



Inquiry into Crimes Legislation
Amendment (Powers, Offences and Other
Measures) Bill 2015

Senate Legal and Constitutional Affairs Committee

Anti-Slavery Australia
Faculty of Law
University of Technology, Sydney
PO Box 123, Broadway NSW 2007

W: antislavery.org.au

Anti-Slavery Australia Submission - Senate Legal and Constitutional Affairs Committee Inquiry into
Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015

Anti-Slavery Australia, University Of Technology, Sydney

Anti-Slavery Australia welcomes the opportunity to provide this submission to the Senate Legal and Constitutional Affairs Committee Inquiry into *Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015* (the Bill).

Anti-Slavery Australia at the University of Technology, Sydney is a specialist law, research and policy centre dedicated to advancing the rights of people who have experienced human trafficking, slavery and slavery-like practices including forced marriage. Anti-Slavery Australia includes a law practice which provides legal advice and representation to women, men and children who are at risk of or who are victims of forced marriage. The law practice has operated for 12 years and clients have access to qualified lawyers and migration agents.

This submission draws upon our research, publications and experience advising or representing people who have been at risk of, or subject to forced marriage.

Summary

Anti-Slavery Australia makes this submission regarding Schedule 4 of the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015. This Schedule sets out proposed amendments to those sections of the *Criminal Code Act 1995* (the Act), dealing with forced marriage. We support the inclusion of these amendments and their passage as enacted legislation.

Expansion of the definition of forced marriage

Forced marriage is currently defined in Subsection 270.7A (1) of the Act.

For the purposes of this Division, a marriage is a **forced marriage** if, because of the use of coercion, threat or deception, one party to the marriage (the **victim**) entered into the marriage without fully and freely consenting.

Anti-Slavery Australia endorses the proposed amendment expanding the definition of forced marriage contained in Subsection 270.7A(1). This amendment extends the definition to read:

- (1) A marriage is a **forced marriage** if one party to the marriage (the **victim**) entered into the marriage without freely and fully consenting:
 - a. Because of the use of coercion, threat or deception; or
 - b. Because the party was incapable of understanding the nature and effect of the marriage ceremony.

Provisions dealing with consent

Anti-Slavery Australia supports broadening the consent provision to include consideration of the capacity to understand the nature and effect of the marriage ceremony. We note from the Explanatory Memorandum¹ that the issue of capacity may arise in relation to age or intellectual disability. The proposed amendments will increase the protection of the law and further promote the human rights of vulnerable people.

¹ The Parliament of the Commonwealth of Australia, House of Representatives, *Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015*, Explanatory Memorandum, paragraphs 12-14

Anti-Slavery Australia Submission - Senate Legal and Constitutional Affairs Committee Inquiry into
Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015

The proposed amendment further expands the definition of forced marriage to affirm the paramount principle that free and full consent is an essential characteristic of a true marriage and as such the inclusion of the phrase “freely and fully consenting” at the beginning of the definition identifies consent as the central issue, with the provisions dealing with the lack of free and full consent set out in part (a) and (b).

Amendment to include a rebuttable presumption of incapacity for persons under 16 years of age

The issue of consent can present a number of challenges in forced marriage prosecutions as referred to in the Explanatory Memorandum where, for example, a party may argue that a child was mature and consented to the ceremony. We recognise that in some circumstances a person under 16 years of age (probably close to the age of 16) may demonstrate strong evidence that they independently consented to a cultural ceremony with the full understanding of the nature and effect of that ceremony.

We welcome the proposed amendment to include a rebuttable presumption of incapacity for persons under the age of 16 years.

We observe that the proposed amendments are consistent with the Marriage Act provisions dealing with recognition of foreign marriages.²

Amendment to increase penalties

Anti-Slavery Australia supports the proposed increase in penalties for both the standard and aggravated offences to ensure they are commensurate with the penalties for other serious slavery-like offences.

Further considerations regarding the Commonwealth response to forced marriage

The following issues may be beyond the scope of the Committee’s current inquiry. However we raise them as being highly relevant to the evolving Commonwealth response to forced marriage.

