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RESPONDING TO VULNERABILITY? FORCED MARRIAGE AND THE LAW

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This article examines how the Australian legal response to forced marriage, introduced in 2013, understands and seeks to remedy the vulnerabilities of those in or at risk of a forced marriage. The article argues that the legal response, framed in terms of the coercive mobilisation of criminal justice as part of the Commonwealth approach to trafficking and slavery, conceptualises the situation of those who are forced to marry without full and free consent in ways that only partially recognise their many vulnerabilities. A more comprehensive strategy would target the factors and settings that create or contribute to the circumstances of vulnerability in the first place – including the complex role of family and community dynamics – via a range of protective and preventative measures and a coordinated approach that recognises forced marriage as a complex form of family violence.

I INTRODUCTION

This article examines how the current Australian legal framework targeting forced marriage understands and seeks to remedy the vulnerabilities of those in or at risk of a forced marriage. Forced marriage is an umbrella term for a number of situations where a marriage takes place without the consent of a person.¹ It is a

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¹ There is no single definition of forced marriage. The most commonly envisaged situations are ones where a marriage takes place against the wishes of a person, but the label is also used to include situations where the person lacks the capacity to give valid consent, eg, because of age or disability. In some jurisdictions the term is only be used in relation to unions formally resembling marriages. In Australia, the Commonwealth *Criminal Code* defines forced marriage offences widely, covering also cultural and religious marriages: *Criminal Code Act 1995* (Cth) sch 1 s 270.7A ('*Criminal Code*'). As will be

multifaceted phenomenon that highlights both the well-known difficulties in developing effective legal responses to gendered forms of violence, as well as the complex mix of intersectional factors that contribute to the vulnerability and marginalisation of those affected. In many countries, the use of the sternest tools of the state, namely criminal law and immigration law, has been advocated on the basis that the criminological and legal framework is indispensable for sending a clear message about the unacceptability of forced marriage and, more broadly, about the importance of freedom of choice in decision-making regarding personal relationships. However, since forced marriage was criminalised in Australia in 2013, it has become clear that many victims and those at risk remain reluctant to come forward and that the limited protections on offer are insufficient to provide the range of assistance and support options that are needed. Indeed, the punitive focus of the current response may even exacerbate victims' situations rather than address the causes behind them.

This article examines Australia's current approach through the concept of vulnerability. Though the concept of vulnerability is 'imprecise and contested',² it is a useful tool in analysing if and/or how intersectional experiences of marginalisation, notoriously difficult to tackle, are addressed in the current responses to forced marriage. Forced marriage is a complex phenomenon, with multiple intersecting factors contributing to situations where a person is pressured, sometimes over a substantial period of time, to marry against their will. Forced marriage is regarded as a gendered issue,³ a phenomenon associated with certain minority communities where parental and extended family involvement in marriage decisions and arranged marriages are customary,⁴ and also one that particularly impacts children and young people.⁵ The current

discussed below, drawing a line between consensual and non-consensual marriages and permissible and impermissible pressures is complex.

² Lourdes Peroni and Alexandra Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law' (2013) 11 *International Journal of Constitutional Law* 1056, 1058.

³ See, eg, Magdalena McGuire, 'The Right to Refuse: Examining Forced Marriage in Australia' (Report, Good Shepherd Youth & Family Service, Domestic Violence Victoria and Good Shepherd Australia New Zealand, December 2014) <https://www.goodshep.org.au/media/1222/right-to-refuse_final-report_v2.pdf>; Women Living Under Muslim Laws, 'Child, Early and Forced Marriage: A Multi-Country Study' (Submission to the UN Office of the High Commissioner on Human Rights, 15 December 2013) <<http://www.wluml.org/resource/child-early-and-forced-marriage-multi-country-study>>; Emma Psaila et al, 'Forced Marriage from a Gender Perspective' (Study for the FEMM Committee, European Parliament, 2016).

