



DISCUSSION PAPER

FORCED AND SERVILE MARRIAGE

How to make comment

Interested stakeholders are invited to provide written submissions which put forward their views regarding the options outlined in this paper. Written submissions should be lodged by no later than **Friday 4 February 2011**. Submissions must include the author's name, the name of their organisation (if appropriate), email address and daytime telephone number.

Submissions should be forwarded to: **criminal.law@ag.gov.au**.

Please note: Submissions will NOT be published on the Attorney-General's Department website, but may be reproduced in part or whole and may be included in a report on this consultation, unless otherwise requested.

Disclaimer: This document is designed to assist consideration of issues and options to inform the consultation process. It does not necessarily reflect the views of the Commonwealth, or indicate a commitment to a particular course of action.

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PART 1: INTRODUCTION

1. The Australian Government is considering possible reforms to ensure there are appropriate measures in place to address the practices of forced and servile marriage that occur within Australia, or that affect Australian citizens and residents overseas.
2. Servile marriage generally refers to situations in which a person is considered a ‘chattel’ that can be sold, transferred or inherited into marriage. This type of practice is described in the *Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery* 1956 (the Supplementary Convention), and is considered to be a practice similar to slavery.
3. The terms servile marriage and forced marriage are used interchangeably. Although there is no settled definition at international law, forced marriage is generally used to describe a marriage entered into without the full and free consent of both parties. A key element to the definition may be the use of force.¹ Situations of forced marriage may involve physical, emotional or financial duress, deception by family members, spouse or others, the use of force or threats or severe pressure.
4. The practices of forced and servile marriage are an abuse of human rights. A failure to prevent, address and respond to these practices is a failure to protect individuals (including children) from a range of crimes and abuses. It is also a failure to protect and support individual rights, specifically involving freedom and autonomy.

Invitation to comment

The Australian Government is seeking views on the options for possible reform that are outlined in Part 3, in particular:

Are additional legislative and non-legislative measures needed to provide:

- a) adequate deterrence against the practices of forced and servile marriage, and
- b) appropriate protection for victims of forced and servile marriage?

Any other information which may assist the Government to address the issues in relation to the practices of forced and servile marriage is welcome.

¹ For example, Section 63A of the *Forced Marriage (Civil Protection) Act 2007 (UK)*.

PART 2: BACKGROUND

Factors involved in the practices of forced and servile marriage

5. A forced and servile marriage is often a result of coercion by members of the victim's family. A family member who forces or attempts to force their child into marriage 'often justifies their behaviour as protecting their child, helping to build stronger families, and preserving cultural or religious traditions.'² Some key motives driving family members are to:

- control unwanted behaviour and sexuality
- prevent unsuitable relationships e.g. outside the ethnic, cultural, religious or caste group
- protect 'family honour'
- respond to peer group or family pressure
- attempt to strengthen family links
- achieve financial gain
- ensure land, property and wealth remain within the family
- protect perceived cultural and religious ideals
- ensure care for a child or adult with special needs when parents or existing carers are unable to fulfil that role
- assist claims for residence and citizenship, and
- fulfil long-standing family commitments.³

6. An arranged marriage is distinct from a forced marriage. In an arranged marriage, the families of both spouses play a dominant role in arranging the marriage, but the spouses have the right to accept the marriage arrangement or not.

7. Forced marriage is sometimes viewed as a religious custom, although no major religion condones this practice. For example, Christian, Hindu, Muslim and Sikh marriages all require full and free consent.⁴

Consequences for victims of forced and servile marriage

8. Forced and servile marriage places children and adults at risk. There are many harmful consequences associated with forced and servile marriage, including:

- the interruption or termination of education
- damage to career opportunities and a loss of economic independence
- emotional and physical abuse
- theft (e.g. of passport, money and belongings)
- unlawful imprisonment and restriction of freedom of movement and association
- abduction and kidnapping

² Foreign and Commonwealth Office London, *Young People and Vulnerable Adults Facing Forced Marriage, Practice Guidance for Social Workers*, March 2004, p 2.

³ HM Government, *Multi-agency practice guidelines: Handling cases of Forced Marriage*, p11.

⁴ Working Group on Forced Marriage, *A Choice by Right*, 2000, p 6.

- genital mutilation
- rape
- enforced pregnancy
- abortion, and
- murder and mutilation.⁵

9. Psychological damage and sexual and/or domestic violence are inherent in forced marriages.⁶ Forced marriage has many potential medical consequences, including early pregnancy and sexually transmitted diseases. Victims may suffer from psychological conditions such as eating disorders and depression.

10. In the case of child marriage, young girls enter into marriage without adequate information about sexual and reproductive health. They are often married to men who are older, more sexually experienced and they are not in a position to negotiate sexual relations. This often leads to sexually transmitted diseases, unwanted pregnancies, complications during pregnancy and birth, and resulting psychological problems.⁷

11. Victims of forced marriage often become estranged from their families as their movement and behaviour is controlled by their spouse.⁸ Further, victims who escape or threaten to escape a forced marriage often face isolation and estrangement from family.

