
Forced and Servile Marriage

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Anti-Slavery Project Submission in response to the Australian Government Attorney-General's Department Discussion Paper

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Marriage shall be entered into only with the free and full consent of the intending spouses, Universal Declaration of Human Rights, Article 16(2)

I. INTRODUCTION

1. The Anti-Slavery Project is a law and research centre dedicated to advancing the rights of people who have experienced human trafficking and extreme forms of exploitation. We provide legal advice and representation to trafficked people in a wide range of legal areas including providing representation for protection or humanitarian visa applicants, and representing trafficked people seeking financial compensation.¹
2. On 18 February 2011 the Anti-Slavery Project hosted a seminar on forced marriage at the UTS Law Faculty. The seminar affirmed our strong view that the Australian Government's response to forced marriage must be developed in close consultation with the community. We hope this submission will assist the Australian Government to identify effective strategies to protect those who have been forcibly married or who are at risk of forced marriage.

II. SUMMARY

Question – Are additional legislative and non- legislative measures needed to provide: (a) adequate deterrence against the practices of forced and servile marriage, and (b) adequate protection for victims of forced marriage?

Answer – Yes. Australia should consider a hybrid of criminal and civil measures to fully implement its international obligations to prohibit slavery and practices similar to slavery and to protect people who are facing or experiencing situations of forced marriage.

An effective strategy to address forced marriage should have six characteristics. First, it will be developed in consultation with the community and reflect a genuine commitment to engagement and dialogue. Second, it will encourage research to close the gaps in our understanding of forced marriage. Third, assistance will be provided on the basis of need and not conditional on assisting law enforcement. Fourth, it will recognise the importance of education for the community, NGOs and government agencies. Fifth, it will make adequate provision for the support and long-term protection of people who avoid or escape forced marriage. Finally, it will fully comply with Australia's international obligations to prohibit and prevent slavery and practices similar to slavery.

¹ The Anti-Slavery Project legal service is conducted by J.M Burn Solicitor, engaged by the Anti-Slavery Project at the UTS Law Faculty.

RECOMMENDATIONS

Recommendation 1: Establish a Forced Marriage Community Advisory Council to advise the Australian Government on Forced Marriage.

Recommendation 2: Encourage and support research that strengthens knowledge and understanding of the nature and extent of forced marriage in Australia.

Recommendation 3: Recognise that forced marriage should be understood within the context of gender-based violence and integrated with ongoing work to prevent violence against women.

Recommendation 4: Develop guidelines and awareness-raising materials on forced marriage for government agencies and NGOs in consultation with the community working group

Recommendation 5: Ensure that the safety and long-term well-being of people who are at risk of, or have experience of, forced marriage is at the heart of the response to forced marriage by investing in culturally appropriate and targeted outreach services.

Recommendation 6: Ensure the *Criminal Code Act 1995* (Cth) fully implements Australia's obligations to criminalise slavery and practices similar to slavery. Any new offences should be carefully crafted to implement Australia's international obligations and to capture the severe forms of exploitation that may result from maintaining a person in a condition of forced marriage. Particular consideration should be given to:

- Amending the *Criminal Code* so that the offence of sexual servitude applies to both commercial sexual exploitation and non-commercial sexual exploitation.
- Introducing an offence of "servitude" which covers the exploitation that may result from maintaining a person in a situation of forced marriage and the practice of servile marriage.
- Amending the definition of "exploitation" in the *Criminal Code* to cover "servitude" and "practices similar to slavery" including "servile marriage".

Recommendation 7: Introduce civil protection orders to ensure that people who are facing forced marriage or are in a condition of forced marriage can obtain legal orders to protect their rights.

Recommendation 8: Provide statutory definitions of duress and forced marriage in the *Marriage Act 1961* (Cth) and ensure such definitions recognise that consent can be nullified by physical and psychological coercion and the abuse of a position of vulnerability.

Recommendation 9: Amend the family violence provisions in the *Migration Regulations* to ensure they fully protect women (and men) who are forced to marry their sponsoring partner and consider how a system of complementary protection could offer protection to the people who have suffered forced marriage.

III. FORCED AND SERVILE MARRIAGE IN AUSTRALIA

A. *What is forced and servile marriage?*

3. The first challenge in developing an effective response is defining the terms 'forced marriage' and 'servile marriage'. Forced marriage is not defined in any international legal treaty or by Australian law.² Our starting point is that a forced marriage occurs where a marriage is entered into without the full and free consent of one or both parties, where the marriage occurs as a result of duress or fraud often involving physical or psychological coercion.
4. We recognise that the question of how to define forced marriage at law may need to be answered differently depending on whether the purpose of relevant law is *protective* (civil protection orders) or *punitive* (criminal sanctions).
5. The term 'forced marriage' encompasses the narrower concept of 'servile marriage', which is specifically defined in the *1956 Supplementary Convention* as a practice similar to slavery where a woman does not have the right to refuse being given in marriage in exchange for payment in money or in kind to gain a benefit by family or another person or group.³
6. Women and men in forced marriages may suffer psychological and physical injuries, sexual assault and domestic violence, false imprisonment and estrangement from their family. The most extreme situations of forced marriage may lead to domestic and sexual servitude or even a situation of slavery.⁴ As the United States Department of State has observed:

Forced marriage is one entered into without full consent and under duress, where the individual has no right to choose a partner or ability to say no....Forced marriages render the forced party (in most cases a woman) vulnerable to abuse and exploitation by her spouse or his family, who exercise significantly greater power and control. This can trap the victim in conditions of enslavement, particularly in domestic or sexual servitude.

Not all forced marriages result in cases of trafficking. Each situation is unique and needs to be evaluated on a case-by-case basis to determine whether it meets the legal definition of trafficking. The evaluation must look particularly at the terms of the marriage and the possible conditions of exploitation encountered afterward.⁵

7. Women in situations of forced marriage may feel unable to leave the marriage because of social stigma, a sense of responsibility for their children, family pressure, financial constraints, fears of violence or deportation and a lack of legal information about their options.
8. Forced marriage is sometimes confused with arranged marriage, but the two practices are different. The distinguishing factor is consent. In an arranged marriage both spouses agree to enter into a marriage that was organised by their families. Forced marriages are conducted without the full and free consent of one or both parties and the marriage is

² Attorney-General's Department, *Discussion Paper: Forced and Servile Marriage*, (2010), p 3.

³ *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, 226 (adopted 7 September 1956) Article 1 (a)(i).

⁴ UN *In-depth study on all forms of violence against women: Report of the Secretary-General*, GA 61st sess, A/61/122/Add.1 (2006), p 40.

⁵ United States Department of State, *Trafficking in Persons Report*, (2010), p 15.

entered into as a result of duress, which can take the form of physical or psychological pressure.⁶

9. It is simplistic to assume that there will always be a clear-line between forced marriage and arranged marriage. In the last three decades the traditional understanding of duress has evolved to encompass a more nuanced concept of psychological coercion.⁷ Instead of refusing to invalidate “an otherwise good marriage” unless there was a “threat of imminent danger ... to life, limb or liberty”,⁸ the courts have become concerned about “whether the mind of the applicant victim has in fact been overborne, howsoever that was caused”.⁹
10. As the courts seek to identify what constitutes coercion, inevitably individual cases raise difficult questions about when consent vanishes in the face of psychological or emotional pressure.¹⁰ In 2004 Justice Singer emphasised:

... there is a spectrum of forced marriage from physical force or fear of injury or death in their most literal form, through to the undue imposition of emotional pressure which is at the other end of the forced marriage range, and that a grey area then separates unacceptable forced marriages from marriages arranged traditionally which are no way to be condemned, but rather supported as a conventional concept in many societies. Social expectations can of themselves impose emotional pressure and the grey area to which I referred is where one may slip into the other: arranged may become forced but forced is always very different from arranged.¹¹

11. The situation is clearer with respect to children who lack legal capacity to consent to marry.¹² The United Nations has recognised that girls are especially vulnerable to being forced into early marriage.¹³

⁶ See ABC Radio, The Law Report, Forced Marriage. Interview with Jennifer Burn – Anti-Slavery Project, 30 November 2010. > <http://www.abc.net.au/rn/lawreport/stories/2010/3077803.htm><

⁷ See *Singh v Singh* [1971] 2 All ER 828 *Hirani v Hirani* (1983) 4 FLR 232; *Mahmood v Mahmood* [1993] SLT 589; *SK, Re* [2004] EWHC 3202. See Anne Phillips and Moira Dustin ‘UK Initiatives on Forced Marriage: Regulation Dialogue and Exit’ (2004) 52 *London School of Economics: Political Studies* 531 at 537 “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”.

