



Submission to the Report of the Office of the High Commissioner for Human Rights on child, early and forced marriage pursuant to resolution A/HRC/RES/24/23 of the Human Rights Council

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Anti-Slavery Australia

Anti-Slavery Australia welcomes the opportunity to provide this submission to the Office of the United Nations High Commissioner for Human Rights as a contribution to the forthcoming report on preventing and eliminating child, early and forced marriage, which will have a particular focus on challenges, achievements, best practices and implementation gaps, to be submitted to the Human Rights Council prior to its twenty-sixth session.

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 trafficking, slavery, and slavery-like practices, including forced labour and forced marriage. Anti-Slavery Australia includes a law practice which provides free legal advice and representation to men, women and children who have been trafficked or enslaved in Australia. The law practice has operated for ten years and clients have access to legal staff who are qualified solicitors and migration agents.

Anti-Slavery Australia works with many organisations including the Law Council of Australia, academics, unions and other groups such as Australian Catholic Religious against Trafficking (ACRATH), Australian Red Cross, the Good Shepherd Network, Salvation Army, Scarlet Alliance and World Vision. Anti-Slavery Australia convenes the Sydney Trafficking Response Network.

Anti-Slavery Australia received funding from the Australian government, through the *Proceeds of Crime Act 2002* (Commonwealth), to raise awareness of all forms of slavery and people-trafficking and to develop and deliver a national online learning program for practitioners in the legal, health, social work and teaching professions, community members, and front-line government and law enforcement agencies. The program will be launched early in 2014.

This submission draws upon our ten years of research, publications and experience representing people who have been trafficked into a wide range of exploitative situations. Anti-Slavery Australia is directed at the mission of preventing slavery, slavery-like practices and human trafficking and protecting those who experience such serious harm.

Anti-Slavery Australia is directed by Associate Professor Jennifer Burn, and staffed by an energetic and dedicated team: Arani Ahmed, Ruth Chandler, Katie Fitzgerald, Maree Marsh, Beau Neilson, and Cinda Viranna with law placement students and volunteers Rhiannon Boardman, Cassandra Jenkins, Charlotte McArthur, Lena Rizk, and Katharine Stanley.

We thank Katharine Stanley for her research assistance in the preparation of this submission.

1. Introduction

Forced marriage is an emerging issue in Australia. To date, there is no reliable research on the nature and extent of forced marriage in Australia, and the practice of forced and early marriage is often unrecognised and underreported.¹ While recent Australian jurisprudence in the Family Court of Australia is evidence of some forms of forced marriage in Australia, overall, there is little data on the number of Australian citizens and residents facing forced marriage, and almost no data on forced marriage within the migration, refugee or asylum seeker context.

Minimum Age for Marriage

The *Marriage Act* 1961 (Commonwealth) provides for the minimum age of marriage,² the principle of consent as a fundamental quality of marriage, and the circumstances where a marriage will be declared void or annulled. The marriageable age for both men and women is 18, and in some exceptional circumstances this can be lowered to 16 or 17 with the authorisation of a Judge or magistrate and the consent of the minor's parents.³

Section 95 of the *Marriage Act* sets out a penalty of imprisonment for 5 years for any person who enters into a marriage with a person who is not of marriageable age, and 6 months imprisonment for any person who marries a minor without the written consent of the minor's parents.⁴

Children or their representatives may also seek protection through a parenting order obtained under the *Family Law Act 1975* (Commonwealth)⁵ if they are at risk of a forced marriage. The Act enables applicants under 18 to seek protection by applying for parenting orders that prohibit the facilitation of the marriage.⁶ These orders may be sought by the young person themselves or by "any other person concerned with care, welfare or development of the child".⁷

¹ Frances Simmons and Jennifer Burn, 'Without Consent: Forced Marriage in Australia' (2013) 36 *Melbourne University Law Review* 970.

² Australia fulfils its international obligations under the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), the *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages*, and the *Convention on the Rights of the Child*, making child marriage unlawful, and ensuring the minimum age for marriage is the same for both sexes.

³ *Marriage Act 1961* (Cth) s 11-13

⁴ *Marriage Act 1961* (Cth) s 95(2)

⁵ See for e.g. *Department of Human Services & Brouker & Anor* [2010] FamCA 742.

