

**Women's Research, Advocacy and Policy (WRAP) Centre
Good Shepherd Australia New Zealand**

**Submission to the Legal and Constitutional Affairs Legislation
Committee**

MODERN SLAVERY BILL 2018

19 July 2018

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ABOUT GOOD SHEPHERD AUSTRALIA NEW ZEALAND

Good Shepherd Australia New Zealand (GSANZ) is a community services organisation that has been delivering on its mission to disrupt the intergenerational cycle of disadvantage, with a focus on women and girls, since 1864 in Australia and 1886 in New Zealand. We achieve this by challenging disadvantage and gender inequality through services, research, advocacy, and social policy development.

Our specific expertise is in:

- **Safety and resilience** - supporting women to be resilient provides a buffer between an individual and adversity, allowing them to achieve improved outcomes in spite of difficulties.
- **Financial security** - supporting women to ensure they have access to sufficient economic resources to meet their material needs so that they can live with dignity.
- **Educational pathways** - assisting women and girls to overcome the obstacles in their life that hinder them from achieving their educational/vocational capacity.
- **Outcomes and evaluations** - developing evidence-based program designs across all Good Shepherd Australia New Zealand programs and services.
- **Research, social policy and advocacy** - researching emerging issues identifying effective change interventions for program design, policy analysis and systemic advocacy.

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 is part of the Good Shepherd Asia-Pacific Anti-Trafficking Network which includes units representing 19 countries across the region dedicated to ending trafficking and exploitation; GSANZ is also represented as a key stakeholder on state wide networks to address forced marriage in New South Wales and Victoria.

SUBMISSION ENDORSEMENTS

This submission has been endorsed by:

- Domestic Violence Victoria
- inTouch Multicultural Centre Against Family Violence

INTRODUCTION

Good Shepherd Australia New Zealand (GSANZ) welcomes the introduction of the Modern Slavery Bill 2018 (the Bill) into the House of Representatives on 28 June 2018. We congratulate the Australian Government for their timely actions that put in place practical measures to address modern slavery following the Joint Standing Committee on Foreign Affairs, Defence and Trade's Inquiry into Establishing a Modern Slavery Act in Australia held in 2017 (the Inquiry).

As has been clearly established throughout the Inquiry, several countries with the highest numbers of people in modern slavery are known to provide low-cost labour which produces consumer goods for markets in Australia. The Bill will ensure that around 3,000 companies investigate and report on risks of slavery in their supply chains including what they are doing to remediate. This will have a significant impact on eradicating modern slavery in Australia and internationally.

GSANZ is pleased to see that the Bill has sought to address some of the shortcomings of the legislation in the United Kingdom which sparked Australia's Inquiry. These include reporting obligations for Commonwealth entities, and a legislated and government-funded repository for modern slavery statements.

The Bill is a welcome step in addressing modern slavery, however, it does have some significant limitations. These include:

- No provision for an Anti-Slavery Commissioner who would essentially provide the accountability mechanism for the legislation.
- No measures for strengthening responses for victims of modern slavery in Australia, particularly those found to be working under such conditions within Australian supply chains.
- An absence of penalties for companies that fail to report, which will effectively leave enforcement and publicising of poorly performing companies listed in the public repository to non-government organisations and civil society.

Of particular concern to GSANZ is that the Bill proposes to use the definition of modern slavery as outlined by the *Commonwealth Criminal Code 1995* Section 270 and 271 and as a result forced marriage is included in the reporting requirement. While we recognise the need for a nationally consistent legal definition of modern slavery, the inclusion of forced marriage in the Bill is likely to have a series of unintended consequences which are not in the best interests of those affected by the practice. One of the potential consequences is that the legislation may operate as a barrier for prevention, the very thing the Bill proposes to achieve.

The following submission sets out several likely consequences of including forced marriage in the reporting requirement and provides a rationale for its removal from the requirement. It also recommends the inclusion of an independent Anti-Slavery Commissioner to ensure that the framework has a strong accountability mechanism.

With reference to victim support, GSANZ refers the Legal and Constitutional Affairs Legislation Committee to our submission to the 2017 Inquiry.¹ The recommendations detailed in this prior submission remain relevant and necessary considerations in the development of the Bill.

GSANZ reserves comment regarding the lack of penalties for companies as this extends beyond our technical expertise.

GSANZ welcomes the opportunity to provide verbal evidence in relation to this submission.

¹ Good Shepherd Australia New Zealand, “Submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade- Inquiry into establishing a Modern Slavery Act”, Submission 111 (2017) https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/ModernSlavery/Submissions.

RECOMMENDATIONS

GSANZ makes the following recommendations:

Recommendation 1: Remove ‘Forced Marriage’ from the supply chain reporting requirement and invest in tailored strategies that have a proven evidence base for prevention, intervention and protection.