⁸ *Szechter v Szechter* [1971] 2 WLR 170 at 297-8.

⁹ *Hirani v Hirani* (1983) 4 FLR 232; see also *SH v NB* (Marriage: Consent) (2009) EWHC 3274 (Fam).

¹⁰ Millbank et al note concern that “policy makers and others either completely conflate arranged and forced marriage or else pose (consensual) “arranged” and “forced” marriages as if they are diametric opposites ...” Millbank, Jenni and Dauvergne, Catherine, ‘Forced Migration and the Exoticization of Gendered Harms in United States Asylum Law (2011) 19(3) *Columbia Journal of Gender and Law* 1, p 2 ; see also Geetanjali Gangol and Khatidja Chantler, ‘Protecting Victims of Forced Marriage: Is Age a Protective Factor’, *Feminist Legal Studies* (2009) 267-268 (...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 categories).

¹¹ *SK, Re* [2004] EWHC 3202 (Fam), per Singer J at 7.

¹² UNICEF, *Early Marriage: A Harmful Traditional Practice: A statistical exploration* (2005) > http://www.unicef.org/publications/index_26024.html< at 11 January 2011 (observing the motivations of parents who force their children to marry may vary from case to case, but can include controlling unwanted behaviour and sexuality, obtaining permanent residence, acquiring land and wealth, protecting ‘family honour’ or responding to social pressure.).

¹³ *United Nations Millennium Declaration*, GA Res, 8th plen mtg, UN Doc A/res/55/2 (2000).

B. What do we know about forced marriage in Australia?

12. We do not have a clear picture of forced marriage in Australia. Reliable data will always be difficult to obtain because of the clandestine nature of the practice and the reluctance of people to speak out against family members. Nonetheless, there is a need for researchers to investigate the nature and extent of forced marriage in Australia.
13. While there is no reliable research about the nature or extent of forced marriage in Australia, recent court cases illustrate that young people in Australia have been faced with forced marriage. For example:
- a. In 2010 a 17-year-old girl saved herself from a forced marriage in Lebanon by calling the Australian Federal Police.¹⁴ The Federal Magistrates Court issued an order restraining her family from taking her outside of Australia.¹⁵
 - b. In 2010 the Victorian Department of Human Services successfully 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.¹⁶
 - c. 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.¹⁷ 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. When Ms Kreet's father repeatedly threatened Ms Kreet that he would have Mr U's sisters and mother raped and kidnapped, Ms Kreet married Mr Sampir.
14. Australian citizens are not the only people to seek protection from being forced to marry abroad. Women who fear being subjected to forced marriage abroad have successfully sought protection visas.¹⁸
15. Care must be taken to distinguish between the practice of forced marriage and the fraudulent practice of sham marriage, where an Australian citizen or permanent resident fraudulently claims to be in a genuine relationship in order to sponsor their "spouse" or

¹⁴ *Police save Sydney Girl from forced marriage (2010) ABC News*, >
><http://.abc.net.au/news/stories/2010/06/03/2916750.htm>< at June 3 2010.

¹⁵ *Kandal & Khyatt & Ors* [2010] FMCAfam 508.

¹⁶ *Department of Human Services & Brouker and Anor* [2010] FamCA 742 (Mushin J found that both of the children proposed to be married were not of marriageable age within the terms of the *Marriage Act 1961* (Cth) and made a parenting order restraining the child's parents from removing her from Australia, placing her on the Airport Watch List and prohibiting the parents from applying for a passport for the child until she was eighteen years old).

¹⁷ *Kreet & Sampir* [2011] FamCA 22.

¹⁸ [2010] RRTA 1136 (17 December 2010) (facing forced marriage to brother in law in Zambia with the Tribunal finding (at 129) 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 fears in the form of the sexual cleansing and forced marriage to her brother in law); See generally Dauvergne, Catherine and Millbank, Jenni, 'Forced Marriage as a Harm in Domestic and International Law' (2010) 73(1) *The Modern Law Review* 57 and the authorities cited therein.

“partner” to migrate to Australia.¹⁹ However, such sham marriages may be arranged by traffickers to facilitate the movement of people to Australia for exploitation.²⁰

IV. PREVENTING FORCED MARRIAGE THROUGH NON-LEGISLATIVE MEASURES

16. Little is known about the prevalence and nature of forced marriage in Australia. The first step in a considered response should be to work with communities to fully explore the dimensions of forced marriage. We recommend that the Australian Government establishes a Forced Marriage Community Advisory Council to advise the Australian Government on Forced Marriage. The terms of reference should include designing and facilitating a process of targeted consultation with the community sector, especially organisations that work with people who are at risk of, or are vulnerable to forced marriage. [**Recommendation 1**].
17. A lack of data on the number of people in forced and servile marriage in Australia does not indicate that the practice does not occur.²¹ We encourage and support research that strengthens our understanding of the nature and extent of forced marriage in Australia [**Recommendation 2**].
18. International experience suggests that forced marriage is a highly gendered practice, which has a disproportionate impact on young women.²² In the United Kingdom the Forced Marriage Unit has cautioned against assumptions that there is a typical case of forced marriage.²³ In the UK a small but significant number of men have been subjected

¹⁹ Department of Immigration and Citizenship, *Partner Visa: Onshore Temporary and Permanent (Subclass 820 and 801)*, Department of Immigration and Citizenship, ><http://www.immi.gov.au/migrants/partners/partner/820-801/>< at 21 February 2011.

²⁰ In Australia’s first reported case of trafficking for domestic servitude 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 resentenced to eight years imprisonment for slavery offences. Following a retrial Melita Kovacs was again found guilty and resentenced to four years imprisonment. In March 2010, she sought leave to appeal her sentence in the Supreme Court see Attorney-General’s Department, *Discussion Paper: Forced and Servile Marriage*, (2010).

²¹ A recent study on supporting women from CALD backgrounds who are victims/survivors of sexual violence observed that there is a critical lack of data about how many refugee and immigrant women who now live in Australia have experienced sexual violence and how many do not access support. See Allimant and Ostapiej-Piatkowski Australian Centre for the Study of Sexual Assault, *Supporting women from CALD backgrounds who are victims/survivors of sexual violence: Challenges and opportunities for practitioners*, (2011) Australian Institute of Family Studies, ><http://www.aifs.gov.au/acssa/pubs/wrap/9/index.html>< at 25 February 2011.

²² Department of Immigration and Citizenship (DIAC), 2010, *Gender Guidelines*, PAM3, p 2; see also UNHCR, *Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/GIP/02/01 (2002), p 10; see also Council of Europe Parliamentary Assembly, *Resolution on Forced Marriages and Child Marriages*, Resolution 1468, 29th sitting, (2005) p 8; see also UNESCO, *Forced marriage of the girl child: Report of the Secretary-General*, 52nd Sess Item 3(c) of the provisional Agenda, UN Doc E/CN.6/2008/4 (2007); see also Anne Gallagher, *International Law of Human Trafficking*, (2010), 196 (observing “certain forms of trafficking including ... trafficking for forced marriage ... are both directed toward and impact disproportionately upon women and girls.”).

