Law Council
OF AUSTRALIA

Enhancing Civil Protection and Remedies for Forced Marriage—Consultation Paper

Attorney-General's Department

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The Law Council advises governments, courts, and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

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The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is www.lawcouncil.au.

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- Law Institute of Victoria
- Law Society of the Australian Capital Territory
- Law Society of New South Wales
- Law Society of South Australia
- New South Wales Bar Association

Introductory remarks

1. The Law Council of Australia appreciates the opportunity to provide this submission to the Attorney-General's Department (**Department**) in response to its July 2024 consultation paper, *Enhancing Civil Protections and Remedies for Forced Marriage* (**Consultation Paper**).

2. The Law Council endorses the goal of enhancing Australia's response to combat forced marriage in the National Action Plan to Combat Modern Slavery 2020–24.[1] The Law Council also welcomes the broadening of access to the Australian Government's Support for Trafficked People Program (including the Forced Marriage Support Stream) (**STPP**), which provides assistance to victims of human trafficking, slavery and slavery-like practices, including forced marriage and forced labour.[2]

3. At the outset, the Law Council notes that Australia, as a multicultural society, celebrates its diversity, but also the rule of law which unites us. Identifying and drawing attention to certain cultural practices by sectors of the Australian community requires thoughtfulness, temperance and a significant degree of sensitivity so as not to single out or discriminate against any particular sector. An educative process is paramount to build a strong foundation for any enhancements to the availability of civil protections and remedies for forced marriage, noting these sensitivities.

4. As the Consultation Paper notes, forced marriage occurs when a person gets married without freely and fully consenting because they have been coerced, threatened or deceived, or are incapable of understanding the nature and effect of a marriage ceremony, or are under the age of 16 when they were married.[3] The circumstances leading to instances of what may constitute forced marriage are multifaceted and complex. Forced marriage happens on a continuum of coercive practices[4] and a 'continuum-thinking' intersectional lens is needed to understand the connections between forced marriage and more 'generic' forms of domestic violence.[5]

5. Individuals who experience forced marriage are in a unique position, where they may need to balance their relationship with their family and their desire to retain autonomy to make choices for themselves or to have a say in matters which affect them. In one recent ABC article, the AFP was quoted as saying that '[v]ictims, often young and vulnerable, may be reluctant to testify against family members or community leaders due to fear of retribution or ostracism'.[6]

6. Any approach to civil protections and remedies for forced marriage should first and foremost be on a prevention basis and informed by a human rights approach. Article 16 of the Universal Declaration of Human Rights states that:

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[1] See further, Law Council of Australia, Submission to Australian Border Force, National Action Plan to Combat Modern Slavery 2020-2024: Public Consultation Paper (Submission, 21 February 2020), 17-18 [54]-[60].
[2] Attorney-General's Department, *Enhancing Civil Protections and Remedies for Forced Marriage: Consultation Paper 2024* (July 2024) 5 ('*Consultation Paper*').
[3] Ibid 4.
[4] Jacqueline Nelson and Jennifer Burn, 'Forced Marriage in Australia: Building a Social Response with Frontline Workers' (2024) *Social & Legal Studies* 1-24, 3.
[5] Frances Simmons and Grace Wong, 'Learning from Lived Experience: Australia's Legal Response to Forced Marriage' (2021) 44(4) *UNSW Law Journal* 1619, 1629.
[6] Charmaine Manual, 'Migrant women call for education and awareness of forced marriage in Australia' (ABC News, 27 August 2024).

(a) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

(b) Marriage shall be entered into only with the free and full consent of the intending spouses.

7. Explicit recognition of forced marriage as a form of family and domestic violence would promote Australia's international human rights obligations including, and primarily, the Convention on the Elimination of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child.[7]

8. Under the *Marriage Act 1961* (Cth) and the *Marriage Regulations 2017* (Cth), to marry in Australia a person must be at least 18 years old (or a court must approve a marriage for a person between 16 and 18), understand what marriage and consenting to marriage means, to freely agree to marry, and be married by an authorised marriage celebrant.[8]

9. The Consultation Paper outlines the four key tenets of the Australian Government's commitment to enhancing support for people in or at risk of forced marriage, being:

(a) building a shared understanding of forced marriage as a form of family and domestic violence;

(b) enhancing education and awareness-raising;

(c) strengthening forced marriage civil protections and remedies; and

(d) enhancing support services through the Forced Marriage Specialist Support Program.

10. Th Law Council supports the four key tenets of the Australian Government's approach to forced marriage. Access to protections and remedies is also ensuring that the relevant legal frameworks are serving their intended purpose. Robust policies and laws will only work if they are developed in connection with the context within which they operate.

11. Different viewpoints exist within the Law Council, and across the legal profession as a whole, as to the best mechanisms to implement a comprehensive civil protection regime for those experiencing or at risk of forced marriage. This submission seeks to demonstrate and balance the raft of potential legal and non-legal options available to support those at risk of, or in, a forced marriage.

[7] Article 3 obliges States parties, including Australia, to take all appropriate measures to ensure 'the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men' and Article 16 directly addresses women's rights in marriage, including the right to freely choose a spouse and to enter into marriage only with their free and full consent (Art 16(1)(b)): *Convention on the Elimination of Discrimination Against Women*, adopted 18 December 1979, UNGA Res 34/180, UN/GA/RES/34/180 (entered into force 3 September 1981) arts 3, 16(1)(b).

[8] Attorney-General's Department, Get married (online).

Responses to the Consultation Paper

Question 1: Are these effective options to improve nationally consistent responses to forced marriage? Are there different options that should be considered?

12. The proposed options provide a sound basis upon which to progress a framework designed to support the range of individuals who may be involved in or affected by forced marriage.

13. Option A under action item 3 of the Consultation Paper proposes to strengthen forced marriage civil protections and remedies through integrating enhanced protections into existing Commonwealth, state and territory family and domestic violence frameworks. As the Consultation Paper notes, 'this could include through developing and agreeing shared principles or features of enhanced protections for jurisdictions to integrate as appropriate in their family and domestic violence frameworks. Option B proposes to establish new protections through Commonwealth legislation, with implementation support from state and territory governments.[9]

14. The Law Council considers that both options A and B under action item 3 identified in the Consultation Paper are attended by both benefits and downsides although elements from both are needed to comprehensively address forced marriage in Australia (see further discussion under Question 9). Above all, the need to protect vulnerable persons in our community and ensure their safety and sense of agency should be at the heart of any law reform related to forced marriage.

15. It is imperative that any design for civil protection and remedies for forced marriage be supported by careful consideration of the multitude of intersecting legal and non-legal issues: criminal and family law, child protection, family and domestic violence, family relationships and sensitivities around different cultural practices. Any changes should also be promoted through social awareness campaigns before they become enforceable.

Part 1: Building a shared understanding of forced marriage as a form of family and domestic violence to improve victim-survivors' access to family and domestic violence services

Question 2. Should forced marriage be recognised as a form of family and domestic violence? Why?

Federal jurisdiction

16. As the Consultation Paper notes, forced marriage is recognised as both a slavery-like practice and a form of domestic and gender-based violence in Australia.[10] At the federal level, it is unlawful to cause a person to enter into a forced marriage, or to be a party, other than the victim, to a forced marriage.[11] Unless a person is a

[9] Consultation Paper (n 2) 9.
[10] Ibid 4.
[11] Ibid 5.

victim of the forced marriage, being a party to a forced marriage means agreeing to marry a person who the person knows or suspects is a victim of forced marriage.[12]

17. Forced marriage is an offence under section 270.7A(1) of the *Criminal Code 1995* (Cth) and defined as a situation whereby one party (the victim) is coerced, threatened, or deceived into entering the marriage without giving genuine and voluntary consent.

18. The Law Council considers that the conduct that would be captured under the offence of forced marriage under the Criminal Code above likely already meet the various broad definitions of 'family violence' contained in legislation at the Commonwealth level.

19. For example, 'family violence' is defined in section 4AB(1) of the *Family Law Act 1975* (Cth), which provides:

> For the purposes of this Act, family violence means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the family member) or causes the family member to be fearful.

20. Examples of family violence are set out in section 4AB(2) but the list does not explicitly include forced marriage, notwithstanding that it would appear to constitute 'family violence'. In *Saska & Radavich*,[13] the Full Court of the Family Court considered the proper interpretation of section 4AB(1) and found that section 4AB(2) of the Family Law Act gives context to the definition contained within section 4AB(1).[14] In *Olivier & Olivier*,[15] which concerned allegations of coercive and controlling behaviour between the parties for the purposes of determining the appropriate parenting orders, the Family Court considered the definitions of 'coerce' and 'control' in relation to the definition under section 4AB(1). The Court noted that,

> … although there is a reference to behaviour that is "violent" or "threatening", the categories of behaviour are open, as indicated by the inclusion of the general "or other behaviour". The essential aspect of the definition is the effect of the behaviour, being that it is behaviour that is controlling, coercive or engenders fear.[16]

21. Depending on the facts of a specific case, the effect of forcing or pressuring a person to marry another person is likely to engender fear, be coercive or controlling. While the specific wording of the definition under section 4AB(1) the Family Law Act appears to sufficiently capture actions related to forced marriage, the Law Council considers that it may be worthwhile explicitly including 'forced marriage' as an express example of family violence under section 4AB(2) of the Family Law Act. For example: 'forcing a family member to marry another person without the first person's valid consent' could be added.

State and Territory jurisdiction

22. As noted in the Consultation Paper, forced marriage is also recognised as a form of domestic and family violence in some states:

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[12] Ibid.
[13] [2016] FamCAFC 179.
[14] Ibid [67].
[15] [2020] FamFC 639, [46]-[52].
[16] Ibid [43].

(a) In **New South Wales** (**NSW**), the *Crimes Domestic and Personal Violence Act 2007* (NSW) (**CDPV Act**) was amended through the *Modern Slavery Amendment Act 2021* (NSW) to expressly define NSW and Commonwealth criminal offences involving forced marriage as personal violence offences. These amendments commenced in January 2022 and sought to ensure access to apprehended violence orders (**AVOs**) by potential adult and child victims of forced marriage.

(i) NSW has also incorporated the section 270.7A definition, as well as the definition of 'child forced marriage' found in section 93AC of the *Crimes Act 1900* (NSW) into the CDPV Act.

(ii) We note that there is an ongoing review of the CDPV Act which is addressed further under our response to Question 4.

(b) In **South Australia**, explicit recognition of forced marriage appears to be limited to the intervention order regime under the *Intervention Orders (Prevention of Abuse Act 2009* (SA), where an intervention order can be issued for the protection of a person where it is suspected that the defendant will commit an 'act of abuse', which definition includes acts which result in (or is intended to result in) emotional or psychological harm.

(c) In **Victoria**, additional protections are afforded under section 5(1)(b) of the *Family Violence Protection Act 2008* (Vic), which recognises forced marriage as a form of family violence.[17]

23. Queensland, Western Australia, Tasmania, the Northern Territory and the Australian Capital Territory do not recognise forced marriage explicitly as a form of family violence.

24. The Law Council and its constituent bodies generally support the national recognition of forced marriage as a form of family and domestic violence. A consistent definition of family violence across Australia's various jurisdictions would help to address the gaps in the legal protections available to victims across Australian jurisdictions, because it would simplify the process for forced marriage victims/victim-survivors seeking protection from family violence, and more specifically forced marriage.