These include:

1. Expand the definition of family violence to include forced marriage—this will open up opportunities for wider multi-sectoral engagement and information and support services for individuals at risk.
 - a. This expanded definition presents an opportunity to embed forced marriage into national secondary education curricula on family violence.
2. Resource a prevention program for local communities founded on partnership and inclusion. The approach must include provision for investing in long-term attitudinal, behaviour and social norm change that will supplement the legislative approach. While the law is a deterrent and has a strong symbolic value it cannot on its own create social change. Forced marriage is a complex social problem which requires multiple solutions, including but not limited to:
 - a. Engaging influential community stakeholders including men and faith leaders, who are often carriers of culture and tradition. Leadership from within communities is an essential element to change social norms.
 - b. Targeted community-led strategies in areas of high prevalence that focus on dialogue and localised action within communities.
3. Invest in an Information Development Framework for data relating to forced marriage in order to 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.

Develop a central point of coordination for federal and state government and civil society stakeholders, such as a Forced Marriage Unit (as modelled by the United Kingdom). This approach will ensure that individuals impacted by forced marriage will be connected to support services and government agencies in a way that is integrated and timely. It will also provide necessary and specialised assistance for individuals who have been taken overseas for the purpose of being forced into a marriage.

Recommendation 2: Amend the Bill to include provision of an independent Anti-Slavery Commissioner to:

- Provide oversight and accountability of the reporting requirement.
- Ensure that individuals who are identified as being in slavery in Australia or abroad are afforded appropriate protection and support.

1. SNAPSHOT OF FORCED MARRIAGE IN AUSTRALIA

The true extent of forced marriage in Australia is unknown as available data is not comprehensive. Since criminalisation it is understood that the Australian Federal Police, as the primary investigative body, has received 230 reports² of forced marriage. This number has gradually increased in each reporting year.

The common trend concerning forced marriage in Australia involves Australian residents or citizens under 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.³

Anecdotal reports from civil society organisations responding to forced marriage show that those commonly affected include females aged between 16 and 21 years of age.

Forced marriage was criminalised under the *Commonwealth Criminal Code 1995* (Cth) (Section 270) in 2013. There have been no prosecutions under this legislation for a number of reasons, including that victims form the foundational evidentiary base and are often required to testify against their parents/relatives who are primarily responsible for facilitating the marriage. In this situation many victims are unwilling to participate in the criminal justice process.

² Commander Lesa Gale, “Public Address”, *Prevention and Prosecution: Australia’s Inaugural Conference on Forced Marriage*, University of Technology Sydney, 18 June 2018.

³ Interdepartmental Committee on Human Trafficking and Slavery, “Trafficking in Persons - The Australian Government Response 1 July 2015 - 30 June 2016”, <https://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Pages/Australias-response-tohuman-trafficking.aspx>.

2. MODERN SLAVERY AND FORCED MARRIAGE

The inclusion of forced marriage within the definition of modern slavery is unique to the domestic legislative environment of Australia—introduced as an offence in the *Commonwealth Criminal Code 1995* (Cth) (Section 270) in 2013. Few, if any, other jurisdictions frame forced marriage within the distinct context of slavery and/or modern slavery.

The international instrument that defines certain forced marriages as slavery is *The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery 1956*. What should be highlighted here is that the Convention is limited to marriages which contain three particular pre-conditions detailed in Article 1 (c),⁴ pre-conditions which are not always present in the occurrence of forced marriage within and outside of the Australian context.

The practice of forced marriage is complex and intersectional, and there are various different overlapping definitions. This multilayered status is reflected in several other international instruments which outline the rights associated with marriage.⁵ In order to reflect what is involved in the practice of forced marriage, a standalone definition of modern slavery is incomplete.

Much has been learnt about forced marriage in Australia since criminalisation. Criminalisation sparked a series of legislative, policy and program initiatives that have assisted in prevention and intervention, and in understanding the nature and victimology of forced marriage. However, the picture of forced marriage in Australia remains incomplete due to the absence of comprehensive data. While approximately 230 cases of forced marriage have been reported to the Australian Federal Police since criminalisation,⁶ the true extent is likely to be larger due to familial and culture pressures, limited knowledge of the law amongst individuals at risk and first responders, and the requirement to report to police in order to obtain a referral to support.

Emerging evidence on how forced marriage manifests in Australia indicates a need to adapt current approaches to shift toward a response that is targeted, holistic and cross-sectoral. To date, GSA NZ understands that the approach of criminalisation has presented itself with a number of challenges, including limited participation in the framework by

⁴ *The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery 1956* Article 1 (c): “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”,
<https://www.ohchr.org/EN/ProfessionalInterest/Pages/SupplementaryConventionAbolitionOfSlavery.aspx>.