²³ Foreign and Commonwealth Office, *Forced Marriage Unit*, (2011) ><http://www.fco.gov.uk/en/travel-and-living-abroad/when-things-go-wrong/forced-marriage>< at 11 January 2011.

to forced marriage.²⁴ Forced marriage is not permitted by any religion and has been described as a “deviation” from the consensual practice of “arranged marriage”.²⁵

19. Forced marriage should be understood as a form of gender-based violence, which the United Nations High Commissioner for Refugees defines as:

Sexual and gender-based violence (SGBV) refers to violence that is directed against a person on the basis of her or his gender or sex. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion, and other deprivations of liberty, whether occurring in public or in private life. While women, men, boys, and girls can all be victims of gender-based violence, women and girls are the main victims.²⁶

20. The Committee on the Elimination of Discrimination against Women has stated “[a] women’s right to choose a spouse and enter freely into marriage is central to her life and her dignity and equality as a human being”²⁷ and observed:

Traditional practices by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision. Such prejudices and practices may justify gender-based violence as a form of protection or control of women. The effect of such violence on the physical and mental integrity of women is to deprive them of the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms... the underlying consequences of these forms of gender-based violence help 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.²⁸

21. Under CEDAW all appropriate measures should be taken to “modify the social and cultural patterns of conduct of men and women” so as to eliminate “prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women”.²⁹ States are obliged to “exercise due diligence to prevent, investigate and ... punish acts of violence against women whether these are perpetuated by the State or private actors.”³⁰

²⁴ In 2010 the FMU received over 1,700 calls and 15% of cases before the FMU involved male victims; see Foreign and Commonwealth Office, *The Forced Marriage Unit In Action* (2011) ><http://www.fco.gov.uk/en/news/latest-news/?view=News&id=557968882>< at 7 March 2011.

²⁵ 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).

²⁶ UNHCR, *UNHCR Handbook for the Protection of Women and Girls*, January 2008, at page 201, available at: ><http://www.unhcr.org/refworld/docid/47cfc2962.html>< [accessed 15 February 2011]. For a discussion on how forced marriage as a gender-related form of persecution in refugee law jurisprudence see Catherine Dauvergne and Jenni Millbank, ‘Forced Marriage as a Harm in Domestic and International law’, *Modern Law Review* (2010) 73(1) 57-88; Millbank, Jenni and Dauvergne, Catherine, ‘Forced Migration and the Exoticization of Gendered Harms in United States Asylum Law (2011) 19(3) *Columbia Journal of Gender and Law*.

²⁷ CEDAW, General Recommendation 21, U.N Doc HRI/ GEN/1/Rev.1 at 90 (1994),[16].

²⁸ CEDAW, General Comment 19 – Violence Against Women, [11].

²⁹ *Convention on the Elimination of All Forms of Discrimination Against Women* 660 UNTS 195; G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), Art 5(a).

³⁰ UN, *Declaration on the Elimination of Violence against Women*, GA res 48/104 85th plen mtg, (1993), Arti4 (c) and art 1 (defining gender-based violence).

22. The issue of forced marriage in Australia should be understood within the context of gender-based violence and integrated with ongoing work to prevent violence against women. Therefore efforts to address forced marriage in Australia may be appropriately located within the Australian Government's National Plan to reduce violence against women and their children.³¹ **[Recommendation 3]**
23. Forced marriage cases have come to the attention of the Australian authorities, but we are not aware of any dedicated training or guidance for government agencies, NGOs, legal, education and health care professionals on how to offer help and assistance. Yet it is these agencies that are most likely to have early contact with people who are faced with forced marriage. As recommended in the Australian Government's National Plan, when vulnerable people seek help "the first door should be the right door".³²
24. Education and consultation in communities, and government agencies is critical to overcome gendered stereotypes and cultural practices that can underpin the practice of forced marriage and is a necessary part of framing effective systems of prevention and protection. Criminalisation of conduct associated with forced and servile marriage may be one part of an effective response but decisions about best practice approaches must be part of a wider consultation with communities.
25. We recommend developing training and awareness materials for government authorities, NGOs, and legal, education and health care professionals who may come into contact with people facing forced marriage. Australian guidelines on forced marriage for government authorities should be developed in consultation with NGOs that provide front-line services to women and men in situations of family violence. The Guidelines should address legal options and provide referral information. **[Recommendation 4]**
26. There have been many reports documenting the obstacles that migrant and refugee women face accessing legal and support services in Australia.³³ People at risk of, or in situations of, forced marriage may have complex legal and social needs including recovery of money or the initiation of family law proceedings to nullify the marriage. Those who have become estranged from their family may require emergency accommodation, independent legal advice, social security benefits and intensive social support and counselling. Cases of forced marriage may result in sexual assault, depression, post-traumatic stress disorder and economic loss. Victims of forced marriage should be entitled to compensation for the harm they have suffered.³⁴ People who have been subjected to forced marriage may also benefit from access to specialised

³¹ Federal Labor Party, *National Plan to Reduce Violence Against Women and their Children 2010 to 2022*, (2010) Australian Government Department of Families, Housing, Community Services and Indigenous Affairs.

³² *Ibid*, p 77 .

³³ Women's Legal Resource Centre, '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 (noting the priority areas for legal services and family law, immigration law and domestic violence); Women's Legal Resource Centre, 'Quarter Way to Equal: A Report on Barriers to Access to Legal Services for Migrant Women', (1994).

³⁴ 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 provide compensation for victims of domestic violence, sexual assault and abduction may also be applicable: see *Victims of Crime (Financial Assistance) Act 1983* (ACT); *Victim Support & Rehabilitation Act 1996* (NSW); *Crime (Victims Assistance) Act 2006* (NT); *Victims of Crime Assistance Act 1996* (Vic); *Criminal Injuries Compensation Act 2003* (WA); *Victims of Crime Assistance Act 2009* (Qld); *Victims of Crime Act 2001* (SA); *Victims of Crime Assistance Act 1976* (Tas).

counselling and support services. In cases of forced marriage involving children questions of guardianship may also arise.

27. The safety and long-term well being of people who are at risk of, or have experience of, forced marriage must be at the heart of any response to forced marriage. Any legislative response to forced marriage cannot succeed unless it is supported 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. **[Recommendation 5]**

V. LEGISLATIVE RESPONSES TO FORCED AND SERVILLE MARRIAGE

28. Australian law does not define forced marriage or sanction those who cause people to enter into, or remain within, a forced marriage and servile marriage. There is no offence of forced marriage or trafficking for forced and servile marriage. If a child is facing a forced marriage, orders can be sought from the Family Court to prevent the marriage occurring; however there are no similar protections in place for vulnerable adults.³⁵
29. States can address forced marriage by introducing civil protection orders, criminal sanctions or by adopting a hybrid approach. Specific criminal offences have been introduced in European countries such Belgium, Norway, Denmark, the Kyrgyz Republic and Germany.³⁶ However, proposals to criminalise forced marriage are sometimes met with opposition on the grounds that criminalisation will dissuade the victims from seeking help.³⁷ For example, the United Kingdom introduced a regime of civil protection orders designed to protect people who are facing forced marriage or who have already been forcibly married.³⁸
30. In Australia the law is silent on the practice of forced marriage. Any laws in relation to forced marriage will need to fall within the scope of the powers granted to the Commonwealth Parliament to create laws under s 51 of the Constitution. Relevantly s 51(xxix) gives the Parliament the power to make laws with respect to “marriage” and s 51 (xxix) gives Parliament the power to make laws with respect to “external affairs”. In this context, it is helpful to consider two questions.
- a. First, does Australia’s *Criminal Code* fully implement Australia’s obligations to prohibit slavery and practices similar to slavery?
 - b. Second, how could civil measures prevent forced marriage from occurring in the first place or help people in situations of forced marriage to leave the marriage?

