

## Position Paper: Ministerial Direction 90

*November 2022*

Section 8.2 of Direction 90 requires decision-makers to consider family violence as very serious when making decisions to refuse or cancel a visa under section 501 or revoke the mandatory cancellation of a visa under section 501CA of the *Migration Act 1958*.

This indicates a lack of understanding about the nature and complex dynamics of family violence and offers no meaningful or guaranteed protection or safety to victim survivors of family violence.

We recognise that it is appropriate to regulate people seeking to enter and remain in Australia by reference to questions of character and risk. However, visa cancellation or refusal has significant and long-lasting impacts for individuals and their families, including detention, family separation, removal from Australia and established support and community networks, loss of protection, and refolement to situations of persecution and serious harm.

We have serious concerns that the current character framework places victim-survivors of family violence, particularly women and children, at considerable risk. These concerns have been raised with government by the Visa Cancellation Working Group, which includes representatives from Women's Legal Services Australia.

Our key concerns include:

- Visa cancellation should not be used as a method of responding to family violence;
- The Direction is inconsistent with National Plan to End Violence against Women and Children 2022-2032;
- Decision-makers are not required to apply a gendered lens to decision-making;
- The Direction does not recognise the prevalence of misidentification of victims as offenders;
- The Direction may deter victim-survivors from seeking assistance;
- The Direction does not take into account the impact of visa cancellation on victims who are dependant on the visa of their spouse, including the cancellation of their own visas;
- Decision-makers are not required to give consideration to the interests of victims; and
- Decision-makers are not giving proper consideration to the best interests of children.

## **Visa cancellation is an inappropriate response to family violence and safety risk**

The Direction lacks an understanding of the nature and complex dynamics of family violence and offers no meaningful or guaranteed protection or safety to victim survivors of family violence.

We are not aware of, and the former government was unable to site any, evidence suggesting that visa cancellation provides an effective method of responding to family violence, holding perpetrators to account, or protecting victim-survivors.

Existing family violence response mechanisms, including specialist family violence services, risk assessment frameworks, the police, and the legal system, already operate to respond to family violence, increase safety for victim survivors and their children and hold perpetrators accountable for family violence offences.

The Direction inappropriately requires the Minister and his delegates to assess 'information or evidence from independent and authoritative sources which indicate that the non-citizen has been involved in family violence' and make an assessment as to the nature of the family violence that has occurred and risk to the victim-survivor. Departmental decision-makers are not qualified and lack specialist family violence expertise, training, or knowledge to make these assessments. In our experience, this increases the risk to safety for victim-survivors and their children.

There are a number of other reforms that could be implemented that would create better outcomes for victim-survivors who are on temporary visas, including the establishment of a separate visa for victim-survivors of family violence, and increased access to government supports including Centrelink and Medicare for all victim-survivors through expanding the family violence provisions or other mechanisms.

## **Inconsistency with the National Plan to End Violence against Women and Children 2022-2032**

The current character framework, including the Direction, is inconsistent with National Plan to End Violence against Women and Children 2022-2032. The National Plan recognises the vulnerability of migrant women and children to family violence linked to their precarious visa status. Importantly, the National Plan recognises that migrant women face structural barriers other women do not, such as the impact ending a relationship has on their visa status and eligibility for social security.

There is no mention in the Plan nor any expert evidence demonstrating that visa cancellation of perpetrators is an appropriate method of responding to family violence, holding perpetrators accountable or protecting victim survivors.

Women's Legal Services provided input to the development of the National Plan which included recommendations to address the unique experiences and needs of women and children on temporary visas in Australia to improve safety, including improved access to services and government supports including Centrelink and Medicare.

## **The lack of a gendered lens to decision-making**

The current visa cancellation framework does not apply a gendered lens to decision-making, placing victim survivors at risk of cancellation and deportation.