⁵ See also: *Universal Declaration of Human Rights 1948* Article 16 (1) (2) (3), *International Covenant on Civil and Political Rights 1976* Article 23, *International Covenant on Economic, Social and Cultural Rights 1954* Article 10 (1), *Convention on the Elimination of All Forms of Discrimination Against Women 1981*, Article 16 (1), *Convention on the Rights of the Child 1990*, Article 6(2), Article 19 (1), Article 27 (1), Article 28 (1), Article 32 (1) , Articles 34, 25 and 26.

⁶ Commander Lesa Gale, “Public Address”, *Prevention and Prosecution: Australia’s Inaugural Conference on Forced Marriage*, University of Technology Sydney, 18 June 2018.

individuals at risk/forced into a 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, and as such individuals are unwilling to instigate criminal proceedings against them. The introduction of the Modern Slavery Bill 2018 (Cth) is an opportunity for policy makers to think deeply about the underlying and complex familial aspects of forced marriage. It is also an opportunity to reflect on the adequacy of current responses to forced marriage and ensure that legislative, policy and practice approaches are designed in a way that responds to its complexity.

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: "violent or threatening behaviour, or any other form of behaviour that coerces or controls a family member or causes the family member to be fearful".⁷

The reality is that forcing a person to marry is a reflection of gender inequality and an imbalance of power within public and private life. 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 . . . physical, sexual and psychological/emotional violence and economic abuse and exploitation, experienced in a range of settings, from private to public, and in today's globalised world, transcending national boundaries.⁸

Research completed in 2017 found that in many other jurisdictions around the world, family violence and gender based violence frameworks are universally accepted as appropriate and necessary to address the issue of forced marriage.⁹

This submission does not seek to align itself with a particular definitional position, or debate the inclusion of forced marriage as a practice of slavery. It does however demonstrate the complex and intersectional nature of forced marriage, and question the appropriateness of monitoring forced marriage through a business-oriented supply chain reporting requirement.

In the sections below we highlight the nature and victimology of forced marriage so as to differentiate it from other practices of modern slavery, namely forced labour, and to illustrate the problems with including forced marriage in the reporting requirement.

⁷ "Facts and Figures", Our Watch, accessed on July 9 2018, <https://www.ourwatch.org.au/Understanding-Violence/Facts-and-figures>.

⁸ Cited by Gangoli, Chantler, Hester and Singleton, "Understanding Forced Marriage" in: Aisha Gill, and Anitha Sundari, *Forced Marriage: Introducing a Social Justice and Human Rights Perspective*, London, United Kingdom Zed Books (2014): 39.

⁹ Laura Vidal, "Innovative and Best Practice Solutions to Address Forced Marriage in Australia" *Winston Churchill Memorial Trust* (2017): 21-25, <https://www.churchilltrust.com.au/fellows/detail/4179/Laura+Vidal>.

2.1 The Nature of Forced Marriage

CASE STUDY—ARA.¹⁰

When Ara* was 15 years of age, her parents took her overseas for a holiday. She thought that the purpose of the trip was to attend her cousin’s birthday party. However, after arriving, Ara’s parents told her that she was getting married. Ara told them that she didn’t want to get married, but they disregarded her wishes. She was forced to marry a man named Rashid*. Rashid was in his 20s and was a friend of the family. He took the view that a man’s wife was his property and, while they were still overseas forced Ara to have sex with him. After the wedding, Ara and her parents returned to Australia and she went back to high-school. After one year, her husband came to Australia on a spousal visa. At the age of 16, Ara was pulled out of school. She started working in a cafeteria to support herself and her husband. Her husband was violent, and would regularly beat her. He also forced her to have sex with him. Ara told her mother that her situation was “awful.” Her mother said “You just have to accept it for the sake of the family.” Ara wanted to leave her husband, but her brothers and her father said that they would kill her if she did so, as this would “destroy the honour of the family.” Ara’s husband also threatened to kill her if she left him. As the years went on, the threat to Ara’s safety escalated. Although her family had threatened to kill her if she left her marriage, she also feared that staying in her marriage would “be the death of her.” When she was 20 years old, she escaped to a family violence refuge. [*Not her real name]

Practitioners engaging in the prevention, intervention and support of those impacted by forced marriage report the nature of forced marriage as a practice that usually involves family and community members facilitating marriages on an individual’s behalf without their free and full consent. Motivation often lies in the desire to keep families together, maintain honour and preserve identity. There is also an overriding factor of economic deprivation which is globally understood to be one of the key drivers of the practice.¹¹

¹⁰ Magdalena McGuire, “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): 21.

¹¹ “Why does child marriage happen?”, Girls Not Brides, accessed on July 9 2018, <https://www.girlsnotbrides.org/why-does-it-happen/>.

