



The practice of dowry and the incidence of dowry abuse in Australia

Submission to the Senate Legal and Constitutional
Affairs References Committee

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Anti-Slavery Australia welcomes the opportunity to provide this submission to the Senate Legal and Constitutional Affairs Committee's inquiry into the practice of dowry and the incidence of dowry abuse in Australia.

Anti-Slavery Australia is the only specialist legal, research and policy centre in Australia dedicated to the abolition of slavery, human trafficking and slavery-like practices such as forced marriage and forced labour. Anti-Slavery Australia is part of the Faculty of Law at the University of Technology Sydney.

Anti-Slavery Australia provides access to comprehensive legal advice, representation and assistance to people who have experienced trafficking or slavery in Australia, including advice about immigration, citizenship, human rights, employment law, family law, criminal law, and victims' compensation.

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Endorsements

Domestic Violence Victoria (DV Vic) and the Australian Catholic Religious Against Trafficking in Humans (ACRATH) fully endorse this submission to the Inquiry.

Jennifer Burn, Director, Anti-Slavery Australia, University of Technology Sydney.

RECOMMENDATIONS

In addressing the terms of reference, Anti-Slavery Australia makes the following recommendations:

Data monitoring

1. That the Commonwealth Government enters into a consultation process with government agencies and community organisations on the practice of dowry and dowry abuse in order to:
 - (a) establish a clear evidence base on the availability of existing legal protections, and
 - (b) make recommendations about any necessary amendments to ensure that those who are at risk of, or experiencing, dowry abuse have access to protection.
2. That the Commonwealth Government strengthen governance of data collection practices and standards by implementing a system to capture and measure the extent and incidence of all forms of family violence including dowry abuse in Australia. For this system, we suggest that relevant statistics and data be collected from legal, health, community, migration and justice systems on the following:
 - (a) reporting rates for instances of dowry abuse and the nature of that abuse;
 - (b) demographics, including the migration status of victims of dowry abuse and their dependents;
 - (c) details of the perpetrators of dowry abuse, including the migration status of perpetrators and their relationship to the victims of dowry abuse; and
 - (d) the number of affected women and dependents presenting to health services as a result of violence arising from dowry abuse.

Research

3. That the Commonwealth Government commissions research to identify and document dowry abuse in the Australian context and the connection between dowry abuse, other forms of family violence and the more extreme forms of exploitation as set out in divisions 270 and 271 of the *Criminal Code Act 1995* (Cth).

Protecting victims of dowry abuse

4. That the Commonwealth Government recognises dowry abuse as a form of family violence and draws on existing frameworks within the broader national agenda to reduce violence against women and their children to address the practice of dowry abuse.

5. That the Commonwealth Government ensure that those who are forced to marry their partner or experience family violence from their partner and/or their partner's family members are protected through the Family Violence Provisions in the *Migration Regulations 1994* (Cth).
 - (a) That the Commonwealth Government amend the Family Violence Provisions in division 1.5 of the *Migration Regulations 1994* (Cth) to ensure that the regulatory framework is consistent with the policy intention to protect women (or men) in family relationships within the migration context.
6. That the Commonwealth Government establish dialogue with the Australian States and Territories to harmonise existing legislation providing for intervention/violence orders to recognise dowry abuse as an act of family violence or economic abuse.
7. That all levels of government in Australia, engage with stakeholders to fund and develop ongoing education and awareness raising campaigns about family violence, including dowry abuse, in conjunction with the development of further training of frontline officers.
 - (a) That the Commonwealth Government include dowry abuse as a possible indicator of exploitation for the purposes of divisions 270 and 271 of the *Criminal Code Act 1995* (Cth) and ensure that this is included in any training programs.
8. That the Commonwealth Government:
 - (a) consider developing guidance material under the *Family Law Act 1975* (Cth) to specifically address dowry payments in the context of making orders about property, and
 - (b) consider the appropriateness of anti-suit injunctions that seek to restrain action under legislation in other jurisdictions concerning dowry abuse.

1. DOWRY ABUSE

1.1. What is dowry?

'Dowry' is a cultural practice referring to money, property or gifts typically transferred by a woman's family to her husband upon marriage.¹ The payment of dowry is common in the Indian, South East Asian, Chinese, African and Middle-Eastern communities.² Dowry traditions can differ from country to country and culture to culture. The total value of the dowry can be a significant amount that is multiple times the annual income of the family of a bride or the groom.³

Anti-Slavery Australia (**ASA**) has been assisted by the Indian (sub-cont) Crisis and Support Agency's (**ICSA**) explanation of dowry, namely that:

- (a) a dowry is distinct from a wedding gift, in purpose and function;
- (b) bestowing a dowry can be intended to ensure that the family receiving the dowry will take care of their new family member, and is given in the belief that the marriage will be enduring;
- (c) the nature and value of a dowry can vary from family to family, and incurring debt through providing a dowry is not uncommon;
- (d) families may begin paying the dowry from the moment the marriage's arrangement is assured (sometimes called a 'rokka'), and can be made during ceremonial events prior to the wedding, on the day of the wedding or after; and
- (e) dowry payments can also be made throughout the marriage's duration, without a defined endpoint; requests for dowry can recur on notable events such as a pregnancy, a child's birth, during cultural festivals, and other marriages in the family. Requests for dowry may also be made on the grounds of financial hardship.⁴

Generally, the African tradition of dowry takes a different form. As the Australasian Centre for Human Rights and Health (**ACHRH**) summarises in its response to the Australian Law Reform Commission's issues paper 48 at page 7:

The man pays bride-price also known as Lobola to her family before the marriage. The price can be negotiated beforehand and depends on her education, and other characteristics. Unlike the Indian custom, in the African tradition the bride price does not escalate into ongoing coercive demands after the marriage. African dowry is paid in cows or \$1000 per cow to families back in Africa, usually countries from the horn of

¹ Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 5, 113. However, we note that in the Muslim faith, dowry (called Mahar or Dower) is paid in the marriage by the groom to the wife: see Australian Centre for Human Rights, Submission No 168 to Royal Commission into Family Violence, Parliament of Victoria, *Royal Commission into Family Violence*, 10 May 2015, 10.

² Australian Centre for Human Rights, Submission No 168 to Royal Commission into Family Violence, Parliament of Victoria, *Royal Commission into Family Violence*, 10 May 2015.

³ Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 5, 113.

⁴ Kittu Randhawa, ICSA, personal communication, August 2018.

Africa, paid to the parents here or in Africa. The amount is negotiated between the two parties and can be anything up to \$100,000 or more.

