

nqr
women's
legal service

Temporary visa holders and domestic violence

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ACKNOWLEDGEMENT OF COUNTRY

We acknowledge the Traditional Custodians of the lands of this nation, particularly those of North and Far North Queensland, within which our Service is privileged to operate.

We pay our respects to Elders past, present and emerging and note their continuing connection to land, sea and community. Sovereignty was never ceded. It was and always will be, their land.

We also acknowledge the contributions that Aboriginal and Torres Strait Islander women have made, and continue to make, to our community.

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Disclaimer:

The guidance provided in this presentation is not legal advice, it is information only. It has been designed for you to use with legal help from a lawyer.

NQWLS believes the information contained within this presentation is accurate as at May 2022 and does not accept responsibility for any errors and omissions.

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About NQWLS

- Specialist community legal centre run by women, for women.
- Receive funding from State and Federal Government.
- Provide free legal advice and assistance to women in relation to family law, domestic and family violence, child protection, sexual assault, discrimination, human rights and Victim Assist.
- Provide information and referrals in all areas of law.
- Offices in Townsville and Cairns but provides outreach services throughout our broad service region.

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Today

NQWLS has been assisting women on temporary visas who have experienced domestic and family violence and other migrants and asylum seekers in great disadvantage. We are working to ensure vulnerable women get a fair and just outcome in the Australian legal system.

Today we will be discussing:

- the Family Violence provisions in migration law;
- who can access the Family Violence Provisions;
- Judicial and Non judicial evidence of family violence;
- challenges in satisfying Genuineness requirement;
- vulnerabilities of applicants;
- protection visa applicants relying on Family Violence Claim; and
- Family Violence prevention.

Q & A at the end of the discussion

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- In the general population, around 23% of women have experienced family or domestic violence.
- In 2019-2020 there were 37, 118 partner visas granted. There were 1,062 (2.9%) partner visas granted under the Family Violence Provisions. This is smaller than the general population-this would suggest there is under-reporting of family violence amongst women on temporary and partner visas.

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In the partner visa context, the regulations prescribe family violence as one of 3 exceptions where the applicant is able to get a permanent partner visa. Family violence is one of those exceptions.

The exception may be invoked by persons who were in the relevant visa circumstances without waiting for 2 years but whose relationship has ended, and they or a member of their family unit has suffered 'relevant family violence' committed by the Australian sponsor.

So this means if the applicant (man or woman) has experienced family violence, they don't need to stay in the relationship and can get their permanent partner visa if they can prove they have experienced family violence.

The reasons these provisions were introduced was to address a community concern that applicants, particularly vulnerable women who had arrived in our country, may be forced to stay in a relationship even though they are experiencing family violence. Part of that family violence is the threat that if they do not stay, they will be deported and the sponsor will withdraw their sponsorship.

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SUBCLASS	VISA TYPE
300	Prospective Marriage Visa
820	Onshore Partner visa (Temporary)
309	Offshore Partner (Provisional)
Bridging visa A, B, C, E Holders	If you have applied for a partner visa
445	Dependent Child (linked to Partner visa)
858	Global Talent Visa

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- So looking at the graph, you see which subclasses are eligible to apply under the Family Provision claim.
- As you can see, there are many visa holders who cannot rely on the Family Provision claim.
- The 309 visa applicants who have applied for an offshore partner visa but it hasn't yet been granted. These applicants may travel to Australia on a visitor visa to spend time with their new partner and if they then experience Family Violence, they are unable to access the family violence provisions. They must first have been granted the 309 visa before they can access the provisions.
- It is interesting to know that during Covid, the department changed the regulations so that subclass 309 visas can be granted onshore. It was only introduced 26 February 2021.

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Different scenarios where the applicant is able to rely on the Family Violence Provision

Scenarios: (Div. 1.5 Migration Regulations 1994 (Cth))

1. Applicant married their spouse while the holder of a Prospective Marriage Visa (subclass 300) and applied for a partner visa (subclass 820/801);
2. Applicant is awaiting the outcome of their application for a temporary partner (subclass 820) visa;
3. Applicant has been granted a temporary partner visa (subclass 820), and awaiting the outcome of the permanent visa (subclass 801);
4. Applicant has entered Australia as the holder of a provisional partner visa (subclass 309);
5. Applicant has been granted a 309 visa onshore;
6. Applicant is a dependent on a Global Talent visa (subclass 858);
7. Applicant is a dependent child (subclass 445) visa holder.