The Interdepartmental Committee on Human Trafficking and Slavery reports that:

. . . the common trend concerning forced marriage in Australia involves Australian residents under the age of 18 being forced into marriage either in Australia or overseas. Often, relatives are alleged to have organised or be organising a marriage without full and free consent.¹²

Further, a recent Australian Institute of Criminology (AIC) report illustrates this pattern from the perspective of individuals who have been impacted by the practice:

Victim/survivors were generally engaged or married to a member of their extended family commonly a cousin . . . family members played different roles, including instigating, supporting and/or arranging the marriage, organising and/or conducting the ceremony and witnessing the marriage. The prospective husband's family also played a strong role in instigating the union. Marriages were conducted by family members, community members and religious leaders in cultural and religious ceremonies, as well as by civil marriage celebrants. Few marriages were registered according to Australia or New Zealand marriage laws.¹³

As illustrated above, the nature of forced marriage typically does not involve systems outside of the immediate and extended family, and in some instances intimately known community members. Knowing this is the common nature of forced marriage, there are questions to be raised about the appropriateness of businesses assessing forced marriage in their supply chains.

There are five critical issues that arise in relation to forced marriage's inclusion in the Bill's reporting requirement:

1. The role of business in regulating private life

A key question concerns the role of corporate entities in relation to the actions of citizens. Ordinarily it is not the role of business to inquire into the private lives of its employees, contractors or suppliers (or employees of its contractors) in order to identify practices such as forced marriage. If we liken the practice of forced marriage to that of family violence, corporate responsibility lies with supporting the wellbeing of individuals impacted by violence, not in identification and reporting on violence.

2. Practicality of investigating forced marriage in supply chains

As well as the appropriateness of corporate entities inquiring into employees' personal lives, there is the issue of practicality. How will businesses be accurately assessing for the presence of forced marriage within their supply chain, given its occurrence within family and community contexts? What will the expectations on business be, should they uncover forced marriage within their supply chain? What will happen if their own employees are

¹² Interdepartmental Committee on Human Trafficking and Slavery. "Trafficking in Persons - The Australian Government Response 1 July 2015 - 30 June 2016", *Commonwealth of Australia*, (2016) <https://www.homeaffairs.gov.au/crime/Documents/report-anti-people-trafficking-interdepartmental-committee-july-2015-june-2016.pdf>.

¹³ Samantha Lyneham and Samantha Bricknell, "When saying no is not an option: Forced marriage in Australia and New Zealand", *Australian Institute of Criminology Research Report 11*, (2018): viii <https://aic.gov.au/publications/rr/rr11>.

responsible for forced marriage? Ara's case study raises the complexity of making businesses and employers responsible for the private actions of citizens.

3. Effectiveness of investigating forced marriage in supply chains

Ara's case study above is a typical scenario presenting across Australia. With the information presented in this case, including where the possible points of intervention may have been for Ara (such as her school), a supply chain reporting requirement would be least visible and effective in identifying, intervening and supporting Ara and others like her.

4. Contrary to human rights of victims and others impacted by forced marriage

A key question is whether this method of identification be in the best interests of individuals at risk/forced into marriage, given they stand to lose autonomy over how they seek support and safety. It is critical that in whatever interventions are identified, individuals remain in control and are given choice and autonomy over their own life. Practice experience shows, that unless individuals are pro-actively engaged in behaviour change, and supported to understand the rationale for change, they are unlikely to commit to interventions and are more likely to return to normative actions.

5. Negative impact on the right to freedom from discrimination

In educating businesses to identify the practice of forced marriage, will the training and auditing framework address potential bias in the profiling of possible offenders? Failure to do this accurately and sensitively may lead to ongoing systemic disadvantage toward individuals from culturally and linguistically diverse backgrounds who already face widespread discrimination in the employment market. A survey completed by the Scanlon Foundation in 2014 reported that 18% of Australians surveyed stated that they had experienced discrimination because of skin colour, ethnic origin or religion, and 39% of its occurrence was within the workplace.¹⁴

Forced Marriage, Forced and Child Labour

A primary argument that links forced marriage and slavery and perhaps the relevance of including it in the reporting requirement is the risk that forced marriage can be a gateway to forced and/or child labour. There is evidence to support this argument with Aids-Free World recently presenting an analysis which takes the strong position that 'all child marriage is child labour'.¹⁵ Aids-Free World argues that, without consenting to a marriage, every action that follows including domestic work, is forced and therefore exploitative. However, what is missing from this analysis is how the distinct definition of 'forced marriage as child labour' is reconciled with the already established definitions and frameworks associated with the practice, such as gender-based violence, family violence and child protection.

¹⁴ Professor Andrew Markus, "Mapping Social Cohesion: The Scanlon Foundation surveys 2014", Scanlon Foundation, Australian Multicultural Foundation, Monash University, (2014):3

¹⁵ See: www.childmarriageischildlabour.com.

