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National Legal Aid

Discussion Paper Forced and Servile Marriage
Criminal Justice Division
Attorney-General's Department
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Dear Attorney-General

Forced and Servile Marriage Discussion Paper

Thank you for the invitation to provide comments on the discussion paper on Forced and Servile Marriage.

About National Legal Aid and Legal Aid Commissions

National Legal Aid (NLA) represents the Directors of each of the eight State and Territory Legal Aid Commissions. The Legal Aid Commissions (Commissions) are independent statutory authorities established under respective state or territory enabling legislation. The Commissions are funded by federal and state or territory governments to provide legal assistance to disadvantaged people in the areas of family law, child protection, family violence, immigration and criminal law. Together, they are the largest legal practice for these areas of law.

The experience of family violence is common in our client base, and the Commissions each provide legal representation, advice, information, education and referral services including to non-legal support services, on a daily basis to many CALD clients who experience family violence.

NLA made a submission to the recent review of family violence laws and legal frameworks by the Australian Law Reform Commission (ALRC) and the New South Wales Law Reform Commission (NSWLRC). That submission is referred to in these comments and a copy of the submission which is dated 15 July 2010 is enclosed for your ease of reference.

Are additional legislative and non legislative measures needed to provide:

- (a) Adequate deterrence against the practice of forced and servile marriage, and**
- (b) Appropriate protection for victims of forced and servile marriage?**

Response to Options for Reform

In considering the response to the discussion paper NLA found the distinction between forced and servile and arranged marriages, as described in paragraph 6 of the discussion paper, to be very challenging. From NLA experience, although, in principle, spouses may have the right to refuse the marriage arrangement, there is often considerable pressure placed on them, particularly young women, to enter into the marriage. Whether or not this 'pressure' could be considered to fall within the definition of forced marriage highlights the need for careful and considered drafting of the definition in any new or expanded legislation.

CASE STUDY

Victoria Legal Aid (VLA) recently assisted a 16 year old girl. She was having issues with her family who were planning to return to Pakistan. She was worried that if she went back to Pakistan with her family that she would be forced to enter into an arranged marriage against her will. VLA arranged mediation between the girl and her parents to try to overcome some of the animosity that existed and to try and rebuild the family unit. This was not entirely successful, but her parents eventually agreed not to force the girl into marriage and agreed that she would be welcome to return to the home at any time. Unfortunately, whenever she did return to the home her mother and brother (her father had returned to Pakistan) made things so difficult for her by calling her names, telling her she had shamed the family and that she wasn't welcome, that she really did not want to visit. She persisted as she was worried about her younger sister.

She felt very isolated and sought the help of many different services because she needed the comfort she got from having a lot of people around her. The Department of Human Services (DHS) saw her as someone who was trying to manipulate the system and who essentially was a bit of a "service junky". VLA persisted with the Child Protection Unit at DHS and Centrelink and assisted the girl to get an "unreasonable to live at home" allowance to help support her to move out of the family home. The rest of the family returned to Pakistan and the girl, an Australian citizen, remained in Victoria with a range of support services in place.

Although reference is made to the influence of family in the making and the maintenance of marriage arrangements; the power of cultural or religious traditions and CALD community expectations in relation to marriage and family relationships requires consideration. In particular, the consequences of refusal to marry or leaving a marriage can result in isolation, community ostracism, pressure from community and religious leaders, threats and harassment from other community members. It is

also common for communities to prefer to deal with their issues within the community, an attitude which further isolates women in these circumstances.

In addition, from experience, in CALD communities with a patriarchal structure it is the fathers rather than the families of both spouses that play a dominant role in the marriage arrangements. In these communities the 'heads of both families', usually the fathers or oldest male member, agree on the grounds for marriage which can be their respective social and economic status, personal linkages and friendships, shared past experiences, and so forth. Often the mothers in both families are not informed when the arrangements are being made and, in particular, the girl's mother is unaware until her counterpart from the male's family comes to her indirectly. The mother of the girl is then assigned the duty of informing the daughter of the father's commitment to the marriage and ensuring her acceptance of the arrangement. Culturally it is often a taboo for a father to discuss marriage issues with his daughter because it involves a sexual relationship. The mother can be at risk of family violence if the daughter refuses to agree to the marriage. The dynamics of this situation are complex and both the mother and the daughter can be put at risk. It may be necessary to consider including, in appropriate circumstances, the protection of the mothers of the girls in the options for protection orders that provide protection from forced and servile marriages.

