



Senator the Hon Ian McDonald
Chair
Senate Legal and Constitutional Affairs Committee

Via email: legcon.sen@aph.gov.au

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Dear Mr McDonald

COMBATTING CHILD SEXUAL EXPLOITATION LEGISLATION AMENDMENT BILL 2019

Good Shepherd Australia New Zealand (GSANZ) welcomes the opportunity to provide comments on the proposed amendments under the Combating Child Sexual Exploitation Legislation Amendment Bill 2019. We congratulate the Government on their principled recommendations to strengthen Australia's response to child sexual exploitation.

About Us

GSANZ is a community services organisation that works to enable fullness of life for women, girls and families experiencing disadvantage. We provide integrated community-based programs and services that support individuals and families at vulnerable times in their lives. A central part of our purpose is to challenge the systems that entrench poverty, disadvantage and gender inequality. We work to advance equity and social justice, and to support communities to thrive. Our impact areas include economic participation and wellbeing, safety, resilience and system change. We aspire for all women, girls and families to be safe, well, strong and connected.

GSANZ is part of a global network of services and advocates established by the Congregation of Our Lady of Charity of the Good Shepherd, which has had special consultative status with the United Nations Economic and Social Council (ECOSOC) since 1996.

GSANZ holds significant expertise in the area of family and domestic violence, including forced marriage. Our Women's Research, Advocacy and Policy Centre conducted research into the issue in 2014.¹ In 2017, our Policy and Research Specialist, Laura Vidal, dedicated her Churchill Fellowship² to exploring best practice solutions in six countries. Ms Vidal has a decade of experience working directly with individuals at risk and/or who have experienced forced marriage.

Whilst GSANZ has extensive experience in supporting women, children and families impacted by a wide range of abusive and exploitative practices, our comments are limited to the proposed amendments in relation to forced marriage. We acknowledge that many sector advocates will address the broader context of the Bill.

(1) BACKGROUND

1.1 Forced Marriage in Australia

Forced marriage was initially introduced into the *Criminal Code Act (1995)* (Cth) in 2013. The practice is defined and understood under Australian law as a practice of slavery. The national strategy to address forced marriage is included in Australia's National Action Plan to Combat Human Trafficking and Slavery (2015-2019).

Under the *Criminal Code Act (1995)* (Cth), forced marriage is defined as:

A marriage entered into without free and full consent of one, or both of the parties involved, as a result of coercion, threat or deception. The definition applies to legally recognised marriages as well as cultural or religious ceremonies and registered relationships; regardless of age, gender or sexual orientation.

Offences apply to marriages which:

- Occur in Australia (and)
- Outside of Australia involving an Australian Citizen or Resident.³

Relevant to the Senate Environment and Communications Legislation Committee are the amendments introduced to the *Commonwealth Criminal Code Act (1995)* (Cth) in 2015, including the introduction of the 'Rebuttable Presumption'. The original intent behind the introduction of this amendment was to make the consent of the child irrelevant. However, this amendment has posed some practice challenges, which in our view, are consistent with what has been outlined by the Explanatory Memoranda of the Bill.⁴

The true extent of forced marriage is unknown as available data is not comprehensive. Recent data released by the Australian Institute of Criminology and the Walk Free Foundation⁵ indicates that in 2016-17 the Australian Federal Police received 70 referrals to their Human Trafficking and Slavery investigative teams nationwide—accounting for 47 per cent of their case work.

The common trend concerning forced marriage in Australia involves Australian residents of citizens under or close to the age of 18 being forced into a marriage overseas, with the expectation that the individual will sponsor their spouse for migration to Australia. Often, relatives are alleged to have organised or be organising a marriage without free and full consent.

Under Australia's current approach, individuals at risk or who have experience forced marriage must engage with the Australian Federal Police in order to access a government funded support program. There have been recent changes to make the support program more accessible to individuals, however, referral to this program continues to be maintained by the Australian Federal Police.

Anecdotal evidence from both law enforcement and community organisations shows that many individuals who do not wish to engage with law enforcement for fear that their family members will face a criminal prosecution; as a consequence they are unable to access appropriate support.