It is necessary to establish clear definitional consensus before introducing legislation that transcends international borders. Not doing this, will result in incorrect identification and limited action; but more importantly, it will result in ineffective and inappropriately targeted remediation strategies.

The reporting requirement set out in the Bill is designed to identify the breadth of modern slavery practices across business supply chains, including forced labour and/or child labour. With effective supply chain evaluation processes in place, these practices will be identified.

Approaches to human rights abuses such as forced marriage, must recognise the nature of the abuse. As illustrated above, forced marriage is distinctly different to that of forced labour and/or child labour. Preventing forced marriage will in some cases also prevent forced labour and/or child labour. However, preventing forced marriage is more likely to eliminate a myriad of other abusive behaviours which are not naturally defined as slavery. Behaviours including, physical, psychological and sexual abuse, limited to no control over reproductive rights, and limited access to education and economic security. As a result forced marriage requires a different suite of protections that have a specific evidence base related specifically to this type of offending.¹⁶

Sexual Servitude

It is important to ensure that there is a clear distinction between forced marriage and sexual servitude. Businesses may have concerns regarding their labour force accessing commercial sexual services whilst deployed on company time. In circumstances where this is forced, exploitative, in breach of local or Australian laws or involves individuals below the age of consent, there is reasonable cause for concern. However, in a situation where an individual has been both forced into a marriage and consequently forced into commercial sexual exploitation, it would not be reasonable to expect a business to be held responsible for the forced marriage. Sexual servitude and forced marriage are distinctly different abusive practices, and should be treated as such.

Forced Marriage in War and Conflict

Internationally, the criminal definition of forced marriage continues to evolve through the International Criminal Court (ICC) and other associated bodies. In particular, the Special Court of Sierra Leone Appeals Chamber (SCSL Appeals Chamber) ruled that forced marriage amounted to more than sexual slavery both in terms of the conduct itself and the ensuing harm.

¹⁶ GSANZ refer the Committee to Our Watch, “Change the Story- A shared framework for the primary prevention of violence against women and their children in Australia” which details an evidence based approach, <https://www.ourwatch.org.au/getmedia/0aa0109b-6b03-43f2-85fe-a9f5ec92ae4e/Change-the-story-framework-prevent-violence-women-children-AA-new.pdf.aspx>.

The SCSL Appeals Chamber defined forced marriage as:

A situation in which the perpetrators through his words or conduct, or those of someone for whose actions he is responsible, compels a person by force, threat of force, or coercion to serve as a conjugal partner resulting in severe suffering, or physical, mental or psychological injury to the victim.¹⁷

The ICC in particular has been looking at forced marriage as it occurs in the context of war and conflict—particularly in Sierra Leone (through the Special Court of Sierra Leone) and Cambodia (the through Extraordinary Chambers in the Courts of Cambodia). The presence of forced marriage in war and conflict may provide some rationale to require businesses to report on forced marriages in their supply chain, particularly if they seek to engage in business in areas affected by war and conflict.

The ICC’s Pre-Trial Chamber II has been tracking the evolution of the definition of forced marriage through case law presented to the above mentioned courts, confirming:

Forced marriage constitutes the crime of an ‘other inhumane act’ within the meaning of Article 7 (1) (k) of the [Rome] Statute,¹⁸ warranting a charge distinct from sexual slavery. The ICC Chamber concurred with the SCSL Appeals Chamber in finding that ‘the central element of forced marriage is the imposition of “marriage” on the victim, i.e. the imposition, regardless of the will of the victim, of duties that are associated with marriage, as well as of a social status of the perpetrator’s “wife”’. It also underlined the exclusivity of this conjugal relationship as ‘the characteristic aspect of forced marriage’, an element distinguishing the crime from sexual slavery and other crimes against humanity.¹⁹

It appears that international criminal courts have settled on the view that forced marriage, when forming part of conflict—particularly, widespread or systematic attacks on civil populations may constitute as a crime against humanity—is distinct from sexual slavery. Business engagement in areas where there is conflict and knowledge of crimes against humanity are arguably covered by already existing international business and human rights standards.²⁰ These rulings from international criminal courts further compels us to consider the intersectional nature of forced marriage, it extends beyond that of slavery and requires a nuanced response that is flexible and tailored.

¹⁷ Josepha Close, “Forced marriage as an independent crime against humanity in the ICC decision confirming the charges against Dominic Ongwen”, June 20 2016, https://aninternationallawblog.wordpress.com/2016/06/20/forced-marriage-as-an-independent-crime-against-humanity-in-the-icc-decision-confirming-the-charges-against-dominic-ongwen/#_ftnref10.