Consequences of refusing to marry or seeking to leave

12. Evidence from the United Kingdom suggests that families of a victim are often unable to accept or understand why a victim would refuse to marry, or choose to leave a forced marriage. This situation often results in families becoming violent or threatening violence.⁹ Victims generally run away to protect themselves and are forced to live in refuges. Victims may live in fear of their own families, who may go to considerable lengths to find them and ensure their return to the spouse.¹⁰ Families may solicit the help of other members of the community to find the victim, or may involve the police by falsely accusing the victim of a crime, or by reporting the victim as a missing person.¹¹

⁵ International Family Law Journal, *Forced marriage: Guidance from the Law Society*, June 2004, p. 126.

⁶ Directorate General of Human Rights Council of Europe, *Forced marriages in Council of Europe member states*, 2005, p 31.

⁷ International Centre for Research on Women, *Too Young to Wed*, 2003, p.6-7.

⁸ Directorate General of Human Rights Council of Europe, *Forced marriages in Council of Europe member states*, 2005, p 31.

⁹ Foreign and Commonwealth Office, *Dealing with Cases of Forced Marriage, Guidance for Police Officers*, January 2005, p 12.

¹⁰ Foreign and Commonwealth Office London, *Young People and Vulnerable Adults Facing Forced Marriage, Practice Guidance for Social Workers*, March 2004, p 4.

¹¹ Foreign and Commonwealth Office, *Dealing with Cases of Forced Marriage, Guidance for Police Officers*, January 2005, p 5.

13. For some ethnic minority communities, maintaining the honour of the individual and their family is paramount. Shame will be brought to an individual and their family by a refusal to marry, by an accusation against a family member of committing a crime, or by approaching a statutory agency for help.¹² These acts may lead to social exclusion and harassment of the victim by their family and community.

14. Many victims who run away from their marriage or the threat of a marriage, have never lived away from home. For people from ethnic minority communities, this act of running away and leaving their family can be especially hard, as family often occupies a very important role in their life and personal identity.¹³

Forced and servile marriage in Australia

15. There is little information regarding the extent of forced and servile marriage in Australia. To date, the Australian Federal Police has received three separate reports of forced and servile marriage in 2010 and there have been two cases heard by the Courts and reported in the media recently. The Court cases are discussed below in paragraphs 91-92.

Australia's international obligations

16. Australia is under an international obligation to criminalise the practice of servile marriage as described by the Supplementary Convention (note: the term 'servile marriage' is not specifically used in the Supplementary Convention).

17. Article 1(c) of the Supplementary Convention prohibits "...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
- (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) the woman on the death of her husband is liable to be inherited by another person."

18. The Supplementary Convention also requires the criminalisation of assistance, conspiracy or an attempt in relation to this conduct.

¹² Foreign and Commonwealth Office, *Dealing with Cases of Forced Marriage, Guidance for Police Officers*, January 2005, p 6.

¹³ Foreign and Commonwealth Office London, *Young People and Vulnerable Adults Facing Forced Marriage, Practice Guidance for Social Workers*, March 2004, p 4.

19. Australia has implemented its obligations under the *International Convention to Suppress the Slave Trade and Slavery*¹⁴ through the slavery and sexual servitude offences in Division 270 of the *Criminal Code Act 1995* (Cth) (Criminal Code). These offences prohibit the exercise of powers attaching to the right of ownership and may apply in circumstances where a victim of a servile marriage is treated as a slave or is subjected to sexual servitude. However, these offences do not specifically prohibit the practice of servile marriage as outlined by the Supplementary Convention. Division 270 of the Criminal Code is discussed further below.

20. To implement its obligations under the *United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (Trafficking Protocol), and the *United Nations Convention on the Rights of the Child*, Australia has implemented trafficking offences within Division 271 of the Criminal Code. However, it has been argued that these offences do not expressly protect children or adults from being trafficked into forced or servile marriage.

21. Australia's obligations to ensure that marriages are entered into with the full and free consent of each spouse are consistent across several treaties and require effective and appropriate measures to be in place, which may include legislation but do not necessarily require a specific criminal offence. The applicable treaties are outlined in *Annexure 1*.

International responses

22. Through a range of civil and/or criminal measures, numerous countries have addressed the practices of forced and servile marriage.

23. The Council of Europe is an international organisation with 47 European member states. The Council supports its members to develop and implement integrated reforms across Europe in relation to political, economic, social, cultural and legal challenges. The results of a study into legislative and political initiatives in relation to forced marriages in member states were published in 2005.¹⁵

24. This study suggested a number of reforms including the need for greater public awareness and education about the practice of forced marriage and its cultural context. A number of initiatives for supporting victims were proposed including financial assistance. The study also proposed that a recommendation be made to governments to criminalise a specific offence of forced marriage, with penalties reflecting aggravated circumstances, and to make 18 years of age the minimum marriage age.

25. Most member countries have a range of criminal offences for conduct that may apply in the context of a forced marriage. For example, offences of rape, assault, kidnapping, abduction, false imprisonment, duress, and crimes against sexual freedom. In some of these countries, there is more specific legislation to cover the practice of forced marriage or the conduct causing a person into a forced marriage.