25. To assist the consultation, the Law Council's Policy Position on a model definition of 'family violence', including definitions for 'economic abuse', 'emotional or psychological abuse', 'family member', 'domestic partner' and 'relative', may be useful in contemplating a federally consistent definition of family violence which includes forced marriage.[18] The model definitions resulted from a National Roundtable with participants from Law Council Constituent Bodies, the Law Council's Family Law Section, relevant Law Council Advisory Committees, the legal assistance sector (including women's Legal Centres), and family violence prevention and survivor support organisations.[19]

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[17] This followed Recommendation 156 of the 2016 Royal Commission into Family Violence in Victoria, which sought to 'expand the statutory examples of family violence to include forced marriage and dowry-related abuse' in the FVPA: Royal Commission into Family Violence: Summary and Recommendations (Report, March 2016) 85.

[18] Law Council of Australia, Model Definition of 'Family Violence (26 May 2021, last updated 10 October 2023).

[19] Ibid.

Contextual placement of forced marriage under family and domestic violence frameworks

26. It is important that addressing the issue of forced marriage should not be confined to a criminal justice response; the present consultation is valuable for this reason. As noted by the Office of the NSW Anti-Slavery Commissioner, 'an AVO will typically be an instrument of last resort for those at risk of forced marriage and the service providers seeking to protect them from forced marriage'.[20]

27. In the experience of members of the Law Council's Constituent Bodies such as the Law Society of New South Wales, individuals affected by forced marriage may be reticent to engage with a criminal justice response, particularly due to fear around the impacts on close family members, as well as the prospect of alienation from their family and community. Stigma and shame, coupled with the fact that victim-survivors may be financially dependent on their spouse are other contributing factors. These factors can be exacerbated for victim-survivors with poor English language skills, as well as migrants, who may fear potential repercussions for their visa status as a result of engaging with the criminal justice system.

28. Solely situating 'forced marriage' in the framework of modern slavery may also not adequately cover situations of coercive control or the types of pressure that individuals face, and the continuum of relationships that exist, to the same extent that including forced marriage under family and domestic violence frameworks would.[21]

29. Concepts and actions related to forced marriage are likely to be better understood by the wider community if communicated through a framework of family and domestic violence, where there have already been significant awareness raising campaigns and recent changes to law, including on consent and coercive control.

30. To place forced marriage under both frameworks of modern slavery and family violence emphasises the seriousness with which the Australian Government treats forced marriage. It may also better allow potential victims or victim-survivors to reflect on whether elements of their situation fall within concepts of forced marriage, which in turn could lead to better awareness and engagement with official supports.

Question 3. What legal, policy changes or additional guidance is needed to better recognise forced marriage as a form of family and domestic violence?

31. Policy and law makers should consider the tensions between the centrality of individual consent in Australia and communitarian approaches to questions of marriage in some communities and cultures in developing legal mechanisms and policy guidance on forced marriage.[22] For example in the United Kingdom (**UK**), some academics 'see "the heavily individualist model of consent inherent in the debate in the West" as markedly different to the marriage process within South Asian communities in the UK, where marital decision making is seen as a familial responsibility'.[23] This is equally apposite in Australia.

[20] Office of the Anti-Slavery Commissioner, Submission to the Review of the NSW Legal Protections for Victim Survivors of Forced Marriage (December 2023).
[21] Nelson and Burn (n 4) 3.
[22] Ibid.
[23] Ibid; F Shariff, 'Towards a transformative paradigm in the UK response to forced marriage: excavating community engagement and subjectivizing agency', (2012) 21 *Social & Legal Studies* 549-565, 557.

32. At its core, Australia has an individualist consent-based legal framework with respect to marriage.[24] Where marriage may become forced is a matter of understanding at which point a person has lost the agency to decide for themselves to get married or to leave a marriage. In the Explanatory Memorandum to the 2019 amendment to the offence under the *Crimes Act 1914* (Cth), it was noted that '[o]perational experience has shown that perpetrators of these crimes are often the victims' parents, close relatives, and religious or community leaders who are in a position to exert subtle and prolonged familial, religious and cultural pressure upon victims'.[25]

33. While the Law Council does not support reforms that undermine the concept of individual consent in marriage in Australia, any broader changes to policy frameworks and corresponding guidance around forced marriage and its recognition as a form of family and domestic violence need to be guided first and foremost by an understanding of the social dynamics through which acts relating to forced marriage occur. Furthermore, any changes need to balance the effect of the civil or criminal penalty on the perpetrator and the relationship between the victim, the perpetrator and other family members.

34. Australian Government responses so far to forced marriage have also largely been confined to a criminal justice response.[26] Despite its introduction into the Criminal Code in 2014, there has so far only been one successful prosecution and conviction under the Criminal Code of forced marriage.[27] In *Commonwealth Director of Public Prosecution v Jan*,[28] Ms Jan was convicted and sentenced to three years' imprisonment for the crime of causing her daughter to enter a forced marriage.[29] Ms Jan herself was married at the age of 13, which highlights the complexities of these cases.

35. We have received strong Constituent Bodies support for the proposition that responses to forced marriage should not be confined to criminal justice. The criminal justice system alone is unable to address the significant physical, psychological and financial harm inflicted where forced marriage occurs for both its primary victims, and on secondary victims including children of the relationship.

Question 4. What enhancements or additional guidance might be needed to help family and domestic violence services more consistently recognise forced marriage as a form of family and domestic violence?

Potential opportunities for enhancements or additional guidance

36. The NSW Department of Communities and Justice (**DCJ**) is currently undertaking a review of the adequacy of the protection available to forced marriage victims in NSW. The DCJ Review in its 2023 Discussion paper focused on available protection under the civil apprehended violence order regime in the CDPV Act, taking into account the changes to the AVO regime introduced by the *Modern Slavery Act 2018* (NSW). We recommend that the Attorney-General's Department liaise with the DCJ to ensure nationally coordinated and consistent solutions.

37. Domestic and family violence services may also benefit from specific training around building client-led relationships with those who seek help. Trust between the client and the service provider will enable the client to express their concerns and give

[24] Nelson and Burn (n 4) 2.
[25] Explanatory Memorandum, Combatting Child Sexual Exploitation Legislation Amendment Bill 2019, 5 [28].
[26] Consultation Paper (n 2).
[27] *Commonwealth Director of Public Prosecution v Jan* [2024] VCC 1122.
[28] Ibid.
[29] Criminal Code, s 270.IA.

them agency in seeking the help that they need for their situation.[30] Teachers and counsellors within school settings may also benefit from educative training where students may be at risk of forced marriage.

38. Furthermore, as an example of where further guidance might be warranted, the Law Society of South Australia has observed that the South Australia Police website does not reference forced marriage as a form of family and domestic violence, nor is it specified as a specific ground for an intervention order. It suggests that recognition by services such as police forces to be an important first step in the more consistent recognition of forced marriage as a form of family and domestic violence.

Part 2: Enhancing education and raising awareness

Question 5. What topics could education or awareness raising activities focus on?

39. The Law Council supports proposals to enhance education and awareness raising across communities of the support services and legal remedies currently available to address forced marriage. It is vital that the justice, education, health and social services sectors are adequately resourced so that their staff have up-to-date knowledge of, and training in relation to, forced marriage within the context of family and domestic violence.

40. This education and training must be guided by trauma-informed principles and be culturally appropriate. Increasing reporting of, and opportunities to intervene and prevent, forced marriage depends on victims having trust in the institutions with which they engage.

41. The following topics could a provide a sound holistic basis for education and awareness raising activities:

    (a) Legislative options for resolving situations of forced marriage, including:

        (i) civil;

        (ii) criminal;

        (iii) migration;

        (iv) administrative.

    (b) Policy options

        (i) healthy relationships and sexual education;

        (ii) consent education;

        (iii) ethics education.

    (c) Community options

        (i) relationship building between law enforcement and CALD communities;

[30] Nelson and Burn (n 4).

(ii) religious and community-led education on healthy relationships.

(d) Cultural practices

(i) arranged marriages;

(ii) dowry practice.

(e) What happens after divorce or nullity of marriage

(i) children;

(ii) migration status and visa options;

(iii) property.

42. We address some of these below.

Social dynamics and the framing of education around 'forced' marriage

43. The drivers and impacts of forced marriage are complex and multi-faceted. Therefore, an effective social response will involve a wide range of activity across multiple levels, from structural and institutional interventions (e.g., Australia's asylum and migration regimes), to community-based programs (e.g., education, settlement support for families, parenting initiatives), down to individual responses (e.g., provision of crisis and longer-term support).[31] A rigorous social response encompasses prevention activity well before marriage is imminent, right through to crisis and recovery support for victim-survivors.[32]

44. It is fundamental for governments to recognise and celebrate Australia's rich cultural diversity and acknowledge the importance of family as foundations on which our society is built, as a preface to any education and awareness raising activities/resources.

45. Particular phrases and language taken from the legal context of 'forced marriage' may not be suitable to raise awareness and educate in the community on the breadth and diversity of relationships and actions that may lead to instances of forced marriage. Education topics should include examples of what a healthy relationship is, why forced or pressured marriage is unacceptable, including the detrimental personal and social impacts on Australian society, much in the same way as has been done with domestic and family violence.

46. Focus should also be on the prevalence of forced or pressured marriage, including to remain in a marriage, the risk factors associated with people particularly vulnerable to forced marriage, and the statistics related to persons subjected to it. Additionally, education should also address the types of precursory actions which may lead to forced marriage, and any other 'warning signs'.

[31] Ibid 4.
[32] Ibid.

Dowry and dowry-related abuse

47. The Law Council has also previously provided a submission to the Senate Legal and Constitutional Affairs References Committee on the practice of dowry and the incidence of dowry abuse in Australia.[33] Dowry is a cultural practice in some countries in South Asia, the Middle East and Africa, and often involves payment by the bride's family to the groom and his family, with the direction of gifts being reversed for the price of the dowry.[34]

48. A group of experts convened by the United Nations Division for the Advancement of Women in 2009 defined dowry-related abuse as 'any act of violence or harassment associated with the giving or receiving at any time before, during or after the marriage'.[35]

49. The recognition of this type of abuse is an important issue on which to educate communities and frontline workers. Members of the legal profession have reported instances of crossover between family law, migration cases and family violence protection orders where dowry-related abuse is a feature.[36] Dowry-related abuse may impact on a party's safety, arrangements made for children of the marriage, property adjustment and financial support.

50. Furthermore, it will be important to consider how different cultures approach nullity of marriage or divorce. For example, under Islamic Sharia law, the equivalent of an annulment ('faskh') when there is fault on the part of the husband, entitles the wife to the dowry (or 'mahr').[37]

Legal dynamics

51. Educational activities should aim to create awareness of the marriageable age in Australia under the Marriage Act[38] and the grounds upon which a marriage is voidable, including where the person is forced or pressured into marriage and has not provided proper consent.[39]

52. Another important national resource, the National Domestic and Family Violence Bench Book, includes 'forced marriage' in its Context Statement on understanding domestic and family violence.[40] This resource is vital in raising and maintaining awareness of the various forms of domestic and family violence nationally and across community and professional sectors who engage with clients through the judicial system.

53. It is also important that educational materials are developed having regard to the limitations of legal remedies (whether criminal or civil) in addressing forced marriage

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[33] Law Council of Australia, Submission to the Senate Legal and Constitutional Affairs References Committee, *The practice of dowry and the incidence of dowry abuse in Australia* (Submission, 19 September 2018).
[34] Ibid 6.
[35] United Nations Division for the Advancement of Women, *Good Practices in Legislation on 'Harmful Practices' Against Women: Report of the Expert Group Meeting* (29 May 2009, online).
[36] Law Council of Australia, Submission to the Senate Legal and Constitutional Affairs References Committee, *The practice of dowry and the incidence of dowry abuse in Australia* (Submission, 19 September 2018) 7.
[37] See Law Council of Australia, Submission to the Senate Legal and Constitutional Affairs References Committee, *The practice of dowry and the incidence of dowry abuse in Australia* (19 September 2018) 15-16.
[38] *Marriage Act 1961* (Cth), s 12.
[39] *Marriage Act 1961* (Cth), s 23.
[40] Australian Institute of Judicial Administration, *National Domestic and Family Violence Bench Book* (online) <https://dfvbenchbook.aija.org.au/terminology/understanding-domestic-and-family-violence/>.

given the religious, social and cultural reasons which may prevent persons from reporting, or even realising they may be subject to, forced marriage in the first place.