There are numerous opportunities during a refusal or cancellation process for an individual to lose access to their rights, for example by failing to act within immovable timeframes, including due to lack of access to legal assistance. This can occur due to a change of address (moving into refuge), an inability to comprehend what can be obscure wording, or a lack of access to legal or other assistance. Individuals may also struggle to respond in ways that properly make their cases, owing to numerous factors including linguistic barriers and entrenched disadvantage.

The retrospective application of the Direction also means that some individuals may not have received appropriate legal advice when responding to FDV (Family and Domestic Violence) criminal offences and may have agreed to a finding of guilt, unaware of the impact on their visa.

Whilst purporting to protect victims of family violence, the Direction does not provide guidance to decision makers where family violence victims may be subject to visa cancellation themselves.

For example, Women's Legal Services Australia is aware of a victim-survivor of family and gendered violence being subject to multiple mandatory visa cancellation processes and prolonged detention due to offending related to the family and gendered violence she experienced as a child and throughout her life.

The Direction provides no guidance to decision makers to consider the significant impact family and sexual violence can have on visa applicants/ holders nor the damaging consequences of visa cancellation processes and prolonged detention on the individual and their families. In this case, family law orders had to be sought to place her child in the care of extended family as there were no other safe and permanent care alternatives.

During a cancellation process, victim survivors preparing their revocation request often do not have access to supports required to prepare a response including reports, complete therapy or courses may have not addressed the FDV as the reason for incarnation as their detained on other grounds such as drug or alcohol problems. Upon release from immigration detention, victim survivors often struggle to re-establish themselves in the community due to lack of supports to access safe housing, employment, childcare and therapeutic and support services.

To meaningfully respond to family violence and safeguard victim survivors of family violence from the wide-ranging negative consequences of family violence and relationship breakdown the Department should enhance legislative and procedural protections for victim-survivors under the Migration Act by applying a gendered lens and ensuring that their experiences of family violence and help seeking don't negatively impact on their visa status.

## **Risks associated with the misidentification of victim-survivors as perpetrators**

The broad consideration of 'information or evidence from independent and authoritative sources indicating that the non-citizen is, or has been, involved in the perpetration of family violence' risks misidentifying victims as offenders.

It is unclear what forms of independent and authoritative sources would be relied on by the decision-maker, however we would assume it would include police reports, risk assessments, child protection reports, evidence in family law proceedings and information available under family violence information sharing schemes which are intended to increase safety and protect victims.

Based on a 2018 review of client intake forms, WLSV found that 10 per cent of our clients had been misidentified as respondents on police applications for family violence intervention orders (FVIOs).

A recent report by the Family Violence Reform Implementation Monitor in Victoria found:

“The number of incidents where police identify a female respondent increasing substantially over recent years (to 22,787 in 2020), misidentification is affecting a significant number of women.”

“There is no single source of truth for the number of women misidentified. However, applying prevalence estimates to the number of incidents where a woman is listed as the respondent equates to misidentification potentially occurring in at least 2,279 incidents in 2020, based on a prevalence of 10 per cent, and possibly many more.”

“Certain cohorts are at greater risk of being misidentified as a perpetrator: in particular, Aboriginal women, migrant and refugee women, women with disabilities, criminalised women and LGBTIQ+ people.”

The Visa Cancellation Working Group, including Women's Legal Services Australia representatives, have previously raised concerns with government about the risk of misidentification and subsequent visa cancellation, including the risk of intervention order cross-applications, false reports being made against victim survivors by perpetrators and perpetrators coercing breaches of FVIOs.

Women on temporary visas are particularly vulnerable to systems abuse by perpetrators of family violence, particularly the use of cross intervention order applications taken out against victims by perpetrators. This places victims at risk of cancellation. A victim-survivor of family violence who through her circumstances is coerced into permitting her partner to have contact with her and their child, in breach of an intervention order, will automatically fail the character test. Perpetrators may use this law to further harm victim-survivors of family violence, particularly women and children.