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What is relevant Family Violence under the Migration Regulations

Regulation 1.21 defines *relevant family violence* as:
Conduct, whether actual or threatened, towards:

- The alleged victim; or
- A member of the family of the alleged victim; or
- A member of the family unit of the alleged perpetrator; or
- The property of the alleged victim; or
- The property of a member of the family unit of the alleged victim; or
- 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, their own wellbeing or safety.*

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What is violence

- "The term 'violence' is not defined in the Migration Regulations 1994, but common law has established the scope of the term:
- In *Sok v Minister for Immigration and Citizenship* the High Court held that violence is not restricted to actual or threatened physical violence. The Court considered that the term 'domestic violence' is also generally understood to encompass emotional abuse and/or economic deprivation.
- Critical to this reasoning is that reg. 1.21 of the Regulations refers to violence that causes the victim to fear for his or her 'personal well-being or safety' and that personal well-being is generally considered to encompass psychological health.

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Who must suffer the Family Violence?

- The person who must have suffered the domestic or family violence varies depending on which visa the applicant is applying for, and which visa they hold at the time of the application or decision.
- Depending on which visa is held at the time of application or decision, an applicant can rely on the family violence committed by the sponsor against:
 - the Applicant;
 - A member of the family unit of the sponsor and/or applicant; or
 - A dependent child of the sponsor and/or applicant

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VARIATIONS IN IDENTIFYING THE ALLEGED VICTIM

SUBCLASS 100 Reg. 100.221(4)	SUBCLASS 801 Reg. 802.221(6)	SUBCLASS 820 Reg. 820.211(9)	SUBCLASS 820 Reg. 820.221(3)
The applicant entered Australia on a subclass 309 visa	The applicant holds a subclass 820 visa	The applicant does not hold a substantive visa, but held a subclass 300 (Prospective Marriage Visa)	The applicant holds a 300 PMV
They were the spouse or defacto partner of the sponsoring partner, but the relationship has ceased	They were the spouse or defacto partner of the sponsoring partner, but the relationship has ceased	The applicant married the sponsor while on that visa, but that relationship has ceased prior to application for the 820 visa	The applicant married the sponsor while on that visa, but that relationship has ceased since the application for the 820
After entering Australia, family violence was committed by the sponsor against: -The applicant; or -A member of the family unit of the sponsor and/or applicant.	Family violence was committed by the sponsor against: -The applicant; or -A dependent child of the applicant and/or sponsor	Family violence was committed by the sponsor against: -The applicant; or -A member of the family unit of the sponsor and/or applicant; or -A dependent child of the applicant and/or sponsor	Family violence was committed by the sponsor against: -The applicant; or -A dependent child of the applicant and/or sponsor

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Global Talent Subclass 858 Reg 858.321	Dependent Child Subclass 445 Reg 445.223(4)
The applicant is the spouse or defacto partner of a holder of a Subclass 858 visa.	The applicant is the dependent child of a parent holding a Subclass 445 visa
The relationship between the holder of the Subclass 858 visa and applicant has ceased.	The relationship between the visa-holding parent and sponsor has ceased.
Family violence was committed by the Subclass 858 holder against: -the applicant; or -A member of the applicant's family unit who has made a combined application with the applicant; -a dependent child of the applicant or holder.	The visa holding parent has requested consideration of their visa status under the family violence provisions.

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<ul style="list-style-type: none"> Before the relationship ended it must have been a genuine and continuing married or defacto relationship (including same sex relationship) committed to a shared life to the exclusion of all others, up until the time of the separation. All of the circumstances of the relationship must be considered: <ol style="list-style-type: none"> Financial; Social; Nature of the household; and Nature of the commitment to each other. When we put together an application for a partner visa and provide the evidence, it is helpful to not only provide the evidence but have the parties write about their relationship, anecdotes, photos and refer to the photos provided as evidence. Some couples may not have a good deal of evidence and so the story as to why this is the case, how and why they have been separated and relying on evidence of communication including WhatsApp and phone records can fill those gaps.