Resourcing and reporting

54. The benefits of education and awareness raising will not be realised unless there are effective available support arrangements to which a first responder can refer an affected individual.

55. Section 9B of the Marriage Act may be relevant in this regard in that it provides for the Minister to, out of moneys appropriated by the Parliament, grant to an approved organisation sums by way of financial assistance for the conduct of programs for marriage education.

56. Furthermore, the NSW Anti-Slavery Commissioner is required to set out in their Annual Report the extent to which the NSW Government has provided mandatory training on modern slavery to frontline government agencies and the public.[41] This may be a useful tool to reflect in any federal approach to forced marriage, to track the progress of education and awareness raising ventures against any targets built out of this consultation process.

Question 6. Who should be involved in education and raising awareness in communities affected by forced marriage?

57. Responses and education initiatives must be developed with, and fit for delivery to, communities and sectors that are affected by forced marriage. The following services may be appropriate to deliver such initiatives:

    (a) primary and high schools;

    (b) the Department of Human Services;

    (c) religious bodies and leaders;

    (d) federal and state police forces;

    (e) social workers;

    (f) child protection agencies;

    (g) psychologists and psychiatrists;

    (h) mediation services;

    (i) community services such as Centacare, Anglicare, Uniting Communities;

    (j) Relationships Australia; and

    (k) solicitors—employed in the private profession and in the legal assistance sector.

[41] *Modern Slavery Act 2018* (NSW) s 19(3)(a).

Community frontline workers

58. The Consultation Paper notes that civil protections and remedies need to form part of an holistic response to forced marriage that includes community education and awareness raising, as well as training for frontline responders.[42] Trusting relationships established between frontline workers and those experiencing forced marriage are proven to be the most effective, where clients lead in deciding what avenues are most in their interests.[43]

59. As recognised in the Law Council's Justice Project, frontline services are best supported to build and maintain trust with individuals and communities who need legal help when governments:

- prioritise adequate, predictable, sustainable and long-term funding models for these services; and
- provide ongoing funding pathways to enable innovative pilots and community-led initiatives which have demonstrated success to flourish longer-term, with specific funding allocated for their evaluation.[44]

60. Programs for frontline workers and responders, including teachers, healthcare professionals, child protection workers and religious and/or community group leaders, are important given they may have sustained contact with the at-risk person and community over a longer period and therefore may be well-placed to notice warning signs and to respond. MyBlueSky has already developed a Frontline Worker Guide to forced marriage and provides a good framework for frontline responders to use in their work.[45]

61. Any training should seek to develop the responder's awareness of legislative and non-legislative options to be sensitive to what may best suit the client's needs. They should be equipped to provide accurate advice and information, while respecting the autonomy and views of the affected individual as to the intervention and/or support that they may require. This is particularly important where victim-survivors have already experienced a lack of agency and autonomy.

62. Sector and community-wide involvement in education and training is required, much as it is in family and domestic violence and child protection (frontline legal and non-legal service delivery organisations, justice, child welfare and education for example). Education and awareness training should be multi-lingual and multi-modal.

Question 7. Which groups in the community require education and increased awareness of forced marriage (e.g. frontline workers such as police, child protection and/or specific cohorts within the community)?

63. As mentioned above, support arrangements to which a first responder can refer an affected individual will be crucial to the accessibility and effectiveness of relevant educational measures. Responding to a forced marriage captures a range of behaviours and activities which may trigger criminal, civil, family, migration, and/or child protection responses.

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[42] Consultation Paper (n 2) 12.
[43] Fiona McGaughey, Tsitsi Gotora, Natalie Skead, Jani McCutcheon, *Tackling Forced Marriage in Western Australia: a Pilot Project*, (2024) University of Western Australia Law School, 9.
[44] Law Council of Australia, Justice Project Final Report (2018), Legal Services Chapter, 29.
[45] MyBlueSky, 'Frontline Worker Guide: Identifying and Responding to Forced Marriage in Australia' (online).

64. Supports are often spread across state and Commonwealth agencies, which can cause great difficulty for a victim in navigating the assistance available to them. One example is a victim-survivor who applies to NSW Police for an AVO, but who would be required to approach Commonwealth agencies if they wanted to be referred to the STPP administered by the Department of Social Services, or have an alert placed on the Passenger Analysis Clear and Evaluation System (**PACES**) by the AFP.

65. A lack of inter-agency coordination may undermine the confidence and trust of the affected individual and create additional barriers to a safe exit from a situation of forced marriage.

66. Community groups or sectors which could benefit from education and increased awareness of forced marriage include:

    (a) religious bodies and leaders;

    (b) law enforcement;

    (c) social workers;

    (d) child protection services;

    (e) mental health practitioners - psychologists and psychiatrists;

    (f) the legal profession;

    (g) mediation services; and

    (h) community services such as Centacare, Anglicare, Uniting Communities.

Law enforcement

67. Relationship building between law enforcement agencies and culturally and linguistically diverse communities is an important facet of targeting pre-existing beliefs about the legal system which may prevent those affected by forced marriage from seeking police assistance.

68. In a report published by the Law and Justice Foundation of New South Wales, Pascoe Pleasence, Christine Coumarelos, Suzie Forell and Hugh McDonald reviewed evidence demonstrating how legal problem-solving is patterned by people's circumstances and explored how the concept of legal capability helps explain research findings.[46] They reported that the previous experiences of migrant communities with the Australian legal system which did not lead to effective outcomes are likely to discourage further participation and interaction with the Australian legal system.[47] This may also be conflated with a sense of distrust held towards police because of experiences of corruption within law enforcement in their home countries, for migrants.

69. The Law Society of NSW noted that in the experience of their members, individuals affected by forced marriage may be reticent to engage with a criminal justice response, particularly due to fear around the impacts on close family members, as well as the prospect of alienation from their family and community. In designing and

[46] Pascoe Pleasence et al., *Reshaping Legal Assistance Services: building on the evidence base* (Discussion Paper, April 2014, Law and Justice Foundation of New South Wales).
[47] Ibid 135.

educating about civil protections and remedies, emphasis should be placed on how it can offer something different to the criminal system which affected individuals may feel more comfortable seeking.

70. For those who do feel comfortable seeking law enforcement assistance, police and other government agencies who receive reports of forced marriage should receive nationally consistent training on the avenues available to victim-survivors to obtain independent and confidential legal advice. Furthermore, public facing resources should have consistent information available.

> For example, the Law Society of South Australia observes that the South Australia Police website does not reference forced marriage as a form of family and domestic violence, nor it is specified as a specific ground for an intervention order.

71. If a police officer or other person responding to a victim-survivor does not recognise the specific conduct as amounting to an offence or grounds for an intervention order, then they may be unable to identify appropriate remedies. Recognition by services such as police forces is an important first step in more consistent recognition of forced marriage as a form of family and domestic violence.

Migration agents and legal practitioners

72. Noting that the vast majority of victim-survivors of forced marriage in Australia are migrants, these individuals are vulnerable to manipulation through their migration status and may require assistance with migration law relevant to their experience.[48] The Law Council is of the view that increased awareness of and education about forced marriage for those who provide immigration advice and services (both migration agents and lawyers practising migration law) would create a safer experience for individuals and give practitioners tools to identify situations early.

73. Careful attention should be given in this context to the legal education needs of migrants who settle in regional, rural and remote (**RRR**) areas of Australia. The Law Council's Justice Project final report of 2018 recognised shifting demographics in this regard, with greater migrant settlement already occurring, and predicted to occur, in RRR Australia.[49] At the same time, it highlighted that relatively little planning appeared to be occurring for tailored legal education/legal assistance services (and supports such as interpreters) to cater for the needs of regional migrant communities.[50] Individuals in these communities may be particularly vulnerable to forced marriage/broader exploitation, and this should be taken into account to ensure that education, advice and referral networks are available.

[48] Law Council of Australia, *The Justice Project* (Report, 2018) Chapter on 'Trafficked persons in Australia', 10.
[49] Law Council of Australia, *The Justice Project* (Report, 2018), Chapters on "Recent Arrivals", 3, and "Rural, Regional and Remote (RRR) Australians". 7
[50] Ibid.

Part 3: Strengthening civil protections and remedies

Proposal for feedback

Question 8. Do you think there are gaps in the existing legal protections available to respond to and prevent forced marriage in Australia? If so, what are those gaps and do they need a national response?

74. The current legal framework for combatting forced marriage largely constitutes a criminal law approach, with a patchwork of state specific intervention order measures or federal family law injunction orders to supplement criminal measures. The Law Council is of the view that the family law jurisdiction should be concurrently reformed with the introduction of civil protections and remedies.

75. Forced marriage is an offence under s 270.7A(1) of the *Criminal Code 1995* (Cth) and defined as a situation whereby one party (the victim) is coerced, threatened, or deceived into entering the marriage without giving genuine and voluntary consent. The AFP is the primary investigative body that is responsible for investigating forced marriage offences in Australia. In dealing with forced marriage offences, the AFP can provide individuals who may be at risk of forced marriage with various supports including safe accommodation, counselling, financial support and legal immigration advice.[51]

The Family Law Act

76. As identified in the Discussion Paper, one of the challenges in providing support systems for different situations is the disparity of protections and remedies available for those who are underage versus adults. However, we consider that the Federal Circuit and Family Court of Australia (**FCFCOA**) is well-placed to respond to the prevention of forced marriage, particularly drawing on the following existing features of the Court:

    (a) specialised family and domestic violence training is undertaken by judicial officers of the Court;

    (b) the operation of the Family Law Watchlist within the Court;

    (c) the information exchange arrangements with child protection authorities and police services across jurisdiction;

    (d) the availability of Court-based assessments of children by Court Child Experts;

    (e) the experience in establishing specialised lists, including the Critical Incident List;

    (f) the existing relationship with the Australian Federal Police, who are responsible for investigating forced marriage offences;

    (g) capacity to list matters urgently for case management and determination, including through use of electronic hearings;

    (h) the use of Independent Children's Lawyers to represent the interests of children and young people; and

[51] Consultation Paper (n 2) 5.

(i) the co-located Family Advocacy Support Services (**FASS**) within registries of the Court.

77. As set out in our response under Question 2, the Law Council considers that including an example of forced marriage under section 4AB(2) of the Family Law Act would strengthen relevant legal provisions and enhance awareness.

78. The Family Law Act makes some provision for FCFCOA intervention in matters involving family violence through sections 68B, 68C, 114 and 114AA. These sections enable the FCFCOA to grant injunctions that provide protection to parties, children and carers who are at risk of family violence—breach of which may result in arrest, and a short period of custody.

79. However, the ability of the Family Law Act to adequately protect a vulnerable person is limited by the operation of section 114AB, which bars the Court from granting injunctive relief where there is an extant application with respect to family violence orders. If a civil protection order for forced marriage were to be introduced, the relationship between such an order, family violence prohibition orders under other jurisdictions, and Family Law Act orders would need to be carefully considered. Furthermore, the lack of an established policy between federal and state prosecuting authorities in respect of enforcement and prosecution of breaches of personal protective orders under section 68B of the Family Law Act is another gap.