¹⁴ [1927] ATS 11 – entry into force for Australia 18 June 1927.

¹⁵ Directorate General of Human Rights, *Forced marriages in Council of Europe member states – A comparative study of legislation and political initiatives*, 2005.

26. Various international approaches to the issue of forced marriage are discussed below. In some countries, there is limited or no legislative protection for victims of a forced marriage.

Belgium

27. Forced marriages in Belgium are punishable by imprisonment from one month to two years or by a maximum fine of between EUR 500 and EUR 2,500. An attempted forced marriage is punishable by imprisonment from 15 days to one year or a maximum fine between EUR 250 and EUR 1,250.¹⁶

Denmark

28. The Danish Criminal Code includes an offence of unlawful coercion which prohibits the use of threats by a person to force another person to do something against their will. This offence would apply to marriage if threats were used to force a person into marriage against their will. The penalty for this offence ranges from a fine to a period of imprisonment not exceeding two years.¹⁷

Germany

29. Section 240 of the German Criminal Code includes an offence of coercion through force or threats. The practice of forced marriage would be captured by this law if the victim was unlawfully forced to marry through the use of violence or a threat of harm. An offence would be punishable by imprisonment from six months to five years.

Norway

30. Forced marriage is specifically prohibited in Norway. Subsection 222(2) of the Norwegian Penal Code prohibits forcing a person to enter into marriage, inciting a person to marry in another country, or agreeing to a marriage on behalf of a minor. Forcing a person to enter into marriage may be captured through conduct such as violence and threats, undue pressure or depriving a person of their freedom. Aiding and abetting is an offence with a penalty of up to six years imprisonment (the same penalty applies for primary offenders).¹⁸

France

31. The minimum age at which a woman can marry was raised from 15 years to 18 years in 2006 to be consistent with the age at which a man can marry. This measure was aimed at discouraging forced marriages, primarily within immigrant communities.¹⁹

¹⁶ Thomas, Cheryl, *Forced and early marriage: a focus on central and eastern Europe and former Soviet Union countries with selected laws from other countries*, United Nations Division for the Advancement of Women, 2009, p15.

¹⁷ The Danish Government, *The Government's Action Plan for 2003-2005 on Forced, Quasi-forced and Arranged Marriages*, 15 August 2003, p15.

¹⁸ Directorate General of Human Rights, *Forced marriages in Council of Europe member states – A comparative study of legislation and political initiatives*, 2005, p107.

¹⁹ Department of Justice Canada, *Research Report, Annotated Bibliography on Comparative and International Law Relating to Forced Marriage*, 2007, p23.

United Kingdom

32. There are no specific criminal offences of forced marriage within England, Wales or Scotland.

33. The *Forced Marriage (Civil Protection) Act 2007* inserted a new part into the *Family Law Act 1996* to create a Forced Marriage Protection Order. This enables the family court to make an order to prevent a forced marriage from taking place, or in the case where a marriage has already occurred, to make an order to protect the victim and help remove them from the situation. A protection order can contain any terms the court considers appropriate, including prohibitions, restrictions or specific requirements, and can relate to extraterritorial conduct.²⁰

34. The victim, a relevant third party, or any other person who is given leave to do so, may apply for a Protection Order. Powers of arrest can be attached if the respondent has used or threatened violence.

35. The British Government established the Forced Marriage Unit in 2005, which is dedicated to dealing with forced marriage. Overseas, the unit works with embassy staff to rescue victims who may have been held captive, raped, or forced into a marriage or to have an abortion.

36. In the UK, the Forced Marriage Unit assists actual and potential victims of forced marriage, as well as professionals working in the social, educational and health sectors. In 2008, over 1,600 incidents of suspected forced marriage were reported to the Forced Marriage Unit.²¹

37. The Forced Marriage Unit provides the following services and assistance to victims:

- repatriation of overseas victims
- supplies the contacts of solicitors and legal aid services who specialise in providing assistance to victims of forced marriage
- operates a public helpline that provides advice on accessing health care, financial assistance, social services, and returning to education
- provides advice on personal safety, and
- runs an ongoing outreach programme, targeting frontline practitioners such as police, healthcare and social workers, that raises awareness of the needs of victims.²²

38. The rationale is that by using civil rather than criminal provisions, victims will be encouraged to seek protection because it does not involve reporting family members to the police.

²⁰ Foreign and Commonwealth Home Office, *Multi-agency practice guidelines: Handling cases of Forced Marriage*, p 36.

²¹ *Ibid*, p 10.

²² *Ibid*, p 18.

Kyrgyz Republic

39. Article 155 of the Kyrgyz Criminal Code prohibits the ‘coercion of women to enter into marriage or to continue marital cohabitation and the abduction of a woman to enter into marriage against her will...’. Punishment for this offence is by fine or imprisonment.²³

New Zealand

40. The *Crimes Act 1961* contains an offence of ‘dealing in slaves’ which captures the practice of servile marriage (section 98). It is an offence for a person to give a woman into marriage or to transfer a woman to another person without her consent, for a gain or reward. It is also an offence to inherit a woman on the death of her husband.