There is very little information about the extent of forced and servile marriage as defined in the discussion paper, in Australia. The Commissions had difficulty identifying case studies which fell within the limited definition used in the discussion paper, but are aware of many circumstances in which assistance has been provided to clients for legal problems which have arisen prior to, and following, an arranged marriage, particularly in the areas of family violence, family law, child protection and immigration.

There is also a need to consider protection for persons who are in defacto relationships. The paper does not consider the difference between the legislative requirements for civil marriage in Australia and the cultural attitudes or requirements in respect of religious marriage in some CALD communities. There are people who consider themselves to be married having entered into a religious marriage in Australia, but are in reality living in a defacto relationship because their marriage doesn't meet the requirements for a civil marriage in Australia. In addition, some Legal Aid Commission clients have experienced a history of family violence, threats and intimidation which continue despite their civil divorces under Australian law. In their communities, from a religious perspective, the marriage continues until a religious divorce (which may not be available) is obtained.

CASE STUDY EXAMPLE (GENERIC)

An arrangement is made for the marriage of X to Y. X is told that she may not continue to participate in social life beyond the family home (such as go to school) unless she agrees to the marriage. Following a religious ceremony X moves in with Y and his family. There follows recurrent violence perpetrated upon her by Y and his other family members. After leaving the relationship X receives ongoing threats and

physical violence from Y and other members of his family and she continues to fear for her life. X is unable to obtain a religious divorce and is encouraged by a community leader who intervenes to return to her husband and his family and be a good wife. She continues to be considered by the community as formally married to Y.

There is a great need to provide ongoing legal education in the areas of family law, child protection and family violence and ensure cooperation from religious and cultural leaders of these communities. There is also a great need to provide support services for victims as well as adequate safe and secure housing arrangements.

Legislation – Criminal measures

It has been suggested that the creation of specific criminal offences would:

- be consistent with the Supplementary Convention in relation to servile marriage;
- fulfil Australia's treaty obligations to take effective and appropriate measures against forced marriage;
- have a deterrent effect. That is, it would raise community awareness of the seriousness of this issue and would send a clear message that this type of conduct is prohibited in Australia; and
- would encourage victims to speak out and educate authorities about the seriousness of this issue.

There is concern however that the use of criminal measures might deter people from reporting their circumstances because of fear of the consequences to themselves, their family and their community. Legislative measures that seek to introduce new criminal offences may give rise to unintended consequences on families. The discussion paper highlights that for some CALD communities, family often occupies a very important role in a community member's life and personal identity.¹ The prospect of being isolated from family and community may actually inhibit victims from reporting incidents of forced or servile marriage.

Each state has criminal law provisions which could be used to address the circumstances that can arise as a consequence of forced or servile marriage and the associated family violence that can be involved. It is suggested that the provisions of relevant legislation and associated definitions of family violence should be consistent in each state and territory, analogous to the recommendations of the ALRC and NSW Law Reform Commission Report *Family Violence - A National Legal Response* (October 2010). It is noted that NLA supported the proposal (5-1) in the report that the definition of family violence in state and territory family violence legislation should be broad enough to capture conduct the subject of potentially relevant federal offences in the family violence context—such as sexual servitude.

¹ At para. 14

Under Victorian criminal law, there may already be some protection for victims in that Section 55 of the Family Violence Protection Act 2008 makes it an offence to:

take away a person by force or detain a person against his or her will -

- (a) with the intention of getting married to, or taking part in an act of sexual penetration with, that person; or
- (b) with the intention that that person should marry, or take part in an act of sexual penetration with, another person.

The maximum penalty is 10 years imprisonment.

