



Australian Government

Attorney-General's Department

Families and Legal System Division

21 August 2018

Dr Sean Turner
Committee Secretary
Senate Legal and Constitutional Affairs References Committee
PO Box 6100
Parliament House
Canberra ACT 2600
Via email: LegCon.Sen@aph.gov.au

Dear Dr Turner,

Senate Legal and Constitutional Affairs References Committee – Inquiry into Dowry Abuse

The Attorney-General's Department (the department) thanks the Senate Legal and Constitutional Affairs References Committee (the Committee) for the opportunity to make a submission to its inquiry into the practice of dowry and the incidence of dowry abuse in Australia.

The department is responsible for matters relating to human rights, marriage and family law and has provided information relevant to the Inquiry's terms of reference in line with these portfolio responsibilities. This submission also provides general information about the training of family law professionals in family violence, relevant expert inquiries into improving the family law response to family violence, as well as Commonwealth services available to support people experiencing family violence.

To assist the Committee, we have attached an overview of existing provisions in the *Family Law Act 1975* (Cth) relating to family violence and abuse (see **Attachment A**).

The department acknowledges that dowry and dowry-related abuse is a form of violence affecting women and families across Australia. The Australian Government takes the issue of family violence very seriously. All Australians deserve to live without violence, fear or coercion, regardless of their religious and cultural practices and beliefs. The Government is committed to taking action to prevent family violence and abuse, and to improve the protections offered through the family law system to those affected by violence and abuse.

The Australian Government is committed to gender equality and to eliminating discrimination against women. The Australian Government believes that all people are entitled to respect, dignity and the opportunity to participate in society regardless of their personal attributes, including gender, and recognises that all individuals should enjoy human rights on an equal basis with others, free from discrimination. Australian law allows individuals to follow their own religious and cultural practices and beliefs, subject to the criminal and civil law.

Current Legal Framework- Protections against Dowry Abuse

Australia's current legal framework provides a range of protections against dowry and dowry-related abuse.

Definitions of family violence and dowry-related abuse

The definition of family violence in the Family Law Act is broad and would include family violence that is dowry-related (see **Attachment A**). Section 4AB of the Family Law Act defines family violence as including violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the family member), or causes the family member to be fearful. The National Domestic and Family Violence Bench Book identifies dowry-related abuse as an example of cultural and spiritual abuse which comes within the meaning of family violence.

We understand that existing definitions in state and territory family violence legislation are similarly broad. Any change to state and territory definitions is a matter for state and territory governments.

Marriage

The *Marriage Act 1961* (Cth) sets out the legal requirements for a valid marriage. While it does not address specific cultural practices associated with marriage, such as dowries, it does stipulate that a marriage will be considered void if the consent of either party was obtained by duress or fraud.

Australia has comprehensively criminalised serious forms of exploitation, including human trafficking, slavery, and slavery-like practices. If a person were to be inherited, sold, or transferred into marriage for payment, this may constitute chattel slavery, which is a criminal offence under the Commonwealth Criminal Code and is punishable by up to 25 years imprisonment.

In addition, if a dowry was used as a means to coerce a person into marriage without their full and free consent, this may constitute a forced marriage, which is also a criminal offence under the Commonwealth Criminal Code and is punishable by up to nine years imprisonment.

Divorce and property settlement

Australian law provides for no-fault divorce for the dissolution of legal marriages. This process is governed by the Family Law Act. The Family Law Act makes no provision for regulating religious divorces. In Australia, civil and religious laws are separate. Under the Family Law Act, divorce proceedings do not finalise any arrangements regarding property, including dowry. Parties must file a separate application if they wish to seek orders for an adjustment of property.

The current financial dispute provisions in the Family Law Act give the court a broad discretion to determine the property disputes of separated parties. Section 79(4) of the Family Law Act sets out the factors the courts must take into account in property settlement

proceedings. These factors include the financial and non-financial contributions made directly or indirectly by or on behalf of a party to the marriage to the acquisition, conservation or improvement of any of the property of the parties to the marriage (paragraphs 79(4)(a) and (b)). Subsection 79(2) of the Family Law Act ultimately requires a 'just and equitable' split of property between the parties.

Courts are able to take family violence, including dowry-related abuse, into account in assessing the parties' respective contributions under section 79 of the Family Law Act. In addition, the leading authority under common law, *Marriage of Kennon* [1997] FamCA 27 provides that courts may consider the effect of family violence where there is a course of violent conduct by one party towards another during the marriage which is demonstrated to have had a significant adverse impact on that party's contribution to the marriage, or to have made the party's contributions significantly more arduous than they ought to have been. A *Kennon* adjustment is limited to exceptional circumstances.