⁶ The definition of "a parenting order" in section 64B(2) of the *Family Law Act 1975* (Cth) includes: (i) any other aspect of the care, welfare or development of the child or any other aspect of parental responsibility for a child.

⁷ *Family Law Act 1975* (Cth), s 65(1)(c); Anti-Slavery Australia submission to the Attorney-General's Department, *Consultation on Forced and Servile Marriage* (February 2011).

Free and Full Consent

A marriage entered into without the consent of either party to the marriage may be declared void through the operation of section 23(1)(d) of the Marriage Act 1961. Under this section, consent is not considered real consent where it was obtained by duress or fraud, where one party was mistaken as to the identity of the other party or the nature of the ceremony, or one party was mentally incapable of understanding the nature and effect of the marriage ceremony.

2. Forced Marriage in Australia

Though forced marriage remains underreported in Australia, cases concerning Australian citizens and residents have come before the courts within a family law context.

In September 2013 the Federal Circuit Court of Australia heard an application for a parenting order by a mother, Ms Elia, on behalf of her 6 year old daughter.⁸ The facts of the case showed that Ms Elia had been forced into a marriage ceremony some ten years prior when she was 14 with a man who was 21 at the time. The marriage ceremony took place in Sydney, with the full knowledge of her parents who had promised her at the time that marriage meant the freedom to “have popcorn, lollies, ice-cream and chocolate. You get to have fun and live life.”⁹ The court found that Ms Elia, at the time of the marriage, was legally and psychologically a child and that she did not consent to the marriage.

The following are key cases that have been brought before Australian courts by girls under the age of 18 that have prevented an early forced marriage from taking place either in Australia or overseas, and one case of a woman over the age of 18 seeking an annulment of a forced marriage.¹⁰

Department of Human Services & Brouker and Anor [2010] FamCA 742

In June 2010, Child Protection of the Department of Human Services in Victoria received a report that “V”, then aged nearly 14, was not attending school. The report suggested that V’s parents were intending to have her married.

Following the report, the Department interviewed V and applied to the Family Court of Australia for orders preventing her from being removed from Australia. In the interview, V stated that she was engaged for one month to a 17 year old man whose photograph she had seen. She had little knowledge of what would be required of her after the marriage, especially with regard to sex. When questioned about the facts of the application, V’s mother did not dispute their accuracy.

⁸ Essey & Elia [2013] FCCA 1525. Note: names have been changed.

⁹ Essey & Elia [2013] FCCA 1525 at [29].

¹⁰ All names have been changed by the courts.

The court ordered an interim injunction to prevent the removal of V from Australia prior to her 18th birthday. The court also retained her passport and placed an injunction on her parents from applying for a new passport for V until she reached the age of 18 years.

Kandal & Khyatt & Ors [2010] FMCAfam 508

Ms Kandal, a 17 year old, applied to the Federal Magistrates Court of Australia seeking intervention from the Department of Human Services and to be placed on the airport watch list. Ms Kandal stated to the court that she wanted minimal involvement with authorities and did not want to involve her parents in the proceedings. The court made ex parte orders placing her on the PACE Alert system (referred to as the airport watch list), the surrendering of her passport, as well as orders restraining her parents or any others acting as their agents from removing her from Australia.

Madley & Madley and Anor [2011] FMCAfam 1007

Ms Madley brought an application to the Federal Magistrates Court of Australia at the age of 16. She gave evidence that she was engaged to be married to a man in Lebanon whom she had met only once before. The marriage was scheduled to take place within 2 weeks of the urgent application to court. In her evidence she stated that she did not want to travel to Lebanon or to marry.

The court ordered that her parents be restrained from removing, attempting or causing her removal from Australia. Ms Madley's passport was surrendered to the court and she was placed on the airport watch list.

Kreet & Sampir [2011] FamCA 22

Ms Kreet brought an application of annulment before the Family Court of Australia. Ms Kreet had been deceived by her parents to travel to India under the belief that she would marry her Australian boyfriend. Instead she was forced to undergo a marriage ceremony to a man her parents had chosen for her. Ms Kreet's parents, on arrival in India, confiscated her passport and threatened to have her boyfriend's mother and sister raped if she did not comply with their demands. The court accepted that she believed this threat to be real and that she would not be able to leave India until the marriage had taken place.

