Parliament of the Commonwealth of Australia
Joint Standing Committee on Migration Regulations

Change of Status on Grounds of Spouse/De Facto Relationships

Second Report

May 1991

Australian Government Publishing Service
Canberra

Change of Status

Marriage and De Facto Relationships

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TERMS OF REFERENCE

The Joint Standing Committee on Migration Regulations was established on 17 May 1990 to inquire into and report upon:

(a) regulations made or proposed to be made under the **Migration Act 1958**;

(b) all proposed changes to the **Migration Act** 1958 and any related acts;

(c) such other matters relating to the **Migration Act** 1958, regulations or reports as may be referred to it by the Minister for Immigration, Local Government and Ethnic Affairs.

MEMBERS OF THE COMMITTEE

Dr Andrew Theophanous, MP Chairman
Mr Philip Ruddock, MP Deputy Chairman
Senator Vicki Bourne (from 19 February 1991)
Senator Barney Cooney
Senator Jean Jenkins (until 30 June 1990)
Senator Jim McKiernan
Senator John Olsen
Senator Sid Spindler (1 July 1990 -19 February 1991)
Mr Maxwell Burr, MP (from 12 September 1990)
Dr Robert Catley, MP
Hon Clyde Holding, MP
Rt Hon Ian Sinclair, MP
Hon Ian Wilson, MP (until 12 September 1990)

Legal Consultant

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Ms Robina Mills, Secretary
Mr Tony Fortey
Ms Sharyn Hourigan
Ms Heidi Quinlan

PREFACE

As Chairman of the Joint Standing Committee on Migration Regulations I am pleased to present the Committee's second report, dealing with change of status on spouse/de facto grounds. This report is part of the Committee's ongoing inquiry into the Migration Act and Regulations, as required by its terms of reference.

The regulations continue to be a source of concern to the Committee, given their complexity and the frequency and number of changes being made. The Committee feels that such a degree of constant change to an already complex system without the simplification foreshadowed by the Minister in May 1990 disadvantages all those involved in the immigration process, including applicants, Departmental officers, community advisers and migration advisers.

The marriage issue itself is an inherently difficult one. Moreover, the current legislative procedures in place to assess the validity or otherwise of a relationship for immigration purposes have complicated the task Departmental officers are required to perform. The Committee is especially concerned at the lack of guidance in the Procedures Advice Manuals relating to some areas of assessment, for example the test for a genuine marriage for immigration purposes. The Committee regards this issue as central to the question of marriage and immigration and discusses it at length in the following report. As well as recommending and endorsing a number of changes to the law, the Committee has recommended that the Department provide more data in its annual report and more support for its staff in the form of training and better guidance in Procedures Advice Manuals.

All Committee members and staff have worked hard to finalise this report, but I would like to express particular gratitude for the advice and assistance given to the Committee in its endeavours by Dr Kathryn Cronin, the Committee's legal consultant. Dr Cronin's objective and intelligent advice has enabled the Committee to pursue its inquiries effectively and has without doubt enhanced the quality of the Committee's deliberations. I would also like to thank all the members and the staff of the Committee for their excellent efforts.

A Theophanous, MP
Chairman

7 May 1991

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RECOMMENDATIONS

Chapter 1

1 The Department of Immigration, Local Government and Ethnic Affairs review its provision of statistical data in its annual reports with a view to providing more detailed and more comprehensive statistical data in future annual reports. (paragraph 1.14)

2. Statistical data provided in annual reports be provided in a standard format from year to year. (paragraph 1.14)

Chapter 3

3 The Department of Immigration, Local Government and Ethnic Affairs include in its training programme for those officers who determine applications on spouse/de facto spouse grounds information on different cultural values and practices. (paragraph 3.29)

4 The Department of Immigration, Local Government and Ethnic Affairs revise its Procedures Advice Manual to ensure that officers are aware that different cultural factors impinge on marriage relationships and that such factors should be considered in the assessment of the "genuine and continuing" marriage. (paragraph 3.29)

Chapter 4

5 The statement in the Procedures Advice Manual concerning de facto relationships be clarified so that decision makers and immigration advisers are made aware of what de facto relationships are not in accordance with Australian social values. (paragraph 4.20)

6 Legal advice be sought on the advice given in the Procedures Advice Manual, namely that it is permissable to exclude under age legally married applicants until both spouses are over the marriageable age. (paragraph 4.20)

7 In the event that the advice contained in the Procedures Advice Manual is in fact incorrect, the definition of spouse in the Regulations be amended to include the requirement that a spouse is a person of Australian marriageable age. (paragraph 4.20)

8 The regulations and Procedures Advice Manual be amended to allow administrative flexibility in individual cases with respect to the degree of separation required for de facto, or married partners separated but not divorced, before the relationship is taken to be not continuing. (paragraph 4.32)

9 The visa and permit conditions included in regulations 17(l) and 28(l) be reworded so as to state the change in circumstances which would justify cancellation. (paragraph 4.74)

10 Such circumstances to be limited to changes in the nature of the marriage or de facto relationship, such that the relationship is no longer genuine or continuing. (paragraph 4.74)

11 These circumstances not to include the death of a spouse or the breakdown in a relationship due to domestic violence or such other change which would not disqualify the spouse from obtaining permanent residence as a spouse. (paragraph 4.74)

12 The requirements of natural justice to be observed before cancelling the spouse's visa or permit, the spouse be given notice of the Minster's intention to cancel the visa or permit and time within which to respond to the allegations. (paragraph 4.74)

13 Visa and permit holders to have explicit written notice of the full terms of conditions attaching to their visa or permit and of the consequences which result from a breach of the conditions. (paragraph 4.74)

14 Extensions of the extended eligibility spouse entry permit be given sparingly and only to ensure that the applicant has lawful immigration status during processing. (paragraph 4.74)

Chapter 5

15 The test for a "genuine marriage", to be set out in the Procedures Advice Manual, be as follows:

> whether at the time at which the matter has to be decided it can be said that the parties have a mutual commitment to a shared life as husband and wife and that they have a genuine intention for their

relationship to be ongoing. (paragraph 5.12)

16 Clear guidance on the appropriate assessment dates, including the dates applicable for applications lodged before 15 April 1991, be written into the Procedures Advice Manual. (paragraph 5.23)

17 The Department of Immigration, Local Government and Ethnic Affairs collect data on the incidence of sham marriages for immigration purposes and make that data available in its Annual Report. (paragraph 5.32)

18 The Procedures Advice Manual include information on particular common marriage customs, with the proviso that staff are advised not to assume that everyone of a particular cultural background adheres to those customs and that all cases are to be assessed on an individual basis; (paragraph 5.51)

19 Departmental officers are made aware of the community assessment of when the couple are married for the purpose of assessing the genuineness or otherwise of a traditional marriage (paragraph 5.51)

20 The Department move to tape record all parallel interviews and that those tapes be made available to appropriate parties. (paragraph 5.58)

21 The Department of Immigration, Local Government and Ethnic Affairs closely monitor the de facto marriage class and collect statistics on the approval and rejection rate of applications for this class. (paragraph 5.67)

22 Statistical evidence on the incidence of sham marriage claims for both legal spouse and de facto spouse be collected. (paragraph 5.67)

23 Such statistical data be included in the Department's Annual Report. (paragraph 5.67)

24 In clear cases when such bogus or sham marriages are detected the non-Australian partner, who has used the marriage to gain entry to or stay in Australia, be removed from Australia; (paragraph 5.87)

25 If the present law enshrined in Section 20(3) concerning the obtaining of residence by deception does not allow the easy deportation of those who have duped their Australian partner in this way, then that provision be amended to enable such a result. (paragraph 5.87)

26 Penalties relating to fraudulent spouse/de facto applicants should also extend to fraudulent interdependency relationships. (paragraph 5.89)

27 The Department of Immigration, Local Government and Ethnic Affairs undertake a routine audit of former spouse applicants who have subsequently applied for citizenship in order to gather statistical data on marriage and to detect those cases where there may be a report of a sham marriage or marriage fraud. (paragraph 5.94)

28 A provision be incorporated into the Regulations to serve the same purpose as Section 204(a) (2a) of the United States Immigration Marriage Fraud Act, that is that the spouse applicant is not permitted to sponsor another spouse for a specified period unless it can be established by clear and convincing evidence that the prior marriage was not entered into for the purpose of evading any provision of the immigration laws. (paragraph 5.94)

29 There be a widespread and effective publicity campaign highlighting the increased surveillance and detection techniques, the increased penalties for fraud and the very real penalties of deportation and restrictions on re-entry. (paragraph 5.94)

Chapter 6

30 Where a marriage between an Australian and a non-Australian citizen has broken down and there has been a child of that marriage, that consideration be given to the rights and interests of the child at the time of application for residence and prior to any deportation action by the Minister for Immigration, Local Government and Ethnic Affairs. (paragraph 6.24)

31 Where legal proceedings, including proceedings relating to divorce, settlement or custody, are under way, no action be taken by the Minister for Immigration, Local Government and Ethnic Affairs prior to the finalisation of such proceedings, provided there is not unreasonable delays in the pursuit of proceedings by the non-Australian party. (paragraph 6.24)

CHAPTER 1

BACKGROUND TO THE INQUIRY

- **The establishment of the Committee**
- **The change of status inquiry**
- **Structure of the report**
- **Major concerns**
- **Availability of statistical data**
- ***Interim* report**
- **Ministerial response**

The establishment of the Committee

1.1 The Joint Standing Committee On Migration Regulations was established on 17 May 1990 to inquire into and report on legislative changes in the area of migration and other matters which may be referred to it by the Minister for Immigration, Local Government and Ethnic Affairs.[1]

1.2 Initially, the Committee determined that it would consider the following matters:

(a) illegal entrants
(b) change of status
(c) refugee/humanitarian issues
(d) review arrangements

1.3 The Committee tabled its report on illegal entrants in September 1990. This current report is the second in the initial series. The Committee has commenced its inquiry into refugee/humanitarian issues and has determined that the inquiry into review arrangements will commence towards the end of 1991.

The change of status inquiry

1.4 *The Committee took the decision to limit its inquiry into change of* status on the basis of marriage de facto relations for the following reasons:

a) there was then a deadline of 30 November 1990 after which time the rules put in place on 19 December 1989 would recommence;

b) pressure to investigate other areas of the regulations precluded a fuller investigation into change of status.

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[1]The Committee's terms of reference are set out in full on page *(iv)*

1.5 The Committee is to consider the wider issues within the change of status area at some time in the future. However, a specific timetable is yet to be considered.

1.6 The Committee took evidence on change of status on the basis of spouse/de facto relationships in October and November 1990. In addition, the Minister referred to the Committee the Report of the Working Party of the National Population Council on this same issue. The Committee determined that the Working Party's report would be looked at as part of its review of change of status.

1.7 The Minister requested that the Committee provide advice to him on change of status on spouse/de facto grounds as soon as possible, in view of the then deadline of 30 November 1990 for the cessation of interim arrangements. In order to satisfy that request the Committee provided interim advice to the Minister on 7 November 1990[2]. That letter of advice is discussed later in this chapter and elsewhere in the report.

Structure of the report

1.8 Following the Committee's advice to the Minister of 7 November, the Committee continued its investigation into change of status. The resulting report is structured as follows:

- Chapter 2 is a statistical analysis of the growth in change of status applications. This analysis attempts to track the growth in the number of applications over the last several years and identify possible reasons for the growth;
- Chapter 3 discusses the different cultural factors which are of relevance in the assessment of whether or not a marriage is "genuine";
- Chapter 4 is an outline of immigration law concerning marriage;
- Chapter 5 is an analysis of marriage fraud; and
- Chapter 6 discusses problems which can arise if the marriage breaks down.

[2]Appendix C

Major concerns

1.9 There is evidence that change of status applications on the basis of marriage have increased significantly over the last ten years. In order to deal with this trend, the Government introduced far more stringent rules on 19 December 1989.

1.10 The increase in applications is of concern because:

a) spouse applicants do not have to satisfy some aspects of the public interest test (see paragraph 4.34). They are not subject therefore to the "screening" which enables the Australian Government to select for migration those applicants who it judges will best serve the interests of Australia;

b) access to change of status provisions from within Australia encourages people to apply on that basis in preference to applying from overseas;

c) there is potential for abuse of the system.

1.11 The Committee's inquiry comprised the following elements:

- an assessment of the growth in change of status applications on the basis of marriage or a de facto relationship;
- a discussion on marriage and immigration;
- an assessment of the fraud component in marriage/de facto applications;
- an examination of Departmental procedures for the assessment of applications, including;
  - discussion on cultural factors relevant to the assessment of the genuineness of marriage;
  - the development of appropriate criteria for assessing the genuineness of a marriage or de facto relationship; and
  - the development of appropriate sanctions against those people who are found to have defrauded the system.

Availability of statistical data

1.12 The Committee found it difficult to analyse accurately the statistical data provided by the Department. This was particularly so when comparing data over time, such comparisons being almost impossible at present as the Department has presented data in different formats from year to year.

1.13 The Committee also notes the increasing paucity of statistical data being provided by DILGEA, especially in its Review 90 Report. It is the Committee's view that with increased computerisation of administration in DILGEA, as in the rest of the public service, it should be easier to collect statistical data and to generate meaningful reports from such data. The Committee has commented on the difficulty of accessing and analysing statistical data in a number of sections of this report, particularly at paragraphs 2.24, 5.24-5.28 and 5.31.

1.14 The Committee therefore recommends that:

(1) the Department of Immigration, Local Government and Ethnic Affairs review its provision of statistical data in its annual reports with a view to providing more detailed and more *comprehensive statistical data in future annual reports; and*

(2) statistical data provided in annual reports be provided in a standard format from year to year.

Interim report

1.15 On 7 November 1990 the Committee forwarded an interim report in the form of a letter[3] to the Minister for Immigration, Local Government & Ethnic Affairs advising the Minister on a number of issues relating to change of status on the basis of marriage. That report made the following recommendations:

(a) in relation to marriage:

(1) that the law presently operating until 30 November should continue to apply after that date for those applicants applying to change of status on the basis of marriage subject to the additional provisions outlined below;

(2) it is recognised that because of immediate resource implications it would be impractical for all applicants for change of status and their spouses to be interviewed and that therefore:

a) all applicants where it is suspected that a principal purpose is immigration be interviewed; and

b) all other applicants be interviewed on a random or risk analysis basis;

[3]That letter is reproduced in full at Appendix C.

(3) that in order for an appropriate determination to be made under 2a) and 2b) the application form be extended to include more specific information and corroborative evidence of public commitment to marriage, for example:

a) the period the parties have known each other;

b) where the parties have resided before marriage and after marriage and for what period; and

any other questions which might assist Departmental officers in establishing the bona fides of the marriage for the purpose of immigration;

(4) that for those people who have married and have not yet gained permanent residence and who:

a) are proven victims of domestic violence or cruel and unconscionable conduct and are a party to non ex parte proceedings in a court of law; and

i) can demonstrate that they come from a cultural situation where, to return as a partner in a failed marriage would impose severe hardship or make them subject to discrimination; or

ii) have a child or children who are Australian citizens who would be entitled to maintenance from the Australian parent; or

iii) for those people who do not meet criteria *i)* or *ii)* above while the presumption is that they will return overseas, if there are circumstances of a compelling and compassionate nature;

provision be made in the regulations for them to considered for permanent residence, even though their Australian spouse may have withdrawn their sponsorship;

(5) that where legal proceedings are not complete the Department of Immigration, Local Government and Ethnic Affairs not initiate any action to disadvantage the applicant;

(b) in relation to de facto relationships:

(6) that for those people who are in a de facto relationship there be a period of 12 months proven cohabitation, with the onus of proof on the applicant, before an application can be made;

(7) in the first instance that application will be for a two year Temporary Entry Permit, after which period an application for permanent residence can be made and will be granted on the basis of evidence being supplied of a continuing permanent relationship.

(c) in relation to other issues:

(8) that present penalties in proven cases of fraud by Australian citizens and visitors in cases of change of status should be strengthened;

(9) that a specific offence in relation to racketeers be created under the Migration Act 1958 with appropriate penalties;

(10) that applicants for GORS on spouse grounds have a right of review.

1.16 The Committee also raised the issue of the vulnerability of immigrant women in domestic violence situations, who have not yet received their permanent residence.

Ministerial response

1.17 In January 1991 the Minister announced[4] the following changes to the law applying to those in Australia temporarily and seeking to remain permanently as the spouse or de facto spouse of an Australian resident or citizen:

- people whose relationships are assessed as genuine will no longer be granted permanent residence immediately, but will be given conditional residence for two years;

- where a relationship is not considered genuine, the non-Australian partner will be required to leave the country;

- at the end of the period of conditional residence, permanent residence may be granted, but only if the relationship continues to be genuine and ongoing;

- special concessions will be available to the victims of domestic violence;

- those applying for two-year conditional residence on the basis of a de facto relationship will have to demonstrate that the relationship has already been of at least six months' duration;

[4]Ministerial Press Release 4/91, 23 January 1991

- those who organise false marriages and fraudulent relationships for migration purposes will be subject to a fine of $100,000, or imprisonment of ten years, or both; and

- the participants in fraudulent marriages for migration purposes will be subject to a fine of $12,000, or imprisonment of two years, or both; the same penalty will apply to family members or friends who knowingly provide supporting "evidence" for people in non-genuine marriages.

1.18 The Minister also advised that special provisions would be developed to give immigrants who were victims of domestic violence access to permanent residence, subject to certain criteria.

1.19 The measures announced by the Minister largely reflected the recommendations in the Committee's 7 November letter. The revised arrangements should result in a reduction in the level of abuse of the system.

CHAPTER 2

THE MIGRATION PROGRAM AND GRANT OF RESIDENCE STATUS STATISTICS

. **Change of status and the migration program**
. **The migration program**
. **Migrant spouse/de facto and fiance arrivals**
. **Permanent entry permits after entry**
. **Applications by category of entry**
. **Applications for GORS/PEPAE on spouse/de facto grounds**
. **Applications by country of citizenship**
. **Residence applications finalised**
. ***Conclusions***

Change of status and the migration program

2.1 People entering Australia as temporary entrants or visitors may wish to remain permanently, although this is a practice not to be encouraged. To do so they are required to apply to change their immigration status. In this chapter the Committee has attempted to assess the growth in applications to change status, the significance of any increase and its relevance to the migration program.

2.2 Resident status permits granted in Australia, including those on the basis of marriage and de facto relationships, are included in the Migration Program and are counted against the appropriate category. Prior to the introduction of the revised Migration Act 1958 and Regulations on 19 December 1989 this category was known as Grant of Resident Status (GORS). With the revised Act this became the Permanent Entry Permit After Entry (PEPAE) category.

2.3 The migration program, represented graphically by Figure 1, is divided into four main categories:

(i) Family	- preferential (eg spouse, fiance, parent)
	- concessional (eg points tested siblings, non-dependant children)[1]
(ii) Skill	- employer nomination
	- business migration
	- special talent
	- independent (points tested)

[1]It is worth noting that this concessional category comprises a significant proportion of the family category and applicants are required to qualify under the points test. It may therefore be more appropriate to consider them as skilled migrants.

(iii) Humanitarian
- refugees
- special humanitarian program

(iv) Special Eligibility
- trans tasman spouse
- other strong compassionate

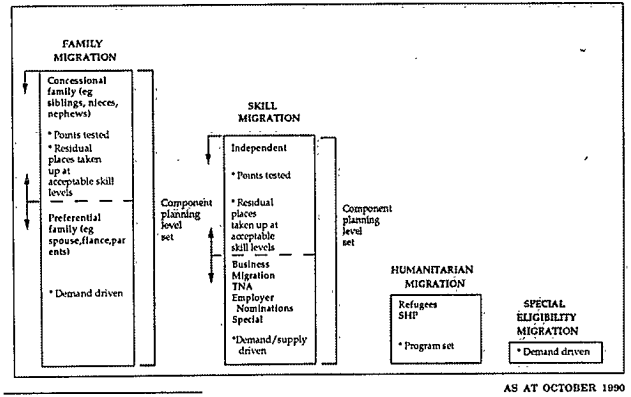
2.4 During the 1980's the annual migration program grew from 67 700 in 1983/84 to reach a peak of 136 400 in 1988/89. Both the family and skill component of the program showed rapid growth over this period. Total program numbers have been reduced over the past 2 years, with a planned outcome for 1990/91 of 126 000.

2.5 The level of GORS/PEPAE applications increased during the 1980's with 14 256 cases in 1986/87 increasing to 20 636 in 1988/89. Applications on spouse/de facto grounds rose from 7 790 to 11 073 in the same period. There was a high level of activity in advance of the introduction of the new law in December, 1989, with some 11 500 applications covering 14 000 persons lodged during the month of December 1989. The majority of these were on compassionate and humanitarian grounds. Since December 1989 the level of applications for PEPAE has fallen.

2.6 The number of approvals of GORS/PEPAE applications as opposed to the number of applications for GORS/PEPAE grew from 9 500 in 1983/84 to 15 400 in 1988/89[2]. The planned migration program for 1990/91 includes on allowance for 16 500 PEPAE approvals.

Figure 1

MIGRATION PROGRAM MANAGEMENT STRUCTURE



AS AT OCTOBER 1990

[2]It is not possible to provide figures for applications for the years 1983/1984 to 1985/86 as they are not obtainable from DILGEA.

The migration program

2.7 Tables 1, 2 and 3 show details of the migration program over the period 1983/84 to 1990/91 in terms of the number of migration visas and GORS/PEPAE permits issued. Table 1 gives the total program outcome each year and the planned program for 1990/91. Where possible the GORS figures have been attributed to the individual categories of the migration program. To make comparison possible, figures for earlier years have been adjusted to conform with the current categories.

2.8 The greatest increases in the overall migration program occurred in the skilled component, which grew from 9 800 in 1983/84 to 52 700 in 1989/90, to which numbers one could also add the concessional family group which is points assessed. The family categories continued to be the largest component of the program reaching a peak of 79 500 in 1987/1988. This was a result of increases in the concessional family (points assessed) category which reached 38 900 in 1987/88. In 1990/91 the overall family program is planned at 64 000, of which the concessional family category comprises 20 000. The preferential family category intake increased from 29 500 in 1983/84 to 46 200 in 1988/89 and has been estimated at 44 000 for 1990/91 or 35% of the planned program. The preferential category includes spouse/de facto, fiance, dependent child, aged parent, special need and last remaining relative classes.

TABLE 1

TABLE 1: PLANNED MIGRATION PROGRAM AND OUTCOMES, VISAS AND PERMANENT ENTRY PERMITS AFTER ENTRY, '000 PERSONS

MIGRATION PROGRAM COMPOSITION	PROGRAM OUTCOME							PLANNED PROGRAM
	1983/84	1984/85	1985/86	1986/87	1987/88	1988/89	1989/90	1990/91
FAMILY COMPONENT								
Preferential Family	29.5	27.3	33.9	38.2	40.6	46.2	44.0	44.0 (a)
Concessional Family	13.1	16.9	29.5	34.4	38.9	26.5	22.6	20.0
Sub-total Family	42.6	44.2	63.4	72.6	79.5	72.7	66.6	64.0
SKILL COMPONENT								
Employer Nomination (b)	3.1	3.7	6.9	8.4	8.3	9.2	11.9	9.0
Business Migration	1.3	1.4	1.8	3.5	7.3	10.2	10.6	10.0
Special Talents	0.1	0.1	0.1	0.1	0.1	0.1	0.2	0.5
Independent	4.3	4.2	6.3	15.2	23.9	28.9	30.0	30.5
Sub-total Skill (c)	9.8	10.1	16.2	28.5	42.0	51.2	52.7	50.0
HUMANITARIAN	14.9(d)	13.9	12.0	11.5	11.7	11.7	12.3	11.0 (e)
SPECIAL ELIGIBILITY	0.2	0.2	0.4	0.6	0.6	0.8	0.9	1.0
TOTAL PROGRAM	67.7	68.4	92.1	113.3	133.8	136.4	132.5	126.0

Sources: MPMS systems - converted policy categories (old to new) at August 1990 ; Bureau of Immigration Research ; Residence System; Ministerial Press Releases.

(a) Includes estimate for Permanent Entry Permits After Entry in Australia (PEPAE) planned to be 12 500 in 1990/91.
(b) Includes Tripartite Negotiated Arrangements (TNA) , and Employer Nomination Scheme (ENS) .
(c) PEPAE/GORS figures not attributed to sub-components until 1989-90. Figure for 1990/91 includes estimate for PEPAE of 3 000.
(d) Settler arrival figure.
(e) Includes a 1 000 contingency reserve and an estimate for PEPAE of 1 000.
Note 1: There is no eligibility for PEPAE under the points-tested Concessional Family category. There is no longer any PEPAE eligibility under the Independent category (Working Holiday Makers had access until July 1989) .
Note 2: Announced planning levels were: 1986/87, 115 000; 1987/88, 132 000; 1988/89, 140 000; 1989/90, 140 000.
Note 3: Due to rounding of figures, totals may not always be the exact sum of components.

Migrant spouse/de facto and fiance arrivals

2.9 Figures published by the Bureau of Immigration Research show that the number of spouse/de facto arrivals as migrants to Australia grew steadily from 9 200 in 1983/84 to 13 300 in 1989/90. The annual number of fiance arrivals increased from 2 400 to 4 700 over the same period.

2.10 Tables 2 and 3 disaggregate the program into the number of persons visaed at overseas posts and the numbers in the resident status (GORS and PEPAE) category.