In circumstances where a dowry includes assets located overseas, the courts have a wide discretion to deal with these assets and enforce orders for the split of property. Property is defined broadly in section 4 of the Family Law Act, and includes any property held overseas to which either or both of the parties to a relationship are entitled. The Family Law Act requires parties to provide full and frank disclosure of all financial circumstances, and this also extends to assets located overseas. Section 31(2) of the Family Law Act provides the family law courts with express jurisdiction to make orders, which are binding on a party to the proceedings, to deal with overseas assets in a particular way, or to account for the value of these assets when making an adjustment of property interests.

State and territory criminal law frameworks

State and territory criminal laws also provide for a wide range of offences, covering violent and non-violent behaviour, and we understand that these offences would capture a range of dowry-related abuse. Any change to state and territory criminal law is a matter for state and territory governments.

The department notes that on 7 August 2018, the Victorian Parliament passed the Family Violence Protection and Other Matters Bill 2018 which in section 5(1)(a) defines the meaning of family violence to include 'using coercion, threats, physical abuse or emotion or psychological abuse to demand or receive a dowry, either before or after a marriage.' The Bill is yet to receive Royal Assent.

Training of family law professionals

The department recognises the importance of ensuring that family law professionals are trained to identify and respond to family violence in all its forms, including dowry-related abuse. The department is progressing a number of key Government-funded initiatives to increase the understanding and awareness of family violence amongst family law professionals, including:

- the development and maintenance of the National Domestic and Family Violence Bench Book, which is a resource for judicial officers in all Australian jurisdictions to improve understanding of family violence and promote consistency and best practice in the

interpretation and application of the law. The Bench Book was launched in June 2017 and updated in July 2018. The Bench Book recognises that family violence can manifest as dowry abuse, which is a form of cultural and spiritual abuse. It also includes a chapter on culturally and linguistically diverse (CALD) communities, exploring the particularly vulnerability of women from these groups to family violence.

- the development and delivery of family violence training for federal, state and territory judicial officers by the National Judicial College of Australia. This training builds upon the National Domestic and Family Violence Bench Book, providing guidance about how to access and use this resource. One training module includes information on how to support vulnerable witnesses to give the best evidence, including witnesses from CALD communities.
- the Child Dispute Services area of the federal family law courts is developing a new induction and advanced family violence training package for family consultants to ensure that family reports are informed by a comprehensive understanding of family violence. These training improvements were funded alongside Government funding to support up to 17 additional family consultant positions Australia-wide.
- Legal Aid NSW is redeveloping the national training program for Independent Children's Lawyers, including updates and improvements to family violence modules. The training includes modules about experiences of family violence in CALD families. This work is scheduled for completion in August 2018.

Support services for victims of family violence, including dowry-related abuse

The department recognises the important role legal and non-legal services play in resolving family law issues, including where there are allegations of violence. The Australian Government also funds a range of legal assistance services to support vulnerable and disadvantaged people.

In recent years, the Australian Government has invested additional funding to support legal assistance and family relationship services dedicated to family violence through three packages of measures, the:

- \$100 million Women's Safety Package, announced in September 2015
- \$100 million for Commonwealth initiatives to support the Third Action Plan of the *National Plan to Reduce Violence against Women and their Children 2010-22*, committed in the 2016 Budget and allocated in October 2016, and
- \$55.7 million for legal assistance services and \$26.8 million for family law measures announced as part of the 2017-18 Budget.

Each of these new investments seeks to better integrate legal and non-legal support services at a range of entry points into the family law system, to provide holistic support to people affected by family violence.

Family law and legal assistance services

Family law services, such as family relationship centres and children's contact services, are an existing and integral part of the family law system. They provide alternative means through which families can seek to resolve post-separation family disputes rather than going to a family law court. They also support post-separation parenting, especially where there is high parental conflict or allegations of family violence.

The Australian Government funds legal aid commissions and community legal centres through the *National Partnership Agreement on Legal Assistance Services 2015-2020* (the NPA) to provide legal assistance services to vulnerable and disadvantaged people. Under the NPA, people experiencing, or at risk of, family violence are a priority client.

Legal aid commissions provide a wide variety of family law services to socially and financially disadvantaged people, ranging from information and advice to family dispute resolution conferencing and representation in court proceedings. A 2016 file audit by National Legal Aid found that domestic violence was a factor in 79 percent of grants of legal aid for representation in family law proceedings.