80. Furthermore, we understand that there are concerns about delays in the FCFCOA in hearing applications for personal protection injunctions, or for their enforcement.[52] To address this, consideration could be given to establishing a separate court list dedicated to these applications, with capacity to hold urgent hearings, where necessary.

Universal Definition of Family Violence

81. As highlighted in the Consultation Paper, not all states and territories recognise forced marriage as a form of family violence, nor does the Family Law Act explicitly reference forced marriage. This is significant because jurisdictions that recognise forced marriage as a form of family violence have a clearer framework for addressing particular applications. They have greater protections and avenues for support available for victims/victim survivors of forced marriage. This includes civil protection orders, legal assistance, medical care, counselling, financial assistance and emergency accommodation.[53]

82. A nationally consistent definition of family violence, including forced marriage as an example, which could apply to any matter and jurisdiction in which forced marriage is in issue may help to address gaps in the legal avenues available to victims across Australia. It may simplify the process for forced marriage victims/victim-survivors seeking protection from family violence or other behaviour. In this respect we note Law Council's model definition of family violence, which may assist in settling a consistent definition.[54]

83. Any universal definition of family violence for the purpose of a civil remedy must reflect the features and dynamics of family violence, rather than specific prohibited behaviour, to mitigate the risk that new or unknown behaviours that are unlisted are

[52] Law Council of Australia, Submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs, *Inquiry into family violence orders* (6 August 2024) 34.
[53] Ibid 10.
[54] Law Council of Australia, Model Definition of 'Family Violence' (Policy Position, 26 May 2021, last updated 10 October 2023).

not inadvertently excluded from the definition. Special attention should also be paid to the differences in definitions owing to the differences in the standards of proof required to make out civil matters as compared to criminal.

Children under the age of 18 years old

84. Section 100B of the Family Law Act may prohibit a child victim-survivor actively participating in proceedings without the leave of the Court. This is a potential gap that could reduce the agency of the victim-survivor to participate in achieving an outcome with the least amount of harm to them.

85. For children who are at risk of a forced marriage that will occur overseas and outside of Australian jurisdiction, there is the possibility to apply to a court to make orders entering the child's name on the Family Law Watch List.[55] This may occur where there is:

    (a) a court-issued parenting order limiting or preventing overseas travel;

    (b) a court-issued injunction limiting or preventing overseas travel;

    (c) a parenting order application currently before the Federal Circuit and Family Court of Australia or the Family Court of Western Australia to limit or prevent overseas travel; or

    (d) a parenting order or injunction currently under appeal.[56]

86. In the FCFCOA, an injunction can be sought under Part VII, Division 9 of the Family Law Act to offer personal protection to a child or the parent of a child in Australia.[57] For instance, the Family Law Act can provide injunctive relief for the personal protection of a minor/s being taken offshore where, the child has an overseas passport rather than, or in addition to, an Australian passport; and/or is eligible for a passport in an overseas jurisdiction, including where the consent of both parents may not be required for a passport to be issued. Members of the legal profession report that this scenario arises not infrequently and often necessitates urgent court action to ensure a child's whereabouts is known and secured, and to obtain injunctive relief against a parent (or other party) who may be seeking to travel overseas with a child, or facilitate the child's removal from Australia, for the purpose of a forced marriage.

87. In circumstances where there is a risk of a child being taken overseas where they hold an Australian passport, an order under section 67D of the Family Law Act can be made to have the passport delivered to the court and for the child to be placed on the AFP Family Law Watchlist (**AFP Order**). An AFP Order can monitor all international departure points of the child from Australia. If the child does not yet have a passport, a Child Alert application can be submitted to the Department of Foreign Affairs and Trade (**DFAT**) to prevent passport issuance. If the child has already been taken abroad and there are serious concerns for their safety, a passport may be issued without parental consent to facilitate the child's return to Australia.[58]

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[55] See *Family Law Act 1975* (Cth) Part VII, Division 6 - Parenting Orders other than child maintenance orders.
[56] Australian Federal Police, 'Family Law Watchlist and the Australian Federal Police' (online).
[57] *Family Law Act 1975* (Cth) s 68B(1)(a)-(b)(i).
[58] Samantha Lyneham and Samantha Bricknell, 'When saying no is not an option: Forced marriage in Australia and New Zealand' (Research Report No 11, Australian Institute of Criminology, 15 August 2018) 75 ('AIC Report').

88. Parenting orders can also be issued regarding a child's care, welfare, or development.[59] These orders can be requested by the child, a parent, another family member, or any concerned individual to address living arrangements, contact with parents, and other related matters.[60]

    (a) For example, in the case of *Madley v Madley*,[61] Ms. Madley, a 16-year-old Australian woman, sought an order under section 65C(b) of the Family Law Act to prevent her parents from removing her from Australia to marry a man in Lebanon. Ms Madley gave evidence that she was concerned for her safety and feared her mother's reactions if she did not marry the man to whom she was engaged. Orders were successfully made in this case 'restraining Ms. Madley's parents from removing her from Australia'.[62]

89. In respect of children in **Victoria**, the Department of Families, Fairness and Housing is made aware of a child being at risk of forced marriage if a report is received, or protective concerns are raised that a child may be at risk of forced marriage. In these circumstances, the Secretary may seek a court order through the Children's Court, protecting the child from being forced into or being at risk of being forced into a non-consensual marriage.[63] This may be an appropriate administrative mechanism that could be replicated at the federal level to provide coverage across all states and territories.

Children between 16 and 18 years of age specifically

90. Under the Marriage Act, a person between the ages of 16 and 18 years may apply to a court for an order authorising them to marry a person of marriageable age.[64] However, such a marriage may not be solemnised without the consent of the parents of the minor person.[65]

91. There is a possibility of these provisions being weaponised by parents to force their child to marry and consideration might be given to amending the legislation to prohibit a person between the ages of 16 and 18 from marrying. However, this would be a significant departure from the status quo, and it is uncertain whether these provisions have in fact been weaponised in this manner. The Law Council does not have a settled view on this matter and would need to consult further before reaching one.

92. Ceremonial marriages on the other hand are not limited by the same constraints as a solemnised celebrated marriage. The best avenues available to mitigate the use of ceremonial marriages for those between 16 and 18 years are still likely to be education and changing attitudes within communities.

[59] *Family Law Act 1975* (Cth) s 64B(2)(i).
[60] Ibid s 65C.
[61] *Madley & Madley and Anor* [2011] FMCAFam 1007.
[62] Ibid.
[63] Department of Fairness, Families & Housing, 'Forced marriage – advice', *Child Protection Manual* (Advice & Protocols, 30 June 2022).
[64] *Marriage Act 1961* (Cth) s 12.
[65] Ibid s 13.

Adults over 18 years of age

93. There is a gap in the protections available to adults who may be at risk of forced marriage under the Family Law Act.[66]

94. To protect adults, intervention orders can provide some injunctive relief by prohibiting a respondent from harming or contacting a protected person.[67] However, these orders are limited to conduct that occurs in Australia and are not specifically targeted at those who may be vulnerable to a forced marriage situation.

95. There is a relevant legal framework that exists in England and Wales, and Northern Ireland, following the passage of the *Forced Marriage (Civil Protection) Act 2007* (**FMCP Act**), which amended the *Family Law Act 1996* (UK). The FMCP Act provides courts in England, Wales, and Northern Ireland with jurisdiction to make an order preventing a forced marriage of a person of any age, from taking place, and/or in circumstances where a forced marriage has already taken place, the court can exercise its powers to protect the victim by removing them from the situation.[68] The LIV submits that civil reforms within the Family Law Act could reflect this model to provide greater protection for adults as risk of forced marriage.

The Marriage Act and the role of celebrants

96. Under the Marriage Act, a marriage is void if either party did not give genuine consent, or if the marriage was obtained through duress or fraud,[69] and it is a criminal offence for a celebrant to solemnise a marriage if they have reason to believe it would be void.[70]

97. While not all forced marriages are subject to solemnisation by celebrant, celebrants could play an important role as a final touchpoint for those at risk in that context. It may be appropriate to amend section 39G(1)(c) of the Marriage Act to contain some express provision in respect of reporting where a celebrated marriage is annulled by virtue of lack of consent. Further, the provisions of section 42B might be strengthened to include that the celebrant should be required to record those circumstances and contemporaneously certify that they are satisfied of an absence of coercion. They could also be required by section 49 to keep such records.

Divorce and Property Law

98. The Law Council notes that there may be property law implications for those who are seeking to exit a forced marriage. It is important that victim-survivors are still entitled to make property applications where an entitlement accrues. This would depend on the length of the marriage, any payment of dowry, and whether there are children borne of the relationship.

[66] Consultation Paper (n 2) 13.
[67] *Family Law Act 1975* (Cth) s 114.
[68] AIC Report (n 46) 4.
[69] *Marriage Act 1961* (Cth) s 23B(d)(i).
[70] *Marriage Act 1961* (Cth) s 100.

Question 9. This paper discusses two options to strengthen civil legal protections: Option A (enhance existing legislation, possibly through shared principles) and Option B (introduce standalone Commonwealth legislation). Which of these two implementation options would be most effective and why? What are the key risks? Are there other options that should be considered?

99. The Law Council does not have a settled position on the two options proposed as we have received a range of views from our Constituent Bodies and other stakeholders. Both options raise a number of complex legal and practical considerations given the cross-jurisdictional nature of current criminal and civil protections against forced marriage, which we outline below.

Option A—integration in state/territory family and domestic violence frameworks

Benefits

100. Option A proposes to integrate enhanced civil protections and remedies in existing Commonwealth, state and territory family and domestic frameworks, building on existing expertise and systems.[71]

101. Option A has the advantage of allowing the civil response to forced marriage to be tailored to the specific arrangements already in place in each jurisdiction, and more easily integrated into existing justice and community support arrangements. This option may better reflect a trauma-informed approach, preventing victims from having to provide information and documentation to multiple agencies repeatedly. Limiting the number of services a victim is required to access may also minimise the risk of a perpetrator being alerted to the victim's attempts to leave a relationship—when the risk of physical violence is heightened.

102. It is desirable that applications are as streamlined and simple as possible, and state and territory legislation would avoid any confusion about the jurisdiction of courts and police. However, that advantage is likely limited only to those jurisdictions which already have robust domestic and family violence frameworks.

103. For example, some family and domestic violence frameworks such as Tasmania, may be too limiting and require alternate frameworks at a state/territory level.[72] This would create another layer and complexity in dealing with another form of family and domestic violence, unless all jurisdictions aligned their family and domestic violence legislation.

Challenges

104. State and territory courts would also need to be vested with the power to make orders preventing a victim's departure from Australia while at the same time exercising family law or state welfare jurisdiction with respect to parental responsibility and a child's care arrangements in the case of children and young persons. The courts would also need power to make ancillary orders relating to the return of children to Australia if already removed from the jurisdiction.

105. While state and territory systems may be more responsive to time-critical applications for certain orders, it would rely on existing resources and would require an injection of funding both for legal and non-legal support services. This would

[71] Consultation Paper (n 2) 15.
[72] Ibid; the *Family Violence Act 2004* (Tas) addresses conduct committed by a person's spouse or partner only, and would not apply to other family members or perpetrators.

likely have to be negotiated between the Commonwealth Government and the states and territories, such as under the National Access to Justice Partnership, which may delay the implementation of those measures.[73]

106. While legal assistance and non-legal support services are trauma- and family and domestic violence-informed, and well positioned to enhance the safety and agency of victim-survivors of or at risk of forced marriage, they are experiencing significant service pressures requiring increased resourcing from government.

