



Submission
on the
Statutes
Amendment
(Child
Marriage)
Bill 2015

Anti-Slavery Australia

December 2015

1. Introduction

Thank you for the opportunity to provide comment on the proposed *Statutes Amendment (Child Marriage) Bill 2015 (SA)*, intended to increase protection for children who are at risk of forced marriage and would amend the existing *Children's Protection Act 1993 (SA)* and the *Criminal Law Consolidation Act 1935*.

We respectfully make a number of comments that may further strengthen the proposed provisions or provide additional protection. To this end, we address the proposed definitions of a child and marriage in the Bill, refer to case-law and make a recommendation about an amendment to South Australian intervention powers that could significantly protect any person facing forced marriage.

2. The definition of a child

The proposed insertion of sections 26C and 26D to the *Children's Protection Act 1993 (SA)* and section 33C to the *Criminal Law Consolidation Act 1935 (SA)* define a child as "a person under 16 years of age". In the context of providing increased protection to children facing forced marriage, and consistent with the provisions dealing with marriageable age in the *Commonwealth Marriage Act (1961)*, we respectfully submit that a child should be defined as a person under the age of 18 years of age.

Article 16(2) of the *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*, provides that "[t]he betrothal and the marriage of a child shall have no legal effect", and Article 1 of the *Convention on the Rights of the Child* defines a child as any person "below the age of 18".

As Australia is a signatory to both the *Convention on the Rights of the Child* and the *Convention on the Elimination of All Forms of Discrimination against Women*, we respectfully submit that a child should be defined as a person 'under the age of 18'; this recommendation is consistent with relevant domestic law and Australia's treaty obligations.

2.1. Domestic Legislation

Child marriages may be a form of gender-based violence, forced marriage and in some cases, lead to human trafficking. Forced marriage is a crime defined under sections 270.7A and 270.7B of the *Criminal Code Act 1995 (Cth)*. A marriage is a forced marriage if "if one party to the marriage entered into the marriage without freely and fully consenting because of the use of coercion, threat or deception; or because the party was incapable of understanding the nature and effect of the marriage ceremony."¹ It is a statutory presumption that all people under the age of 16 are incapable of understanding the nature and effect of a marriage ceremony². The provisions in the *Criminal Code Act* extend to all forms of marriage, including those conducted in accordance with the *Marriage Act*, and further include cultural or religious marriages.

In Australian law, the *Marriage Act (Cth)* provides that a marriage will be if certain criteria are met, including:

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

² *Criminal Code Act 1995 (Cth)* s 270.7A(4).

- Both parties to a marriage give full and free consent to the marriage.³
- Both parties are of marriageable age.⁴

The marriageable age in Australia is 18 years old⁵, however a person between the age of 16 and 18 years old may be considered to be a person of marriageable age if there are exceptional circumstances and the person obtains an order from a judge or magistrate authorising the marriage of the person to another person of marriageable age.⁶ Where the marriage had taken place overseas and one of the parties to the marriage was domiciled in Australia, the marriage will not be recognised as a valid marriage if one of parties to the marriage was not of marriageable age.⁷

We respectfully submit that even though marriages of people between the ages of 16 and 18 years are possible within Australia, this is the exception rather than the rule. We submit that the proposed legislation should consider this factor accordingly and protect people under the age of 18 whilst recognising valid marriages of people between the ages of 16 and 18 that are in compliance with current Australian law.

One possible mechanism of achieving this is by:

- Defining a child under the proposed section 33C of the *Criminal Law Consolidation Act 1935* (SA) as a person below the age of 18; and
- Including a rebuttable presumption to the proposed section 33C of the *Criminal Law Consolidation Act 1935* (SA) such that a marriage which has taken place within Australia of a person below the age of 18 will be considered as a 'child marriage' except where that marriage has been authorised by a court order (in accordance with section 12 of the *Marriage Act 1961* (Cth)).

2.2. Case studies

By way of example of the importance of amending the current definition of a child, we refer to two cases involving children between the age of 16 and 18 who, through their representatives, sought Family Court orders to prevent them from being taken outside Australia for marriage.