⁴ For instance, in the United Kingdom ('UK'), the issue is framed as particularly affecting South-Asian communities: Sundari Anitha and Aisha Gill, 'Coercion, Consent and the Forced Marriage Debate in the UK' (2009) 17 *Feminist Legal Studies* 165. In Germany, it is seen as an issue of Muslims of Turkish origin: Kerstin Braun, "'I Don't Take This Man to Be My Lawfully Wedded Husband': Considering the Criminal Offense of "Forced Marriage" and Its Potential Impact on the Lives of Girls and Young Women with Migrant Backgrounds in Germany' (2015) 16 *German Law Journal* 845. In Australia, concern over forced marriage is not specific to one community but arose from a number of cases to do with children being taken overseas: Australian Broadcasting Corporation, 'Without Consent', *Four Corners*, 29 March 2012 (Sarah Ferguson) <<http://www.abc.net.au/4corners/without-consent/3933100>>.

⁵ Though the term forced marriage typically covers situations where a person is too young to give valid consent to a marital union, the term early/child marriage can be used as a separate term to refer to those who marry while underage. See Tina Jelenic and Matthew Keeley, 'End Child Marriage: Research Report

approach was adopted at a time when the knowledge base regarding the phenomenon was patchy at best – indeed, both national research on and understanding of forced marriage are still incomplete, as research on forced marriage remains relatively rare in Australia.⁶ It is therefore important to ask whether the current approach can respond to what we know about the intersectional experiences of vulnerability involved in forced marriage cases. This is particularly important in relation to a phenomenon that is politicised and associated with already heavily policed and stigmatised minorities in the media and elsewhere.⁷ Much work remains to be done in analysing how responses could be conceptualised so that they best ameliorate the vulnerabilities of those at risk.

This article first outlines the harms involved in forced marriage and common responses to it, and then introduces the framework for its analysis that draws from theorising around the notion of vulnerability. It then argues that the current Australian legal response, framed around the coercive mobilisation of criminal justice as part of the Commonwealth response to trafficking and slavery, conceptualises the situation of those who are forced to marry without full and free consent in ways that only partially recognise their many vulnerabilities. It has been built to offer protection and assistance only in return for reporting the crime and, even with recent changes to the framework, does not fully acknowledge the barriers faced by individuals or provide the support they need to exercise agency, leaving gaps that expose them to continued pressures. A more comprehensive strategy should address the factors and settings that create the circumstances of vulnerability in the first place – including the complex role of family and community dynamics – via a range of protective and preventative measures and a coordinated approach (at both state and federal level) that treats forced marriage as a complex (and relatively rare) form of family violence. The article contends that the challenge to create policies that protect and support victims and those at risk can only be met via a more nuanced assessment of the multiple factors that put individuals at risk of having to marry against their will, one that recognises the inevitable pitfalls of taking action against a complex phenomenon that is not yet fully understood.

on the Forced Marriage of Children in Australia' (National Children's and Youth Law Centre, May 2013) <http://www.lawstuff.org.au/_data/assets/pdf_file/0009/15759/End-Child-Marriage-NCYLC-Research-Report.pdf>.

⁶ Helen Sowe, 'From an Emic Perspective: Exploring Consent in Forced Marriage Law' (2018) 51 *Australian & New Zealand Journal of Criminology* 258, 259–60.

⁷ See, eg, Piers Akerman, 'Unholy Matrimony and the Islamic Culture's Hidden Stain', *The Daily Telegraph* (online), 15 January 2017 <<https://www.dailytelegraph.com.au/news/opinion/piers-akerman-unholy-matrimony-and-the-islamic-cultures-hidden-stain/news-story/beb9cb07f083cbcec836c2c855eab896>>. Negative sentiments towards Muslims are expressed by 22–25 per cent of the population: Andrew Markus, 'Mapping Social Cohesion: The Scanlon Foundation Surveys 2017' (Report, Scanlon Foundation, 2017) 57.