41. The penalty for these offences is imprisonment not exceeding 14 years.

Existing legislative arrangements in Australia

42. Current Commonwealth slavery and people trafficking offences, contained in Divisions 270 and 271 of the Criminal Code may cover some situations of forced and servile marriage.

Slavery offences

43. Subjecting a person to a situation of forced or servile marriage may constitute a slavery offence under subsection 270.3(1) of the Criminal Code. The offence captures conduct where a person, whether within or outside Australia, intentionally possesses a slave or exercises over another person (a slave) any powers attaching to the right of ownership.

44. Section 270.1 of the Criminal Code defines ‘slavery’ as “the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including where such a condition results from a debt or contract made by the person”.

45. It is arguable whether servile marriage as defined in the Supplementary Convention would constitute the exercise of a “power attaching to the right of ownership” for the purposes of the slavery offences. Servile marriage could be covered by the definition of slavery if it involves the sale of a woman by her parents, guardian, family etc, whether by the payment of money or some other consideration. The payment of consideration, either in money or in kind, coupled with the lack of a right to refuse to enter into the marriage, would indicate that a power attaching to the right of ownership is being exercised over the victim. The payment of a dowry to a woman’s parents, guardian, family, would not amount to the exercise of a right of ownership provided the proposed marriage is freely consented to by the woman and it is clear she also has the right to refuse that marriage.

²³ United Nations, Division for the Advancement of Women, Report of the expert group meeting, *Good practices in legislation on ‘harmful practices’ against women*, 2009, p 24.

46. There is a risk that the existence of certain specific offences for practices similar to slavery (such as debt bondage offences in section 271.8 of the Criminal Code) implies, as a matter of statutory construction, that the absence of a similarly specific offence of servile marriage means that servile marriage is not intended to be covered by the current offences.

Decision of Queen v Wei Tang

47. The High Court decision of *Queen v Wei Tang*²⁴ confirmed a broad definition of slavery. The decision ensured a charge of slavery could be proven even if the victim retains some degree of personal autonomy in terms of their movement. This means that slavery may be established by more subtle forms of control and possession than physical force and threats. The provisions under Division 270 of the Criminal Code may therefore cover some instances of forced and servile marriage.

People trafficking offences

48. Situations of forced or servile marriage which involve slavery (as defined in s270.1 of the Criminal Code), sexual servitude or forced labour may be covered by current trafficking in persons offences. For example, subsection 271.2(1B) provides for an offence where a person organises or facilitates the entry or the receipt of another person into Australia and is reckless as to whether this other person will be exploited after entry or receipt.

49. The definition of ‘exploitation’ in the Criminal Code includes situations where the exploiter’s conduct causes the victim to enter into slavery, forced labour or sexual servitude, and where the conduct causes an organ of the victim to be removed. The definition of ‘sexual servitude’ is the condition of a person who is forced to provide sexual services. ‘Sexual service’ is limited to the commercial use or display of the body of the person for the sexual gratification of others. In order to fall within this aspect of the definition of exploitation, a situation of forced or servile marriage would require the involvement of commercial sexual services.

50. ‘Forced labour’ is defined in subsection 73.2(3) of the Criminal Code to mean the condition of a person who provides labour or services (other than sexual services) and who is not free to cease providing this labour or services or is not free to leave the place where the person provides labour or services. In order for forced or servile marriage to satisfy this definition, the prosecution would have to show that the victim provides labour or services and is not free to cease providing those services.

51. The relevant offences in the Criminal Code are summarised in *Annexure 2*.

²⁴ *The Queen v Wei Tang* [2008] HCA 39.

Offences under the Marriage Act 1961 (Cth)

52. There are provisions within the *Marriage Act 1961* (Cth) that could be relevant to victims of forced and servile marriage.

53. By definition, the victim of a forced or servile marriage has not consented to the marriage, and therefore the marriage (if performed in Australia) would be void under the Marriage Act.

54. Under section 23B of the Marriage Act, a marriage may be void if the consent of either of the parties was not real i.e. consent was obtained by duress or fraud, the party was mistaken about the identity of the other party or the nature of the ceremony performed, or the party was mentally incapable of understanding the nature and effect of the marriage ceremony. The marriage will also be void if either of the parties was not of marriageable age.

55. It is an offence for a marriage celebrant to solemnise a marriage if the celebrant has reason to believe there is a legal impediment to the marriage, or if the celebrant has reason to believe that the marriage would be void (section 100 of the Marriage Act). The maximum penalty is 6 months imprisonment/\$500 fine. However, there is no formal procedure for a marriage celebrant to satisfy the requirement that a couple is not entering a void marriage (i.e. to establish whether the consent is real or not real). Nor are there offences specifically relating to lack of consent, either for the parties or the marriage celebrant.