³⁵ *Family Law Act 1975* (Cth) s 68B(1)(a).

³⁶ Attorney-General’s Department, *Discussion Paper: Forced and Servile Marriage*, (2010), p 8-10.

³⁷ In 2005 a report by the UK Home Office entitled ‘Forced Marriage: A Wrong not a Right’, recommended introducing a specific criminal offence for forcing a person to marry Foreign and Commonwealth Office Scotland, *Forced Marriage: A Wrong Not a Right* (2005). The proposal was ultimately abandoned in favour of a civil protection order regime see House of Commons Home Affairs Committee (UK), *Domestic violence, forced marriage and “honour-based” violence*, HC 263 of 2007-8, (2008).

³⁸ Scotland has recently followed suit and introduced a bill creating forced marriage protection orders. *Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Bill* (SP Bill 53) as introduced in the Scottish Parliament (Session 3 2010) on 29 September 2010.

Case Study - the use of civil protection orders to prevent forced marriage in the UK

The Forced Marriage (Civil Protection) Act (2007) inserted Forced Marriage Protection Orders into the Family Law Act 1996 (UK). In the United Kingdom the courts have the power to make Forced Marriage Protection Orders to protect a person facing forced marriage or a person who has been forced into marriage.³⁹ Under the Act

- 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.⁴⁰
- “Force” is defined broadly to include “coerce by threats or other psychological means.”⁴¹
- If a person who is subject to FMPO breaches its terms that person may be arrested⁴², and the courts may convict a person for contempt of court.⁴³ For example, a British mother has been sentenced to eight months jail for breaching an FMPO to return her seventeen year old son from Nigeria to the UK.⁴⁴

The Court can make an order on its own application or, if there are family proceedings already on foot, of its own initiative or a third party can apply without the leave of the court.⁴⁵ Any other applicant who wishes to obtain a FMPO must first seek the leave of the Court. The orders can be made ex-parte⁴⁶ and have extraterritorial application.⁴⁷

The UK has married law reform with a significant investment in training and education. A Forced Marriage Unit was established within the Home Office and statutory guidance on forced marriage was issued under ‘The Right to Choose’ under s 63Q(1) of the FMPCA.⁴⁸ In 2008 the FMU assisted about 400 actual and potential victims. By 2009 that number was more than 1600. In its first year of operation 86 forced marriage protection orders were granted. The review found “there is a need for action, but also 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”.⁴⁹ In our view, one of its greatest strengths is that it focuses on the importance of ensuring that people trying to avoid or escape forced marriage understand their legal rights and options.

³⁹ *Forced Marriage (Civil Protection) Act* (2007) s 63A.

⁴⁰ *Ibid*, s 63A(4).

⁴¹ *Ibid*, s 63A(6).

⁴² *Ibid*, s 63H.

⁴³ *Ibid*, s 63I.

⁴⁴ BBC News UK, *Edirin Onogeta-Idogun mother jailed over ‘missing’ son* (2011), BBC News ><http://www.bbc.co.uk/news/uk-england-london-12455820>< at 17 February 2011.

⁴⁵ *Forced Marriage (Civil Protection) Act* (2007) s 63C.

⁴⁶ *Ibid*, s 63D.

⁴⁷ *Ibid*, s63B92)

⁴⁸ Foreign and Commonwealth Office (HM Government), *The Right to Choose: Multi-agency statutory for dealing with forced marriage*, (2008).

⁴⁹ 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), p 10.

A. Are additional legislative measures needed to provide adequate deterrence against the practices of forced and servile marriage?

31. Australia's laws could provide more effective deterrence against extreme forms of exploitation by fully implementing our international obligations and introducing criminal laws effectively targeting the worst forms of exploitation, namely "practices similar slavery", "servitude", and "servile marriage".
32. The meaning of the terms forced marriage and servile marriage may overlap with the concepts of "slavery", "servitude", "practices similar to slavery", "forced labour" and "trafficking in persons". For example, after a woman is forced to marry she may be maintained in the situation of forced marriage by her husband. The condition of exploitation that results may fall within the definition of servitude and, in the most extreme cases, slavery.⁵⁰
33. There are various drafting options that could be considered if the Australian Government decided to introduce an offence of forced marriage. For example, an offence of forced marriage could criminalise:
- a. The conduct of causing a person to enter into a forced marriage offence (see debt bondage offence as an example);
 - b. Facilitating or bearing witness to a marriage in the knowledge or reasonable suspicion of the lack of consent of one of the parties.
 - c. The conduct of intentionally or recklessly causing a person to be maintained in a condition of forced marriage.
34. There is no stand-alone offence of 'forced marriage' in the *Criminal Code Act 1995* (Cth). At this stage, not enough is known about the modus operandi of people who facilitate forced marriage or cause people to enter into forced marriage to target this type of precursor conduct with criminal laws.
35. Depending on the facts of the particular case forced marriage may result in charges of sexual assault, abduction, and in cases involving children, procuring children for sexual activity, statutory rape, sexual abuse of children or false imprisonment. A person who is maintained in a situation of forced marriage may experience elements of both labour exploitation and sexual exploitation. The most severe cases of forced marriage may fall within the international prohibitions on servitude, slavery, and practices similar to slavery.
36. In the last decade, Australia has introduced new criminal offences prohibiting slavery, sexual servitude, and people trafficking.⁵¹ However, division 270 and 271 do not cover

⁵⁰ See generally *The United Nations Voluntary Trust Fund on Contemporary Forms of Slavery*, GE.05.42135 (2005); see also UN, *Specific Human Rights Issues: Contemporary Forms of Slavery: Report of the Working Group on Contemporary Forms of Slavery in its twenty-eighth session*, E/CN.4/Sub.2/2003/31 (2003).

⁵¹ In 1999, the *Criminal Code Amendment (Slavery and Sexual Servitude) Offences Act 1999* (Cth) introduced to the offences of slavery (s 270.3), sexual servitude (s 270.6) and deceptive recruiting for sexual services (s 270.7) into the Commonwealth Criminal Code. In 2005, 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 (explaining the legal meaning of slavery); *Sieders v R; Somsri V R* [2008] NSWCCA 187 (explaining the meaning of sexual servitude).

the full spectrum of extreme exploitative conduct that Australia is required to prohibit under international law. These gaps could be closed by:

- a. Introducing a stand-alone offence of “servitude”, which covers the exploitation of a person in practices similar to slavery
- b. Amending the definition of “exploitation” to cover “servitude”, and “practices similar to slavery” including servile marriage.
- c. Amending the offence of sexual servitude to cover non-commercial sexual exploitation. **[Recommendation 6]**

37. While international courts and commentators have distinguished between the different types of exploitation such as slavery and servitude,⁵² the High Court of Australia found it was “unnecessary and unhelpful” to seek to draw boundaries between slavery and cognate concepts such as servitude, peonage, forced labor, or debt bondage and that the various concepts should not be understood as “mutually exclusive”.⁵³ Therefore, the question of whether a situation of forced marriage can be characterised as slavery will depend on the *degree* of exploitation suffered by the victim.

