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Assistant Secretary
Criminal Law and Law Enforcement Branch
Attorney-General's Department
3-5 National Circuit
Barton ACT 2600

25 February 2011

Dear Sir or Madam,

**CATWA Submission in response to the request by the Attorney-General's
Department for public comment on forced and servile marriage.**

Please find enclosed our response to the proposals raised by the Attorney-General's Department, regarding legislation on forced and servile marriage in Australia.

Should you require any further information or wish to discuss our recommendations, a representative from our organisation would be most happy to answer any queries or concerns that you might have.

Warm regards,

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On behalf of the Coalition Against Trafficking in Women Australia



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**Coalition Against Trafficking in Women Australia
www.catwa.org.au**

Who are we?

The Coalition Against Trafficking in Women Australia (CATWA) is the Australian branch of CATW International, a Non Governmental Organisation that has Category II consultative status with the United Nations Economic and Social Council. It works locally and internationally to end all forms of sexual exploitation of women, especially in relation to issues of prostitution and trafficking in women.

Our Position

CATWA believes that practices of forced and servile marriage involve numerous violations of women's human rights, and as such, should be dealt with in legislation and by authorities as a criminal offence. CATWA advocates the criminalisation of forced marriage as one aspect of a broader victim-centred approach that recognises the seriousness of the harms women face as a result of forced marriage, and in view of the constraints that women experience in these situations, which may limit their ability to access civil remedies such as protection orders.

Key Recommendations

CATWA recommends several measures to the Government to assist in both deterring the occurrence of forced marriages and in better protecting victims. These are:

- the creation of a new criminal offence of forced and servile marriage
- amending the definition of exploitation in the 2005 Criminal Code Amendment (Trafficking in Persons Act) to include non-commercial forms of sexual exploitation (such as forced and servile marriage)
- raising the legal age of marriage to 18, in all circumstances (thus excluding the option of parental consent for the marriage of a minor)
- education campaigns in schools, that inform women and girls of their rights in relation to marriage
- funding of support services for girls and women seeking to avoid or escape forced marriage

Submission Outline

The first section of this submission details the human rights violations that practices of forced and servile marriage involve. It then considers the various options for reform outlined in the Discussion Paper on forced and servile marriage issued by the Attorney-General's Department, and makes several recommendations.

In summary:

CATWA regards the creation of a new criminal offence of forced marriage as a necessary measure, due to the number of human rights abuses that forced marriages entail, as well as the nature and severity of these abuses. In view of these, criminalisation is identified as the best practice by which to ensure the full range of abuses involved in forced marriages are captured by Australian law, and through which Australia can meet its international human rights obligations.

CATWA expresses concern about the introduction or use of civil remedy or community-engagement approaches as the primary means for dealing with forced marriage, which has been the case in countries such as the UK. Such measures are considered problematic due to the fact that they place the burden of responsibility on women to prevent a marriage, and often require victims to partake in mediation with those who are forcing them to marry, which may cause further trauma and harm.

Lastly, CATWA believes that failure to provide adequate protection to women who are vulnerable to forced marriage can be considered as an inadvertent form of racism, wherein some women are afforded less human rights than others, on the basis of race or culture. CATWA calls on the Government to adopt the criminalisation of forced marriage as the best means by which to ensure that the human rights of *all* women are protected in this area.

This submission draws principally on the experience of authorities in dealing with forced marriage in the UK, which provides a useful point of analysis in view of the similarities between the Australian and British legal traditions, and the multicultural makeup of both states.

I. Forced Marriage as a Violation of International Human Rights Law

Practices of forced or servile marriage involve a range of human rights abuses, which run contrary to Australia's obligations under international human rights law. These include: the right to free and full consent in choosing a spouse, the right to be free from all forms of violence, the right to equality within marriage and the family, the right to education, the right to be free from slavery, and the right to non-discrimination on the basis of sexuality.