TABLE 2

TABLE 2: PLANNED MIGRATION PROGRAM AND OUTCOMES, VISAS ONLY, '000 PERSONS

MIGRATION PROGRAM COMPOSITION	PROGRAM OUTCOME							PLANNED PROGRAM
	1983/84	1984/85	1985/86	1986/87	1987/88	1988/89	1989/90	1990/91
FAMILY COMPONENT								
Preferential Family	21.3	22.2	25.7	29.7	29.9	34.1	32.7	31.5
Concessional Family	13.1	16.9	29.5	34.4	38.9	26.5	22.6	20.0
Sub-total Family	34.4	39.0	55.2	64.2	68.8	60.6	55.3	51.5
SKILL COMPONENT								
Employer Nomination (a)	3.1	3.7	6.9	8.4	8.3	9.2	10.2	9.0 *
Business Migration	1.3	1.4	1.8	3.5	7.3	10.2	10.6	10.0 *
Special Talents	0.1	0.0	0.0	0.1	0.0	0.1	0.1	0.5 *
Independent	4.3	4.2	6.3	15.2	23.9	28.9	29.1	30.5 *
Sub-total Skill	8.8	9.4	15.1	27.2	39.6	48.3	50.0	47.0
HUMANITARIAN	14.8(b)	13.8	11.7	11.2	11.4	11.3	11.7	10.0 (c)
SPECIAL ELIGIBILITY	0.2	0.2	0.4	0.6	0.6	0.8	0.5	1.0
TOTAL PROGRAM	58.2	62.4	82.4	103.2	120.3	121.0	117.5	109.5

Sources: MPMS systems - converted policy categories (old to new) at August 1990; Bureau of Immigration Research; Ministerial Press Release.

(a) Includes Tripartite Negotiated Arrangements (TNA), and Employer Nomination Scheme (ENS).
(b) Settler Arrival figure.
(c) Includes a 1 000 contingency reserve.
* Includes estimates for PEPAE, a total of 3 000 for 1990/91.
Note 1: Due to rounding of figures, totals may not always be the exact sum of components.

TABLE 3

TABLE 3: PLANNED PROGRAM AND OUTCOMES, PERMANENT ENTRY PERMITS AFTER ENTRY (PEPAE), '000 PERSONS

PROGRAM COMPOSITION	PROGRAM OUTCOME							PLANNED PROGRAM
	1983/84	1984/85	1985/86	1986/87	1987/88	1988/89	1989/90	1990/91
FAMILY COMPONENT								
Preferential Family	8.2	5.1	8.2	8.5	10.7	12.1	11.3	12.5
Concessional Family	-	-	-	-	-	-	-	-
Sub-total Family	8.2	5.1	8.2	8.5	10.7	12.1	11.3	12.5
SKILL COMPONENT (a)								
Employer Nomination (b)	*	*	*	*	*	*	1.7	*
Business Migration	*	*	*	*	*	*	0.0	*
Special Talents	*	*	*	*	*	*	0.1	*
Independent	*	*	*	*	*	*	0.9	*
Sub-total Skill	1.0	0.7	1.1	1.3	2.4	2.9	2.7	3.0
HUMANITARIAN	0.1	0.1	0.3	0.2	0.3	0.4	0.6	1.0
SPECIAL ELIGIBILITY	*	*	*	0.0	0.0	0.0	0.4	*
TOTAL (c)	9.5	6.0	9.7	10.1	13.5	15.4(d)	15.0	16.5

Sources: Bureau of Immigration Research; Residence System; Ministerial press releases.

(a) Accurate PEPAE figures not available for sub-components until 1989-90.
(b) Includes Tripartite Negotiated Arrangements (TNA), and Employer Nomination Scheme (ENS).
(c) Totals for 1983/84 to 1985/86 includes small numbers of unallocated "other" and "not stated".
(d) Figures for this year include 2 500 "not stated", which have been allocated across all categories on a pro-rata basis.
Note 1: Before 19 December 1989, PEPAE was known as Grant of Resident Status (GORS). There was/is no eligibility for GORS/PEPAE under the points-tested Concessional Family category. There is no longer any PEPAE eligibility under the Independent category (Working Holiday Makers had access until July 1989).
Note 2: Due to rounding of figures, totals may not always be the exact sum of components.
* These figures not available.

Permanent Entry Permits After Entry

2.11 Table 4 illustrates the growth in resident status numbers over the period, from 9 500 in 1983/84 to 15 400 in 1988/89, with provisions for 16 500 permits in the 1990/91 program. This increase reflects the growth in GORS/PEPAE applications in 1989/90. However, it should be noted that resident status declined as a percentage of the total program during the 1980's with the rapid growth of migrant visas issued and now comprises 13.1% of the planned program for 1990/91.

TABLE 4[3]: MIGRATION PROGRAM AND PERMANENT ENTRY PERMITS AFTER ENTRY[4]

Year	Migration Program (a) '000's	Program Entry Permit After Entry (b) '000's	%
1983/84	67.7	9.5	14.0
1984/85	68.4	6.0	8.8
1985/86	92.1	9.7	10.5
1986/87	113.3	10.1	8.9
1987/88	133.8	13.5	10.1
1988/89	136.4	15.4	11.3
1989/90	132.5	15.0	11.3
1990/91 (c)	126.0	16.5	13.1

(a) Migrant visas issued and PEPAE/GORS
(b) PEPAE (known as GORS prior to 19 December 1989)
(c) Planned program

[3]Source: DILGEA (Migration Program Management and Residence System)

[4]During 1989/90 a new Residence Management System was introduced by DILGEA with records held on computer and data entered at each stage of processing for PEPAE applications. This is akin to the Migration Program Management System used to process applications finalised at overseas posts. Detailed statistics on applications finalised are now available from 1989/90. Statistics for earlier years are not recorded on this data base and were compiled in DILGEA's central office from returns sent in by regional offices. Further tabulations are not available from this earlier data.

Applications for GORS/PEPAE on spouse/de facto grounds

2.12 As shown in Table 5 applications for permanent residence on spouse/de facto grounds increased from 7 790 cases in 1986-87 to 11 435 in 1989-90. The total number of applications for permanent residency from within Australia in all GORS/PEPAE categories more than doubled over the same period from 14,256 cases in 1986-87 to 33 007 in 1989-90. The growth in applications during 1989-90 was influenced by the announcements leading up to the introduction of the new migration legislation in December 1989. Figure 2 shows that much of the increase in applications during 1989/90 occurred during the month of December 1989 in advance of the introduction of the more stringent criteria for resident status. The majority of applications during this month were lodged by PRC nationals and other applicants on humanitarian grounds.

TABLE 5[5]: APPLICATIONS LODGED FOR PERMANENT RESIDENCE ON SPOUSE/DE FACTO GROUNDS BY TEMPORARY ENTRANTS IN AUSTRALIA

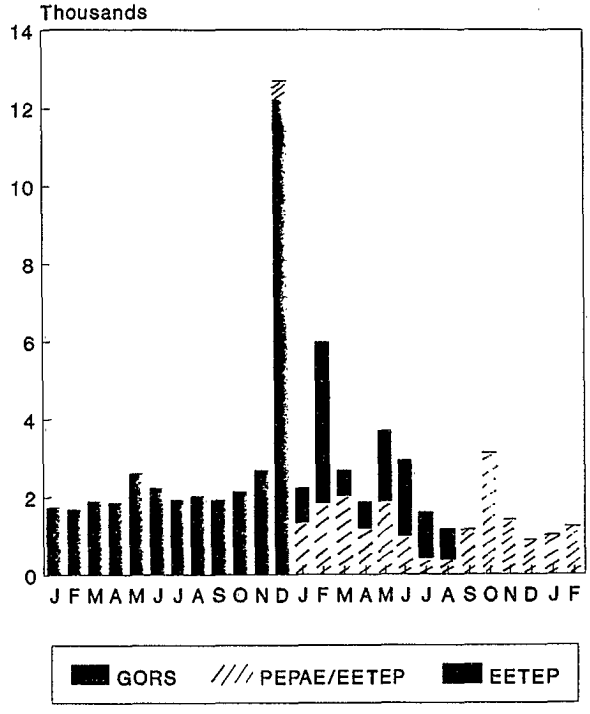
Entry Category	1986-87	1987-88	1988-89	1989-90 (a)
spouse/de facto				
cases	7790	7176	11,073	11,436
persons	8457	8049	12,353	11,902
total				
cases	14,256	14,916	20,636	33,007
persons	17,352	19,774	25,563	38,915

(a) Includes applications for both GORS and PEPAE. Note that from 19/12/89 to 30/6/90 some 10107 EETEP applications were received. It is not possible to determine the categories or current status of these and they have not been included in the above table.

[5]Source: Bureau of Immigration Research, DILGEA unpublished data

FIGURE 2

RESIDENCE & EETEP APPLICATIONS RECEIVED JANUARY 1989 TO FEBRUARY 1991



Source: Revenue Collection System

Applications by category of entry

2.13 Table 6 sets out the categories of entry to Australia of those people applying for GORS/PEPAE between 1986-87 and 1989-90. While the increase in the applications for GORS/PEPAE may seem alarming at first glance, an analysis of the breakdown of the increase is interesting.

2.14 The majority of applications were lodged by visitors. That category has increased from 6 175 to 7 014 over the 4 years, an increase of around 13%. However, the most significant increase in percentage terms is that in the student category, which jumped from 637 in 1986-87 to 1 999 in 1988-89, an increase in the order of 213%. Similar increases to the student category are evident in the temporary resident category. These increases compare with the relatively small increase in the visitor category over the same period.

2.15 However, in about 1987-88 Australia commenced an aggressive marketing campaign to sell education services to overseas students, which resulted in many more overseas students coming to Australia. There were also large numbers of students from the Peoples' Republic of China, many of whom have applied to remain permanently in Australia.

2.16 1988 was also the year of Australia's bicentenary, with a very large increase in the number of visitors to this country. The increase in visitor applications may therefore be a reflection of this increase in visitor numbers.

TABLE 6[6]: APPLICATIONS LODGED BY TEMPORARY ENTRANTS FOR PERMANENT RESIDENCE ON SPOUSE/DE FACTO GROUNDS (CASES) BY CATEGORY OF ENTRY TO AUSTRALIA

Category of Entry	1986-87	1987-88	1988-89	1989-90 (a)
student	637	800	1815	1999
temporary resident	841	980	1412	1986
visitor	6175	5306	7549	7014
stowaway/deserter	59	33	23	-
other/not stated	78	57	265	436
Total	7790	7176	11073	11435

(a) . includes applications for both GORS and PEPAE (7733 for GORS and 3701 for PEPAE)

. figure varies slightly from that provided at hearings by the Committee on 31 October 1990 due to subsequent purification of data

[6]Source: 1986-87 - 1988-89 - Bureau of Immigration Research; 1989-90 DILGEA unpublished data (may be subject to data entry error)

Approvals for GORS/PEPAE on spouse/de facto grounds

2.17 Approvals for the grant of resident status on spouse/de facto grounds increased from 5 427 cases in 1986-87 to 9 268 in 1989-90, which covered 9 663 persons (dependents of spouse/de facto applicants are included in the figures for the category). As shown in table 7, the total grew from 10 105 persons in 1986-87 to 15 411 in 1988-89 but fell to 14 541 in 1989-90. The approvals data relates to the year in which the decision is taken and not the year in which the application is lodged. The approvals shown for 1989-90 are based on cases lodged in that year and others lodged in previous years, whilst many cases lodged in 1989-90 will not be decided until 1990-91 or possibly later, depending upon the circumstances.

TABLE 7[7]: APPROVED APPLICATIONS FOR PERMANENT RESIDENCE FROM TEMPORARY ENTRANTS IN AUSTRALIA BY ENTRY CATEGORY (a)

Entry Category	1986-87	1987-88	1988-89	1989-90
spouse/de facto				
cases	5427	6917	6647	9268
persons	5800	7460	7437	9663
other				
cases	3097	4386	6567	3500
persons	4260	6027	7974	4878
total				
cases	8524	11303	13214	12768
persons	10105	13487	15411	14541

(a) Includes both GORS and PEPAE

Applications by country of citizenship

2.18 Detailed statistics are available for the period 1986-87 to 1988-89 based on the country of citizenship of applicants for permanent residence on spouse grounds. Applications were lodged by temporary residents from a wide range of countries. Table 8 lists those countries where more than 200 applications were lodged in 1988-89.

2.19 Most applications were lodged by UK citizens with the numbers growing from 1400 to 1893 between 1987-88 and 1988-89. China ranked second in 1988-89 showing a dramatic jump of over 700% in applications from 162 in 1986-87 to 1,164 in 1988-89. This reflects the increase in the number of PRC students in Australia.

[7]Source: Bureau of Immigration Research, DILGEA unpublished data

2.20 Applications by Fijian citizens increased from 291 in 1986-87 to 722 in 1988-89, of which 468 applications were lodged by visitors. Other ranked countries to show an increase in the level of applications were Malaysia, Thailand, Ireland, Japan and Indonesia. It may be of interest to note that applications on spouse/de facto grounds from citizens of the Philippines declined over this period.

TABLE 8[8]: APPLICATIONS LODGED BY TEMPORARY ENTRANTS FOR PERMANENT RESIDENCE ON SPOUSE/DE FACTO GROUNDS (CASES) BY COUNTRY CITIZENSHIP

Country of Citizenship	1986-87	1987-88	1988-89
United Kingdom	1345	1400	1893
China	162	330	1164
Fiji	291	413	722
Philippines	703	533	671
Malaysia	404	398	587
USA	519	404	482
Yugoslavia	452	289	481
Thailand	133	188	388
Ireland	165	178	337
Germany	233	201	238
Poland	241	173	233
Canada	201	176	208
Japan	114	116	206
Indonesia	142	118	204
Other	2685	2260	3259
TOTAL	7790	7176	11073

Residence applications finalised

2.21 Table 9, produced by the new residence system gives details of applications finalised by the major component of the program for 1989/90 and 1990/91 to 31 March 1991. Spouse/de facto cases formed the bulk of the caseload in 1988/89, when 10 121 or 63% of the 16 176 cases finalised were in this category. **Over 91% of spouse/de facto cases finalised were approved.**

2.22 From 1 July 1990 to 31 March 1991 spouse/de facto approvals were 61% of all resident status approvals. However, they were only 31% of all cases finalised because of the large numbers, 6 048 cases, lapsed/withdrawn in the humanitarian category. Most of these cases were withdrawn because of the new PRC arrangement announced by the Government.

[8]Source: DILGEA unpublished data

2.23 As at 31 March 1990 the residence system backlog comprised 24 282 cases covering 28 715 persons. This backlog contained 10 582 GORS cases and 13,700 PEPAE cases. There were 10 590 spouse/de facto applications in this case load or 43.6% of the total of 24 282 cases. Even under new rules and processing arrangements announced by the Government the backlog will take a considerable time to clear.

Conclusions

2.24 The Committee notes with some concern that there has been a large increase in change of status applications, a significant proportion of which can be attributed to applications on spouse/de facto grounds. However, the statistical data *that is currently available may to some degree hide the extent of the problem.* Again the Committee reiterates its concern at the lack of data available, in this instance, to enable an accurate assessment of the extent of the problem areas in access to change of status.

TABLE 9: PERMANENT ENTRY PERMITS AFTER ENTRY: (a) APPLICATIONS FINALISED 1 JULY 1989 TO 31 MARCH 1990

	SPOUSE/ DEFACTO	OTHER PREFERENTIAL	ECONOMIC	SPECIAL	HUMANITARIAN	NOT STATED	TOTAL
1989/90							
APPROVED	9233	1098	1716	194	497	34	12772
REJECTED	459	240	592	279	883	38	2491
LAPSED/WITHDRAWN	429	156	191	33	93	11	913
TOTAL	10121	1494	2499	506	1473	83	16176
1990/91 (TO 31/3/91)							
APPROVED	4625	826	1008	212	560	342	7573
REJECTED	356	132	486	256	1360	177	2767
LAPSED/WITHDRAWN	472	162	217	270	6048	218	7387
TOTAL	5453	1120	1711	738	7968	737	17727

SOURCE: DILGEA unpublished data

(a) Includes Grant of Resident Status (GORS)

CHAPTER 3

CULTURAL FACTORS AND MARRIAGE

. **Introduction**
. **National Agenda for a Multicultural Australia**
. **Multiculturalism and the law**
. **Culture and administration**
. **DILGEA's current approach**
. **Conclusions and recommendations**

Introduction

3.1 Since 1947, Australia has undergone a demographic revolution in both size and ethnic composition. Nearly 4 million migrants have entered Australia, of whom nearly 3 million have remained, to whom 2 million children have been born. Fifty-six per cent of these migrants are of non-British origin. This immigration has accounted for nearly 60 per cent of Australia's post-war population growth.[1]

3.2 Australia's immigration program, whilst initially (in 1947) concentrating on immigration from Great Britain, soon included a greater number of people from diverse ethnic backgrounds with quite different cultural values. In particular, over the past 10 - 15 years there has been a significant increase in immigrants from the Middle East and Asia.

3.3 Because one objective of Australia's immigration program is to enable family reunion, some applications for entry to Australia must be assessed on the basis of a family relationship or intended family relationship. Such assessment of necessity must include consideration of the cultural values of particular ethnic groups.

National Agenda for a Multicultural Australia

3.4 The Government has published a document called a National Agenda for a Multicultural Australia (NAMA) in which is identified three dimensions of multicultural policy, including cultural identity, i.e. the right of all Australians within carefully defined limits, to express and share their individual cultural heritage, including their language and religion.[2]

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[1]Storer D (ed), **Ethnic Family Values in Australia**, Prentice-Hall, 1985, p1

[2]**National Agenda for a Multicultural Australia**, AGPS, 1989, p vii

3.5 The Government outlines two objectives in the area of the law in NAMA:

(a) to promote equality before the law by systematically examining the implicit cultural assumptions of the law and the legal system to identify the manner in which they may unintentionally act to disadvantage certain groups of Australians; and

(b) to promote an environment that is tolerant and accepting of social and cultural diversity, and that respects and protects the associated rights of the individual[3].

3.6 Part of this expression of cultural and/or religious identity involves the right to marry according to the customs or religious practices of the particular group. In some cases this will involve arranged marriages, sometimes between members of the same extended family grouping.

3.7 However, the Government has also stressed that their are limits to Australian multiculturalism. These are:

- multicultural policies are based upon the premise that all Australians should have an overriding and unifying commitment to Australia, to its interests and future first and foremost;
- multicultural policies require all Australians to accept the basic structures and principles of Australian society - the Constitution and the rule of law, tolerance and equality, Parliamentary democracy, freedom of speech and religion, English as the national language and equality of the sexes; and
- multicultural policies impose obligation as well as conferring rights: the right to express one's own culture and beliefs involves a reciprocal responsibility to accept the right of others to express their views and values.

Multiculturalism and the law

3.8 As part of the National Agenda for a Multicultural Australia, the Australian Law Reform Commission has been charged with a brief to consider whether the principles underlying family law, contract law and criminal law are appropriate to a society made up of people from different cultural backgrounds. In its discussion paper on Multiculturalism: Family Law the Commission states:

[3]ibid, p17

> In some societies, there may be little difference between the law and, for example, religious beliefs and practices. Australian law, deriving from the common law of England and Judeo - Christian values, is based on principles broadly acceptable to the historically dominant cultural group, Anglo-Celtic Australians. These principles now include a tolerance of diversity, equality, freedom of religious belief and practice and freedom of expression. Australian law may not, however, adequately recognise or protect the cultural values of all Australians, in particular, those Australians who identify with one of the many minority communities which are part of broader Australian society.[4]

3.9 The Commission then goes on to quote the International Covenant on Civil and Political Rights (ICCPR):

> The International Covenant on Civil and Political Rights 1966 (ICCPR), which Australia has ratified, recognises the right of persons belonging to ethnic and religious communities, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion and to use their own language.[5]

3.10 The Australian Law Reform Commission argues that:

> If the rights envisaged in the international agreements are to be more than illusory and all Australians are to enjoy the same rights to live their lives as they wish, the legal system must ensure that the free expression of a person's cultural heritage is not inhibited, except to the extent necessary to protect the fundamental rights and freedoms of others.[6]

3.11 The Discussion Paper goes on to say:

> Australian society consists of many diverse communities within a broader community. Many people identify themselves as Australians and as members of a particular ethnic community with whom they share particular social, political and religious values.[7]

[4]**Multiculturalism: Family Law**, Australian Law Reform Commission Discussion Paper 46, January 1991, p1

[5]ibid, p2

[6]ibid, p3

[7]ibid, p6

Culture and administration

3.12 The administrative difficulty of accommodating the cultural mores of people of non British origin within a legal and administrative system derived from the British is perhaps nowhere more apparent than in the area of immigration dealing with marriage or de facto relationships.

3.13 Once a marriage is recognised by DILGEA as genuine and continuing then the non-Australian party has a right to be granted migrant entry or permanent residence in Australia. The Department therefore has a responsibility to make a conscientious assessment of the "genuineness" of a marriage. However, this is not easy, given that people, particularly from cultures other than the Australian, marry for many different reasons.

3.14 The Australian Law Reform Commission states:

> In some Australian communities, marriage is more than a personal relationship between the parties. It plays a vital role in establishing status and honour and maintaining alliances between families. The interests and honour of the wider family group can strongly influence decision making about the affairs of individual members.[8]

3.15 The Law Reform Commission further states:

> The extended family, of which the married couple and their children are a part, provides a social support system for its members. The interests of the individual spouses are closely allied to the interests of their extended family and the members of this family.[9]

3.16 Studies have shown that first and to a significant degree second generation immigrants from countries which do not have similar cultural values to Australia still prefer to marry a partner from within their own cultural group.[10] The Western view of marriage and the issue of choice of marriage partner does not equate to that of many eastern cultures, where arranged marriages are likely to be, if no longer the norm, still quite common.

3.17 The question of arranged marriages would appear to be of some concern to the Department. The PAM on the topic of marriage states:

> "While an arranged marriage may be legally recognised under the Migration Act, special care should be taken in assessing whether the marriage is genuine and continuing".

[8]ibid, p9

[9]ibid, p22

[10]Storer, op cit, p 19-23

3.18 However, within some ethnic groups, for example Turkish or Lebanese families and groups from the Indian sub-continent, arranged marriages are and remain an accepted custom, although the custom may not apply to all.

3.19 Hearst comments:

> Marriage among relatives, especially in the paternal side, is the preferred type of marriage, cementing existing kinship obligations. Marriage is used to strengthen existing kinship ties or to extend kinship outside the village to people of like ethnicity.[11]

3.20 Even in Australia most Turkish marriages are arranged,[12] with pressure being strong to marry an approved partner.

3.21 Hassan, Healy and McKenna state that within the Lebanese community in Australia, marriages are generally arranged. Such arranged marriages may be for reasons of:

> " .... reciprocity, as a means of repaying debts or enlarging the chain of family migration.... " [13]

DILGEA's current approach

3.22 The Department's Procedures Advice Manual lists the following factors of relevance in assessing the bona fides of a marriage:

- public recognition of the parties as a couple in an ongoing domestic relationship;
- knowledge of each other's personal circumstances, background and family situation;
- shared accommodation;
- shared responsibility for children of the relationship or children of either party living as part of the family unit;
- sharing of income, financial assets and liabilities.[14]

[11]Hearst S; "Turkish Families" in Storer D(ed), op cit, p157, 158

[12]ibid, p 170

[13]Hassan R, Healy J, McKenna R, "Lebanese Families" in Storer D, op cit, p 188

[14]Procedures Advice Manual, "Marriage and Divorce", p 10

3.23 More detailed guidelines are set out in the De Facto Marriage Relationships PAM[15]. These guidelines include:

- public recognition of the parties as a couple in an ongoing domestic relationship;
- knowledge of each other's personal circumstances, background and family situation;
- shared accommodation;
- shared responsibility for children of the relationship or children of either party, living as part of the family unit;
- declaration of the relationship;
- existence of sexual relationship;
- intentions that relationship will be long term;
- intermittent cohabitation;
- the use of one family name;
- the terms of the parties wills.

3.24 However, the Department does caution officers that the absence of some factors does not necessarily disqualify a claim and a balanced assessment of all information provided by the applicants or otherwise available is to be made.[16]

3.25 The Department does not specifically alert officers to the possibility that for cultural reasons some of the listed factors may not be appropriate and should not therefore be considered. For example, one factor listed in the De Facto Marriage Relationship PAM, is the use of one family name. In some cultures this is not common practice and is even becoming less so in Australia.

3.26 It is also not clear how much training the Department makes available to its officers responsible for the assessment of the genuineness of a marriage and whether that training includes a component on cultural factors and the effect of such factors on marriage relationships and even the reasons for the marriage.

[15]Reproduced at Appendix F

[16]DILGEA PAM, **De Facto Marriage Relationships**, p12-13

Conclusions and Recommendations

3.27 It is obvious from the National Agenda for a Multicultural Australia that the Government places a great deal of emphasis on the understanding and acceptance of some religious and cultural values and customs other than those derived from an Anglo-Saxon heritage.

3.28 The Committee concludes that, in view of the Government's stated commitment to multiculturalism, the Department of Immigration Local Government and Ethnic Affairs must be mindful of cultural values of individual ethnic groups when assessing the genuineness of marriage.

3.29 The Committee therefore recommends that:

(3) the Department of Immigration, Local Government and Ethnic Affairs include in its training programme for those officers who determine applications on spouse/defacto spouse grounds information on different cultural values and practices;

(4) the Department of Immigration, Local Government and Ethnic Affairs revise its Procedures Advice Manual to ensure that officers are aware that different cultural factors impinge on marriage relationships and that such factors should be considered in the assessment of the "genuine and continuing" marriage.

CHAPTER 4

MARRIAGE AND IMMIGRATION LAW

- **Background**
- **The definition of spouse in immigration law**
- **The valid marriage**
- **The genuine de facto marriage**
- **The ongoing marriage**
- **Marriage as a category for entry**
- **Marriage as a category for change of status within Australia**
- **National Population Council Working Party**
- **The 15 April 1991 legislative amendments**

Background

4.1 Several of the international law instruments dealing with the protection of human rights emphasise the special protection to be given to 'the natural and fundamental group unit of society,' the family. The Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights assert that 'no-one shall be subjected to arbitrary interference with his ... family'. The International Covenant on Civil and Political Rights protects 'the right of men and women of marriageable age to marry and found a family[1].