Slavery

38. The internationally accepted definition of slavery is found in the *International Convention to Suppress the Slave Trade and Slavery* 1926 (1926 Slavery Convention), 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”.⁵⁴
39. In 1999 Australian legislators borrowed the language of the 1926 Slavery Convention to define slavery in the Australian *Criminal Code* as “the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including where such a condition results from a debt or contract made by the person”.⁵⁵
40. In 2008 the High Court considered the meaning of slavery in the landmark case of *R v Tang*.⁵⁶ The Court relied on a 1953 report of the UN Secretary General to identify the following 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 compensation commensurate to the value of the labour; the power to control and restrict a person’s movements; and the power to commodify a person by

⁵² For e.g., the *travaux préparatoires* of the ICCPR suggest the drafters narrowly construed the concept of slavery in art 8(1) as a “relatively limited and technical notion” which “implied the destruction of 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”. MJ Bossuyt, *Guide to the ‘Travaux Préparatoires’ of the International Covenant on Civil and Political Rights* (1987), p 164-167; see also *Siliadin v France* (2006) 43 EHRR 16.

⁵³ (2008) 237 CLR 1, 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”.

⁵⁴ Opened for signature 25 September 1926, 212 UNTS 17 (entered into force 18 June 1927), Art 1(1). The language of article 1(1) of the *1926 Slavery Convention* has “proved to be abiding” and is now accepted to define slavery at international customary law. International Criminal Tribunal for the former Yugoslavia, *Prosecutor v Kunarac, Kovac and Vukovic* (IT-96-23 & IT-96-23/I-T) Judgment, 22 February 2001, [519] [hereinafter *Kunarac Trial*].

⁵⁵ *Criminal Code Act* 1995 (Cth) s 270.1.

⁵⁶ (2008) 237 CLR 1.

treating the person as an object of sale and purchase.⁵⁷ Gleeson CJ noted that the capacity to deal with a person as an object of sale and purchase, “may be a powerful indication that a case falls on one side of the line [between harsh employment and slavery]”.⁵⁸

41. It is possible that extreme cases of forced marriage may fall within the legal definition of slavery. However, the offence of slavery is highly unlikely to cover the conduct of forcing a person to enter into a forced marriage unless that conduct involved some type of commodification (for example the sale and purchase of a person) or resulted in the maintenance of a person in a condition where that person was subjected to the powers attaching to the right of ownership.

Practices similar to slavery

42. International law recognises that not all forms of egregious exploitation are encompassed by the concept of slavery. The 1926 Slavery Convention was augmented by the 1956 Supplementary Convention, which obliges Australia to criminalise ‘practices similar to slavery’, including any institution or practice whereby:

- (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.⁵⁹

43. Servile marriage thus encompasses “situations in which a person is considered to be a chattel that can be sold, transferred, or inherited into a marriage.”⁶⁰ Australian law does not define or prohibit servile marriage. A person who is a victim of servile marriage is a person of servile status.⁶¹

44. The practice of forced marriage and servile marriage could not be prosecuted under the offence of sexual servitude which only applies to the exploitation of sexual services in the commercial sex industry or for commercial profit.⁶² This could be easily rectified by changing the definition of sexual service to include non-sexual acts.

45. However, a sexual servitude offence may not capture a person in a situation of forced marriage who is required to provide domestic labour. One solution may be to introduce

⁵⁷ *Ibid* at [27]-[35 citing United Nations, Economic and Social Council, Slavery, the Slave Trade, and other forms of Servitude (Report of the Secretary-General), UN Doc E/2357, 27 January 1953.

⁵⁸ *Ibid* at [50].

⁵⁹ Article 7(a).

⁶⁰ Attorney-General’s Department, *Discussion Paper: Forced and Servile Marriage*, (2010), p 3.

⁶¹ Article 7(b).

⁶² Senate Legal and Constitutional Legislation Committee, *Criminal Code Amendment (Trafficking in Persons Offences) Bill 2004* [2005] [2.45] (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. In response to these concerns the 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*. However, the Attorney-General’s Department agreed that non-commercial sexual exploitation would be captured by the proposed offence of trafficking in children.

an offence of “servitude” which is capable of capturing severe forms of exploitation that do not fall within the offence of slavery.⁶³

46. The concept of servitude is found in the *International Covenant on Civil and Political Rights* (ICCPR)⁶⁴ and the *Universal Declaration of Human Rights* and is understood to encompass a broader range of exploitative conduct than the concept of slavery. Anne Gallagher has observed:

While the relationship between the two concepts is not fully settled, most agree that the distinction between slavery and servitude is both distinct and qualitative: “[s]ervitude should be understood as human exploitation falling short of slavery.”⁶⁵

47. The *Forced Labour Convention 1930 (ILO No.29)*⁶⁶ and the *Abolition of Forced Labour Convention 1957 (ILO No. 105)*⁶⁷ provide for the abolition of forced labour, which is defined in article 2(1) of *ILO No. 29* as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”.

48. We support the introduction of a forced labour offence into the *Criminal Code*.⁶⁸ However, relying on a forced labour offence to target the exploitative conduct that results from a situation of forced marriage may prove difficult. As the abuse occurred in a familial context the defendant could argue that the profit from the complainant’s labour was a financial contribution to the household. Therefore we recommend introducing a standalone offence of “servitude.”

Forced Marriage

49. There is no specific international obligation for Australia to define and prohibit forced marriage, however, as we have discussed the type of exploitation that may occur as a result of forced marriage could be captured by a new offence of “servitude” or by amending the definition of sexual servitude to capture all forms of gross sexual exploitation, regardless of whether the perpetrator profits from the victim.
50. The international jurisprudence on the elements of forced marriage is sparse. The most significant decision is by the Appeals Chamber of the Special Court of Sierra Leone, which held that forced marriage is a crime against humanity, which should be recognised

⁶³ Fiona David, Presentation to the Anti-Slavery Project Seminar on Forced Labour and Reparations, 18 February 2010 (noting that the concept of *servitude* would potentially provide a useful alternative in situations where the conduct is very serious but not sufficiently extreme to fall within the parameters of slavery).

⁶⁴ Opened for signature 16 December 1966, 999 U.N.T.S 171 (entered into force 23 March 1976 except Art 41 which came into force 28 March 1979). Article 8 of the ICCPR prohibits slavery, servitude and forced and compulsory labour. The concept of forced labour is a more specific concept than the general concept of servitude, which could encompass both sexual and domestic servitude.

⁶⁵ Anne Gallagher, above n 22, p 182.

⁶⁶ Opened for signature 29 July 1929, 39 U.N.T.S 55, (entered into force 1 May 1932).

⁶⁷ Opened for signature 25 June 1957, 320 U.N.T.S. 291, (entered into force 17 January 1959).

⁶⁸ Anti-Slavery Project, *The Criminal Justice Response to Slavery and People Trafficking; Reparation; and Vulnerable Witness Protection*, Response to the Australian Government Attorney-General’s Department Discussion Paper, March 2011. Frances Simmons and Jennifer Burn, ‘Evaluating Australia’s Response to all forms of Trafficking: Towards Rights-centred Reform’, (2010) 84 *The Australian Law Journal* 712.

as a distinct crime instead of treated as a species of sexual slavery.⁶⁹ The Appeals Chamber defined the crime of forced marriage as a situation in which:

...a 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 mental suffering or physical, mental or psychological injury to the victim.⁷⁰

51. The Appeals Chamber found 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, with the “wife” expected to show love and fidelity to her “husband” in a marriage-like context. The physical and psychological harms suffered by the victims of forced marriage include non-consensual sex and sexual violence, forced labour, corporal punishment, and deprivation of liberty. The Appeals Chamber concluded “acts of forced marriage were of similar gravity to several similar enumerated crimes against humanity including enslavement, imprisonment, torture, rape, sexual slavery and sexual violence.”⁷¹
52. One of the most significant aspects of the decision is that the Court focused on the harm that occurs when a person is maintained – through coercion – in a situation of forced marriage. While an offence of forced marriage could target the conduct of maintaining a person in a condition of forced marriage, this conduct could be captured by a standalone offence of servitude. Amending the *Criminal Code* to ensure the offence of sexual servitude captures non-commercial sexual exploitation could also provide law authorities with the tools necessary to respond to extreme cases of forced marriage.

