

# WITHOUT CONSENT: FORCED MARRIAGE IN AUSTRALIA

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*[This article explores Australia's response to the emerging issue of forced marriage. In light of community and government responses to forced marriage, we review the challenges involved in defining forced marriage and the degree to which the practice overlaps with other forms of exploitative conduct such as servitude and slavery. While we welcome the reform of existing criminal laws to fully reflect Australia's international obligations to prohibit 'practices similar to slavery', we caution against prioritising prosecutions over preventative and protective strategies. We argue that the creation of specific criminal offences of forced marriage should be accompanied by the introduction of new, family law-based civil remedies for people seeking to avoid or escape forced marriage, and targeted support services for people in, or facing, forced marriage. These measures should be accompanied by investment in community legal education and consultation in order to deepen the community's understanding of forced marriage in Australia.]*

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## I INTRODUCTION

In April 2011 the Federal Magistrates Court placed a 16-year-old woman on the airport watch list and ordered her parents not to remove her from Australia. The orders were sought by Ms Madley (not her real name), who asked the Court to stop her parents from forcing her to marry a man in Lebanon.<sup>1</sup> The case was unusual but not unique. In the last two years, Australian courts have made orders to prevent — and in one case annul — forced marriages,<sup>2</sup> while journalists have told the stories of young women from new migrant communities facing forced marriage abroad.<sup>3</sup> While there is a lack of widespread community awareness about forced marriage and little research about the nature and extent of forced marriage in Australia, in 2013 the Australian Parliament enacted new laws to criminalise forced marriage.<sup>4</sup> The specific criminalisation of forced marriage followed the release of an Australian government discussion paper in 2010 that considered how the law could respond to forced and servile marriage within Australia, or to cases where Australian citizens and residents face forced marriage abroad.<sup>5</sup>

<sup>1</sup> *Madley v Madley* [2011] FMCAfam 1007 (1 April 2011).

<sup>2</sup> See, eg, ‘Police Save Sydney Girl from Forced Marriage’, *ABC News* (online), 3 June 2010 <<http://www.abc.net.au/news/stories/2010/06/03/2916750.htm>>; Caroline Overington, ‘Arranged Marriage Ruled Invalid’, *The Australian* (Sydney), 3 February 2011, 9; Peter Mickelborough, ‘Judge Forbids Girl, 14 to Wed’, *The Daily Telegraph* (Sydney), 15 September 2010, 7; Caroline Overington, ‘Family Banned from Taking Girl to Arranged Marriage’, *The Australian* (Sydney), 3 June 2010, 3. See also ABC Radio National, ‘Forced Marriage’, *The Law Report*, 30 November 2010.

<sup>3</sup> See, eg, Caroline Overington, ‘Teenage Girls Forced to Marry’, *The Australian* (Sydney), 11 February 2012, 3; Caroline Overington, ‘The Wedding Vow’, *The Australian Magazine* (Sydney), 11 February 2012, 12.

<sup>4</sup> *Crimes Legislation Amendment (Slavery, Slavery-Like Conditions and People Trafficking) Act 2013* (Cth) (‘*Slavery Act 2013*’), amending *Criminal Code Act 1995* (Cth), received Royal Assent on 7 March 2013 and came into effect on the following day.

<sup>5</sup> Attorney-General’s Department (Cth), ‘Forced and Servile Marriage’ (Discussion Paper, 2010) 3 [1].

In this article we examine the challenges of developing an effective and holistic Australian response to the complex phenomenon of forced marriage. In Part I we provide a brief overview of the difficulty of defining the complex problem of forced marriage.<sup>6</sup> In Part II we focus upon what is known about forced marriage in the Australian community, Australia's international obligations to prohibit egregious forms of exploitation, and recent proposals to criminalise forced marriage. Part III argues that Australia's response to forced marriage should prioritise protection and prevention by providing effective civil remedies options to people who want to avoid or escape situations of forced marriage, investing in community education and training of government agencies and non-government organisations ('NGOs'), and developing targeted support services.<sup>7</sup>

We conclude that any effective response to forced marriage must be developed through close consultation and engagement with the community and informed by continuing research about the nature of forced marriage in Australia. The limitations of constructing the legal response to forced marriage within a law enforcement paradigm must be clearly acknowledged: criminal sanctions cannot respond to the root causes of forced marriage nor provide vulnerable people with the tools to escape or avoid forced marriage, and the impact of the new criminal offences of forced marriages requires careful monitoring. Ultimately, the first priority of any effective strategy to address forced marriage must be prevention and protection, not prosecution.

<sup>6</sup> Geetanjali Gangoli and Khatidja Chantler, 'Protecting Victims of Forced Marriage: Is Age a Protective Factor?' (2009) 17 *Feminist Legal Studies* 267, 267–9. Gangoli and Chantler observe 'it is not always easy to make a distinction between forced and arranged marriage, and that in some cases, there can be an experiential slippage between these two categories': at 269. See also Jenni Millbank and Catherine Dauvergne, 'Forced Marriage and the Exoticization of Gendered Harms in United States Asylum Law' (2010) 19 *Columbia Journal of Gender and Law* 898, who note concern that 'policymakers and others either completely conflate arranged and forced marriage or else pose (consensual) "arranged" and "forced" marriages as if they are diametric opposites': at 899; Ministry of Justice (UK), *One Year On: The Initial Impact of the Forced Marriage (Civil Protection) Act 2007 in Its First Year of Operation* (2009) 12.

<sup>7</sup> See, eg, civil remedies available under *Forced Marriage (Civil Protection) Act 2007* (UK) c 20, s 63A. See also Brigitte Clark and Claudina Richards, 'The Prevention and Prohibition of Forced Marriages — A Comparative Approach' (2008) 57 *International and Comparative Law Quarterly* 501; Aisha K Gill, 'The Pros and Cons of Criminalisation of Forced Marriage' (2012) 31 (Winter) *Australian Domestic & Family Violence Clearinghouse Newsletter* 9.

## II CONSENT AND COERCION: THE DIFFICULTY OF DEFINING FORCED MARRIAGE

It is only in the last two years that forced marriage has come to the attention of Australian law and policy makers. In our view any discussion of the legal responses to forced marriage must acknowledge the challenges that face lawmakers grappling with the preliminary and complex question: what exactly is a forced marriage? It is common for official reports about forced marriage to define forced marriage by what it is not: forced marriage is not an arranged marriage; forced marriage is not consensual.<sup>8</sup> The problem with defining forced marriage by what it is not is that it encourages a binary understanding of consent and coercion. The reality is more complex. Forced marriage exists along a continuum of coercive practices where the pressure to fulfil expected gendered roles may, in some cases, deprive women and men of the opportunity to fully and freely consent to marriage.<sup>9</sup>

In this context, forced marriage is best understood as a form of gender-based violence.<sup>10</sup> As the Office of the United Nations High Commissioner for Refugees ('UNHCR') has noted, while women, men, boys, and girls can all be victims of gender-based violence, women and girls are the main victims.<sup>11</sup> Gender discrimination and violence is both a cause and a consequence of forced marriage — as the United Nations (UN) Committee on the Elimination of Discrimination against Women has observed, a woman's right to 'enter freely into marriage is central to her life and to her dignity and equality as a

<sup>8</sup> See, eg. Attorney-General's Department (Cth), 'Forced and Servile Marriage', above n 5, 3 [3]; Foreign and Commonwealth Office (UK), *Multi-Agency Practice Guidelines: Handling Cases of Forced Marriage* (2009) 8.

<sup>9</sup> See generally Millbank and Dauvergne, 'Forced Marriage and the Exoticization of Gendered Harms', above n 6; Sundari Anitha and Aisha Gill, 'Coercion, Consent and the Forced Marriage Debate in the UK' (2009) 17 *Feminist Legal Studies* 165; Aisha Gill and Sundari Anitha, 'The Illusion of Protection? An Analysis of Forced Marriage Legislation and Policy in the UK' (2009) 31 *Journal of Social Welfare & Family Law* 257. See also Gill, above n 7, 9.

<sup>10</sup> For discussion of sexual and gender-based violence, see Office of the United Nations High Commissioner for Refugees, *UNHCR Handbook for the Protection of Women and Girls* (2008) 201. For a discussion on forced marriage as a gender-related form of persecution in refugee law jurisprudence, see generally Catherine Dauvergne and Jenni Millbank, 'Forced Marriage as a Harm in Domestic and International Law' (2010) 73 *Modern Law Review* 57; Millbank and Dauvergne, 'Forced Marriage and the Exoticization of Gendered Harms', above n 6.

<sup>11</sup> UNHCR, above n 10, 201.

human being',<sup>12</sup> and the denial of that right perpetuates stereotypes and helps 'to maintain women in subordinate roles and contribute to their low level of political participation and to their lower level of education, skills and work opportunities'.<sup>13</sup>

Historically, the courts have refused to engage with how societal and familial pressures could deprive a person of the opportunity to freely consent to marriage and refused to invalidate 'an otherwise good marriage' unless there was a 'threat of immediate danger ... to life, limb or liberty'.<sup>14</sup> However, more recent jurisprudence focuses upon 'whether the mind of the victim has in fact been overborne, howsoever that was caused'<sup>15</sup> resulting in a more nuanced understanding of how psychological coercion can remove a person's ability to freely and fully consent to the marriage.<sup>16</sup> This, in turn, can complicate the task of distinguishing between forced marriage (where one or both of the parties do not consent to the marriage) and arranged marriage (where both parties consent to enter into a marriage organised by their families).<sup>17</sup>

The practice of forced marriage has been described as 'more than a sum of its parts'; it entails various abuses of human rights. Those subjected to forced marriage may suffer psychological and physical injuries, sexual assault and

<sup>12</sup> *Report of the Committee on the Elimination of Discrimination against Women: Thirteenth Session*, UN GAOR, 49<sup>th</sup> sess, Agenda Item 97, Supp No 38, UN Doc A/49/38 (12 April 1994) [16].

<sup>13</sup> *Report of the UN Committee on the Elimination of Discrimination against Women: Eleventh Session*, UN GAOR, 47<sup>th</sup> sess, UN Doc A/47/38 (1992) [11].

<sup>14</sup> *Szechter v Szechter* [1971] P 286, 297–8 (Simon P).

<sup>15</sup> *Hirani v Hirani* (1983) 4 FLR 232. See also *SH v NB* [2010] 1 FLR 1927.

<sup>16</sup> *Singh v Singh* [1971] P 226; *Hirani v Hirani* (1983) 4 FLR 232; *Mahmood v Mahmood* [1993] SLT 589; *Re SK* [2006] 1 WLR 81. See also Anne Phillips and Moira Dustin, 'UK Initiatives on Forced Marriage: Regulation Dialogue and Exit' (2004) 52 *Political Studies* 531, 537 observing 'there has been such a marked progression from an earlier — very restrictive — definition of duress to one that recognises the force of moral and emotional blackmail.'