Following the marriage ceremony Ms Kreet remained in India with the man, and faced ongoing assault when she declined physical intimacy. After lodging paperwork to sponsor the 'husband' to Australia, Ms Kreet flew back to Sydney, Australia. Ms Kreet eventually left for Melbourne to live with her former boyfriend, and made the application to court.

The court did not recognise the marriage under Australian law and held that the application for a decree of nullity of marriage would be granted based on the ground that the marriage

was void. The judgment stated that Ms Kreet's "physical state at the time of the ceremony was such that she was physically and mentally overborne. Her consent was not real because it was obtained by duress."

3. Migration and Forced Marriage

In our experience advocating for people facing or experiencing forced marriage, we observe there is often misunderstanding about the indicia of forced marriage in contrast with other forms of gender-based violence. Forced marriage is frequently conflated with other forms of slavery or slavery-like practices such as slavery, servitude or forced labour. The Special Rapporteur on trafficking in persons, especially women and children stated in her May 2012 Report on her Mission to Australia that "The use of marriage as a mechanism to traffic young women both into and out of Australia is of growing concern."¹¹ This was seen in the case of *R v Kovacs* [2008] QCA 417 where a sham marriage took place between a Filipina national and the family friend of the defendants Mr and Mrs Kovacs to facilitate her migration to Australia. On arrival the woman was subject to domestic servitude, forced to work six days a week in the family's takeaway shop and suffered sexual assaults at the hands of Mr Kovacs.

The Australian Institute of Criminology completed research into forced and servile marriage in the context of human trafficking¹² in March 2013. The research was directed at understanding the role of marriage and partner migration in the trafficking of persons and confirmed that marriage has been used to facilitate the trafficking of people into Australia "in a small number of cases."¹³ In the cases identified by the research, the experience of being trafficked for exploitation was then compounded by additional forms of exploitation, such as domestic servitude. Although the research highlighted the use of marriage as a vehicle for slavery and slavery like practices, it is unclear whether the research identified cases of forced marriage.

Prospective Marriage Visa Program

In November 2011 the Australian Parliament Senate Legal and Constitutional Affairs Committee undertook an Inquiry into the Prospective Marriage Visa Program.¹⁴ These visas are for the prospective fiancés of Australians and allow the visa holder to enter Australia

¹¹ Report of the Special Rapporteur in Trafficking in Persons, especially women and children, Joy Ngozi Ezeilo Report to Human Rights Council on the Mission to Australia, 18 May 2012 A/HRC/20/18/Add.1.

¹² Australian Institute of Criminology, *Forced and servile marriage in the context of human trafficking*, Research in Practice No. 32, March 2013.

¹³ Ibid.

¹⁴ Senate Legal and Constitutional Affairs Committee, Prospective Marriage visa program, 26 June 2012 available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed%20inquiries/2010-13/marriagevisaclasses/report/index

and marry their Australian sponsor in Australia. As part of the terms of reference, the Inquiry investigated the risk, incidence and assessment of fraud in that specific visa program; cases where Prospective Marriage visa holders were subject to an arranged marriage; whether the visa program facilitated forced marriages; and policies to strengthen protections against fraud.

The Inquiry found that while there was no widespread abuse of the visa program some aspects of the program required improvements to provide greater protections to applicants who, due to vulnerabilities such as age, may become victims of forced marriage or trafficking.

The Inquiry led to a reform of the Prospective Marriage visa program. A significant change was the Government's acceptance of the committee's first recommendation to increase the minimum age of visa holders within the program to 18 years of age.¹⁵ Changes in July 2013 now require that all applicants and sponsors under the program must both be at least 18 years of age. Any applications made before the changes where a party is under 18 will be subject to interview by the Department of Immigration. The Government also accepted the recommendation to allow the reporting on incidents of fraud within the visa program. Application and sponsorship forms under the program were amended to include a question on whether any coercion or force was present in entering the relationship.