¹⁸ *Rome Statute of the International Criminal Court (2000)*, Article 7 (1) (k) “Other inhumane acts of similar character intentionally causing great suffering or serious injury to body or to mental or physical health”.

¹⁹ Josepha Close, “Forced marriage as an independent crime against humanity in the ICC decision confirming the charges against Dominic Ongwen”, June 20 2016, https://aninternationallawblog.wordpress.com/2016/06/20/forced-marriage-as-an-independent-crime-against-humanity-in-the-icc-decision-confirming-the-charges-against-dominic-ongwen/#_ftnref10.

²⁰ For a full list of the 24 international principles and guidelines for companies operating in conflict affected areas, see: Mark van Dorp, “*Multinationals and Conflict: International principles and guidelines for corporate responsibility in conflict affected areas*” SOMO, Amsterdam, (2014), <https://www.somo.nl/wp-content/uploads/2014/12/Multinationals-and-Conflict-1.pdf>.

2.2 The Victimology of Forced Marriage

CASE STUDY—NADIRA²¹

Nadira* is a 23-year-old woman with an intellectual disability. She was born in Australia. Nadira grew up in a violent household. Her father was very violent towards her mother. He was also violent toward Nadira. Recently, Nadira’s father said that he was going to have her ‘married off’ to someone overseas. Nadira’s mother was unhappy about this. When she raised her objections to the marriage her husband became violent and threw her out of the family home. He would not let her take her daughter with her. Nadira’s mother is now living in a refuge. She reports that her husband has taken her daughter overseas to be married. [*Not her real name]

Forced marriage in Australia often involves the complex manipulation of intimate and dependant relationships. This dynamic has significant bearing on both the impacts that derive from a forced marriage, but also the ways in which individuals at risk of/forced into a marriage engage in preventative actions or help-seeking.

Identifying the impacts and experiences of individuals at risk of/forced into marriage are important as they illustrate where effective points of intervention are, in turn ensuring the best opportunities for prevention and protection.

Impacts and experiences include, but are not limited to:

- physical, psychological and sexual abuse
- forced/unwanted pregnancy
- poor physical and mental health outcomes—including higher risk of illness and disease
- withdrawal from education
- lower economic opportunities
- isolation from family and community including risk of homelessness
- disempowerment and deprivation of fundamental human rights.

In help-seeking, individuals often do not report explicitly that their concerns are in relation to a forced marriage. More commonly individuals seek assistance for issues associated with related abuse and violence, examples include:

- mental ill-health such as suicidal attempts/ideation
- physical health concerns, including sexual and reproductive health
- safety concerns.

²¹ Magdalena McGuire, “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): 4.

In the previously mentioned report by the AIC the dynamic of help-seeking by individuals at risk was explored:

All victim/survivors interviewed for the research successfully left their situations, either before or after the marriage took place. However, victim/survivors were unanimous in their views that leaving their situation was difficult. The method by which victim/survivors exited varied depending on their motivation, their ability to recognise their situation as wrong, their knowledge and access to people and services that could provide assistance, the ability of potential help-givers to recognise, acknowledge and respond to their vulnerability...²²

Individuals at risk often report that barriers to them leaving or changing their situation include:

- family pressure and obligation
- fear of retaliation by family/community members, including threats against life
- shame, stigma and isolation
- financial independence/capability
- absence of accurate information about the criminal justice system in Australia.

Impacts and help-seeking trends are important to understand so as to ensure that policies and legislation are designed in a way that will truly prevent the practice and provide maximum opportunity to individuals at risk/forced into marriage.

The debilitating impact of fear and shame is often underestimated in the design of responses toward prevention, intervention and support. This is evident in the lack of prosecutions in Australia since criminalisation which has been largely due to victim willingness to participate in the criminal justice process.

A multi-sectoral approach is vital in the prevention of forced marriage in Australia. Making resources available and supporting service infrastructure for schools, mental health providers, health services, family violence service providers and child protection is a logical and effective move given our understanding of how the issues present and how individuals seek support. It remains unclear how a business oriented supply chain reporting requirement will be a meaningful tool for prevention or protection.

Environments of high surveillance, characterised by multiple legislative provisions, may also lead to an increased risk that reporting will remain low, and that opportunities to engage in prevention and early intervention will remain limited.

²² Samantha Lyneham and Samantha Bricknell, "When saying no is not an option: Forced marriage in Australia and New Zealand", *Australian Institute of Criminology Research Report 11*, (2018): ix, <https://aic.gov.au/publications/rr/rr11>.