Option B—establishing new Commonwealth protection legislation implemented with State/Territory support

Benefits

107. Option B proposes to establish a new forced marriage order through a standalone Act of the Commonwealth.[74] The standalone 'Act would allow courts to make orders that address the prevention and protection needs of people in or at risk of forced marriage'.[75]

108. Option B has the advantage of providing national consistency and may be more expedient to implement given the need for introduction and passage of legislation through only one parliament. Implementation would, as a matter of practical necessity, depend on the State and Territory governments. Securing this agreement would likely require agreement to the terms of legislation, which could significantly lengthen the timeframes involved.

109. This option would, much like the creation of the criminal offence of forced marriage, have national application and enable uniformity in the implementation of the legislation and investigative powers of the AFP. It would also align with existing Commonwealth funded non-legal supports already provided by the STPP and the soon to be established Forced Marriage Specialist Support Programme (**FMSSP**).

110. Another benefit to a national scheme under a standalone Act would be the ability to expand the existing jurisdiction of the federal courts to exercise the necessary powers to prevent the removal of victim-survivors to Australia under the Family Law Act. If minors are involved, a standalone Act could explicitly include a power to appoint an Independent Children's Lawyer to represent the victim/victim-survivor and to gather critical evidence on their behalf, similar to section 68L of the Family Law Act.[76]

111. Although some of our Constituent Bodies consider their own state and territory intervention order schemes (such as in NSW, Victoria and South Australia) are broad enough to encompass and provide a remedy for many situations where a forced marriage situation may arise, they would support Option B in circumstances where it would provide greater protection for forced marriage victim survivors or those at risk across Australia.

112. For example, they comment that a Commonwealth definition of forced marriage might be broader and could encompass a wider range of abusive behaviours,

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[73] Australian Government, 'The Heads of Agreement for the National Access to Justice Partnership | Federation' (online, 12 September 2024).
[74] Consultation Paper (n 2) 16.
[75] Ibid.
[76] The Federal Circuit and Family Court can appoint an Independent Children's Lawyer under s 68L of the *Family Law Act 1975* (Cth), or on the application of a child, an organization concerned with the welfare of children, or any other person, to represent and promote the best interests of a child in family law proceedings.

potentially including situations where the individuals perpetrating such offences do not fall under the meaning of 'family members' as defined in section 8 of the FVP Act in Victoria.[77] In contrast, they suggest that under Commonwealth legislation, such as the Family Law Act or other related legislation, more extensive provisions and protections could be provided that might apply to a broader range of relationships and conduct.

Challenges

113. One of the challenges to Option B is the FCFCOA's inability to exercise state/territory welfare jurisdiction if a child or minor is unable to return to the care of and legal decision making of a parent.

114. Furthermore, the experience of some members of the profession suggests that State police services are reluctant to enforce Commonwealth family law personal protection orders[78] in contrast to their attention to State and Territory family violence prohibition or intervention orders. Unless the State police services were accepting of the proposed civil protection orders issued by a Federal Court, the entire proposed scheme could be rendered toothless.

International Example: The United Kingdom

115. Based on the experience in the United Kingdom, integration into the existing federal family law system may be the best approach. Following the introduction of a forced marriage protection orders (**FMPOs**) scheme in 2008 into their *Family Law Act 1996* (UK), data shows an overall broad long-term trend upward in the number of FMPOs from their introduction in November 2008 until the end of 2019, with a less pronounced increase thereafter.[79] FMPOs are perceived to be a powerful remedy and to constitute a significant judicial intervention, and the legislation is considered overall to have had a positive 'messaging effect' on individuals, families and communities.[80]

116. A 2023 research study of the UK scheme observed that FMPOs represent an important remedy that can prevent a forced marriage, protect potential victims and assist those who have already been forced into a marriage.[81] However, the research study also identified that FMPOs can increase the risk of honour-based violence and other forms of abuse being committed by the parents and wider family against those seeking its protection, and that victims living in the family home faced particular difficulties.[82]

117. Other practical issues identified with the operation of the FMPO regime include difficulties faced by victims acting as applicants for FMPOs[83] and a lack of

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[77] Under the FVP Act, 'family members' are typically confined to include people in a domestic relationship or related by blood, marriage, or adoption.
[78] See *Family Law Act 1975* (Cth) ss 68B, 68C, 114, and 114AA.
[79] See Ministry of Justice, *Family Court Statistics Quarterly: January to March 2024* (27 June 2024).
[80] See for example Professor Janeen M. Carruthers and Felicity A. Belton, *Combatting Forced Marriage: Strengthening Protection in Scots Law, Scottish Civil Justice Hub* (Report, July 2024).
[81] Sundari Anitha, Aisha K Gill and Kyja Noack-Lundberg, *Understanding Protection and Prevention Responses to Forced Marriage in England and Wales* (2023, School for Policy Studies, University of Lincoln and University of Bristol) 8-9.
[82] Ibid 9.
[83] Carruthers and Belton (n 68) 129. An application for a FMPO can be made by the person who is to be protected by the order (including adults or children), a relevant third party or any other person with the permission of the court. A relevant third party is someone appointed by the Lord Chancellor to make applications on behalf of others. To date, local authorities have been appointed and in practice this work is undertaken by their social care teams.

monitoring of FMPOs after they are granted (including enforcement action for breaches).[84]

Whichever option is taken should include shared principles to establish parity of application across jurisdictions

118. The Law Council is of the view that whichever option is taken by government, it would be beneficial for shared principles to be developed between the federal, state and territory governments. We agree with the view expressed in the Consultation Paper that those shared principles could guide the implementation of the proposals under Parts 1 and 2 of the consultation. This is because such an approach would provide flexibility for policy implementation within state and territory jurisdictions among non-legal support frameworks, which as highlighted through this paper are fundamental to the success of a civil protections and remedies framework.

119. Furthermore, any legislation at either the state and territory or federal levels should consider the following:

    (a) address the limitations of existing state-based frameworks to achieve parity of outcomes across jurisdictions;

    (b) ensure that legislation is sufficiently broad to capture differing roles played by persons in relation to forcing a person to marry another (not just the primary perpetrator);

    (c) include within the legislation examples of conduct amounting to coercion or threats as they pertain to forced marriage, e.g. preventing a victim-survivor from working or studying, applying financial pressures or limitations, limiting contact with persons outside of the family or community, restricting travel or limiting access to personal devices or the internet; and

    (d) include in the legislation permissible terms of an intervention order, e.g. specifically aimed at preventing forced marriages or ensuring a victim-survivor's ongoing safety and wellbeing.

120. Underpinning either the criminal or civil regime, victims must be supported by practical intervention and protection mechanisms. In the most extreme scenarios, the victim must be supported to escape their immediate circumstances, if necessary, as is the case for other forms of family violence. This should occur irrespective of whether the victim wishes to pursue legal remedies.

[84] Anitha, Gill and Noack-Lundberg (n 69) 8. See also for example Karma Nirvana, "Forced Marriage Protection Orders Increase by 20% in 2023: Our View on the Latest Family Court Statistics Release", (2 August 2024).

Question 10. Under Option A, are there civil protection frameworks alternatives to family and domestic violence frameworks that could be used to strengthen forced marriage civil protections?

Alternative option: Strengthened state and territory intervention order regimes may be possible but come with drawbacks

121. Members of the Law Society of South Australia suggest that a separate federal civil scheme may not be required if intervention order schemes across states and territories were consistently improved to address the issues under paragraph [119] above.

122. Civil schemes also place the onus of seeking a remedy on the victim-survivor rather than having the benefit of the police bringing an application for an intervention order on their behalf. While this potentially absolves the victim-survivor of the burdens of taking carriage of the application, meeting evidentiary thresholds and engaging legal representation, it also means the police play a significant role in deciding whether a matter is proceeded with, noting this is largely determined by the prospects of a successful application or prosecution.

123. This police control can make it very difficult for victim-survivors from culturally or linguistically diverse backgrounds who may not have relationships of trust with police or the necessary supports to give effective information. It also means that the police generally determine the terms of an intervention order, which can sometimes be problematic in certain relationships, and can give rise to the victim-survivor facilitating the breaching of an order (for example by communicating with a perpetrator about arrangements for a child) that can then jeopardise the chances of enforcement of other aspects of the order against the defendant. These considerations must be carefully balanced.

Creating a forced marriage watchlist

124. In the context of forced marriages, consideration could be given to creating a "watchlist" which could be checked by authorised celebrants prior to their solemnising the parties' marriage. Such a check would take place after receipt of the parties' notice of intention to marry, but prior to the wedding ceremony itself. If the names of the parties were on the forced marriage watchlist, then the authorised celebrant would be barred from undertaking the marriage ceremony. However, this would require careful consideration to a number of issues, including the circumstances in which a person is placed on a watchlist, privacy and confidentiality aspects and the possible risks of a person's name being made available on a watchlist which could be viewed by celebrants, and reported back to the individual and family involved as a reason for barring the ceremony.

Grounds for Orders

Question 11. What evidence or other types of actions, risks or harms connected to forced marriage should be considered as grounds for seeking a civil protection order for forced marriage?

125. The potential acts giving rise to a fear that a person will be forced to marry another person without their valid consent will be many and varied. The Law Council notes that such acts could include threats of harm to the person or a member of their family, a risk or expectation of being taken overseas for the purposes of a forced marriage, or the respondent undertaking coercive behaviour to force a marriage. However, other actions could be far more subtle, or on their face, individually not give rise to a risk.

126. The collective input received by the Law Council from the legal profession suggests that the better course of action with respect to grounds for seeking civil protection orders for forced marriage is to keep the elements of any legal test broad, leaving the matter ultimately to the discretion of the relevant court. To that end, the Family Law Section of the Law Council has suggested that a broad risk test could be applied, as follows:

    (a) first, the relevant ground could simply be whether or not the applicant is at an 'unacceptable risk' of being forced to marry a person without their valid consent. This could be prescribed as:

        (i) The protected person is at an unacceptable risk of being forced by the respondent to marry another person without their valid consent.

    (b) alternatively, a two-step process could be adopted, as follows:

        (i) The protected person is at risk of being forced by the respondent to marry another person without their valid consent; and

        (ii) The court considers it appropriate for a civil protection order to be made to reduce that risk.

127. The assessment of risk is well understood by the courts. The task of a court in assessing risk was described by the High Court in *M v M* [1988] HCA 68. The Court held that the task is to 'assess and evaluate the likelihood or possibility of events or occurrences which, if they came about, will have a detrimental impact'.[85] A court is required to give real and substantial consideration to the facts to determine whether they give rise to an unacceptable risk, The assessment of risk is not discretionary but an 'evidence-based conclusion'.[86]

128. The benefit of adopting a risk approach, rather than specifying particular grounds, is that when assessing risk, it is not necessary for a court to determine on the balance of probabilities whether certain acts or past acts have taken place. This provides a more flexible scheme than attempting to articulate the possible circumstances which could lead to forced marriage.

[85] *M v M* [1988] HCA 68, [24].
[86] *Isles & Nelissen* [2022] FedCFamC 1A 97, [85].

129. In terms of the evidence required, the Law Council considers that it would be appropriate that the rules of evidence *not* apply to an application for such a preventative order. In the event of actual forced marriage, evidence of children of the marriage should be a relevant consideration.

Scope of Orders

Question 12. Do the proposed protections listed above address the most common and significant risks and harms faced by people in or at risk of forced marriage, including children? If not, what else should be addressed?

Broad jurisdiction to make an order

130. Under the South Australian intervention order model, it is open to a court to impose any requirement on the defendant to take, or to refrain from taking, specified action.[87] While there are no terms specifically directed towards preventing forced marriage, the broad discretion under the model can be tailored towards situations in which forced marriage might have, or has already occurred, and the specific needs and requests of the complainant.