<sup>17</sup> Phillips and Dustin, above n 16, 544. It is noted that responses to forced marriage often define forced marriage by reference to its difference with arranged marriage. Anitha and Gill argue that by adopting this binary distinction in policy documents, law and policy makers 'frame the problem of forced marriage in cultural terms, rather than as a specific manifestation of a wider problem of violence against women': Anitha and Gill, 'Coercion, Consent and the Forced Marriage Debate in the UK', above n 9, 166.

domestic violence, false imprisonment and estrangement from their family.<sup>18</sup> The problem is often hidden and effective state protection is not always available.<sup>19</sup> After women have been forced to marry they may find it difficult to seek help because of social stigma, family pressure, financial constraints, fears of violence or deportation, lack of legal information about their options and/or concern about their children.<sup>20</sup> Unsurprisingly, reliable statistics about the number of people facing forced marriage worldwide do not exist.<sup>21</sup>

Further complicating the task of crafting a legal and policy response to forced marriage is that forced marriage has many different manifestations and, while forced marriage can occur in a range of settings, it is usually organised by family members. These family members may not perceive their actions as wrong but may organise the marriage for a complex array of reasons: some may wish to control behaviour that challenges cultural norms, deny the sexuality of young people or prevent unsuitable marriages, while others may want to protect 'family honour' and conform to perceived cultural and gendered ideas about marriage.<sup>22</sup>

While both women and men can experience forced marriage,<sup>23</sup> it is a practice that disproportionately affects women.<sup>24</sup> Sometimes forced marriage may

<sup>18</sup> Krista Stout, 'What's in a Name? The Feasibility and Desirability of Naming Forced Marriage as a Separate Crime under International Humanitarian Law' (2010) 19 *Dalhousie Journal of Legal Studies* 1, 20–1.

<sup>19</sup> UN Statistical Commission, *Report on the Meeting of the Friends of the Chair of the UN Statistical Commission on Statistical Indicators on Violence against Women*, UN Doc ESA/STAT/AC.193/L.3 (February 2010) 13 [52]; Sigma Huda, *Report of the Special Rapporteur on the Human Rights Aspects of the Victims of Trafficking in Persons, Especially Women and Children*, UN Doc A/HRC/4/23 (24 January 2007) 11 [29].

<sup>20</sup> Attorney-General's Department (Cth), 'Forced and Servile Marriage', above n 5, 5–6 [12]–[14].

<sup>21</sup> See Cheryl Thomas, 'Forced and Early Marriage: A Focus on Central and Eastern Europe and Former Soviet Union Countries with Selected Laws from Other Countries' EGM/GPLHP/2009/EP.08 (19 June 2009) 2. Thomas observed that '[r]eliable statistics on forced marriage are difficult to compile due to the unofficial and, therefore, undocumented nature of most forced marriages'.

<sup>22</sup> Attorney-General's Department (Cth), 'Forced and Servile Marriage', above n 5, 4 [5].

<sup>23</sup> In 2011, the FMU received over 1400 calls and 22 per cent of cases before the FMU involved male victims: see Foreign and Commonwealth Office (UK), *Forced Marriage Unit* <<http://www.fco.gov.uk/en/travel-and-living-abroad/when-things-go-wrong/forced-marriage>>.

<sup>24</sup> Department of Immigration and Citizenship (Cth), *Procedures Advice Manual 3: Refugee and Humanitarian — Gender Guidelines* (2013) [13.1]. See also *Resolution on Forced Marriages and Child Marriages*, Resolution No 1468, Parliamentary Assembly of the Council of Europe, 29<sup>th</sup> sitting (5 October 2005) [2]; UN Educational Scientific and Cultural Organization (UNESCO), *Forced Marriage of the Girl Child: Report of the Secretary-General*, UN GAOR, 52<sup>nd</sup> Sess, Provisional Agenda Item 3(c), UN Doc E/CN.6/2008/4 (5 December 2007); Anne T

involve conduct that occurs in two jurisdictions (for example, when a young woman is sent abroad to marry) and sometimes it may occur within state borders. The degree of exploitation after the marriage may also vary from case to case. For example, the situation of a young woman who is forced to participate in a marriage ceremony by her family but then finds her new husband is willing to end the marriage differs from the situation of another young woman who is forced into a marriage by family members and then maintained in a condition of servitude where she is required to work in the family business, clean the family home, and forced to have sexual intercourse with her 'husband'. Sometimes forced marriage will result in crimes — such as kidnapping, false imprisonment, and sexual assault — that are already subject to sanctions.<sup>25</sup>

### III FORCED MARRIAGE AND SERVILE MARRIAGE IN THE AUSTRALIAN CONTEXT

#### A *The Nature and Extent of Forced Marriage in Australia*

Forced marriage in Australia is poorly understood and under-researched. Although media reports suggest there is 'overwhelming evidence' that forced marriage is a problem in Australia,<sup>26</sup> reliable statistics about the nature and extent of the problem do not exist. However, the lack of empirical research about forced marriage should not lead to the conclusion that forced marriage does not exist: despite the lack of awareness and research about forced marriage and the difficulties in identifying instances of forced marriage, the issue has confronted the Australian courts.<sup>27</sup>

Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, 2010) 196, observed: 'Certain forms of trafficking including ... trafficking for forced marriage ... are both directed toward and impact disproportionately upon women and girls'.

<sup>25</sup> See, eg, Attorney-General's Department (Cth), *Exposure Draft: Crimes Legislation Amendment (Slavery, Slavery-Like Conditions and People Trafficking) Bill 2012 (Cth)* (2011) 7 cl 270.6, 13 cl 271.1A.

<sup>26</sup> Overington, 'The Wedding Vow', above n 3.

<sup>27</sup> See generally ABC Radio National, above n 2.

In May 2010, a 17-year-old girl saved herself from a forced marriage in Lebanon by calling the Australian Federal Police.<sup>28</sup> After obtaining Legal Aid representation, the Federal Magistrates Court issued an order under s 68B of the *Family Law Act 1975* (Cth) ('FLA') restraining her family from taking her outside of Australia.<sup>29</sup> In another case, the Victorian Department of Human Services applied for an order from the Family Court to prevent the parents of a 14-year-old girl from taking her overseas to be married to another minor.<sup>30</sup> Justice Mushin found that neither child was of marriageable age within the terms of the *Marriage Act 1961* (Cth) ('*Marriage Act*') and made a parenting order restraining the girl's parents from removing her from Australia and placing her on the Airport Watch List.<sup>31</sup>

In 2011, an Australian born woman, Ms Kreet, successfully petitioned the Family Court for orders that her marriage, which occurred in India in 2009, was void for duress.<sup>32</sup> Ms Kreet travelled to India where she believed she would marry Mr U, her Australian boyfriend. When she arrived her parents confiscated her passport and introduced her to Mr Sampir. Ms Kreet's father threatened Ms Kreet that he would have Mr U's sisters and mother raped and kidnapped unless she married Mr Sampir. Under duress, Ms Kreet married Mr Sampir, sponsored his application for an Australian partner visa, and then flew back to Australia where she withdrew the visa application and returned to Mr U. Her relationship with her parents broke down and she sought an indefinite intervention order to protect herself from her father. She also sought and obtained an order from the Family Court annulling the marriage on the grounds of duress.

Under the current provisions of the *Marriage Act*, a marriage is void if it was obtained by duress or fraud or if one party did not have the mental capacity to truly consent to the marriage.<sup>33</sup> However, the *Marriage Act* does

<sup>28</sup> 'Police Save Sydney Girl from Forced Marriage', above n 2.

<sup>29</sup> *Kandal v Khyatt* (2010) 43 Fam LR 344, 346 (Dunkley FM).

<sup>30</sup> *Department of Human Services v Brouker* (2010) 44 Fam LR 486.

<sup>31</sup> *Ibid* 490-1.

<sup>32</sup> *Kreet v Sampir* (2011) 44 Fam LR 405.

<sup>33</sup> *Marriage Act* ss 23(1)(d), 23B(1)(d) provide that a marriage is void if

the consent of either of the parties was not a real consent because:

- (i) it was obtained by duress or fraud;
- (ii) that party was mistaken as to the identity of the other party or as to the nature of the ceremony performed; or
- (iii) that party was mentally incapable of understanding the nature and effect of the marriage ceremony.



not specifically define forced marriage, duress or coercion and there is no specific offence of forcing a person to marry another. In *Kreet v Sampir*<sup>34</sup> Cronin J observed that 'duress is not defined in [the] *Marriage Act* but there is no reason to give it any other meaning than that which is normally known to the law. It must be oppression or coercion to such a degree that consent vanishes'.<sup>35</sup> His Honour then referred approvingly to the case of *Re Marriage of S* where Watson SJ granted an application for a nullity from a young woman who had married an Egyptian man.<sup>36</sup> Although the young woman was not threatened, nor was she in physical danger, Watson SJ found '[s]he was caught in a psychological prison of family loyalty, parental concern, sibling responsibility, religious commitment and a culture that demanded filial obedience'.<sup>37</sup> After reviewing the case law on duress, Watson SJ found:

The emphasis on terror or fear in some of the judgments seems unnecessarily limiting. A sense of mental oppression can be generated by causes other than fear or terror. If there are circumstances which taken together lead to the conclusion that because of oppression a particular person has not exercised a voluntary consent to a marriage that consent is vitiated by duress and is not a real consent.<sup>38</sup>

Most recently, Ms Madley, a 16-year-old Australian woman, sought a court order to prevent her parents from removing her from Australia to marry a man in Lebanon.<sup>39</sup> The applicant had the necessary standing by virtue of s 65C(b) of the *FLA*, which provides that a child may apply for a parenting order. Observing that Ms Madley's evidence made it very clear that 'she does not wish to be married to a person whom she has met once, has no affection for, and no relationship with', Harman FM made orders restraining Ms Madley's parents from removing her from Australia and assaulting, molesting, threatening or intimidating their daughter.<sup>40</sup>

<sup>34</sup> (2011) 44 Fam LR 405.

<sup>35</sup> *Ibid* 140 [39], citing *Re Marriage of S* (1980) 42 FLR 94, 105, where Watson SJ observed that consent may be nullified by 'non-violent but nevertheless controlling parental coercion'.

<sup>36</sup> (1980) 42 FLR 94.

<sup>37</sup> *Ibid* 104.

<sup>38</sup> *Ibid*.

<sup>39</sup> *Madley v Madley* [2011] FMCAfam 1007 (1 April 2011).

<sup>40</sup> *Ibid* [30].

Those facing forced marriage may be reluctant to speak out against family members and those forcing others to marry may not view their actions as wrong. Misinformation about a person's immigration status may create a coercive environment in which newly arrived migrant women will not seek help for fear of being sent home by immigration authorities.<sup>41</sup>

In light of these difficulties and the general lack of community awareness of the forced marriage, it is reasonable to assume that instances of forced marriage in Australia are likely to be under-reported.<sup>42</sup> After evaluating 48 submissions received in response to the Discussion Paper, an interdepartmental committee chaired by the Commonwealth Attorney-General's Department observed that the community responses suggested that 'forced marriage is likely to be more prevalent than the small number of cases that have been reported to the police would indicate' and 'the low number of reports may be attributed to the familial nature of some forced or servile marriages, or that victims may not actually identify their marriage to have been forced'.<sup>43</sup>

Further research is critical to develop a scholarly understanding of forced marriage and identify the social, economic and cultural factors that leave people vulnerable to such practices.<sup>44</sup> A key challenge will also be to distinguish forced marriage from the practice of sham marriage, where a citizen or permanent resident fraudulently claims to be in a genuine relationship in order to sponsor their 'spouse' or 'partner' to migrate to Australia. This task is complex as there is evidence that suggests sham marriages may sometimes be

<sup>41</sup> Australian Immigrant and Refugee Women's Alliance, Submission to Attorney-General's Department (Cth), *Forced and Servile Marriage*, 25 February 2011, 10.

<sup>42</sup> See, eg, Good Shepherd Australia New Zealand, Submission to Attorney-General's Department (Cth), *Forced and Servile Marriage*, March 2011, 4, quoting one domestic violence professional in a specialist service for women from culturally diverse backgrounds, who stated that 'forced and servile marriage ... affects 99 percent of the 800 women we work with each year'.