56. It is a criminal offence under section 95 of the Marriage Act for a person to go through a marriage ceremony with a person who is not of marriageable age (that is, 18 years of age), unless there is an exceptional circumstance as defined in the Act. For example, a court order may be made under section 12 to allow the marriage of a person aged between 16 and 18 years of age with the consent of their parents. An offence against section 95 attracts a maximum penalty of up to 5 years imprisonment.

57. The application of Chapter Two of the Criminal Code would extend criminal responsibility to any person who for example, aided or abetted the commission of the offence.

58. The Marriage Act only has application to marriages under Australian law (i.e. marriages that take place within Australia). The Marriage Act has no application when an Australian is married overseas. However, a marriage that takes place overseas may be recognised when a couple move to Australia. If one of the parties to the marriage was of unmarriageable age or did not consent freely, the marriage would not be recognised under Australian law.

Other offences – State and Territory law

59. A victim of a forced or servile marriage may be subject to specific conduct that would be covered by an existing offence under State and Territory law. For example, a forced or servile marriage may involve domestic violence (eg assault, physical and emotional abuse), rape, abduction or kidnapping. Physical restrictions may also be imposed on the victim that may amount to an offence of false imprisonment. Situations may also include the confiscation, destruction or theft of a passport and other belongings of the victim.

60. It is an offence in Victoria, South Australia and Tasmania to take away or detain a person against their will by force with the intention that the victim should marry or have sexual intercourse with a person. In South Australia, the offence attracts a maximum penalty of 14 years imprisonment for a basic offence, and 18 years imprisonment for an aggravated offence. The Victorian and Tasmanian offences attract a maximum penalty of 10 and 21 years imprisonment respectively.

61. Most jurisdictions have an offence of sexual servitude, to capture people who compel another person (i.e. by force or threats) to provide sexual services. Not all jurisdictions define sexual services as being commercial sexual services, which provides a broader scope than at Commonwealth level. Most of these offences carry a maximum penalty of 15 years imprisonment, with a higher penalty for offences relating to children.

PART 3: OPTIONS FOR REFORM

Legislation – new criminal offences

62. While exploitation or criminal acts within a forced or servile marriage may be addressed by current State, Territory and Commonwealth laws, there is a risk that these laws do not fully address the practices, particularly as contemplated by the Supplementary Convention.

63. A specific offence of forced and servile marriage could be created to criminalise the conduct of a person who causes a second person (the victim) to enter into a marriage without the victim's full and free consent.

64. Forced and servile marriage could be defined within the legislation to ensure consistency with Australia's international law obligations. Forced marriage would be defined as any marriage entered into without the full and free consent of both parties.

65. The definition of servile marriage could be based on the definition in Article 1(c) of the Supplementary Convention, although it would not be limited to a marriage between adults. The definition could capture any practice whereby:

- a person, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to his or her parents, guardian, family or any other person or group, or

- the spouse of a person, or the spouse's family, has the right to transfer their spouse to another person for value received or otherwise, or
- a person on the death of their spouse is liable to be inherited by another person.

66. An offence of forced and servile marriage would require the individual to have had an *intention* to bring about a marriage without the full and free consent of the victim. An individual could also be prosecuted if they *knew*, or were *reckless* as to whether the marriage was to occur without the full and free consent of the victim. This would capture those who 'aid and abet' the contracting of such marriages, and those who profit from procuring and trafficking individuals into such marriages. A person involved in the marriage (for example, a marriage celebrant) who is unaware that consent was given under coercion, would not be guilty of an offence.

67. The offence could capture circumstances where the consent of the victim is obtained through physical forms of coercion as well as non physical forms of coercion including a threat of force, duress, deception or fraud, and circumstances where the victim is incapable of giving full and free consent due to any incapacity (natural or induced).

68. An individual could be found guilty of an offence even if the marriage had not taken place.

69. An *aggravated* offence could also be inserted into the Criminal Code for conduct in relation to a victim under 18 years of age. The offence would apply both where the individual intended to commit, or had knowledge or was reckless as to committing, the offence against a person under that age.

70. In framing an offence, consideration would need to be given to an appropriate maximum penalty. Forced and servile marriage covers a wide range of conduct and abuses. It can involve persistent sexual abuse, slavery like situations, and the abuse and exploitation of a child. A high maximum penalty is necessary to cover the range of serious conduct that could be involved. As such the proposed forced and servile marriage offence could carry a maximum penalty of 15 years imprisonment, while the aggravated forced and servile marriage offence could carry a maximum penalty of 20 years imprisonment. This would provide consistency with the penalty for the sexual servitude offences under section 270.6 of the Criminal Code.

71. The offence could capture the following situations:

- a. the offence occurs in Australia
- b. the offence is committed against an Australian citizen or resident outside Australia, or
- c. the offence is perpetrated by an Australian citizen or resident outside Australia.

Legislation – amendment to definition of exploitation in Criminal Code

72. The definition of ‘exploitation’ contained in the ‘trafficking in person’ offences in the Criminal Code currently captures conduct that constitutes slavery, forced labour or sexual servitude (which is limited to sexual exploitation for a commercial purpose).