4.2 However, these multilateral provisions, even if taken together, do not confer on family members a right to enter a State's territory so as to live there with close relatives. The instruments merely proscribe 'arbitrary' interference with family life. The framers clearly signified that certain restrictions might be imposed on the spouse and family of citizens and residents who were seeking to migrate or obtain residence for family reunion purposes[2].

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[1]The Universal Declaration of Human Rights, Article 12; 16(3); The International Covenant on Economic, Social and Cultural Rights, Article 10. The International Covenant on Civil and Political Rights, Articles 17/ 23.

[2]R Plender, **International Migration Law**, Martinus Nijhoff, 1988, p 366.

4.3 The instruments do not confer a legal right of entry on close family members but they do signify a widespread acceptance of the moral principle that States should facilitate the admission and stay of family members of their own citizens and residents, at least when it would be unreasonable to expect he family to be reunited elsewhere[3].

4.4 In keeping with this sentiment Australia accords special priority to the family reunion component in its immigration program. Spouses, dependent children and certain close relatives are permitted preferential migration to and stay in Australia. They do not have to meet the selection standards set for the skilled migration categories.

The definition of 'spouse' in immigration law

4.5 Before considering the rules for the entry and stay of spouses, it is appropriate to explain how 'spouse' is defined in migration law. This is particularly so because there are different definitions of 'spouse' applying in the Migration Act and the Migration Regulations.

4.6 'Spouse' is not defined in the Migration Act but, according to general legal principles, means a person legally married to another person in a marriage which is recognised as a valid marriage under the Migration **Act**. Under the Migration **Regulations** a 'spouse' means:

"(a) a person who has entered into a marriage recognised as valid for the purposes of the Act, where:

(i) the marriage has not been ended by divorce or the death of one of the parties; and

(ii) the parties are not living separately and apart on a permanent basis; or

(b) a de facto spouse[4]".

4.7 A 'de facto spouse' until 15 April 1991 was defined in the Regulations as "a person who is living with another person of the opposite sex as the spouse of the other person on a genuine domestic basis although not legally married to the other person" (reg 2). At 15 April 1991 the definition became:

[3]ibid

[4]Regulation 2

Interpretation - de facto spouse

3A (1) For the purposes of these Regulations, a person is the de facto spouse of another person if, at the time when an application for a visa or entry permit is made by either of the persons, they:

(a) have lived together, during the immediately preceding 6 months (or such lesser period as is specified in a particular case, under subregulation (2)), on a genuinely domestic basis as spouses without being legally married to each other; and

(b) are not of the same sex.

(2) For the purposes of subregulation (1), the Minister may, on written application, specify a period of less than 6 months if the Minister is satisfied that:

(a) there are exceptional circumstances affecting the persons; and

(b) there are compelling reasons for specifying that lesser period[5].

4.8 The spouse definitions require that the marriage must be an ongoing and a valid marriage and that de facto partners in a de facto marriage must have lived together in the 6 months immediately preceding the application.

The valid marriage

4.9 In Australian law a marriage is "the voluntary union for life of a man and a woman to the exclusion of all others "[6]. It is a relationship regulated by laws. Law determines its validity, allows its formal ending and imposes obligations of mutual support on the parties, in some cases even after the marriage has been concluded.

4.10 Generally, a valid marriage is one performed in Australia under the Marriage Act 1961 or a foreign marriage recognised under that Act as a valid marriage. However, the Migration Act specifically excludes from recognition certain foreign marriages recognised in the countries where they were performed and otherwise recognised in Australia under s88E of the Marriage Act Section 88E incorporates for family law purposes the common law rules under private international law concerning marriage validity.

[5]Regulation 3A, Statutory Rules No.60

[6]**Hyde v Hyde & Woodmansee** (1866) LR 1PD 130

4.11 The marriages which are not valid for migration purposes include the following:

- certain polygamous marriages;
- certain underage marriages;
- marriages within prohibited relationships;
- marriages where consent is not real consent;

Polygamous marriages

4.12 Only the first marriage of a polygamous marriage is legally recognised under the Migration Act. The first spouse would be eligible for consideration as a married spouse. Any other spouses could be considered as de facto spouses but only if the relationship with the other spouse had ended and that spouse had relinquished the right of entry to Australia[7]. The Committee sees value in a procedure where applicants for migration, who are party to a polygamous union, are made aware **at interview** that only one spouse of a polygamous union is eligible for entry as the spouse or de facto partner.

Under age marriages

4.13 The Australian marriageable age is now 18 for males and 16 for females[8], although in 'exceptional and unusual' circumstances an Australian court may authorise a marriage if one of the parties is no more than two years below these ages. The Migration Act generally does not recognise under-age marriages even if the parties have a foreign domicile and their under age marriage is permitted by the law of their domicile. As a matter of policy no spouse visa or permit application is to be approved while either party to the marriage is under age[9].

4.14 The PAM advises decision makers that where one of the parties was domiciled in Australia at the time of an 'under age' marriage the marriage is not valid for migration purposes and the parties, if over the marriageable age at the time of their application, can only be considered as de facto spouses. If neither party was domiciled in Australia their marriage will be considered valid for migration if at the time of the visa or permit application, both parties are over the Australian marriageable ages.

[7]PAM, Marriage and Divorce para 4.7.1

[8]The Sex Discrimination Amendment Bill currently before Parliament contains a clause which will raise the marriageable age for females to 18 years.

[9]PAM, Marriage and Divorce para 4.8

Prohibited relationships

4.15 Marriages between people within prohibited relationships - that is, between the person and an ancestor or descendant (e.g.: a grandchild and grandparent) or between brother and sister, whether step or adoptive siblings, are not recognised for spouse migration applications. However, the Act does recognise marriages between cousins and between, for example, a nephew and aunt or niece and uncle.

Real consent

4.16 Marriages where the consent of either party was not real consent, for example where one of the parties had been forced into the marriage against his/her will and had not consented to the marriage are not recognised. The PAM notes that this issue may be relevant for arranged or for proxy marriages which are generally legally recognised under the Migration Act.

Assessing an invalid marriage under the de facto criteria

4.17 Where a marriage is not legally recognised under the Migration Act, the application based on that marriage can be assessed against the de facto relationship criteria. The Committee supports the principle as noted in the PAM that such relationships must be 'in accord with Australian social values' before approval for migration as a spouse should be given[10].

4.18 While the PAM currently states that it is permissible to exclude under age legally married spouses until both parties are over the Australian marriageable age, the Committee is concerned that this statement does not appear to correspond with the requirements in the regulations. This means that, having fulfilled the requirements of the legislation, the parties may be entitled to the grant of an entry permit, notwithstanding the fact that one or both of them is under Australian marriageable age.

Conclusion and recommendations

4.19 The Committee is concerned that approval for migration as a spouse should only be given in such cases when both parties have reached Australian marriageable age.

[10]PAM, De Facto Marriage Relationships para 3.1.2

4.20 The Committee therefore recommends that:

(5) **the statement in the Procedures Advice Manual concerning de facto relationships be clarified so that decision makers and immigration advisers are made aware of what de facto relationships are not in accordance with Australian social values;**

(6) **legal advice be sought on the advice given in the Procedures Advice Manual, namely that it is permissible to exclude under age legally married applicants until both spouses are over the marriageable age; and**

(7) **in the event that the advice contained in the Procedures Advice Manual is in fact incorrect, the definition of spouse in the Regulations be amended to include the requirement that a spouse is a person of Australian marriageable age.**

The de facto marriage

4.21 Although there can be difficulties in assessing the legal validity of a marriage, it is considerably more difficult to determine, in accordance with the definition 'de facto spouse', whether unmarried partners are living together as de facto spouse 'on a genuine domestic basis'. There is no official certificate to mark the commencement of the de facto marriage. Information about the duration of the relationship and the nature of the parties' domestic arrangements comes comes in substantial part from the parties themselves, often with corroboration from family, friends and neighbours. They may not always be objective or reliable.

4.22 At law, a de facto marriage is genuine if it has all the indicia of a marriage-like relationship without the legal bonds. Yet, according to the Courts, this involves a comparison of a de facto relationship with what the Courts consider to be a very imprecise relationship standard, namely marriage. While the formalities of marriage are generally clear and ascertainable, the profile of the marriage relationship is infinitely varied:

> The day has long passed (if it in fact ever existed) when one could safely generalise about what constituted a typical marriage[11].

[11]Tang V81/11; (1981) 3 ALN No 49

4.23 The indicia of a de facto relationship are written into the Social Security Act 1947[12]. Yet, as the Courts have pointed out, it is becoming increasingly difficult to generalise about the distinctive elements that characterise marriage-like relationships and to apply the indicia test. A de facto marriage is a relationship which is recognisable but which is so varied it is not susceptible to definition by criteria:

> 'Many people, particularly young people, live in a common household without there being any relationship akin to husband and wife... Increasingly the right to quite idiosyncratic arrangements in marriage-like relationships is being both demanded and accepted![13]

4.24 The Migration Act and Regulations have avoided the difficulties of the indicia test for a de facto marriage. The Procedures Advice Manual lists the factors which may be considered relevant in establishing a claim for a de facto marriage[14] but these are merely guidelines for officers. They have not been incorporated into the legislation. The absence of certain factors, for example, joint finances or a common surname, will not of themselves disqualify the claim for a de facto relationship and the parties may rely on evidence of a marriage-like relationship which is not covered by these informal guidelines.

4.25 The migration approach would appear to be closer to that advocated by Fitzgerald J, then of the Federal Court, who ruled that 'all facets' of the parties' relationship need to be taken into account, including an assessment of what was the normal pattern of behaviour for the applicants' peer group. Fitzgerald J said:

> 'What must be looked at is the composite picture ... Any attempt to isolate individual factors and to attribute to them relative degrees of materiality or importance involves a denial of common experience and will almost inevitably be productive of error.[15]

4.26 The question simply stated - but not so simply answered - is whether the de facto relationship can fairly be said to be a living together as if husband and wife. Decision makers are required to distinguish between the genuine de facto relationship and an informal cohabitation for financial or other convenience. A couple may have a close personal relationship but not a de facto marriage. Such questions are made more difficult in the immigration context where parties often contrive together or one may be tricked into forming a de facto marriage so that one of the parties can secure residence in Australia.

[12]Section 3A (Appendix G)

[13]Smith and Secretary, Department of Social Security, No N84/530, 1985 SSR314; R.C. and Director General of Social Security, N80/35, 4 SSR 36 (1981), 3 ALD 334

[14]Appendix F

[15]Lynam F.C v Director-General of Social Security (1983) ALR 128 at 131

The ongoing marriage

4.27 The Regulations require that the parties' valid marriage 'has not been ended by divorce or the death of one of the parties, and the parties are not living separately and apart on a permanent basis[16]'. This requirement is further underlined in the general criteria specified for the legal and de facto spouse visa or entry permits. Applicants generally must show that their relationship is "continuing".

4.28 A marriage is over for migration purposes if the parties are divorced. In Australia the marriage is legally dissolved when the divorce decree absolute is granted. A foreign divorce can be taken to end the relationship if the foreign divorce is recognised as valid in Australia. Such divorces are generally valid where they are in accordance with the laws of the overseas country and one of the parties to the divorce was a citizen or was resident in that country at the time of the divorce.[17]

4.29 Where the married partners are not divorced they may still cease to be spouses for migration purposes if they are living separately and apart on a permanent basis'. This term is used in social security, tax and family law and has been taken to refer to a situation where there is both a physical separation between the parties and a destruction of the consortium vitae or matrimonial relationship[18]. The deterioration of a relationship may be gradual. It may be difficult at any one time to decide if the marriage is still intact. As the Court noted in Moore [19] the term 'living separately and apart' refers to circumstances where a matrimonial relation has ceased:

> 'We are concerned with not only the physical separation of the parties but also the permanent break-down of the marriage relationship which must be clearly established... there [must have] been a change in their relationship gradual or sudden, constituting a separation.

4.30 It is not clear in the Regulations or the Procedures Advice Manual whether a de facto spouse ceases being a spouse when the parties are temporarily separated. This might have been inferred from the requirement in the regulation current to 14 April 1991 that de facto spouses be living with their partners. The regulations and manuals are also silent on the question of when a relationship, married or de facto, is no longer a 'continuing' one. Is it permanent separation and marital breakdown in accordance with the phrase "living separately and apart on permanent basis", or is it evidenced by a simple, temporary separation?

4.31 An example will illustrate the present uncertainties following from the use of these various terms. Take a couple, married or de facto, who continue to acknowledge each other as husband and wife or de facto partners, but who are living separately and apart and will continue to do so because their employment requires them to live in separate places. Such a de facto couple are spouse for migration purposes if they have lived together for six months immediately prior to the application. They are married spouse provided they are not divorced and there is no breakdown in the marital relationship. However, it might be argued that, in the circumstances, the relationships are not 'continuing'.

4.32 The Committee therefore recommends that:

(8) **the regulations and Procedures Advice Manual be amended to allow administrative flexibility in individual cases with respect to the degree of separation required for de facto, married partners separated but not divorced, before the relationship is taken to be not continuing.**

Marriage as a category for entry

4.33 The Migration Regulations set down the categories of person who can qualify to migrate to or obtain conditional migration or temporary entry to Australia. The person, in this instance, the spouse, must satisfy the criteria set down in the Regulations for the particular visa or permit class. The Act stipulates that where the Minister is satisfied that the person meets the criteria for the particular visa or permit class, the Minister shall grant the visa or permit. Where it appears to the Minister that the person does not meet the prescribed criteria, the Minister shall refuse the visa or permit[20].

4.34 In the Regulations the spouse of an Australian citizen or permanent resident can qualify to migrate to Australia. They have no claim to enter as of right but will be granted a permanent entry visa or permanent entry permit on entry if they satisfy the following conditions or criteria prescribed for the spouse visa class:

- the applicant must be a 'spouse', whether legal or de facto;
- 'the relationship must be a genuine and continuing relationship between the two spouses' (reg 44);
- the applicant is required to be sponsored by the Australian spouse and may be required to provide an assurance of support which is acceptable to the Minister;

[16]Regulation 2

[17]Family Law Act 1975, s104

[18]**Main v Main** (1948) 78 CLR 636

[19]Moore V87/31, cited in P Johnson, The Annotated Social Security Act, Federation Press, 1989, p 33

[20]Migration Act, s24: s34

the applicant must satisfy the public interest criteria as outlined in regulation 2, except they are not required to show that they are likely to become established in Australia without undue personal difficulty and without imposing undue difficulties on or costs to the Australian community ;

the applicant must satisfy the health criteria as described in items 9 and 10, Schedule 1 of the Regulations, the Minister is entitled to waive certain requirements of the health test for spouse applicants. For example, for those disabled spouse applicants whose care or treatment would not prejudice the access to health care of any Australian citizen or resident[21].

Marriage as a category for change of status within Australia

4.35 As other sections in this Report make clear, governments have long been concerned not just about the growing numbers of people applying in Australia for residence but also at the scope for abuse which the change of status facility presents to undeserving and unscrupulous applicants. There have been several attempts over the years to deal with these problems.

4.36 In 1980 the Migration Act[22] was amended to limit the categories of people eligible to obtain residence status in Australia. Prior to this, resident status was granted under broad general provisions of the Migration Act. The 1980 amending section (s6A - the precursor of the present s47) listed those eligible for residence. These included asylum and refugee claimants, economic and family applicants, including spouses and those qualifying on strong compassionate or strong humanitarian grounds. The Minister indicated that the amendment was designed to curtail illegal immigration 'by removing its principal incentive - the prospect of entering as a visitor and subsequently gaining the right of legal permanent residence here.'[23]

4.37 In later years governments sought to further limit those eligible for residence on spouse grounds. In October 1985 a tough, new policy towards illegals applying for change of status on spouse grounds was announced. Illegals were henceforth expected to leave Australia voluntarily and, if eligible, apply for entry as spouses from overseas in the 'normal way'. Illegals applying for residence as the spouse of Australian citizen or resident in Australia were 'rarely' or 'not readily' to be granted it. This policy was modified following the Federal Court decision in Tang[24] but was revived in the December 1989 amendments to the regulations.

[21]Regulation 144

[22]Migration Amendment Act, No 2, 1980 (no 75 of 1980)

[23]Cited in National Population Council Report, June 1990, p4

[24]**Tang v Minister for Immigration and Ethnic Affairs**, (1986) 67 ALR at 177

4.38 There have also been suggestions in the recent past concerning the rights of visitors seeking residence within Australia on spouse grounds. The House of Representatives Standing Committee on Expenditure, in its 1985 Report 'Who Calls Australia Home', recommended that a new separate category of entry permit be created for tourists and short term visitors, (those here 6 months or less) and that those in this new category be prohibited from seeking residence in Australia except on political asylum or refugee grounds. This recommendation was partly incorporated into the 1989 Migration Regulations, in that those regulations prohibited visitors from changing status in Australia on spouse/economic grounds and restricted applicants including visitors changing status on family grounds. Those changing status on family grounds were required to have met the qualifications for that permit after entry to Australia. Effectively visitors could apply to change status only on refugee grounds.

4.39 The Migration Act as amended in 1989, continues to allow the spouses of Australian citizens or residents to qualify from within Australia for permanent entry permits after entry. A 'spouse' under the Migration Act is a legal spouse. A de facto spouse is therefore not able to qualify under s47(1)(b) of the Act for change of status as a spouse. However the Department treats the de facto spouse as qualifying under Section 47(1)(f) of the Act which permits change of status on strong compassionate grounds. The existence of the de facto relationship can constitute strong compassionate grounds for residence. The de facto spouse having qualified under the Act is then treated as a spouse applicant under the Regulations and must along with legal spouses satisfy the spouse permit requirements.

4.40 Under the Act the applicant spouse whether legal or de facto must have a valid temporary entry permit to qualify for change of status. The permit must be valid in the sense that it has not expired and cannot be a permit that is not valid for change of status to permanent resident that is, one granted subject to the conditions set down in sections 23(4)(a) and (33)(4)(a). Almost all temporary entry permits granted after 19 December 1989 are granted subject to the condition that they are not valid permits for change of status to permanent residence[25] Temporary entry permit applicants are therefore obliged to qualify first for an extended eligibility (spouse) entry permit which gives this threshold eligibility for a permanent entry permit after entry and permanent residence in Australia.

Extended eligibility (spouse) entry permit

4.41 The legal device of the eligibility permit allows the Minister to limit the numbers qualifying for change of status. Regulation 126, as drafted in December 1989, did not allow illegal entrants or lawful visitors to qualify for an extended eligibility (spouse) permit. All those with visitor permits granted after 19 December and all illegals applying after 19 December 1989 were consequently prevented from qualifying for residence on spouse grounds at that time. The then Minister explained the purpose of the amendment:

[25]s 23(4)(a) and s 33(4)(a)

'I, and previous Ministers, have been concerned at the steady growth in the number of GORS applications, particularly given the scope for abuse of these provisions by supposedly "bona fide" visitors and by people who choose to remain in Australia illegally in the hope of establishing a case to remain.

As a general principle, people seeking permanent residence in Australia are expected to apply and be considered overseas. Those who jump the queue by coming to Australia as temporary entrants when permanent, not temporary, residence is their intention threaten the orderly management of the Migration Program[26].

4.42 Under those arrangements visitor spouses could not qualify in Australia for permanent residence but, temporary resident spouses, for example students and working holiday makers, were eligible to apply for residence because as the Minister pointed out:

> 'the length of stay of a temporary resident is much longer than that of the average visitor, it is accepted that genuine and enduring relationships are more likely to arise[27].'

4.43 On 15 February 1990, after receiving advice from this Committee's predecessor, the Joint Select Committee on Migration Regulations, the Minister announced a concessional arrangement *whereby lawful visitors* were again permitted access to spouse change of status provisions. However, illegals were excluded from that concession.[28] After repeated extensions in March, June and November 1990, the concession was set to expire on 31 March 1991.

National Population Council Working Party

4.44 On 22 February 1990 the Minister requested the National Population Council *to form a working* party to examine issues relating to the grant of resident status on spouse/de facto grounds to people in Australia on visitor's permits.

4.45 The Working Party examined the visitor spouse rules in its Report of June 1990 and discussed three main options[29]:

a) no access by visitors to grant of residence status, (ie the situation under the amended Act and regulations);

[26]Letter of 14 November 1989 from Minister Ray to Chairman

[27]ibid

[28]Ministerial News Release 35/90, 15 February 1990

[29]Report of the Working Party of the Migration Committee of the National Population Council, June 1990, Part 5

b) allowing grant of residence status to visitors subject to a qualifying period for permanent residence;

c) allowing access to grant of residence status to visitors (the situation which pertained prior to 19 December 1989).

4.46 After consideration of the advantages and disadvantages of each option, the Working Party advised that:

> 'the Working Party sees no alternative but to revert to the situation which obtained prior to 19 December 1989 referred to as Option 3 in Part 5 of this report[30].

4.47 *The Working Party's reasons were as follows:*

a) the denial of access to change of status did considerable injustice to genuine couples;

b) the 19 December procedure was unlikely to succeed in its aim of protecting the community from fraudulent applications on spouse/de facto grounds;

c) the possibility of injustice outweighed the probability of greater detection of fraud by off-shore processing[31].

4.48 The Working Party therefore recommended that the pre-19 December situation prevail with the adoption of measures to reduce fraud.

4.49 Subsequent to the Report of the National Population Council and prior to the then deadline of 30 November 1990 for the spouse concession the Committee wrote to the Minister making a number of interim recommendations, in anticipation of this more detailed report[32]. The interim recommendations are listed at the beginning of this report and the full text is appended at Appendix C.

4.50 Subsequent to the receipt by the Minister of the Committee's advice the 30 November deadline was extended to 31 March 1991 and on 23 January 1991 the Minister announced a number of changes which are incorporated in para 1.1. These included:

(a) *increased evidentiary requirements through changes to documentary* and interview procedures;

[30]ibid, executive summary

[31]ibid

[32]Appendix C

(b) a 2 year period of conditional residence for all eligible spouse/de facto applicants with limited sponsorship rights, re-entry facilities and permission to work;

(c) a requirement that a de facto relationship be in existence for 6 months prior to date of application;

(d) increased penalties for fraudulent claims;

(e) increased application fees from $360 to $750;

(f) provision for domestic violence victims to be granted permanent residence.

4.51 The immediate procedural changes which took effect from 22 January 1991 were notified by Central Office to the regional offices as follows:

- in all cases where the applicants fail to establish the genuine or ongoing nature of their relationship through the application documentation, officers are expected to arrange a personal interview with the applicant and partner to resolve this question. Interview findings should have at least equal weight with the other evidence presented by an applicant in support of the genuineness of the relationship;

- de facto couples are required to produce documentary evidence that their relationship has been in existence (in Australia or overseas) for a least 6 months prior to lodgement of the application. In cases where relationships have existed for a shorter period, officers would not usually accept claims that the couple had established their intention that this relationship should be lasting and exclusive. If the relationship has only recently commenced few applicants are likely to present convincing claims to substantiate an intention that the relationship is more than temporary. Only those applicants who are able to fully demonstrate their mutual support and cooperation in financial, social and domestic matters can be seen as meeting the genuineness criterion if their relationship began less than 6 months before application;

officers are required to make a full record of their assessment particularly in those cases where they decide to approve the case solely on the basis of the documentation provided by the applicant and partner and unsupported by further enquiry at interview or by correspondence. Supporting statements should usually lend themselves to independent verification and temporary entrants are not in a position to support an applicant's claims for this purpose.[33]

The 15 April 1991 legislative amendments

4.52 The regulations gazetted on the 15 April 1991 change the rules for spouses applying within Australia for change of status. Regulation 3A also touches spouses applying outside Australia. It requires all de facto spouses to show that they were living with their Australian partners in the six months before lodging their applications.

4.53 As a result of the changes, spouses applying within Australia are to be given extended eligibility spouse permits which have a period of validity no greater than two years. It appears from the regulations, that those who entered Australia as fiances and married within Australia must also obtain the two year eligibility permit before qualifying for permanent residence. A permanent entry permit can be granted on completion of the two years conditional residence. At this stage the formalities associated with applying for the eligibility and permanent entry permits are not clear. Applicants may be required to submit two separate applications or, formally, to renew their combined spouse permit application at the close of their two year term. The updated Procedures Advice Manual should clarify such matters.

4.54 The prescribed criteria for the spouse eligibility permit is little changed. Applicants are required to satisfy the health and public interest criteria and must show that they are spouses of Australian citizens or residents, nominated by the Australian partners and that their marital relationships are genuine and continuing[34]. Applicants must satisfy these relationship criteria again in order to qualify for the spouse (after entry) permanent entry permit.

4.55 One feature of the spouse after entry rules has been significantly relaxed. Former spouses of Australian citizens or residents can now apply for the extended eligibility and permanent entry permits. The former spouse must show that they:

- would satisfy the criteria pertaining to the marital relationship except that their spouse has died;
- satisfy the Minister that their marital relationships were genuine and,

[33]Policy Control Instructions 1764, issued 7 February 1991 (Appendix D)

[34]reg 126 (1)(a)

had the spouse not died, would have continued; and
- have developed close business, cultural or personal ties in Australia.

4.56 The Minister has announced that, in the second phase of implementing the spouse rules, this special provision will be extended to allow for the grant of permanent residence to former spouses where the applicant has suffered domestic violence or where access rights or maintenance obligations in respect of any children have been awarded to the Australian partner[35]. At the same time of completion of this report those regulations had not been gazetted.

4.57 Under the 15 April Regulations extended eligibility spouse permit holders are permitted to sponsor their dependent children into Australia. The spouse eligibility permit holders who applied for their extended eligibility permit after 15 April 1991 will be able to sponsor in their dependent children from outside Australia. The children must satisfy appropriate health and public interest criteria and show that the grant of the entry permit would not prejudice the rights or interests of any person who has, or may reasonably be expected to have, guardianship or custody of, or access to, that child[36].