For those seeking to be protected from forced marriage

131. The types of behaviour which could lead to or abet forced marriage are widely varied. For example, it may be necessary to prohibit a respondent from simply discussing the marriage, or mentioning the intended spouse, or making arrangements for the wedding, such as sending out invitations. If the decision of 'coerced' set out above is adopted, it is possible that this sort of conduct would not be captured by a prescriptive legislative test.

132. The Law Council considers that the proposed protections address the most common and significant risks and hardships for people who may be at risk of forced marriage. In particular, the final ground (being to 'restrain a respondent from committing particular actions or types of harm') would confer a broad discretion on the relevant Court to ensure that risks to the protected person can be addressed even where there are more subtle acts by family members or the wider community. However, it may be useful to provide examples in the legislation of the range of low-level to high-level acts that may constitute unacceptable behaviour.

For those wishing to leave a forced marriage

133. In relation to those victim-survivors who are in a forced marriage, other types of actions, risks or harms connected to forced marriage may be appropriate to include as indicia of a deemed forced marriage, including:

    (a) assault;

    (b) sexual assault or other sexually abusive behaviour;

    (c) repeated derogatory taunts;

    (d) unreasonably denying financial autonomy;

    (e) deprivation of liberty;

[87] *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 12(1)(l).

(f) withholding financial support; and

(g) preventing a person from making or keeping connection with family, friends of culture.

134. A civil order made on these grounds would only require the judicial officer to be satisfied on the balance of probabilities, rather than the beyond reasonable doubt threshold for criminal offences.

Question 13. Are there any other risks or unintended consequences of the proposed protections that should be considered?

135. If the scope of protections capable of being ordered includes effectively cancelling wedding venues and other suppliers, consideration may need to be given to the question of costs and damages arising from the making of a civil protection order. This would be particularly so if an order were made on an interim basis, and ultimately found to have no merit on a final basis. However, it is also important to consider the situation where an application is made for a collateral purpose or is an abuse of process—such situations should be addressed in drafting any relevant powers.

Applicants

Question 14. Are there any additional people or organisations who should be able to apply for a civil protection order for forced marriage? If yes, who and why?

Who may make an application?

136. The Law Council has received differing views on the range of eligible applicants for a civil protection order. The final determination of who may make an application other than the victim/victim-survivor will need to be balanced against whether those additional categories of applicant are capable of acting in the best interests of the victim/victim-survivor.

137. Some practitioners consider that applications for a civil protection order for forced marriage should be confined to the protected person, parents or guardians, the police, and relevant child protection officers. It may be difficult to identify any other community organisation or service provider who would be able to have sufficient power or resources to adequately investigate the circumstances surrounding the potential need for a civil protection order for forced marriage, and then to adequately present the matter to the Court.

138. However, it may be in the interests of the person at risk of or subject to forced marriage to include a broad category of individuals who may otherwise be more suitable than those individuals or organisations prescribed in the legislation.

(a) For example, in South Australia, the list of persons who may make an application for an intervention order includes a 'suitable representative' where they are given permission by the Court.[88] The Law Society of South Australia notes that 'suitable representative' is not defined, and it is therefore unclear who would constitute a suitable representative and how the victim's views would be ascertained by the court in such circumstances.

[88] *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 20(1)(b).

139. If this option is taken, evaluation is needed of the factors that the court can consider in giving permission to someone other than specified individuals to make an application on a complainant's behalf. An examination of relevant state and/or territory provisions may assist in this regard.

Question 15. Are there risks associated with giving particular individuals or organisations the ability to apply for a protection order? If so, what are these risks and how could they be mitigated?

140. Expanding the list of who may have standing to bring an application to include additional community organisations, service providers and/or other non-government organisations runs the risk of either the Courts being overwhelmed with applications, or alternatively persons at significant risk failing to be identified, as various organisations potentially assume that another service will be taking action.

141. In keeping with family violence protection orders, community services who may be able to identify a person in need of a civil protection order would be able to either assist the person to obtain an order themselves or report the matter to the police.

Respondents

Question 16. Should there be any limits on who can be a respondent for forced marriage civil protections? If so, how should they be defined (e.g. family members only)?

142. We have received feedback from the legal profession that there should not be any limits placed on who can be a respondent for a forced marriage civil protection order.[89] The Law Council considers the list of potential respondents in the Consultation Paper, particularly 'other person/s involved in forcing a person to marry, including where they are forcing, attempting to force, aiding, or abetting a forced marriage' to be broad enough to capture the range of potential contributors to a forced marriage.[90]

143. Given the potential for a broad range of family or community members to pressure or coerce an individual into a forced marriage, the ability to name any respondent may lend versatility to the ability to seek a civil protection order. The conduct of the respondent, as opposed to the relationship between the respondent and the victim-survivor, should inform the basis for civil protections.

144. This broad approach to who may be covered would also be consistent with the position that any court should be granted a broad discretion in the granting of any relevant order. Moreover, such a broad discretion with respect to respondents expands the utility of civil protection orders over family violence protection orders, which are limited to family members.

[89] For example, in South Australia, no limit applies as to who can be a respondent for an order under the *Intervention Orders (Prevention of Abuse) Act 2009* (SA).
[90] See Consultation Paper (n 2) 19.

Victim-survivor agency

Question 17. How can the risk of victim-survivors being coerced into abandoning orders be addressed?

145. The complex social and cultural factors that contribute to victim-survivors being coerced into abandoning protection orders against their perpetrators, or failing to obtain legal assistance, need to be considered and appropriately addressed. Research from the Australian Institute of Criminology (**AIC**) based on interviews with seven female victim-survivor participants reveals that victim-survivors were pressured to return to their husbands and accept their circumstances as inevitable, being told that they needed to 'respect and listen to what [their husband and his family] say,' and were frequently labelled as 'crazy' or a 'drama queen', and generally that they were not supported by family members in their decisions to leave their harmful situations.[91]

146. The AIC Report further states that in many instances, victims were coerced into going back to abusive situations, while others returned because they feared the repercussions of leaving.[92] It highlights that victim-survivors have reported feeling pressure from their parents and relatives to stay in the relationship, believing that isolation and surveillance constitutes a 'normal marital relationship', being threatened with deportation, a lack of financial independence and stability, as well as threats of honour-based violence and death.[93]

147. Overcoming such deeply ingrained, socially embedded factors to prevent victim-survivors from abandoning orders will not be easy. However, the Law Council and its stakeholders consider education to be instrumental in creating awareness among victim-survivors, and those at risk of becoming victims, about how to obtain legal protection if in need, and where other social protections are insufficient, how to obtain orders for their protection.

148. The Australian Government needs to undertake greater assessment of the extent of educational programs that are available to vulnerable communities to effectively determine the magnitude of this situation. For Culturally and Linguistically Diverse (**CALD**) individuals who may be vulnerable to coercion, providing educational materials in various languages and formats is essential for effective support—and to ensure information is accessible and comprehensible to those who might face language barriers. It is also important to offer resources in diverse formats such as online text, audio and visual to assist with the dissemination of the relevant educational materials and messaging.

149. Regardless, preventing forced marriage will be challenging if education cannot address the reasons families and communities justify it. Education efforts need to do more than just inform people that forced marriage is unlawful in Australia; they must also show that genuine consent to marriage supports and enhances family and community values, rather than undermines them.

[91] AIC Report (n 46) 60.
[92] Ibid.
[93] Ibid 58.

A separate standalone offence?

150. While the approach to forced marriage should not be limited to a criminal justice response, it may nevertheless be appropriate to consider implementation of a separate standalone offence (or ground for civil action) for a person who coerces or deceives another person into abandoning the seeking of civil orders.

151. Where an application is on foot, it may also constitute contempt of court or the offence obstructing or perverting the course of justice or the due administration of the law in the relevant jurisdiction.[94]

Question 18. How can the views of victim-survivors, including children, best be sought and incorporated into the process for hearing and issuing civil protections for forced marriage?

152. Victim-survivor agency in the civil process for seeking a protection order is an important aspect of any response to domestic and family violence, including forced marriage, where familial or cultural implications are relevant considerations. To ensure agency is respected, interviews with victim-survivors should be conducted by appropriately trained and experienced interviewers, with support persons permitted to be present. Communications should be appropriately adapted for culturally and linguistically diverse persons and interpreters should be available where necessary.

153. However, there is a persistent and 'widespread shortage throughout Australian jurisdictions of language service providers who have specialised understanding of domestic and family violence matters and the legal terminology used in related proceedings'.[95]

154. The National Accreditation Authority for Translators and Interpreters (**NAATI**) issues accreditation for translators and interpreters in Australia, but there is no statutory requirement that translators and interpreters be accredited, which has led to an unregulated profession.[96] Where there are inadequate, incompetent or poorly managed language services, a victim-survivor may not have their views appropriately incorporated into a process for hearing and issuing a civil protection for forced marriage.

155. Furthermore, as the National Domestic and Family Violence Bench Book notes, it is important to consider whether face-to-face or telephone appearances are the most appropriate and practical means of providing the language services that meet the needs of the victim-survivor in offering a reliable and trusted service.[97] This often also relies on the availability of appropriate communication technology, which may differ between courtrooms and any financial arrangements necessary for the payment of associated expenses.

156. For child victim-survivors, a court could appoint an Independent Children's Lawyer who specialises in forced marriage matters and can assist the victim-survivor to navigate the system. For adult victims, the Law Council considers there is a need for specialised legal assistance services, which are accompanied by social supports as part of a joint servicing approach. We consider this approach would be preferable to court-appointed advocate process, as adult victims may have distinct

[94] See for example, the offence under s 256 of the *Criminal Law Consolidated Act 1935* (SA).
[95] Australian Institute or Judicial Administration, *National Domestic and Family Violence Bench Book* (June 2023) Chapter 5 Fair hearing and safety, Part 5.5 Interpreters and translators.
[96] Ibid.
[97] Ibid.

and discreet complexities which require specialised skills and knowledge of the system.

Courtroom protections and assistance through the legal process

Question 19. What other supports should be available to people in or at risk of forced marriage, including children, to support them though the civil protection order application process? For example, additional supports through the application process, or additional courtroom protections.

157. The supports available to affected family members in family violence protection schemes should also be made available to applicants in a civil protection order for forced marriage application. Access to supports such as social workers and counselling services should be granted.

158. In Court, supports such as screens, remote witness facilities, translators, separate waiting areas, and security should all be available.

Interim orders and ex-parte hearings

Question 20. What grounds should be relevant to making interim orders where a person is in or at risk of forced marriage?

159. In addition to the grounds outlined in the Discussion Paper, whether a person has provided real consent to the marriage and whether the victim-survivor was under duress or undue influence to marry should be grounds relevant to the making of an interim order. Grounds for interim orders will also necessarily require an assessment of the degree of risk and whether it is time-critical balanced against procedural fairness and limited opportunity to test what evidence is available to the court. If a risk-based approach is taken by the courts (as outlined in our response to Question 11), it could apply to both interim and final orders.

Question 21. Should interim orders be limited to include some but not all of the proposed scope of orders (outline in Scope of Orders)? If so, what protections should be included or excluded and why?

160. The Law Council does not support the exclusion of any particular protections in the scope of orders available at the interim level. At most, some protections (such as restraint on travel overseas, or excluding a party from a home) could be limited to exceptional circumstances.

Question 22. What kind of evidence could point to a risk of forced marriage and be considered by police when considering the grounds for an interim order where a person is in or at risk of forced marriage?