South Australia and Tasmania also have offence provisions which prohibit the detention of a person against their will with the intention that they marry or have sexual intercourse with a person. In SA the maximum penalty is 14 years or 18 years if the offence is aggravated. Tasmania has maximum penalties of 10 and 21 years respectively.

Western Australia has the offence of deprivation of liberty which carries a maximum penalty of 10 years imprisonment under s333 of the Criminal Code. This offence provision would apply to circumstances where a person is being detained against their will for a specific purpose such as marriage.

In Victoria there are also existing provisions that cover many of the harmful consequences associated with forced and servile marriage that are outlined in paragraph 8 of the discussion paper. Criminal offences already exist in Victoria for sexual assault, rape, physical abuse, theft, unlawful imprisonment, abduction and kidnapping, genital mutilation and murder. There are existing criminal provisions relating to sexual offences against children. There are also penalties in place for misleading authorities in circumstances where a victim has run away and their family members involve police by falsely accusing them of committing a crime.² The *Crimes Family Violence Act (1987)* Victoria may also afford protection. Some of these offences exist in other states and territories.

If new offences were created successful prosecution would be difficult and may result in further trauma for victims.

The discussion paper suggests that a specific offence be created to criminalise conduct of a person who causes a second person (the victim) to enter into a marriage without giving full and free consent. The definition of such an offence would have to take into account cultures or customs in communities where marriages are arranged between families and distinguish arranged from forced or servile marriages. The terms of the offence as set out in paragraph 63 of the discussion paper are considered to be too narrow.

² At para. 12

In circumstances where a person has entered into a marriage of convenience (arranged, for example, to facilitate immigration to Australia), the victim may be complicit. There is a danger that some victims, if they are complicit, will be at risk of sanction and penalty themselves. This also raises important issues relating to the definition of "forced" marriage and, in particular, the definition of consent: including whether behaviour can be criminal when there has been consent.

In the United Kingdom the majority of agencies, professionals and individuals who responded to the *Forced Marriage, A Wrong Not a Right*³ consultation paper felt the disadvantages of creating new legislation would outweigh the advantages and potentially drive forced marriage underground by preventing victims from coming forward.

Their concerns included:

- the risk that the fear of their families being prosecuted may stop victims from asking for help;
- the risk that parents may take children abroad and marry them off, or hold them there, at an earlier age to avoid increased risks of prosecution in Britain;
- that there are already sufficient criminal offences and protective measures that can be used;
- that if it were very difficult to mount a successful prosecution the new offence might be routinely flouted with impunity;
- that a new offence would disproportionately impact on Black and Minority ethnic communities and might be misinterpreted as an attack on those communities;
- that families concerned may not feel implicated by such an offence because many may believe their children did consent to the marriage, even though that consent was obtained under duress;
- implementing a new offence would be expensive and funds would be better spent on improving support for those at risk;
- increased risk of prosecution or threat of prosecution would make it harder for victims to reconcile with their families;
- increased involvement in criminal prosecutions could be harrowing for victims who want to move on; and
- there are better, non-legislative means of working within communities to change views and tackle the abuse.

NLA does not consider the introduction of new criminal offences to be the preferred approach.

Legislation – amendment to the Marriage Act 1961 (Cth)

The discussion paper suggests the Marriage Act (1961) could be amended to include an offence for a person to cause another person (the victim) to enter into a marriage

³ 2005 (UK)

without the victim's full and free consent. While section 23B of the Act currently provides that a marriage is void because the consent of either of the parties is not a real consent if "... *it was obtained by duress or fraud*", or because "*either of the parties is not of marriageable age*", in practical terms it appears this potential remedy would only be available after the fact of a "marriage", when it may be very difficult for the aggrieved party to take the steps necessary to have the marriage declared void.

It is suggested that the creation of an offence could capture circumstances where the victim is incapable of giving full and free consent due to any incapacity, as well as physical and non-physical forms of coercion. The definition of such an offence would have to address the challenge of distinguishing between arranged and 'forced' or 'servile' marriages, to avoid inappropriately 'narrow' interpretation of the latter.

Whilst there are some potential negatives inherent in creating an offence when dealing with family matters, it is likely that any potential victim sufficiently distressed to complain would already be in conflict with the family and, consequently, already isolated. Providing the victim with an avenue of complaint is, in itself, unlikely to substantially exacerbate this isolation.