Trafficking for the purpose of forced and servile marriage

53. Australia’s international obligations under the *Trafficking Protocol* require 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”.⁷² The definition of trafficking in persons covers trafficking for the purpose of exploiting people in ‘practices similar to slavery’ including servile marriage.⁷³ Article 3(a) defines trafficking in persons as

- (a) the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or

⁶⁹ *The Prosecutor of the Special Court v. Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu (the AFRC accused) (Appeal Judgment)*, SCSL-2004-16-A, Special Court for Sierra Leone, 22 February 2008. 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 article 2(g) of the Rome Statute and that the residual category of crimes against humanity, “other inhumane acts” was confined to acts of a non-sexual nature and 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.

⁷⁰ *Ibid* at 196.

⁷¹ *Ibid* at 199-200. 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’.

⁷² Article 5(2).

⁷³ UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, (2000) 15 November 2000 Article 3(a).

benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.⁷⁴

54. The United Nations Office of Drugs and Crime considers that trafficking for forced marriage falls within the definition of trafficking in article 3 of the *Trafficking Protocol*.⁷⁵ While women are more likely to be the victims of trafficking for the purpose of forced marriage⁷⁶, the UNODC *Model Law Against Trafficking in Persons* recommends updating the definition of forced and servile marriage in the 1956 Supplementary Convention ‘to include practices in which both women/girls and men/boys can be the subject of forced or servile marriage.’ This may cover trafficking for marriage and certain forms of ‘mail order bride packages’.⁷⁷
55. The legal concept of trafficking captures both “the bringing of a person into a situation of exploitation and the maintenance of that person in a situation of exploitation,”⁷⁸ however the trafficking offences in the *Criminal Code* focus upon the movement of persons either across or within borders for the purpose of exploitation.⁷⁹
56. The trafficking offences in the *Criminal Code* prohibit trafficking for the purpose of ‘exploitation’ but the definition of exploitation does not specifically cover ‘servile marriage’, ‘servitude’ or ‘practices similar to slavery’.⁸⁰ In 2005 the Senate Legal and Constitutional Committee recommended that the trafficking offences should provide unambiguous coverage of *all forms of exploitation contemplated by the Protocol* and recommended that the definition of exploitation include an express reference to servile marriage.⁸¹ The recommendation was not implemented.
57. An effective legislative response to trafficking requires national anti-trafficking laws to precisely define what constitutes exploitation.⁸² We recommend amending the definition

⁷⁴ The UNODC have clarified that the definition of trafficking applies to trafficking that occurs across and within state borders. UNODC, *Legislative Guide to the Trafficking Protocol*, (2004).

⁷⁵ Human Rights Council, Report of the Special Rapporteur on the Human Rights Aspects of the Victims of Trafficking in Persons, Especially Women and Children, U.N. Doc. A/HRC/4/23 (January 24, 2007)(prepared by Sigma Huda), p 21.

⁷⁶ International Labor Organisation (ILO), *A Global Alliance Against Forced Labour :Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, (2005) p 58 [273] (observing gender-specific cultural practices can make women particularly vulnerable to trafficking for forced marriage – for example, the International Labor Organization (ILO) observes that ‘certain traditions in central Asian republics, such as arranged marriages or forced marriages of young women and girls, have contributed to the rise in trafficking for sexual exploitation’).

⁷⁷ United Nations Office on Drugs and Crime, *Model Law against Trafficking in Persons*, (2009).

⁷⁸ Anne Gallagher, above n 22, p 47.

⁷⁹ See further Anti-Slavery Project, *The Criminal Justice Response to Slavery and People Trafficking; Reparation; and Vulnerable Witness Protection*, Response to the Australian Government Attorney-General’s Department Discussion Paper, March 2011.

⁸⁰ The definition under the *Criminal Code* states ‘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’.

⁸¹ Senate Legal and Constitutional Legislation Committee, *Criminal Code Amendment (Trafficking in Persons Offences) Bill 2004* [2005] Recommendation 8, see also at p 20.

⁸² UNODC, *Model Law Against Trafficking in Persons* (2009), pp 35-36, 18; see also Anti-Slavery Project, *The Criminal Justice Response to Slavery and People Trafficking; Reparation; and Vulnerable Witness Protection*, Response to the Australian Government Attorney-General’s Department Discussion Paper, March 2011.

of “exploitation” in the dictionary of the *Criminal Code* to include “practices similar to slavery”, “servile marriage” and “servitude” to ensure that Australia’s laws more fully reflect Australia’s obligations under the *Trafficking Protocol*.⁸³ **[Recommendation 9]**

B. What are our international obligations to prevent child marriage and trafficking for child marriage?

58. When children are forced to marry, the rights of the child come into focus. Australia’s international obligations require Australia to prohibit child marriage and the sale and traffic of children for any purpose.⁸⁴ 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’.⁸⁵

59. Under the *Marriage Act 1961* (Cth), it is an offence to marry a child.⁸⁶ A marriage is void if it was obtained by duress or fraud or one party did not have the mental capacity to truly consent to the marriage.⁸⁷ Section 11 provides “[s]ubject to section 12, a person is of marriageable age if the person has attained the age of 18 years”.⁸⁸

60. Children who are at risk of being forced into a marriage may seek protection through a parenting order obtained under the *Family Law Act*.⁸⁹ The Act enables people under 18 who are at risk of forced marriage to seek protection by applying for parenting orders that prohibit the facilitation of the marriage.⁹⁰ These orders may be sought by the young person themselves or by “any other person concerned with care, welfare or development of the child”.⁹¹

⁸³ The creation of a federal criminal offence of trafficking for the purpose of exploitation (in forced marriage) should fall within the scope of the powers granted to the Commonwealth to create laws under the external affairs laws. Equally, these laws could be established pursuant the marriage power, to protect the institution of marriage. See further See, Anti-Slavery Project, *The Criminal Justice Response to Slavery and People Trafficking; Reparation; and Vulnerable Witness Protection*, Response to the Australian Government Attorney-General’s Department Discussion Paper, March 2011.

⁸⁴ CRC, art 35; CEDAW art 16(2).

⁸⁵ Human Rights Council, above n 75, p 21

⁸⁶ See *Marriage Act 1961* (Cth), s 95 (1) makes it an offence for a person to go through a form of ceremony of marriage with a person who is not of marriageable age (Penalty: imprisonment for 5 years) and s 95(2) makes it an offence for a person to go through a form of ceremony of marriage with a minor unless the minor has previously been married, or written consent from a person whose consent to the marriage of the minor is required under the Marriage Act has been given or dispensed with in accordance with the Marriage Act. The penalty for this offence is a fine of \$500 or imprisonment for 6 months.

⁸⁷ *Marriage Act 1961* (Cth), s 23(1).

⁸⁸ Section 12 permits a Judge or Magistrate of a State or Territory Court to authorise the marriage of a person aged between 16 and 18 in a matter in which “the circumstances of the case are so exceptional and unusual as to justify the making of the order”.

⁸⁹ See for eg, *Department of Human Services & Brouker & Anor* [2010] FamCA 742.

⁹⁰ The definition of “a parenting order” in section 64B(2) of the *Family Law Act 1975* (Cth) includes: (i) any other aspect of the care, welfare or development of the child or any other aspect of parental responsibility for a child.

⁹¹ *Family Law Act 1975* (Cth), s 65(1)(c).