73. The definition does not include debt bondage, serfdom, or servile marriage yet all of these practices are defined in Article 1 of the Supplementary Convention as ‘institutions and practices similar to slavery’. As the Trafficking Protocol defines exploitation to include practices similar to slavery, it could be reasoned that all of these forms of conduct should be captured as offences in the Criminal Code, to align with the international definition of trafficking in the Trafficking Protocol.²⁵

74. Whilst forced marriage could be considered a form of sexual servitude (which would be captured under the definition of exploitation as a trafficking offence), a situation involving this practice may not always be captured under the Criminal Code.

75. Given there is a separate offence of debt bondage in the Criminal Code (section 271.8), it could be argued that all forms of exploitation covered by the Trafficking Protocol should be captured in this way.

76. In conjunction or as an alternative, the definition of exploitation could also be amended to include ‘forced and servile marriage’.²⁶

Legislation – amendment to the Marriage Act

77. The Marriage Act could be amended to include an offence for a person to cause a second person (the victim) to enter into a marriage without the victim’s full and free consent. This could be in place of a specific offence within the Criminal Code, however would be limited to the application of the Marriage Act.

78. This offence could extend to any person who was knowingly involved, including a spouse, parent, friend, or other facilitator.

79. A further offence could capture a person who solemnises a marriage or purports to solemnise a marriage with knowledge or recklessness that one or both parties do not provide full and free consent to the marriage.

80. These offences would apply to marriages under Australian law.

²⁵ Elizabeth Broderick, *Beyond Wei Tang: Do Australia’s human trafficking laws fully reflect Australia’s international human rights obligations? Speech to the Workshop on Legal and Criminal Justice Responses to Trafficking in Persons in Australia: Obstacles, Opportunities and Best practice*, November 2009.

²⁶ Recommendation 8 of the Senate Legal and Constitutional Committee Report on the Criminal Code Amendment (Trafficking in Persons Offences) Bill 2004 [2005] of March 2005 recommended including ‘servile marriage’ in the definition of exploitation.

Arguments for implementing criminal measures

81. Criminalising the practice of servile marriage would be consistent with the Supplementary Convention in relation to servile marriage (the practices described under Article 1(c) of the Supplementary Convention).
82. Criminalising the practice of forced marriage would be consistent with Australia's obligations in relation to forced marriage, which are consistent across several treaties and require Australia to take effective and appropriate measures against this practice.
83. Creating specific forced and servile marriage offences would send a clear message to the community that this type of conduct is prohibited in Australia and would reflect the seriousness of the issue and the harm that may be caused. This may provide a deterrent effect, although would be contingent on a high level of awareness of, and public support for, the new offences.
84. Criminalising the behaviour may also encourage and provide the confidence for victims to speak out and seek help from authorities. It may also lead to authorities having a better understanding of the seriousness of a victim's claims of being forced into marriage.

Arguments against implementing criminal measures

85. It is important to consider the possible adverse effects on victims and their families if specific criminal measures were to be introduced. In instances where a victim's family have facilitated and supported the marriage, there is a significant risk that the imposition of a criminal sanction on a perpetrator (which could include a parent for example), would result in increased isolation of a victim from their family and community.
86. Further, it may be difficult to bring a successful prosecution because of the potential difficulties in collecting evidence, (particularly where conduct takes place outside Australia), and the reluctance of victims to testify against family members.
87. To avoid prosecution, there may be an increase in the number of victims being taken overseas by their family members. However, an offence with an extended geographical jurisdiction would cover conduct occurring outside of Australia.
88. The enforcement of criminal measures could be resource intensive. Some would argue that new criminal measures are not needed as the sanctions already in place provide adequate protection, and it would be more beneficial to apply resources to other types of measures.

Legislation – civil measures

89. Civil measures are also available for addressing the issue of forced and servile marriage. As outlined above, the UK *Forced Marriage (Civil Protection) Act 2007* inserted a new Part into the *Family Law Act 1996* to create Forced Marriage Protection Orders to protect victims or those at risk of becoming a victim of forced marriage.

90. In Australia, civil remedies could be provided for within existing legislation. The possible legislative gaps can be adduced by reference to two recent judgments.

91. In August 2010, the Family Court extended an interim injunction preventing a 14 year old girl from being taken out of Australia for an arranged marriage, prior to her eighteenth birthday.²⁷ The Court relied on section 68B of the *Family Law Act 1975* (Cth) to make this order. The Court also placed the girl on the Airport Watch list, and ordered that her passport be retained by the Court registry until she turns 18 years of age.

92. In May 2010, the Federal Magistrates Court made an Order under section 68B of the Family Law Act to protect a 17 year old girl from being taken by her mother to Lebanon against her will, to be married.²⁸ The girl was placed on the Airport Watch List and her family was restrained through an injunction from assaulting, threatening, harassing or intimidating the girl.

93. The protections provided by the Court through the Family Law Act are only available to persons under the age of 18 years. If the individuals were 18 years of age, the measures taken under the Family Law Act would not have been available. There are currently no injunctive measures in the Marriage Act to prevent a marriage occurring.