There is little research or evidence suggesting that the practice of dowry in and of itself is harmful and it is important to distinguish the practice of giving dowry and the abuse of this practice. While the use of dowry in itself is not a form of abuse, there is a point where the practice may become associated with coercive or abusive practices.⁵

1.2. What is dowry abuse?

The United Nations Division for the Advancement of Women defines dowry-related violence or harassment as ‘any act of violence or harassment associated with the giving or receiving of dowry at any time before, during or after the marriage’.⁶

The Victorian Royal Commission into Family Violence (**VRCFV**) was commissioned by the Victorian Government in February 2015, and delivered its report in March 2016.⁷ The VRCFV heard that the misuse of dowry is a substantial problem in Australian society and that it can be linked to significant emotional and physical abuse.⁸ Dowry may be associated with gender based inequality within communities.⁹ In such circumstances, a bride’s family may feel compelled to meet dowry demands to ensure their daughter’s welfare and happiness within her in-laws family.¹⁰

Dowry abuse commonly involves claims by a groom or his family that dowry was not paid and/or coercive and escalating demands for further money or gifts from a bride and her extended family.¹¹ In some circumstances, these demands are violent, using battery, marital rape, acid attacks, wife burning, starvation, deprivation of clothing, evictions, and false imprisonment.¹² Violence may also be disguised as suicides or accidents, such as stove or kerosene disasters, to burn or kill women for failing to meet dowry demands.¹³

The person subject to dowry abuse may experience severe physical, sexual, emotional and psychological abuse which may result in her death.¹⁴ Dowry abuse

⁵ Wyndham Legal Service, Submission No 83 to Royal Commission into Family Violence, Parliament of Victoria, Royal Commission into Family Violence, 2015, 35.

⁶ United Nations Division for the Advancement of Women, ‘*Good Practices in Legislation on “Harmful Practices” against Women*’, 26 – 29 May 2009.

⁷ Victoria, Royal Commission into Family Violence, Report and Recommendations (2016) Summary and Recommendations, 1.

⁸ Australasian Centre for Human Rights and Health, Submission No 168 to Royal Commission into Family Violence, Parliament of Victoria, Royal Commission into Family Violence, 10 May 2015, 3.

⁹ Ibid.

¹⁰ Ibid 10.

¹¹ Wyndham Legal Service, Submission No 83 to Royal Commission into Family Violence, Parliament of Victoria, Royal Commission into Family Violence, 2015, 12.

¹² Family violence and culturally diverse women (2018) Better Health Channel <<https://www.betterhealth.vic.gov.au/health/HealthyLiving/Family-violence-and-culturally-diversewomen?viewAsPdf=true>>.

¹³ *Dowry Related Violence* (2010) The Advocates for Human Rights <http://www.stopvaw.org/dowry-related_violence>.

¹⁴ L Davies, *Letter: Stopping dowry related abuse and violence* (26 April 2018) White Ribbon Australia

includes physical abuse as well as emotional and economic abuse, stalking and harassment, and can be perpetrated by a partner, or other members of the partner's family.¹⁵ Dowry deaths can occur when a young woman is murdered or driven to commit suicide by 'continuous harassment and torture by the husband and in-laws in an effort to extort an increased dowry'.¹⁶

In its submissions to the VRCFV, the ACHRH observed that:

... Thus marriage in certain ethnic communities is conducted as a business transactions where the women come to be viewed as "commodities". This sows the seed of gender based inequality from day one of the marriage. Irrespective whether the dowry is given to the groom or given by the groom it is the young bride who suffers emotional abuse and physical violence; either because he did not get enough dowry; or because he was aggrieved for having to give "too much dowry". To add to the problem the Australian permanent residency status is being used as a bargaining tool to negotiate a higher dowry price where the marriage is arranged between Australian and non-Australian residents.¹⁷

During ACHRH's National Anti-Dowry Summit in Melbourne in December 2016, two prominent African leaders spoke of the harm caused by a 'sense of entitlement and ownership over the wife conferred by the payment of a bride-price. The woman is unable to leave her husband as she has been "paid for."¹⁸

The impact of dowry abuse is significant, with victims facing serious mental health impacts from repeated emotional and physical trauma inflicted by a husband (or family) who are dissatisfied with a wife's dowry.¹⁹

1.3. Prevalence and incidence of dowry abuse internationally

While some studies have examined the prevalence and incidence of dowry abuse in other jurisdictions, the topic has been extensively researched and examined in India.²⁰

<<https://www.whiteribbon.org.au/2018/04/26/letter-stopping-dowry-related-abuse-and-violence/>>.

¹⁵ The Advocates for Human Rights – Stop Violence Against Women, <http://www.stopvaw.org/dowry-related_violence>.

¹⁶ S. Mohanty, S. Mousumi and G. Sahu, 'Analysis of risk factors of dowry death – A south Indian study: *Journal of Forensic and Legal Medicine*' (2013) 316-320.

¹⁷ Australasian Centre for Human Rights and Health, 'Refusal to Comply with Dowry Demands Contributes to Family Violence and Death in Victoria', 10 May 2015.

¹⁸ Australasian Centre for Human Rights and Health, Response to the Australian Law Reform Committee's issues paper no. 48, 7.

¹⁹ Mental Health; Studies from University of Melbourne Yield New Information about Mental Health (Dowry-related domestic violence and complex -post-traumatic stress disorder: a case report): *Psychology & Psychiatry Journal*, Apr 15,2017, 847.

²⁰ Priya R. Banerjee, 'Dowry in 21st-Century India: The Sociocultural Face of Exploitation' (2014) 15(1) *Trauma, Violence & Abuse* 34; Dr. Sanjay Salunke & Dr. Babasaheb Ambedkar, 'Domestic Violence in India: An Sociological Analysis' (2012) 1(1) *Indian Sociological Society* 179; Bonkougou Zakaliyat & A Sathiya Susuman, 'Factors of Domestic Violence Against Women: Correlation of Women's Rights and Vulnerability' (2018) 53(2) *Journal of Asian and African Studies* 285; Khatidja Chantler, Geetanjali Gangoli & Marianne Hester, 'Forced marriage in the UK: Religious, cultural, economic or state violence?' (2009) 29(4) *Critical Social Policy* 587.

In 2011, a report by the National Crime Records Bureau of India recorded that 99,135 Indian women reported cruel treatment by their husbands and relatives.²¹ In 2013, the number of dowry death cases increased by 2.6% from the previous year to 8,383 as compared to 8,172 in 2013.²² The Police stated that for 70% of these cases, the victims are known or related to the accused and the crime is committed inside the home, which makes implementing preventative strategies difficult.²³

According to a 2016 report by the National Crime Records Bureau of India, 21 women are killed every day in dowry-related incidents.²⁴

1.4. Prevalence and incidence of dowry abuse in Australia

There has been no comprehensive study into the cause, prevalence and incidence of dowry abuse in Australia and the available evidence is largely anecdotal, often cited by community groups, and there have been disturbing reports of abuse, including though two dowry-related murders that have been reported in Victoria.²⁵

The *Report and Recommendations by the Royal Commission into Family Violence* (2016) found that some women in culturally and linguistically diverse (**CALD**) communities have experienced specific forms of family violence including, dowry-related violence and forced marriage.²⁶

The Australasian Centre for Human Rights and Health published a clinical audit comparing 50 cases of family violence in South Asian families compared with 25 Middle-Eastern family violence victims. The South Asian victims demonstrated dowry-related violence and associated financial extortion in 50% of cases whereas none of the Middle-Eastern women were subjected to dowry abuse.²⁷

In a survey of family violence service providers in South East Melbourne the organisation Shakti found that approximately 40% of survey participants had identified instances of forced marriage and dowry abuse. Expecting to find that a greater proportion of service providers would have encountered these issues, Shakti suggested that there could be two possible explanations for this percentage:

²¹ National Crime Records Bureau (Ministry of Home Affairs) Government of India, *Crime in India 2011* (3 September 2012) <<http://ncrb.gov.in/statpublications/psi/Prison2011/Full/PSI-2011.pdf>>.