C. What legislative measures could provide appropriate protection for people at risk of, or in situations of, forced and servile marriage?

61. The right to marry is a freedom that is protected by human rights law. The principle that marriage is an institution that must be entered into with the “free and full consent” of both parties is enshrined in the ICCPR,⁹² the *International Covenant on Economic, Social and Cultural Rights*⁹³ and the *Convention on the Elimination of all Forms of Discrimination Against Women*.⁹⁴ Australia is a party to the *Convention on Celebration and Recognition of the Validity of Marriages*, which provides that Australia may refuse to recognise a marriage entered into without the full and free consent of both parties.⁹⁵

1. *Empowering the Family Court to make forced marriage protection orders to protect people from being forced to marry or who have been forcibly married.*

62. While the most extreme cases of forced marriage may attract the attention of the criminal law, the experience in the UK illustrates the critical role of civil protection orders in enabling vulnerable people to escape or avoid forced marriage. *The Marriage Act 1961* (Cth) prohibits marriage that is not between consenting adults of a marriageable age or which occurs as a result of duress or fraud. However, it does not provide a statutory definition of duress or forced marriage. There is no mechanism for vulnerable adults facing forced marriages or in situations of forced marriage to escape that situation to seek civil protection orders.

63. Forced marriage is a form of family violence. People at risk of, or in situations of, forced marriage may seek an AVO preventing a person from assaulting, threatening, stalking, intimidating or going within a certain distance of their home or workplace. It would be possible for a person in a forced marriage situation to seek an apprehended domestic violence order after leaving the marital home.⁹⁶ However, such orders are not designed to protect a person at risk of forced marriage. The types of orders a court could use to prevent forced marriage should seek to:

- i. stop intimidation and violence,
- ii. prevent forced marriage from occurring,
- iii. stop someone from being taken abroad,
- iv. hand over all passports where there is dual nationality,
- v. not to apply for a new passport,
- vi. attend court and

⁹² ICCPR Article 23(2).

⁹³ ICESCR Article 10(1).

⁹⁴ CEDAW Article 16(1)(b) (providing *State 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 a basis of equality of men and women:...(b) the same right freely to choose a spouse and to enter into marriage only with their free and full consent.*

⁹⁵ Australia has not signed or ratified the *Convention on Consent to Marriage, Minimum Age for Marriage and Registration for Marriage*, which provides that “[n]o marriage shall be legally entered into without the full and free consent of both parties ...” (Article 1(1)).

⁹⁶ 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.

- vii. reveal the whereabouts of a person,
- viii. facilitate or enable a person to return to Australia by a certain date.⁹⁷

64. The Attorney-General's Discussion Paper canvasses the possibility of making protection orders available through the *Marriage Act 1961 (Cth)* to protect a person at risk of a forced or servile marriage, or who has already been forced into marriage. An order could contain any prohibitions, restrictions, requirements or terms that may be necessary to protect the victim and cover all matters mentioned above.

65. We recommend creating a regime of civil protection orders to enable people to avoid or escape forced marriage. The Family Court and the Federal Magistrates Court should have jurisdiction to deal with applications for orders to protect people facing forced marriage or already in situations of forced marriage. **[Recommendation 7]**

66. International experience suggests that people facing forced marriage or in situations of forced marriage may not have the capacity to seek a legal order. Consideration needs to be given to who has standing to seek such an order and, in the event that the application is made by a third party, what steps are taken to ensure that the wishes and views of the person concerned are represented. The question of how an application for a forced marriage protection order and an application for an annulment of the marriage on the grounds of duress could be dealt with simultaneously should also be considered.

2. *Introducing a definition of duress into the Marriage Act 1961 (Cth)*

67. We recommend defining forced marriage and duress in the *Marriage Act 1961 (Cth)*. The definition of forced marriage should be broad and clearly encompass situations where consent is nullified by psychological and emotional coercion or the abuse of a position of power and vulnerability. **[Recommendation 8]**

68. Under the *Marriage Act 1961 (Cth)* a marriage is void if the consent of either party was not real.⁹⁸ A person who escapes a forced marriage may apply to nullify that marriage on the basis that the marriage was entered into on the basis of duress.⁹⁹ Sections 23(1)(d) and 23B(1)(d) of the *Marriage Act 1961 (Cth)* provide that a marriage is void if the consent of either of the parties was not 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

69. For recognition purposes, marriages that take place outside Australia are covered by Part VA of the *Marriage Act 1961 (Cth)*. Sections 88B and 88C provide that a marriage solemnised in a foreign country is recognised as valid under the local law of that country and Part VA of the *Marriage Act* applies. Section 88D relevantly provides that a marriage that occurred overseas will not be recognized by Australian law if "the consent of either

⁹⁷ See forced marriage provision orders in the UK's *Forced Marriage (Civil Protection) Act 2007 (UK)* which came into force November 2008. Refer to Her Majesty's Courts Service, *Forced Marriage Protection Orders* (2009) <<http://www.hmcourts-service.gov.uk/cms/14490.htm>> at 17 February 2011.

⁹⁸ *Marriage Act 1961 (Cth)*, s 23B.

⁹⁹ See for eg. *Kreet & Sampir* [2011] FamCA 22.

of the parties was not a real consent for a reason set out in subparagraph 23B(1)(d)(i), (ii) or (iii)".

70. The terms 'duress or fraud' are not defined by the *Marriage Act 1961 (Cth)*. In *Kreet & Sampir*¹⁰⁰, where an Australian born woman sought an annulment of her marriage to an Indian man on the grounds of duress, Justice Cronin commented that,

...duress is not defined in the 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 (see *In the Marriage of S* (1980) FLC 90-820).¹⁰¹

71. In *Kreet & Sampir* the presence of duress was obvious. Ms Kreet was born in Australia and fell in love with an Australian man, Mr U, but her parents were determined she should marry an Indian man chosen for her by her father. Ms Kreet was tricked into travelling to India by her parents who promised she could marry Mr U in a traditional ceremony. Ms Kreet was physically assaulted by her father and her father threatened to arrange to rape Mr U's sisters if the marriage did not occur. The judgment does not delve into the particulars, however, it is clear that "[t]he wife refused the respondent's attempts at physical intimacy which culminated in assaults."¹⁰² Ms Kreet sponsored her husband's spouse application then flew back to Australia where, after staying with Mr U, she withdrew the visa application and returned to Mr U. Her relationship with her parents broke down: Ms Kreet sought an indefinite intervention order to protect herself from her father and applied to the Family Court to nullify the marriage on the grounds of duress.

72. To explicitly provide for the variety of situations in which marriage can be obtained by duress, fraud, or coercion, the *Marriage Act* should provide a statutory definition of duress that encompasses physical and psychological coercion. The definition should be framed broadly to include duress or coercion through an abuse of a position of power or vulnerability. The definition of duress should be linked to a new statutory definition of forced marriage, which recognises that forced marriage can occur by reason of physical and psychological pressure. **[Recommendation 8]**

D. Helping Australia citizens and permanent residents facing forced marriage abroad

73. In *Kreet & Sampir* an Australian woman was forced to marry a man in India. Existing criminal offences do not target the conduct of forcing an Australian citizen or permanent resident into marriage abroad and there is no civil mechanism for an adult at risk of being forced into marriage abroad to seek a protective order from the Family Court.

74. If the Australian Government decides to pursue criminalisation, consideration should be given to the extra-territorial application of forced marriage laws. The *Commonwealth Attorney-General Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement powers*, warns that

[c]aution should be exercised before moving beyond standard jurisdiction. It will often be more appropriate to leave the laws of a foreign jurisdiction to apply to matters falling outside

¹⁰⁰ *Kreet & Sampir* [2011] FamCA 22.