Similarly, even without a finding of guilt, a victim may be misidentified as a perpetrator of violence by other unverified but 'authoritative sources' which may be relied upon by decision makers. This may include witness testimony included in police reports, child protection reports and risk assessments accessible under family violence information sharing schemes and places victim-survivors at an increased risk of misidentification and systems abuse.

## **Deterring victim-survivors from seeking assistance**

We are concerned that the broad consideration of 'authoritative sources' by the decision-maker and the risk of being misidentified as a perpetrator will have the unintended effect of deterring help-seeking and reporting amongst victim-survivors and place them at a significant risk of further family violence.

Policies including early intervention may be undermined, as may recourse to support, such as counselling and family violence support services, given that information may be, against a survivor's wishes, used adversely against a partner or may be used to jeopardise their status in Australia.

These concerns have also been raised with the previous government.

## **The risk to victim-survivors of having their own visas cancelled**

Women and children who hold temporary visas are in a particularly vulnerable position and may be subject to consequential cancellation where they are dependent on the perpetrator's visa.

Often, their visas will be dependent upon the visas held by a male head of the family, who was the 'primary applicant' for the temporary visa. Temporary visas do not contain domestic violence provisions, which would allow holders to transition from one visa to another if they demonstrate family violence. Rather, if the visa held by the 'primary' visa holder is cancelled on character grounds, as he has committed family violence against his partner or children, the perverse result is that his partner or children who are dependent upon his visa must also have *their* visas cancelled.

In the absence of alternative visa pathways for many women and children who have experienced family violence, perpetrated by the primary visa holder, there is very little security or assistance available for non-citizen survivors of family violence, further contributing to their precarious status.

We know that dependent applicants experience fears of reporting the main visa applicants or holder and barriers to help seeking because their migration status depends on the perpetrator. Reporting the perpetrator without any guarantee that the affected family member will be able to remain in Australia safely is a significant issue.

## **Lack of consideration of victims' interests**

The Direction's principles mean the prospects of having a visa cancellation being overturned where there has been family violence is almost impossible. The Direction provides that "family violence ... is so serious that even strong countervailing considerations may be insufficient in some circumstances, even if the non-citizen does not pose a measurable risk of causing physical harm to the Australian community."

While we agree that family violence is serious and can have significant impact on victims, the Direction does not take into consideration the victims' interests. As we have raised previously, it also significantly increases the possibility of the permanent separation of families against the will of those families, including leaving women and children without viable visa options in Australia, no material, parenting or other support. Survivors' voices may be sidelined. Women

and children may be subjected to paternalistic, disempowering, and dangerous intervention in their lives and against their wishes. They may have little control over the outcomes and processes.

### **Best interests of the child not given proper consideration**

While the Direction provides that decision makers must consider the best interests of minor children affected by a visa refusal or cancellation under section 501 of the Act, in our experience, decision makers have made concerning and unqualified findings as to the best interests of children.

In our view, Departmental decision-makers are not trained nor qualified to make risk assessments as to parent-child relationships. An unqualified assessment in the context of family violence and child protection matters, places children risk of harm, family separation and institutionalisation.

We are concerned that the factors that must be considered by decision-makers also misunderstand the complex dynamics of family violence and may be used against the parent who has experienced family violence.

For example, a woman may be found to have exposed her children to the family violence she was experiencing at the hands of an abusive partner and emotional trauma or may have been 'absent' or denied 'meaningful contact' with her children by an abusive partner. Due to the significant trauma of family violence, a victim-survivor may not be able to 'play a positive parental role' and other persons may be 'fulfilling a parental role'.

In one mandatory cancellation decision, the decision maker concerningly found that the 'long period of absence' of a mother whilst detained in immigration detention and the 'limited meaningful contact' between the mother and her children during her period of detention was sufficient justification to cancel the mother's visa, deport her and permanently separate the family. During the mother's period of detention, Women's Legal Service Victoria had to seek orders for the care of the children to ensure they could be safely placed with other relatives to prevent them being placed in State care or with the perpetrator of violence.