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Process for claiming the Family Violence exception:

Notify the DHA of the change of circumstances of the relationship; (should notify the DHA within 14 days of change of address and as soon as practicable re FV);

Provide evidence either as judicial or non-judicial to DHA of the family violence;

DHA assesses the genuineness of the relationship;

DHA assesses the family violence under the provisions;

DHA refers the matter to an Independent Expert if there are doubts of the family violence;

Visa is granted if the family violence, genuineness and other visa criteria (health/character) are satisfied;

Request for internal review if found error in the decision (rarely successful);

If visa is refused, option of applying for review of decision at AAT;

Potential for judicial review;

Ministerial Intervention option.

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Examples of evidence of Genuine relationship:

- Marriage certificate/registration of relationship;
- Social media evidence of relationship;
- Documentary evidence-lease/utilities/bank statements/insurance in both names;
- Financial assets-purchased in both names/binding beneficiary on superannuation/wills;
- Evidence relationship declared to gov't agencies-Centrelink/ATO;
- Evidence of children-birth certificates;
- Communication records;
- Statutory declarations made by both applicant and sponsor.
- Once the genuine relationship is established, the DHA will assess the Family Violence provisions.
- The case officer must be satisfied that Family Violence or part of the FV occurred while the relationship existed. (Reg 1.23(14))
- There is no requirement that the relationship has broken down because of DV

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Step 2: Claiming FV exception:

- Judicially determined evidence, and/or
- Non Judicial evidence

Judicially determined evidence

Court Order Reg. 1.23(4)	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... that order was made after the court had given the alleged perpetrator an opportunity to be heard, or otherwise to make submission to the court, in relation to the matter.
Conviction Record Reg 1.23(6)	If a court has convicted the perpetrator of an offence of violence against the victim, or recorded a finding of guilt in respect of the same
Injunction Reg 1.23(2)	If on the victim's application, the court has granted an injunction under Family Law Act 1975 against the perpetrator

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Non-Judicial evidence:

- Joint Undertaking-Reg. 1.23(8)(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; **OR**
- A statutory declaration using form 1410-Statutory declaration for family violence claim** by the applicant outlining the alleged incidents of domestic and family violence; AND
 - Instrument IMMI12/116. Specification of Evidentiary Requirements under Migration Regulations 1994*

At least 2 forms of acceptable and different evidence from the table below:

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Type of Evidence	Evidence must include the following detail
1 Medical/Hospital report, discharge summary or statutory declaration that is made by a person who is: #Registered as a medical practitioner and is performing the duties of a medical practitioner, or #Registered as a nurse within the meaning of Section 3 of the Health Insurance Act 1973 and is performing the duties of a registered nurse.	*Identifies alleged victim, and *Details the physical injuries or treatment for mental health that is consistent with the claimed family violence
2 A report, record of assault, witness statement or statutory declaration that is made by: #A police officer of state or territory or AFP office; OR #A witness statement that is made by someone other than the alleged victim to a police officer during the course of a police investigation.	*Identifies the alleged victim, and *Identifies the alleged perpetrator, *Identifies an incident/s of domestic violence

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3 Report or statutory declaration made by an officer of: #a child welfare authority, or #a child protection authority of a state or territory	*Details fears for the dependent child's safety due to family violence within the household, and *Identifies the alleged perpetrator
4 Letter or assessment report made on the organisation's letterhead by: #A women's refuge, or #A family/domestic violence crisis centre	*States that the alleged victim has made a claim of family violence, and *States whether the alleged victim was subject to family violence, and *Identifies the alleged perpetrator, and details any evidence used to form the opinion.

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5. Statutory Declaration made by: #a member of the Australian Association of Social Workers, or #a person who is eligible to be a member of that Association who has provided counselling or assistance to the alleged victim while performing the duties of a social worker	*States in their opinion the alleged victim- was subject to family violence, and *Details the reasons for the opinion, and *Identifies the alleged perpetrator.
6. Statutory declaration made by a registered psychologist in a State or Territory who has treated the alleged victim while performing the duties of a psychologist.	*States in their opinion the alleged victim was subject to family violence, and ☑*Details the reasons for the opinion, and *Identifies the alleged perpetrator.