In the case of *Kandal & Khyatt & Ors* [2010] FMCAfam 508, a 17 year old girl contacted the Australian Federal Police and said words to the effect that she was being taken against her will by her Mother, and perhaps other family members, to Lebanon to be married. It was alleged that her parents (her mother, father and step-father) were all supportive of her forced removal from Australia. The Australian Federal Police and Legal Aid New South Wales then assisted the child to apply for a parenting order under the *Family Law Act 1975* (Cth) to place herself on the Airport Watch List and request intervention by the Department of Human Services. The Department of Human Services and appropriate cultural organisations also indicated to the Federal Police that they would provide intervention and emergency housing assistance if required.

³ *Marriage Act 1961* (Cth) s 23(1)(d).

⁴ *Marriage Act 1961* (Cth) s 23(1)(e).

⁵ *Marriage Act 1961* (Cth) s 11.

⁶ *Marriage Act 1961* (Cth) s 12.

⁷ *Marriage Act 1961* (Cth) s 88D(2)(b).

In the case of *Madley & Madley* [2011] FMCAfam1007, a 16 year old girl sought in an application to the Family Court to obtain a parenting order to restrain her parents from removing, or attempting or causing her removal from Australia. This included an order for the girl's passport to be surrendered by her parents to the court within 72 hours and to have the girl's name placed on airport watch lists. Further, the order restrained the parents from harassing or intimidating the child, questioning the child in relation to the proceedings, and preventing the child from being removed from school. Any member of police were also authorised to automatically arrest without warrant any person who breached these orders.

3. The definition of marriage

We respectfully submit that the Bill makes it clear that definition of marriage includes all forms of marriage, including those marriages conducted outside the provision of the *Marriage Act 1961* (Cth).

3.1. Non-legal marriages

A marriage does not need to be a legal marriage in order to have negative consequences on a child, as it has been seen in the reporting of 'religious' or 'cultural' marriages, such as an incident involving a 12 year old girl in New South Wales where a rogue cleric 'officiated' a marriage between a 12 year old girl and a 27 year old man⁸. The *Criminal Code Act 1995* (Cth) includes a definition of 'marriage' to include marriages that are "void, invalid, or not recognised by law, for any reason"⁹ and therefore provides protection to children subject to these unofficial marriages.

We submit for a definition of marriage to be included in the Bill which reflects the recognition of harm caused by non-legal marriages as well as legal marriages upon children.

4. Child Marriages within Australia

We observe that the current Bill only protects children whom are at risk of being taken outside of the state for the purpose of marriage. While Anti-Slavery Australia supports the establishment of offences against taking children out of the state for the purpose of child marriage, we submit that it is equally important to also give consideration to non-legal child marriages occurring any state or territory in Australia. This may include 'cultural' or 'religious' marriages involving children, and also the act of arranging or bringing children into Australia for the purpose of marriage.

We submit for additional provisions to be included in the Bill to the effect that:

- A protection order may be made if the court has reasonable grounds to suspect that a child may be at risk of going through the form or ceremony of a marriage.
- It is an offence to arrange or bring a child into the State for the purpose of marriage.
- It is an offence to arrange or cause a child to enter into a marriage within the State, whether that marriage is legally valid or not.

⁸ Samantha Maiden, 'Australian underage marriage laws to be tightened', *The Daily Telegraph* (online), 7 March 2015 <<http://www.dailytelegraph.com.au/news/nsw/australian-underage-marriage-laws-to-be-tightened/story-fnnpn118l-1227252928978>>.

⁹ *Criminal Code Act 1995* (Cth) s 270.7A(2)(d).

5. Protections for Victims of Forced Marriage

5.1. The *Intervention Orders (Prevention of Abuse) Act 2009*

The *Intervention Orders (Prevention of Abuse) Act 2009* (SA) provides for any person over the age of 18 to make an application for the purposes of protection. We submit that men and women over the age of 18 may also be at risk of forced marriage, and may also be vulnerable to forced marriage within the State or being taken outside the State or overseas for the purposes of marriage. The *Family Law Act* jurisdiction does not provide protection for those over the age of 18. There is a valuable opportunity within South Australia to lead the way and expand State law dealing with intervention and protection of any person facing forced marriage including those over the age of 18.

As there are currently no specific provisions in the *Intervention Orders (Prevention of Abuse) Act 2009* (SA), we submit that the Intervention Order jurisdiction be expanded to explicitly provide that forced marriage may be an act of abuse within the provisions of the Act.