²² Manikamma Nagindrappa & Radhika M.K, 'Women Exploitation in Indian modern society' (2013) 3(2) *International Journal of Scientific and Research Publications* 1, 8.

²³ Meghana Phaneendr, 'Prevention and Prohibition of Sexual Exploitation on Women' (2016) 2 *Social Sciences International Research Journal* 142, 143.

²⁴ National Crime Records Bureau (Ministry of Home Affairs) Government of India, *Crime in India 2015* (29 July 2016) <<http://ncrb.gov.in/StatPublications/CII/CII2015/FILES/CrimeInIndia2015.pdf>>.

²⁵ Ashley Aragoon, 'Dowry links to murder and family violence', *The Herald Sun* (Victoria), 23 April 2015, 3.

²⁶ Crime Statistics Agency, *An Overview of Family Violence in Victoria: Findings from the Victorian Family Violence Database 2009–10 to 2013–14* (January 2016), 80; Victorian Multicultural Commission, Submission No 557 to the Royal Commission into Family Violence, *Inquiry into Family Violence*, June 2015, 4.

²⁷ Australasian Centre for Human Rights and Health, Response to the Australian Law Reform Committee's issues paper no. 48, 8.

- (a) women affected by these two types of abuse were not reaching out to agencies or services, or
- (b) even if women were reaching out, these culturally-specific forms of abuse were not being assessed or discovered by the agencies or services.²⁸

In addition, a number of media articles have reported on cases of dowry abuse experienced by women in Australia:

- (a) In 2014, Kiara* arrived in Australia to marry an Australian citizen who was originally given a dowry of AUD\$6,000 but later demanded a further AUD\$100,000. When Kiara and her family were unable to pay this amount, Kiara was ultimately forced to repay this 'debt' through sexual servitude.²⁹
- (b) Deepa* came to Melbourne on a spousal visa. When she arrived, her husband barely spoke to her because he was angry that she had not brought enough money with her. Deepa's husband told her to call her parents in India and ask them for more money, but she refused. Deepa's husband started beating her, locking her out of the house in the middle of the night and verbally abusing her. Deepa's mother-in-law, who lived with Deepa and her husband also started to abuse her. After she left her husband, Deepa suffered from severe suicidal depression and Post Traumatic Stress Disorder.³⁰
- (c) In 2012, the Herald Sun reported that a 21 year old was killed by her mother-in-law who wanted her son to marry another woman, who offered a dowry of \$500,000 in exchange for permanent residency in Australia.³¹
- (d) Kittu Randhawa, a representative from ICSA, made the following comments:

On a regular week, I'll get about five calls from women needing assistance and dowry will be a factor in about 70% of those cases.

...

When we talk about dowry abuse we're not talking about some Bollywood movie situation where the mother-in-law beats the daughter within an inch of their life unless the father pays up...[f]or some young girls who come from poor families, who cannot fund any further education, marriage is considered the only option...a chance to escape the poverty trap by marrying a man overseas is a tempting

²⁸ Shakti Australian Inc., Submission No 500 to Royal Commission into Family Violence, Parliament of Victoria, *Royal Commission into Family Violence*, 29 May 2015, pg 11.

²⁹ G Rushton, 'Dowry Abuse Is the Domestic Violence Crisis You've Never Heard Of', <https://www.buzzfeed.com/ginarushton/dowry-abuse-is-the-domestic-violence-crisis-youve-never?utm_term=.itV4dLO4Y#.qb96qBw6G>.

*Names changed to protect the victims

³⁰ Australasian Centre for Human Rights and Health, '*Refusal to Comply with Dowry Demands Contributes to Family Violence and Death in Victoria*', 10 May 2015.

³¹ Herald Sun, '*Dowry link to murders and family violence in Victoria*', 23 April 2015.

opportunity for the family...[p]eople are subtly making a lot of money through marriage in this country.³²

These reports highlight research gaps, and the complexity and seriousness of dowry abuse in Australia and its impact predominantly on women from CALD communities. However, broader research must be undertaken in order to develop a deep and nuanced understanding of this complex form of family violence and its prevalence in Australia. Wide consultation by way of forums or focus groups with community organisations and government agencies, will provide a firm evidence base from which to develop further protections, education, awareness raising campaigns and training for frontline workers.

Data monitoring

Recommendation 1

That the Commonwealth Government enters into a consultation process with government agencies and community organisations on the practice of dowry and dowry abuse in order to:

- (a) establish a clear evidence base on the availability of existing legal protections, and
- (b) make recommendations about any necessary amendments to ensure that those who are at risk of, or experiencing, dowry abuse have access to protection.

Recommendation 2

That the Commonwealth Government strengthen governance of data collection practices and standards by implementing a system to capture and measure the extent and incidence of all forms of family violence including dowry abuse in Australia. For this system, we suggest that relevant statistics and data be collected from legal, health, community, migration and justice systems on the following:

- (a) reporting rates for instances of dowry abuse and the nature of that abuse;
- (b) demographics, including the migration status of victims of dowry abuse and their dependents;
- (c) details of the perpetrators of dowry abuse, including the migration status of perpetrators and their relationship to the victims of dowry abuse; and
- (d) the number of affected women and dependents presenting to health services as a result of violence arising from dowry abuse.

³² G Rushton, 'Dowry Abuse Is the Domestic Violence Crisis You've Never Heard Of', <https://www.buzzfeed.com/ginarushton/dowry-abuse-is-the-domestic-violence-crisis-youve-never?utm_term=.itV4dLO4Y#.qb96qBw6G>.

1.5. Nexus between dowry abuse and family violence, forced marriage, modern slavery and domestic servitude

While there is a demonstrable lack of research in the Australian context on dowry abuse and its potential links to forced or arranged marriages, international scholarship suggests that there may be a connection between the two, particularly within the context of transnational marriages.³³

The research suggests that those who suffer dowry abuse at the hands of their partners and partners' families may also be vulnerable to other forms of family violence and exploitation. Anecdotal evidence from ASA's case work, and case studies from community organisations in Australia, suggests there may be a link between family violence and the practice of dowry in a small number of cases. However, it is not clear whether the receipt of a dowry can be the motivation for families to force marriages, or if dowry abuse is an indicator of trafficking and more extreme forms of exploitation. Further research must be undertaken to explore links between dowry abuse, forced marriage, other forms of family violence and slavery or slavery-like practices, as outlined in divisions 270 and 271 of the *Criminal Code Act 1995* (Cth) (**Criminal Code**).