The right to free and full consent in choosing a spouse

The right to free and full consent in choosing a spouse is articulated in international law in the 1964 Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage and in the 1979 Convention on the Elimination of All Form of Discrimination Against Women (CEDAW). Article 16 of CEDAW calls on state parties to ensure women's right to 'freely to choose a spouse and to enter into marriage only with their free and full consent'.

The practice of forced marriage clearly violates women's human right to exercise consent in selecting a spouse, as victims are coerced into marrying a person that has been chosen by their family, a person who is often unknown to them and for whom they have no affection or desire (Jeffreys 2009). Women's capacity to exercise free and full consent in the context of forced marriage is also constrained by a lack of information or education relating to their rights in marriage. For instance, women may lack the maturity to fully understand their rights in relation to marriage given that a significant proportion of forced marriage victims are minors (HAC 2008: Ev 448), or may suffer from a lack of information regarding the right to choose one's own spouse in relation to marriage (HAC 2008: Ev 35; also see Sanghera 2009). In these circumstances, the opportunity to exercise free and full consent in choosing a spouse cannot be said to fully exist.

The right to be free from all forms of violence

Women's human right to be free from all forms of violence is made explicit in CEDAW'S General Recommendation no. 19, which identifies violence against women as 'acts that inflict physical, mental or sexual harm or suffering, threats of

such acts, coercion and other deprivations of liberty’, and which ‘impair or nullif[y] the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions’.

Forced marriages involve clear violations of this right both before and during a marriage, as well as after women have left a marriage, and at a physical and psychological level. Research from the United Kingdom indicates that extreme violence, such as rape, beatings and kidnapping, are often used to bring about a woman’s consent to a family-arranged marriage. Non-physical forms of coercion, furthermore, including blackmail, threats of social or financial ostracism, or emotional pressure, are also prominent (Beckett and Macey 2001: 312; Brandon and Hafez 2010: 10). Reports from refuges in the UK that specialise in assisting women escaping forced marriage document the ways in which women’s survival is threatened after a marriage has taken place. According to Jasvinder Sanghera, who directs Karma Nirvana, an organisation that works in assisting forced marriage victims, rape and sexual violence against women are common occurrences. She states, ‘forced marriage leads to repeated rapes, et cetera, and horrific violence. Our victims, when we come across them, who have been forced into marriage very often say this to us’ (HAC 2008: Ev 35). Abuse of women in forced marriages may also come from extended family, and in particular, in-laws (Brandon and Hafez 2008: 23).

It is important to note that acts of violence against women do not necessarily end if a woman manages to escape a forced marriage. In fact, threats to women’s survival often become heightened if they choose to leave a marriage due to the ‘dishonour’ that this is seen to cause their family (Brandon and Hafez 2008; HAC 2008; Siddiqui 2005). Women may be murdered by their family members, in an effort to ‘cleanse’ the family’s reputation (Khanum 2008: 15). Thus at all stages leading up to, during, and after a forced marriage, women’s right to be free from violence is threatened.

The right to equality within marriage and the family

Article 16 of CEDAW comprehensively outlines women’s rights to equality within marriage and the family. It calls on state parties to ensure, for instance, that men and women have ‘the same rights and responsibilities during marriage and at its

dissolution'; 'the same rights and responsibilities as parents'; and 'the same rights to decide freely and responsibly on the number and spacing of their children'.

Such rights are violated in forced marriage as its role is to control women and in maintain women in a subordinate position. This is reflected in the traditionally defined gender role to which women are confined in forced marriages, which restricts them to the domestic sphere and overwhelmingly places the burden of responsibility for household labour and care practices on wives. Women in forced marriages report not being allowed to work outside of the home, and as being made to do perform all household work as well as care of family members, which often includes their in-laws (Brandon and Hafez 2008; HAC 2008). One woman explains:

[I]t was very hard for me, I was so used to doing what I wanted at home and it was so easy with my own parents...and now I had to do what my mother-in-law wanted me to do and that was very depressing. At times I would just cry (Bhopal 1999: 130).

Women's inability to control the number and spacing of their children is also significant. This is noted by another victim of forced marriage, who states,

All I ever did was the cooking and cleaning and try to make children. That was all there was in my life (Brandon and Hafez 2008: 25).