4. The Criminalisation of Forced Marriage

Divisions 270 and 271 of the *Criminal Code Act 1995* (Commonwealth) provide for criminal offences related to slavery, servitude, and slavery-like practices such as forced labour and forced marriage. In March 2013 the Australian Government introduced the *Crimes Legislation Amendment (Slavery, Slavery-like practices and People Trafficking) Act 2013*, criminalising the slavery like practices of forced labour and forced marriage.

Forced marriage is defined under section 270.7A of the Act. 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 freely and fully consenting.

Forced marriage is specifically criminalised by the enactment of two provisions under section 270.7B:

Causing a person to enter into a forced marriage

- (1) A person (the **first person**) commits an offence if:
 - (a) the first person engages in conduct; and

¹⁵ Australian Government, Government Response to the Senate Legal and Constitutional Affairs References Committee Report: Prospective Marriage Visa Program, June 2013.

- (b) the conduct causes another person to enter into a forced marriage as the victim of the marriage.

Being a party to a forced marriage

- (2) A person commits an offence if:
 - (a) the person is a party to a marriage (within the meaning of section 270.7A); and
 - (b) the marriage is a forced marriage; and
 - (c) the person is not a victim of the forced marriage.

The penalty for either offence is 4 years imprisonment. This penalty increases to 7 years imprisonment if the victim of the forced marriage is under 18. These provisions apply to Australian citizens and residents whether the conduct occurs within or wholly outside of Australia.¹⁶

Forced marriage was criminalised in Australia following a lengthy consultation process. In 2010 a Discussion Paper on Forced and Servile Marriage was released by the Attorney General's Department, and in 2012 an Inquiry was conducted by the Senate Legal and Constitutional Affairs Committee into the then Crimes Legislation Amendment (Slavery, slavery-like practices and People Trafficking) Bill 2012. Both the discussion paper and the Inquiry heard from various non-government stakeholders, including Anti-Slavery Australia, as well as Government agencies.

Anti-Slavery Australia has a long standing view that the criminalisation of forced marriage is only one part of an effective response by the Australian Government, and should be adopted with civil measures in partnership with relevant community based bodies. These measures should include the development of multi-lingual factsheets, targeted community engagement, access to legal advice, housing and counselling, and the training of front-line officers and community members.

5. Trafficking and Forced Marriage

Although there is no express obligation in international law to criminalise the practice of forced marriage, the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* obliges state to criminalise trafficking in persons.¹⁷ While forced marriage is not specifically mentioned in the list of exploitative practices in Article 3 of the Protocol, the United Nations Office on Drugs and Crime (UNODC) has confirmed trafficking for forced marriage falls within the definition of trafficking of persons.¹⁸ In March

¹⁶ *Criminal Code 1995 (Cth) s 270.9*

¹⁷ *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*, opened for signature 15 December 2000, 2237 UNTS 319 (entered into force 29 September 2003) ('*Trafficking Protocol*') art 5.

¹⁸ see UNODC, *Model Law Against Trafficking in Persons*, UN Doc V.09-81990 (E) (5 August 2009) 28.

2013, the Australian Government passed the *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013*. This act amended the Criminal Code, introducing new offences of organ trafficking, forced labour and forced marriage. It also replaced the offence of sexual servitude with a broader offence of servitude, and expanded the definition of coercion to include psychological control and abuse of a person's vulnerability.

Australia is a destination country for women, children and men trafficked for exploitation. In the period between January 2004 to 30 June 2013 the Australian Federal Police (AFP) investigated just under 400 slavery and people trafficking related offences.¹⁹ Since 2004, the majority of people identified have been women trafficked into the sex industry. However, in recent years there have been increased reports in the number of men and women in situations of slavery, slavery-like practices, servitude or forced labour in other industries, including hospitality, agriculture, construction and in private homes.²⁰

Over the past decade there have been a number of key reforms improving legislation and access to support for victims of trafficking. Throughout, measures to combat trafficking have received bi-partisan support. It is unclear whether those identified as victims of forced marriage will receive support under the current Australian Government Support for Trafficking People Program, including access to housing, counselling, medical and legal services. It also remains unclear whether support will be linked to their involvement in the criminal justice process.