161. The type of evidence required will be case-specific but may contain elements of:

(a) age;

(b) lack of consent;

(c) whether duress or coercion was involved;

(d) details of the actual or prospective spouse;

(e) arranged removal from the jurisdiction;

(f) evidence of enforced residence overseas (and any threats relating to these matters); and

(g) children born from the arrangement.

162. Evidence of other vulnerabilities may also be relevant, including whether there are any mental or physical disabilities or financial dependence.

Service, Enforcement and Breaches

Question 23. Are there any circumstances where personal service of orders should not be required (e.g. via electronic service)? If so, what are those circumstances?

163. Some of the instances in which personal service may not be appropriate or required include: a respondent is avoiding service; the location of the respondent is unknown after reasonable steps have been taken to ascertain it; or the respondent is in a location where personal service is not practicable (e.g. they are overseas). However, the Law Council suggests that it would be possible to replicate in a civil protection scheme the usual rules with respect to the dispensation of service and/or orders with respect to substituted service under rule 2.34 of the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021*.

164. Members of the Family Law Section of the Law Council are of the view that there is no basis as to why differing rules should apply to a civil protection order for forced marriage. Courts should be granted the power to determine what service is necessary on application by the applicant (upon consideration of the relevant evidence at that time). In the event a court concluded that it was appropriate to dispense with service, or make other orders for substituted service or service by other means, such orders would then be appropriate to make.

Other remedies

Question 24. Are there remedies, in addition to civil protections, for people in or at risk of forced marriage that should be considered?

Family law options

165. A best practice justice system response to people in or at risk of forced marriage should include the following as potential remedies where appropriate and applicable:

(a) urgent family law proceedings for interim orders as to the living and spend time arrangements of any children of a forced marriage;

(b) restraining orders preventing the perpetrator parent of a forced marriage from removing children form the care of the victim-survivor parent, attending in the vicinity of the victim-survivor parent's home or workplace or from discussing parents matters or court proceedings with the children;

(c) serious penalties for breaches of related orders;

(d) mandated attendance at behaviour change programs or parenting courses; or

(e) interim intervention orders naming the victim-survivor and children of the forced marriage as protected person.

166. Financial assistance and legal assistance funding should be available to facilitate these measures, including where a victim-survivor applies to the FCFCOA for a declaration of nullity.

Potential Marriage Act amendment

167. Noting that the majority of forced marriage allegations reported to the AFP involve minors, it may be appropriate to require court authorisation for all marriages of minors under the Marriage Act. Pursuant to section 13 of the Marriage Act, the consent of each of the minor's parents or guardians, or alternatively authorisation from a judge or magistrate is required. The Family Law Section of the Law Council suggests that section 13 could be amended to require both consent from the minor's parents/guardians *and* judicial authorisation.[98] It considers that subsection 13(1) of the Marriage Act could read as follows:

> (1) Subject to this Part, where a party to an intended marriage, not having previously been married, is a minor, the marriage shall not be solemnised unless there is produced to the person by whom the marriage is solemnised:
>
> (a) in respect of each person whose consent is required by this Act to the marriage of the minor, not being a person to whom paragraph (b) is applicable:
>
> (i) the consent in writing of that person, duly witnessed and dated not earlier than 3 months before the date on which the marriage is solemnised or, in such cases as are prescribed, such other evidence that the consent of that person to the intended marriage has been given not earlier than that time as the regulations declare to be sufficient for the purposes of this section; ~~or~~ and
>
> (ii) an effective consent in writing of a magistrate or a Judge under this Part ~~in place of the consent of that person~~; and
>
> (b) in respect of any person whose consent to the marriage of the minor has been dispensed with by a prescribed authority--the dispensation in writing signed by the prescribed authority.

168. Similarly, an amendment could be made to Pt VA of the Marriage Act with respect to the recognition of foreign marriages. Where the foreign marriage is the marriage of a minor, an amendment could be made to section 88D requiring a court to declare the marriage as valid in Australia.

Administrative remedial avenues available through the migration system for non-Australian citizens

169. One of the major risks that accompanies forced marriage for victim-survivors is the uncertainty of whether they can remain in or return to Australia if they are a visa holder or if visa dependent family members may also face visa cancellation or removal from Australia. Each individual victim-survivor will have distinct migration circumstances, and any migration solution will need to be flexible to respond to those different circumstances.

[98] Concurrent amendments would also need to be made to s 16 of the Marriage Act to ensure consistency.

170. For example, the possibility that a potential victim or victim-survivor of forced marriage is an applicant for a Prospective Marriage (Subclass 300), Partner (Provisional) (Subclass 309) or Partner (Permanent) (Subclass 801) visa and is present in Australia on a Bridging visa or other type of visa while awaiting the outcome of the visa application may not seek assistance for fear of being refused the visa.

171. There are number of reasons that visa applicants at risk of or in forced marriage could be refused a visa, including:

    (a) If the visa applicant ceased to be sponsored by the intended or actual spouse;[99]

    (b) Not being able to satisfy the decision-maker that the parties *genuinely* intend to marry if the applicant divulges that they are not a consenting party to the marriage;[100]

    (c) Not being able to satisfy the decision-maker that the parties are in a genuine relationship.[101]

172. There is the added complication for any children who are secondary applicants to a visa application by a person at risk of or in a forced marriage, and whose prospects of being granted the visa rely on the primary applicant being able to satisfy the criteria.[102] Furthermore, perpetrators (and their family members) who are present in Australia on a visa may face visa cancellation or future refusal of another visa on either general or character grounds, which may be complicated if there are protection obligations owed by Australia to a perpetrator.[103] It may be necessary to provide specific avenues of migration assistance, including legal, to these individuals to ensure access to justice and appropriate representation.

Potential changes to the migration system to support exit from forced marriage for migrants

173. We note that there is an avenue available through the Department of Home Affairs (**DHA**) for those victim-survivors who may have consented to be in a relationship, but are seeking to exit the relationship and are experiencing family and domestic violence.[104] The DHA notes that this can include instances of financial abuse, forced isolation or economic deprivation, including dowry-related abuse, which may be experienced by those being pressured to remain in a relationship or marriage.[105]

174. However, not all instances of forced marriage will satisfy the family violence assistance the DHA can currently offer to regularise a victim-survivor's immigration status. There are several possibilities the Law Council envisages could be taken up to further support migrants who are at risk or victim-survivors of forced marriage:

    (a) Broadening the family violence provisions in the *Migration Act 1958* (Cth) under which a temporary or permanent visa holder who is onshore in Australia could seek to alter their visa status. Those provisions could be expanded to

[99] *Migration Regulations 1994* (Cth) cr 300.211, cr 309.211, cr 801.221.
[100] Ibid cr 300.215(a).
[101] Ibid cr 309.211(2) and (3) (Provisional Partner visa), cr 801.221(2) (Permanent Partner visa)
[102] Ibid cr 309.312; cr 300.321, cr 801.311.
[103] *Migration Act 1958* (Cth) s 116 and s 501.
[104] Department of Home Affairs, Domestic and family violence and your visa (homeaffairs.gov.au) (online, 23 September 2024).
[105] Ibid.

make an exception to the genuine relationship criteria at the point at which the domestic violence occurred to satisfy the decision-maker that the visa holder or applicant was a victim of forced marriage. This could equally apply to both visa applicants and visa holders to help them transition from a visa based on the partnership to another type of visa where eligible.

(b) Modifying the Community Support Program for offshore applicants where they are concerned about their safety in their home country if they were to publicly raise their allegations, to allow an Approved Proposing Organisation to sponsor these applicants for a Woman at Risk (Subclass 204) visa.[106]

Mitigating the potential for cancellation of a victim-survivor's visa

175. Furthermore, under section 116(1AB) of the Migration Act, the Minister or a delegate may cancel a visa if satisfied that a visa holder provided incorrect information in the process of the applying for the visa and which information was relied in granting the visa. There is a risk that raising claims of forced marriage may disadvantage a victim-survivor who holds a visa where such a claim could be used to substantiate a ground for cancellation of the visa. If the victim-survivor maintains that they have never consented to the marriage, but evidence was provided to suggest that it was a genuine relationship for the processing of the visa, a decision-maker could rely on this as evidence that the visa holder/victim-survivor provided incorrect information to the Department in order to be granted the visa. The consequence of a visa cancellation would be that the victim-survivor would be liable to be taken into immigration detention and removed from Australia unless they were able to be granted another visa.[107]

176. In order to mitigate this potentially very difficult situation for a victim of forced marriage and to alleviate any stress about whether they would be able to stay in Australia, it may be appropriate for the DHA to address this by introducing an exception for victims of forced marriage through either policy (noting that the general cancellation power under section 116 of the Migration Act is a discretionary power) or through legislative amendment to the Migration Act or Migration Regulations.

Question 25. Currently, do forced marriage victim-survivors face barriers or difficulties when seeking a declaration of nullity in relation to their forced marriage? If yes, how could these barriers or difficulties be addressed?

177. The Family Law Section of the Law Council notes that the first barrier to a victim-survivor seeking a declaration of nullity will likely be with respect to seeking legal representation, and if they are unable to do so, then navigating a complex legal system by themselves will constitute a further barrier. This could be exacerbated by differing levels of English language capability or lack of access to appropriate translators and interpreters.

178. Furthermore, if an application for a declaration of nullity is opposed, the victim-survivor may need to appear at a contested hearing with the respondent perpetrator present, and may be required to go through cross-examination. The prospect of undergoing a hearing and cross-examination may be enough to persuade an applicant for a declaration of nullity to withdraw from the proceedings.

[106] See Department of Home Affairs, Community Support Program (CSP) (homeaffairs.gov.au) (online, 23 September 2024).
[107] *Migration Act 1958* (Cth) ss 189(1) and 198.

Provision of legal assistance where cross-examination required

179. By withdrawing an application, there are likely to be costs implications for which the victim-survivor would be liable to pay, e.g. application costs, solicitor/barrister costs, or the costs of the opposing party.

180. Section 102NA of the Family Law Act provides mandatory protections for parties where an examining party intends to cross-examine another party (**witness party**), and there has been an allegation of family violence between the examining and witness parties. If there conditions under section 102NA(1)(c) of the Family Law Act are met,[108] then the examining party must not cross-examine the witness party personally, and the cross-examination must be conducted by a legal practitioner acting on behalf of the examining party.

181. Where section 102NA does not apply to prevent the examining party cross-examining the witness party personally, but where there is still an allegation of family violence between the examining party and the witness party, then the Court must ensure that during cross-examination there are appropriate protections for the party who is the alleged victim of the family violence.[109]

182. To protect victims of forced marriage, the Law Council suggests that where there is an allegation of forced marriage, parties in an application for nullity could be automatically eligible for court ordered legal representation under section 102NA of the Family Law Act.

Family Law Practice Direction: Nullity and validity of marriage proceedings (1 September 2021)

183. In all States and Territories other than Western Australia, declarations of nullity are exercised under the jurisdiction of the FCFCOA.[110] In the FCFCOA, the process for seeking a declaration of nullity is set out in the Family Law Practice Direction: Nullity and Validity of Marriage Proceedings.[111] Under this Practice Direction, once the matter has been listed, the parties are required to attend dispute resolution and pre-trial hearings.

184. The Family Law Section has raised that there does not appear to be any other pathway the parties to an application seeking a nullity of marriage can take to progress the proceedings other than that which is set out in the Central Practice Direction—Family Case Law Management.[112]

185. Due to the unusual circumstances of forced marriage, the process outlined in the Central Practice Direction may not be an appropriate pathway for the resolution of these matters.