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7. Statutory declaration made by a family consultant appointed under the Family Law Act 1975 or a family relationship counsellor who works at a Family Relationship Centre listed on the Australian Government Family Relationships website	*States that the alleged victim has been treated or counselled, by the family consultant or family relationship counsellor, and *States that in their opinion the alleged victim was subject to family violence, and *Details the reasons for the opinion, and *Identifies the alleged perpetrator.
8. Statutory declaration or a letter on the school's letterhead made by a school counsellor or school principal in their professional capacity.	*States that they have made, or been made aware of, observations that are consistent with the alleged victim's claims that they were subject to family violence, and *Identifies the alleged perpetrator, and *Provides details of those observations.

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Collating non-judicial evidence:

- Detailed file note focusing on the breakdown of the relationship;
- Time line of events and people involved;
- Assess whether the client needs additional support or advice;
- Refer client to support services
- Assess whether client needs additional legal advice-Family Law/DVPO

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Independent Expert Assessment

- If the Minister is not satisfied that FV has occurred based on the non-judicial evidence:
 - The Minister must seek the opinion of an independent expert about whether the relevant Family Violence occurred - Reg 1.23(10)(c)(i) and
 - The Minister must take the IE's opinion as correct-Reg. 1.23(10)(c)(ii)
 - IE-are meant to be independent and their training relevant to the assessment required.
 - Any adverse findings by the DHA are sent to the IE at the time of the referral.
 - No legal representation at interview with IE however advise client to contact a support worker to attend with them as the interview is likely to cause further trauma to the client and may also assist with responses;
 - Applicant may need an interpreter;
 - Request that applicant records the interview;
 - In the letter sent to the applicant, they are informed of the referral to the IE and are advised as to the name of the IE (Business name) and advised:

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Your cooperation with IE(named) in this matter is very important for the processing of your visa application. It is important to note that failure to cooperate or excessive delays in responding to IE requests for documents or information may have adverse consequences for your visa application

CASE STUDY

- Client relying on FV Provisions-providing Non judicial evidence only. The NJE is not strong.
- Client referred after 12 months to IE;
- IE decided the FV claims not upheld and advised delegate;
- Delegate issued a Natural Justice Letter to applicant-meaning please provide response within 28 days as to why your visa should be approved considering the information presented;
- Do FOI request to DHA for the referral to the IE and assessment report of IE;
- Refer client to another psychologist for another opinion using the information provided by the IE;
- Apply for extension to respond to NJ letter until after the FOI for assessment report of IE information received.
- Statutory declaration by applicant addressing concerns;
- Letter-flawed independent expert report-look at IE failed to apply test of 'relevant family violence' per Reg. 1.21(1)-internally assessed by DHA before any refusal.

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FV Exception Challenges

1. Genuine relationship-applicant's statutory declaration; limited access to documents; lack of legal advice; social isolation;
- DHA-refusing partner visa by claiming relationship was not genuine and so evidence of FV does not need to be considered or addressed;
- Singh [2016] FCCA 114, Riley J noted

"the regulations specifically requires the tribunal to consider all of the circumstances of the relationship when determining whether it was genuine. The statutory declarations about family violence go to the circumstances of the relationship. They tend to support the claim that there was a relationship between the parties, albeit one that ended badly."
- Threat to deport-coercive and psychological abuse. Advise client sponsor does not have the decision making about any cancellation of visa.
- Infidelity-DHA have cited adverse information that one party has been unfaithful as evidence the relationship is not genuine
- In *Cao v Minister for Immigration and Anor* [2007]FMCA 225 (21 March 2007):

The Court found that "...the correct interpretation of the relevant regulations is that it is a matter of fact and degree in circumstances of the particular case whether an extra-marital sexual encounter indicates a lack of the required commitment to a shared life of husband and wife to the exclusion of all others."

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1.Cross Orders-DVPO

- The Minister may refuse to grant a visa if the applicant does not satisfy the Minister they satisfy the character test-s 501(1) Migration Act.
- The character test relies on:
 - having a substantial criminal record;
 - being convicted of particular offences;
 - membership of certain groups or organisations;
 - risks posed by the person to the Australian community.
- Some sponsors apply for a DVPO naming the applicant as the respondent in a DVPO knowing the impact this may have on the FVP application made by the applicant. It is another form of DV and control. This should be addressed with any FVP application.