1.5.1. Human trafficking, slavery and family violence

ASA's legal practice has seen that survivors of human trafficking and slavery are exploited in both commercial and domestic settings. In 2013, amendments to the *Criminal Code* broadened the definition of servitude to include labour or services other than sexual services, and introduced the offence of forced labour.³⁴ In 2016, ASA published a research note, *Hidden from view: slavery in the home*³⁵ testing the potential application of Australia's laws against servitude identified in a case in the United Kingdom. The research identified parallels between the slavery-like practice of servitude and circumstances involving extreme forms of family violence.

ASA has identified an emerging trend of Australian citizens and residents being trafficked out of Australia to be abandoned overseas, and who are then subsequently unable to return to Australia. It is our experience that these cases often occur within the context of family violence.

The following case studies illustrate the potential link between dowry abuse, family violence and slavery or slavery-like practices such as servitude and forced marriage here in Australia. The case studies are based on a case from the Federal

³³ Sundari Anitha, Anupama Roy, and Harshita Yalamarty, 'Gender, Migration, and Exclusionary Citizenship Regimes: Conceptualizing Transnational Abandonment of Wives as a Form of Violence Against Women' 24(7) *Violence Against Women* 747.

³⁴ *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013* (Cth).

³⁵ Anti-Slavery Australia, *Hidden from view: Slavery in the home*, (2016) Research Note, available online at <<http://www.antislavery.org.au/images/pdf/Publications/2016%20-%20Hidden%20from%20View%20Slavery%20in%20the%20home.pdf>>.

Magistrates Court concerning a protection visa claim³⁶ and a case presented by Shakti in its submissions to the VRCFV.³⁷

Case Study: Dowry abuse and exploitation

Meera, a woman in her 20s from an Asian nation came to Australia following an arranged marriage, in her country of origin, to an Australian citizen. When in Australia, Meera faced physical, sexual and verbal abuse. Meera found a job in Australia but her husband kept all her wages. Meera's husband said that nothing could happen to him as he was a citizen and came from a rich family with connections, whilst she was from a poor family. Meera's husband said that he had asked her family for additional dowry but they had not provided it. Meera's family did not want her to return home because they had already paid a large dowry and returning would bring shame upon her family.

1.5.2. Forced marriage and family violence

Forced marriage is a human rights abuse and is recognised as a form of gender-based violence³⁸ and a form of family violence, that includes emotional, psychological, physical, sexual, economic or financial abuse, as well as female genital mutilation and honour-based violence.³⁹

In 2013, the *Criminal Code* was amended to include the Federal offence of forced marriage as a slavery-like practice under division 270. Following further amendments to the *Criminal Code* in 2015,⁴⁰ a forced marriage is now defined as a practice where:

[O]ne 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.⁴¹

³⁶ *SZITJ v Minister for Immigration and Multicultural Affairs* [2006] FMCA 1196.

³⁷ Shakti Australian Inc., Submission No 500 to Royal Commission into Family Violence, Parliament of Victoria, *Royal Commission into Family Violence*, 29 May 2015, Appendix 1.

³⁸ Interdepartmental Committee on Human Trafficking and Slavery, Australian Government, *Trafficking in Persons: The Australian Government Response – 1 July 2015 – 30 June 2016*, 1; UNHCR Division of International Protection Services, 'UNHCR Handbook for the Protection of Women and Girls' (UNHCR Handbook, United Nations High Commission for Refugees, 6 March 2008) 194 <<http://www.unhcr.org/en-au/protection/women/47cfae612/unhcr-handbook-protection-women-girls.html>>.

³⁹ Frances Simmons and Jennifer Burn, "Without Consent: Forced Marriage in Australia" [2013] 36(3) *Melbourne University Law Review* 971, 975; Domestic Violence London: A Resource for Health Professionals, *What is Domestic Violence/Forms of Domestic Violence*, (2017) National Health Service <<http://www.domesticviolencelondon.nhs.uk/1-what-is-domestic-violence-/18-forced-marriage.html>>.

⁴⁰ *Crimes Legislation Amendment (Powers, Offences and Other Measures) Act 2015* (Cth) sch 4.

⁴¹ *Criminal Code Act 1995* (Cth) s 270.7A(1).

The *Criminal Code* includes a rebuttable presumption that a child, under the age of 16 is incapable of understanding the nature and effect of the marriage ceremony.⁴²

In forced marriages, a marriage can be viewed as a business transaction where girls or women come to be viewed as 'commodities'.⁴³ Forced marriages deprives a person of their rights, but can also sow the seeds of gender based inequality from the beginning of the marriage, increasing the likelihood of domestic violence.⁴⁴ In these circumstances, young women may feel like they have no choice but to marry the person chosen for them, for fear of losing their family's love and support.⁴⁵

A woman may feel that she cannot leave an abusive relationship or forced marriage because of the money her family has spent on dowry, which she knows is well in excess of what they can afford.⁴⁶ This widely held perception⁴⁷ is centered on the deeply entrenched cultural belief which has been socially practiced for decades that women from poor backgrounds are required to fulfil their family's financial constraints through marrying a wealthier suitor. This is further affirmed in research conducted by Free the Slaves on child, early and forced marriage in the Democratic Republic of Congo. The report highlights that one of the types of forced marriages observed in this context is 'marriage by sale' where the promise of dowry motivates parents to force a marriage, 'this economic obligation is the key coercive mechanism that links a dowry to forced marriage.'⁴⁸

Case Study: Dowry abuse, forced marriage and female circumcision

Akinyi, a woman in her 20s originally from an African nation, faced a forced marriage and female circumcision. Akinyi's parents and her prospective husband had organised a circumcision ceremony multiple times. Each time, Akinyi refused to be circumcised. A dowry had been paid to Akinyi's prospective husband and his family. Taking back the dowry was not an option and is considered 'taboo' in her culture. Akinyi's parents told her that if she did not go through with the marriage and circumcision she would be killed.

⁴² Ibid s 270.7A(4).

⁴³ Australasian Centre for Human Rights, Submission No 168 to Royal Commission into Family Violence, Parliament of Victoria, Royal Commission into Family Violence, 10 May 2015, 3.

⁴⁴ Ibid.

⁴⁵ Centre for Multicultural Youth, Submission No 452, to Royal Commission into Family Violence, Parliament of Victoria, Royal Commission into Family Violence, 10 May 2015, 4.

⁴⁶ Wyndham Legal Service, Submission No 83 to Royal Commission into Family Violence, Parliament of Victoria, Royal Commission into Family Violence, 2015, 33.

⁴⁷ Khatidja Chantler, Geetanjali Gangoli & Marianne Hester, 'Forced marriage in the UK: Religious, cultural, economic or state violence?' (2009) 29(4) *Critical Social Policy* 587, 601; Madhu Purnima Kishwar, 'Strategies for Combating the Culture of Dowry and Domestic Violence in India' (Expert Paper, UN Division for the Advancement of Women, 17-20 May 2005) 9; Priya R. Banerjee, 'Dowry in 21st-Century India: The Sociocultural Face of Exploitation' (2014) 15(1) *Trauma, Violence & Abuse* 34.

⁴⁸ Free the Slaves Submission to the Women Human Rights and Gender Section, Office of the United Nations High Commissioner for Human Rights, *Call for submission on child, early and forced marriage*, 13 December 2013, 2.