As argued by Menon and Kapur in Gill and Anitha:

Legal measures remain an essential but insufficient route to gender justice both because of the historic inability of the law to capture the multiple ways in which women exercise agency within (and despite) constraints because of the law's preoccupation with the victim-subject often results in protectionist responses that erode women's rights and reinforced gendered stereotypes within legal discourses.²³

With specific reference to Nadira's case, there are multiple disadvantages and complexities that would affect Nadira's capacity to actively participate within a legislative context. Nadira does, however, require support from social services, which as the AIC have identified are still evolving—multiple gaps and challenges to providing an effective service delivery response remain. As with Ara, Nadira's case is not an uncommon presentation, and based on the information known a supply chain reporting requirement would not present any benefit to preventing her forced marriage.

2.3 Unintended Consequences and Impacts

To summarise, the above analysis highlights the following unintended consequences and impacts of including forced marriage in the supply chain reporting requirement:

1. A standalone definition of modern slavery as it is currently applied to forced marriage falls short of recognising the intersectional nature of the practice—including gender inequality as a key driver. Such a recognition would lend itself to more specific, targeted strategies for prevention.
2. There is a likelihood that the reporting requirement may function as a barrier to prevention. The current legislative environment contributes to fear, shame and isolation that limits individuals from coming forward. There is a risk that without an investment in programs targeted at changing social norms additional legislation will only contribute to the current clandestine nature of offending and reporting.
3. There is a risk that racial or cultural bias will be applied by businesses in profiling possible offenders within their supply chain. This may lead to ongoing systemic disadvantage of individuals from culturally and linguistically diverse backgrounds, who already face widespread discrimination in employment.
4. Intervention points for identifying forced marriage commonly fall outside of business-oriented supply chains. Individuals reporting risk of forced marriage often do not disclose forced marriage explicitly. They are more likely to report issues associated with abuse and violence. Therefore, we need to turn our investment of resources and infrastructure to appropriate intervention points such as—health and mental health services, schools, family violence providers and child protection.

²³ Aisha Gill and Anitha Sundari, "Framing forced marriage as a form of violence against women" in, "Forced Marriage: Introducing a Social Justice and Human Rights Perspective", *Zed Books*, (2014): 11.

2.4 Alternatives and Recommendations

The process of criminalisation has shown us that the law, whilst a vital and symbolic tool to respond, is not effective in isolation and is often the least used tool by victims themselves when seeking alternative options or assistance to the proposed marriage.

Legal mechanisms have limitations, particularly regarding the cultural context, power imbalances, social and familial complexities, and gender-inequality that underpin the practice of forced marriage. Gender inequality and relative powerlessness as discussed above must be recognised as central drivers to the practice, which in turn must be reflected in the design and implementation of legislative or policy measures. The AIC conclude:

It is doubtful whether absolute prevention is possible unless the fundamental rationales for the practice of forced marriage are negated. Two predominant themes in the national response to family and domestic violence are offender accountability and the changing of attitudes (COAG 2011). In the context of forced marriage, accountability is only effective if it is pre-emptive rather than reactive, and if it is reinforced by family, peers and influential community members.²⁴

A complementary suite of measures that translate the intent of legislation into awareness and behavioural change is needed. These include an alignment with approaches being employed in relation to child protection and domestic and family violence. Fundamentally, a shift away from blunt legislative solutions with an accompanying direction of resources toward primary prevention measures is required in order to address the problem at its source.

As a deeply gendered practice there is significant value in investing in forced marriage programs focused on changing social norms. Social norm change is a valuable non-legislative measure that has an international evidence base for shifting harmful practices.²⁵

Gill and Anitha argue that changing or introducing laws does not

necessarily dismantle the structural and institutional contexts that sustain particular forms of gender-based violence . . . the fact that women from minoritised communities often distrust the legal system, and are thus reluctant to access both the criminal justice system and public support services, becomes another symptom of their exclusion from the protections that citizenship and residency are meant to afford.²⁶

²⁴ Samantha Lyneham and Samantha Bricknell, “When saying no is not an option: Forced marriage in Australia and New Zealand”, *Australian Institute of Criminology Research Report 11* (2018): 96, <https://aic.gov.au/publications/rr/rr11>.

²⁵ GSANZ refer the Committee to the “Advanced Learning and Innovation on Gender Norms (ALIGN) Platform” led by the Overseas Development Institute (ODI) which includes a range of evidence based tools and resources focused on social norm change in child marriage, <https://www.alignplatform.org/child-marriage>.

²⁶ Aisha Gill and Anitha Sundari, “Framing forced marriage as a form of violence against women” in, “Forced Marriage: Introducing a Social Justice and Human Rights Perspective”, *Zed Books*, (2014): 10.

GSANZ offers the following recommendations for consideration by the Legal and Constitutional Affairs Legislation Committee. We note that these recommendations have been consistently made by civil society since the Inquiry began its work and present evidence-based measures for the prevention, intervention and protection of individuals impacted by forced marriage.

Recommendation 1: Remove ‘Forced Marriage’ from the supply chain reporting requirement and invest in tailored strategies that have a proven evidence base for prevention, intervention and protection.