Community legal centres play a complementary role to legal aid commissions, assisting people who are ineligible for legal aid, but who would struggle to pay for private legal services. Reporting received by the department under the NPA indicates that family law is a significant area of work for community legal centres.

Family Advocacy and Support Services

The Australian Government is providing \$18.5 million over three years from 2016- 2019 for legal aid commissions to establish and operate Family Advocacy and Support Services (FASS) in family law court registries and other locations across Australia. Services are operational in all states and territories, at 16 court locations, and are also supporting regional court circuits across select states. This funding is part of the Australian Government's \$100 million package of measures under the Third Action Plan 2016-2019 of the *National Plan to Reduce Violence against Women and their Children 2010-2022*.

This initiative increases the capacity of duty lawyer services in family law court registries and integrates family violence support services, to help families affected by family violence with matters before the family law courts. The FASS assists self-represented parties attending the family law courts and introduces family violence support services to identify and address the client's non-legal issues alongside their legal issues. Support workers conduct risk assessments and prepare safety plans, and make appropriate referrals to other services to support clients' multiple needs.

As part of the funding allocation for the FASS, the Australian Government is funding an independent evaluation which is currently underway and the development of a community legal education resource to complement the service. The resource will be designed to assist people navigate the family violence and family law systems.

For a case study of how the FASS in Tasmania has assisted a client from a culturally and linguistically diverse (CALD) background, see **Attachment B**. The department notes that while this example is not specific to dowry abuse, such services can assist women with diverse cultural and language barriers to navigate the family law system.

Legally-Assisted Family Dispute Resolution Pilots

The Australian Government has provided \$6.2 million over three years from 2016-17 to undertake eight pilots of enhanced models of family dispute resolution, targeted at culturally and linguistically diverse families, as well as Aboriginal and Torres Strait Islander families, experiencing family violence. These are families who may otherwise be considered unsuitable for family dispute

resolution due to issues of power imbalance arising because of family violence or the cultural context.

This program is a further example of the multi-faceted services that are currently being provided in the family law system, specifically providing support to culturally and linguistically diverse families who have also experienced family violence.

Culturally-appropriate family dispute resolution, involving lawyers and other culturally-appropriate support persons, as well as interpreters when needed, provides a holistic and accessible form of family dispute resolution practice. This is a good alternative to court for vulnerable CALD and Indigenous families as it is less costly, allows disputes to be resolved with greater efficiency and cultural sensitivity, improves interactions with existing family law services, and improves overall outcomes for families. An additional significant benefit of this model is that it is being undertaken at Family Relationship Centres, which can facilitate referral of clients to further support services so that clients receive holistic wrap-around support and do not need to re-tell their story to multiple agencies.

Specialist Domestic Violence Units and Health Justice Partnerships

The Australian Government has committed \$23.8 million over four years from 2015-16 to pilot specialist domestic violence units and health justice partnerships to assist women experiencing family violence. Under the program, established legal assistance providers are trialling the integration of legal assistance with social and/or health services.

The specialist domestic violence units provide tailored, trauma-informed services to support vulnerable and disadvantaged women and their children. The units offer expert legal assistance and help clients access other services, such as crisis accommodation, counselling and financial advice. The units are staffed with a combination of experts such as lawyers and social workers or case managers. Together they provide intensive support, tailored to clients' individual needs, to reduce the burden on women dealing with domestic violence. Across the units, 28 percent of clients are from culturally and linguistically diverse backgrounds, and 10 percent are assisted by interpreters.

Five of the providers have established health justice partnerships. Through these partnerships, lawyers assist women who have been victims of domestic violence by providing on-site legal assistance services at local hospitals or health centres. The providers also train health professionals to recognise women who may benefit from legal assistance and safely facilitate their access to a lawyer.

An evaluation of the program is due to be completed in August 2018, and will inform consideration of future service delivery.

Other Inquiries

Standing Committee on Social Policy and Legal Affairs Inquiry – A better family law system to support and protect those affected by family violence

On 7 December 2017, the House of Representatives Standing Committee on Social Policy and Legal Affairs (the Committee) tabled its report, *A better family law system to support and protect those affected by family violence*. The Government has been carefully considering the Committee's report and will formally respond in due course.