Other apparent obstacles such as the difficulty of collecting evidence, the need for additional resources to investigate and bring alleged offenders to court, or the potential for victims to be taken abroad are all obstacles already faced by police and prosecutors dealing with family violence, child protection and family law matters, including the removal of children from the jurisdiction, and should not impede the legislature from taking positive action to protect potential victims in accordance with international obligations.

On the positive side, potential victims would be reassured by the existence of such a measure, and legislative provisions combined with targeted ongoing community legal education could act as an inhibitor to persons tempted to undertake such activities.

The few recent decisions of the Family Court of Australia to issue injunctions that protected young women from being taken overseas for the purpose of marriage were only possible by the use of provisions designed to ensure the best interests of children. There appears to be no provision that would provide protection to an adult in such circumstances and, as such, amendment to the Marriage Act to protect adult women should be considered. Consideration should be given to the creation of a civil remedy such as the capacity for a court to make a protection order to prevent a forced marriage taking place as existing Australian law, as summarised in the discussion paper, does not appear to offer sufficient protection for those who seek to avoid a marriage which is not being entered into with the "... *free and full consent of the intending spouses*" as set out in Article 16 of the Universal Declaration of Human Rights.

Under present legislation, a marriage is not valid unless (inter alia) both parties have given full and free consent. The provision of full and free consent has been considered by courts over many years, but its application has sometimes been

confused as to whether the test should be objective or subjective. It has been relatively narrowly defined to specify that the victim must have entered into the marriage in a state of heightened fear existing at the time of the ceremony itself.⁴ This test needs to be clarified to ensure compliance with Australia's international obligations to do what can be done to prevent forced and servile marriages.

It is suggested that:

- the word "force" be inserted in subsection 23B(1)(d)(i) of the Marriage Act to further emphasise the focus of the provisions, ie the wording of that subsection be amended to read: "it was obtained by duress, force or fraud";
- the Marriage Act be amended to specifically prohibit any person from forcing another into a marriage;
- force be defined to include social, familial, economic or physical actions or threats of such actions targeting either the potential victim or any other third person and should include reference to the proposed new definition of family violence to be included in the Family Law Amendment Bill (Family Violence) 2010 intended to amend the *Family Law Act 1975*;
- consideration also be given to clarifying that the test for force in these circumstances is subjective, but reasonable;
- it should be an offence to cause or incite another person to facilitate or be part of any of the above activities and an offence to cause or incite another person to enter into a marriage in another country. The definition of these offences would have to distinguish between arranged and forced or servile marriages;
- it should be an offence to knowingly or recklessly marry a person who has been subjected to any of the above;
- any marriage that does take place despite the above circumstances should be voidable;
- there should be a provision to enable an injunction to be issued on the application by any party with an interest to prevent a forced marriage from taking place and to make orders to protect the victim (before or after the marriage) and help remove them or any other affected person (eg the victim's mother) from the situation. The terms should enable the Court to make any orders it considers appropriate in the circumstances including preventing overseas travel for the purpose of a forced marriage, using the relevant provisions of the *Forced Marriage (Civil Protection) Act 2007 (UK)* as a model; and
- the Family Court should be the relevant jurisdiction for such matters and consideration will have to be given to the need for any consequential amendment of the *Family Law Act 1975*.

⁴See, for example:

Parojcic v Parojcic [1958] 1 WLR 1280

DiMento v Visalli [1973] 1 ALR 351

In the Marriage of S (1980) FLC 90-320

Szcheter v Szechter (1971) 3 All ER 905

Legislation – civil measures

The use of civil and non-legislative measures, such as those used in the United Kingdom, may be more beneficial to protect and assist victims than criminal measures. The civil measures would be less likely to add to the trauma already experienced by victims of forced or servile marriage. Community engagement and education would also be necessary.