These include:

1. Expand the definition of family violence to include forced marriage—this will open up opportunities for wider multi-sectoral engagement and information and support services for individuals at risk.
 - a. This expanded definition presents an opportunity to embed forced marriage into national secondary education curricula on family violence.
2. Resource a prevention program for local communities founded on partnership and inclusion. The approach must include provision for investing in long-term attitudinal, behaviour and social norm change that will supplement the legislative approach. While the law is a deterrent and has a strong symbolic value it cannot on its own create social change. Forced marriage is a complex social problem which requires multiple solutions, including but not limited to:
 - a. Engaging influential community stakeholders including men and faith leaders, who are often carriers of culture and tradition. Leadership from within communities is an essential element to change social norms.
 - b. Targeted community-led strategies in areas of high prevalence that focus on dialogue and localised action within communities.
3. Invest in an Information Development Framework for data relating to forced marriage in order to 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.
5. Develop a central point of coordination for federal and state government and civil society stakeholders, such as a Forced Marriage Unit (as modelled by the United Kingdom). This approach will ensure that individuals impacted by forced marriage will be connected to support services and government agencies in a way that is integrated and timely. It will also provide necessary and specialised assistance for individuals who have been taken overseas for the purpose of being forced into a marriage.

3. INDEPENDENT ANTI-SLAVERY COMMISSIONER

Throughout the course of the Inquiry in 2017 there has been clear and strong support for the establishment of an independent Anti-Slavery Commissioner.

The Joint Standing Committee on Foreign Affairs and Trade (the Committee) overseeing the Inquiry recommended that the establishment of an Australian Modern Slavery Act should include an Independent Anti-Slavery Commissioner (the Commissioner)—to lead and coordinate Australia’s response to combatting modern slavery.²⁷

GSANZ notes here that there were numerous other recommendations made by the Committee in relation to the Commissioner’s role,²⁸ particularly with reference to improving victim identification and coordination of support. As the Bill has limited itself only to include a supply chain reporting requirement, we highlight the necessity of the role for a Commissioner in this context.

The functions of the Commissioner, relevant to the proposed supply chain reporting requirement in the *Modern Slavery Bill 2018* (the Bill), include:

- Engaging with government and entities on the implementation and operation of the proposed supply chain reporting requirement and central repository
- Undertaking legislated reviews of the proposed Modern Slavery Act at least every three years
- Providing advice on how to improve the proposed Modern Slavery Act, as well as responses to modern slavery on an ongoing basis
- Providing independent oversight of the response to combatting modern slavery across all sectors, and identifying gaps and solutions.²⁹

We also note that the proposed Bill falls short of being a comprehensive Modern Slavery Act as conceived by the Inquiry—particularly in relation to domestic modern slavery action and victim support.

The alternative proposal to a Commissioner is for the establishment of a Business Engagement Unit.³⁰ This proposal falls short of ensuring the independence and rigour that a Commissioner would provide—importantly, but not limited to, the ability for the Government to monitor itself given the inclusion of Commonwealth Government entities in the reporting requirement of the Bill. The Inquiry Committee asserted the importance of the Commissioner being truly independent from the government or any other body in order to ensure compliance and accountability.

The Business Engagement Unit is not an adequate alternative to a Commissioner particularly given their own reporting requirements under the law—and their necessary relationships with business outside of the context of modern slavery.

²⁷ Joint Standing Committee on Foreign Affairs, Defence and Trade, *Hidden in Plain Sight*, Parliament of Australia, Canberra (2017): x.
http://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024102/toc_pdf/HiddeninPlainSight.pdf;fileType=application%2Fpdf.

²⁸ Joint Standing Committee on Foreign Affairs, Defence and Trade, xxxi-xxxii.

²⁹ Ibid.

³⁰ Assistant Minister Alex Hawke, “Government strengthens Australia’s response to modern slavery”, accessed May 10 2018, <http://minister.homeaffairs.gov.au/alexhawke/Pages/modern-slavery.aspx>.

A Commissioner would strengthen the accountability framework of the Bill. The reporting requirement will become mandatory should the Bill be enacted into law, which raises questions about its efficacy and its financial sustainability if there is not a statutory requirement for a dedicated role to provide oversight and accountability. Moreover, there remain no provisions in the proposal for a Business Engagement Unit for the assistance that should be provided to individuals who are identified as being in slavery in Australia or abroad. There remains a significant gap in what business is required to do to remediate slavery once it has been identified, a gap that would otherwise be filled by the role of a Commissioner.

Recommendation 2: Amend the Bill to include provision of an independent Anti-Slavery Commissioner to:

- Provide oversight and accountability of the reporting requirement.
- Ensure that individuals who are identified as being in slavery in Australia or abroad are afforded appropriate protection and support.

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