1.5.3. Study demonstrating the intersection between dowry abuse, family violence, forced marriage, slavery and slavery-like practices

A 2017 study, conducted with 57 women who were abandoned by their husbands across three of India's northern states including, Punjab, Gujarat and Delhi, found that domestic violence, financial and psychological abuse were intrinsically linked to dowry-related issues.⁴⁹ These issues were exacerbated by the transnational character of the marriage and left women vulnerable to exploitation in the home of their in-laws (which could arguably be considered servitude or forced labour) and deception from both the husband and the in-laws as to the nature of the marriage they were entering (which could arguably be considered forced marriage).

Authors of the report made a number of key observations that established these links:

- (a) all participants were demanded to give the dowry to their in-laws,
- (b) 98% of the women suffered abuse related to domestic labour and each woman in the study had experienced coercive control or intimidation from their partner,⁵⁰
- (c) 23 of these women migrated after their marriage and after suffering physical, emotional and financial abuse were subsequently taken back to India under false pretenses and abandoned there,⁵¹
- (d) just under two thirds of the women never migrated following their marriage, but were left with their in-laws by their husbands who returned to their countries of residence and made false promises about enabling the women to join them. The women would then be responsible for domestic labour and care for her in-laws, who would often demand ongoing dowry transfer from her parents, and
- (e) at least five of the cases involved women being deceived about their husband's health upon entering the marriage. Some of the men had long-standing behaviour/health conditions or a dependency on drugs and their families believed the marriage would 'cure' them.

The authors emphasised that the transnational context affected the level of violence and exploitation suffered by the wives:

There are several local and transnational contexts that explain the abuse, exploitation and abandonment of wives. The inequalities within the institution of marriage are exacerbated by the geopolitical inequalities between nations, whereby the groom's family is able to command greater resources, mobility, knowledge of

⁴⁹ Sundari Anitha, Anupama Roy, and Harshita Yalamarty, 'Gender, Migration, and Exclusionary Citizenship Regimes: Conceptualizing Transnational Abandonment of Wives as a Form of Violence Against Women' 24(7) *Violence Against Women* 747.

⁵⁰ Ibid 755.

⁵¹ Ibid 754.

*state institutions, and legal mechanisms. In the majority of cases documented in our research, men colluded with their families to derive benefits from such a marriage.*⁵²

Though this study was only conducted on a small-scale, it highlights the link between dowry abuse, family violence, forced marriage and exploitation. ASA recommends further exploration of these links in the Australian context.

Examining dowry abuse and its intersection with other forms of violence or exploitation will also help frontline officers address victims' vulnerabilities and enhance the quality and accuracy of their referrals to government agencies and service providers.

Research

Recommendation 3:

That the Commonwealth Government commissions research to identify and document dowry abuse in the Australian context and the connection between dowry abuse, other forms of family violence and the more extreme forms of exploitation as set out in divisions 270 and 271 of the *Criminal Code Act 1995* (Cth).

2. EFFECTIVENESS OF THE CURRENT LEGAL FRAMEWORK

2.1. Adequacy of the migration law

In Australia, anecdotal evidence suggests that dowry abuse can be linked to migration status, particularly within the partner visa context.⁵³ This prospective entitlement to a visa can be used as a form of control, enabling escalating demands for dowry payments, which may escalate to physical, sexual, emotional, psychological abuse, social isolation, sometimes leading to death.⁵⁴

Dowry abuse can co-exist with other visa and migration challenges for women who hold spousal visas and are more limited in their options.⁵⁵ Such women may be fearful of approaching authorities because of their limited visa status, or may be misled by abusers about their rights. These women often face additional challenges in accessing family violence services as they are often isolated from friends and family and are unable to read, write or speak English fluently.⁵⁶

⁵² Ibid 769.

⁵³ L Davies, *Letter: Stopping dowry related abuse and violence* (26 April 2018) White Ribbon Australia <<https://www.whiteribbon.org.au/2018/04/26/letter-stopping-dowry-related-abuse-and-violence/>>.

⁵⁴ Ibid.

⁵⁵ Wyndham Legal Service, Submission No 83 to Royal Commission into Family Violence, Parliament of Victoria, Royal Commission into Family Violence, 2015, 14.

⁵⁶ Ibid 35.

Currently, the *Migration Regulations 1994* (Cth) (**Regulations**) establish a regime for addressing judicial or non-judicial claims of family violence by applicants who are in the process of applying for permanent residence in Australia.⁵⁷ For temporary migrant women who have suffered dowry abuse while in Australia, the Family Violence Provisions enable women on certain temporary visas to access permanent residency if their marriage⁵⁸ ceases due to family violence, or if a member of their family unit (a dependent) has experienced family violence by their partner.⁵⁹

2.1.1. Family Violence Provisions

In order to access the Family Violence Provisions, a temporary migrant woman must:

- (1) demonstrate that their relationship was genuine until it ceased and that family violence took place during the relationship;⁶⁰
- (2) hold an eligible class of temporary visa as prescribed under the Act and the Regulations; and
- (3) satisfy certain evidentiary requirements, by providing acceptable evidence that she or her dependents have been the victim of family violence committed by their partner.

The Minister for Immigration (through a delegate) will then assess the application. Where the application is based on non-judicial evidence, if the Department determines that there is reasonable doubt regarding the evidentiary basis of the claim of family violence, it can refer the evidence to an independent expert for assessment and the determination of that expert must be accepted by the Department.⁶¹

The Family Violence Provisions under the Regulations are accessible by temporary migrant women (among others) on the following temporary visa subclasses:⁶²

- (1) in the Family Stream: primary applicants for a partner (temporary or permanent) visa (subclass 309/100 and subclasses 820/801) and certain forms of other partner visas lodged before 1 July 2009;⁶³ and

⁵⁷ For a general overview of the regime see Australian Government Department of Home Affairs, 'Fact sheet – Family violence provisions' <<https://www.homeaffairs.gov.au/about/corporate/information/fact-sheets/38domestic>>.

⁵⁸ We note that the Family Violence Provisions also apply to de facto relationships.

⁵⁹ *Migration Regulations 1994* (Cth) div 1.5.

⁶⁰ Ibid regs 1.23, 1.15A and 1.09A.

⁶¹ Ibid reg 1.23(10).

⁶² Australian Government Department of Home Affairs, 'Fact sheet – Family violence provisions' <<https://www.homeaffairs.gov.au/about/corporate/information/fact-sheets/38domestic>>.

⁶³ Spouse (permanent) (subclass 100) visa; Interdependency (permanent) (subclass 110), Spouse (temporary and permanent) (subclasses 820/801) visas and Interdependency (temporary and permanent) (subclasses 826/814): Australian Government Department of Home Affairs, 'Fact sheet – Family violence provisions' <<https://www.homeaffairs.gov.au/about/corporate/information/fact-sheets/38domestic>>.