¹⁰¹ *Ibid*, 39. In the *Marriage of S Watson* SJ emphasised that it was unnecessary to place an emphasis on fear or terror in finding duress, observing that consent may be nullified by "non-violent but nevertheless controlling parental coercion." *In the Marriage of S* (1980) 5 Fam LR 831, 839.

¹⁰² *Ibid*, 29.

standard jurisdiction and unrealistic to expect that Australian enforcement officials could engage in enforcement overseas.¹⁰³

75. The *Criminal Code* provides for four categories of jurisdiction.¹⁰⁴ Category A extends to citizens but not Australian residents abroad subject to foreign law defence. Category B extends to citizens and residents for what they do anywhere in the world (subject to a foreign law defence for non-citizens). Category C covers anyone anywhere in the world regardless of citizenship or residence, subject to a foreign law defence. Category D provides universal jurisdiction and applies to anyone anywhere regardless of citizenship or residence with no foreign law defence for offences directly threatening the nation or over which there is universal jurisdiction in Australian law.
76. Category B would appear to be the appropriate way of moving beyond standard jurisdiction. Category B jurisdiction offences include people trafficking, debt bondage, slavery, some child sex offences, child sex grooming, sexual servitude and money laundering.¹⁰⁵ However, categories A, B, and C would not capture a situation where an Australian citizen is coerced into marriage, if the coercion and marriage occurred entirely outside of Australia and did not involve the conduct of Australian citizens or residents. The only way to address these cases without asserting universal jurisdiction would be to build in a bespoke regime addressing extra-territorial application.
77. In practice, forced marriage offences that occurred entirely overseas would be hard to investigate due to the challenges of obtaining evidence from family members. The offence would be harder to prosecute and, in light of the fact that very few countries have enacted forced marriage offences, subject to a foreign law defence for non-citizens.
78. As a practical matter, Australian consular officials should receive training about how to provide diplomatic assistance to Australian nationals and permanent residents facing forced marriage abroad. The assistance a consular official may provide could include issuing emergency passports, acquiring a loan to assist the person return to Australia and, in some circumstances, speaking to local authorities. In a case like that of Ms Kreet, prompt and effective consular assistance may have been able to prevent the forced marriage occurring or help the victim of the forced marriage escape that situation.
79. The experience in the UK illustrates how civil protection orders could operate to protect a person from conduct occurring outside Australia. In circumstances where a victim is removed from Australia along with those involved in the forced marriage, a civil protection order would appear to be of little coercive value unless those involved intended to return to Australia where they could be brought before a court, and sanctions (such as imprisonment) could be imposed. Nonetheless, it appears that the Act provides a workable model for Australia to protect most victims and potential victims of forced marriage from conduct that may occur overseas.

¹⁰³ Australian Government, Attorney-General's Department, *Commonwealth Attorney-General Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement powers* (2007), >http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_GuidetoFramingCommonwealthOffences,CivilPenaltiesandEnforcementPowers> at 17 February 2011, p 36.

¹⁰⁴ *Criminal Code Act 1995* (Cth), ss 15.1-15.4.

¹⁰⁵ The jurisdiction over people smuggling is similar to Category B but restricted to where the condition or result of the offence occurs or was intended to occur in Australia.

E. How could the family violence provisions of the Migration Regulations protect people who have been forcibly married?

80. The Australian Government's response to forced marriage must ensure people at risk of, or already in situations of forced marriage obtain protection and support, regardless of whether they are able or willing to assist police pursue criminal investigations. Under current law, the application of the Witness Protection Trafficking Framework may not generally be appropriate for people who have been forcibly married as the grant of the Witness Protection Trafficking Permanent visa is conditional upon the person cooperating with a police investigation or the prosecution of a person who has trafficked the victim and forced them into exploitative conditions.¹⁰⁶ The current framing of the trafficking in persons offences could exclude people who have been subjected to forced marriage from the protection offered by the trafficking visa framework.¹⁰⁷
81. 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.¹⁰⁸ Special provisions in the *Migration Regulations 1994* 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.¹⁰⁹ There are also limitations on serial sponsorship of foreign partners and sponsorship in circumstances where there is a history of family violence.¹¹⁰
82. 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". Family violence is defined as:
- conduct, whether actual or threatened, towards: the alleged victim, or a member of the family unit of the alleged victim, or a member of the family unit of the alleged perpetrator, or the property of the alleged victim, or the property of a member of the family unit of the alleged victim, or the property of a member of the family unit of the alleged perpetrator, that causes the alleged victim to reasonably fear for, or to be reasonably apprehensive about, his or her own wellbeing or safety.¹¹¹
83. Although forced marriage is a form of family violence, the family violence provisions are not designed to protect people who have been forced to marry their sponsoring partner. The most obvious hurdle is that 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 relationship). In cases where the marriage was not performed in accordance with the *Marriage Act 1961 (Cth)* by reason of duress, the family violence provisions will not apply because the visa applicant will be unable to establish that the relationship

¹⁰⁶ Migration Regulations 1994, Reg 2.07AK. Applications for Witness Protection (Trafficking) (Permanent) (Class DH) visas. See generally Burn J & Simmons F 2009 'Prioritising protection — A new visa framework for Trafficked People', *Immigration Review* 41:3-10.

¹⁰⁷ *Criminal Code Act 1995 (Cth)*. Division 271 – Trafficking in persons and debt bondage.

¹⁰⁸ Department of Immigration and Citizenship, *Partner Visa: Onshore Temporary and Permanent (Subclass 820 and 801)*, Department of Immigration and Citizenship, ><http://www.immi.gov.au/migrants/partners/partner/820-801/>< at 21 February 2011.

¹⁰⁹ The domestic violence provisions were introduced into the Migration Regulations in 1991. Division 1.5, Regulations, 1.21 – 1.27 of the *Migration Regulations 1994 (Cth)*.

¹¹⁰ *Migration Regulations 1994 (Cth)* Reg 1.20J.

¹¹¹ *Migration Regulations 1994 (Cth)* Reg 1.21(1).

84. The family violence provisions of the *Migration Regulations*¹¹² could be amended to enable a person to apply for a permanent partner visa on the basis that the person is the victim of forced marriage. 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 Family Law Act. Division 1.5 provides for evidence of family violence to be provided by a 'competent person'.¹¹³ We submit that the family violence provisions should be amended to enable a person who is the subject of a forced marriage protection order to meet the family violence provisions or to enable a victim of forced marriage to meet the family provisions by providing appropriate evidence in the form of a statutory declaration and two statements from competent people.
85. We recommend amending the family violence provisions of the *Migration Regulations* to ensure they fully protect women (and men) who are forced to marry their sponsoring partner. **[Recommendation 9].**
86. Women who are at risk of forced marriage if they return to their country of origin may also be able to apply for protection visa (Class XA) on the basis that they are members of a particular social group.¹¹⁴ We also support examining how a system of complementary protection could offer protection to the people who have been forcibly married or face forced marriage abroad. These reforms should be considered as part of the ALRC's current inquiry into family violence and immigration law.¹¹⁵

¹¹² *Migration Regulations 1994* (Cth) Reg 1.21.

¹¹³ *Ibid* – a 'competent person' is a person holding a qualification specified in the Migration Regulations for this purpose.

¹¹⁴ See generally Dauvergne, Catherine and Millbank, Jenni, 'Forced Marriage as a Harm in Domestic and International Law' (2010) 73(1) *The Modern Law Review* 57.

¹¹⁵ The Australian Law Reform Commission (ALRC) Issues Paper 37 - Family Violence and Commonwealth Laws – Immigration Law.
><http://www.alrc.gov.au/sites/default/files/pdfs/publications/IP37whole.pdf>< at 7 March 2011.