<sup>43</sup> Anti-People Trafficking Interdepartmental Committee, Parliament of Australia, *Trafficking in Persons — The Australian Government Response: 1 July 2010 – 30 June 2011* (2011) 8.

<sup>44</sup> See Good Shepherd Australia New Zealand, *Forced and Servile Marriage*, above n 42, 21–2; Australian Catholic Religious against Trafficking in Humans, Submission to the Attorney-General's Department (Cth), *Forced and Servile Marriage*, 24 February 2011; Women's Health West, Submission to the Attorney-General's Department (Cth), *Forced and Servile Marriage*, 21 February 2011, 3. See also Annabelle Allimant and Beata Ostapiej-Piatkowski, 'Supporting Women from CALD Backgrounds Who Are Victims/Survivors of Sexual Violence: Challenges and Opportunities for Practitioners' (Wrap No 9 2011, Australian Centre for the Study of Sexual Assault, Australian Institute of Family Studies, February 2011).

arranged by traffickers to facilitate the movement of people to Australia for exploitation.<sup>45</sup>

### B *Australia's International Obligations*

Forced marriage is sometimes described as a slavery-like practice or simply a modern-day form of slavery. However, while Australia's obligations to prohibit and sanction slavery and slavery-like practices are clearly set out in international law, international law does not provide an authoritative definition of forced marriage and the overlap between 'forced marriage' and other slavery-like practices is sometimes unclear. Understanding the obligations that Australia has under treaties which define and prohibit people trafficking, slavery and slavery-like practices is important because the Australian government has framed its responses to forced marriage within the context of our international obligations.

International law provides no authoritative definition of 'forced marriage',<sup>46</sup> however, the principle that marriage must be entered into with the 'free and full consent' of both parties is enshrined in the *Universal Declaration of Human Rights*,<sup>47</sup> the *International Covenant on Civil and Political Rights* ('ICCPR'),<sup>48</sup> the *International Covenant on Economic, Social and Cultural Rights*<sup>49</sup> and the *Convention on the Elimination of all Forms of Discrimination against Women* ('CEDAW').<sup>50</sup> Australia is also a party to the *Convention on*

<sup>45</sup> See Anti-People Trafficking Interdepartmental Committee, above n 43, 81, which provides a summary of Australia's first reported case of trafficking for domestic servitude, in which a married couple in Queensland arranged a sham marriage in order to bring a woman from the Philippines to Australia to work as a domestic servant. Upon arrival the woman was exploited and repeatedly raped. Following numerous appeals, in February 2010, Zoltan Kovacs entered a plea of guilty and was re-sentenced to eight years' imprisonment for slavery offences. Following a retrial Melita Kovacs was again found guilty and re-sentenced to four years' imprisonment. In March 2010, she sought leave to appeal her sentence in the Supreme Court.

<sup>46</sup> Attorney-General's Department (Cth), 'Forced and Servile Marriage', above n 5, 3 [3].

<sup>47</sup> GA Res 217A (III), UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, UN Doc A/810 (10 December 1948) art 16(2).

<sup>48</sup> Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 23(3).

<sup>49</sup> Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 10(1).

<sup>50</sup> Opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981). Article 16(1)(b) provides:

States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on

*Celebration and Recognition of the Validity of Marriages*,<sup>51</sup> which provides that Australia may refuse to recognise a marriage entered into without the full and free consent of both parties.<sup>52</sup> Various international instruments also oblige Australia to make child marriage unlawful and ensure the minimum age for marriage is the same for both sexes.<sup>53</sup> The sale and trafficking of children for any purpose is prohibited,<sup>54</sup> and the UN *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* ('*Trafficking Protocol*')<sup>55</sup> prohibits trafficking in adults and children for the purpose of exploitation, including forced marriage.<sup>56</sup>

Yet there is no international instrument that expressly defines forced marriage or obliges states to criminalise the practice. There is, however, a specific obligation to criminalise 'practices similar to slavery' including servile marriage in the *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery* ('*Supplementary*

a basis of equality of men and women: ... (b) [t]he same right freely to choose a spouse and to enter into marriage only with their free and full consent.

<sup>51</sup> Opened for signature 14 March 1978, 1901 UNTS 131 (entered into force 1 May 1991).

<sup>52</sup> However, Australia has not signed or ratified the *Convention on Consent to Marriage, Minimum Age for Marriage and Registration for Marriages*, opened for signature 10 December 1962, 521 UNTS 231 (entered into force 9 December 1964) art 1(1), which provides that '[n]o marriage shall be legally entered into without the full and free consent of both parties'.

<sup>53</sup> See CEDAW art 16(2). See also UN Committee on the Elimination of Discrimination against Women, *Report of the Committee on the Elimination of Discrimination against Women: Thirteenth Session*, UN GAOR, 49<sup>th</sup> sess, Supp No 38, UN Doc A/49/38 (12 April 1994).

<sup>54</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 35; CEDAW art 16(2); The UN Special Rapporteur on Trafficking in Persons has argued that '[s]ince children are, by definition, incapable of consent or of exercising the right of refusal, child marriage is forced marriage, and as such violates fundamental human rights standards and must therefore be strictly prohibited': Sigma Huda, *Report of the Special Rapporteur on the Human Rights Aspects of the Victims of Trafficking in Persons, Especially Women and Children*, UN Doc A/HRC/4/23 (24 January 2007) 9 [21].

<sup>55</sup> Opened for signature 15 November 2000, 2237 UNTS 319 (entered into force 25 December 2003).

<sup>56</sup> While forced marriage is not specifically mentioned in the list of exploitative practices in art 3 of the *Trafficking Protocol*, the United Nations Office on Drugs and Crime ('UNODC') has confirmed trafficking for forced marriage falls within the definition of trafficking of persons: see UNODC, *Model Law against Trafficking in Persons* (United Nations, 2009) 18.

Convention’).<sup>57</sup> Servile marriage was first described in the *Supplementary Convention*, which characterised the circumstances of a person of servile status as those in which:

- (i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or
- (ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or
- (iii) A woman on the death of her husband is liable to be inherited by another person.<sup>58</sup>

Under the *Supplementary Convention*, states are obliged to criminalise conduct that induces another person to adopt a servile status.<sup>59</sup> The term ‘forced marriage’ encompasses the narrower idea of ‘servile marriage’, or ‘situations in which a person is considered a “chattel” that can be sold, transferred, or inherited into marriage.’<sup>60</sup>

Further, while the various concepts of forced and servile marriage, slavery, servitude and forced labour have different definitions under international law, the concepts may overlap. The most extreme situations of forced marriage may amount to servitude or, in the most egregious circumstances, slavery.<sup>61</sup> The authoritative international definition of slavery is found in the 1926 *Slavery Convention*<sup>62</sup> which defines slavery as ‘the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised’.<sup>63</sup> But despite the age and stature of the international prohibition on slavery, it is only in the last decade that legislative action to combat human trafficking, and the introduction of enslavement into the *Rome Statute*

<sup>57</sup> Opened for signature 7 September 1956, 266 UNTS 3 (entered into force 30 April 1957) arts 6(1)–(2).

<sup>58</sup> *Ibid* art 1(c).

<sup>59</sup> *Ibid* arts 1, 6(2).

<sup>60</sup> Attorney-General’s Department (Cth), ‘Forced and Servile Marriage’, above n 5, 3 [2].

<sup>61</sup> UN Secretary-General, *In-Depth Study on All Forms of Violence against Women: Report of the Secretary-General*, UN GAOR, 3<sup>rd</sup> Comm, 61<sup>st</sup> sess, Agenda Item 61, UN Doc A/61/122/Add.1 (6 July 2006) 40 [122].

<sup>62</sup> Opened for signature 25 September 1926, 60 LNTS 253 (entered into force 9 March 1927).

<sup>63</sup> *Ibid* art 1(1). The language of art 1(1) of the *Slavery Convention* has ‘proved to be abiding’ and is now accepted to define slavery at customary international law: *Prosecutor v Kunarac (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case Nos IT-96-23-T and IT-96-23/1-T, 22 February 2001) [519]–[520].

of the International Criminal Court ('Rome Statute'),<sup>64</sup> has 'breathed new life into what was recently a dormant field of prosecution'.<sup>65</sup>

In 2008, the High Court of Australia contributed to jurisprudence on the meaning of slavery when it considered the application of domestic slavery offences that borrowed the language of the *Slavery Convention*.<sup>66</sup> The High Court drew upon the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia to resolve the question of whether five Thai women, who worked in conditions of debt bondage in the Australian sex industry, could be described as slaves. The Court identified four powers attaching to the right of ownership: the power to use a person's labour in a substantially unrestricted manner; the entitlement to the fruits of the person's labour without commensurate compensation; the power to control and restrict a person's movements; and the power to commodify a person by treating the person as an object of sale and purchase.<sup>67</sup>

While drafters and commentators have distinguished between different types of exploitation such as slavery and servitude,<sup>68</sup> the High Court found it 'unnecessary ... and unhelpful to seek to draw boundaries between slavery and cognate concepts such as servitude, peonage, forced labour, or debt bondage' as the various concepts should not be understood as 'mutually exclusive'.<sup>69</sup> Applying this reasoning, it is apparent that the most egregious

<sup>64</sup> Opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002).

<sup>65</sup> Jean Allain, 'The Legal Definition of Slavery into the Twentieth-First Century' in Jean Allain (ed), *The Legal Understanding of Slavery: From the Historical to the Contemporary* (Oxford University Press, 2012) 356, 390.

<sup>66</sup> *R v Tang* (2008) 237 CLR 1.

<sup>67</sup> *Ibid* 18–21 [27]–[35] (Gleeson CJ), citing UN Secretary-General, *Slavery, the Slave Trade, and Other Forms of Servitude*, UN ESCOR, 15<sup>th</sup> sess, Agenda Item 18, UN Doc E/2357 (27 January 1953) 28.

<sup>68</sup> See, eg, the *travaux préparatoires* of the ICCPR, which suggest the drafters narrowly construed the concept of slavery in art 8 as a 'relatively limited and technical notion' which 'implied the destruction of the juridical personality', while the prohibition on servitude in art 8(2) was 'a more general idea covering all possible forms of man's domination of man': Marc J Bossuyt, *Guide to the 'Travaux Préparatoires' of the International Covenant on Civil and Political Rights* (Martinus Nijhoff Publishers, 1987) 16–17. See also *Siliadin v France* (2006) 43 EHRR 16.

<sup>69</sup> *R v Tang* (2008) 237 CLR 1, 19 [29] (Gleeson CJ), observing that '[t]hose who engage in the traffic in human beings are unlikely to be so obliging as to arrange their practices to conform to some convenient taxonomy.'

cases of forced marriage may fall within the legal definition of slavery, but less egregious cases may not — the question will be whether or not the powers exercised by the perpetrator over the victim can be characterised as powers attaching to the right of ownership.<sup>70</sup>

A different approach was adopted by the Special Court of Sierra Leone in *Prosecutor v Brima*, where the Appeals Chamber recognised forced marriage as a specific crime against humanity, distinct from sexual slavery.<sup>71</sup> This case concerned charges of crimes against humanity, brought against military leaders of the Armed Forces Revolutionary Council (‘AFRC’), for atrocities committed during the Sierra Leone civil war. During the war, rebel soldiers abducted women and girls to serve as ‘wives’. The marriages were de facto arrangements; there was no marriage at law but the term ‘wife’ was deliberately used to exert control over the women, and the ‘wives’ were forced to perform what were considered ‘wifely duties’ such as cleaning, cooking and caring for their husbands. The Trial Chamber, in June 2007, concluded that every sham marriage forced upon the women by AFRC troops was a case of sexual slavery, ‘leaving no lacuna in the law that would necessitate a separate crime of forced marriage as an “other inhumane act”’.<sup>72</sup>

One of the issues on appeal was whether the prosecution had established the elements of a non-sexual offence of forced marriage independent of the crime of sexual slavery. The Appeals Chamber heard evidence that ‘[t]he use of the term ‘wife’ by the perpetrator was deliberate and strategic’, designed to demonstrate ‘a rebel’s control over a woman.’<sup>73</sup> Therefore, instead of characterising forced marriage as a species of sexual slavery, the Appeals Chamber

<sup>70</sup> Ibid. See also Attorney-General’s Department (Cth), ‘Forced and Servile Marriage’, above n 5, 10–11 [42]–[46].