- (2) in the Skilled Stream (business), partners of primary applicants for a Distinguished Talent Visa (subclass 858), or skilled stream (Business) visas lodged before 1 July 2012.⁶⁴

The Regulations define 'relevant family violence' as:⁶⁵

.... *conduct, whether actual or threatened, towards:*

- (a) the actual victim; or*
- (b) a member of the family unit of the alleged victim;*
- (c) a member of the family unit of the alleged perpetrator; or*
- (d) the property of the alleged victim; or*
- (e) the property of a member of the family unity of the alleged victim; or*
- (f) the property of a member of the family unit of the alleged perpetrator; that causes the alleged victim to reasonably fear for, or to be reasonably apprehensive about, his or her own wellbeing or safety.*

The definition is broad and is not limited to instances of physical violence. The conduct may also include psychological and/or financial abuse,⁶⁶ and arguably dowry abuse, if the conduct caused the woman to be reasonably apprehensive about her own physical, psychological or economic wellbeing.

If a temporary migrant woman does not hold one of these visas, she will have no ability to apply for permanent residency in Australia under the Regulations in circumstances where she has experienced family violence. This produces a result whereby the Australian migration system does not recognise the marriage or relationship or the conduct of family violence, leaving a temporary migrant woman with no permanent rights in Australia and little to no ability to access financial and/or housing support.

The Australian Women Against Violence Alliance's recent comments that the definition of 'relevant family violence' in the Regulations is problematic for reasons including that it 'does not foresee the possibility of the family unit of the sponsor to be alleged perpetrators' are consistent with ASA's experience.⁶⁷ This is particularly applicable in instances of dowry abuse and forced marriage, as the case studies have indicated that dowry abuse may be committed against a wife by not only the husband, but the husband's family and the wife's family.⁶⁸ The complex nature of the violence and threats used by partners within the current migration context should not

⁶⁴ Including Established Business in Australia (subclass 845); State/Territory Sponsored Regional Established Business in Australia (subclass 846), Labour Agreement (subclass 855), Employer Nomination Scheme (subclass 856), Regional Sponsored Migration Scheme (subclass 857).

⁶⁵ *Migration Regulations 1994* (Cth) reg 1.21.

⁶⁶ Australian Government Department of Home Affairs, 'Fact sheet – Family violence provisions' <<https://www.homeaffairs.gov.au/about/corporate/information/fact-sheets/38domestic>>.

⁶⁷ Australian Women Against Violence Alliance, 'Submission into the Public Consultation on Visa Simplification (15 September 2017).

⁶⁸ ACHR, Submission No 168 to Royal Commission into Family Violence, Parliament of Victoria, *Royal Commission into Family Violence*, 10 May 2015.

be a barrier to those affected by dowry abuse, forced marriage and slavery or slavery-like practices accessing permanent residency.

ASA recommends expanding the definition of family violence in the Regulations to recognise that complex forms of family violence such as dowry abuse, forced marriage and other slavery or slavery-like practices can be exacted on victims in Australia by parties other than the victim's sponsor.

Protecting victims of dowry abuse

Recommendation 4

That the Commonwealth Government recognises dowry abuse as a form of family violence and draws on existing frameworks within the broader national agenda to reduce violence against women and their children to address the practice of dowry abuse.

Recommendation 5

That the Commonwealth Government ensure that those who are forced to marry their partner or experience family violence from their partner and/or their partner's family members are protected through the Family Violence Provisions in the *Migration Regulations 1994* (Cth).

- (a) That the Commonwealth Government amend the Family Violence Provisions in division 1.5 of the *Migration Regulations 1994* (Cth) to ensure that the regulatory framework is consistent with the policy intention to protect women (or men) in family relationships within the migration context.

2.2. Adequacy of the laws regarding families and family violence

The primary question is whether current domestic and family violence and family law systems are effective in responding to the legal issues reported to arise from the practice of dowry, including in divorce and property settlement proceedings.⁶⁹

The following legal issues are raised by dowry abuse:

- (1) whether dowry abuse is captured within the current definitions of physical, psychological/emotional⁷⁰ and economic abuse⁷¹ in legislation governing intervention orders in states and territories;

⁶⁹ See Australian Centre for Human Rights, Submission No 168 to Royal Commission into Family Violence, Parliament of Victoria, Royal Commission into Family Violence, 10 May 2015, 5-11.

⁷⁰ See Shakti Australian Inc., Submission No 500 to Royal Commission into Family Violence, Parliament of Victoria, Royal Commission into Family Violence, 29 May 2015.

⁷¹ Wyndham Legal Service, Submission No 83 to Royal Commission into Family Violence, Parliament of Victoria, Royal Commission into Family Violence, 2015, 12 and 33-35.

- (2) in divorce or property settlement matters between a husband and wife, issues surrounding:
- (a) ownership, division and/or return of the dowry; and
 - (b) extra-jurisdictional enforcement mechanisms for Australian judgements and orders.

2.2.1. Domestic and Family Violence legislation – definition of abuse

State and Territory intervention orders vary by jurisdiction, and are available to adults who seek protection in circumstances of personal or domestic violence.⁷² The differences between jurisdictions means, however, that victims and potential victims of dowry abuse, human trafficking, slavery and forced marriage have varying levels of protection available to them under these State and Territory-based schemes.

For example, in New South Wales, adult victims or potential victims of human trafficking and forced marriage, who may be experiencing family violence, can seek an apprehended domestic violence order (**ADVO**). An ADVO can prevent a person who has or had a domestic relationship with the victim from assaulting, threatening, stalking or intimidating the victim, as well as restricting or prohibiting access to premises where the victim lives or works.⁷³ However, for an ADVO to be made, the court must be satisfied that on the balance of probabilities, the victim has reasonable grounds to fear, and does in fact fear, the commission of a personal violence crime by the other person, or the engagement of the other person in conduct where the victim will be intimidated or stalked.⁷⁴ The *Crimes (Domestic and Personal Violence) Act 2007* defines ‘personal violence offence’ as specific offences under the *Crimes Act 1900* (NSW) (**Crimes Act**).⁷⁵ Dowry abuse and the Federal crimes of human trafficking, slavery and forced marriage are not included in this definition. While some cases of extreme exploitation may involve personal violence offences, such as sexual assault pursuant to the *Crimes Act*, these elements are certainly not present in all circumstances of dowry abuse, human trafficking, slavery and forced marriage.

ASA recommends that the Australian Government encourage the States and Territories to include dowry abuse and/or forced marriage in their legislative definitions of emotional/psychological abuse, economic abuse or an act of personal violence. This approach is consistent with both Victoria and South Australia’s leading efforts to incorporate more inclusive definitions of abuse that account for the complex experiences of CALD women.

⁷² Apprehended Violence Orders (NSW), Intervention Orders (Vic and SA), Violence Restraining Orders (WA), Protection Orders (Qld), Domestic Violence Orders (ACT and NT) and Family Violence Orders (Tas).

⁷³ *Crimes (Domestic and Personal Violence) Act 2007* (NSW) Part 8.

⁷⁴ *Ibid* s 16(1).

⁷⁵ *Ibid* s 4.

Victorian Royal Commission into Family Violence's recommendations regarding definition of family violence

Australia's first Royal Commission into family violence was commissioned by the Victorian Government in February 2015, to address the scale and impact of family violence in Victoria.