Several researchers from the UK report the forced pregnancy of women as a means used by families and husbands to ensure that women will remain in a marriage, and not runaway or commit self-harm (Brandon and Hafez 2008: 21; Khanum 2008: 30). In some communities that practice forced marriage, *izzat* or honour is understood to reside in female members of the group, such that if a woman were to leave a forced marriage she would be considered to have brought dishonour or shame onto her family and husband (Brandon and Hafez 2008: 24). As researchers James Brandon and Salam Hafez explain, 'the pressure lies solely on the woman who is seen as responsible for upholding her family's honour. There is often no comparable shame attached to the husband's family for ending the marriage or abandoning his wife' (ibid). The burden of expectation placed on women to remain in unequal marriages, as well as their inability to control both the nature of their labour or capacity to

reproduce, provides a useful illustration of the violation of women's right to equality within marriage that occur through this practice.

The right to education

Increasingly, organisations and services working on issues of forced marriage report cases in which girls have been taken from school and restricted to the family home prior to the occurrence of a marriage (for example, Sanghera 2009; also Brandon and Hafez 2008: 15). One woman, who escaped a forced marriage, explains, 'My parents handed in a sick note from the family GP telling them [the school] that I was not well enough to attend. I was kept at home for the whole year and chaperoned everywhere I went' (HAC 2008: Ev 16). In many cases, girls who are removed from school are taken overseas to be married, and are not allowed to return to the UK, let alone to school, until they are pregnant (Hansard - UK 2004): the British Foreign and Commonwealth Office reports that it deals with close to two hundred cases of such overseas marriage each year (HAC 2008: Ev 447).

The right to education is clearly stated in the 1948 Universal Declaration of Human Rights, yet frequently violated as a result of forced marriage. Article 28 of the Declaration states, 'Everyone has the right to education...Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms'. As women are increasingly taken out of schools, forcibly married and impregnated (Brandon and Hafez 2008; Hansard – UK 2004; Sanghera 2009), it is not only their right to education that is abused but also their right to an adequate standard of living (Article 25 of the Declaration), and the right to be free from violence. Their loss of education and potential career serves to increase their dependence on their husbands and families, inhibiting their options for escape (Brandon and Hafez 2008: 18). In cases where women do manage to escape forced marriages, the combination of a limited education, and experiences of violence and trauma, place them in difficult circumstances in which to support themselves and any children they might have (Sanghera, 2009).

The right to be free from slavery

The right to be free from slavery is stated in international law in the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and

Institutions and Practices Similar to Slavery, which identifies ‘servile’ marriage as a practice ‘similar to slavery’ (Article 1). In situations where women are given in marriage in exchange for payment or gifts and where her consent has not been given, forced marriage can be seen to clearly violate women’s right to be free from slavery as set out in the terms of the Convention.

There are also a number of other instances, beyond the absence of consent and exchange of payment, which point to the links between forced marriage and slavery. Slavery in Article 7 of the 1956 Convention is identified as ‘the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised’. In forced marriage, such powers are apparent in the restriction of women’s movement that often takes place upon marriage; women who have escaped forced marriages report being disallowed contact or communication with the outside world, and as being made to the service the household, described above, without any payment or remuneration aside from subsistence (Brandon and Hafez, 2008).

The right to non-discrimination on the basis of sexuality

A significant amount of research from the UK indicates that in many cases forced marriage is used by parents as a corrective to what is perceived to be a child’s wayward behaviour, particularly in situations where a woman is considered to be sexually promiscuous or where a victim is gay or lesbian (Hester et al. 2007, p. 30). In such circumstances, parents may force a child to marry in order to prevent behaviour that is considered outside family or community standards. In addition to the human rights violations that all victims of forced marriage endure, the consequences for the victim in this situation also include heterosexual rape of a non-heterosexual person.