<sup>71</sup> *Brima v Prosecutor (Judgment)* (Special Court for Sierra Leone, Appeals Chamber, Case No SCSL-2004-16-A, 22 February 2008) (*‘Brima (Appeal)’*). See also *Prosecutor v Brima (Judgment)* (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-04-16-T, 20 June 2007) (*‘Brima (Trial)’*); *Prosecutor v Sesay (Judgment)* (Special Court for Sierra Leone, Appeals Chamber, Case No SCSL-04-15-A, 26 October 2009).

<sup>72</sup> *Brima (Trial)* (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-04-16-T, 20 June 2007) [713], quoted in *Brima (Appeal)* (Special Court for Sierra Leone, Appeals Chamber, Case No SCSL-2004-16-A, 22 February 2008) [187].

<sup>73</sup> *Brima (Appeal)* (Special Court for Sierra Leone, Appeals Chamber, Case No SCSL-2004-16-A, 22 February 2008) [192]. The prosecution expert noted: ‘By calling a woman “wife”, the man or “husband” openly staked his claim and she was not allowed to have sex with any other person. If she did, she would be deemed unfaithful and the penalty was severe beating or death.’

concluded that the nature of ‘forced conjugal association’ was different from the exercise of ownership powers that characterise slavery, because it imposes social exclusivity upon the victims:

unlike sexual slavery, forced marriage implies a relationship of exclusivity between the ‘husband’ and ‘wife’, which could lead to disciplinary consequences for breach of this exclusive arrangement. These distinctions imply that forced marriage is not predominantly a sexual crime.<sup>74</sup>

The Appeals Chamber held that forced marriage is a crime against humanity, which should be recognised as a distinct crime instead of subsumed within the crime of ‘sexual slavery’ set out in art 7(1)(g) of the *Rome Statute*.<sup>75</sup> The Appeals Chamber defined the crime of forced marriage as a situation in which

the perpetrator through his words or conduct, or those of someone for whose actions he is responsible, compels a person by force, threat of force, or coercion to serve as a conjugal partner resulting in severe suffering, or physical, mental or psychological injury to the victim.<sup>76</sup>

Notably, this definition focuses on the conduct of *maintaining* a person in forced marriage over a period of time and the physical and psychological harm suffered by victims as a result of being forced to ‘serve’ as wives.<sup>77</sup>

<sup>74</sup> Ibid [195].

<sup>75</sup> Ibid. The appeal reversed the trial decision, which acquitted the defendants of forced marriage on the basis that the conduct was captured by the existing crime of sexual slavery, which is prohibited by art 7(1)(g) of the *Rome Statute*. The Trial Chamber had held that the residual category of crimes against humanity, ‘other inhumane acts’, was confined to acts of a non-sexual nature; if the evidence of sexual slavery was removed from the trial there was not sufficient evidence to establish the elements of a non-sexual crime of sexual slavery. The Appeals Chamber declined, however, to enter a fresh conviction in this case for the crime of forced marriage. The Appeals Chamber found that the conduct that constituted forced marriage had already been relied upon to convict the appellants of the crime of ‘Outrages upon Personal Dignity’: at [202].

<sup>76</sup> Ibid [196].

<sup>77</sup> Ibid [199]–[200]. The Appeals Chamber noted the act of forced marriage was ‘of similar gravity to several enumerated crimes against humanity including enslavement, imprisonment, torture, rape, sexual slavery and sexual violence’: at [200].



### C Australia's Legislative Response

In the decade prior to the introduction of the *Slavery Act 2013*, Australia introduced new criminal offences prohibiting slavery, sexual servitude, people trafficking, and debt bondage into divs 270 and 271 of sch 1 of the *Criminal Code Act 1995* (Cth) ('*Criminal Code*'),<sup>78</sup> with the intention of implementing its international obligations to prohibit slavery, people trafficking and slavery-like practices. However, these provisions failed to fully incorporate the international prohibitions on servitude, forced labour, and other practices similar to slavery.<sup>79</sup> Indeed, the 2005 offences reflected an early preoccupation with egregious incidences of exploitation in the sex industry: for example, the legislation enacted in 1999 created a stand-alone offence of 'sexual servitude' that specifically targets exploitation of sexual services in the commercial sex industry or for a commercial profit,<sup>80</sup> but did not capture sexual exploitation

<sup>78</sup> The *Criminal Code Amendment (Slavery and Sexual Servitude) Offences Act 1999* (Cth) introduced the offences of slavery (s 270.3), sexual servitude (s 270.6) and deceptive recruiting for sexual services (s 270.7) into *Criminal Code Act 1995* (Cth) sch 1. The *Criminal Code Amendment (Trafficking in Persons Offences) Act 2005* (Cth) added the offences of trafficking in persons (s 271.2), trafficking in children (s 271.4), domestic trafficking in persons (s 271.5) and debt bondage arrangements (s 271.8). See *R v Tang* (2008) 237 CLR 1, 16 [21]–[23] (Gleeson CJ) (explaining the legal meaning of slavery); *R v Sieders* (2008) 72 NSWLR 417 (explaining the meaning of sexual servitude).

<sup>79</sup> See Miriam Cullen and Bernadette McSherry, 'Without Sex: Slavery, Trafficking in Persons and the Exploitation of Labour in Australia' (2009) 34 *Alternative Law Journal* 4. See also Andreas Schloenhardt and Jarrod Jolly, 'Honeymoon from Hell: Human Trafficking and Domestic Servitude in Australia' (2010) 32 *Sydney Law Review* 671, discussing how a case of exploitation involving domestic servitude resulted in slavery and sexual assault convictions; Frances Simmons and Jennifer Burn, 'Evaluating Australia's Response to All Forms of Trafficking: Towards Rights-Centered Reform' (2010) 84 *Australian Law Journal* 712; Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 29 August 2012, 27–30 (Jennifer Burn, Director, Anti-Slavery Australia); Anne T Gallagher and Rebecca Surtees, 'Measuring the Success of Counter-Trafficking Interventions in the Criminal Justice Sector: Who Decides — and How?' (2012) 1 *Anti-Trafficking Review* 1.

<sup>80</sup> Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Criminal Code Amendment (Trafficking in Persons Offences) Bill 2004* (2005) 19 [2.49] observed that non-commercial sexual exploitation was not caught by the proposed offences and recommended that the proposed trafficking offences be amended to remove any doubt that they apply to non-commercial sexual exploitation: at 20 [2.53]. In response to these concerns, the Commonwealth Attorney-General's Department expressed the view that non-commercial sexual exploitation is a matter for state and territory governments to address under their laws and not a matter that the Australian government had to address to implement the *Trafficking Protocol*: at 18 [2.45].

in a non-commercial setting or recognise the concept of servitude may properly describe severe forms of exploitation in a range of different settings.

There were other gaps in the formulation of Commonwealth trafficking offences: the accepted international definition of trafficking in persons captures both ‘the bringing of a person into exploitation and the maintenance of that person in a situation of exploitation’.<sup>81</sup> In contrast, Australia’s anti-trafficking laws only dealt with the movement of persons either across or within borders for the purpose of exploitation.<sup>82</sup> Moreover, the 2005 trafficking offences in the *Criminal Code* prohibited trafficking for the purpose of ‘exploitation’<sup>83</sup> but the definition of exploitation did not specifically cover ‘servile marriage’, ‘servitude’ or ‘practices similar to slavery’, despite the fact that these practices were clearly captured by the international definition of trafficking in persons found in the *Trafficking Protocol*.<sup>84</sup>

<sup>81</sup> Gallagher, above n 24, 47.

<sup>82</sup> See Fiona David and Anne Gallagher, Submission to the Attorney-General’s Department (Cth), *The Criminal Justice Response to Slavery and People Trafficking; Reparation; and Vulnerable Witness Protections*, 1 March 2011.

<sup>83</sup> The definition in the *Criminal Code* Dictionary states that exploitation occurs if:

- (a) the exploiter’s conduct causes the victim to enter into slavery, forced labour or sexual servitude; or
- (b) the exploiter’s conduct causes an organ of the victim to be removed and:
  - (i) the removal is contrary to the law of the State or Territory where it is carried out; or
  - (ii) neither the victim nor the victim’s legal guardian consented to the removal and it does not meet a medical or therapeutic need of the victim.

In 2005, the Senate Legal and Constitutional Committee noticed this gap and recommended that the trafficking offences should provide unambiguous coverage of all forms of exploitation contemplated by the *Trafficking Protocol*: Senate Legal and Constitutional Legislation Committee, *Trafficking in Persons Offences Report*, above n 80, 14–17 [2.33]–[2.43], 20 [2.54]. In the view of the Committee, the definition of ‘exploitation’ should have been amended to expressly cover servile marriage.

<sup>84</sup> *Trafficking Protocol* art 3; UNODC, above n 56. See also Joy Ngozi Ezeilo, *Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children: Mission to Australia*, 20<sup>th</sup> sess, Agenda Item 3, UN Doc A/HRC/20/18/Add.1 (18 May 2012) 8; Anti-Slavery Australia, Submission to the Attorney-General’s Department (Cth), *Forced and Servile Marriage*, 25 February 2011, 56; Anti-Slavery Australia, Submission to the Attorney-General’s Department (Cth), *The Criminal Justice Response to Slavery and People Trafficking; Reparation; and Vulnerable Witness Protections*, March 2011; Simmons and Burn, ‘Evaluating Australia’s Response to All Forms of Trafficking’, above n 79, 712.

In response to concerns about gaps in Australia's anti-trafficking laws, in May 2012 the Australian government introduced the Crimes Legislation Amendment (Slavery, Slavery-Like Conditions and People Trafficking) Bill 2012 (Cth), and on 27 February 2013 the Bill was passed by the Australian Parliament.<sup>85</sup> The new Act introduces stand-alone offences of forced marriage, servitude and forced labour, clarifies the meaning of 'coercion' in the context of trafficking-related crimes, introduces a new offence which applies where a person harbours or receives a victim of trafficking or slavery, and amends the definition of exploitation to include a 'condition similar to slavery', including (but not limited to): servitude, forced labour, forced marriage, and debt bondage.<sup>86</sup>

Amending the definition of exploitation to include 'a condition similar to slavery' is consistent with Australia's international obligations under the *Trafficking Protocol*, which requires Australia to 'adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of [the *Trafficking Protocol*]'.<sup>87</sup> The replacement of the offence of 'sexual servitude' with a broader offence of 'servitude' that will capture all forms of servitude is also welcome, as the previous focus on sexual servitude in the commercial sex industry (to the exclusion of other forms of servitude) sat uneasily with the Australian government's stated intention to address all forms of trafficking.