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[108] The requirements include that one of the following be satisfied: (i) either party has been convicted of, or is charged with, an offence involving violence, or a threat of violence, to the other party; (ii) a family violence order (other than an interim order) applies to both parties; (iii) an injunction under s 68B or 114 for the personal protection of either party is directed against the other party; or the court makes an order that the requirements of subsection (2) are to apply to the cross-examination.
[109] *Family Law Act 1975* (Cth) s 102NB.
[110] Federal Circuit and Family Law Court, Nullity (Invalid marriage) (online).
[111] Federal Circuit and Family Law Court, Family Law Practice Direction: Nullity and validity of marriage proceedings (online, 1 September 2021).
[112] Federal Circuit and Family Law Court, Central Practice Direction: Family Law Case Management (online, 1 September 2021).

186. The Law Council suggests that the FCFCOA might review the relevant Practice Directions and may wish to establish a separate court list for declarations of nullity on the basis of forced marriage.[113]

Risk factors and barriers to seeking support

Question 26. What are the risks and barriers for seeking support for people at risk of or in a forced marriage? What strategies could be considered to address these?

187. The risks and barriers the legal profession considers most likely to occur for people seeking support in relation forced marriage include: social stigma, family pressure, financial constraints, fears of violence or deportation, lack of legal information about their options and/or concern about their children. [114] Another emerging issue which might be a risk for people experiencing forced marriage may be exit trafficking (where one person organises for another to exit Australia and is reckless to whether that person will be exploited once they have exited Australia—see paragraphs [195]–[198] below). We discuss some of these issues below in more detail.

Financial constraints

188. The Law Council understands that the Australian Border Force is responsible for undertaking a review of state and territory victims of crime financial assistance schemes under the National Action Plan to Combat Modern Slavery 2020–25.[115] While we are not aware of the outcome of that review or whether it has concluded, it may be appropriate to consider federal options for financial assistance to those at risk of or in a forced marriage where state and territory schemes are inconsistent and are not designed to provide a remedy to victims of Federal offences.[116]

189. We note that the Court does have jurisdiction to order a person convicted of a Commonwealth offence (such as forced marriage) to make reparation to a victim for any loss suffered, or any expense incurred, by the victim by reason of the offence.[117] However, this avenue is only accessible to victim-survivors where there has been a conviction and where the convicted person is capable of paying reparation. That will not always be the case.

190. The financial insecurity of a person seeking to exit a forced marriage scenario could be addressed through a national compensation scheme as advocated for by Anti-Slavery Australia and the Law Council of Australia in the 2016 Report on Establishing a National Compensation Scheme for Victims of Commonwealth Crime.[118]

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[113] For example, the Federal Circuit and Family Court have separate lists for the Critical Incident List (a fast-tracked list for family law applications which are filed in circumstances where there is no parent available to care for a child/children as a result of a critical incident) and the Evatt List (for high-risk family law cases), see: Critical Incident List | Federal Circuit and Family Court of Australia (fcfcoa.gov.au) and Guide for parties in the Evatt List | Federal Circuit and Family Court of Australia (fcfcoa.gov.au).

[114] Frances Simmons and Jennifer Burn, 'Without Consent: Forced Marriage in Australia' (2013) 36(3) Melbourne University Law Review 971,

[115] Attorney-General's Department, *National Action Plan to Combat Modern Slavery 2020-25* (Report, 2020) 27.

[116] Anti-Slavery Australia and the Law Council of Australia, *Report on Establishing a National Compensation Scheme for Victims of Commonwealth Crime* (2016) 4.

[117] *Crimes Act 1914* (Cth) s 21B.

[118] Anti-Slavery Australia and the Law Council of Australia, *Report on Establishing a National Compensation Scheme for Victims of Commonwealth Crime* (2016).

191. In that report, Anti-Slavery Australia and the Law Council put forward several models for the scheme and argued that there may be different streams of revenue that could be used to fund the scheme, including through the use of confiscated proceeds of crime (which are used at the federal level to provide for funding projects aimed at crime prevention and law enforcement).[119]

Perception of potential for visa refusal or cancellation and removal from Australia

192. As discussed above under Question 24, those at risk of or in a forced marriage are likely to be migrants and hold a visa to stay in Australia.[120] As Nelson and Burn note, participants in focus groups they studied 'reported both that misinformation about Australian visas is rife and also that, amongst those holding partner visas, there is a great fear about the possibility that someone will withdraw their sponsorship for a visa,' without which they may cease to hold an entitlement to remain in Australia and would be liable for removal from Australian under the *Migration Act 1958* (Cth).[121] Victim-survivors may also fear the impacts on family members, and the perpetrator/s, through reporting these activities.

193. This misconception or misinformation about the limit of migration pathways for victim-survivors of forced marriage who experience these types of threats is a real barrier for those who may wish to seek support. Pursuing these pathways requires people to have the capacity to engage with services, and oftentimes that is not possible where there are too many other immediate needs that are unmet, including homeless, unemployment and financial constraints.[122]

194. This is where the policy considerations under Part 2 of this Consultation are important, to ensure that education and resources are available in the immediate and long terms to support victim-survivors in understanding that they are able to seek assistance on what options they have available.

Exit Trafficking

195. Under section 271.2(1C) of the *Criminal Code 1995* (Cth) (**Criminal Code**), it is an offence for a person (**the first person**) to organise or facilitate the exit or proposed exit of another person from Australia; and in organising or facilitating that exit or proposed exit, the first person is reckless as to whether the other person will be exploited, either first person or another, after that exit. The maximum term of imprisonment for this offence is 12 years.

196. In 2021, the District Court of NSW delivered the first conviction under section 271.2(1C) in relation to a man who used threats, coercion and deception to force a woman and her child to return to India.[123] In a Victim Impact Statement, the victim described the severe impact of the exit trafficking on her and her child: 'Because of his action, I live in constant fear and stress knowing the lengths he will go to find us and harm us. This fear and stress impacts my physical, emotional and mental health…[and] I am constantly worried about my daughter'.[124]

197. As recently as September 2024, another Sydney man was charged with one count of exit trafficking under the Criminal Code, following a nine-month investigation by

[119] Ibid, 9.
[120] Consultation Paper (n 2).
[121] Nelson and Burn (n 4) 14; *Migration Act 1958* (Cth) s 198.
[122] Ibid.
[123] Australian Federal Police, 'First exit trafficking conviction in Australia' (Media Release, 26 March 2021).
[124] Ibid.

the Australian Federal Police, after allegedly tricking his wife into travelling to Pakistan and abandoning her there without her passport.[125]

198. While we acknowledge that not all victim-survivors of forced marriage are at risk of exit trafficking, and that victim-survivors of exit trafficking may not be in or at risk of a forced marriage, some of the behaviours that are displayed by both acts do overlap. The Law Council considers that this consultation process should be mindful of the potential risk of exit trafficking for those experiencing or at risk of forced marriages.

Question 27. What risks and barriers might a person face if they seek protection through legal systems? How can these be mitigated?

199. Culturally and linguistically diverse (**CALD**) communities, including migrants and refugees, face the greatest risks and barriers to seeking protecting through legal systems, including language/translation-related barriers as described above.

200. People from refugee or migrant communities face a litany of specific barriers and risk factors that can prevent them from seeking legal assistance regarding forced marriage. These risks and barriers are especially grave and must be carefully considered and addressed, and can include a fear of deportation, threats from a perpetrator that they will have the victim deported, the victim-survivor being financially dependent on the perpetrator, a fear of being socially isolated from their culture and community, and/or religious beliefs that deter an individual from ending a relationship or reporting a forced marriage.[126] Specifically, individuals at risk of faith-specific forms of family violence, including forced marriage, can also experience dowry abuse and visa abuse, though they may not recognise this behaviour as being family violence.[127]

201. It is imperative to offer face-to-face services in multiple languages and in a culturally sensitive way, to supplement the growing repository of written government and frontline service delivery resources that provide information about legal services. This would ensure that those who may not be confident in their literacy, even if it is in their native language, can express themselves and increase their level of understanding of the legal system.

202. The Law Council supports the Australian Government's plan to fund and establish a Forced Marriage Specialist Support Program in 2025 to provide more tailored support to those in or at risk of forced marriage.[128]

[125] Amber Shultz, 'This Sydney tradie told his wife they would visit family abroad. Instead, he allegedly abandoned her in Pakistan', *The Sydney Morning Herald* (online, 25 September 2024).
[126] InTouch and Safe+Equal, 'Forced marriage in the context of family violence', (Booklet, 2021).
[127] Ibid.
[128] Consultation Paper (n 2) 9.

Question 28. Engaging with support and legal systems may heighten risks for people facing forced marriage. Are there any actions that should not be undertaken by frontline responders or legal services when a person may be at risk of forced marriage?

203. The consultation process should consider how best to harmonise the regimes for family violence protection orders and civil protection orders in circumstances where it may be necessary for both types of orders to be granted. This might include providing the relevant court with jurisdiction to deal with both types of applications concurrently.

204. Many of the risk factors and barriers faced by those experiencing circumstances around forced marriage are similar to those experienced by victim-survivors of domestic, family and sexual violence more broadly.

205. The issue of forced marriage is not inherent to one culture, country, or community, and the risks and barriers faced by an individual attempting to seek protection through the legal system vary enormously depending on who the victim is and their cultural, national, and ethnic background. In particular, people who are migrants and/or refugees, and/or who are CALD, face risks and barriers to accessing protection that warrant attention.

206. Of paramount importance is a victim-survivor's agency. No action should be taken without the consent of the victim-survivor, as it can undermine both the victim-survivors trust of authorities and lead to a withdrawal from seeking help. For example, in a 2021 study:

> One interviewee, who was the sponsor in a partner visa application, contacted the Department of Home Affairs ('the Department') to find out if she could withdraw her sponsorship but was told it was impossible to do so without her husband knowing she had done so, a risk she was not prepared to take. Without seeking her consent, the Department referred her matter to the AFP. Despite her fear, she declined to disclose her circumstances to the AFP and did not consider obtaining an intervention order against her family or moving out of the family home, because of her fear of getting her family in trouble. She explained that when she met with the AFP:
>
> > I change[d] my words, I didn't say that there was a forced marriage or anything because I don't want my family to go through, you know, bad times.
>
> She was not referred to the STPP and refused to have any further contact with the AFP. Her experience highlights the problem of conditionality: because she was unwilling to disclose her true circumstances to the AFP, she was not able to access support under the STPP.[129]

[129] Frances Simmons and Grace Wong, 'Learning from Lived Experience: Australia's Legal Response to Forced Marriage' (2021) 44(4) *UNSW Law Journal* 1619, 1646.

Supporting Children

Question 29. What additional supports and protections could be considered to help children to access the proposed legal protections and to assist them through applications, courtroom and other legal processes?

207. Children and young people should have the benefit of an independent child or youth lawyer with specialist training to assist them to navigate the legal process. Existing victim support services, including the court companion services offered to children in criminal matters,[130] could be expanded to provide services to children at risk of or in a forced marriage. Under the family law jurisdiction of the FCFCOA, the Court Children's Service (**CCS**) is staffed by psychologists and social workers who have specialist expertise in the needs of children in family that are separate; the role is to assist parents, registrars and judges to make decisions about arrangements that are in the best interests of the children.[131] These services, if extended to specifically address the needs of those experiencing forced marriage, would lend clinical support to assist everyone involved in the process and to mitigate any relationship ruptures between the involved family members.

208. As noted above, the appointment of an Independent Children's Lawyer or a child advocate would greatly assist children to navigate the legal process of seeking a civil remedy and could work in concert with other children's services. Consideration should be given to legal practitioners being appointed either on an instructions-based model, or on a 'best interests' model, depending on the circumstances of the case.

[130] See for example the services provided in the Federal Circuit and Family Court: Federal Circuit and Family Court, Court Children's Service (online).
[131] Ibid.