To date, there remain no prosecutions under the criminal legislation. Whilst criminalisation sparked a number of initiatives led by the Australian Government and civil society, there is growing acknowledgement that in order to holistically address the practice, legislation is only one part of a complex and comprehensive response to best support individuals and their families. Young people aged 16-18 years represent a significant number of those at risk, and a more nuanced intervention is required.

1.2 Forced Marriage and Family Violence

GSANZ recognises the explicit link between forced marriage and family violence which points to a holistic and comprehensive victim-survivor led response for prevention, intervention and protection.

Australia's overarching approach of criminalisation in relation to forced marriage has presented a number of challenges, including limited participation in the system by individuals at risk/forced into marriage. Particularly pertinent is the reality that the primary offenders in situations of forced marriage are either an individual's parents or close family members; as such, individuals are reluctant to seek help or make a report which may lead to criminal proceedings.

GSANZ's research, policy and practice wisdom has shaped our view that forced marriage involves many of the elements that constitute the definition of family violence. These elements include: "violence or threatening behaviour, or any other form of behaviour that coerces or controls a family member or causes a family member to be fearful".⁶

Forcing a person to marry is a reflection of gender inequality and an imbalance of power. It is a practice that typically targets and disproportionately impacts women and girls. The UN Secretary General's Report on Violence against Women in 2006 illustrated a definition for family violence which can be applied directly to the experience of forced marriage:

Gender-based violence is a continuum of multiple, interrelated and sometimes recurring forms of physical, sexual and psychological/emotional violence and economic abuse in a range of settings, from private to public...⁷

Whilst it can be argued that Australia's definition of family violence is broadly sufficient to include practices like forced marriage, it is our experience that because it is not explicitly recognised or named, gaps in accessibility to legal mechanisms and associated support services remain. It is for this reason that the Royal Commission into Family Violence in Victoria recognised forced marriage as a distinct form of family violence and recommended this be reflected in the *Family Violence Protect Act (2008)* (Vic).⁸ The Act was subsequently amended to list forced marriage as an example of family violence and received Royal Assent in August 2018.

Our practice experience has demonstrated a significant disconnect between the various agencies best placed to intervene in situations of forced marriage. The issue is considered to be a Commonwealth matter and as such there are ad-hoc and often unsatisfactory responses from local law enforcement, child protection agencies and mainstream family violence service providers. We assert that the recognition of the practice alongside the family violence intervention framework will afford individuals at risk of forced marriage access to these services and supports and create an impetus for tailored and targeted service provision.

Including forced marriage in the national definition of family violence would ensure that the agencies and organisations responding to family violence are equipped to identify and refer cases of forced marriage efficiently and appropriately.

We recommend:

The definition of domestic and family violence be expanded nationally to include forced marriage—this will open up opportunities for wider multi-sectoral engagement and information and support services for individuals at risk.

(2) PROPOSED AMENDMENTS

2.1 Schedule 5: Expanding the definition of forced marriage.

GSANZ is supportive of this amendment, noting that this change will ensure harmonisation across various State and Federal law. Notably, the age of 16 is in line with the marriageable age provisions in Part II of the *Marriage Act (1961)* (Cth); it is also in line with age of consent laws in most State jurisdictions across Australia.⁹

Repealing the rebuttable presumption provides recognition of the detrimental impacts of marriage on minors including the long term physical and mental health implications; and often, withdrawal from education which continues to create systemic disadvantages and barriers across the lifespan.

There is growing consensus internationally, that what is needed to end child/underage marriage is to set a minimum age of 18.¹⁰ In addition to supporting the repeal of the rebuttable presumption, **we recommend the Committee give consideration to revising the minimum age of marriage in Australia.** The *Marriage Act (1961)* (Cth) currently allows for the marriage of an individual aged between 16 and 18 in exceptional circumstances provided there is the required consent (usually parental) and an Australia court order. Whilst we know in practice that this is not freely administered, committing to a minimum age of

marriage—age 18—would be a clear principled step that ensures under no circumstances a minor is to be married.