Under the Act, servitude is defined by *Criminal Code* s 270.4 as follows:

- (1) For the purposes of this Division, *servitude* is the condition of a person (the *victim*) who provides labour or services, if, because of the use of coercion, threat or deception:
  - (a) a reasonable person in the position of the victim would not consider himself or herself to be free:
    - (i) to cease providing the labour or services; or
    - (ii) to leave the place or area where the victim provides the labour or services; and
  - (b) the victim is significantly deprived of personal freedom in respect of aspects of his or her life other than the provision of the labour or services.

<sup>85</sup> For a discussion of the gaps in existing legislation and the merits of the proposed new offences, see David and Gallagher, above n 82.

<sup>86</sup> *Slavery Act 2013* sch 1, amending *Criminal Code*.

<sup>87</sup> *Trafficking Protocol* art 5(1).

- (2) Subsection (1) applies whether the coercion, threat or deception is used against the victim or another person.
- (3) The victim may be in a condition of servitude whether or not:
  - (a) escape from the condition is practically possible for the victim; or
  - (b) the victim has attempted to escape from the condition.

The new offence of servitude does not focus upon the absence of consent, but instead takes into account the conditions of the relationship, the deprivation of personal freedoms, and whether a person's labour or services are exploited. Thus, the servitude provision may apply in situations where marriage is entered into with consent of both parties, but after the marriage has occurred one party subjects the other to servitude. This is important, as sometimes the marriage itself may not be identified by the parties as 'forced'. Instead, consent is given to enter into marriage, but the nature of the marriage is not in line with one or both of the parties' expectations.<sup>88</sup> The servitude provision may cover a situation where a marriage ceremony was voluntarily entered into but then one of the parties was subsequently subjected to serious exploitation.<sup>89</sup> While it appears clear that the offence of servitude captures exploitation in private and non-private settings, a recent Senate inquiry into the Bill recommended that the explanatory memorandum make this situation clear.<sup>90</sup> Although the explanatory memorandum does not expressly address this point, it does make it clear that the intention of the new provision is to recast the servitude offence so that 'it covers the broadest possible range of exploitative conduct'.<sup>91</sup>

<sup>88</sup> Women's Legal Services NSW, Submission to the Attorney-General's Department (Cth), *Forced and Servile Marriage*, 4 March 2011, 2.

<sup>89</sup> Attorney-General's Department (Cth), Answers to Questions on Notice to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Crimes Legislation Amendment (Slavery, Slavery-Like Conditions and People Trafficking) Bill 2012*, 4 September 2012, 15.

<sup>90</sup> Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Crimes Legislation Amendment (Slavery, Slavery-Like Conditions and People Trafficking) Bill 2012 [Provisions]* (2012) 34 [3.83]–[3.84] ('*Slavery Bill Report*'). See also Second Addendum to the Explanatory Memorandum, *Crimes Legislation Amendment (Slavery, Slavery-Like Conditions and People Trafficking) Bill 2012*.

<sup>91</sup> See Commonwealth of Australia, Explanatory Memorandum, *Crimes Legislation Amendment (Slavery, Slavery-Like Conditions and People Trafficking) Bill 2012*, 15.

The forced marriage offences inserted by the Act target conduct causing a person to enter into a forced marriage and being a (non-victim) party to forced marriage, but do not focus upon the maintenance of a person in a situation of forced marriage (for example, making a woman 'serve' a husband as a forced wife). Although it appeared in the exposure draft as a 'condition similar to slavery' falling within the definition of 'exploitation',<sup>92</sup> no reference is made to the concept of servile marriage in the Act; it is not a stand-alone offence. The response of the Commonwealth Attorney-General's Department was that no new offence for 'servile marriage' was necessary. 'Servile marriage' refers to a situation in which a person is considered a chattel, to 'be sold, transferred or inherited', and these situations would be covered either under the existing offence of slavery, or the new offences of forced marriage.<sup>93</sup> Where a person voluntarily enters into a marriage but is later coerced, threatened or deceived into remaining in the marriage, this conduct may be captured by servitude or slavery offences, or by state and territory domestic violence legislation.<sup>94</sup>

Consequently, the Australian approach to the criminalisation of forced marriage deals with the discrete question of whether there was an absence of consent at the point in time the marriage was entered into,<sup>95</sup> rather than

<sup>92</sup> Attorney-General's Department (Cth), *Exposure Draft*, above n 25, 13 cl 271.1A(2). See Commonwealth of Australia, Explanatory Memorandum, Crimes Legislation Amendment (Slavery, Slavery-Like Conditions and People Trafficking) Bill 2012, 15, which states:

Given the rise in the number of individuals identified as being exploited in industries other than the sex industry (for example, hospitality) it is necessary to recast this offence so that it covers the broadest possible range of exploitative conduct, regardless of the industry in which the exploitation occurs. This is especially important in order to ensure that investigators and prosecutors have the most appropriate range of offences available to them where the circumstances of a matter do not amount to slavery but nonetheless demonstrate significant inappropriate conduct.

<sup>93</sup> Attorney-General's Department (Cth), Answers to Questions on Notice to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Crimes Legislation Amendment (Slavery, Slavery-Like Conditions and People Trafficking) Bill 2012*, 4 September 2012, 11; Commonwealth of Australia, Explanatory Memorandum, Crimes Legislation Amendment (Slavery, Slavery-Like Conditions and People Trafficking) Bill 2012.

<sup>94</sup> See Commonwealth of Australia, Explanatory Memorandum, Crimes Legislation Amendment (Slavery, Slavery-Like Conditions and People Trafficking) Bill 2012, 25.

<sup>95</sup> *Slavery Act 2013* sch 1 item 12, amending *Criminal Code* s 270.7A. Whether the Commonwealth decides to introduce criminal or civil measures, it would appear the legislative response to forced marriage could be justified under either the external affairs power in s 51(xxix) of the *Constitution* — as giving effect to Australia's international obligations to prohibit and prevent practices similar to slavery (including servile marriage) and protect the right to enter into marriage freely and voluntarily — or as laws made with respect to marriage pursuant to s 51(xxi) of the *Constitution*.

adopting the approach in *Brima (Appeal)* where the Appeals Chamber focused upon the ‘suffering, or physical, mental or psychological injury to the victim’ that occurs as a result of being forced to ‘serve’ as a wife.<sup>96</sup>

According to the Act, ‘a marriage is a *forced marriage* if, because of the use of coercion, threat or deception, one party to the marriage (the *victim*) entered into the marriage without freely and fully consenting.’<sup>97</sup> This definition incorporates a broad definition of ‘coercion’, introduced by the Act, which states coercion can include force, duress, detention, psychological oppression, abuse of power, and taking advantage of a person’s vulnerability.<sup>98</sup> Significantly, s 270.7A(3) introduced by the Act provides that the definition of forced marriage applies whether the coercion, threat or deception is used against the victim or another person.

Section 270.7B creates two offences of forced marriage. The first offence of ‘causing a person to enter into a forced marriage’ provides:

- (1) A person (the *first person*) commits an offence if:
  - (a) the first person engages in conduct; and
  - (b) the conduct causes another person to enter into a forced marriage as the victim of the marriage.<sup>99</sup>

Coercion and threat are defined at s 270.1A, while the concept of deception is already defined in the *Criminal Code*.<sup>100</sup>

The second specific offence, that of ‘being a party to a forced marriage’, targets the conduct of a person who remains in a marriage to a victim of forced marriage. Under s 270.7B, a person who commits an offence is a

<sup>96</sup> *Brima (Appeal)* (Special Court for Sierra Leone, Appeals Chamber, Case No SCSL-2004-16-A, 22 February 2008) [195].

<sup>97</sup> *Slavery Act 2013* sch 1 item 12, inserting *Criminal Code* s 270.7A, which provides that a marriage includes a de facto relationship registered in Australia, a marriage or registered de facto relationship recognised under a law of foreign country, and a marriage that is invalid or not recognised by law, for any reason, including that a party to the marriage has not freely and fully consented to the marriage or that a party to marriage is married to more than one person.

<sup>98</sup> *Slavery Act 2013* sch 1 item 8, inserting *Criminal Code* s 270.1A.

<sup>99</sup> *Slavery Act 2013* sch 1 item 12, inserting *Criminal Code* s 270.7B(1).

<sup>100</sup> *Criminal Code* s 271.1.

person who is a party to a marriage (as defined in s 270.7A), where the marriage is a forced marriage and the person is not a victim of the forced marriage. The offence will not apply if the person has a 'reasonable excuse', but no statutory guidance is provided about what excuses would be acceptable.<sup>101</sup> As a result, it is unclear how the offence will operate.<sup>102</sup>

The differing degrees of harm that may result from a forced marriage are in part acknowledged by s 270.8, which provides for an aggravated offence for slavery-like offences, including the forced marriage offences. The aggravated offence will be committed if: the victim is under 18; the offender subjects the victim to cruel, inhuman or degrading treatment; or the offender engages in conduct that gives rise to a danger of death or serious harm to the victim or another person. Serious harm is not defined in the Act but the concept of cruel, inhuman or degrading treatment parallels the international definitions drawn from the *ICCPR*.<sup>103</sup> If the prosecutor intends to prove an aggravated offence the charge must allege the relevant aggravated offence. The relevant fault element is recklessness.<sup>104</sup>

Criminalising the conduct that causes a person to enter into a forced marriage is likely to be challenging. Little is known about the modus operandi of people who facilitate forced marriage or cause others to enter into forced marriage in Australia, but if the experience in Australia is similar to that of the United Kingdom then typically the 'offenders' will be family members. These family members may not view their actions as wrong or harmful and their children or relatives may be reluctant to participate in criminal proceedings against their relatives. In order for an entry offence to be effective, the question of what constitutes coercion in a familial context where multiple

<sup>101</sup> *Slavery Act 2013* sch 1 item 12, inserting *Criminal Code* s 270.7B(4).

<sup>102</sup> See failed amendments moved by Senator Brandis, on behalf of the Opposition: Commonwealth, *Parliamentary Debates*, Senate, 27 February 2013, 14–16. The operation of strict liability in s 270.7B(2)(c) was controversial: see Commonwealth, *Parliamentary Debates*, Senate, 25 February 2013, 103–10; Commonwealth, *Parliamentary Debates*, House of Representatives, 21 August 2012, 9267–97; Commonwealth, *Parliamentary Debates*, House of Representatives, 20 August 2012, 9487–91.

<sup>103</sup> *ICCPR* art 7.

<sup>104</sup> *Slavery Act 2013* sch 1 item 12, inserting *Criminal Code* s 270.8(1)(c)(ii). It is noted that s 270.8(3) provides:

If, on a trial for an aggravated offence, the trier of fact is not satisfied that the defendant is guilty of the aggravated offence, but is otherwise satisfied that the defendant is guilty of the corresponding slavery-like offence, it may find the defendant not guilty of the aggravated offence, but guilty of the corresponding slavery-like offence.

members may place pressure upon a person to marry must be carefully defined and the question of what conduct is egregious enough to warrant criminal sanction must be precisely articulated. Community stakeholders have argued that extensive community consultation and education would need to accompany any new offences.<sup>105</sup>

While the Australian government has moved to define the concepts of forced marriage and coercion in the criminal law, the role of civil legislation in responding to forced marriage has not yet attracted the same attention. As noted above, the concept of forced marriage is complex and not all cases involve obvious methods of duress; as Watson SJ observed in *Re Marriage of S*, the opportunity to freely consent may be removed as a result of ‘controlling parental coercion.’<sup>106</sup> In civil matters concerning the annulment of marriage, the availability of injunctive relief by way of civil protection orders, the operation of immigration laws intended to protect temporary migrants experiencing family violence, and claims for compensation by victims of violent crime, courts and statutory decision-makers may benefit from statutory guidance and training about the concepts of forced marriage and coercion. Thus, while the criminal law focuses upon punishing the perpetrators, in Part IV we now examine measures that focus upon preventing forced marriage and protecting those who are subjected to the practice.