Anti-Slavery Australia supports the criminal justice response to forced marriage³. Additionally, we continue to advocate for the introduction of a civil response crafted in recognition of the challenges and complexities of forced marriage. To this end we see that there are strong arguments in support of the introduction of a complementary civil framework through amendments to the *Family Law Act 1975*.⁴ We believe these civil responses would address a number of gaps in victim support and protection where people are at risk of or subject to a forced marriage.

a. Protective and preventative orders for persons over the age of 18

The Family Court of Australia and the Federal Circuit Court of Australia have jurisdiction under the *Family Law Act 1975* (Cth) to issue protective and preventative orders for children. These orders may include orders preventing a child from leaving the jurisdiction to marry overseas.

² *Marriage Act 1961* (Cth), s88D

³ Frances Simmons & Jennifer Burn, ‘Without Consent: Forced Marriage in Australia’, (2013) 36 MULR 970.

⁴ *Ibid*, 995-999.

Anti-Slavery Australia Submission - Senate Legal and Constitutional Affairs Committee Inquiry into
Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015

The following are examples of the implementation of these orders:

- In one such case the Department of Human Services (DHS) in Victoria applied to the Family Court for orders to prevent a 13 year old girl being taken outside Australia for marriage and the court formed the view that such a marriage was not in her best interests and that 'a 14 year old child would not have the understanding of the significance of marriage which would be attributable to an adult.'⁵
- In another example, a 17 year old telephoned the Australian Federal Police (AFP) and told the police that her family was making arrangements to take her out of Australia for marriage against her will. In an application to the court, the court ordered that the child's name be placed on the airport watch-list, that her passport be surrendered to the court and that her parents be restrained for assaulting, threatening, harassing or intimidating her.⁶

While these cases refer to children under the age of 18, it is the experience of Anti-Slavery Australia that there are vulnerable young women (and possibly young men) who are over the age of 18 and at risk of forced marriage. Vulnerable adults may be subject to intense family pressure and coercion to marry in the absence of full and free consent.

We are aware of cases where, for example, a vulnerable young adult feared being coerced to travel outside of Australia to be married. In such an emergency, the intense nature of the coercion may prevent them from reaching out to a Customs officer or AFP officer at the barrier, particularly in the presence of family members who have made threats against them.

For this reason, Anti-Slavery Australia recommends that the jurisdiction of the Family Court of Australia be broadened to permit the making of protective and preventative orders for people over the age of 18 in relation to forced marriage.⁷

In the United Kingdom, courts may make Forced Marriage Protection Orders (FMPO), for both adults and children at risk of or in a forced marriage, including orders for passports to be surrendered. The Forced Marriage (Civil Protection) Act ⁸ came into force in 2008 in the form of an amendment to the UK Family Law Act.⁹ The court may make ex-parte orders in a number of circumstances including where there is a risk of significant harm to the person to be protected if the order is not made immediately or if it is likely that an applicant will be deterred or prevented from pursuing an application if an order is not made immediately.

Although there has been some criticism that the UK orders have had a slow take-up rate, it is expected that their use will increase with the introduction of the UK criminal justice response to

⁵ Department of Human Services & Brouker and Anor [2010] FamCA 742 at [9], [19].

⁶ Kandal & Khyatt & Ors [2010] FMCAfam 508.

⁷ Frances Simmons & Jennifer Burn, 'Without Consent: Forced Marriage in Australia', (2013) 36 MULR 970, 993-999.

⁸ *Forced Marriage (Civil Protection) Act 2007* (UK)

⁹ *Family Law Act 1996* (UK) Part 4A.

Anti-Slavery Australia Submission - Senate Legal and Constitutional Affairs Committee Inquiry into
Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015

forced marriage in early 2015¹⁰ which includes criminalising breaches of Forced Marriage Protection Orders.¹¹

Closing comments

Anti-Slavery Australia supports the amendments proposed in the Bill to further strengthen the Commonwealth criminal justice response to forced marriage in Australia. In addition, we continue to support the important prevention, awareness-raising and education work of both government agencies and non-government organisations, including our own, to better support victims and those at risk and to better identify cases of forced marriage in Australia. Anti-Slavery Australia is making a contribution to this important work through a number of Commonwealth-funded projects including our free online e-learning program which includes a forced marriage module as well as the development of a forced marriage website and comprehensive pro bono legal service which will provide a national referral mechanism for reports about forced marriage.

Jennifer Burn
Director, Anti-Slavery Australia, UTS

¹⁰ *Anti-Social Behaviour, Crime and Policing Act 2014* (UK), Part 10

¹¹ Oonagh Gay, Home Affairs Section, Forced Marriage, Standard Note SN/HA/1003, House of Commons Library, 21 January 2015