- That conduct leading to forced marriage, fear of forced marriage or forced marriage itself should be recognised as forms of abuse and ground issuing of a South Australian intervention order.

Grounds for Making an Intervention Order

In South Australia, a person who is over the age of 18, or is under the age of 18, is able to make an application for an intervention order so long as there has been an **act of abuse** committed by a defendant, or will be committed by a defendant, or by a child who may be exposed to the effects of an act of abuse by a defendant.¹⁰ A formal application is heard by the Local Court, and an interim application is able to be issued by SA Police, however, the defendant must be present before a police officer or already be in police custody.¹¹ A protection intervention order may also be issued by a person on the behalf of another,¹² and is able to be issued as a singular order or as multiple orders for the protection of more than 1 person.¹³

The grounds for issuing an intervention order are set out in section 6 of the *Intervention Orders (Prevention of Abuse) Act 2009* (SA), where an order against a person (the “defendant”) can be issued if:

- (a) It is reasonable to suspect that the defendant will, without intervention, commit an act of abuse against a person; and
- (b) The issuing of the order is appropriate in the circumstances.¹⁴

The definition of “abuse” and “an act of abuse” is outlined in s8 of the Act. Section 8(1) recognises that **abuse** can take many forms such as “**physical, sexual, emotional, psychological or economic abuse**”. The section continues to state that an “**an act of abuse**” against a person is an act that results in or is intended to result in:

¹⁰ *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s7(1).

¹¹ *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s18(1).

¹² *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s7(2).

¹³ *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s7(3).

¹⁴ *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s6.

- (a) physical injury; or
- (b) **emotional or psychological harm**; or
- (c) **an unreasonable and non-consensual denial of financial, social or personal autonomy**; or
- (d) damage to property in the ownership or possession of the person or used or otherwise enjoyed by the person.¹⁵

Section 8 also provides inclusions and examples of the above. Under this Act, “**emotional or psychological harm**” includes:

- (a) mental illness; and
- (b) nervous shock; and
- (c) **distress, anxiety, or fear, that is more than trivial.**¹⁶

Examples of emotional or psychological harm are listed, where in the instances of exiting the country for possible exploitation or forced marriage, subsection 8(4)(p) would most likely apply:

- (a) sexually assaulting the person or engaging in behaviour designed to coerce the person to engage in sexual activity;
- (b) unlawfully depriving the person of his or her liberty;
- (c) driving a vehicle in a reckless or dangerous manner while the person is a passenger in the vehicle;
- (d) causing the death of, or injury to, an animal;
- (e) following the person;
- (f) loitering outside the place of residence of the person or some other place frequented by the person;
- (g) entering or interfering with property in the possession of the person;
- (h) giving or sending offensive material to the person, or leaving offensive material where it will be found by, given to or brought to the attention of the person;
- (i) publishing or transmitting offensive material by means of the Internet or some other form of electronic communication in such a way that the offensive material will be found by, or brought to the attention of, the person;
- (j) communicating with the person, or to others about the person, by way of mail, telephone (including associated technology), fax or the Internet or some other form of electronic communication in a manner that could reasonably be expected to cause emotional or psychological harm to the person;
- (k) keeping the person under surveillance;
- (l) directing racial or other derogatory taunts at the person;
- (m) threatening to withhold the person's medication or prevent the person accessing necessary medical equipment or treatment;
- (n) threatening to institutionalise the person;
- (o) threatening to withdraw care on which the person is dependent;
- (p) **otherwise threatening to cause the person physical injury, emotional or psychological harm or an unreasonable and non-consensual denial of financial,**

¹⁵ *Intervention Orders (Prevention of Abuse) Act 2009 (SA) s8(2).*

¹⁶ *Intervention Orders (Prevention of Abuse) Act 2009 (SA) s8(3).*

social or domestic autonomy or to cause damage to property in the ownership or possession of the person or used or otherwise enjoyed by the person.¹⁷

In pursuing section 8(4)(p) of the Act, it would also be necessary to look at subsection 5 as it gives examples of abuse that are an unreasonable and non-consensual denial of financial, social or personal autonomy. In an instance of exiting the country for possible exploitation or force marriage, a majority of the provisions could apply depending on the circumstances:

- (a) denying the person the financial autonomy that the person would have had but for the act of abuse;
- (b) withholding the financial support necessary for meeting the reasonable living expenses of the person (or any other person living with, or dependent on, the person) in circumstances in which the person is dependent on the financial support to meet those living expenses;
- (c) without lawful excuse, preventing the person from having access to joint financial assets for the purposes of meeting normal household expenses;
- (d) preventing the person from seeking or keeping employment;
- (e) causing the person through coercion or deception to—
 - (ii) relinquish control over assets or income; or
 - (iii) claim social security payments; or
 - (iv) sign a power of attorney enabling the person's finances to be managed by another person; or
 - (v) sign a contract for the purchase of goods or services; or
 - (vi) sign a contract for the provision of finance; or
 - (vii) sign a contract of guarantee; or
 - (viii) sign any legal document for the establishment or operation of a business;
- (f) **without permission, removing or keeping property that is in the ownership or possession of the person or used or otherwise enjoyed by the person;**
- (g) disposing of property owned by the person, or owned jointly with the person, against the person's wishes and without lawful excuse;
- (h) preventing the person from making or keeping connections with the person's family, friends or cultural group, from participating in cultural or spiritual ceremonies or practices, or from expressing the person's cultural identity;
- (i) **exercising an unreasonable level of control and domination over the daily life of the person.**¹⁸

In South Australian law, an intervention order is able to be issued for abuse that is either 'domestic' or 'non-domestic' in nature. The act of abuse will be **domestic abuse** if the defendant and the person against whom they committed the act of abuse against were in a relationship, such as:

- (a) they are married to each other; or
- (b) they are domestic partners; or

¹⁷ *Intervention Orders (Prevention of Abuse) Act 2009 (SA) s8(4).*

¹⁸ *Intervention Orders (Prevention of Abuse) Act 2009 (SA) s8(5).*

- (c) they are in some other form of intimate personal relationship in which their lives are interrelated and the actions of 1 affects the other; or
- (d) 1 is the child, stepchild or grandchild, or is under the guardianship, of the other (regardless of age); or
- (e) 1 is a child, stepchild or grandchild, or is under the guardianship, of a person who is or was formerly in a relationship with the other under paragraph (a), (b) or (c) (regardless of age); or
- (f) 1 is a child and the other is a person who acts in *loco parentis* in relation to the child; or
- (g) 1 is a child who normally or regularly resides or stays with the other; or
- (h) they are brothers or sisters or brother and sister; or
- (i) they are otherwise related to each other by or through blood, marriage, a domestic partnership or adoption; or
- (j) they are related according to Aboriginal or Torres Strait Islander kinship rules or are both members of some other culturally recognised family group; or
- (k) 1 is the carer (within the meaning of the *Carers Recognition Act 2005*)¹⁹

The burden of proof for proving that the defendant should have an application for an intervention order be successful against them is based on the balance of probabilities.²⁰

Court Considerations

Section 10 of the Act sets out “Principles for intervention against abuse” that the Court should recognised and take into account when determining whether or not it is appropriate to issue an intervention order, and also in determining the terms of an intervention order.

10—Principles for intervention against abuse

(1) The following must be recognised and taken into account in determining whether it is appropriate to issue an intervention order and in determining the terms of an intervention order:

- (a) abuse occurs in all areas of society, regardless of socio-economic status, health, age, culture, gender, sexuality, ability, ethnicity and religion;
- (b) abuse may involve overt or subtle exploitation of power imbalances and may consist of isolated incidents or patterns of behaviour;
- (c) it is of primary importance to prevent abuse and to prevent children from being exposed to the effects of abuse;
- (d) as far as is practicable, intervention should be designed—
 - (i) to encourage defendants who it is suspected will, without intervention, commit abuse to accept responsibility and take steps to avoid committing abuse; and
 - (ii) to minimise disruption to protected persons and any child living with a protected person and to maintain social connections and support for protected persons; and

¹⁹ *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s8(8).

²⁰ *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s28.