It is important to note that the age of consent and the age of marriage do not need to be synonymous. There is a growing understanding internationally (e.g.??) that having an age of consent lower to that of marriage is improving the rate of lowering child/underage marriage as individuals do not feel as though they need to be married in order to explore their sexuality.¹¹

2.2 Schedule 6: Restricting the defence to overseas child sex offences based on a valid and genuine marriage.

GSANZ is supportive of the proposal to repeal Section 272.17 of the *Commonwealth Criminal Code Act (1995)* (Cth), noting again, that this change will ensure legislative harmony—this time, with the provisions relating to forced marriage set out under Section 270 and 271 of the *Commonwealth Criminal Code Act (1995)* (Cth).

Under Section 270 and 271 of the *Commonwealth Criminal Code Act (1995)* (Cth) situations whereby there is a nexus to Australia—that being if an individual involved in facilitating the marriage, or who has been forced into the marriage is a resident or citizen of Australia—the offence of forced marriage can apply. Additionally, forced marriage for the purposes of these provisions also extends to religious, cultural or traditional ceremonies.

The existing provision under section 272.17 of the *Commonwealth Criminal Code Act (1995)* (Cth) currently allows for an offender to escape culpability of sexually abusing a child under 16 outside Australia if they can provide they were legally married to the child at the time. Being forced into a marriage without consent by nature means that any act within that marital relationship is also without consent, in this instance, sexual intercourse. It is fair and reasonable to therefore introduce an amendment that does not allow an offender to escape culpability for engaging in sexual relations with a child under 16 because they were 'married'. It also ensures consistency across the *Commonwealth Criminal Code Act (1995)* (Cth) with regard to how a forced marriage is defined and the consequent exploitation that is experienced as a result.

(3) ADDITIONAL CONSIDERATIONS

3.1 Federal Civil Law Mechanism: Forced Marriage Protection Order (FMPO)

There is increasing recognition that a standalone criminal justice approach to the issue of forced marriage is inadequate. We note and welcome the federal government's intention to introduce Forced Marriage Protection Orders (FMPOs).¹²

An FMPO is a civil measure that would provide for the intervention and protection of individuals facing a forced marriage. As a Commonwealth order, there is recognition that successful implementation and enforcement requires investment by States and Territories. Recognition of forced marriage as family violence (as illustrated above) will create a level of familiarity amongst law enforcement, legal practitioners and service providers that will ensure the orders are accessible and can achieve what they are intended to do.

Whilst the Australian Government has committed to this measure, steps toward implementation have been stalled. **We recommend that the implementation of this order be prioritised for action as a key preventative measure in relation to forced marriage.**

Complementary Recommendations

Whilst the Committee considers these amendments it is important to also recognise that the limits to prosecution in forced marriage cases extend beyond the strength of the law. It is important to view forced marriage as complex and intersectional in nature. The burden to report and provide evidence is often placed on a vulnerable minor, whereby the primary offender is usually their parent or close relative.

In addition to criminal legislative amendments, the Committee should consider complementary measures to support accessibility and unconditional support of vulnerable or at-risk individuals; including:

1. Resource a prevention program for local communities founded on partnership and inclusion. Forced marriage is a complex social problem which requires multi-platform solutions, including but not limited to:
 - a. Engaging influential community stakeholders including men and faith leaders who hold and promote cultural and traditional norms. Leadership from within communities is an essential element to changing social norms;
 - b. Targeted community-led strategies in areas of high prevalence that focus on dialogue and localised action within communities.
2. Resource capacity building of mainstream and specialist workforces—including state and territory police—to understand and respond to diversity through cultural training. This training should place particular emphasis on the concept of forced marriage, amongst other complex familial relations and practices within CALD communities.
3. Invest in an information development framework for data relating to forced marriage in order to best identify gaps and determine priority information needs. This work should inform the collection of nationally consistent data which will establish the true nature and prevalence and support targeted interventions that show clear impact in preventing the practice and protecting individuals at risk.
4. De-link, in full, victim engagement and participation with law enforcement as a gateway to support.