#### IV BEYOND CRIMINALISATION: PROTECTING PEOPLE EXPERIENCING FORCED MARRIAGE

The vexed question of how the law should respond to forced marriage is visible in the different ways states have chosen to address forced marriage. Among nations with laws specifically targeting forced marriage, some favour prosecution, while others focus on prevention (civil protection orders and community education). Specific criminal offences of forced marriage have been introduced in European countries such as Belgium, Norway, Denmark and Germany.<sup>107</sup> In the United Kingdom the debate about how to address

<sup>105</sup> See Law Council of Australia, Submission to the Attorney-General’s Department (Cth), *Crimes Legislation Amendment (Slavery, Slavery-Like Conditions and People Trafficking) Bill 2012*, 20 January 2012, 19; Good Shepherd Australia New Zealand, *Forced and Servile Marriage*, above n 42, 20–1; Anti-Slavery Australia, Submission No 28 to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into Crimes Legislation Amendment (Slavery, Slavery-Like Conditions and People Trafficking) Bill 2012*, 6 August 2012, 8.

<sup>106</sup> (1980) 42 FLR 94, 105.

<sup>107</sup> Attorney-General’s Department (Cth), ‘Forced and Servile Marriage’, above n 5, 8–10 [27]–[41]. See *Strafgesetzbuch* [Criminal Code] (Germany) § 240, where there is up to five



forced marriage has focused on whether criminalisation is an effective part of the legal response to forced marriage. Proponents of criminalisation argue that it is necessary to deter persons from organising and/or partaking in forced marriages, empower victims of forced marriages to challenge their spouses and/or their families, recognise the specific gendered harm that occurs as a result of 'forced marriage', and punish offenders.<sup>108</sup> Those against criminalisation argue that the prospect of family members facing criminal charges may deter victims from seeking help and that civil protection orders are an effective legal mechanism to assist people to avoid or exit forced marriage.<sup>109</sup>

In our view the Australian response to forced marriage, which has so far focused upon proposals to criminalise forced marriage, should be broadened to examine how legislative and non-legislative measures can operate to prevent forced marriages from occurring and protect those individuals who are subjected to these practices. The Discussion Paper released by the Commonwealth Attorney-General's Department canvassed criminal and civil law reform, as well as the need for non-legislative measures such as community awareness initiatives.<sup>110</sup> While the Australian government has prioritised criminal law reform, in our view an early priority must be community consultation and education strategies and civil protection orders. This reflects the need to deepen community awareness and understanding of forced marriage, provide people facing forced marriage with the legal tools to avoid or exit forced marriage, and the reality that criminal convictions are likely to be extremely difficult to obtain due to the standard of proof required and the reluctance of those facing forced marriage to give evidence against family members.

years' imprisonment for compelling another into marriage 'by force or threat of serious harm'; *General Civil Penal Code* (Norway) s 222(2), which specifies an imprisonable offence of forced marriage, of up to 6 years; *Penal Code* (Belgium) art 391, which provides that there is an offence if a person 'by violence or threats forces someone into marriage'.

<sup>108</sup> Home Office (UK), *Forced Marriage Consultation* (2011) 11.

<sup>109</sup> Aisha Gill and Khatun Sapnara, 'Forced Marriages Blight Lives, but Criminalising Them Would Not Work', *The Guardian* (online), 9 April 2012 <<http://m.guardian.co.uk/commentisfree/2012/apr/09/forced-marriages-criminalising?cat=commentisfree&type=article>>. See also ABC Television, 'Without Consent', *Four Corners*, 2 April 2012 (Sarah Ferguson).

<sup>110</sup> Attorney-General's Department (Cth), 'Forced and Servile Marriage', above n 5.

A *Forced Marriage as a Form of Family Violence: Protective Measures*

The former Commonwealth Attorney-General, the Hon Nicola Roxon, was quoted as saying that criminalising forced marriage is necessary to 'send a strong message that the practice is not acceptable and help to deter the practice.'<sup>111</sup> However, criminalisation is but one part of a range of legal and policy initiatives that may be employed to prevent and respond to the complex issue of forced marriage, and protect those facing or already in a forced marriage.<sup>112</sup> Although the Discussion Paper canvassed introducing specific civil remedies to prevent forced marriage, there have been no further announcements about civil remedies or community education and consultation strategies. Civil remedies are a practical way to protect Australian citizens or residents from being forced to marry abroad and send a clear message that there are legal tools to avoid or exit a forced marriage without having to give evidence about family members to the police. Moreover, civil protection orders have the potential to help more people than criminal charges which are necessarily reactive and must be proven beyond a reasonable doubt. In contrast, protection orders would be made if the less stringent civil standard (balance of probabilities) is satisfied and could be obtained before the forced marriage occurred.

A greater focus on prevention and protection would be welcomed by community stakeholders. The Anti-People Trafficking Interdepartmental Committee has acknowledged that there is community support

for a combination of legislative and non-legislative measures with a focus on ensuring individuals understand their rights and responsibilities in relation to marriage; that various professionals understand the issues involved in a forced or servile marriage; and that legal avenues or other mechanisms are available to assist victims.<sup>113</sup>

An effective civil legal response to forced marriage is important, as people who are facing forced marriage may not be willing to speak to the law enforcement authorities about their experiences. Moreover, even in cases where the suspected victim does provide a police statement, the evidence may

<sup>111</sup> Overington, 'Teenage Girls Forced to Marry', above n 3.

<sup>112</sup> See ABC Radio National, 'Forced Marriage', *The Spirit of Things*, 29 July 2012 (Jennifer Burn). See also Good Shepherd Australia New Zealand and Anti-Slavery Australia, *Hidden Exploitation: Women in Forced Labour, Marriage and Migration* (2012) 16–19; Senate Legal and Constitutional Affairs Legislation Committee, *Slavery Bill Report*, above n 90, 34–6 [3.85]–[3.94].

<sup>113</sup> Anti-People Trafficking Interdepartmental Committee, above n 43, 8.

not be sufficient to support a criminal conviction, especially where other family members who have information about the situation or circumstances may be pressured not to speak to authorities.<sup>114</sup>

The experience in the UK demonstrates that forced marriage protection orders are a practical legal tool that can assist people to avoid or exit forced marriage. After debating whether to create a criminal offence of forced marriage, the UK instead chose to enact civil legislation. The *Forced Marriage (Civil Protection) Act 2007* (UK) c 20 ('FMCPA') amended the *Family Law Act 1996* (UK) c 27 and empowered courts to make Forced Marriage Protection Orders (FMPOs) to protect a person facing forced marriage or a person who had been forced into a marriage.<sup>115</sup> Under this legislation, a person ('A') is forced into a marriage if another person ('B') forced A to enter into a marriage without A's free and full consent.<sup>116</sup> 'Force' is defined broadly to include 'coerce by threats or other psychological means'.<sup>117</sup>

If a person who is subject to a FMPO breaches its terms, that person may be arrested<sup>118</sup> and the breach may constitute a contempt of court.<sup>119</sup> For example, a British mother has been sentenced to eight months' jail for breaching a FMPO that required her to return her 17-year-old son from Nigeria to the UK.<sup>120</sup> People facing forced marriage or in situations of forced marriage may find it difficult to seek a legal order.<sup>121</sup> Either the court can make an order on its own application or of its own initiative where family law

<sup>114</sup> Attorney-General's Department (Cth), 'Forced and Servile Marriage', above n 5, 16 [84]–[85]. See also Fiona David, 'Prosecuting Trafficking in Persons: Known Issues, Emerging Responses' (Trends and Issues in Criminal Justice No 358, Australian Institute of Criminology, June 2008); Andreas Schloenhardt, Genevieve Beirne and Toby Corsbie, 'Human Trafficking and Sexual Servitude in Australia' (2009) 32 *University of New South Wales Law Journal* 27.

<sup>115</sup> *Forced Marriage (Civil Protection) Act 2007* (UK) c 20, s 63A.

<sup>116</sup> *Ibid* s 63A(4).

<sup>117</sup> *Ibid* s 63A(6).

<sup>118</sup> *Ibid* s 63H.

<sup>119</sup> *Ibid* s 63I(2).

<sup>120</sup> 'Edirin Onogeta-Idogun Mother Jailed over "Missing" Son', *BBC News* (online), 14 February 2011 <<http://www.bbc.co.uk/news/uk-england-london-12455820>>.

<sup>121</sup> Foreign and Commonwealth Office (UK), *Forced Marriage Statutory Guidance Consultation Paper* (2008) 16. Isolation is a key problem for victims facing forced marriage. They may not feel free to express their concerns about the marriage. Young people who are forced to marry may be withdrawn from education and their social networks which restricts their educational and personal development. Mental or physical disability and illness can also add to victims' vulnerability.

proceedings have already been initiated, or a third party can apply without the leave of the court.<sup>122</sup> Any other applicant who wishes to obtain a FMPO must first seek the leave of the court. The orders can be made *ex parte*<sup>123</sup> and have extraterritorial application.<sup>124</sup>

Importantly, the introduction of FMPOs was accompanied by a significant investment in training, education and community outreach. The Forced Marriage Unit (FMU) was established within the Home Office, and statutory guidance on forced marriage was issued.<sup>125</sup> From 2008 to 2010 the FMU assisted around 400 actual and potential victims per year, leading to 293 FMPO orders.<sup>126</sup> The first review of the new FMPO regime found that '[t]here is a need for action, but also a need for caution and understanding of the impact of an application on a young person who then loses family and community, and will need long term protection and support'.<sup>127</sup>

The FMPO regime has been criticised as a weak response to an egregious abuse of human rights. In 2011, the Home Affairs Committee of the House of Commons expressed concern about 'inadequacies in monitoring of compliance with an order after it is made and a lack of effective action in cases of breach, with only one person receiving a jail sentence for breach of an order'.<sup>128</sup> The report went on to urge the UK government to criminalise forced marriage, arguing that

[w]hile the measures in the Act should continue to be used, we believe that it would send out a very clear and positive message to communities within the UK and internationally if it becomes a criminal act to force — or to participate in forcing — an individual to enter into a marriage against their will.<sup>129</sup>

<sup>122</sup> *FMCPA* s 63C.

<sup>123</sup> *Ibid* s 63D.

<sup>124</sup> *Ibid* s 63B(2)(a).

<sup>125</sup> Foreign and Commonwealth Office (UK), *The Right to Choose: Multi-Agency Statutory Guidance for Dealing with Forced Marriage* (2008) 4.

<sup>126</sup> Home Affairs Committee (UK), *Forced Marriage*, House of Commons Paper No 880, Session 2010–12 (2011) 4 [4], 7 [12].

<sup>127</sup> Ministry of Justice (UK), above n 6, 10.

<sup>128</sup> Home Affairs Committee (UK), above n 126, 7 [12].

<sup>129</sup> *Ibid* 18 (conclusion and recommendation 2).