Specific consultation with Commonwealth, state and territory government agencies, such as child welfare authorities, housing and Centrelink in relation to their policies, would be needed to ensure consistency and cooperation in the management of these matters; with appropriate protocols so that affected people are provided with appropriate protection, particularly for children, in circumstances where relocation interstate is necessary to ensure their safety. It is understood that child welfare authorities have played a role in relation to such arrangements in the past.

Immigration

Some victims of forced and servile marriage are in a similar position to people who are trafficked to Australia. Legal aid commissions are aware that victims of trafficking have had their difficult circumstances exacerbated by their limited eligibility for visas.

For people coming to Australia on a number of classes of visa (including, for example, temporary spouse visas) the criteria allow the grant of a permanent visa, even though the relationship has ended, if the applicant has been subjected to family violence. This is to ensure that victims of family violence do not remain in abusive relationships to protect their visas. These provisions are protective of victims of violence.

By way of contrast, the visas for which victims of trafficking can apply are not primarily aimed at providing support and protection to those victims. Rather, they are geared towards supporting law enforcement authorities in their efforts to prosecute the perpetrators of trafficking. In an article contained in the *Asian and Pacific Migration Journal* in 2006, Jennifer Burn and Frances Simmons critiqued the visa regime, which required victims of trafficking to make a "substantial contribution" to a prosecution; and to satisfy the Attorney-General that they had made such a contribution, before becoming eligible for a visa. The writers of the article suggested that such an approach "fails to adequately protect the human rights of trafficking victims".⁵

While reforms in 2009 relaxed the visa regime for victims of trafficking and gave greater accessibility to visas for trafficking victims, they are still obliged to participate in a police investigation against the person who trafficked them, in order to become eligible for visas. This discourages victims from seeking a visa as many fear reprisals against themselves or against their families. This regime could be said to encourage people to avoid exposing the people traffickers and ineffective in

preventing abuses by traffickers. Amnesty International critiqued the post-reform visa laws in a press release dated 19 January 2009.

Against this background the absence of any discussion about visas for victims of forced and servile marriage in the discussion paper is unfortunate. It may be that existing provisions in the criteria for spouse visas, which provide some protection to victims of family violence, are sufficient to protect victims of forced and servile marriage. If not, the legal aid commissions' experience in assisting women who seek visas as victims of trafficking indicates that visa criteria, which do not depend on contributions made to prosecutions, are the best means of exposing abuses and of protecting the victims themselves.

Non-legislative measures

Any legislative measures that may be introduced will be more effective if supported by education strategies. Community education around forced or servile marriages can be built into a national community legal education strategy for recent arrivals. Non-legislative measures would require specific consultation with community groups as there is a need to understand and be sensitive to cultural practices.

An important factor to consider is that new arrivals often come from a background where customary or religious and civil laws coexist, notwithstanding inconsistencies or contradictions between the two systems. In addition many new arrivals, particularly refugees, come from countries experiencing complete breakdown of civic society, making the customary or religious aspects of family life particularly important to them.

National Legal Aid is currently developing a DVD that is part of a community legal education strategy for recent arrivals. Projects like this, with appropriate additional funding, could be expanded to include information about forced and servile marriage. In addition, community legal education publications that are produced by legal aid commissions could be amended to include information about forced and servile marriage and how to get help. These could be translated into community languages.

Legal aid commissions are currently preparing scenarios specifically aimed at educating migrants about various legal matters in Australia. In the preparation of this material it would be beneficial to have some input from the Commonwealth Attorney-General's Department on the issue of forced and servile marriage.

For example, many people from CALD backgrounds have difficulty understanding the legal requirements of full and free consent to marry, and that Australian law requires that people be 18 years of age to legally consent. They are surprised to discover that they cannot arrange for the marriage of their children overseas and the potential consequences of proceeding with such arrangements. Culturally there is often a view that obedience equates with consent and that by obeying the wishes of family

⁵ See Jennifer Burn and Frances Simmons "Trafficking and Slavery in Australia: An Evaluation of Victim Support Strategies" *Asian and Pacific Migration Journal* 15(4)(2006), pg 553

members and meeting community expectations, the child is giving their full and free consent to marry.