94. Protection orders could be made available through the Marriage Act to protect a person at risk of a forced or servile marriage, or who has already been forced into marriage. An order could contain any prohibitions, restrictions, requirements or terms that may be necessary to protect the victim.

95. The benefit of a protection order is that it would provide a victim with protection without causing the victim to be completely alienated from family members. This remedy may also encourage a victim to seek protection because they will not need to report a family member to the police.

96. Court ordered mediation and family counselling could also be useful to assist victims prior to, or following, a forced marriage, although these remedies could be very dangerous for victims. In the United Kingdom, there have been cases where individuals have been murdered by their families during mediation.²⁹ Mediation or family meetings could also lead to undue pressure being placed on an individual to return home.³⁰

²⁷ *Department of Human Services & Brouker and Anor* [2010] FamCA 742.

²⁸ *Kandal & Khyatt & Ors* [2010] FMCAfam 508.

²⁹ Foreign and Commonwealth Office, *Dealing with Cases of Forced Marriage, Guidance for Police Officers*, January 2005, p 12.

³⁰ *Ibid*, p 12.

97. Currently it is possible for a court to order an offender who has been found guilty of a Commonwealth offence, to provide reparation to the victim, by way of a payment for the loss they have suffered. However, this would not necessarily be appropriate when the offender is a family member of the victim. It is important that there are other mechanisms in place to provide financial support to the victim, particularly if they do not have family support networks in place following the marriage, and may face isolation, homelessness or unemployment.

98. The UK experience has shown that civil remedies may be effective in some circumstances, although protection orders may still result in the estrangement of a victim from their family.³¹ This is usually a result of threats of violence by the family and their inability to accept the victim's decision.

Non-legislative measures

99. It may be useful to implement non-legislative measures in conjunction with legislative measures to comprehensively address the practices of forced and servile marriage. Non-legislative measures could include:

- information and education to inform individuals of their rights, responsibilities and the range of support services available
- education, training and awareness raising for professionals who may come into contact with individuals affected by forced or servile marriage and who may be able to inform and educate individuals about the issues (for example, marriage celebrants, teachers, medical practitioners, youth workers, women's groups, law enforcement agencies, prosecutors, counsellors, mediators, immigration and embassy officials), and
- engagement between government, the community, support groups and organisations to discuss relevant issues and propose strategies for addressing these practices.

100. The provision of information and education to the public may assist in changing attitudes, influencing behaviour and raising general awareness about the seriousness of the practices of forced and servile marriage and its potential for harm. This could be done through online and physical resources. A key objective would be to provide information to individuals about their legal rights and responsibilities in relation to marriage. Information would need to be appropriately tailored to ensure individuals from a range of cultural backgrounds, and with possible language barriers, are able to access the information and know how to obtain further assistance if needed.

³¹ Foreign and Commonwealth Office London, *Young People and Vulnerable Adults Facing Forced Marriage, Practice Guidance for Social Workers*, March 2004, p 4.

101. Mediation outside the court may be an effective means to resolve conflict and reconcile families. However, it should only be conducted if all parties to the mediation agree to participate, if it would not place the victim at further risk of harm, and if it is conducted by highly skilled staff. Victims should be adequately supported during the mediation process to ensure their safety and that they are able to participate in the process free from intimidation and fear. Cultural considerations should be taken into account when determining whether to proceed with a mediation process, and if so, what specific measures may be needed to provide a culturally appropriate service.

102. Victims of forced or servile marriage may require a range of support including housing or refuge assistance, legal advice, counselling, financial assistance, potential change of identity, assistance returning to education, and in some cases assistance to return to Australia. Individuals may also require assistance with language or other cultural barriers. A high level of cooperation between a range of agencies and organisations would be needed to ensure victims are able to access timely and coordinated assistance.

103. Although the Forced Marriage Unit operating in the UK could be a useful model to consider further, the resources required to establish such a body in Australia could well be disproportionate given the low number of reported cases of forced and servile marriage in Australia.

Arguments against implementing non-legislative measures

104. The implementation of various non-legislative measures outlined above could require significant funding and the limited evidence available may not indicate that the problem in Australia necessitates dedicated resources. However, there may be scope to better utilise existing mechanisms for providing information and training, and to build cross agency cooperation.

ANNEXURE 1

Relevant treaties relating to the practice of forced marriage

105. Australia is a party to a number of treaties that contain obligations relevant to forced marriage (understood to be marriage without the full and free consent of both parties).

106. Article 23(3) of the *International Covenant on Civil and Political Rights*³² (ICCPR) states ‘[n]o marriage shall be entered into without the free and full consent of the intending spouses.’ This obligation need not necessarily be fulfilled by a criminal prohibition – Article 2(2) merely requires the adoption of ‘such laws or other measures which may be necessary to give effect to the rights recognized in the present Covenant.’ On the other hand, Article 2(3) requires an effective remedy for any violation, so if the current laws against marriage without consent do not provide an unwilling spouse with such a remedy, further measures may be required.