4.58 There is also a provision in the new regulations for an extended eligibility spouse visa which can be granted to extended eligibility spouse entry permit holders within or outside Australia. This will allow them to travel abroad and return to Australia during their two year term. Those applying for this visa outside Australia must show:

Reg 44A (1)(b)

(i) *that the applicant was the holder of a valid extended eligibility (spouse) entry permit immediately before his or her last departure from Australia; and*

(ii) *that the Minister is satisfied that the relationship between the applicant and his or her spouse that met a criterion for the grant of that entry permit is genuine and continuing.*

4.59 The Committee generally approves these amendments to the spouse change of status scheme. However, the Committee is concerned at the following features of the new arrangements:

(a) the provision for granting a further extended eligibility spouse permit; and
(b) the mandatory condition imposed on extended eligibility spouse visas and entry permits.

[35]P.C. 1771

[36]reg 126 (1)(c); reg 44 A(1)(c) & (2)

Provision for granting a further extended eligibility spouse permit

4.60 The spouse extended eligibility permit is valid for two years. Regulation 126 states that, where an extended eligibility spouse permit holder has applied for the spouse (after entry) permit and no decision has been made on that application and the Minister has determined in writing that more time is required to make the decision, a further extended eligibility spouse permit may be granted.

4.61 The Committee is concerned about the way this provision may work in practice. The Committee has no objection to the grant of a further eligibility permit as a sort of processing permit to ensure that an applicant has lawful immigration status while a backlog of spouse claims is processed. The Committee would be concerned however if this device was used to impose a further period of probationary residence on applicants whose relationships were genuine and on-going, but a trifle shaky.

4.62 The Committee considered the example of a couple who had separated for a time during the two year probationary term. They then reconciled. The immigration officer was satisfied it was a genuine relationship but believed that the relationship might break down again in say six months or a year. There is a temptation and this provision would allow for an officer to grant a further extended eligibility permit in such cases to test the parties continuing commitment Such a test is setting them up to fail.

4.63 The Committee believes that a conditional residence term can be a deterrent for false or frivolous marriage claimants. However, critics here and abroad have pointed out that such probationary terms may also put undue pressure on a genuine marriage and cause such marriages to fail. It can be difficult for couples to make long term plans if the immigration status of one of the partners is unsettled. In 'normal' marital quarrels the Australian partner may threaten to withdraw his/her nomination for the permanent entry permit. These insecurities can undermine genuine marriages.

4.64 The Committee notes that appropriate guidance must be given so that immigration officers are made aware that the probationary term is calculated to expose the fraudulent marriage and not to undermine the genuine marriage. Extensions of the extended eligibility spouse entry permit should be given sparingly and only to ensure that the applicant has lawful immigration status during processing of a backlog of claims.

The mandatory condition imposed on extended eligibility spouse visas and entry permits

4.65 The Committee is also concerned about the amendments made on 15 April 1991 to regulations 17 and 28 and Schedule 5. The effect of these changes is that extended eligibility spouse visa and permit holders will in future be granted their visa or permit subject to the following mandatory condition:

the condition that during the period of validity of the visa [or permit], there is no material change in the circumstances on the basis of which the visa [or permit] is granted.

4.66 These conditions have been drafted for good reason. A spouse applicant has two years temporary stay before qualifying for permanent residence. It may be that a marriage or de facto relationship breaks down in the first six months of that probationary term. The Committee agrees that the Minister should have the power to cancel the spouse's permit in such circumstances. It is not appropriate that the spouse in a failed marriage can simply remain in Australia to see out their temporary permit.

4.67 The Committee endorses the sentiment or purpose of the regulatory change but is concerned about the form and workings of this control mechanism. There are several issues associated with this new requirement.

4.68 The Committee is firstly concerned that the meaning of this condition is not immediately clear to the visa or permit holder. The spouse may be aware that the visa or permit was granted on the basis that the person was the spouse and was sponsored by the Australian partner in a genuine or continuing marriage or de facto relationship. A material change in any of these circumstances could constitute breach of the condition[37]. The spouse could not be expected to know what was meant by 'material change.' Is it a decisive change in relevant matters or merely a change that would invite an officer to investigate it as a matter that had the potential to influence the decision to grant the visa or permit?[38] There is no clear legal authority on this point in Australian immigration law.

4.69 The Minister has absolute discretion to cancel an extended eligibility spouse visa or entry permit if this condition is breached. There is no domestic right of review of a Minister's decision cancelling a visa or temporary entry permit[39]. The Minister is not required to observe the rules of natural justice and give the spouse an opportunity to be heard before the visa or permit is cancelled. From the moment of cancellation the spouse becomes an illegal entrant with limited capacity to regularise his or her stay in Australia and is liable to mandatory deportation.

[37]The Committee notes that the policy guidelines (PC 1771) state that 'the material change referred to is the breakdown in the relationship. The condition is however, drafted in wider terms and would cover changes in sponsorship, the genuineness or continuing basis of the marriage.

[38]Justice Lee in Rubrico v Minister for Immigration Local Government and Ethnic Affairs (1989) 86 ALR 681 suggests that a material particular is one that would influence the decision maker in a relevant matter.

[39]s 120 (1)(b)

4.70 The death of a spouse or the breakdown of the relationship because of domestic violence would constitute a material change on the basis of which the person's eligibility spouse permit was granted, justifying cancellation. The policy guidelines, PC 1771, attempt to deal with this, stating that if the relationship which has broken down meets any of the exceptional circumstances in the substantive regulations, it is not appropriate to cancel the visa or entry permit. The policy circular continues, 'in any other circumstances it may be appropriate to cancel the visa or entry permit'.

4.71 This condition may work unfairly against a married spouse. The married spouse can objectively prove his/her marriage. This is an advantage at the application stage. The ease of proof may be a disadvantage if the marriage breaks down. It is easier for the Department to obtain objective evidence of separation and irretrievable breakdown of a marriage, for example the filing of a divorce petition, than to investigate and obtain evidence of the breakdown of a de facto partnership. The Committee is concerned that the eligibility permit of a married spouse could be cancelled before or more frequently than that of a de facto spouse simply because objective proof of a material adverse change in the legal marriage relationship was easier to ascertain and evaluate.

Conclusions and recommendations

4.72 The Committee has concluded that applicants should be entitled to know what constitutes a material change in circumstances. The Committee has further concluded that such material change in circumstances should be limited to changes in the nature of the relationship such that the relationship is no longer genuine and continuing.

4.73 The Committee also considers that, given the unusual form of this condition which does not require a positive act or omission on the part of the applicant, the requirements of natural justice be observed and that no permits be cancelled before an applicant has had an opportunity to respond to a notice of intention by the Minister to cancel a visa or entry permit.

4.74 The Committee therefore recommends that:

(9) **the visa and permit conditions included in regulations 17(l) and 28(l) be reworded so as to state the change in circumstances which would justify cancellation;**

(10) **such circumstances to be limited to changes in the nature of the marriage or de facto relationship, such that the relationship is no longer genuine or continuing;**

(11) **these circumstances not to include the death of a spouse or the breakdown in a relationship due to domestic violence or such other change which would not disqualify the spouse from obtaining permanent residence as a spouse;**

(12) **the requirements of natural justice to be observed before cancelling the spouse's visa or permit, the spouse to be given notice of the Minister's intention to cancel the visa or permit and time within which to respond to the allegations;**

(13) **visa and permit holders to have explicit written notice of the full terms of conditions attaching to their visa or permit and of the consequences which result from a breach of the conditions[40]; and**

(14) **extensions of the extended eligibility spouse entry permit be given sparingly and only to ensure that the applicant has lawful immigration status during processing.**

[40]Recommendation of the Joint Select Committee on Migration Regulations in its First Report to the Minister on 28 November 1990

CHAPTER 5

IMMIGRATION MARRIAGE FRAUD

. Introduction
. The genuine marriage test
. The timing of the genuineness test
. The incidence of sham immigration marriages
. The nature of marriage fraud
. Immigration intent and fraud
. The arranged marriage
. Investigating the marriage
. Detecting and deterring sham marriages

Introduction

5.1 Sham marriages contracted for immigration purposes present particular legal and administrative problems for immigration services both here and overseas The detection and deterrence of marriage frauds is difficult and costly. In recent years governments in Europe, the Americas and Australia have passed various laws which, it is hoped, will show up the 'tricksters' and discourage such fraud.

5.2 Marriage fraud is not a victimless crime. It is expensive to police. The integrity of the immigration programme is compromised when those who cannot qualify within the program secure migration or residence by dishonesty or trickery. Marriage shams jeopardise the community goodwill which is necessary to sustain humane migration provisions facilitating family reunion. There is also a cost in individual human misery. In one-sided marital frauds the innocent partner has been tricked into a marriage to achieve an immigration benefit for the other spouse. When the marriage breaks down and the sham is exposed, the innocent partner may suffer financial loss, psychological stress and feel a good deal of bitterness and anger.

5.3 The Australian migration programme is restricted to skilled, humanitarian and family classes. Marriage, including in Australia a de facto marriage, represents for many the only or the simplest way to qualify for migration or residence. Visitors, students or working holiday makers in Australia who want to make this their home quickly realise that a marriage to an Australian citizen or resident can be their best route. In evidence to the Committee the Department described the de facto category in particular as "an opportunity to write your own ticket."[1]

[1]Mr W Gibbons, Transcript of Evidence, 31 October 1990, p629

5.4 Marriage is one of the determining factors for migration. The following observation on Filipina-Australian marriages is also true for many other "mixed marriages":

> 'Economic reasons are usually given priority for women marrying foreign men and this is understandable. The Philippines and its people are suffering from extreme poverty and political unrest. The future for many is bleak. The only way for many to survive is to leave. The same pressures that force many Filipinos into prostitution, force them and others to migrate ... Marriage to an Australian or a man from another Western country becomes the only option.[2]

5.5 This is not to say that marriages contracted for immigration purposes are necessarily sham. Both parties may fully intend to live as man and wife. The party desiring to live in Australia clearly has a real incentive to work at the marriage. The point to be made is that the rules permitting entry to spouses encourage others to become spouses to qualify for residence. It has become an uncapped, growing migrant category.

5.6 In order to deal with these issues immigration services in countries such as the United States, Canada, Britain, Western Europe and Australia have required spouse applicants to show not only that they are married but that there are certain specific qualitative features to the relationship which qualify them for settlement. It may be a requirement, as in the current Australian regulations, that the relationship is 'genuine and continuing' or a rule such as those operating in Britain and Canada[3] which require parties to show that they did not contract the marriage with the principal purpose of obtaining residence in those countries.

5.7 These differing approaches derive from a different interpretation of the 'mischief' in the immigration marriage. In Britain the rules permitting spouses to enter and stay are seen as 'the achilles heel' of strict immigration control. By proscribing sham marriages and those contracted for a 'primary' immigration purpose authorities intend to curb abuse and 'protect the labour market.'[4] In Australia the rule is not designed specifically to cut down the numbers of spouse applicants, but rather to ensure that qualifying spouses are genuinely entering for the purpose stated, namely to live with their Australian partners. As a DILGEA officer stated in evidence to the Committee:

[2]C Boer, **'Are You Looking for a Filipina Wife?' A Study of Filipina-Australian Marriages**, Research Project, Anglican General Synod, T988, 5.3

[3]United Kingdom Statement of Changes in the Immigration Rules, HC 251, paragraph 50, 130. Canada, Immigration Regulations, section 4(3), enacted 1 April 1984

[4]S Grant, 'Humpty Dumpty's Primary Purpose Rule', **New Law Journal** 18 January 1991, p52

> In a sense, we do not really care or investigate what their motives are, whether for love or money or if part of the reason for the marriage is to gain entry to Australia, provided the intention is to enter into a genuine and ongoing relationship. It is a matter of the intention of the parties to enter into a genuine and ongoing relationship ... If money changes hands for the purposes of entry into the marriage you would look to that as to whether it is evidence of an intention to enter into a genuine ongoing relationship. ... you look for evidence of the intention to maintain the marriage, that after entry or after change of status they intend to live in a married relationship. That is what the criteria seeks to address.[5]

The genuine marriage test

5.8 The Australian requirement of a genuine marriage is on its face a clear, simple test, certainly an easier test to apply than what one senior British Judge described as 'the vexed primary purpose rule'[6]. Even so, there are difficulties with the term.

5.9 There is no explanation of what is meant by a 'genuine marriage' in the Regulations. The Procedures Advice Manual defines it as follows:

> 'the basic test is whether the parties genuinely intend to continue to live as a married couple in Australia.[7]'

5.10 This definition of a "genuine marriage" is not entirely clear. It simply recasts the test to say that a genuine marriage requires a genuine intention. The definition does not explain what is then meant by a genuine intention or how it is evidenced. The definition also raises a further question concerning what is meant by 'living as a married couple'.

Conclusions and recommendations

5.11 The Committee feels that a definition is required which highlights better the components of a genuine marriage, namely the parties' intentions, their mutual commitment to marriage and their shared life as husband and wife, namely the following test set down in a case recently decided by the full Federal Court:

[5]Ms J Gordon, Transcript of Evidence, 31 October 1990, p599

[6]Simon Brown J in Matwinder Singh (Divisional Court), unreported, 23 March 1987, extracts from this case in IAT v Hoque and Singh (1988) Imm. A. R. 216

[7]PAM Marriage and Divorce, 5.2

'The true test, we would suggest the only test, is whether at the time at which the matter has to be decided it can be said that the parties have a mutual commitment to a shared life as husband and wife to the exclusion of others.'[8]

5.12 The Committee recommends that:

(15) **the test for a "genuine marriage", to be set out in the Procedures Advice Manual, be as follows:**

> **whether at the time at which the matter has to be decided it can be said that the parties have a mutual commitment to a shared *life as husband and wife and that they* have a genuine intention for their relationship to be ongoing.**

The timing of the genuineness test

5.13 One real difficulty with the 'genuineness' test is when does one test the bona fides of the relationship. This too has been a vexed issue in this area on immigration law both here and abroad. The primary purpose test makes this a simple matter for immigration officers in the United Kingdom where the motives of the parties are tested at the time of their marriage. As was noted in one British case if the parties fail the primary purpose test at the date of the marriage, it would not assist the non-citizen spouse to gain entry even if the application for entry was made at the time of their golden wedding anniversary.[9] However, the timing of the Australian test is more complicated.

5.14 The problem of the timing of the test can be illustrated by the example of an immigration marriage of convenience. At the time of the marriage one or both parties were not committed to the marriage. If the parties' bona fides are tested at the date of the marriage the applicant fails to qualify for migration. But, as His Honour Judge Wilcox pointed out in the case of Prasad, a marriage contracted for convenience may develop into a full relationship in which the parties genuinely intend to continue living together as a married couple. If the genuineness of the same marriage is tested at this later time the spouse may qualify to enter or remain. It may also happen that a marriage which began as a genuine relationship breaks down before the spouse secures residence. The spouse who would have qualified in the genuine relationship at the earlier date is later disqualified. This situation is discussed further in Chapter 6.

[8]Minister for Immigration, Local Government and Ethnic Affairs v Dhillon, 8 May 1990, unreported

[9]R v IAT, ex parte Arun Kumar (1986) Imm. A. R. 446

5.15 The Migration Regulations[10] generally require applicants for a visa or entry permit to 'satisfy the prescribed criteria in relation to the relevant class of visa or entry permit (other than public interest criteria and prescribed health criteria) at the time of application.' Those applying to migrate to Australia as spouse are therefore required to show that at the time of the application their relationships were genuine and continuing[11].

5.16 Prior to 15 April 1991 the spouse (after entry) permanent entry criteria incorporated the regulation 34A timing, namely that the relationship be genuine at the date of application. The effect of those provisions was that those who applied after entry and before 15 April 1991, directly for a spouse permanent entry permit, for example fiance permit holders, were required to show that at the date of their application, their marriage relationship was genuine[12].

5.17 The majority of those temporary permit holders applying for a spouse permit after entry had first to obtain an eligibility spouse permit. They had to show:

(i) that at the date of application and the decision date they were spouse (as defined in reg 2);
(ii) that at the date of application their marriage relationship was genuine[13]; and
(iii) that at the time the application was decided their marriage relationship was genuine[14].

5.18 For those applying to remain as spouses after entry to Australia, the timing rules are different. The relevant portion of the extended eligibility (spouse) entry permit regulation now states as follows:

126 (1) *The prescribed criteria in relation to an extended eligibility (spouse) entry permit are that, at the time when the application for the permit is decided:*

(a) the applicant:
(i) is the spouse of:
(A) an Australian citizen; or
(B) an Australian permanent resident;
who:

[10]reg 34A

[11]reg 34A; reg 44

[12]previous reg 135 with reg 34A

[13]reg 135 with reg 34A

[14]reg 126 with reg 34A

(C) *was the spouse of the applicant when the application was made; and*
(D) *nominated the applicant for grant of the entry permit; and*
(E) *has a marital relationship with the applicant that is genuine and continuing.*

5.19 Those who satisfy the extended eligibility spouse permit criteria will be granted this temporary entry permit which has a period of validity no greater than two years. Two years after their application for an extended eligibility (spouse) permit, the spouse can qualify for a permanent entry permit.

5.20 For those applying on or after 15 April 1991, for the spouse (after entry) permit, there are new timing provisions in the amended regulations, namely:

Spouse (after entry) entry permit
135. (1) Subject to subregulation (2), the additional criteria in relation to a spouse (after entry) entry permit are that:

(a) at the time when the application for the entry permit is decided:

(i) the applicant is the spouse of:

(A) an Australian citizen; or
(B) an Australian permanent resident

who:

(C) nominated the applicant for the grant of the entry permit; and
(D) has a genuine and continuing marital relationship with the applicant.

5.21 This means that for both EETEP spouse and PEPAE spouse the relevant date for determining the genuine and continuing marriage is the date of decision.

Conclusions and recommendation

5.22 These assessment date provisions appear excessively complicated and convoluted. Although the Committee welcomes the amendments which bring the timing provision for spouse EETEP's and PEPAE's into line, the Committee is concerned that there is no guidance on this issue given in the Procedures Advice Manual.

5.23 The Committee recommends that:

(16) clear guidance on the appropriate assessment dates, including the dates applicable for applications lodged before 15 April 1991, be written into the Procedures Advice Manual.

The incidence of sham immigration marriages

5.24 It does not seem possible at present to get a clear, reliable picture of the incidence of immigration marriage fraud. The Committee heard evidence from Dr Robert Birrell concerning the incidence of divorce of Asian born partners. Dr Birrell advised that the divorce rate for Asian born spouses had shown a substantial growth rate from 1987 to 1989. Dr Birrell advised that:

> ... there is suggestive evidence but it does not suggest major manipulation of the crudest sort. It is consistent with my general starting point that I feel that a lot of these marriages may well have had an immigration intent ... but it is not the only intent.[15]

5.25 The Committee agrees with Dr Birrell that an immigration intent, whilst it may be a factor in marriage, does not of itself indicate a sham under the present law.

5.26 Another indication would be the number of spouse claims refused by the Department. The refusal rate for offshore spouse applications was not given to the Committee, although the Committee was given approximate rejection rate figures for four overseas posts - Ankara 30-50 per cent; Belgrade 40 per cent; Cairo 25 per cent and Fiji 30 per cent[16]. The overall rejection rate for spouse residence applications lodged in Australia is 5 per cent.

5.27 This last figure does not sit well with the Departmental case officers' perceptions of on-shore marriage fraud, which vary from 10 per cent to 50 per cent of the spouse case load lodged in Australia. However, the Department was unable to provide 'any firm basis' for its estimates[17]. Instead, comments of the following kind were made:

> On the basis of departmental experience over a long period, I think most people involved in the Department in this area would argue that people who apply via a sponsorship, an offshore application, are more likely to be genuine than people applying in Australia. Within the

[15]Dr R Birrell, Transcript of Evidence, 22 November 1990, p845

[16]Transcript of Evidence, 31 October 1990, p619

[17]Transcript of Evidence, 31 October 1990, p619

group applying in Australia, people applying on the basis of marriage are more likely to be genuine than people applying on the basis of a de facto relationship. This is the wisdom within the organisation, based on years of exposure to the case load[18].

5.28 The uncertainty in the area of sham marriages for immigration purposes is reflected in the lack of data. Although the evidence provided to the Committee does not necessarily indicate a problem level in marriage fraud cases, the Committee accepted that the case experience of officers supported such a finding. However, such frauds are notoriously difficult to detect and case officers are clearly reporting their suspicions rather than proven fraud cases. Their figures take us no closer to a concrete assessment of the general incidence of the problem.

5.29 The Committee was given more specific information concerning a problem case load of 848 spouse cases referred for investigation to a Sydney - based project task force. These were the 'hard' cases which had defeated the primary decision makers. They included cases associated with particular migration agents or marriage celebrants suspected of being fraudulent or ones where there were unexplained disparities of age or socio-economic background between the parties. The task force initially set aside 601 of the cases as fraudulent (some 71 per cent). Their figure has subsequently been revised down to 61 per cent.

5.30 The Committee noted the American experiment, reported to the National Population Council's Working Party which looked at approximately 600 applications for 'adjustment of status on marriage grounds.' These random cases were examined intensively, investigated and processed using extensive resources. The number of fraudulent marriages detected was 25 per cent of the total. The American authorities were then able to decide whether the additional fraudulent cases detected justified the allocation of intensive investigatory resources to all cases[19].

Conclusions and recommendations

5.31 The Committee concludes that the Department seek to collect reliable data on marriage fraud. These should not be figures taken from a selected caseload of problem applications but, in line with the American example discussed above, should comprise an entirely random selection of spouse applications. Such an investigation may well be timely in Australia given the increase in investigatory staff who currently spend 60 per cent of their activity on contrived marriages[20].

[18]Mr W Gibbons, Transcript of Evidence, p.617

[19]National Population Council Working Party Report, op cit, p11

[20]Transcript of Evidence, 31 October 1990, p586

5.32 The Committee recommends that:

(17) the Department of Immigration, Local Government and Ethnic Affairs collect data on the incidence of sham marriages for immigration purposes and make that data available in its Annual Report.

The nature of marriage fraud

5.33 Marriage fraud can take several different forms, including unilateral or one-sided fraud and contractual fraud. The motives of those participating in the differing types of fraud are also likewise mixed, as the following summary from the National Population Council's Report illustrates.

Contractual Fraud

5.34 Contractual fraud occurs where both parties conspire to marry or to assert a de facto relationship to enable a non-resident to seek and obtain permanent residence in Australia. The Australian partner typically would receive payment as consideration but other motives include sympathy for the situation of the non-resident, "favours" to friends, relatives or community members, or philosophical objections to the restrictive immigration policy. In turn such contractual fraud may be arranged by the participants themselves or could be organised by an agency or a third party, usually for a fee.

Unilateral fraud

5.35 One-sided marriage fraud, unilateral fraud, involves fraud on the part of the non-resident spouse who marries an unsuspecting Australian partner solely for the purpose of gaining permanent residence in Australia. The Australian partner, on the other hand, has entered into the relationship genuinely, frequently only to find him or herself abandoned once the desired resident status is achieved.[21]

[21]Report, 3.12. See also: E P Lynskey, 'Immigration Marriage Fraud Amendments of 1986: Till Congress Do Us Part, University of Miami Law Review, V.41 May 1987 1087 at 1091; J H Wade 'Marriages of Convenience in Australia', Federal Law Review, V.11, 1980,85.

Immigration intent and fraud

5.36 The forms of fraud outlined above do not include the genuine marriage contracted for the primary purpose of entry to Australia. These are marriages, often traditional arranged marriages, where the parties intend to live together as husband and wife, but where the motivation of at least one or perhaps both of the parties, is to secure one partner's entry to or residence in Australia. It may be argued that such marriages constitute a type of fraud.

5.37 The regulations do not outlaw the arranged marriage for the primary purpose of immigration to Australia and the Committee again refers to the statement by a DILGEA officer at public hearing on 31 October, when she said:

> "In a sense we do not really care or investigate what their motives are or if part of the reason for the marriage is to gain entry to Australia, provided the intention is to enter into a genuine and ongoing relationship".[22]

5.38 The Committee agrees that an immigration intent as a primary reason for marriage does not by itself determine that the marriage is not genuine or that it will not be ongoing. Such a factor will not of itself justify the rejection of the application. However, questions relating to the motives of a marriage are relevant in the context of determining the genuineness of the marriage.

The arranged marriage

5.39 The Committee considers that there is justification for taking care when assessing arranged marriages. However, the Committee is concerned that, in practice, an arranged marriage, where one purpose is immigration, may be taken by Departmental offices to be a sham. The traditional arranged marriage is the only marriage type singled out in the PAM as one requiring 'special care' in processing:

> 'while an arranged marriage may be legally recognised under the Migration Act, special care should be taken in assessing whether the marriage is genuine and continuing.'[23]

[22]Ms J Gordon, Transcript of Evidence, 31 October 1990, p599

[23]PAM, **Marriage and Divorce** 4.10.2

5.40 The Committee considers that there are other types of marriages which need special care in processing, including the marriage of convenience and such marriages contracted by, for example, mail order. The Committee's concern stems in part from the fact that the spouse category is uncapped and outside the restrictions of the immigration program. Special care therefore needs to be exercised in the initial assessment of spouse applications, and especially those outlined here.