The right to non-discrimination on the basis of sexuality is established in international human rights law in such treaties as the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 2 of the ICCPR, for instance, outlines the principle of non-discrimination:

Each State Party to the present Covenant undertakes to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Where forced marriage is used to ‘correct’ a person’s sexual practice or preference, it is in clear violation of the right to non-discrimination on the basis of sexuality.

II. Policy Recommendations

In view of the significant abuse of women’s human rights that forced marriages entail, CATWA recommends a series of measures to be undertaken by the Government, to deter the practice and better protect its victims. These include firstly, the criminalisation of forced marriage; as well as changes to the definition of sexual exploitation in the Criminal Code; raising of the legal age of marriage to 18, without exception; and the introduction of education campaigns in schools to better inform young women of their rights in relation to marriage.

Creation of a new criminal offence of forced or servile marriage

The creation of a new criminal offence provides the best means by which combat forced marriage, for several reasons. In terms of deterrence, criminalisation of forced marriage signals to those contemplating or engaging in the custom that their behaviour is illegal and criminal, and establishes community standards for acceptable behaviour. For victims, criminalisation is crucial because it confirms for them that they are in the right, and in fact, are having their human rights violated by others. The importance of criminalisation for victims is noted by Jasvinder Sanghera of Karma Nirvana, who explains that in many cases women are unaware that a crime has been committed against them:

I have not met a victim yet who believes forced marriage is against the law. They deem themselves to be perpetrators for going against their families; they do not deem themselves to be victims. There needs to be a very strong message that this is criminal activity (HAC 2008: Ev 35)

The introduction of a new criminal offence of forced marriage is also regarded as necessary in view of the multiple human rights abuses that the practice involves.

Although existing criminal law, such as on rape, kidnapping, etc., may be used to prosecute in cases of forced marriage, these only capture in part the human rights abuses that the custom entails. Forced marriage, as a practice, involves a *series* of human rights violations, which should not be fragmented into individual acts when prosecuted, given that the experience of the victim was of the practice as a whole. On these grounds, the creation of a new criminal offence of forced marriage serves as the best means by which to ensure that the full range of abuses involved in forced marriages are addressed in Australian law.

The implementation of criminal legislation also provides the most straightforward way through which Australia can meet its obligations under international law to protect women's human rights. In countries where criminalisation has been rejected by policymakers, such as in the UK as recently as 2005, it is clear that concern for the protection of women's human rights has proved secondary to the political desire not to offend minority cultural groups. In the UK criminalisation was opposed largely on the grounds that 'the creation of specific legislation could cause racial segregation and create a "minority law" (FCO 2006: 11), and would be seen as stigmatising racial minorities. It was also suggested that such legislation may dissuade young women from reporting forced marriage for fear of getting their families into trouble, and that criminalisation would drive the practice 'underground' (ibid). Such arguments provide a useful illustration of the way in which women's rights are often attributed lesser importance as a result of multicultural politics. In fact, the practice of forced marriage can already be considered to be 'underground', given that much of what occurs in the custom is out of the sight of public authorities in that it occurs in the private sphere, or even overseas, with the practice of parents taking children abroad to be marriage well established in Britain (HAC 2008: Ev 36). The argument that women will be dissuaded from reporting their family members as a result of criminalisation is equally problematic. For instance, would civil rather than criminal measures be favoured in relation to abuses such as domestic violence, on the grounds that women are often reluctant to report the abuse perpetrated by those close to them? Jasvinder Sanghera summarises this point:

We had the same debate with that [domestic violence]: people were saying, "It won't work, women won't want to get their partners in trouble". But we created legislation, empowered

victims, raised awareness, put in special measures. The same would apply to forced marriage. It would create the recognition that this is a crime (cited in Saner 2008).

The failure to criminalise forced marriage thus reflects a use of double standards by which human rights abuses suffered by women are dealt with; whereas abuses suffered by ‘mainstream community’ women are considered matters for criminal law, those suffered by ‘minority’ group women are deemed as less than criminal. CATWA maintains that such a distinction constitutes a form of discrimination, whereby some women are afforded less human rights than others on the basis of race, and calls on the government to adopt the criminalisation of forced marriage as the best means by which to ensure that the human rights of all women are protected.