107. Similarly, Article 16(1)(b) of the *Convention on the Elimination of All Forms of Discrimination Against Women*³³ (CEDAW) states that both men and women must have ‘[t]he same right freely to choose a spouse and to enter into marriage only with their free and full consent.’ The concrete obligations under CEDAW are to take all appropriate measures to eliminate discrimination against women in the specified areas, ‘including sanctions where appropriate’ (Article 2(b)).

108. Article 10(1) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)³⁴ constitutes an obligation to protect families, but also provides that ‘[m]arriage must be entered into with the free consent of the intending spouses.’ The relevant obligation under Article 2(1) of ICESCR is to ‘take steps, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.’

109. Article 5(d)(iv) of the *Convention on the Elimination of All Forms of Racial Discrimination*³⁵ (CERD) is also relevant. Article 5 obliges States parties, of which Australia is one, to:

...prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

...

(d) Other civil rights, in particular:

...

³² [1980] ATS 23 – entry into force for Australia 13 August 1980.

³³ [1983] ATS 9 – entry into force for Australia 27 August 1983.

³⁴ [1976] ATS 5 – entry into force for Australia 10 March 1976.

³⁵ [1975] ATS 40 – entry into force for Australia 30 October 1975.

(iv) The right to marriage and choice of spouse....

110. Article 2(1)(d) of CERD describes the form of this obligation, which involves taking ‘all appropriate means, including legislation as required by circumstances.’

111. The *Hague Convention on Celebration and Recognition of the Validity of Marriages* provides that a Contracting State may refuse to recognise the validity of a marriage where, at the time of the marriage, under the law of that State, one of the spouses did not freely consent to the marriage.³⁶

112. These obligations are supported by Article 16 of the *Universal Declaration of Human Rights* adopted by the United Nations General Assembly in 1948, which states that “marriage shall be entered into only with the full and free consent of the intending spouses.”

³⁶ [1991] ATS 16 - entry into force for Australia 1 May 1991, art 11(5).

ANNEXURE 2

Summary of relevant offences in the Criminal Code 1995 (Cth)

Division 270 - Slavery, sexual servitude and deceptive recruiting		
Section	Offence	Maximum Penalty
Definition of 'slavery'	The condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including where such a condition results from a debt or contract made by the person	
270.3(1)	Possess or exercise right of control over a slave	25 years
270.3(2)	Commercial transactions involving a slave	17 years
270.6(1)	Causing another person to enter into or remain in sexual servitude	15/20 years (aggravated offence*)
270.6(2)	Conducting a business involving the sexual servitude of another	15/20 years (aggravated offence*)
270.7(1)	Intentionally inducing another person to enter into an engagement where the other person is deceived about providing sexual services, the nature of the sexual services to be provided, extent to which the person will be free to leave or cease providing sexual services, involvement of exploitation or debt bondage or confiscation of travel or identity documents	7/9 years (aggravated offence*)
Division 271 - Trafficking in persons and debt bondage		
Section	Offence	Maximum Penalty
Definition of 'Exploitation'	The exploiter's conduct causes the victim to enter into slavery, forced labour or sexual servitude, or causes a victim's organ to be removed	
271.2(1), (1A), (1B), (1C)	Trafficking offences involving the use of force or threats, or recklessness as to whether the trafficked person will be exploited	12/20 years (aggravated offence**)
271.2(2), (2A)	Trafficking offences where trafficked person	12/20 years

	is deceived about providing sexual services or involvement of exploitation or debt bondage or confiscation of travel or identity documents	(aggravated offence**)
271.2(2B), (2C)	Trafficking offences where there is an arrangement for the trafficked person to provide sexual services but is deceived about the nature of those sexual services, freedom to leave or cease providing sexual services, or any debt owed in connection with the arrangement	12/20 years (aggravated offence**)
271.3	Aggravated trafficking offences where the trafficked person will be exploited; or subject to cruel, inhuman or degrading treatment; or subject to conduct that gives rise to a danger of death or serious harm	20 years
271.4(1), (2)	Trafficking in children offences where there is intention for or recklessness as to whether the child will be used to provide sexual services or be otherwise exploited	25 years
271.5(1), (2)	Domestic trafficking offences involving the use of force or threats, or recklessness as to whether the trafficked person will be exploited	12/20 years (aggravated offence**)
271.5 (2A)	Domestic trafficking offences where trafficked person is deceived about providing sexual services or involvement of exploitation or debt bondage or confiscation of travel or identity documents	12/20 years (aggravated offence**)
271.5 (2B)	Domestic trafficking offences where there is an arrangement for the trafficked person to provide sexual services but is deceived about the nature of those sexual services, freedom to leave or cease providing sexual services, or any debt owed in connection with the arrangement	12/20 years (aggravated offence**)
271.8(1)	Intentionally causing another person to enter into debt bondage	12 months/2 years (aggravated offence*)

**aggravated offences refer to an offence committed against a person under 18 years*

***aggravated offences refer to an offence where the offender intended the victim be exploited, or subjected to cruel, unhuman or degrading treatment or the offender is reckless as to the danger of death or serious harm to the victim.*