Guided by a Terms of Reference with the overarching aim of arriving at practical recommendations to stop family violence,⁷⁶ the VRCFV received some 1000 written submissions, convened 25 days of public hearings and consulted with over 800 community members.⁷⁷ In line with the Terms of Reference,⁷⁸ the VRCFV also had specific regard to the needs and experiences of people from inter alia CALD backgrounds, including in relation to specific forms of family violence experience by some CALD women including dowry abuse.⁷⁹

The VRCFV delivered its report in March 2016 and provided 227 recommendations.⁸⁰ Importantly, one recommendation was that the statutory example of 'economic abuse' in section 6 of the *Family Violence Protection Act 2008* (Vic) be expanded to include dowry abuse and forced marriage (Recommendation 156).⁸¹ This recommendation was received favourably by the media and community based interest groups.⁸²

The VRCFV made the following observations in relation to Recommendation 156:⁸³

In addition to forms of family violence experienced in all communities, there are some specific forms of family violence experienced by women in some CALD communities—for example, forced marriage, female genital mutilation, and dowry-related violence. These forms of abuse are not readily recognised as constituting family violence.

...

The Commission makes recommendations to strengthen the capacity of mainstream and specialist services to identify and respond to the needs of family violence victims from CALD communities, to improve practices and policies relating to the use of interpreters in family violence-related cases, and to include forced marriage and

⁷⁶ Victoria, Royal Commission into Family Violence, Terms of Reference (22 February 2015).

⁷⁷ Victorian Government, Royal Commission into Family Violence Report
<<https://www.vic.gov.au/familyviolence/royal-commissionreport.html>>.

⁷⁸ Victoria, Royal Commission into Family Violence, *Terms of Reference* (22 February 2015) Item 6.

⁷⁹ Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 5, 100, 111 and 113.

⁸⁰ Victoria, Royal Commission into Family Violence, *Summary and Recommendations* (2016).

⁸¹ Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 5, 128 (Recommendation 156).

⁸² Dr M O'Connor, Royal Commission Recommends Dowry Related Abuse to be a Statutory Example of Family Violence Protection Act (27 April 2016) SBS
<<https://www.sbs.com.au/yourlanguage/punjabi/en/article/2016/04/08/royal-commission-recommends-dowryrelated-abuse-be-statutory-example-family>>; L Davies, Letter: Stopping dowry related abuse and violence (26 April 2018) White Ribbon Australia
<<https://www.whiteribbon.org.au/2018/04/26/letter-stopping-dowry-related-abuse-and-violence/>>; R Jones, Once a girl is married, there is no going back (30 July 2017) ABC
<<http://www.abc.net.au/news/2017-07-29/dowry-abuse-domestic-violence-kasish-story/8745118>>.

⁸³ Victoria, Royal Commission into Family Violence, *Summary and Recommendations* (2016) 34.

dowry-related abuse as statutory examples of family violence in the Family Violence Protection Act.

Research indicates that dowry abuse is often committed by not only the groom, but the groom's parents and family, against the wife and also the wife's parents.⁸⁴ Those people fall within the ambit of the *Family Violence Protection Act 2008* (Vic).

The Justice Legislation Amendment (Family Violence Protection and Other Matters) Bill 2018 expands the 'family violence' examples set out in the *Family Violence Protection Act 2008* (Vic) to include dowry abuse and forced marriage. The Bill passed the Victorian Parliament (with the Bill passing the Legislative Council on 7 August), and will now go to the Governor for royal assent.

Clause 15(a) of the Bill amends the examples of the definition of 'family violence' in section 5(1) of the *Family Violence Protection Act 2008* (Vic) and inserts two new examples of what constitutes 'family violence' for the purpose of the Act, being:

- using coercion, threats, physical abuse or emotional or psychological abuse to cause or attempt to cause a person to enter into a marriage;
- using coercion, threats, physical abuse or emotional or psychological abuse to demand or receive dowry, either before or after a marriage.

After the Bill receives royal assent, the above amendments will come into operation on a day or days to be proclaimed or no later than 1 September 2020 (whichever is earlier) (clauses 2(2) and (3) of the Bill).

ASA supports these amendments to the definition of 'family violence' and recommends that other State and Territories follow Victoria's lead in amending their domestic family violence legislation in a similar manner to include dowry abuse and/or forced marriage.

⁸⁴ Shakti Australian Inc., Submission No 500 to Royal Commission into Family Violence, Parliament of Victoria, *Royal Commission into Family Violence*, 29 May 2015, 7-9 and 11.

Protecting victims of dowry abuse

Recommendation 6

That the Commonwealth Government establish dialogue with the Australian States and Territories to harmonise existing legislation providing for intervention/violence orders to recognise dowry abuse as an act of family violence or economic abuse.

Recommendation 7

That all levels of government in Australia, engage with stakeholders to fund and develop ongoing education and awareness raising campaigns about family violence, including dowry abuse, in conjunction with the development of further training of frontline officers.

- (a) That the Commonwealth Government include dowry abuse as a possible indicator of exploitation for the purposes of divisions 270 and 271 of the *Criminal Code Act 1995* (Cth) and ensure that this is included in any training programs.

2.2.2. Divorce and property settlement proceedings⁸⁵

Property settlements pursuant to section 79 of the *Family Law Act 1975* (Cth) (**FLA**) are considered by taking into account the property that makes up matrimonial pool of assets, less the liabilities, which is then split between the parties on the basis of the respective contributions and the future needs of each party.

Therefore, where the wife's family seeks to recover the dowry paid to the groom or groom's family upon entry into the marriage, the relevant claims may fall outside the scope of the *FLA* because a dowry could be paid indirectly, not from wife to husband, but from the wife's family to the husband's family.

Putting aside a consideration of the division of joint assets of the parties under the *FLA*,⁸⁶ whether the dowry is repayable or returnable to the wife's family upon marriage breakdown will turn on whether the dowry can properly be regarded at law as either:

- (1) an absolute gift, with the result that the groom and/or the groom's family has no obligation to repay the dowry; or

⁸⁵ Anti-Slavery Australia thanks Lander & Rogers for their advice on the content and recommendations in this section on the *Family Law Act 1975* (Cth).

⁸⁶ The *Family Law Act 1975* sets out the general principles that the court considers when deciding financial disputes after the breakdown of a marriage (see sections 79(4) and 75(2)).

- (2) a conditional gift, whereby the dowry has been provided by the wife's family at the request of the groom's family with the intention that the payment be a pre-condition of the marriage.

Generally in these circumstances, there is a presumption by the court that the amount given is a gift not a loan, unless demonstrated otherwise.

A related consideration involves principles of unconscionability. For example, it may be asserted by the wife's family member who paid the dowry that it is unconscionable for the groom (or, equally, the members of the groom's family) to retain the dowry upon the marriage breakdown, given the parties had initially envisaged a continuing marriage.

These issues do not solely turn on matters of law, rather the court complete a detailed consideration of the underlying factual matters concerning the payment of the dowry. This will be either by affidavit evidence or in-person attendance in court.