In recommending criminalisation as best practice for dealing with forced marriage, CATWA calls on the Government to employ in any future legislation a broad definition of ‘force’, which is not limited to only physical forms of coercion, but also takes into account more subtle forms of force, such as psychological or emotional abuse, threats of social or financial ostracism, and restriction on freedom of movement, as factors used to bring about a woman’s ‘consent’ to a family-arranged marriage. In doing so, CATWA also urges the Government to adopt a more critical approach to the sharp distinction often made between ‘forced’ and ‘arranged’ marriages (for example, Attorney-General’s Department 2010: 4). Although such a distinction may be considered politically necessary, research indicates that for the young women involved, the difference between these types of marriage is one of degrees, often dependent on whether or not they readily accept the partner chosen for them (Chantler et al. 2009: 597; Gangoli et al. 2006: 10; Macey 2009). As one woman explains, ‘they will arrange the marriage and if you reject the person they will force you to marry the person’ (Chantler et al. 2009: 597). A broad definition of ‘force’ is therefore required in legislation if all victims of forced marriages are to find protection in Australian law.

***Amendment to the definition of exploitation in the Criminal Code
Amendment (Trafficking in Persons Act) 2005***

An additional measure that is necessary to protecting forced marriage victims is an amendment to the definition of exploitation used in the Australian Criminal Code, to

include non-commercial forms of sexual exploitation. Exploitation in the Code does not currently take into account forms of sexual servitude that are for private or non-commercial purposes.

An amendment to the Criminal Code is crucial to addressing the problem of forced marriage. As several studies show, men's sexual use of women in forced marriage is both abusive and exploitative, though it is not usually for any other purpose than their own sexual gratification (that is to say, husbands' sexual exploitation of their wives does not contain a commercial element, from which they profit financially). Further, the practice of forced marriage is closely linked with the problem of trafficking in women. In the UK for instance, the government deals with almost 200 cases per year in which British nationals have been taken overseas for forced marriage (HAC 2008: 447). Although a lack of data on forced marriage practices in Australia means that the estimates of similar cases in Australia are, at this point, unable to be surmised, the trend toward taking women overseas for marriage in the UK indicates the need for Australia to amend its trafficking legislation to address non-commercial forms of sexual exploitation, such as those that occur in forced marriage. Such an amendment is necessary if Australia is to fulfil its obligations under the 2000 UN Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, to ensure the protection of all trafficking victims.

Raising the legal age of marriage to 18, without exception

CATWA also recommends the raising of the legal age of marriage to 18, without exception, as a further measure that can be undertaken to prevent forced marriages. The 1961 Marriage Act allows for a court order to be made to allow the marriage of a person aged between 16 and 18 years old with the consent of their parents (section 12). Given that in forced marriage, it is often parents who are perpetrating the crime, removing this exception may provide an additional means by which to combat the practice and to remove any legal loopholes allowing for its occurrence.

Education campaigns as to women's rights in marriage

In the UK the NGO Karma Nirvana is funded to provide information about girls' rights in marriage through talks and printed materials, in schools. They are also called

upon to go into schools to talk to girls who are identified as being at risk. Suitable NGOs in Australia should be funded to provide information and support in this way in the major cities where girls are most likely to be in harm's way.

Problems with civil or community-engagement based approaches

CATWA lastly would like to express concern about the prospect of civil or community-engagement based approaches as the primary means for dealing with forced marriage. Should the Government consider introducing legislation similar to the British Forced Marriage (Civil Protections) Act 2007, it should be noted that while the empowerment of courts with measures to provide women with protection orders is valuable, the adequacy of such legislation as the centerpiece of efforts to combat the practice is a matter of concern. In many cases, women who are forced to marry by their families do not know until the last moment what is about to occur. In situations where they are taken abroad to be married, it is often not until they arrive at the overseas destination that the reason for their travel is revealed (see Sanghera 2009), at which point a civil protection order is out of reach and ineffectual. Moreover, such legislation places the burden of preventing forced marriages on the young women who are the object of the practice, rather than on law-enforcement or state services. Similarly, there are difficulties with community engagement strategies that aim to put young women into mediation with those trying to force them to marry (see Phillips and Dustin 2004: 534), which will likely cause further harm and trauma to victims. Finally, questions can be raised as to the suitability of civil law approaches in adequately communicating to affected communities that forced marriage is wrong and a violation of women's human rights.