The National Action Plan to combat trafficking is currently under revision and is suggested to encompass slavery and slavery-like practices including forced marriage.²¹ With increased awareness of slavery and slavery-like practices, and the introduction of new offences of forced labour and forced marriage, we anticipate the figure of identified trafficked people will grow.

¹⁹ Interdepartmental Committee on Human Trafficking and Slavery (IDC), *Trafficking in Persons: The Australian Government Response July 2011-June 2012* (2012); IDC, *Australia's Strategy to Combat Human Trafficking and Slavery – 1 July to 30 December 2012* (2012); IDC, *Australia's Strategy to Combat Human Trafficking and Slavery – 1 January to 30 June 2013* (2013).

²⁰ Frances Simmons and Jennifer Burn 'Evaluating Australia's Response to all Forms of Trafficking: Towards Rights-centred Reform' (2010) 84(1) *Australian Law Journal* 712; Jennifer Burn, Frances Simmons and Sam Blay 'Combating Trafficking: Australia's Response to Modern Day Slavery' (2005) 79 *Australian Law Journal* 543.

²¹ Commonwealth of Australia, Committee Hansard, Attorney General's Department evidence to the Parliamentary Joint Standing Committee on Foreign Affairs Defence and Trade, Inquiry into Slavery, Slavery-like Practices and People Trafficking, 9 October 2013.

6. Best Practice Response

Anti-Slavery Australia advocates in favour of civil remedies for forced marriage. Currently, the Family Courts are empowered to deal with cases of minors who are facing or in forced marriages. Stronger protections and support pathways are required, as well as community education and consultation.

Drawing on our submissions to Australian Government and NSW Inquiries between 2010 and 2013,²² we outline Anti-Slavery Australia's recommendations for a best practice response to early and forced marriage:

(a) Education and Awareness

- The development of training and awareness materials for government authorities, civil society organisations, legal, education and health care professionals who may come into contact with people facing forced marriage;
- Australian guidelines on forced marriage for government authorities should be developed in consultation with civil society organisations that provide front-line services to women and men in situations of family violence. The Guidelines should address legal options and provide referral information;
- Prioritising research into the full nature and extent of forced marriage in Australia.

(b) Protection and Support

- That the Australian Government take a human rights based approach to forced marriage responses;
- The Australian Government's response to forced marriage must ensure people at risk of, or already in situations of forced marriage obtain protection and support, regardless of whether they are able or willing to assist police pursue criminal investigations. Including access to legal advice, housing and medical support.

²² See Anti-Slavery Australia submission to the Attorney-General's Department, *Consultation on Forced and Servile Marriage* (February 2011); Anti-Slavery Australia submission to The Senate Legal and Constitutional Affairs Committee *Inquiry into the Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012*, Submission 28 (2012); Anti-Slavery Australia submission to the Joint Standing Committee on Foreign Affairs Defence and Trade, *Inquiry into Slavery, Slavery-like Practices and People Trafficking* (2012); Anti-Slavery Australia submission to the NSW Community Relations Commission *Inquiry into the Exploitation of Women through Trafficking* (2012).

(c) Strengthening Family Violence Provisions

- Amendment of the family violence provisions of the *Migration Regulations*²³ to enable a person to apply for a permanent partner visa on the basis that the person is the victim of forced marriage, including protection of non-citizen women who are forced to marry their sponsoring partner.

(d) Implementation of Civil Protection Orders

- The creation of a regime of civil protection measures to enable people to escape or avoid forced marriages. These measures should give jurisdiction to the Family Court and the Federal Circuit Court to handle applications for protection orders.

Anti-Slavery Australia has been involved in the development of Australian responses to human trafficking, slavery, and slavery-like practices for over a decade. Anti-Slavery Australia is committed to the development of the Australian response to the emerging issue of forced marriage within a human rights framework, and we value the collaboration and dedication of many individuals and organisations working together to end all forms of human trafficking and slavery.

For further information please contact Jennifer Burn, director of Anti-Slavery Australia at Jennifer.Burn@uts.edu.au.

Thank you for the opportunity to make this submission to the Office of the United Nations High Commissioner for Human Rights.

²³ *Migration Regulations 1994* (Cth) Reg 1.21.