The Committee made 33 recommendations for improving the family law system's response to families impacted by family violence. The Committee reiterated recommendations previously made by the Family Law Council in its 2012 and 2016 reports about improving the family law system for CALD families (recommendation 25). The Committee also recommended extending the FASS to include referral pathways to specialist support services for families with additional challenges using the UK CAFCASS model (recommendation 26) and to extend the FASS to more locations including regional and remote Australia (recommendation 1).

The department is addressing a number of the Family Law Council's CALD-specific recommendations through initiatives such as the operation of Domestic Violence Units as part of the Women's Safety Package, and piloting of Legally-Assisted Culturally Appropriate Dispute Resolution in Family Relationship Centres.

ALRC review

The Australian Government is committed to ongoing improvements to the family law system and providing the best possible outcomes for families and children. The Government has commissioned the Australian Law Reform Commission to conduct the first comprehensive review of the family law system since the Family Law Act came into operation. The review commenced on 1 October 2017, and will report by 31 March 2019. The review is considering whether, and if so what, reforms to the family law system and the Family Law Act are necessary to meet the needs of Australian families into the future.

The department would be happy to provide further information to the Committee as required.

Yours sincerely

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Attachment A – Definition of Family Violence and Abuse

‘Family violence’ is defined in the *Family Law Act* in section 4AB, which provides a non-exhaustive list of behaviours that may constitute family violence:

- (1) For the purposes of this Act, **family violence** means violent, threatening or other behaviour by a person that coerces or controls a member of the person’s family (the **family member**), or causes the family member to be fearful.
- (2) Examples of behaviour that may constitute family violence include (but are not limited to):
 - (a) an assault, or
 - (b) a sexual assault or other sexually abusive behaviour, or
 - (c) stalking, or
 - (d) repeated derogatory taunts, or
 - (e) intentionally damaging or destroying property, or
 - (f) intentionally causing death or injury to an animal, or
 - (g) unreasonably denying the family member the financial autonomy that he or she would otherwise have had, or
 - (h) unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support, or
 - (i) preventing the family member from making or keeping connections with his or her family, friends or culture, or
 - (j) unlawfully depriving the family member, or any member of the family member’s family, of his or her liberty.
- (3) For the purposes of this Act, a child is exposed to family violence if the child sees or hears family violence or otherwise experiences the effects of family violence.
- (4) Examples of situations that may constitute a child being exposed to family violence include (but are not limited to) the child:
 - (a) overhearing threats of death or personal injury by a member of the child’s family towards another member of the child’s family, or
 - (b) seeing or hearing an assault of a member of the child’s family by another member of the child’s family, or
 - (c) comforting or providing assistance to a member of the child’s family who has been assaulted by another member of the child’s family, or
 - (d) cleaning up a site after a member of the child’s family has intentionally damaged property of another member of the child’s family, or
 - (e) being present when police or ambulance officers attend an incident involving the assault of a member of the child’s family by another member of the child’s family.

‘Abuse’ is defined separately in section 4 of the Act:

abuse, in relation to a child, means:

- (a) an assault, including a sexual assault, of the child; or
- (b) a person (the **first person**) involving the child in a sexual activity with the first person or another person in which the child is used, directly or indirectly, as a sexual object by the first person or the other person, and where there is unequal power in the relationship between the child and the first person; or
- (c) causing the child to suffer serious psychological harm, including (but not limited to) when that harm is caused by the child being subjected to, or exposed to, family violence; or
- (d) serious neglect of the child.

Provisions related to family violence and abuse

The *Family Law Act* and the associated *Family Law Rules 2004* contain a number of provisions designed to identify when a case involves family violence, and to protect a person who may be affected by family violence at all stages of the trial.

A comprehensive summary of these provisions is provided in the *Family Violence Best Principles* released by the family violence committee of the Family Court of Australia and the Federal Circuit Court. The full *Family Violence Best Practice Principles* can be found at:

www.familycourt.gov.au/wps/wcm/connect/fcoaweb/reports-and-publications/publications/family+violence/family-violence-best-practice-principles

Attachment B - FASS Tasmania case study

Ahadi was referred to FASS from the Migrant Resource Centre. Ahadi's brother had made the appointment and told the FASS co-ordinator he would accompany his sister and translate for her.

Due to cultural and language issues, the coordinator could only undertake limited risk assessment and triage, so an urgent appointment was made for Ahadi and her brother to meet with the FASS duty lawyer. In ten minutes it was clear to the duty lawyer that Ahadi and her brother were not able to properly provide instructions, nor understand advice given. Ahadi could not speak or read English. Ahadi could not read nor write in Swahili. Ahadi had arrived in Australia on a Refugee Visa.