Conclusion

This submission has argued that there should be 5 approaches to forced marriage:

- 1.** Forced marriage should be made a criminal offence because this is the only way to capture all the harms that are involved in the practice and provides an invaluable educational tool for girls who are risk and their communities.
- 2.** The definition of exploitation in the 2005 Criminal Code Amendment (Trafficking in persons) Act should be expanded to include: '*the exploiter's conduct causes the victim to enter into forced marriage*'. This will enable trafficking into forced marriage to be brought within the scope of Australia's anti-trafficking legislation.
- 3.** The age of marriage should be raised to 18, without exception, to enable girl children to finish school and have more chance of economic independence and choice in relation to marriage.
- 4.** NGOs should be funded to provide educational resources regarding forced marriage.
- 5.** NGOs should be funded to support girls and women seeking to avoid or escape forced marriage.

If these measures are adopted, Australia will be at the forefront of international efforts to counter this practice.

References

Attorney-General's Department (2010) *Discussion Paper. Forced and Servile Marriage*. Canberra, Criminal Justice Division.

Bhopal, Kalwant (1999) 'South Asian women and arranged marriages in East London', in Barot, Rohit *et al.* (eds) *Ethnicity, Gender and Social Change*. New York: St. Martin's Press.

Beckett, Clare and Marie Macey (2001) 'Race, Gender and Sexuality: the Oppression of Multiculturalism', *Women's Studies International Forum* 24(3-4): 309-319.

Brandon, James and Salam Hafez (2008) *Crimes of the Community: honour-based violence in the UK*. London: Centre for Social Cohesion, Civitas.

Chantler, Khatidja *et al.* (2009) 'Forced marriage in the UK: religious, cultural or economic state violence?', *Critical Social Policy* 29: 587-612.

Foreign and Commonwealth Office (2005) *Forced Marriage: A Wrong Not a Right*. London: Community Liason Unit, Foreign and Commonwealth Office.

Gangoli, Geetanjali *et al.* (2006) *Forced marriage and domestic violence among South Asian communities in North East England*. Bristol: School for Policy Studies, University of Bristol and Northern Rock Foundation.

HAC (Home Affairs Committee - Commons) (2008) *Domestic violence, forced marriage, and 'honour'-based violence. Sixth Report of Session 2007-8, Vol. 2*, London: the Stationary Office.

House of Commons (UK) (2004) *Hansard*. 14 June, Col. 577.

Hester, Marianne *et al.* (2007) *Forced marriage: the risk factors and the effect of raising the minimum age for a sponsor, and of leave to enter the UK as a spouse or fiancé(e)*. Bristol and Manchester: School for Policy Studies, University of Bristol and School of Nursing, Midwifery and Social Work, University of Manchester.

Jeffreys, Sheila (2009) *The Industrial Vagina: the Political Economy of the Global Sex Trade*. London and New York: Routledge.

Khanum, Nazia (2008) *Forced marriage, family cohesion and community engagement: national learning through a case of Luton*. Watford: Barham Press.

Macey, Marie (2009) *Multiculturalism, Religion and Women: Doing Harm by Doing Good?* Basingstoke: Palgrave Macmillan.

Phillips, Anne and Moira Dustin (2004) 'UK Initiatives on Forced Marriage: Regulation, Dialogue and Exit', *Political Studies* 52: 531-551.

Saner, Ermine (2008) 'The invisibles', *The Guardian*, 14 March.

Sanghera, Jasvinder (2009) *Daughters of Shame*. London: Hodder and Stoughton.

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