Another common concern that is raised is the validity (and security) of existing marriages where, for example, there has been an underage marriage in another country in the past. Collaboration with the Immigration Department would be beneficial to ensure appropriate education and advice is available about the status of current marriages especially when underage spouses are brought into Australia.

The Department of Immigration and Citizenship has published a booklet entitled "Beginning a Life in Australia". It is available in 37 different languages.

The booklet specifically provides information on forced marriage:

Forced early marriage

Children under 16 years of age are not allowed to marry. Children between 16 and 18 years of age can only marry with parental consent and if authority from an Australian court allows this.

It is also illegal to take or send a child to another country for forced early marriage or to have someone else organise this.

And further specific information:

Domestic or family violence

Violence within the home and within marriage is known as domestic or family violence.

This is behaviour by a person that results in the victim experiencing or fearing physical, sexual or psychological abuse and damage, forced sexual relations, forced isolation or economic deprivation.

Sexual assault

Sexual assault or violence is any behaviour of a sexual nature that is unwanted or happens without consent. It includes sexual harassment, sexual assault, childhood sexual abuse and rape. Sexual violence is an abuse of power that may involve the use of physical force, threat or coercion.

The "Beginning a Life in Australia" booklet briefly mentions the fact that marriage can only be entered into by consent. This content and the content about family violence including sexual assault could be expanded as part of an education strategy in relation to forced and servile marriages.

The Department of Immigration and Citizenship (DIAC) funds a range of services to help people who have recently arrived in Australia to settle and become participating members of Australian society. These services, known as settlement services, are available to eligible permanent migrants and humanitarian entrants.

The Department's Integrated Humanitarian Settlement Strategy (IHSS) offers initial intensive settlement support to newly arrived refugees and humanitarian entrants, generally for around six months, but this may be extended to twelve months for particularly vulnerable clients.

These services could be a useful mechanism for the dissemination of additional information relating to forced and servile marriage.

It is also very important that other government agencies (eg Centrelink and the departments of housing and health) have appropriate policies and procedures in respect of the issue of forced and servile marriage and that staff are educated to ensure that these policies and procedures are implemented so that appropriate supports are provided and referrals made. This will ensure that these agencies will be able to assist vulnerable girls and women with housing, income and health support.

The ALRC and NSW Law Reform Commission Report *Family Violence - A National Legal Response* (October 2010) proposed (Proposal 19-1) that state and territory governments should establish and further develop integrated responses to family violence in their respective jurisdictions, building on best practice. The Australian government should also foster the development of integrated responses at a national level. These integrated responses should include the following elements:

- (a) common policies and objectives
- (b) mechanisms for inter-agency collaboration, including those to ensure information sharing
- (c) provision for legal and non-legal victim support and a key role for victim support organisations
- (d) training and education programs, and
- (e) provision for data collection and evaluation.

NLA supported this proposal and considers that a strategy to address forced and servile marriages could be part of this broader integrated response to family violence. Legal aid commissions have strong working relationships with other agencies working with family violence issues and would welcome the opportunity to participate in planning and implementation of integrated response/s in relation to the issues associated with forced and servile marriages.

Forced Marriage Unit

In Australia, it seems that the reported incidence of forced and servile marriage - as defined in the discussion paper - is low. In these circumstances, early intervention and prevention strategies through community work may be more cost effective than the creation of a stand-alone forced marriage unit. That education should also address the broader issues associated with arranged marriages, including the meaning of consent and the distinction between civil and customary/religious marriages in Australia and family violence in CALD communities. This could assist in changing attitudes and overcome the current consequences in some communities of

refusing to marry or leaving a marriage, such as isolation, community ostracism, pressure from community and religious leaders and threats and harassment from other community members.

If a forced marriage unit was to be created this could be done within the structure of an existing government agency, and could fulfil a broader range of functions to those of the forced marriage unit in the United Kingdom. The unit would be staffed by people who are specifically trained to understand the cultural issues associated with arranged, forced and servile marriage, and the trauma that victims may experience and to make referrals to relevant support services.

Should you require any further information please do not hesitate to contact us.

Thank you again for the opportunity to comment on this discussion paper.

Yours sincerely

Alan Kirkland
Chair
National Legal Aid