This report was quickly followed by the release of a discussion paper by the UK Home Office seeking public views 'on whether making forcing someone to marry should be a criminal offence or whether current arrangements provide adequate protection'.<sup>130</sup>

Although it is clearly too early to assess the impact of the proposed criminalisation of forced marriage in the UK, proponents for and against criminalisation agree that the civil remedies should remain in place. This recognises that allowing the family courts to issue FMPOs to prevent forced marriages from taking place has provided protection to those facing forced marriage. Indeed, opponents of criminalisation have pointed to the increasing number of FMPO applications as evidence that the existing legislative response is effective.<sup>131</sup>

While Australia does not have a specific regime of forced marriage protection orders, children at risk of forced marriage may obtain state protection by applying for a parenting order prohibiting the conduct that would enable the marriage.<sup>132</sup> Under the *FLA*, these orders may be sought by the young person themselves, either or both parents, a grandparent or by 'any other person concerned with care, welfare or development of the child'.<sup>133</sup> However, there are no similar protections in place for vulnerable adults facing forced marriage to obtain orders that would prevent the marriage from taking place. Adults at risk of, or in situations of, forced marriage may seek an apprehended violence order ('AVO') preventing a person from assaulting, threatening, stalking, intimidating or going within a certain distance of their home or workplace.<sup>134</sup> However, such orders are not designed to respond to the specific issue of forced marriage, which may involve conduct that occurs overseas.

Under an Australian regime of FMPOs the courts could be empowered to make a suite of orders, including orders to: stop intimidation and violence, prevent forced marriage from occurring, stop someone from being taken abroad, confiscate all passports where there is dual nationality, prevent

<sup>130</sup> Home Office (UK), above n 108, 11.

<sup>131</sup> Gill and Sapnara, above n 109.

<sup>132</sup> See, eg, *Department of Human Services v Brouker* (2010) 44 Fam LR 486. A 'parenting order' includes, among other things, 'any aspect of the care, welfare or development of the child or any other aspect of parental responsibility for a child': *FLA* s 64B(2)(i).

<sup>133</sup> *FLA* s 65C.

<sup>134</sup> The police are obliged to apply for an AVO when a domestic violence offence, a stalking/intimidation offence or an act of child abuse has been committed or is imminent or likely to be committed: see Australian Government Solicitor, *Domestic Violence Laws in Australia*, (Commonwealth of Australia, 2009) pt 2 for an overview of state and territory laws relating to domestic violence protection orders.

applications for new passports, oblige someone to attend court and reveal the whereabouts of a person, and facilitate or enable a person to return to Australia by a certain date.<sup>135</sup> The effectiveness of the regime would depend upon a robust implementation strategy that establishes clear procedures for monitoring compliance with orders, prosecuting breaches, and providing effective support, information and counselling services to those whom the orders were designed to protect and to whom the orders were directed. In this respect, requiring those who were subject to FMPOs to attend counselling may help produce attitudinal change. The police, the judiciary, support workers, family violence services, and consular officials would also require training.<sup>136</sup> It would also be sensible to consider whether an application for a FMPO and an application for an annulment of the marriage could be dealt with simultaneously.

Admittedly in cases where the victim has already left Australia, a civil protection order would only be of coercive value if those involved intended to return to Australia where they could be brought before a court, and sanctions could be imposed. But the experience in the UK illustrates that FMPOs can operate to protect vulnerable people who are facing forced marriage abroad. In *Chief Constable v YK*,<sup>137</sup> police applied for a FMPO to prevent a British national of Pakistani descent from being forced to marry her cousin. Orders made under this FMPO forbade family members from using violence, intimidation or harassment to solicit the marriage and obliged her parents to hand over all travel documentation. Despite these orders, the young woman went through a marriage-like ceremony, prompting the court to make further orders preventing the civil registration of any purported marriage and to issue an alert to border authorities to prevent the young woman from leaving the UK.

<sup>135</sup> See, eg, *FMCPA* s 63B, which provides for the content of FMPOs.

<sup>136</sup> Assistance provided by a consular official could include issuing emergency passports, acquiring a loan to assist the person to return to Australia and, in some circumstances, speaking to local authorities and facilitating referrals to appropriate support services. This is similar to the consular support services that the UK and Canada have in place for victims of forced marriage. In particular, the UK has country-by-country guides for the most common places forced marriages of British citizens occur, and lists the extensive services that the embassy and the Forced Marriage Unit can provide to citizens abroad: Crown Prosecution Service (UK), *Honour Based Violence and Forced Marriage* <[http://www.cps.gov.uk/legal/h\\_to\\_k/honour\\_based\\_violence\\_and\\_forced\\_marriage](http://www.cps.gov.uk/legal/h_to_k/honour_based_violence_and_forced_marriage)>.

<sup>137</sup> [2011] 1 FLR 1493.

### B Forced Marriage and Immigration Law

The Australian government's response to forced marriage must ensure vulnerable people obtain protection, regardless of whether they are able or willing to assist police and irrespective of their immigration status. So far public discussion of forced marriage has centred on concern about 'Australian girls'.<sup>138</sup> This echoes the developments in the UK where initiatives to help people avoid or escape forced marriage have focused upon assisting British citizens and residents facing forced marriage abroad, while the plight of asylum seekers afraid of being forcibly married on their return has not received the same attention.<sup>139</sup> In our view, any credible response to forced marriage must respond to the plight of non-citizens who have experienced forced marriage in Australia and would face harm if returned home to face their family members, as well as the situation of women and men who seek asylum in Australia on the grounds they would be forcibly married if returned to their country of origin.

Although many countries around the world fail to protect women from forced marriage, historically women escaping forced marriage have struggled to obtain recognition as refugees.<sup>140</sup> However, following the landmark decision of the High Court of Australia in *Minister for Immigration and Multicultural Affairs v Khawar*,<sup>141</sup> women who face severe family violence in countries where the state authorities will not protect them from their persecutors may be able to claim refugee status. The Department of Immigration's own *Gender Guidelines* identified that gender-related harm may occur where there is forced marriage, noting that

many societies practise arranged marriages and this in itself may not be a persecutory practice, however the consequences of defying the wishes of one's family when viewed against the background of the state's failure to protect a person should be carefully considered.<sup>142</sup>

<sup>138</sup> Overington, 'Teenage Girls Forced to Marry', above n 3.

<sup>139</sup> Dauvergne and Millbank, 'Forced Marriage as a Harm', above n 10.

<sup>140</sup> See generally Australian Law Reform Commission, *Family Violence and Commonwealth Laws: Immigration*, Issues Paper No 37 (2011) 26. See also Natalie O'Brien, 'Escaping a Marriage of Misery', *The Sydney Morning Herald* (Sydney), 21 August 2011, 24, which highlighted the plight of a 23-year-old foreign national whose claim for an asylum visa was rejected despite her claims that if she returned to her country, she may face an honour marriage.

<sup>141</sup> (2002) 210 CLR 1. See generally Dauvergne and Millbank, 'Forced Marriage as a Harm', above n 10.

<sup>142</sup> Department of Immigration and Citizenship (Cth), *PAM3: Gender Guidelines*, above n 24.

However, research by Dauvergne and Millbank shows that the prospect of being forcibly married still rarely triggers protection obligations under refugee law.<sup>143</sup> In cases where the claimant would face forced marriage but cannot establish the necessary nexus to one of the five grounds provided for in the *Convention Relating to the Status of Refugees*,<sup>144</sup> the new system of complementary protection, which came into effect on 24 March 2012, may assist.<sup>145</sup>

Nevertheless, it is apparent that the fear of being 'deported' under Australia's immigration laws (whether real or perceived) may mean that temporary residents facing forced marriage in Australia feel they cannot seek assistance from Australian authorities. As a consequence of the *Crimes Legislation Amendment (Slavery, Slavery-Like Conditions and People Trafficking) Act 2013* (Cth), suspected non-citizen victims of forced marriage may be eligible for visas under the trafficking visa framework that was introduced in 2004. All identified victims of trafficking, whether citizens or non-citizens, are eligible for a period of support.<sup>146</sup> However, the Witness Protection (Trafficking) (Permanent) visa is only available to a person who contributes to a police investigation or prosecution of a trafficking offence and who the Minister considers would be in danger if returned home. It would not provide protection to victims of forced marriage who were unwilling or unable to assist police.<sup>147</sup> People facing forced marriage may not wish to inform police about

<sup>143</sup> Dauvergne and Millbank, 'Forced Marriage as a Harm', above n 10, 67, 86, examining 69 forced marriage claims from Australia, 40 from Canada and 11 from the UK, found that if individuals rescued abroad by the UK FMU were to seek asylum in the UK, Australia or Canada on the basis of forced marriage they would be refused. Dauvergne and Millbank also observed (at 70) that

the issue of identifying the social group was particularly difficult for heterosexual women, whereas for gay men and lesbians establishing the nexus between the group and the persecution, that is, that the harm feared was 'for reasons of' their group membership, posed the major barrier.

<sup>144</sup> Opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) art 1A(2), which provides for 'race, religion, nationality, membership of a particular social group or political opinion'. See also *ibid*.

<sup>145</sup> *Migration Amendment (Complementary Protection) Act 2011* (Cth) sch 1, inserting *Migration Act 1958* (Cth) ss 36(2)(aa), 36(2A). Domestic violence has been recognised as a form of cruel, inhuman and degrading treatment: see, eg, *Opuz v Turkey* (European Court of Human Rights, Chamber, Application No 33401/02, 9 June 2009) [159]–[161].

<sup>146</sup> Senate Legal and Constitutional Affairs Legislation Committee, *Slavery Bill Report*, above n 90, 29 [3.64].

<sup>147</sup> *Migration Regulations 1994* (Cth) reg 2.07AK. See generally Jennifer Burn and Frances Simmons, 'Prioritising Protection — A New Visa Framework for Trafficked People' (2009) 41 *Immigration Review* [570]; Anti-Slavery Australia, Supplementary Submission No 28 to



the role of family members and, as a result, may be unwilling to contribute to a police investigation.

In the last decade many countries, including Australia, have developed special visa arrangements to protect victims of human trafficking who would face danger if returned to their country of origin and who provide assistance to police and prosecutors. As an alternative to the Witness Protection (Trafficking) (Permanent) visa, a trafficked person has the option of making an application for a protection visa on *Refugee Convention* grounds.<sup>148</sup>

In some cases the family violence provisions of the *Migration Act 1958* (Cth) may provide assistance to temporary residents forced to marry Australian citizens or permanent residents.<sup>149</sup> Women who hold temporary partner visas are especially vulnerable to family violence, and special provisions in the *Migration Regulations 1994* (Cth) ('*Migration Regulations*') enable a partner who is being sponsored for permanent residence in Australia to leave the abusive relationship without losing the opportunity to apply for a permanent visa.<sup>150</sup> The family violence provisions have the protective effect of providing permanent residence to visa applicants who were in a genuine relationship at the time of the visa application, who hold a provisional partner visa, and have experienced 'family violence'.<sup>151</sup> In June 2012, the Minister for Immigration

Senate Standing Committee on Legal and Constitutional Affairs, *Crimes Legislation Amendment (Slavery, Slavery-Like Conditions and People Trafficking) Bill 2012*, 5 September 2012.

<sup>148</sup> 1008440 [2010] RRTA 1136 (17 December 2010) [129] (Member Caravella). The applicant was facing forced marriage to her brother-in-law in Zambia. The Tribunal found that if the applicant were to return to her husband's family there was a very real chance that she would suffer the harm she feared in the form of the sexual cleansing and forced marriage to her brother-in-law. See generally Dauvergne and Millbank, 'Forced Marriage as a Harm', above n 10.

<sup>149</sup> Australian immigration law enables an Australian citizen or permanent resident to sponsor their spouse, de facto or same-sex partner for permanent residence in Australia: Department of Immigration and Citizenship, *Partner Visa: Onshore Temporary and Permanent (SubClasses 820 and 801)* <<http://www.immi.gov.au/migrants/partners/partner/820-801>>.