From the documents that Ahadi and her brother had with them, the duty lawyer was able to ascertain that Ahadi's husband had filed an Application for a property settlement. The duty lawyer explained to Ahadi and her brother that she would arrange for a Swahili translator, and that this would be arranged urgently so that proper assistance could be provided. The duty lawyer was aware of the need to ensure that this occurred in plenty of time prior to the upcoming case assessment conference.

The FASS co-ordinator arranged a Swahili interpreter and a further appointment was made for Ahadi.

In that appointment the duty lawyer took Ahadi through the husband's documents and explained what he was seeking. The documents indicated that Ahadi and her husband had commenced cohabitation in the December of the previous year and had married that January. The husband claimed that he and Ahadi had separated in February, only one month later.

The documents indicated that the matrimonial home was owned outright. Ahadi had with her a document which had been filed at the same time as the husband's application for property settlement, severing a joint tenancy of the property. It appeared that within one month of marriage, the husband had transferred the property into the wife's joint name (as a joint tenant) and then had severed that tenancy.

Ahadi explained that prior to the relationship, she had received her pension into her own account. At some time either during cohabitation or the one month marriage, Ahadi had closed this account or her pension was paid directly into her husband's bank account. Ahadi has no access to her pension unless her husband allowed it.

The husband's application sought that Ahadi vacate the matrimonial home, that the home be transferred to him and that he pay her \$7,000.

Ahadi instructed the husband was a very heavy drinker, that he would start drinking first thing in the morning, drink for a great deal of the day, usually go out of an evening and continue drinking, sometimes coming home, sometimes not. She said that her husband would become violent, would shout at her, throw things and break things around the home.

The risk framework indicated that Ahadi had been subjected to family violence, Ahadi was also homeless and without access to her pension or other financial means.

There were also cultural issues to consider. Ahadi considered her marriage was for life. Her view was that the marriage had not ended and she would not leave the house as it was her home. Ahadi

considered that she had not separated from her husband. Ahadi was very emotional, distressed and overwhelmed by the situation.

Ahadi's understanding of her domestic situation was very different. She instructed that she and her husband continued as husband and wife in every aspect of their lives.

Ahadi had not had access to money during the relationship. Her pension was transferred into her husband's bank account. The husband was the only one with access to that account. Ahadi's husband would accompany her shopping and to other places where transactions were required. Ahadi's husband conducted all financial transactions.

Ahadi was given information and advice about separation and property matters. Because of the language barriers the duty lawyer determined that she should prepare an Affidavit for Ahadi (which is very unusual in a property matter at this stage) setting out the issues from her perspective. It better prepared Ahadi (and any lawyer representing her) for the case assessment conference.

Significant time was spent with Ahadi, with the initial interview taking nearly two hours. From this appointment the FASS lawyer was able to prepare responding documents for Ahadi including the Affidavit.

Once the documents were ready, a further appointment with Ahadi and the interpreter were arranged, the documents were emailed to the interpreter. At the second appointment Ahadi was taken through her responding documents and some amendments were made to those documents.

During the second appointment Ahadi was again very emotional and distressed about the purported end to her marriage and the possibility of her vacating the matrimonial home. Documents were then signed by Ahadi with the appropriate translation made and noted on the documents.

The FASS lawyer then prepared Ahadi for the case assessment conference. The duty lawyer made arrangements with the Family Law Courts for a translator to be booked by the Court for the Case Assessment Conference.

The FASS duty lawyer then arranged representation for Ahadi for the Case Assessment Conference (and beyond) with the Women's Legal Service (a key referral service for FASS) and a warm referral was made to that service. The FASS duty lawyer provided a detailed brief to the Women's Legal Service. The second appointment took two hours with additional work undertaken after that appointment.

Ahadi was also referred to FASS social support worker who offered a risk assessment and support for Ahadi. During the language/cultural issues the social support worker obtained Ahadi's permission to work with the Migrant Resource Centre to ensure that culturally appropriate support and counselling were offered to Ahadi around the breakdown of her marriage and the possibility of her having to vacate the matrimonial home. Referrals for financial and housing assistance were also made.

Language and cultural barriers particularly in relation to marriage and separation made the family law experience very difficult for Ahadi. Thanks to FASS, a translator was quickly arranged and Ahadi was given information, support and significant assistance in the preparation of her material.

Timely and effective referrals took into account Ahadi's language, and cultural needs. Ahadi received culturally appropriate social support drawing on the strengths of her existing relationship with the Migrant Resource Service and direct referrals to address her financial and housing situation.