5.41 An indication of how the guidelines on arranged marriages work in practice is given in the case **Re. Aydin Tok**[24] which was recently considered by the Immigration Review Tribunal. In that case the applicant, a Turkish citizen applied for a fiance then a spouse visa. He was married in a civil ceremony in Turkey to his first cousin, Leyla Ergene, an Australian citizen, born in Turkey. Ms Ergene had migrated to Australia with her parents when she was three. The marriage had been arranged by their parents. At the time of the primary decision the marriage had not been consummated. The civil marriage ceremony, the 'Nikhah' had taken place. A formal ceremony, the 'Nisan', had also been performed in the village one month later. By tradition the couple were not permitted to have marital relations until after the formal public ceremony, the "Dugun", which the parents had arranged to take place in Melbourne. In his interview with the immigration officer Aydin Tok was quite explicit about his motives for the marriage. The officer's note records the following answers to his questions:

> "I got engaged to her to get a visa to go to A/A [Australia]"...
>
> "the main reason for this marriage is to get me out of TRK [Turkey]"

5.42 The officer recorded his own assessment of the marriage as follows:

> 'Typical set-up to circumvent current migration policy ... This is a typical Turkish set-up **so popular** at this post arranged between the families to get P/A [principal applicant] to A/A. We have seen dozens of cases like this one. There is **nothing** to suggest that this one is different. There is no evidence of any relationship and there are very strong doubts that a permanent relationship is intended.'

5.43 The officer gave the following reasons for refusing the decision:

> **"Applicants must clearly demonstrate at interview that the marriage is a genuine one and that a permanent relationship is intended in the future. They must clearly demonstrate that the marriage is not being used to circumvent current immigration policy (our emphasis)**[25].

[24]V90/00109, 10 January 1991

[25]**re: Aydin Tok**, op cit

5.44 In this case the Tribunal, after hearing expert evidence on traditional Turkish marriages and evidence from the wife and her family, found the relationship genuine and allowed the appeal.

5.45 The Committee is not concerned with the merits of the decision in the Tok case and does not endorse all the comments made by the Tribunal in that case. However, the Committee is concerned at what the case shows of the understanding in practice concerning a 'genuine' marriage. There is no doubt the husband's motive in marrying was his desire to leave Turkey. The husband's motives in marrying are clearly relevant to an assessment of the genuineness of the marriage but the immigration motive does not make it a sham. In this case the parties were closely related. They both agreed to the match. It was arranged by their parents. The husband was expected to work in his father-in-law's restaurant. All those are indicators of a genuine arranged marriage.

5.46 The Committee is further concerned that there appears to be some degree of inconsistency between senior Departmental officers and case officers. The PAM's do not require applicants to demonstrate that the marriage is not being used to circumvent current immigration policy and the Department's advice at public hearing confirms this[26].

Other marriage customs

5.47 It is not uncommon in, for example Muslim marriages, for the parties to live apart after the civil marriage ceremony and prior to a formal public ceremony. Until the public ceremony is held the community does not take them to be husband and wife. In the **Tok** case knowledge of the marriage formalities may have explained why the marriage was not consummated. The Tribunal observed:

> 'Had the nature of the relationship been examined in the light of the traditional marital values held by the families involved, a positive assessment would probably have been reached in the first place.'

5.48 Another case example illustrates how knowledge of such customs might have alerted officers to refuse a marriage that was a sham. The case derives from a nullity application in the Family Court. The parties were Lebanese born. The wife was an Australian resident. They met in Lebanon and had apparently formed an attachment. The male partner was sponsored into Australia as a fiance. The parties were legally married in Australia but did not cohabit or consummate the marriage. The public celebration, the 'erais', did not take place after the civil ceremony. The Court heard conflicting evidence as to the reasons for this omission. The wife's evidence was that the husband told her 'I don't want to marry you, the whole purpose of the marriage contract was to obtain residency.' The husband, who was not living with his wife, applied for and was given permanent residence.[27]

Conclusions and recommendations

5.49 Although the Committee's view is that the traditionally arranged marriage, in addition to other types of marriage, do require special care in investigation, the Committee believes that the Procedures Advice Manuals could appropriately indicate that some people within certain communities follow particular marriage customs and may have differing assumptions about the requirements and significance of marriage. Inquiries concerning genuine marriages should take account of such customs. In highlighting this point the Committee does not assume that everyone of a particular cultural background adheres to those customs and each case will require individual assessment.

5.50 Given appropriate guidance and in appropriate situations, officers could require evidence, not only of the validity of the marriage, but also of the community acceptance of such marriages demonstrated in public community marriage celebration. Evidence that the celebration has taken place and that the married parties are cohabiting would assist in establishing that the marriage is genuine.

5.51 The Committee recommends that:

(18) **the Procedures Advice Manual include information on particular common marriage customs, with the proviso that staff are advised not to assume that everyone of a particular cultural background adheres to those customs and that all cases are to be assessed on an individual basis;**

(19) **Departmental officers are made aware of the community assessment of when the couple are married for the purpose of assessing the genuineness or otherwise of a traditional marriage.**

[26]Transcript of Evidence, 31 October 1990, p599

[27]Osman v Mourrali (1990) FLC 92-111.

Investigating the marriage

5.52 The Committee heard evidence of the difficulties faced by immigration officers who were called upon to assess applicants' marriage relationships[28]. Immigration officers are not psychologists or anthropologists, yet in a sense the rules require them to act these parts. They are required to find the reality behind the stated intentions of the parties. They are assessing the personal commitment of parties and their domestic arrangements often across a deep divide of religion, culture and language.

5.53 The opportunities for immigration officers to assess the parties are limited. Any large scale investigation of all or most applicants would be prohibitively expensive.

5.54 The interviewing technique used here and by most other comparable immigration services is the parallel interview. Couples are interviewed separately and questioned in some detail about their domestic arrangements, the lay-out of their home, their social life - matters which they could be expected to know if they were living together and sharing their lives. The answers are then compared for inconsistencies. If the parties answers do not tally on significant matters and the inconsistencies cannot be resolved or explained away the officer may well conclude on a balance of probability that the couple's relationship is not genuine or continuing.

5.55 This interview technique is not always a reliable guide. Couples can learn their stories - the 'Green Card' scenario. For other couples, who may be quite genuine, the interview represents what His Honour Judge Wilcox described as 'a considerable ordeal.' ... 'It involves discussing with a complete stranger, an official in whose hands one's future is thought to lie, personal - even intimate - matters.' Nervous interviewees may fail to recall incidents or confuse events in their lives. They may fail to understand the questions.

5.56 The use of the parallel interview technique has been criticised here and in Britain[29]. The Committee would support the Department in a move towards a more extensive use of this technique. However, there can be disputes about answers given in interviews. A fuller note may indicate the answer was rather more ambiguous than the officer noted. The Committee notes the suggestion of His Honour Judge Wilcox in **Prasad**[30] namely:

[28]Transcript of Evidence, 31 October 1990

[29]**Commission for Racial Equality, Immigration Control Procedures, Report of a Formal Investigation** February 1985, pp37-39

[30]**Prasad v Minister for Immigration and Ethnic Affairs**, (1985) 65 ALR 549 at 567

'if the Department is to continue to rely upon interviews of the parties as the primary method of determining the genuineness of relationships - a course the wisdom of which is open to serious question - it seems most desirable that it arrange for those interviews *to be tape recorded and for the tapes to be made available to those* who have to evaluate the answers.'

5.57 The Committee is aware that in one Departmental regional office in Sydney lawyers are permitted to accompany spouses at interview. The Committee does not support this practice but would support the making available to lawyers or other advocates a copy or transcript of any recorded proceedings.

5.58 The Committee therefore recommends:

(20) the Department move to tape record all parallel interviews and that those tapes be made available to appropriate parties.

Investigation - the primary decision stage

Before 19 December 1989

5.59 The Committee heard evidence that, prior to the codification of the migration rules, officers experienced considerable difficulties investigating marriage fraud. A Departmental audit, commissioned in 1988 was made available to the Committee[31]. It was described as a 'very good' audit[32]. The Audit concluded that:

- immigration officers were confused about the requirements of proof in marriage cases;
- the law was unclear;
- officers were fearful that an aggrieved spouse might seek judicial review of a refusal decision and that they would be required to justify their refusal decision before the Federal Court;
- officers therefore found it easier to approve applications[33] than to reject them.

[31]Transcript of Evidence, 31 October 1990, p636 and National Population Council Report

[32]Transcript of Evidence, 31 October 1990, p635

[33]Transcript of Evidence, 31 October 1990, p635

After 19 December 1989

5.60 In their evidence to the Committee the Department was confident that the 1989 amendments had dealt with many of these investigatory problems:

> 'One of the interesting changes that took place on 19 December was the evidentiary requirements, and in effect the legislative amendments put much greater emphasis on the applicant to supply the evidence. In respect of the audit they were pre-19 December cases where many officers felt that the evidentiary requirements fell more heavily on them[34];

and

> In the regime before 19 December there was nothing in the law that explained what was a relevant consideration; anything was admissible. Documenting a decision sufficiently to withstand exhaustive judicial scrutiny had become a very difficult task, beyond the experience, training, and in some cases competence of the officers routinely employed on this. The regime that applies post-19 December narrows the field significantly. In addition, there is a two-tier review system sitting on top of it. So, if the primary officer gets it wrong, it is second guessed by an internal appeal officer; if he gets it wrong there is an external merits review process. So the decision that is finally litigated in the court is the decision of the Immigration Appeals Tribunal and not the primary decision. Officers involved at the primary stage are not, therefore, liable for subpoena in the context of a challenge in the court.[35]

5.61 At the primary decision stage the Department is now reasonably well placed to detect marriage fraud. Information on change of status applications is being collected and will be stored centrally so as to be available to decision makers[36]. The Department's computerised records system, the Travel and Immigration Processing System (TRIPS) allows officers access to the full Departmental files on change of status applicants, including the information which applicants provided for their visa applications before entering Australia. Immigration officers will also have repeated opportunities to assess whether applicants have established that their marriages or de facto relationships are genuine and continuing. Applicants must now satisfy these criteria at the start and the end of the two year temporary stay given to spouse applicants applying in Australia.

[34]Mr V McMahon, Transcript of Evidence, 31 October 1990, p636

[35]Mr W Gibbons, Transcript of Evidence, 31 October 1990, p639-640

[36]Transcript of Evidence, 31 October 1990, p?

5.62 With the new arrangements and higher fees the Committee expects that an increased level of scrutiny will be achieved quickly for change of status applicants. However, in achieving this goal, the Committee feels that more use could be made of the information and knowledge gained by Departmental officers posted overseas, especially information relating to the character of a marriage within a particular society.

5.63 This is not to say that all the investigatory problems have been resolved. Investigations of marriage fraud will always be difficult. The Department has very real resource problems in this area. The Department indicated in evidence that marriage cases 'get better scrutiny overseas than they do in Australia given that the Department was better resourced overseas than they were in this area in Australia[37].

Investigating de facto claims

5.64 The de facto category continues to cause particular investigatory problems at the primary decision stage. There is no certificate to prove the commencement date or the validity of the de facto marriage. It is increasingly difficult to base decisions, whether approving or rejecting the applicant, on an assessment of the distinctive elements that characterise marriage-like relationships.

5.65 The Committee heard evidence that the majority of sham marriage applications were de facto marriages[38]. The Committee considered seriously recommending to the Minister that de facto spouses ought to be excluded from the migration or residence programs. Australia, New Zealand and Holland stand alone in offering de facto spouses the chance to migrate or achieve residence within their countries. In the United States, Canada, Britain and all other western European countries spouse for migration purposes means a legal spouse.

5.66 The Committee accepts with some reservations that the new stricter requirements for de facto relationships, the two year conditional residence scheme and the additional penalties for fraud may resolve the difficulties in the de facto spouse class. The Committee endorses the comment from the Department that simply requiring de facto spouses to prove that their relationship has lasted six or twelve months does not answer the problem. As a Departmental officer observed in evidence:

> 'I do not know that 12 months necessarily proves that the relationship is genuine or non-genuine. It certainly would discount frivolous applications but I do not think people claiming to have been

[37]Transcript of Evidence, 31 October 1990, p621

[38]National Population Council Report, op cit

together for 12 months is an ironclad test that the relationship is genuine. It also raises the question of at what point in time you establish the de facto relationship started. There is no piece of paper as there is with a marriage.[39]

5.67 The Committee recommends that:

(21) **the Department of Immigration, Local Government and Ethnic Affairs closely monitor the de facto marriage class and collect statistics on the approval and rejection rate of applications for this class;**

(22) **statistical evidence on the incidence of sham marriage claims for both legal spouse and de facto spouse be collected;**

(23) **such statistical data be included in the Department's Annual Report.**

Investigation - following the grant of a residence permit

5.68 While it is still no simple matter for an immigration officer to refuse residence to a spouse application if the officer is not satisfied that the marriage is genuine or continuing, it is much more difficult for the officer to take back the residence permit after it has been granted.

5.69 Even with improved investigation at the primary decision stage it is certain that some sham de facto or marriage relationships will slip past the decision makers. Spouses in sham marriages will inadvertently be given residence permits.

5.70 The sham marriages which often come to light after the award of residence are those arrangements in which Australian citizens or residents have been duped by their non-citizen partners. The partners had no intention of continuing with the relationships once they acquired residence and they often leave at or soon after the grant of residence. Typically the Department comes to hear of such cases from the aggrieved Australian partner.

5.71 The Australian partners tricked into such sham marriages are unfortunate victims of very cruel deceptions. The personal consequences can be very serious, particularly if the Australian partner is within a community where divorce is unacceptable.

[39]Mr C Dear, Transcript of Evidence, 31 October 1990, p625

5.72 One such case came before the Family Court as an application for a decree of nullity on the ground that the consent to the marriage was obtained by fraud or deceit[40]. The Australian 'wife' applicant was a young girl of seventeen. She had left her high school in Melbourne to marry her Turkish spouse. The marriage was never consummated. The judge observed that the 'husband' had 'not the slightest intention of fulfilling in any respect the obligations of marriage':

> 'He has used the unfortunate applicant as a tool of his own convenience. His conduct amounts to a total rejection of the institution of marriage and what it stands for. He clearly deceived the applicant into marriage for his own personal motives and with the intention of summarily rejecting her immediately after the ceremony.'

5.73 The young wife suffered a nervous breakdown and attempted suicide. In her evidence requesting annulment she indicated that she would prefer to die rather than face the shame of being divorced. The judge noted:

> 'it was apparent from her demeanour that she was quite serious in what she said.'[41]

5.74 There was a happier conclusion to the case. The husband was refused residence and deported. The marriage was annulled.

5.75 The decision in **Deniz** has not been followed in recent applications for nullity decrees brought by other victims in sham marriages. In the case of **Otway**, the 'husband' was Australian. His spouse was from the Philippines. She married him to secure residence and left him to take up with a former boyfriend. In refusing the decree of nullity the judge found that unlike the husband in **Deniz**, this non-citizen wife 'had every intention of fulfilling the obligations of marriage for a limited period of time:

> [She] ... intended to marry and intended to stay with the [husband] ... for a sufficient length of time so that the immigration authorities would not say that the marriage had been one of convenience and entered into solely to enable her to remain in this country.[42]

[40]**In the Marriage of Deniz** [1977] 31 FLR 144

[41]ibid

[42]In the Marriage of Otway and Otway 1987 FLC 91-807*
*See also: **In the Marriage of Al Soukmani** (1990) FLC 92-107; **In the Marriage of Osman and Mourrali** (1990) FLC 92-111; B Davis, 'Logic, Fraud and Sham Marriages,' (1989) 3 **Australian Journal of Family Law** 191-92; O Jessep, 'Fraud and Nullity of Marriage in Australia,' (1989) 3 **Australian Journal of Family Law**, 93-96.

5.76 The Family Court decisions refusing to annul sham immigration marriages stress that void marriages are void for all purposes. There must be some external indicia that can be measured at the time the marriage is entered into. The flaw in migration marriage shams can generally be measured only subjectively by events which occur after the marriage ceremony[43].

5.77 The duped Australian partners in such marriages have not only unsuccessfully petitioned the Family Court. The Committee heard evidence that they have often been unsuccessful in persuading the Immigration Department to reopen their spouses' files, investigate their allegations and deport the fraudulent spouses.[44]

5.78 It is not clear how many such cases come to the attention of the Department. The Department confirmed that the number of sham marriages reported after the non-citizen spouse acquired residence was 'small'[45]. One Sydney DILGEA office told the Committee that they generally receive one such report each month.

5.79 The Committee also heard evidence from one man, Mr Gary White, who was the victim in a sham marriage. He perceived the problem to be a larger one. As he stated:

> 'I know of a number of other cases, and since it is from my small circle of associates, it is obvious that there must be a much wider aspect to it'.[46]

5.80 Departmental investigations conducted after the spouse has acquired residence can be very difficult. It is resource intensive, time consuming and may be unproductive. Not all spouses reporting marriage shams are victims of marriage frauds. Following genuine marriage breakdowns, estranged partners may seek to punish or make trouble for their non-citizen partners by making false allegations to the Department about the marriage. Sometimes a spouse makes serious allegations of fraud and subsequently retract them during the Departmental's investigation because there has been a reconciliation with the other spouse.

[43]In the **Marriage of Al Soukmani** (1990) FLC 92-107)

[44]Mr G White, Transcript of Evidence, pp890, 894. Similar allegations were made against the American Immigration and Naturalisation Service in evidence from members of the public to the Sub-Committee on Immigration and Refugee Policy of the United States Senate's Committee on the Judiciary, 26 July 1985, pp42-56.

[45]Transcript of Evidence, 31 October 1990

[46]Transcript of Evidence, p902

5.81 There are not only investigatory problems at this post residence stage. The Department can face real legal difficulties in establishing a case to take away the fraudulent spouse's permanent entry permit. As the law now stands, if it can be shown that the non-citizen spouse made a statement that was false or misleading in a material particular when applying for entry or change of status, the spouse is an illegal entrant and the spouse's temporary or permanent entry permit is automatically revoked[47]. An untruthful statement concerning the bona fides of the marriage is almost certainly a false statement in a material particular[48]. This will be put beyond doubt when the Department's comprehensive declaration forms and application forms are fully utilised.

5.82 At the primary decision stage applicants must show that they satisfy the prescribed criteria. If the Department is seeking to deport the fraudulent spouse as an illegal entrant, the Department appears to carry the onus of proving this case.

5.83 There is no clear Australian authority as to who bears the burden of proof and the standard of proof required in such cases. If British immigration case authority is followed here the Department has a significant onus of proving the immigration fraud to a 'high balance' or a preponderance of probability[49]. American immigration and citizenship case authority, if followed, would alleviate the burden on the Department. In the American formulation false information is material if it averted further enquires concerning the application, but only if those enquires would ultimately have revealed a disqualifying fact. The Department has the onus of proving that it is more probable than not that a disqualifying fact existed at the time of entry or change of status. The spouse, who is then presumed to be disqualified from entry, has an opportunity and bears the onus of proving

[47]s 20; s 35(2)

[48]Although there is no clear authority on what constitutes a material particular for immigration purposes, the dicta of Justice Lee in **Rubrico v Minister for Immigration and Ethnic Affairs** (1989) 86 ALR 681, suggests that a statement is only false in a material particular if it has influenced the decision maker in a relevant matter for consideration (at p694)

[49]**Khawaja v Secretary of State for the Home Department**, HL (E) 1983, 2WLR, 321

she/he was not disqualified from entry[50]. The shifting burden of proof casts an obligation on the non-citizen which may be difficult to discharge. This is justified on policy grounds:

> 'The burden would create a strong incentive for the petitioning alien to tell the truth initially, when the resources for proving eligibility are most available.'[51]

5.84 Given the practical difficulties associated with investigating sham marriages after residence has been acquired and the legal uncertainties and burdens in litigating such matters, the Department's reluctance to investigate such cases in the past is understandable but should not be allowed to continue. It is difficult for individuals to admit that they have been duped by their chosen partner, but it is twice as hard to learn that the partner cannot be removed from Australia. Even so the Department should not shelve its responsibilities in this area. For many Australian partners who chafe at the Department's inactivity or timidity in this area there are many non-citizen partners boasting of having beaten the system.

5.85 Even if the Department has insufficient evidence to proceed against the non-Australian partner as an illegal entrant at the very least the Department may be able to act to limit the benefits acquired by the allegedly fraudulent spouse. The case related by Mr White reveals what can go wrong if all sections of the Department are not so motivated:

> In my own case, I had notified the Minister, and the Department in Adelaide where she lived, that the matter was pending before the court as to the actual legality of the marriage. My legal advice was that the marriage was not legal because the marriage licence was not signed by the local civil registrar. Under Philippine law, unless a licence is signed by the local civil registrar, any alleged marriage that follows from that is automatically void. I notified the Department and I notified the Minister. I got an acknowledgment from the Minister that the matter was under investigation. Shortly after the Minister assured me that the matter was being investigated, she was granted Australian citizenship. Naturally, I wanted to try to find out why she was granted Australian citizenship when the matter went before the court, but I got told only that the matter was subject to further investigation. After all this time, I still have got no explanation as to why she was granted Australian citizenship while the matter was before the court[52].

[50]**Kungys v United States** 108 SCt 1537 [1988]

[51]M Stakun, 'Materiality in the Denaturalization Context: Kungys v United States (108 SCt, 1537)' V23 **Cornell International Law Journal** Winter 1990, 161 - 186, at 182
Wolf, M "Fraud and Materiality: Has the Supreme Court redefined immigration and nationality fraud?" (1989) 62 Temple Law Review, 481

[52]Mr G White, Transcript of Evidence, 22 November 1990, p886

5.86 Mr White's marriage was annulled by the Family Court. His wife acquired permanent residence as a result of that void marriage. She now has Australian citizenship and continues to reside in Australia. The Department is investigating the matter. Mr White's conclusion is that 'Absolutely nothing has been done about it[53].

5.87 The Committee refers to its first report, Illegal Entrants in Australia, and reiterates the recommendation contained there that;

> **(24) the Committee is adamant that in clear cases when such bogus or sham marriages are detected the non-Australian partner, who has used the marriage to gain entry to or stay in Australia, be removed from Australia;**
>
> **(25) if the present law enshrined in Section 20(3) concerning the obtaining of residence by deception does not allow the easy deportation of those who have duped their Australian partner in this way, then that provision be amended to enable such a result.**

Detecting and deterring sham marriages

5.88 The Committee supports the following measures announced by the Minister, which will serve to deter sham marriages:

- increased evidentiary requirements;
- two year conditional residence;
- increased penalties of up $100,000 for fraudulent claims; and
- imprisonment for 10 years for organisers of 'false marriages'.

5.89 The Committee notes however that the penalties only apply to those detected in a fraudulent marriage and do not extend to those in fraudulent interdependency relationships. The Committee therefore recommends that:

> **(26) penalties relating to fraudulent spouse/de facto applicants should also extend to fraudulent interdependency relationships.**

5.90 The Committee commends to the Minister the adoption of two additional control measures which were part of the U.S. Senate Committee's recommendations to combat their marriage fraud problem. These measures are the routine audit of former spouse applicants, (ie. applicants who entered the USA as a sponsored spouse) at the time of citizenship application and the inclusion of a provision in the Regulations which prevents spouse applicants sponsoring a further spouse for a period of five years after the date of permanent residence.

[53]Mr G White, Transcript of Evidence, 22 November 1990, p905. However, the Committee was later advised that the Minister's office had in fact followed the matter up and responded to Mr White

5.91 The institution of a routine audit of former spouse applicants if and when they apply for citizenship is directed at determining whether the spouse remains married to their Australian partner. In some cases the audit could produce evidence of an earlier marriage fraud. The Committee sees value in such an audit as, while the fraud is being investigated thee Department could ensure that the non-citizen was not awarded Australian citizenship, as happened in the Gary White case. The Committee additionally sees this audit as a source of useful data on the duration of immigration marriages, data which could be useful as a guide to the length of the probationary term of stay awarded to spouses within Australia.

5.92 The Committee also sees value in the sponsorship bar provision currently enshrined in US immigration law as follows:

> *(2)(A) The Attorney General may not approve a spousal second preference petition filed by an alien who, by virtue of a prior marriage, has been accorded the status of an alien lawfully admitted for permanent residence as the spouse of a citizen of the United States or as the spouse of an alien lawfully admitted for permanent residence, unless -*
>
> > *(i) a period of 5 years has elapsed after the date the alien acquired the status of an alien lawfully admitted for permanent residence, or*
> > *(ii) the alien establishes to the satisfaction of the Attorney General by clear and convincing evidence that the prior marriage (on the basis of which the alien obtained the status of an alien lawfully admitted for permanent residence) was not entered into for the purpose of evading any provision of the immigration laws.*

5.93 This provision was designed to deter non-citizens who were marrying Americans solely to obtain residence, filing for divorce and then sponsoring their long-standing genuine non-citizen partner as their spouse. The provision does not permit the spouse applicant to sponsor another non-citizen spouse applicant within 5 years after he/she acquired permanent residence unless the sponsor establishes 'by clear and convincing evidence that the marriage which qualified the spouse for residence was not a marriage of convenience.'

5.94 The Committee therefore recommends that:

(27) the Department of Immigration, Local Government and Ethnic Affairs undertake a routine audit of former spouse applicants who have subsequently applied for citizenship in order to gather statistical data on marriage and to detect those cases where there may be a report of a sham marriage or marriage fraud;

(28) a provision be incorporated into the Regulations to serve the same purpose as Section 204(a) (2a) of the United States Immigration Marriage Fraud Act, that is that the spouse applicant is not permitted to sponsor another spouse for a specified period unless it can be established by clear and convincing evidence that the prior marriage was not entered into for the purpose of evading any provision of the immigration laws; and

(29) there be a widespread and effective publicity campaign highlighting the increased surveillance and detection techniques, the increased penalties for fraud and the very real penalties of deportation and restrictions on re-entry.

CHAPTER 6

MARRIAGE BREAKDOWN

. Domestic violence
. Cultural considerations
. The Committee's advice to the Minister
. Children

6.1 The Committee received submissions and heard evidence on the vulnerability of the non-Australian partner in instances where a marriage breaks down prior to Australian residency being granted. In essence, evidence related to the possibility of exploitation if the non-Australian partner had not yet received their permanent residency. The Committee heard evidence in particular about women in domestic violence situations and problems relating to children of any marriage which has broken down. A third problem arises when, for cultural or religious reasons, it may not be possible for the non-Australian partner to return to their country of origin, particularly if that person is female.

