 7.2] and Explanatory Statement to SR 1996, No 211 - New div 1.4B.

[56] *Babicci v MIMIA* [2004] FCA 1645 at [17] where Moore J preceded the above with: '.... the Tribunal must consider whether the circumstances are (to use the defined meaning in the New Oxford Dictionary referred to above) such that they evoke interest or attention in a powerfully irresistible way. It is a way that must be irresistible to the Tribunal…'.

[57] *Babicci v MIMIA* (2005) 141 FCR 285 at [24] upholding *Babicci v MIMIA* [2004] FCA 1645.

[58] reg 1.20KA(3)(a).

There are three important differences in the consideration of compelling reasons in the reg 1.20KA context compared to that in reg 1.20J, namely:

- the compelling reasons must be the visa applicant's reasons (rather than affecting the sponsor);
- the reasons must be for not applying for a Subclass 143 or 864 visa at the same time as the proposed sponsor or for withdrawing an application for such a visa; and
- while the compelling reasons may include where the visa applicant was unable to migrate with the proposed sponsor due to family illness or other obligations, they may not include reasons related to her or his financial circumstances.

The term 'compelling' is not defined in the legislation, although Departmental guidelines state that it may include where the visa applicant was unable to migrate with the proposed sponsor due to a major family illness or other significant obligations.[60] The judgment in *Zhang v MIBP* provides an example of a judgment involving waiver of reg 1.20KA, with the Court finding no error in the Tribunal's finding that there were no compelling reasons, other than reasons relating to financial circumstances, for the applicant not applying for the visa at the same time as his wife.[61] For a full discussion of the issue, see the Compelling and/or Compassionate Circumstances/Reasons commentary.

Compelling circumstances affecting the sponsor or the applicant – reg 1.20KB

The limitation on sponsorship contained in reg 1.20KB may be waived where the sponsor or, in the case of a Child visa, the sponsor or his or her spouse or de facto partner:

- completed the sentence more than 5 years before the date of the application for approval of the sponsorship; and
- in the time since the sentence was completed, the sponsor has not been charged with another registrable offence, or if charged with such an offence, the charge has been withdrawn, dismissed or otherwise disposed of without the recording of a conviction; and
- there are 'compelling circumstances affecting the sponsor or the applicant'.

The term 'compelling circumstances' is not defined in the legislation. Departmental guidelines provide that 'compelling' is to be given its ordinary dictionary meaning in this context.[62] For a full discussion of the issue see the Compelling and/or Compassionate Circumstances/Reasons commentary.

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[59] reg 1.20KA(3)(b).
[60] Policy instructions: Div 1.4B – Limitation on certain sponsorships under div 1.4 – Sponsorship limitations – Partner (Provisional/Temporary) and Prospective Marriage visas at [12.2] (reissued 18/11/2016).
[61] *Zhang v MIBP* [2017] FCCA 2739. The applicant in *Zhang* claimed compelling reasons due to his mother having been diagnosed with cancer, but the Tribunal found his sister was able to care for his mother and it was his brother who was making the decisions in relation to her care.
[62] See policy instruction - Div 1.4 - Form 40 sponsorship - Protection of children - Sponsors of concern - Approving sponsorships under reg 1.20KB waiver provisions at [29] (reissued 09/05/2014).

Approving sponsorship where reasonable to do so

Discretion to approve sponsorship where sponsor has a 'significant criminal record' - reg 1.20KC(4)

If the Minister (or Tribunal on review) is satisfied that the sponsor has a 'significant criminal record', it must still consider whether it is reasonable to approve the sponsorship despite the 'significant criminal record' being present. The range of factors that must be considered when assessing whether it is reasonable include, but are not limited to:

- the length of time since the sponsor completed the sentence (or sentences) for the relevant offence (or offences);
- the best interests of any children of the sponsor or any children of the applicant who is seeking to satisfy the primary criteria for the grant of the visa concerned;
- the length of the relationship between the sponsor and the applicant who is seeking to satisfy the primary criteria for the grant of the visa concerned.[63]

The Tribunal must not restrict itself only to the factors listed above however, and must also have regard to all matters raised by the sponsor and applicant in support of approving the sponsorship as well as any other relevant considerations that arise on the available evidence.

Whether it is 'reasonable' to approve the sponsorship despite a 'significant criminal record' being present is a question of fact for the decision maker. However to avoid an inference being drawn about matters that were or were not considered in making that finding, decision makers should ensure that cogent reasons are recorded in their decisions that demonstrate a consideration of all relevant factors.

Relevant case law

Babicci v MIMIA [2004] FCA 1645	Summary
Babicci v MIMIA (2005) 141 FCR 285	Summary
Wu v MIBP [2016] FCCA 290	Summary
Jiang v MIBP [2016] FCCA 360	
Zhang v MIBP [2017] FCCA 2739	
Makhmudkhodjaeva v MICMSMA [2020] FCAFC 88	Summary

[63] reg 1.20KC(4).

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Relevant amending legislation

Title	Reference Number	Legislation Bulletin
Migration Regulations (Amendment) 1996 (Cth)	SR 1996, No 211	
Migration Regulations (Amendment) (Cth)	SR 1997, No 109	
Migration Regulation (Amendment) (Cth)	SR 1997, No 354	
Migration Amendment Regulations 2005 (No 4) (Cth)	SLI 2005, No 134	
Migration Legislation Amendment Regulations 2009 (No 2) (Cth)	SLI 2009, No 116	
Migration Amendment Regulations 2009 (No 7) (Cth)	SLI 2009, No 144	No 09/2009
Migration Amendment Regulations 2010 (No 2) (Cth)	SLI 2010, No 50	No 2/2010
Migration Legislation Amendment (2016 Measures No 3) Regulation 2016 (Cth)	F2016L01390	No 03/2016

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