<sup>150</sup> *Migration Regulations* div 1.5.

<sup>151</sup> Family violence is defined as conduct, whether actual or threatened, towards: the alleged victim; a member of the family unit of the alleged victim; a member of the family unit of the alleged perpetrator; the property of the alleged victim; the property of a member of the family unit of the alleged victim; or the property of a member of the family unit of the alleged perpetrator: *ibid* reg 1.21 (definition of 'relevant family violence'). Family violence is currently taken to have been committed if a court has made an order under a state or territory law or under the *FLA*: at reg 1.23.

and the Minister for the Status of Women jointly announced changes to the family violence provisions that simplify the process of providing evidence about the occurrence of family violence.<sup>152</sup>

Legal responses to family violence were addressed by the Australian Law Reform Commission ('ALRC') in the *Family Violence* report,<sup>153</sup> which recommended a core definition of 'family violence' that includes in its first part 'violent, threatening or other behaviour that coerces or controls a family member or causes that family member to be fearful'; and in its second part a non-exhaustive list of physical and non-physical behaviour that would be encompassed by this definition.<sup>154</sup> However, the ALRC's report does not discuss forced marriage, nor is the concept of forced marriage explicitly included or explained within the ALRC's recommended 'core definition' of family violence. This oversight could be easily remedied as part of a strategy by law and policy makers to raise awareness of the issue of forced marriage in the Australian context. An important part of this strategy would be ensuring that the Australian government collaborates with migration service providers and industry bodies to ensure that culturally appropriate information about legal rights and the family violence exception are provided to visa applicants on arrival in Australia.<sup>155</sup>

Although the government has taken some steps to implement the ALRC's recommendations by streamlining the evidentiary requirements for temporary residents seeking the benefit of the family violence provisions,<sup>156</sup> more work needs to be done to improve understanding and awareness of forced marriage within agencies and amongst decision-makers who may come into contact with the practice. In this context, it is concerning that although forced

<sup>152</sup> Chris Bowen and Julie Collins, 'New Support for Family Violence Victims' (Joint Media Release, 17 June 2012).

<sup>153</sup> ALRC, *Family Violence and Commonwealth Laws — Improving Legal Frameworks*, Report No 117 (2011).

<sup>154</sup> *Ibid* 77–8 [3.8].

<sup>155</sup> *Ibid* 26 (recommendation 20-6).

<sup>156</sup> These changes were implemented in November 2012: *Migration Legislation Amendment Regulation (No 5) 2012* (Cth) sch 6.

marriage is clearly an egregious form of violence, the family violence provisions do not specifically refer to forced marriage. This may pose problems, as to rely upon the family violence provisions the visa applicant has to show that he or she was in a genuine relationship at the time the family violence occurred (as opposed to a forced marriage, which is, by definition, invalid). In cases where the marriage was not performed in accordance with the *Marriage Act* by reason of duress, the family violence provisions may not apply because the visa applicant will be unable to establish that a genuine relationship existed in the first instance.<sup>157</sup> We propose amending the family violence provisions of the *Migration Regulations* to clarify that a person may benefit from the family violence provisions if the person is a victim of forced marriage.<sup>158</sup>

Raising awareness of forced marriage among immigration decision-makers is an important part of any strategy to prevent forced marriage and protect those subject to the practice. For example, the ALRC's recommendation to allow Prospective Marriage (Subclass 300) visa holders to have access to the family violence exception could assist people experiencing forced marriage.<sup>159</sup> The issue of forced marriage was also highlighted in the recent report of the Senate Legal and Constitutional Affairs References Committee into Australia's Prospective Marriage (Fiancée) visa program. The report specifically recommended that the Department of Immigration and Citizenship consider how to ensure the safety of a non-consenting party to a Prospective Marriage visa application and protect the visa applicant from harm that could result if knowledge about the absence of consent was made available to the parties as part of the Department's decision record.<sup>160</sup> Furthermore, the Committee recommended that the Department's policy be amended to specifically require decision-makers to assess the consent of each of the parties to a Prospective Marriage visa.<sup>161</sup>

<sup>157</sup> The family violence provisions apply to all partner relationships, including marriage, de facto and same sex relationships: *Migration Act* s 237.

<sup>158</sup> *Migration Regulations* reg 1.21.

<sup>159</sup> ALRC, Report No 117, above n 153, 25 (recommendation 20-1).

<sup>160</sup> Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Prospective Marriage Visa Program* (2012) viii [5.34] (recommendation 5).

<sup>161</sup> *Ibid.*

### C Access to Support Services, Legal Advice, and Front-line Training

It is apparent that any legislative initiatives to address forced marriage will not succeed unless they are accompanied by culturally appropriate legal and social services that meet the needs of people who have experienced forced marriage or are at risk of forced marriage.<sup>162</sup> The provision of multilingual fact sheets with clear information about how to seek support and obtain legal advice is vital. The lack of training or guidance for the government agencies, NGOs, and legal and health care services that may come into contact with people experiencing forced marriage creates a real risk of missing opportunities to identify cases of forced marriage. Education and consultation in communities and government agencies will be critical to identify suspected cases of forced marriage, overcome gendered stereotypes that can underpin the practice of forced marriage, and provide safe exit pathways for those experiencing forced marriage. Following the introduction of forced marriage offences, there is an opportunity to consult widely with both government agencies and NGOs to develop a package of measures designed to empower people to avoid or exit forced marriage.

The safety and long-term wellbeing of people who are at risk of, or have experienced, forced marriage must be at the centre of any strategy to address forced marriage. Máiréad Enright observes that

any effective law around forced marriage needs to give an account of the influence of [those] specific cultural factors on young women's marriage choices, and indeed on the options open to them to seek state assistance when that freedom is compromised.<sup>163</sup>

However, the analysis of the specific cultural factors that may influence a person's marriage choices should not obscure the interplay between cultural pressures and social and economic problems.<sup>164</sup> Legislative responses to forced marriage must be accompanied by an investment in support services, community education and training for government officials and NGO support workers. People who have experienced forced marriage must be able to access

<sup>162</sup> There have been many reports documenting the obstacles that migrant and refugee women face in accessing legal and support services in Australia: see, eg, Women's Legal Services NSW, *A Long Way to Equal — An Update of 'Quarter Way to Equal: A Report on Barriers to Access to Legal Services for Migrant Women'* (2007); Women's Legal Services NSW, *Quarter Way to Equal: A Report on Barriers to Access to Legal Services for Migrant Women* (1994).

<sup>163</sup> Máiréad Enright, 'Choice, Culture and the Politics of Belonging: The Emerging Law of Forced and Arranged Marriage' (2009) 72 *Modern Law Review* 331, 343.

<sup>164</sup> *Ibid* 351.

safe places to stay. Experience in the UK suggests the role of NGOs will be critical in developing an effective response to forced marriage.<sup>165</sup> We recommend that Australian guidelines on forced marriage for government authorities be developed in consultation with the NGOs that provide front-line services for people experiencing family violence.

The introduction of new Commonwealth offences of forced marriage have been framed within the broader context of legislative changes to Australia's anti-trafficking laws. However, it is unclear how people facing forced marriage will benefit from the support program already established to benefit victims of trafficking. Australia's response to human trafficking is still evolving but one of its key features is a government-funded Support for Victims of People Trafficking Program, established in 2004, and currently delivered by the Australian Red Cross.<sup>166</sup> The program provides intensive support to trafficked people who are referred to the program by the Australian Federal Police as suspected trafficking victims. While the initial 45 days of support are not conditional upon assisting police, ongoing support is only available to victims who are also prepared to act as witnesses and make a contribution to a police investigation or prosecution.<sup>167</sup> The program has been criticised for making support for trafficking victims contingent upon being able and willing to assist police.<sup>168</sup> In the specific context of people facing forced marriage, a human rights-based approach demands that support is available on a needs basis and the design and purpose of the existing support program may not be appropriate for victims of forced marriage. Therefore it would be helpful for law and policy makers to consider how existing programs to protect victims of family violence could be expanded to meet the specific needs of people facing forced marriage.<sup>169</sup> The Australian government's *National Plan to Reduce Violence against Women and Their Children* represents an opportunity to incorporate

<sup>165</sup> Home Affairs Committee (UK), above n 126, 17 [43] observed that '[s]pecialist services run by the voluntary sector provide a vital means of support to individuals at risk of forced marriage, who are often failed by statutory agencies or do not feel able to approach them'.

<sup>166</sup> See Australian Red Cross, *Support for Trafficked People* (2013) <<http://www.redcross.org.au/support-for-trafficked-people.aspx>>.

<sup>167</sup> Simmons and Burn, 'Evaluating Australia's Response to All Forms of Trafficking', above n 79, 716.

<sup>168</sup> Anna Dorevitch and Michelle Foster, 'Obstacles on the Road to Protection: Assessing the Treatment of Sex-Trafficking Victims under Australia's Migration and Refugee Law' (2008) 9 *Melbourne Journal of International Law* 1.

<sup>169</sup> See, eg, Women's Legal Services NSW, Submission to *Forced and Servile Marriage*, above n 88.

services for people in, or facing, forced marriage within the broader national framework of strategies to reduce violence against women.<sup>170</sup>

People who are at risk of or who are victims of forced marriage are likely to have a complex mix of legal and social needs. Forced marriage may result in sexual assault, depression, post-traumatic stress disorder, physical and psychological harm, and economic loss. Victims may need intensive social support and counselling, legal advice, and access to social security benefits. Where minors are involved, questions of guardianship must be dealt with. In particular, those who have become estranged from their family and community may require emergency and longer-term accommodation. Some victims may be entitled to compensation, either as a victim of crime or by taking civil action.<sup>171</sup> Family law proceedings may need to be initiated to nullify the marriage.<sup>172</sup> It is vital that immediate services are available to victims of family violence.

## V CONCLUSION

The introduction of specific offences of forced marriage presents an opportunity to raise community awareness about the practice of forced marriage and develop specific services to support people to avoid or exit abusive situations. However, crafting an effective response to forced marriage requires recognising the inherent limitations of the criminal justice system to contend with the complex causes of forced and servile marriage. When a person is facing forced marriage, help should not be conditional upon assisting law enforcement. Any credible response to forced marriage must ensure women and men who want assistance from authorities can obtain protective orders and receive appropriate referrals to effective support services. The operation

<sup>170</sup> Council of Australian Governments, *National Plan to Reduce Violence against Women and Their Children — Including the First Three-Year Action Plan* (2010).

<sup>171</sup> People who have been subjected to forced marriage may seek redress under the ‘trespass torts’ that protect people from battery, assault and false imprisonment. Statutory compensation schemes that provide compensation for victims of domestic violence, sexual assault and abduction may also be applicable: see *Victims of Crime (Financial Assistance) Act 1983* (ACT); *Victims Support and Rehabilitation Act 1996* (NSW); *Victims of Crime Assistance Act 2006* (NT); *Victims of Crime Assistance Act 2009* (Qld); *Victims of Crime Act 2001* (SA); *Victims of Crime Assistance Act 1976* (Tas); *Victims of Crime Assistance Act 1996* (Vic); *Criminal Injuries Compensation Act 2003* (WA).

<sup>172</sup> See, eg, *Kreet v Sampir* (2011) 44 Fam LR 405.

of the new criminal offences will require careful monitoring, and further research should be undertaken to examine whether the prospect of criminal charges serves as an effective deterrent, or conversely, dissuades potential or actual victims of forced marriage from seeking help. The success of any legal initiatives to address forced marriage will depend upon the provision of support to those in forced marriage situations, and the provision of training, education and culturally appropriate community consultation and outreach.