Domestic violence

6.2 The Committee received a submission from Harvey and Katzen relating solely to immigration law and its effect on women in domestic violence situations.[1] The submission focused on immigrant women applying to change status on the basis of a relationship with an Australian permanent resident or citizen and who are subject to domestic violence prior to the grant of residency. The submission notes:

> The particularity of the situation of immigrant women does therefore not reside in the fact that they are subject to DV (domestic violence) but in the fact that they are especially vulnerable when subjected to this form of aggression. In most cases migrant women are detached from their families and support systems. Many of them lack English, knowledge about services and their legal rights. Even if they know about services, access is difficult or they show a high level of reticence to approaching these services. This vulnerability is aggravated by the immigration law which forces them to "choose" between remaining in a 'marital' situation fraught by domestic violence or face deportation. It is this additional vulnerability which distinguishes immigrant women[2].

[1]Submission 48, Submissions Vol 2, p203

[2]ibid, p204-205

6.3 Prior to 19 December 1989 it was possible for women in such circumstances to be granted entry in the compassionate category. However, that category no longer exists, for grant of residence status within Australia. This has eliminated any discretion that officers may have had to admit applicants in such a situation.

6.4 It was put to the Committee that a woman who had undergone severe disruption to her life by coming to Australia to marry an Australian citizen or permanent resident was put at a distinct disadvantage if the marriage failed. The marriage was no longer ongoing and there was therefore no basis in law for the Department to grant permanent residence.

6.5 Harvey and Katzen go on to state:

> An immigrant woman who does not have residency and is victimised by DV faces a choice. If, as the criminal law encourages her, she seeks an AVO (apprehended violence order)and/or leaves an abusive partner she is jeopardising any application for residence status as a spouse because she is no longer in a "genuine and continuing" relationship.[3]

6.6 Harvey and Katzen also point out that their case experience indicates that the threat of deportation can be used as a tool of coercion, restricting a partner from leaving a relationship or seeking the protection of the law.[4]

6.7 The Association of non-English speaking Background Women of Australia (ANESBWA) representatives described the following case at public hearing:

> 'We have one case that is stated in this study where a Filipino woman was sponsored to Australia as the fiancee of an Australian citizen. The Australian man actually falsified her documents and made false statements on her application for permanent residency. When difficulties arose in the marriage and she tried to leave him because of the situation of domestic violence in their relationship, he turned around and threatened to deport her, stating that he would prove to the Department of Immigration that the statements that she had made - that he had, in fact, made himself - were false. On that basis he threatened that she would be deported from the country, when in fact she knew nothing about the false statements at all.[5]

[3]ibid, p207

[4]ibid, pp207-8

[5]Transcript of Evidence, 1 November 1990, pp742-743

6.8 This sort of case highlights the vulnerability of the non-Australian partner, particularly where that person's first language is not English, given the very severe consequences of giving inaccurate information on entry[6].

Cultural considerations

6.9 In cases where a woman has come to Australia to be married[7] and the marriage subsequently breaks down, there are circumstances where it would be unjust to require that woman to return to her country of origin. Some countries such as the Philippines do not recognise divorce. The ANESBWA representatives pointed out at public hearing that:

> 'The woman's prospects for a future life with, say, a man back in her own country and her own culture may have been totally destroyed by the fact that she has come to Australia and been married to somebody else.[8]

6.10 The ANESBWA representatives further argued that if a woman has left her family and her country to enter into marriage with an Australian citizen then she should have some expectation that she will be permitted to remain in Australia, even if her marriage turns out to be unworkable.

6.11 Representatives of the Filipino Forum and Filipino Community Co-operative in NSW stated at public hearing:

> ...Because of these present rules, once we are married being still subjected to whether we can stay or not is very detrimental to the concerned party ... if I get married I cannot face the whole world if I am separated from my husband. It is our culture and, again, our religion ... It is a shame for a divorced Filipino to face the community[9].

[6]This is a 20 illegality, where, if a non-citizen produces or causes to be produced bogus documents or made or caused to be made false statements that person is illegal from the time of entry to Australia.

[7]It should be noted here that women comprise about 90% of the spouses and fiances entering each year. (Submission 101, p1)

[8]Transcript of Evidence, 1 November 1990, p759

[9]Transcript of Evidence, 1 November 1990, p793

6.12 The Filipino Women's Council also stressed that Filipino women are at risk:

> Domestic violence in cases where the legal status is at stake is a big problem. ...The uncertainty of status and time limits set out in the Migration Act & Regulations make the women passive to domestic violence[10].

6.13 The Filipino Women's Council also queried why the women were the receivers of the punishment in the form of being required to leave Australia given that they had come to Australia to enter into a genuine marriage. There is a particular problem for Filipinos, as a return to the Philippines may mean social ostracism.

The Committee's advice to the Minister

6.14 The Committee in its initial advice to the Minister on 7 November 1990 requested:

> 'that for those people who have married and have not yet gained permanent residence and who:
>
> a) are proven victims of domestic violence or cruel and unconscionable conduct and are a party to non ex parte proceedings in a court of law; and
>
> i) can demonstrate that they come from a cultural situation where, to return as a partner in a failed marriage would impose severe hardship or make them subject to discrimination; or
>
> ii) have a child or children who are Australian citizens who would be entitled to maintenance from the Australian parent; or
>
> iii) for those people who do not meet criteria i) or ii) above while the presumption is that they will return overseas, if there are circumstances of a compelling and compassionate nature;

[10]Submission No 113, Filipino Women's Council

> provision be made in the regulations for them to be considered for permanent residence, even though their Australian spouse may have withdrawn their sponsorship.'[11]

6.15 The Minister's January press release indicated that he shared the Committee's concern for victims of domestic violence:

> "I do not believe that people who have suffered domestic violence should be placed in a situation of stress by the Australian partner where they face the simple choice of continuing the relationship or being required to relinquish their permanent residency hopes."[12]

6.16 The Minister has agreed that special provisions were necessary for victims of domestic violence. He stated:

> "I do not believe that people who have suffered domestic violence should be placed in a situation of duress by the Australian partner where they face the simple choice of continuing the relationship or being required to relinquish their permanent residency hopes.[13]"

Children

6.17 The interests of children were not considered in the amended Act and regulations, nor was there any mention of the consideration of children's interests in the Minster's April statement. However, the issue may be taken into account in amendments to the Regulations.

6.18 The Committee's particular concerns are as follows. If the marriage fails and there has been a child of the marriage, the non-Australian partner, whose application for permanent residence must then fail, is required to leave the country. Usually any children of such a marriage, in most cases Australian citizens, will be quite young. If the child remains with the Australian partner, then that partner has gained full custody of the child and rights to all property acquired during the marriage without going through settlement or divorce proceedings. If the child returns overseas with the non-Australian partner they may well be denied the advantages of growing up in Australia. Whatever the situation, the child will be disadvantaged in being denied access to both parents.

[11]Letter from Chairman to Minister, dated 7 November 1990

[12]Ministerial Press Release 4/91, 23 January 1991

[13]Ministerial Press Release 4/91, 23 January 1991

6.19 Mr Brian Murray described a situation in one of his submissions to the Committee, which concerned a man whose wife and child were permitted to migrate to Australia without either the man's knowledge or consent. The man's wife had subsequently sponsored the husband but had later withdrawn the sponsorship, which made him ineligible for residence. Mr Murray made the following comment:

> 'but "rorting the system" is not directed solely to gaining residence; it can also be directed to preventing someone from gaining residence and thereby denying them rights which they would otherwise have, in this case, denying a father access to his child.[14]

6.20 The conflict between family law and immigration law was raised in Katzen and Harvey's submission and by the ANESBWA representatives at public hearings. Harvey and Katzen state:

> 'Further, the immigration regime is inconsistent with the tenor and principles of Australian family law which, where there is a marital breakdown, seeks to effect some compromise in the best interests of the child. There is a presumption in favour of joint custody and care and access between the child and parent. Children in these situations are usually Australian citizens.
>
> The aims of Australian family law are reflected in international laws which ensure that a child is not separated from his/her family (Convention on Rights of the Child 1988) (Article 9), and noted as a source of concern by the Human Rights Commission Report No 18 The Human Rights of Australia Born Children Whose Parents are Deported (AGPS) 1986)[15].

6.21 Smithers J in Kaufusi and Another v Minister for Immigration and Ethnic Affairs, held that:

> "In the excercise of his discretion under s18 of the Act, in considering whether to deport parents of Australian-born children, the Minister must consider the rights of the family as a whole including the children's independant right not to be deported, give due consideration to any material before him which would reveal to him the effects of deportation upon the children and balance the reasons for deporting the parents against the interests of the children in not being deported.[16]

[14]Submission No 136, p2

[15]Submission No 48, Submissions Vol 2, p212-213

[16]**Kaufusi & Another v Minister for Immigration and Ethnic Affairs**, 1985 9 FCR 186-87

Conclusion

6.22 The Committee raised the matter of children's rights with the Minister in its interim advice. However, it is clear that the matter is one of importance. The Committee is of the view that there should be consistency in the application of principles applying to family law and migration law and that if necessary, the migration law should be amended to give due regard to the rights of children in such cases.

6.23 The Committee is further concerned that the non-Australian partner may be disadvantaged if required to leave Australia before divorce/settlement/custody proceedings are finalised, provided there was not unreasonable delay in pursuing proceedings by the non-Australian party.

6.24 The Committee recommends that:

(30) where a marriage between an Australian and a non-Australian citizen has broken down and there has been a child of that marriage, that consideration be given to the rights and interests of the child at the time of application for residence and prior to any deportation action by the Minister for Immigration, Local Government and Ethnic Affairs;

(31) where legal proceedings, including proceedings relating to divorce, settlement or custody, are under way, no action be taken by the Minister for Immigration, Local Government and Ethnic Affairs and the party be permitted to remain until finalisation of such proceedings, provided there is not unreasonable delay in the pursuit of proceedings by the non-Australian party.

DISSENTING REPORT
SENATORS V BOURNE AND B COONEY

We do not agree with the Committee:

(1) in its view as set out in paragraph 6.14 of the Report about what should happen to spouses from overseas when his or her marriage breaks up.

(2) in its recommendation set out in paragraph 6.24 of the Report about what should happen to children born of a marriage between an Australian citizen or resident and a person not entitled to stay here permanently.

In our view a person should be allowed to remain in Australia where he or she is here from overseas as the spouse of a citizen or permanent resident, the marriage breaks up and it would be unconscionable to force him or her to leave the country.

It may well be unconscionable if he or she were the victim of domestic violence or cruel and unconscionable conduct, but it might also be so for other reasons. For example, if a spouse from overseas has expended his or her life's savings in a property which then falls into the hands of their partner, as a result of expulsion from this country. It might not be unconscionable for a spouse to be deported even though he or she has suffered domestic violence if that violence was confined to one or two occasions in circumstances of great provocation. In the great majority of cases it probably would be, but I make the point that it is unconscionable conduct that should attract exemption from deportation not simply "domestic violence or cruel and unconscionable conduct".

Spouses should not have to go to the extent of suffering physical violence or cruel and unconscionable conduct to be able to stay here when their marriage breaks up as a result of their partner's conduct. Australia must bear some responsibility for what its citizens and permanent residents do to people from overseas.

The Committee's approach means that where a spouse from overseas is in effect put on probation for two years and his or her partner is in effect made the probation officer, he or she is highly vulnerable to the conduct and whim of that partner. Even if such spouse lives the life of the perfect marriage partner, severs links with the country of origin in the interest of the relationship and becomes an outstanding resident of Australia, they will be forced out of their home because of the actions of a person to whom the Commonwealth attaches no sanctions and also has acted in an unconscionable way.

It would be harsh for the Commonwealth to further victimise the victims of its citizens or permanent residents.

As far as children born here of at least one parent who is Australian or a permanent resident go, they should be entitled to stay here. They are innocent of any fraud or opportunism. They are the responsibility of citizens or permanent residents of this country and it is proper for it to embrace that reality by offering them a homeland.

APPENDIX A

HEARINGS AND WITNESSES

31 October 1991 at Canberra

Department of Immigration, Local Government and Ethnic Affairs

Mr Laurence Bugden	Assistant Secretary Analysis & Compliance Branch
Mr Christopher Dear	Acting Assistant Secretary Social Policy Branch
Mr Wayne Gibbons	Deputy Secretary
Ms Jennifer Gordon	Acting Assistant Secretary Procedures Branch
Mr Peter Hughes	Assistant Secretary Central Operations Branch
Mr Vincent McMahon	Assistant Secretary Regional Operations Branch
Mr Allan Rice	Director, Post Liaison
Ms Ruth Sharkey	Regional Manager Rockdale (South) Office

Mr Brian Murray

National Population Council Working Party

Mr Ross Tzannes (Chairman)

1 November 1990 at Canberra

Association of Non-English Speaking Background Women of Australia.

Ms Matina Mottee
Ms Anna Schinella

Filipino Forum in NSW

Mr Jose Relunia

Filipino Community Co-operative Ltd

Ms Nancy Casaol

Mr Andrew Cope

22 November 1990 at Canberra

Dr Robert Birrell

Mr Gary White

APPENDIX B

LIST OF SUBMISSIONS ON CHANGE OF STATUS

LIST OF SUBMISSIONS ON CHANGE OF STATUS

Submission No	Name/Organisation
2	Mr M Williams JP
16	Mr J L Horsley
27	Dr S M Hong, Ph.D
30	Mr G Binkowski Export & Commercial Research Services
44	Mr G White
45	Ling Du Duong
46	Commander F Menzies
48	D Harvey & H Katzen
50	Mr P Baker Chairman Migration Committee Law Institute of Victoria
51	Mr R Merkel QC Victorian Immigration Advice and Rights Centre Inc
52	Mrs M Marchi
68	Mr S A Monir Ahmadiyya Muslim Association of Aust Inc.
72	Dr O Mendis President Sinhala Cultural & Community Services Foundation

Submission No	Name/Organisation
77	Mr L Hardy Executive Director Refugee Council of Australia
82	Mr R Merkel QC President Victorian Immigration Advice and Rights Centre Inc
83	Mr M Palmer
85	Mr V Valevatu Secretary Fijian-Australian Resource Centre Inc
86	Mr T Shao
88	Mr C Harbaum MBE Chairperson Federation of Ethnic Communities Councils of Australia Inc
89	Ms L Lindsay Ethnic Minorities Action Group
91	Mr A Cope Migration Consultant Haines & Polites
93	Mr M Ross Ross & Laba Migration Services
97	Mr G Masri Solicitor Immigration Advice & Rights Centre Inc
100	Mr N L A Barlow Barlow and Co
104	Mr W Lim, JP

Submission No	Name/Organisation
112	Mr W Lim, JP
113	Ms L Farmer Convenor Filipino Women's Council
114	Rev B Sudirgo The Uniting Church in Australia
115	A Karel President Russian Ethnic Representative Council of Victoria, INC
117	Mr A Cope Migration Consultant Haines & Polites
118	Mr G White
119	Rev J J Murphy Director Catholic Immigration Office
121	Mr E Rodan Chairman Administrative Law Section Law Institute of Victoria
122	Mr B Murray Brian Murray & Associates
126	Mr G Binkowski Managing Director Export & Commercial Research Services P/L
127	Mr G Binkowski Managing Director Export & Commercial Research Services P/L

Submission No	Name/Organisation
128	The Board of Directors Filipino Community Council of NSW c/- Ms L Swords
129	Mr R P Cocks Acting Secretary Adminstrative Law Section Law Institute of Victoria
133	Ms B Hounslow Gay & Lesbian Immigration Task Force
135	Mr A Fenech Hon Secretary Maltese Community Council of NSW
136	Mr B Murray Brian Murray & Associates

APPENDIX C

LETTER FROM CHAIRMAN OF COMMITTEE
TO MINISTER, 7 NOVEMBER 1990

PARLIAMENT OF AUSTRALIA
JOINT STANDING COMMITTEE ON MIGRATION REGULATIONS

PARLIAMENT HOUSE
CANBERRA ACT 2600
TEL: (06) 277 4564
FAX. (06) 277 2221

The Hon G L Hand, MP
Minister for Immigration, Local
Government and Ethnic Affairs
Parliament House
CANBERRA ACT 2601

Dear Minister

The Joint Standing Committee on Migration Regulations has been considering the issue of change of status on the basis of marriage, including a consideration of the Report of the Working Party on the National Population Council.

The Committee is not in a position to put a final report to the Parliament prior to the end of November, when the current arrangements for change of status by visitors on spouse grounds will cease.

However, the Committee is mindful of your desire to take action on the matter prior to 30 November and in order to assist you in this regard is prepared to make some preliminary recommendations immediately, whilst at the same time flagging those areas where there is a need for further detailed investigation.

After a considerable discussion of the issues the Committee wishes to make the following recommendations:

RE: MARRIAGE

1) that the law presently operating until 30 November should continue to apply after that date for those applicants applying to change status on the basis of marriage subject to the additional provisions outlined below;

2) it is recognised that because of immediate resource implications it would be impractical for all applicants for change of status and their spouses to be interviewed and that therefore:

   a) all applicants where it is suspected that a principal purpose is immigration be interviewed; and

   b) all other applicants be interviewed on a random or risk analysis basis;

3) that in order for an appropriate determination to be made under 2a) and 2b) the application form be extended to include more specific information and corroborative evidence of public commitment to marriage, for example:

a) the period the parties have known each other;

b) where the parties have resided before marriage and after marriage and for what period; and

any other questions which might assist Departmental officers in establishing the bona fides of the marriage for the purpose of immigration;

4) that for those people who have married and have not yet gained permanent residence and who:

a) are proven victims of domestic violence or cruel and unconscionable conduct and are a party to non ex parte proceedings in a court of law; and

i) can demonstrate that they come from a cultural situation where, to return as a partner in a failed marriage would impose severe hardship or make them subject to discrimination; or

ii) have a child or children who are Australian citizens who would be entitled to maintenance from the Australian parent; or

iii) for those people who do not meet criteria i) or ii) above while the presumption is that they will return overseas, if there are circumstances of a compelling and compassionate nature;

provision be made in the regulations for them to be considered for permanent residence, even though their Australian spouse may have withdrawn their sponsorship;

5) that where legal proceedings are not complete the Department of Immigration, Local Government and Ethnic Affairs not initiate any action to disadvantage the applicant;

RE: DE FACTO RELATIONSHIPS

6) that for those people who are in a de facto relationship there be a period of 12 months proven cohabitation, with the onus of proof on the applicant, before an application can be made;

7) in the first instance that application will be for a two year Temporary Entry Permit, after which period an application for permanent residence can be made and will be granted on the basis of evidence being supplied of a continuing permanent relationship.

(The Committee is divided on the issue of the right to work during this period and will report more fully on the matter in its next report to Parliament).

OTHER ISSUES

8) That present penalties in proven cases of fraud by Australian citizens and visitors in cases of change of status should be strengthened;

9) that a specific offence in relation to racketeers be created under the Migration Act 1958 with appropriate penalties;

10) that applicants for GORS on spouse grounds have a right of review.

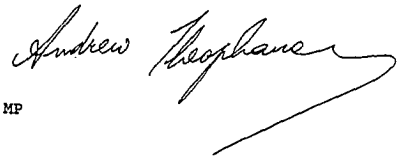
In its report, the Committee will present argument and further comment on the recommendations made above.

In addition, as mentioned earlier, the Committee will continue to inquire into those matters which require further investigation. These include:

- criteria for assessment of the genuineness of marriage and whether the principle applied in the United Kingdom, the "dominant purpose", rule would be appropriate in Australia;
- Procedures Advice Manual guidelines for assessment of the genuineness of marriage;
- resource implications of more detailed assessment and interviewing;
- application of resources and training programmes.

I hope to submit the full report early in the Autumn Session. It is my intention to table this letter in Parliament at soon as possible. I must also advise you that there are aspects of this report with which Senator Cooney disagrees.

Yours sincerely



A Theophanous, MP
Chairman

7 November 1990

APPENDIX D

DILGEA POLICY CIRCULAR 1764

GOVERNMENT AND ETHNIC AFFAIRS

INSTRUCTION

Unless re-issued or deleted sooner this instruction lapses 12 months from the date of issue.

POLICY CONTROL INSTRUCTION NO. PC 1764	DATE OF ISSUE 7/2/91	FILE NO. 91/10026

CHANGES TO PROVISIONS FOR APPLICATIONS TO REMAIN PERMANENTLY IN AUSTRALIA BASED ON GROUNDS OF MARRIAGE TO - OR DE FACTO RELATIONSHIP WITH - AN AUSTRALIAN CITIZEN OR PERMANENT RESIDENT

Background

The purpose of this instruction is to advise of forthcoming changes to the arrangements for the processing of applications for resident status based on marriage to, or de facto relationship with, an Australian citizen or permanent resident.

2 The Minister announced on 23 January 1991 that while all temporary entrants (excluding those who entered Australia as transit passengers) will continue to be able to apply to remain permanently in Australia on spouse/de facto grounds, a stricter approach is to be taken with these applications.

3 Introduction of a new package of measures is intended to prevent abuse of this migration concession. The key elements are that more rigorous testing of claims is to be undertaken and applicants who meet the criteria will be granted conditional residence for two years if the relationship claims are assessed as genuine. Permanent residence will only be granted if the legal or de facto relationship is still genuine and on going at the end of this two years of conditional residence. The full range of measures that make up the package, the timing of the introduction and procedural impact are outlined below.

4 Summary of Changes

- There will be increased evidentiary requirements through changes to documentary and interview procedures.
- There will be a two year conditional period of residence granted to eligible applicants for resident status on spouse/de facto grounds.
- De facto relationships will not usually be considered genuine unless they are of at least 6 months duration prior to application.

MINIMUM DISTRIBUTION		SUBJECTS FOR INDEXING
CENTRAL OFFICE:	Branch Heads and above ☐ Section Heads and above ☑	PAM:PEPAE Topic 3 Spouse
REGIONAL OFFICES AUSTRALIA:	☑	
OVERSEAS:	All Posts ☑ DILGEA Posts ☐	
Last number issued to Overseas Posts: PC 1763		
FREEDOM OF INFORMATION ACT		EFFECT ON OTHER INSTRUCTIONS
PUBLICLY AVAILABLE ☑	PARTIALLY EXEMPT (See Text) ☐ EXEMPT ☐	Superseded PC1760

- There will be increased penalties for fraudulent claims associated with these applications - up to $100,000 and or imprisonment for 10 years for organisers of "false marriages".

- The application fee will increase from $360 to $750.

- There will be special provisions to allow for the grant of residence status to an applicant whose relationship has broken down before the residence application is decided and the applicant is suffering/has suffered domestic violence.

- There will be limited sponsorship rights, re-entry facilities and permission to work, available to people on conditional residence.

Timing of the Changes

5 Implementation of the "two year period of conditional residence," the new fee, the domestic violence provisions, and the sponsorship rights mentioned above can not take effect until amendments are made to the Regulations. These amendments are expected to be made in the next few weeks - further advice will be forthcoming.

6 Regulations 126 and 135 are to be amended. It is anticipated that the the "two years conditional residence" will take the form of an Extended Eligibility Temporary Entry Permit (EETEP), and that processing time up to the grant of the EETEP will be counted toward the two years. This means that a Permanent Entry Permit After Entry (PEPAE) may not be granted until at least two years after the date of lodgement of the application.

7 The increased penalties for fraudulent claims associated with these applications are dependent on amendment of the Migration Act. These amendments are proposed for the Autumn Session of Parliament.

8 Amendment to Social Security legislation will be required to allow payment of Special Benefit to holders of "conditional residence" permits. You will receive further advice on this issue.

Immediate Procedural Changes

9 From 22 January 1991 there is to be more rigorous testing of claims to residence on spouse/de facto grounds.

10 To implement the full package of measures, major procedural changes are in preparation eg a revised application form, PAM revision, more comprehensive declaration forms etc. Pending finalisation of procedural change, the increased scrutiny of claims will take the following format:

NOTICE TO PERSONS APPLYING TO REMAIN IN AUSTRALIA PERMANENTLY ON GROUNDS OF DE FACTO RELATIONSHIP WITH AN AUSTRALIAN CITIZEN / PERMANENT RESIDENT

In addition to the information contained in the Form 887N you should be aware of the following requirement:

- de facto relationships will not usually be considered genuine unless they are of at least 6 months duration prior to the lodgement of the application. So when you lodge your application it must be accompanied by evidence that your relationship has been in existence (in Australia and/or overseas) for at least 6 months

APPENDIX E

15 APRIL 1991 REGULATIONS

Statutory Rules 1991 No. [1]

Migration Regulations[2] (Amendment)

I, THE GOVERNOR-GENERAL of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following Regulations under the *Migration Act 1958*.

Dated 1991.

Governor-General

By His Excellency's Command,

Minister of State for Immigration,
Local Government and Ethnic Affairs

1. Commencement

1.1 These Regulations, other than subregulations 22.1, 29.2, 29.3 and 42.1, commence on 15 April 1991.

1.2 Subregulations 22.1, and 42.1 are taken to have commenced on 19 December 1989.

1.3 Subregulations 29.2 and 29.3 are taken to have commenced on 20 February 1990.

2. Amendment

2.1 The Migration Regulations are amended as set out in these Regulations.

3. Regulation 2 (Interpretation)

3.1 Subregulation 2 (1) (definition of "de facto spouse"):
Omit the definition, substitute:
"**'de facto spouse'** has the meaning set out in regulation 3A;".

3.2 Subregulation 2 (1) (definition of "extended eligibility entry permit)":
Omit the definition, substitute:
"**'extended eligibility entry permit'** means an entry permit specified in Schedule 3 as a class 12 entry permit;".