Thank you for your consideration of our comments and recommendations. We welcome the opportunity to provide the Committee with further evidence in relation to the Bill.

For queries in relation to this submission, please contact:

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Yours sincerely

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Chief Executive Officer

¹ McGuire, M. "The Right to Refuse: Examining Forced Marriage in Australia", Good Shepherd Youth & Family Service, Domestic Violence Victoria and Good Shepherd Australia New Zealand: Melbourne. (2014), https://www.goodshep.org.au/media/1222/right-to-refuse_final-report_v2.pdf

² Vidal, L. "Developing Innovative, Best Practice Solutions to Address Forced Marriage in Australia", Report to the Winston Churchill Memorial Trust of Australia, (2017) <https://www.churchilltrust.com.au/fellows/detail/4179/Laura+Vidal>

³ Australian *Criminal Code Act (1995)* (Cth), Section 270 and 271.

⁴ The Parliament of the Commonwealth of Australia, House of Representatives, *Combating Child Sexual Exploitation Legislation Amendment Bill 2019*, Explanatory Memorandum, (2019), https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6291_ems_53785d94-467c-4074-b841-44c62cd75bd5/upload_pdf/698453.pdf;fileType=application%2Fpdf

..."It has equated a child's understanding of what marriage is with their consent to that marriage. Operational experience to date has shown that the majority of child victims have, on their own evidence, clearly demonstrated the nature and effect of the marriage ceremony...Paired with many victims' reluctance to give evidence against their own family or community members, the offences as currently drafted have made it difficult to prosecute forced marriage offences involving child victims". (p. 5)

⁵ Lyneham, S. Dowling, C. Bricknell, S., *Estimating the dark figure of human trafficking and slavery victimisation in Australia*, The Australian Institute of Criminology, 2019, <https://aic.gov.au/publications/sb/sb16>

⁶ Our Watch, "Facts and Figures", (2018), <https://www.ourwatch.org.au/understanding-violence/facts-and-figures>

⁷ UN Secretary General, "Report on Violence Against Women", (2006) cited in Gill, A and Sundari, A. *Forced Marriage: Introducing a Social Justice and Human Rights Perspective*, London, United Kingdom Zed Books (2014): 39.

⁸ State of Victoria, "Royal Commission into Family Violence: Summary and recommendations", *Parl Paper No 132*, (2014-16): Recommendation 156: The Victorian Government amend section 6 of the Family Violence Protection Act (2008) (Vic) to expand the statutory examples of family violence to include forced marriage and dowry-related abuse [within 12 months].

⁹ The age of consent is 16 across all States and Territories outside of South Australia and Tasmania who stipulate age 17; see: <https://aifs.gov.au/cfca/publications/age-consent-laws>

¹⁰ Girls Not Brides, *The case for a minimum age of marriage of 18*, (2017),
<https://www.girlsnotbrides.org/wp-content/uploads/2017/12/Why-a-minimum-age-of-marriage-of-18.pdf>

¹¹ Petroni. S, Madhmuta. D, Sawyer, S., *Protection versus rights: age of marriage versus age of sexual consent*, The Lancet: Child and Adolescent Health, (2018)
[https://www.thelancet.com/journals/lanchi/article/PIIS2352-4642\(18\)30336-5/fulltext](https://www.thelancet.com/journals/lanchi/article/PIIS2352-4642(18)30336-5/fulltext)

¹² Former Minister for Foreign Affairs, The Hon. Julie Bishop MP, "Media Release - Australian Government National Roundtable on Human Trafficking", 16 August 2018,
https://foreignminister.gov.au/releases/Pages/2018/jb_mr_180816.aspx?w=tb1CaGpkPX%2FIS0K%2Bg9ZKEg%3D%3D:

"The Government has also enhanced access to vital support for victims of forced marriage and committed to disrupt and prevent forced marriages by developing a model for a Commonwealth Forced Marriage Protection Order this year... Forced Marriage Protection Orders will complement Australia's existing criminal offences and provide a flexible civil remedy for people in, or at risk of, forced marriage".