ASA agrees with ACHRH's submission to the VRCFV that there is no guidance or legislative provisions in the *FLA* which expressly directs courts to consider dowries as a woman's contribution to the joint pool of marital assets. Without such protections, women's families who have provided dowries have no recompense upon separation of the couple for the money they paid to secure the wellbeing of their daughter. The effect of this is particularly egregious when dowry abuse has occurred, and the woman's family may have little to no resources, or incurred a debt, in order to pay the dowry in the first place. Women may be more reluctant to leave the abusive or exploitative relationship knowing the sacrifices their families have made to pay their dowry, or the lack of resources their family now has to set up a new marriage for her.

ASA recommends that explicit guidance materials be developed on how dowry should be considered when parties apply for property orders under *FLA*. Any dowry paid should be recognised as an initial contribution by the wife or a conditional gift from the wife's parents.

2.2.3. Anti-suit injunctions and *Singh v Singh* – is Australia the best place to determine a dispute about dowry?

In the event of a marriage breakdown resulting in divorce and property settlement proceedings, there is a prospect of related cross-border litigation, particularly in India where dowry was criminalised in 1961.⁸⁷ Further, and in any event, even where both the husband and wife each have permanent residency status, there often remains strong familial and legal (for example, property) links with their home country resulting in cross-border related proceedings.⁸⁸

⁸⁷ E Sutherland, *The Future of Child and Family Law: International Predictions* (Cambridge University Press, 2012) 166-167.

⁸⁸ As was the case in *Singh v Singh* (2010) 242 FLR 90; (2010) 44 Fam LR 85; [2010] FMCAfam 949 (*Singh v Singh*).

It is not uncommon for parties to a marriage involving the payment of dowry, in which one or both are permanent residents of Australia, to retain a connection with their country of origin. Further, by reason of cultural practice, many of those couples will have likely participated in cultural, religious and/or legal ceremonies in their country of origin thereby strengthening the connection of their marital union to the jurisdiction of their country of origin.

In the event of divorce and property settlement proceedings, questions arise concerning the appropriateness of the Australian forum to hear and determine these disputes and the status of any related orders and agreements of overseas courts.⁸⁹ Within this context, there have been very few judicial decisions that have expressly considered dowry related disputes in Australia.

In one such case, the husband commenced *FLA* proceedings where allegations of the payment of dowry in his family law matter may have led to the institution of criminal proceedings in India. Australian courts may issue an injunction to restrain a party from proceeding as a plaintiff in another jurisdiction or continuing for with foreign proceedings if the Court is satisfied that such proceedings would interfere with current Australian proceedings.⁹⁰ This is known as an ‘anti-suit injunction’.

In *Singh v Singh*,⁹¹ Neville FM of the Federal Magistrates Court granted an injunction against a wife restraining her from participating in criminal proceedings in India in relation to the alleged payment of dowry by the wife’s family to the husband. Ms Singh was restrained from taking any action, or causing or allowing or assisting any other person to do so, under the *Dowry Prohibition Act 1961* (India).

His Honour’s reasoning for granting the injunction pursuant to section 114(1)(a) of the *Family Law Act 1975* (Cth) was as follows:⁹²

In my view, an injunction should be granted as sought by Mr Singh under s.114(1)(a), which section refers to “the personal protection of a party to the marriage.” From what has been stated, there is sufficient evidence before the Court to be concerned that Mr Singh faces a risk of imprisonment if ever criminal proceedings are instituted in India. The fact that there is no time limit in which such proceedings may be instituted, and that there is a complete absence from Ms Singh in relation to her intentions in relation to such proceedings, and that no such proceeding has been commence, only adds to the need, in my view, to afford some personal protection to Mr Singh. I note again that both parties are Australian citizens, they reside and work/study here, with their son.

⁸⁹ Ian Kennedy, ‘Do I file in Brisbane or Monaco? International Family Law Matters – the Tussle for Jurisdiction’ (Paper presented at the Queensland Law Society Family Law Conference, Gold Coast, 13-17 July 2017).

⁹⁰ *CSR Ltd v Signa Insurance Australia Ltd* (1997) 189 CLR 845.

⁹¹ [2010] FMCAfam 949, [141]. Neville FM alternatively based the injunction on s 114(3), which empowers the court to grant any injunction that is ‘just or convenient’: [2010] FMCAfam 949, [142].

⁹² *Ibid.*

The Court's reasoning in *Singh v Singh* has been criticised by Mr Sirko Harder, a legal academic and Senior Law Lecturer at Monash University, on the following basis:⁹³

The grant of the injunction is problematic with regard to both the assumption of the discretion to grant such an injunction and the exercise of that discretion. Considering the latter issue at first, it is unclear why the injunction was necessary. Neville FM made no finding in respect of Ms Singh's allegation that she had not even contemplated instigating criminal proceedings in India before Mr Singh applied for the injunction. An expert witness on Indian Law testified that the Indian courts would not entertain criminal proceedings against Mr Singh if the Australian court made a declaration that no dowry had been paid or demanded. This requirement may have been satisfied by Neville FM's 'notation' that Ms Singh failed to establish that a dowry had been paid, received, demanded or requested by Mr Singh or his family. Furthermore, the injunction afforded Mr Singh no real protection. Neville FM pointed out that the injunction restrained only Ms Singh, leaving her relatives free to raise the dowry issue with authorities in India. Equity does not normally act in vain.

More importantly, an injunction to restrain a party from participating in foreign criminal proceedings raises concerns with regard to the principle of territorial sovereignty under customary international law. This principle would be infringed by an injunction that purports to restrain foreign authorities from commencing or continuing criminal proceedings in their own country. The principle may also be infringed by an injunction that restrains a person from appearing as a witness in foreign criminal (or indeed civil) proceedings where the person lives in the foreign country and is obliged to appear under the foreign law.

ASA recommends that explicit guidance be provided to the Family Court of Australia on the purpose and features of an anti-suit injunction, and the inappropriateness of its use generally in cases involving dowry abuse, particularly where the injunction seeks to prevent a party from participating in foreign criminal proceedings such as those commenced under the *Indian Dowry Prohibition Act 1961*.

Protecting victims of dowry abuse

Recommendation 8

That the Commonwealth Government:

- (a) consider developing guidance material under the Family Law Act 1975 (Cth) to specifically address dowry payments in the context of making orders about property, and
- (b) consider the appropriateness of anti-suit injunctions that seek to restrain action under legislation in other jurisdictions concerning dowry abuse.

⁹³ S Harder, 'Recent Judicial Aberrations in Australian Private International Law' (2012) 12 *Australian International Law Journal* 161, 164.

3. CONCLUSION

In the Australian context, there is a research gap between the practice of dowry and the potential for dowry abuse. This submission has drawn together available evidence and research, finding that there are significant gaps in knowledge and practice that can lead to underreporting and misidentification of dowry abuse as a form of family violence, or as an indicator of slavery or forced marriage. The findings have underscored an urgent need for increased research and training about the practice of dowry and the ways in which, in some cases, it can be used as a tool of coercion. Dowry abuse as an indicator of slavery, servitude, forced labour, forced marriage and debt bondage has been largely unrecognised in the Australian context, and underscores a need for greater awareness, training and research.