3.3 Subregulation 2 (1) (definition of "priority list of occupations"):
Omit the definition.

3.4 Subregulation 2 (1) (definition of "relative" ,paragraph (a)):
Omit "refugee:", substitute "refugee, an interdependency (temporary) visa or entry permit, an extended eligibility (interdependency) visa or entry permit or an interdependency (permanent) visa or entry permit:".

3.5 Subregulation 2 (1) (definition of "sponsor"):
Omit the definition, substitute:
"**'sponsor'**, in relation to an applicant for a visa or entry permit, means:

(a) a person who is not less than 18 years of age and is:
  (i) an Australian citizen: or
  (ii) an Australian permanent resident; or
  (iii) if the applicant is a dependent child of the holder of an extended eligibility (spouse) entry permit or an extended eligibility (interdependency) entry permit—that holder; or

(b) an organisation in Australia:

who or which:

(c) is approved by the Minister for the purpose of entering into sponsorship of the application: and

(d) has entered into the sponsorship;".

3.6 Subregulation 2 (1) (definition of "temporary resident visa" , paragraph (a)):
Omit "47 and 60", substitute "47, 60 and 62".

4. New regulation 3A

4.1 After regulation 3, insert:

Interpretation—de facto spouse

"3A. (1) For the purposes of these Regulations, a person is the de facto spouse of another person if, at the time when an application for a visa or entry permit is made by either of the persons, they:

(a) have lived together, during the immediately preceding 6 months (or such lesser period as is specified in a particular case, under subregulation (2)), on a genuinely domestic basis as spouses without being legally married to each other; and

(b) are not of the same sex.

"(2) For the purposes of subregulation (1), the Minister may, on written application, specify a period of less than 6 months if the Minister is satisfied that:

(a) there are exceptional circumstances affecting the persons: and

(b) there are compelling reasons for specifying that lesser period.".

5. Regulation 13 (Grant of visa)

5.1 Subparagraph 13 (2) (a) (iii):
Omit "59 and 60", substitute "59, 60, 61, 62 and 63".

5.2 Subparagraph 13 (2) (a) (v):
Omit "14 and 15", substitute "14, 15 and 16".

6. Regulation 17 (Conditions in connection with grant of visa)

6.1 Subregulation 17 (1):
Add at the end:

"(o) the condition that during the period of validity of the visa, there is no material change in the circumstances on the basis of which the visa is granted.".

7. Regulation 22B (Certain applications for temporary entry permits to have effect as applications for processing entry permits)

7.1 Paragraph 22B (2) (c):

Omit "permit.", substitute "permit; or".

7.2 Subregulation 22B (2):

Add at the end:

"(d) an extended eligibility (interdependency) entry permit.".

8. New regulation 22E

8.1 After regulation 22D, insert:

Certain applications for temporary entry permits to have effect as applications for further temporary entry permits

"22E. (1) An application by a person for an extended eligibility (spouse) entry permit also has effect as an application for a further extended eligibility (spouse) entry permit if:

(a) the first mentioned application is made:

(i) at the same time as an application for a spouse (after entry) entry permit; and

(ii) on the form approved by the Minister for the purposes of this regulation: and

(b) at the expiration of the period of validity of an entry permit granted in respect of the first-mentioned application, the Minister has determined, in writing, that more time is required to make a decision on the application for the spouse (after entry) entry permit.

"(2) An application by a person for an extended eligibility (interdependency) entry permit also has effect as an application for a further extended eligibility (interdependency) entry permit if:

(a) the first mentioned application is made:

(i) at the same time as an application for an interdependency (permanent) entry permit; and

(ii) on the form approved by the Minister for the purposes of this regulation: and

(b) when the period of validity of an entry permit granted in respect of the first-mentioned application has expired, the Minister has determined, in writing, that more time is required to make a decision on the application for the interdependency (permanent) entry permit.".

9. Regulation 28 (Conditions in connection with grant of temporary entry permits)

9.1 Subregulation 28 (1):

Add at the end:

"(m) the condition that during the period of validity of the entry permit, there is no material change in the circumstances on the basis of which the entry permit is granted.".

10. Regulation 34A (Satisfaction of prescribed criteria)

10.1 Subregulation 34A (2):

Omit "135," and "135 (d),".

11. Regulation 35AA (Grant of entry permits—illegal entrants)

11.1 After subregulation 35AA (1), insert:

"(1A) Despite any other provision in these Regulations, except subregulation (2), the Minister may grant an entry permit to a person who:

(a) is an illegal entrant by reason only of the operation of subsection 14 (2) of the Act; and

(b) satisfies the prescribed criteria in relation to that kind of entry permit (other than, if applicable, the prescribed criterion that the person be the holder of a valid entry permit and the criteria prescribed by subregulation 42 (1A));

if the person applies for the entry permit before being served, or before the expiry of 7 working days after the day on which he or she is served, with a notice by the Minister to the effect that the person is an illegal entrant.".

12. Regulation 36 (Restrictions on re-entry)

12.1 Paragraph 36 (2) (i):

Omit "permit.", substitute "permit;".

12.2 Subregulation 36 (2):

Add at the end:

"(j) an extended eligibility (spouse) visa or entry permit;

(k) an interdependency (temporary) visa or entry permit;

(l) an extended eligibility (interdependency) visa or entry permit;
(m) an interdependency (permanent) entry permit.".

12.3 Subregulation 36 (4):
Omit all the words after paragraph (d), substitute:
"(e) interdependency (temporary) visa;
(f) an extended eligibility (spouse) visa;
(g) an extended eligibility (interdependency) visa;
and **'priority entry permit'** means:
(h) any equivalent entry permit; or
(i) an interdependency (permanent) entry permit.".

13. Regulation 40 (Prescribed change in circumstances—paragraphs 36 (1) (a) and 37 (2) (a) of the Act
13.1 Subparagraph 40 (1) (q) (ii):
Omit the subparagraph, substitute:
"(ii) has made an application:
(A) before 19 December 1989—for a determination of refugee status under paragraph 47 (1) (d) of the Act; or
(B) in relation to such a determination—for reconsideration by the Minister of the determination;
which application had not been decided before 10 December 1990, or:
(C) on or after 19 December 1989—for a determination of refugee status under paragraph 47 (1) (d) of the Act; or
(D) for an extended eligibility (other) entry permit, an extended eligibility (limited) entry permit or a humanitarian grounds entry permit;".

13.2 Paragraph 40 (1) (l):
Omit "127 (a) (vi)", substitute "127 (a) (vi);".

13.3 Paragraph 40 (1) (r):
Omit "1991.", substitute "1991;".

13.4 Subregulation 40 (1):

Add at the end:
"(s) the person receives a notice by the Minister to the effect that the person is an illegal entrant by reason of the operation of subsection 14 (2) of the Act.".

13.4 Subparagraph 40 (2) (d) (iii):
Omit "September 1990.", substitute "September 1990;".

13.5 Subregulation 40 (2):
Add at the end:
"(e) the person:
(i) satisfies the criteria specified in paragraph 130A (1) (a); and
(ii) began the relationship referred to in subparagraph 130A (1) (a) (ii) before 19 December 1989.".

14. Regulation 42 (Classes of entry permit)
14.1 Subregulation 42 (2):
After "34,", insert "34B,".

14.2 Subregulation 42 (2):
After "59B,", insert "59C, 59D,".

14.3 Subregulation 42 (2):
Omit "(inclusive) and 74 to 78 (inclusive)", substitute "(inclusive),74 to 78 (inclusive), 90 and 94A".

15. New regulation 44A
15.1 After regulation 44, insert:

Extended eligibility (spouse) visa
"44A. (1) The additional criteria for an extended eligibility (spouse) visa are:
(a) if the applicant is in Australia on the day the application is made—that the applicant is the holder of a valid extended eligibility (spouse) entry permit; or
(b) if the applicant is not in Australia on the day the application is made:

(i) that the applicant was the holder of a valid extended eligibility (spouse) entry permit immediately before his or her last departure from Australia; and

(ii) that the Minister is satisfied that the relationship between the applicant and his or her spouse that met a criterion for the grant of that entry permit is genuine and continuing; or

(c) if the applicant is a dependent child of the holder of a valid extended eligibility (spouse) visa or entry permit:

(i) that the applicant is not in Australia at the time the application is made; and

(ii) that the applicant satisfies the criteria specified in items 5 and 10 of Schedule 1; and

(iii) that the sponsorship of the applicant by that holder is approved by the Minister; and

(iv) that the Minister is satisfied that the grant of the visa would not prejudice the rights or interests of any person who has, or may reasonably be expected to have, guardianship or custody of, or access to, the applicant.

"(2) In this regulation, **'holder of an extended eligibility (spouse) entry permit'** does not include a holder who applied for that entry permit before the commencement of this regulation.".

16. Regulation 51 (Employer nomination visa)

16.1 Omit the regulation, substitute:

Employer nomination visa

"51. The additional criteria in relation to an employer nomination visa are the following criteria:

(a) the applicant is nominated by an employer in respect of an approved appointment under Part 6A, in that employer's business;

(b) in relation to the approved appointment, the applicant is highly skilled within the meaning of subregulation 166A (2);

(c) unless the approved appointment is exceptional—the applicant is, at the time of making the application, less than 55 years of age;

(d) in the case of an applicant in relation to an appointment referred to in subparagraph 166A (1) (c) (ii)—the Minister is satisfied that the applicant has a genuine intention to reside permanently in Australia.".

17. New regulation 79A

17.1 After regulation 79, insert:

Interdependency (temporary) visa

"79A. (1) The additional criteria for an interdependency (temporary) visa are that, at the time when the application for the visa is decided:

(a) the applicant:

(i) is sponsored by a person who:

(A) is an Australian citizen or Australian permanent resident; and

(B) is not a member of the family unit, or other relative, of the applicant;

being a person who has a relationship with the applicant that is acknowledged by both and that involves:

(C) residing together; and

(D) being closely interdependent; and

(E) having a continuing commitment to mutual emotional and financial support; and

(ii) satisfies the Minister that the relationship with the sponsor:

(A) is genuine; and

(B) has existed for a period of at least 6 months (or such lesser period as the Minister specifies) immediately before the application is made; and

(C) will continue; and

(iii) if the applicant has dependent children—all such children (whether or not accompanying the applicant) satisfy:

(A) the public interest criteria that are applicable; and

(B) the prescribed health criteria specified in item 10 in Schedule 1; or

(b) the applicant is a dependent child of another applicant for an interdependency (temporary) visa (in this paragraph referred to as the **'principal applicant'**) and:

(i) the principal applicant is granted an interdependency (temporary) visa; and

(ii) the sponsorship of the principal applicant expressly extends to that child; and

(iii) the Minister is satisfied that the grant of the visa would not prejudice the rights or interests of any person who has, or may reasonably be expected to have, guardianship or custody of, or access to, that child.".

"(2) For the purposes of subregulation (1), the Minister may, on written application, specify a period of less than 6 months if the Minister is satisfied that:

(a) there are exceptional circumstances affecting the persons referred to in paragraph (1) (a); and

(b) there are compelling reasons for specifying that lesser period.

"(3) An applicant referred to in paragraph (1) (a) who is less than 18 years of age at the time the application is made is not entitled to be granted an interdependency (temporary) visa.".

18. Regulation 89 (Close family visitor visa)

18.1 Omit "immediate", substitute "close".

19. New regulation 107C

19.1 After regulation 107B, insert:

Extended eligibility (interdependency) visa

"107C. The additional criteria for an extended eligibility (interdependency) visa are:

(a) if the applicant is in Australia on the day the application is made—that the applicant is the holder of a valid extended eligibility (interdependency) entry permit; or

(b) if the applicant is not in Australia on the day the application is made:

(i) that the applicant was the holder of a valid extended eligibility (interdependency) entry permit immediately before his or her last departure from Australia; and

(ii) that the Minister is satisfied that the relationship between the applicant and his or her nominator that met a criterion for the grant of that entry permit is genuine and continuing; or

(c) if the applicant is a dependent child of the holder of a valid extended eligibility (interdependency) visa or entry permit:

(i) that the applicant is not in Australia at the time the application is made; and

(ii) that the applicant satisfies the criteria specified in items 5 and 10 of Schedule 1; and

(iii) that the sponsorship of the applicant by that holder is approved by the Minister; and

(iv) that the Minister is satisfied that the grant of the visa would not prejudice the rights or interests of any person who has, or may reasonably be expected to have, guardianship or custody of, or access to, the applicant.".

20. Regulation 108 (Grant of visa or entry permit to family unit members)

20.1 Paragraph 108 (6) (b):

Omit "permit.", substitute "permit; or".

20.2 Subregulation 108 (6):

Add at the end:

"(c) an applicant for, or the holder of, an extended eligibility (spouse) visa or entry permit; or

(d) an applicant for, or the holder of:

(i) an interdependency (temporary) visa or entry permit; or

(ii) an extended eligibility (interdependency) visa or entry permit.".

21. Regulation 117A (Domestic protection (temporary) entry permit)

21.1 Paragraph 117A (1) (b):

Omit "granted refugee status by the Minister:", substitute "determined by the Minister to have refugee status;".

21.2 Subparagraph 117A (1) (c) (ii):
Omit "X—ray", substitute "X-ray".

21.3 Subregulation 117A (2):
Omit the subregulation, substitute:

"(2) The period specified under paragraph 24 (1) (d) in relation to a domestic protection (temporary) entry permit must not exceed 4 years.".

22 New regulations 119L and 119M

22.1 After regulation 119K, insert:

Special equivalent 1989 (temporary) entry permit

"119L. The following criteria are prescribed in relation to a special equivalent 1989 (temporary) entry permit:

(a) the applicant:
  (i) is the holder of a valid visa that he or she applied for before 19 December 1989; and
  (ii) would have been granted a temporary entry permit if he or she had entered Australia before 19 December 1989; and
(b) there is, in relation to that visa, no temporary entry permit that is an equivalent entry permit.

Special equivalent 1989 (permanent) entry permit

"119M. The following criteria are prescribed in relation to a special equivalent 1989 (permanent) entry permit:

(a) the applicant:
  (i) is the holder of a valid visa that he or she applied for before 19 December 1989; and
  (ii) would have been granted an entry permit other than a temporary entry permit if he or she had entered Australia before 19 December 1989; and
(b) there is, in relation to that visa, no permanent entry permit that is an equivalent entry permit.".

23. Regulation 120 (Grant of temporary entry permit to holders of visitor visa, visitor entry permit or prescribed temporary entry permit)

23.1 Omit "permit or a domestic worker (diplomatic or consular)", substitute "permit, domestic worker (diplomatic or consular) entry permit or an interdependency (temporary)".

24. Regulation 121 (Grant of temporary entry permit to holders of working holiday visa or entry permit or prescribed temporary entry permit)

24.1 Paragraph 121 (e):
Omit "permit or a medical treatment", substitute "permit, medical treatment entry permit or an interdependency (temporary)".

25. Regulation 122 (Grant of temporary entry permit to holders of certain student visas or entry permits or of a prescribed temporary entry permit)

25.1 Omit "permit or a domestic worker (diplomatic or consular)", substitute "permit, domestic worker (diplomatic or consular) entry permit or an interdependency (temporary)".

26. Regulation 125 (Prescribed criteria for grant of temporary entry permit to lawful temporary residents or holders of prescribed temporary entry permits)

26.1 Omit "permit or a domestic worker (diplomatic or consular)", substitute "permit, domestic worker (diplomatic or consular) entry permit or an interdependency (temporary)".

27. Regulation 126 (Extended eligibility (spouse) entry permit)

27.1 Omit the regulation, substitute:

Extended eligibility (spouse) entry permit

"126. (1) The prescribed criteria in relation to an extended eligibility (spouse) entry permit are that, at the time when the application for the permit is decided:

(a) the applicant:
  (i) is the spouse of:

(A) an Australian citizen; or
(B) an Australian permanent resident;
who:
(C) was the spouse of the applicant when the application was made; and
(D) nominated the applicant for grant of the entry permit; and
(E) has a marital relationship with the applicant that is genuine and continuing; and

(ii) is not an illegal entrant, other than:
(A) a prescribed applicant referred to in paragraph 42 (1C) (a), (b), (ba) or (c); or
(B) a person who, before becoming an illegal entrant, entered Australia as an exempt non-citizen referred to in paragraph (b) or (e) of the definition of **'exempt non-citizen'** in subsection 4 (1) of the Act; and
(iii) if the applicant has dependent children—all such children (whether or not accompanying the applicant) satisfy:
(A) the public interest criteria that are applicable; and
(B) the prescribed health criteria specified in item 10 in Schedule 1; or

(b) the applicant is a person who:
(i) would satisfy the criteria specified in paragraph (a) except that his or her spouse has died; and
(ii) satisfies the Minister that the marital relationship was genuine and, had the spouse not died, would have continued; and
(iii) has developed close business, cultural or personal ties in Australia; or

(c) the applicant is a dependent child of the holder or an extended eligibility (spouse) entry permit and:
(i) is in Australia; and
(ii) satisfies:
(A) the public interest criteria that are applicable; and
(B) the prescribed health criteria specified in item 10 in Schedule 1; and
(iii) satisfies the Minister that grant of the entry permit would not prejudice the rights or interests of any

person who has, or may reasonably be expected to have, guardianship or custody of, or access to, that child; or

(d) the applicant, being a person who is, or was at time of making the application, the holder of an extended eligibility (spouse) entry permit—has applied for a spouse (after entry) permit in respect of which the Minister has:
(i) not made a decision; and

(ii) determined, in writing, that more time is required to make a decision.

"(2) The holder of a transit entry permit is not entitled to be granted an extended eligibility (spouse) entry permit.

"(3) An extended eligibility (spouse) entry permit must not have a period of validity greater than 2 years.

"(4) This regulation is taken to apply to a person who meets the criterion specified in sub-subparagraph (1) (a) (ii) (B) as if the regulation had commenced operation on 19 December 1989.".

28. New regulation 130A

28.1 After regulation 129, insert:

Extended eligibility (interdependency) entry permit

"130A. (1) The prescribed criteria for an extended eligibility (interdependency) entry permit are that, at the time when the application for the entry permit is decided:

(a) the applicant:
(i) is nominated for the grant of the entry permit by a person who:
(A) is an Australian citizen or Australian permanent resident; and
(B) is not a member of the family unit, or other relative of the applicant;
being a person who has a relationship with the applicant that is acknowledged by both and that involves:
(C) residing together; and
(D) being closely interdependent; and

(E) having a continuing commitment to mutual emotional and financial support; and

(ii) satisfies the Minister that the relationship with the nominator:

(A) has existed for a period of at least 6 months (or such lesser period as the Minister specifies) immediately before the application is made; or

(B) in the case of an applicant who is the holder of a valid interdependency (temporary) entry permit—is the same relationship as the relationship that satisfied a criterion for the grant of the interdependency (temporary) entry permit;

and that that relationship:

(C) is genuine; and

(D) will continue; and

(iii) is not an illegal entrant, other than:

(A) a prescribed applicant referred to in paragraph 42 (1C) (a) or (c); or

(B) a person who, before becoming an illegal entrant, entered Australia as an exempt non-citizen referred to in paragraph (b) or (e) of the definition of **'exempt non-citizen'** in subsection 4 (1) of the Act; and

(iv) if the applicant has dependent children—all such children (whether or not accompanying the applicant) satisfy:

(A) the public interest criteria that are applicable; and

(B) the prescribed health criteria specified in item 10 in Schedule 1; or

(b) the applicant is a person who:

(i) satisfies the criteria specified in paragraph (a) except that his or her nominator has died; and

(ii) satisfies the Minister that the relationship with the nominator was genuine and, had the nominator not died, would have continued; and

(iii) has developed close business, cultural or personal ties in Australia; or

(c) the applicant is a dependent child of another applicant for an extended eligibility (interdependency) entry permit (in this paragraph referred to as the **'principal applicant'**) and:

(i) the child is in Australia; and

(ii) the principal applicant is granted an extended eligibility (interdependency) entry permit; and

(iii) the nomination of the principal applicant expressly extends to that child; and

(iv) the Minister is satisfied that the grant of the entry permit would not prejudice the rights or interests of any person who has, or may reasonably be expected to have, guardianship or custody of, or access to, that child; or

(d) the applicant, being a person who is, or was at time of making the application, the holder of an extended eligibility (interdependency) entry permit—has applied for an interdependency (permanent) permit in respect of which the Minister has:

(i) not made a decision; and

(ii) determined, in writing, that more time is required to make a decision.

"(2) For the purposes of subregulation (1), the Minister may, on written application, specify a period of less than 6 months if the Minister is satisfied that:

(a) there are exceptional circumstances affecting the persons referred to in subparagraph (1) (a); and

(b) there are compelling reasons for specifying that lesser period.

"(3) A person who:

(a) is the holder of a transit entry permit; or

(b) being a person referred to in paragraph (1) (a) or (b)—is less than 18 years of age at the time the application is made;

is not entitled to be granted an extended eligibility (interdependency) entry permit.

"(4) An extended eligibility (interdependency) entry permit must not have a period of validity greater than 2 years.".

29. Regulation 131 (Processing entry permits)

29.1 Subparagraph 131 (b):
Omit "criteria.", substitute "criteria;".

29.2 Paragraph 131 (c):
Omit "(except those relating to health and character)".

29.3 Paragraph 131 (c):
Omit "*1989*);", substitute:
"*1989* except:

(i) the requirements relating to health and character; and
(ii) the requirement that the applicant be the holder of a temporary entry permit;".

29.4 Paragraph 131 (e):
Omit "determined.", substitute "determined;".

29.5 Add at the end:

"(f) in the case of an applicant for an extended eligibility (spouse) entry permit:
(i) the applicant, before becoming an illegal entrant, entered Australia as an exempt non-citizen referred to in paragraph (b) or (e) of the definition of **'exempt non-citizen'** in subsection 4 (1) of the Act; and
(ii) the applicant is the spouse of:
(A) an Australian citizen; or
(B) an Australian permanent resident; and
(iii) the Minister is satisfied that it would be unreasonable to require the applicant to leave Australia before the application is decided.

30. Regulation 135 (Spouse (after entry) entry permit)

30.1 Omit the regulation, substitute:

Spouse (after entry) entry permit

"135. (1) Subject to subregulation (2), the additional criteria in relation to a spouse (after entry) entry permit are that:

(a) at the time when the application for the entry permit is decided:
(i) the applicant is the spouse of:
(A) an Australian citizen; or
(B) an Australian permanent resident;

who:
(C) nominated the applicant for the grant of the entry permit; and
(D) has a genuine and continuing marital relationship with the applicant; and
(ii) the applicant is the holder of a valid extended eligibility (spouse) entry permit, a criterion for the grant of which was that the applicant was the spouse of that Australian citizen or Australian permanent resident; and

(iii) the decision is not made earlier than 2 years after the day on which the application is made; or

(b) the applicant is a person who:
(i) would satisfy the criteria specified in subparagraphs (a) (i) and (ii) except that his or her spouse has died before the Minister makes a decision on the application; and

(ii) satisfies the Minister that the marital relationship was genuine and, had the spouse not died, would have continued; and
(iii) has developed close business, cultural or personal ties in Australia.

"(2) If the applicant, when applying for an extended eligibility (spouse) entry permit (or other entry permit):
(a) was:
(i) an illegal entrant; and
(ii) a prescribed applicant referred to in paragraph 42 (1C) (a), (b), (ba) or (c); or
(b) did not apply for the entry permit on the form referred to in subregulation 22B (1);
and, before the commencement of this subregulation:
(c) the application for that entry permit has not been decided; or
(d) the application for that entry permit has been decided but the applicant has not applied for a spouse (after entry) entry permit;
the additional criteria in relation to a spouse (after entry) entry permit are that, at the time when the application for the permit is decided:
(e) the applicant:
(i) is the spouse of:
(A) an Australian citizen; or

(B) an Australian permanent resident; and

(ii) has a genuine and continuing marital relationship with that citizen or resident spouse; and

(iii) is nominated for the grant of the entry permit by that citizen, or resident, spouse; and

(iv) is a person to whom any of the paragraphs of subsection 47 (1) of the Act applies: or

(f) the applicant is a person who:

(i) would satisfy the criteria specified in paragraph (e) except that his or her spouse has died: and

(ii) satisfies the Minister that the marital relationship was genuine and, had the spouse not died, would have continued: and

(iii) has developed close business, cultural or personal ties in Australia.".

31. New regulation 142D

31.1 After regulation 142C, insert:

Interdependency (permanent) entry permit

"142D. The additional criteria in relation to an interdependency (permanent) entry permit are that:

(a) at the time when the application for the permit is decided, the applicant:

(i) is nominated by:

(A) an Australian citizen: or

(B) an Australian permanent resident;

who has a relationship with the applicant that is acknowledged by both and that involves:

(C) residing together: and

(D) being closely interdependent: and

(E) having a continuing commitment to mutual emotional and financial support; and

(ii) is the holder of a valid extended eligibility (interdependency) entry permit, a criterion for the grant of which was that the applicant and that Australian citizen or Australian permanent resident had the relationship specified in subparagraph 130A (1) (a) (i);

and the application has been made not less than 2 years before the day on which the application is decided; or

(b) the applicant is a person who:

(i) would satisfy the criteria specified in subparagraph (a) (i) and (ii) except that the Australian citizen or Australian permanent resident with whom the applicant had the relationship referred to in that paragraph has died; and

(ii) satisfies the Minister that that relationship was genuine and, had the other party to the relationship not died, would have continued; and

(iii) has developed close business, cultural or personal ties in Australia; or

(c) the applicant is a dependent child of another applicant for an interdependency (permanent) entry permit (in this paragraph referred to as the **'principal applicant'**) and:

(i) the child is in Australia: and

(ii) the principal applicant is granted an interdependency (permanent) entry permit: and

(iii) the nomination of the principal applicant expressly extends to that child; and

(iv) the Minister is satisfied that the grant of the entry permit would not prejudice the rights or interests of any person who has, or may reasonably be expected to have, guardianship or custody of, or access to, that child.".