- (iii) to ensure continuity and stability in the care of any child living with a protected person; and
 - (iv) to allow education, training and employment of a protected person and any child living with a protected person, and arrangements for the care of such a child, to continue without interruption; and
 - (v) if the defendant is a child—
 - (A) to ensure the child has appropriate accommodation, care and supervision; and
 - (B) to ensure the child has access to appropriate educational and health services; and
 - (C) to allow the education, training and employment of the child to continue without interruption.
- (2) The following must also be taken into account in determining whether it is appropriate to issue an intervention order and in determining the terms of an intervention order:
- (a) any relevant Family Law Act order or Children's Protection Act order of which the issuing authority has been informed;
 - (b) how the intervention order would be likely to affect contact (in accordance with a relevant Family Law Act order or Children's Protection Act order or otherwise) between—
 - (i) the protected person or the defendant; and
 - (ii) any child of, or in the care of, either of those persons;
 - (c) any relevant agreement or order for the division of property under the *Family Law Act 1975* of the Commonwealth, or the *Domestic Partners Property Act 1996* or a corresponding law of another jurisdiction, of which the issuing authority has been informed;
 - (d) if considering whether to prohibit the defendant from taking possession of property or to require the defendant to return property to a protected person or to allow a protected person to recover or have access to or make use of property—the income, assets and liabilities of the defendant and the protected person (to the extent that the issuing authority has been informed of those matters);
 - (e) any other legal proceedings between the defendant and protected person of which the issuing authority has been informed.
- (3) Before issuing an intervention order the issuing authority must consider whether, if the whereabouts of a person proposed to be protected by the order are not known to the defendant, the issuing of the order would be counterproductive.
- (4) An issuing authority may take into account any other factor the authority considers relevant in the circumstances.²¹

Terms Which May Be Imposed in An Intervention Order

Section 12 of the *Intervention Orders (Prevention of Abuse) Act 2009* (SA) provides a list of general terms that may be attached to an intervention order. A Court is able to impose an intervention order

²¹ *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s10.

against a defendant with multiple terms attached, and the Court is able to specify conditions and alterations to terms in the intervention order. There are a multitude of terms that may be imposed on the order, but examples of those that are applicable to the instances of exiting the country for possible exploitation or forced marriage are:

- prohibiting the defendant from contacting, intimidating, or threatening the protected person or any other person at their place of residence or work
- prohibiting the defendant from taking possession of specified personal property reasonable needed by a protected person, such as their passport.

Furthermore, one of the terms in section 12 specifically state that the Court may impose a term in the intervention order that **“required the defendant to return specified personal property to a protected person”**.²² This term will very much include the return of a protected person’s passport if it has been taken from their possession.

Section 31 of the Act also looks at the penalties involved with contravening an intervention order. Under this Act, if a defendant contravenes one term of an intervention order imposed against them in section 13, they are guilty of an offence which carries a maximum penalty of \$1,250 with an expiation fee of \$160. If the defendant has contravened more than one term of an intervention order, then the maximum penalty becomes 2 years of imprisonment.

There also appears to be no Australian law regarding the voluntary surrendering of a passport by a person 18 years and over.

Summary of Recommendations

1. Define a child as a person below the age of 18 in all relevant sections of the Bill.
2. Include a rebuttable presumption to the proposed section 33C of the *Criminal Law Consolidation Act 1935* (SA), such that a marriage which has taken place within Australia of a person below the age of 18 will be considered as a child marriage except where that marriage has been authorised by a court order (in accordance with section 12 of the *Marriage Act 1961* (Cth)).
3. Include a comprehensive definition of marriage in all relevant sections of the Bill, recognising the existence of legal, non-legal, religious, and cultural marriage ceremonies.
4. Include a provision in the Bill that a protection order may be made if the court has reasonable grounds to suspect that a child may be at risk of going through the form or ceremony of a marriage.
5. Include a provision in the Bill that it is an offence to arrange or bring a child into the State for the purpose of marriage.
6. Include a provision in the Bill that it is an offence to arrange or cause a child to enter into a marriage within the State, whether that marriage is legally valid or not.
7. Include an amendment to the *Intervention Orders (Prevention of Abuse) Act 2009* (SA) for there to be a provision that forced marriage should be a recognised type of abuse under which an intervention order can be made.

²² *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s12(j).

8. Include an amendment to the *Intervention Orders (Prevention of Abuse) Act 2009 (SA)* for there to be a provision that an order may be made for a protected person to voluntarily surrender their passport to the court as a means of protection.

Thank you again for the opportunity to comment on the proposed amendments.

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