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Character: Direction 90

- Direction no 90-Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under S 501CA
- Primary considerations
 - In making a decision under s 501(1), 501(2) or 501CA(4) the following are primary considerations:
 - (1) Protection of the Australian community from criminal or other serious conduct;
 - (2) Whether the conduct engaged in constituted family violence; (As defined s4AB FLA)
 - (3) The best interests of the minor children in Australia;
 - (4) Expectations of the Australian community.
 - Ministerial Direction 90 Family Violence defined:
 - "violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the family member), or causes the family member to be fearful", such as:

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- an assault; or
- a sexual assault or other sexually abusive behaviour; or
- stalking; or
- repeated derogatory taunts; or
- intentionally damaging or destroying property; or
- intentionally causing death or injury to an animal; or
- unreasonably denying the family member the financial autonomy that he or she would otherwise have had; or
- unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support; or
- preventing the family member from making or keeping connections with his or her family, friends or culture; or
- unlawfully depriving the family member, or any member of the family member's family, or his or her liberty.

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How to address DVPO with applicant as respondent:

1. Address the potential character issues in a FV statutory declaration:
 - Outline the order against the applicant-and why they consented to the DVO (or as the case may be);
 - Address any controlling behaviour by the partner-if the DVPO application was a deliberate attempt cause harm/legal abuse to applicant-as part of the ongoing FV experienced by the applicant-provide non-judicial evidence of this to support;
 - Provide information how court system is used by perpetrators of FV to control, intimidate and harass victims in submissions;
 - If not already, advise if sufficient evidence to applicant to make application for DVPO in own right-provide this to DHA if granted to support the concerns above.

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Sponsors-can have full control of the visa application process

- Many applicants have little knowledge of the process and the sponsor controls the application and submission of evidence and even all correspondence from DHA;
- When giving advice, can ask condition of DVPO that applicant be given full access to their application and all documentation;
- Visa applicant deemed responsible by DHA even if a third party has provide the information or was the recipient in all communication. The responsibility of the DHA is to provide information to the email address/postal address provided in the application, not to ensure the applicant has received that information.

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Protection Visa-Family Violence Claims

- A person suffering from domestic or family violence may also be able to apply for a refugee protection visa on the basis of fear of return to their home country.
- *'A refugee is someone who, owing to a well founded fear of being persecuted on the grounds of race, religion, nationality or membership of a particular social group or political opinion, is outside their country of their nationality and is unable or ...unwilling to avail themselves of the protection of that country.'*
- **Membership of a Particular Social Group**
- Being a woman is in some circumstances, can constitute being a member of a particular social group in regard to overall discrimination, arguing that the fear of persecution experienced by women fleeing a domestic violence is based on this membership of a particular social group. (Common acceptance in women from PNG). The applicant needs to show:
 - She has a well founded fear of being persecuted; and
 - This fear is for a convention reason-member of a particular social group; and
 - She cannot rely on state protection (police and state);
 - She cannot relocate (ie: relocate to close country or within country)

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TPV SHEV holders (Temporary Protection and Safe Haven Enterprise Visa)

TPV/SHEV visas-ongoing temporary protection for boat arrivals in Australia-not from Manus or Nauru;

Spouse suffering family violence may stay in abusive r/ship if they are linked to the refugee claim of perpetrator;

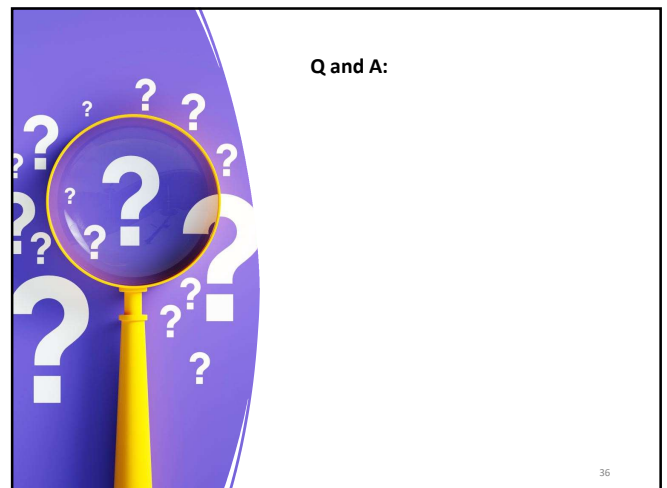
If they leave r/ship they can apply for TPV but if not successful may be forced to return to home country;

Partner perpetrator may face character issues for visa.

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Q and A:



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