32. Regulation 144 (Waiver of health criteria)

32.1 Paragraph 144 (1) (x):

Omit "(permanent).", substitute "(permanent); and".

32.2 Subregulation 144 (1):

Add at the end:

"(y) extended eligibility (spouse); and

(z) interdependency (temporary); and

(za) extended eligibility (interdependency); and

(zb) interdependency (permanent).".

33. Regulation 146 (Qualifications—suitability for employment)

33.1 Subregulation 146 (1):

After "qualification" (second occurring), insert "prescribed".

33.2 Sub-subparagraph 146 (1) (a) (i) (B):
Omit "included in the priority list of occupations:", substitute "a priority occupation:".

33.3 Sub-subparagraph 146 (1) (a) (i) (C):
Omit the sub-subparagraph, substitute:

"(C) for which, in Australia, a degree, trade certificate, diploma, associate diploma or post-trade qualificationpis required or that is a professional-equivalent occupation or a technical-equivalent occupation; and".

33.4 Sub-subparagraph 146 (1) (a) (i) (D):
Omit "degree or trade certificate", substitute "degree, trade certificate, diploma, associate diploma or post-trade qualification".

33.5 Subparagraph 146 (1) (a) (ii):
Omit the subparagraph, substitute:

"(ii) has in respect of that occupation, qualifications or experience (or both) required for the purpose of any Australian occupational licence or registration (or both); and".

33.6 Subparagraph 146 (1) (a) (iii):
Omit the subparagraph, substitute:

"(iii) has worked in that occupation, or, on any occasion when not working in the usual occupation, a closely related occupation:

(A) for not less than 3 years, or such longer period as is specified by a CTC or NOOSR, (except for periods of absence that, in total duration, have not exceeded 12 months) immediately before making the application; and

(B) in the case of a person who has a qualification referred to in sub-subparagraph

(1) (a) (i) (D)—after acquiring that qualification:".

33.7 Paragraph 146 (1) (b):
Omit the paragraph, substitute:

"(b) the applicant's usual occupation:

(i) is not a priority occupation: and

(ii) is an occupation:

(A) for which, in Australia, a degree or trade certificate is required; or

(B) that is a professional-equivalent occupation; and

(iii)in respect of which the applicant has:

(A) a degree, trade certificate or post-trade qualification that is assessed by the relevant Australian authority as meeting Australian educational or training standards for that occupation; or

(B) experience assessed by the relevant Australian authorities to be equivalent to the Australian standards for that occupation:

(iv) in respect of which the applicant has qualifications or experience (or both) required for the purpose of holding any Australian occupational licence or registration (or both); and

(v) in which the applicant has worked or (on any occasion when not working in the usual occupation) that is closely related to the occupation in which the applicant has worked:

(A) for not less than 3 years, or such longer period as is specified by a CTC or NOOSR, (except for periods of absence that, in total duration, have not exceeded 12 months) immediately before making the application; and

(B) in the case of an applicant to whom sub-subparagraph (iii) (A) applies, after acquiring the qualification referred to in that sub-subparagraph;".

33.8 Paragraph 146 (1) (c):
Omit the paragraph, substitute:

"(c) the applicant meets the qualification specified in paragraph (b) except that, in respect of subparagraph (b) (v), he or she has worked, immediately before making the application:
(i) for a period of less than 3 years; or
(ii) if a longer period of relevant work is specified by a CTC or NOOSR for the purposes of this provision—for a period less than that specified period;".

33.9 Paragraph 146 (1) (d):
Omit the paragraph, substitute:
"(d) the applicant's usual occupation:
(i) is not a priority occupation; and
(ii) is an occupation:
(A) for which, in Australia, a diploma or associate diploma is required; or
(B) that is a technical-equivalent occupation; and
(iii) in respect of which the applicant has:
(A) a diploma or associate diploma that is assessed by the relevant Australian authority as meeting Australian educational or training standards for that occupation; or
(B) experience assessed by the relevant Australian authorities to be equivalent to the Australian standards for that occupation;
(iv) in respect of which the applicant has qualifications or experience (or both) required for the purpose of holding any Australian occupational licence or registration (or both); and
(v) in which the applicant has worked or (on any occasion when not working in the usual occupation) that is closely related to the occupation in which the applicant has worked:
(A) for not less than 3 years, or such longer period as is specified by a CTC or NOOSR, (except for periods of absence that, in total duration, have not exceeded 12 months) immediately before making the application; and
(B) in the case of an applicant to whom sub-subparagraph (iii) (A) applies, after acquiring

the qualification referred to in that sub-subparagraph;".

33.10 Subparagraph 146 (1) (e) (ii):
Omit the subparagraph, substitute:
"(ii) has, immediately before making the application, worked in the applicant's usual occupation, or, on any occasion when not working in the usual occupation, a closely related occupation:
(A) for a period of less than 3 years; or
(B) if a period of relevant work is specified by a CTC or NOOSR for the purposes of this provision—for a period less than that specified period;
and:
(C) in the case of a person who has a qualification referred to in sub-subparagraph (1) (a) (i) (D)—after acquiring that qualification:".

33.11 Paragraph 146 (1) (h):
Omit "6 years of", substitute "12 years of primary and".

33.12 Paragraph 146 (1) (i):
Omit "4 years of", substitute "10 years of primary and".

33.13 Subparagraph 146 (1) (j) (i):
Omit the subparagraph, substitute:
"(i) is the holder of a degree, diploma, associate diploma or trade certificate that:
(A) was completed not earlier than 12 months immediately before making the application; and
(B) is assessed by the relevant Australian authority to be of equivalent standard to a comparably styled degree, diploma, associate diploma or trade certificate awarded by an Australian educational institution; and".

33.14 Subparagraph 146 (1) (k) (ii):
Omit the subparagraph, substitute:

"(ii) is the holder of a degree, diploma, associate diploma or trade certificate that:

(A) was completed earlier than 12 months immediately before making the application; and

(B) is assessed by the relevant Australian authority to be of equivalent standard to a comparably styled degree, diploma, associate diploma or trade certificate awarded by an Australian educational institution; and".

33.15 Subregulation 146 (2):

Omit the subregulation, substitute:

"(2) In this regulation:

'professional-equivalent occupation' means an occupation specified by the Minister, by notice published in the *Gazette*, to be a professional-equivalent occupation;

'priority occupation' means an occupation specified by the Minister, by notice published in the *Gazette*, to be a priority occupation;

'relevant Australian authority' means:

(a) NOOSR, or any body authorised in writing by NOOSR to assess educational qualifications or work experience on behalf of NOOSR; or

(b) a CTC; or

(c) if the circumstances of the case are such that an authority referred to in paragraph (a) or (b) is unable to make an assessment—an officer authorised in writing by the Minister or the Secretary to assess educational qualifications or work experience for the purposes of this regulation;

'technical-equivalent occupation' means an occupation specified by the Minister, by notice published in the *Gazette*, to be a technical-equivalent occupation.".

34. New Part 6A

34.1 After Part 6, insert the following Part:

"PART 6A—EMPLOYER NOMINATION

Employer nomination criteria

"166A. (1) The criteria in relation to an employer nomination in respect of a proposed employment appointment are:

(a) the employer nomination must be made by an employer in respect of a need for a paid employee in a business:

(i) located in Australia; and

(iii) operated by that employer;

(b) the work to be performed requires the appointment of a highly skilled person;

(c) the appointment will provide the employee with full-time employment and will:

(i) be permanent; or

(ii) in the case of an appointment to an academic or scientific-research position in an academic, or scientific research, institution:

(A) be for a fixed term of at least 3 years; and

(B) not be subject to an express exclusion of the possibility of renewal of the appointment for a further such term;

(d) the Minister is satisfied that:

(i) the employer has made, and continues to make, adequate provision for training existing employees in work relevant to the business; or

(ii) if the business is newly established—the employer is making adequate provision for future training of employees in work relevant to the business;

(e) the Minister is satisfied that:

(i) an Australian citizen or resident cannot be found who is suitable for the appointment; or

(ii) in the circumstances of the case—the employer should not be required to seek a suitable employee in Australia.

"(2) In this regulation:

'highly skilled person', in relation to a proposed employment appointment, means a person will have, in respect of work of the kind to be performed under that appointment:

(a) completed, over a period of at least 3 years, formal training or equivalent experience; and

(b) unless the approved appointment is exceptional—been employed for at least 3 years;

(i) after completing the training or experience referred to in paragraph (a); and
(ii) before making the application; and
(c) acquired competence assessed by the Minister to be at least average for a person to whom paragraphs (a) and (b) apply.

Approved appointment

"166B. A proposed appointment, the subject of an employer nomination that satisfies the criteria specified in regulation 166A, is an **'approved appointment'** for the purpose of regulation 51.".

35. Regulation 186 (Fee on application for certain entry permits)

35.1 Paragraph 186 (1) (a):
Omit the paragraph.

36. New regulations 186A, 186B and 186C

36.1 After regulation 186, insert:

Fee on application for an extended eligibility (spouse) entry permit

"186A. (1) Subject to subregulation (2), the fee payable on application for an extended eligibility (spouse) entry permit is:
(a) in the case of an applicant referred to in sub-subparagraph 126 (1) (a) (ii) (A)—$360; or
(b) in any other case—$750.

"(2) No fee is payable on application for a further extended eligibility (spouse) entry permit if the application takes effect under regulation 22E.".

Fee on application for a spouse (after entry) entry permit

"186B. (1) There is payable, on application for a spouse (after entry) entry permit:
(a) if at the time the application is made, the applicant holds a valid temporary entry permit:
(i) that is not subject to the condition referred to in 33 (4) (a) of the Act; and
(ii) for which application was made:
(A) before the commencement of this regulation; and

(B) otherwise than in accordance with subregulation 22B (1);
a fee of $150; or
(b) in any other case—no fee.".

Fee on application for an extended eligibility (interdependency) entry permit

"186C. (1) There is payable, on application for an extended eligibility (interdependency) entry permit, a fee of $750.

"(2) No fee is payable on application for a further extended eligibility (interdependency) entry permit if the application takes effect under regulation 22E.".

37. Fee on application for visa to enable re-entry

37.1 Paragraphs 191 (a) and (b):
Omit "(inclusive), 80, 81 and 82", substitute "(inclusive) and 80 to 87 (inclusive)".

38. New regulation 191A

38.1 After regulation 191, insert:

Employer nomination fee

"191A. There is payable in respect of an employer nomination under regulation 166A, a fee of $100.".

39. New regulation 202

39.1 After regulation 201, insert:

Fee on application under paragraph 40 (1) (p)

"202. Despite any other provision in these Regulations, no fee is payable on application for an entry permit if the application is made:
(a) in consequence of the applicant having received a notice referred to in paragraph 40 (1) (s); and
(b) not later than the expiry of 7 working days after the day on which the applicant received the notice.".

40. Schedule 1 (Criteria and representative symbols)

40.1 Item 6 (column 2), paragraph (a):

Omit "the applicant, being an applicant seeking permanent residence in Australia, when",

substitute:

"an applicant for a visa or entry permit, at the time when the person is".

41. Schedule 2 (Classes of visas, prescribed criteria and code numbers)

41.1 Part 1:

After item 60, insert:

"61	extended eligibility (spouse)	(a) the criteria specified in regulation 44A	820
62	interdependency (temporary)	(a) the criteria specified in regulation 79A (b) D, H^1	305
63	extended eligibility (interdependency)	(a) the criteria specified in regulation 107C".	826

41.2 Part 3:

Add at the end:

"16	special equivalent (temporary)".	304

42. Schedule 3 (Classes of entry permits)

42.1 Class 1 entry permit, item 2 (column 3):

Omit "B", substitute "B^1".

42.2 Class 1 entry permit:

After item 34, add:

"34B	special equivalent 1989 (permanent)	Reg. 119M	813
34C	interdependency (permanent)	Reg. 142D; B^1, D, E, H^1".	814

42.3 Class 2 entry permit:

After item 59B, add:

"59C	special equivalent 1989 (temporary)	Reg. 119L	304
59D	interdependency (temporary)		305".

42.4 Class 12 entry permit, item 90 (column 3):

Insert:

"Reg. 126; B^1, D, H^1".

42.5 Class 12 entry permit:

After item 94, add:

"94A	extended eligibility (interdependency)".	Reg. 130A; B^1, D, H^1	826

43. Schedule 4 (Prescribed qualifications and prescribed number of points)

43.1 Part 5, Column 2:

Omit "of entering into" (wherever occurring), substitute "the Department receives".

43.2 Parts 6 and 7:

Omit the Parts, substitute:

"PART 6—SETTLEMENT OF SPONSOR QUALIFICATION

24 sponsor:

(a) has been resident in Australia (except for short absences for the purposes of recreation or business) throughout the period of 2 years immediately before the Department receives the relevant sponsorship; and

(b) is not, at the time the sponsorship is entered into, receiving a benefit under the *Student Assistance Act 1973* or any form of Australian social security benefit, other than:

(i) an age pension under the *Social Security Act 1947*; or

(ii) a pension under the *Seamen's War Pensions and Allowances Act 1940* or the *Veteran's Entitlements Act 1986*;

and:

(c) if a person who is financially independent, engaged in paid employment or receiving a benefit referred to in subparagraph (b) (i) or (ii)—has not received an unemployment benefit or a special benefit under the *Social Security Act 1947* in respect of more than 4 weeks during that period of 2 years; or

(d) if not a person who is financially independent, engaged in paid employment or receiving a benefit referred to in subparagraph (b) (i) or (ii)—does not have a spouse who has received an unemployment benefit or a special benefit under the *Social Security Act 1947* in respect of more than 4 weeks during that period of 2 years

24A sponsor is not a person to whom item 24 in this Schedule applies

PART 7—LOCATION OF SPONSOR QUALIFICATION

25 sponsor has been, throughout the period of 2 years immediately before the Department receives the relevant sponsorship (except for short absences for the purposes of recreation or business), resident in one or more of the areas specified by the Minister, by notice published in the *Gazette*, to be **'designated areas'** for the purpose of this item

44. Schedule 5 (Mandatory conditions for grant of visas and entry permits)

44.1 Item 1, (column 2):
Omit "or entry permit", substitute:
"or entry permit, special equivalent (temporary) visa or entry permit".

44.2 After item 12, insert:

"13	61, 63	condition referred to in paragraphs 17 (1) (o) and 28 (1) (m) respectively
14	62	condition referred to in paragraphs 23 (4) (a) and 33 (4) (a) of the Act respectively condition referred to in paragraphs 17 (1) (o) and 28 (1) (m) respectively".

45. Schedule 8 (Fees)

45.1 Part 1:
After item 83, insert:

"84	extended eligibility (spouse) visa	(a) if the application is lodged in Australia —$50 (b) if the application is lodged outside Australia—$100
85	special equivalent 1989 (temporary)	$50
86	interdependency (temporary) visa	(a) if the application is lodged in Australia —$50 (b) if the application is lodged outside Australia—$100
87	extended eligibility (interdependency) visa	(a) if the application is lodged in Australia —$50 (b) if the application is lodged outside Australia—$100".

45.2 Part 2, item 1, (column 3):
Omit "186", substitute "186B".

45.3 Part 2, item 11, (column 3):
Omit "$360", substitute:
"the fee ascertained under regulation 186A".

45.4 Part 2:
Add at the end:

"26	extended eligibility (interdependency)	the fee ascertained under regulation 186C
27	interdependency (permanent)	—"

NOTES

1. Notified in the *Commonwealth of Australia Gazette* on 1991.

2. Statutory Rules 1989 No. 365 as amended by 1989 Nos. 414 and 416; 1990 Nos. 1, 34, 69, 75, 109, 204, 237, 242, 251, 261, 272, 279, 320, 339, 371, 402 and 452; 1991 Nos. 2, 8 18 and 25.

APPENDIX F

PROCEDURES ADVICE MANUAL, DE FACTO MARRIAGE RELATIONSHIPS

Procedures Advice Manual

De Facto Marriage Relationships

1st edition
December 1989

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2. Legislative framework
3. Interpreting the legislation
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Department of Immigration, Local Government and Ethnic Affairs

3 Interpreting the legislation

3.1 Assessing De facto Marriage Relationships

3.1.1 As de facto marriage relationships are generally not evidenced by formal documentation as in the case of a legal marriage, claims that a de facto relationship exists must be examined to decide if the relationship falls within the definition in the regulations. The onus is on the applicant to satisfy the officer that a genuine and continuing de facto relationship exists.

3.1.2 Marriages which are not legally recognised under the Migration Act (eg some polygamous marriages), or marriages for which there is no documentation (eg customary marriages), may be considered against the de facto marriage relationship criteria. This would only occur where the marriage cannot be legally recognised, but where the relationship itself is in accord with Australian social values. The Subject: Marriage and Divorce should be referred to for a detailed discussion of the recognition of marriages under the Migration Act.

3.1.3 To establish that a de facto relationship exists, applicants need to evidence an ongoing relationship containing elements commonly found in marital relationships. There is of course a wide variety of elements which may be found in marriages and the same range can be expected in de facto relationships. The principal elements commonly attributed to marriages are:

- a common residence
- a level of mutual support and co-operation in financial, social and domestic matters
- an intention that the relationship should be lasting and exclusive.

3.1.4 The following list gives an indication of the factors which may be considered relevant in establishing a claim that a de facto marriage relationship exists. De facto relationships can have the same degree of diversity as a marriage relationship and the list below serves only as a guide to officers assessing the de facto relationship. The absence of some of the factors

listed will not necessarily disqualify a claim that a de facto relationship exists. Similarly, individual cases may also rely on evidence which is not covered by the guidelines. A balanced assessment of all the information provided by the applicants or otherwise available from Departmental records should be made.

3.1.5 Guidelines for assessing de facto marriage relationships:

- *public recognition of the parties as a couple in an ongoing domestic relationship:*
  evidence may include:
  – joint membership of organisations or groups;
  – documentary evidence of joint participation in sporting, cultural, social or other activities;
  – statements of parents, family members, relatives, friends and other interested parties. Such statements should be in the form of statutory declarations. Evidence of the relationship solely in the form of statutory declarations from close friends will not normally be sufficient for the *purpose of establishing the genuineness* of the relationship unless other supporting evidence is available.

  Absence of evidence of public recognition in countries where law, culture or religion prohibits de facto relationships would not preclude an assessment that a de facto marriage relationship exists.
- *knowledge of each other's personal circumstances, background and family situation:*
  this may be investigated at interview (if one is conducted). Note: all applicants for a Permanent Entry Permit After Entry on the basis of a de facto relationship are required to be interviewed.
- *shared accommodation:*
  shared accommodation can be evidenced by:
  – joint ownership of residential property;
  – joint residential leases;
  – joint rental receipts;
  – joint utility accounts (electricity, gas, telephone);
  – correspondence addressed to either or both parties at the same address.

Evidence of the joint arrangement(s) having existed for a reasonable period of time would be given more weight than recently established joint arrangements.

- *shared responsibility for children of the relationship or children of either party, living as part of the family unit:*
  this may be investigated at interview (if one is conducted). Birth certificates for any children of the relationship, showing details of both parents should be obtained.
- *sharing of income, financial assets and liabilities:*
  joint financial and other commitments may be evidenced by:
  – major joint purchases, including for example, residential property, car, or household furnishings;
  – operation of joint bank or credit accounts – evidence that the account has been operated with reasonable frequency and for a reasonable period of time would be given more weight than just the opening of such an account.
- *declaration of the relationship:*
  evidence that the relationship has been declared to other government bodies and commercial/public institutions or authorities and acceptance of these declarations by such bodies.
- *existence of sexual relationship:*
  a de facto marriage relationship would normally involve a sexual relationship between the parties. This is not however conclusive and officers should be careful to respect the privacy of applicants. Evidence that a sexual relationship exists, without other evidence that the parties are living together on a bona fide domestic basis is not sufficient to prove that a de facto relationship exists.
- *intentions that relationship will be long term:*
  a relationship is not necessarily temporary because it has only just commenced, or has existed for only a short time. However the longer the period for which the relationship can be substantiated, the more weight can be given to claims that it is intended that the relationship will be long term. In general, evidence that the relationship has existed for at least 12 months is required. This should be supported by indications that the parties consider the relationship to be more than temporary such as the extent to which the

parties have combined their affairs. Officers should be satisfied that the parties intend to continue living on a long-term basis as a de facto couple in Australia.

- *intermittent cohabitation:*
  intermittent cohabitation (eg where work commitments may prevent the parties living together full-time) does not preclude a de facto marriage relationship existing. Such circumstances would require more extensive inquiry to establish that the arrangements were consistent with the continuance of a de facto relationship. Evidence of communication between the parties during any periods of separation may be relevant.
- *the use of one family name:*
  evidence of the use of one family name may include:
  – copies of name change deed polls;
  – documents issued in the common family name;
  – official correspondence addressed to both parties in the common family name.
- *the terms of the parties' wills:*
  wills made out in each other's favour provide some evidence of an intention that the relationship is permanent.

NOTE: This list is not exhaustive and decision makers should not ignore relevant considerations which may emerge in individual cases. No undue weight should be placed on any individual factor. Nor should any individual factor be considered in isolation.

3.1.6 A clear distinction should be made between relationships that might be considered genuine de facto marriage relationships and informal cohabitation for reasons of financial or other convenience. It may be considered that although a couple have a close personal relationship, it is not a de facto marriage relationship.

3.1.7 Particular attention should also be given to cases where there has been a history of previous applications, attempts to circumvent immigration policy, indications that payment has been made to one of the parties to enter the relationship, evidence of collusion, or evidence that the relationship has been entered into solely for the purpose of establishing eligibility for a visa or entry permit without the intention that parties will live together long term.

3.2 Circumstances where "spouse" does not include de facto spouse

3.2.1 For the purposes of satisfying s47 of the Migration Act (which is a requirement for all classes of PEPAE), a de facto spouse is not a legal spouse and cannot meet the requirements of s47(1)(b). However, the existence of a de facto marriage relationship might be seen as constituting strong compassionate grounds under s47(1)(f).

4 Public policy considerations

4.1 *There may be circumstances where a de facto relationship is found to exist but would be considered contrary to Australian social mores, or public policy. This section provides details of relationships which may fall into this category.*

4.2 Age limits

4.2.1 Age limits for people in de facto marriage relationships should be consistent with the age limits applicable under Australian law in respect of marriages. *This means that if the female partner is under 16 years of age, or the male partner is under 18 years of age, the relationship should not be recognised.*

4.3 Polygamous relationships

4.3.1 Australian immigration policy does not provide for admission of more than one partner of a polygamous relationship. Policy allows for *the migration of one of the* partners, subject to the genuineness of the relationship being beyond doubt and all the partners being aware of the *application and the policy which applies to polygamous* relationships.

4.3.2 A person claiming to be maintaining more than one de facto marriage relationship, or to be maintaining an ongoing marriage relationship at the same time as a de facto marriage

relationship, would not be able to demonstrate that any of the relationships satisfied the de facto marriage requirements.

4.3.3 A person who is legally married, but is separated from his/her spouse may be able to establish that he/she is living in a de facto relationship with another person. See Subject: *Marriage and Divorce for a discussion of legal separation,* and processing guidelines for applicants who are separated.

4.4 *Homosexual relationships*

4.4.1 Homosexual relationships do not meet the definition of de facto relationships in the *Migration Regulations.*

5 Implications for processing visa and entry permit applications

5.1 For all visa and entry permit applications a de facto marriage relationship once assessed as such, has the same value as a marriage.

5.2 This means that if the existence of a marriage is a consideration in an application for a visa or entry permit, the existence of a de facto relationship is to be treated in the same way.

5.3 *The circumstances in which this may occur are:*

- where a principal applicant who is in a de facto marriage relationship with:
  - *an Australian citizen or permanent resident; or*
  - a New Zealand citizen who is resident in Australia and who has met health and character requirements

  and so is eligible to be considered for a Permanent Entry Visa, for a Permanent Entry Permit After Entry, or for an Extended Eligibility Temporary Entry Permit;
- the de facto spouse of an applicant for a Permanent Entry Visa, a PEPAE, an EETEP, a Temporary Residence Visa or Entry Permit, or a Student Visa or Entry Permit who derives eligibility from the principal applicant and is not

required to satisfy specific eligibility criteria in his/her own right. The de facto spouse is required to meet the same standard processing requirements (such as health and character checking) as the applicant.

NOTES

APPENDIX G

EXTRACT FROM THE SOCIAL SECURITY ACT 1947
SECTION 3A

EXTRACT FROM SOCIAL SECURITY AND VETERANS' AFFAIRS LEGISLATION AMENDMENT (NO. 3) NO. 163, 1989

Marriage-like relationships

"3A. In forming an opinion about the relationship between 2 people for the purposes of the definition of 'de facto spouse' or 'married person' in subsection (3)1, the Secretary is to have regard to all the circumstances of the relationship including, in particular, the following matters:

(a) the financial aspects of the relationship, including:
  (i) any joint ownership of real estate or other major assets and any joint liabilities;
  (ii) any significant pooling of financial resources especially in relation to major financial commitments; and
  (iii) any legal obligations owed by one person in respect of the other person; and
  (iv) the basis of any sharing of day-to-day household expenses;

(b) the nature of the household, including:
  (i) any joint responsibility for providing care or support of children; and
  (ii) the living arrangements of the people; and
  (iii) the basis on which responsibility for housework is distributed;

(c) the social aspects of the relationship, including:
  (i) whether the people hold themselves out as married to each other; and
  (ii) the assessment of friends and regular associates of the people about the nature of their relationship; and
  (iii) the basis on which the people make plans for, or engage in, joint social activities;

(d) any sexual relationship between the people;

(e) the nature of the people's commitment to each other, including:
  (i) the length of the relationship; and
  (ii) the nature of any companionship and emotional support that the people provide to each other; and
  (iii) whether the people consider that the relationship is likely to continue indefinitely; and
  (iv) whether the people see their relationship as a marriage-like relationship".