II FORCED MARRIAGE: THE HARM AND RESPONSES TO IT

There is no internationally agreed-upon definition of forced marriage, but most commonly a forced marriage is understood to be one where the marital union is entered into without the full and free consent of both parties, often because of some form of impermissible coercion.⁸ Forced marriage is widely recognised as a violation of human rights (including the right to freely enter into marriage to found a family)⁹ and as a form of violence against women and children.¹⁰ Coercion can range from physical force to various forms of psychological, financial, and emotional pressures, often applied by immediate or extended family members.¹¹ Multiple harms are associated with and result from coercion to marry – victims may suffer psychological, sexual, and physical harms, including assault, rape, domestic violence, and false imprisonment, but also consequences such as withdrawal from education, economic dependence, and social isolation.¹² Many of these harmful effects are more serious for girls and women, who are disproportionately affected,¹³ and may involve, eg, early/forced pregnancy and childbearing.¹⁴ Resisting or rejecting forced marriage may result in harms such as violence, family estrangement, and social isolation. Regardless of any associated harms, forced marriage is also wrongdoing in and of itself: it denies autonomy in an important life decision that creates an official link between individuals, with both social and legal ramifications.¹⁵

Coverage of forced marriage in high-income western countries has largely associated the phenomenon with some migrant families and communities, which is not helpful for understanding its dynamics in a country such as Australia,

⁸ Attorney-General's Department, 'Forced and Servile Marriage' (Discussion Paper, 24 November 2010) 3. Note that forced marriage exists 'along a continuum of coercive practices' and drawing a line between consensual and non-consensual marriages can be difficult, especially in contexts where family involvement in marriage decisions is accepted as the norm: Frances Simmons and Jennifer Burn, 'Without Consent: Forced Marriage in Australia' (2013) 36 *Melbourne University Law Review* 970, 973. Note also that forced marriage can be divided into three stages – pre-marriage stage, actual marriage ceremony, and subsequent marital life (sometimes referred to as marital captivity): Iris Haenen, *Force & Marriage: The Criminalisation of Forced Marriage in Dutch, English and International Criminal Law* (Intersentia, 2014) 9.

⁹ See, eg, *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 23 ('ICCPR'); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 10 ('ICESCR').

¹⁰ See *Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence*, opened for signature 11 May 2011, CETS No 210 (entered into force 1 August 2014) arts 32, 37 ('*Istanbul Convention*').

¹¹ Jelenic and Keeley, above n 5, 10–11.

¹² Ibid; McGuire, above n 3.

¹³ For instance, the UK Forced Marriage Unit reports that 80 per cent of forced marriage cases involved women victims and 26 per cent involved victims below 18 years of age (and a further 34 per cent involved victims aged 18–25): Forced Marriage Unit, 'Forced Marriage Unit Statistics 2016' (Report, 9 March 2017) 3.

¹⁴ Jelenic and Keeley, above n 5, 10–11.

¹⁵ Haenen, above n 8, 312.

characterised by colonial and Indigenous heritage¹⁶ and large-scale immigration.¹⁷ Though forced marriage can be intertwined with an immigration aspect – eg, take place overseas or aim at visa sponsorship – it is an extraordinarily complex and poorly understood phenomenon that resides in the intersection of many social, economic and cultural dimensions.¹⁸ Though cultural reasons are often emphasised, motives are multifaceted and varied, including, for instance: maintenance or expansion of transnational ties (often with ancestral homelands); economic purposes, including those related to poverty, sharing of resources and transfer of dowry/bridewealth; prevention/control of young people's unwanted behaviour (including relationships, homosexuality, and alcohol/drug use); gendered ideas about 'family honour', obedience, and commitments; and practical aims, such as obtaining services and support for a disabled person in need of a long-term carer.¹⁹ These often-mentioned factors, however, also have to be treated with care: they are also frequent motivations behind consensual arranged marriages – often emphatically distinguished from forced marriages²⁰ – and cultural explanations can obscure important roles played by other factors, for instance family breakdown and domestic violence,²¹ and inaccurately imply that entire communities endorse or normalise coercion in relation to marriage.²²

Forced marriage is a serious harm that requires a legal and policy response from the state, but developing effective and holistic responses has proved challenging. Recent trends show an overwhelming tendency to respond through law, and particularly via criminal justice and immigration law.²³ In terms of

¹⁶ Regarding Indigenous customary marriages, see Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986).

¹⁷ Carolyn Evans, 'Forced Marriage in Australia: Definitely Not the "Usual Suspects"' on *E-International Relations* (23 September 2015) <<http://www.e-ir.info/2015/09/23/forced-marriage-in-australia-definitely-not-the-usual-suspects/>>. The 2016 census shows that nearly half (49 per cent) of Australians had either been born overseas or one or both parents had been born overseas: Australian Bureau of Statistics, 'Census Reveals a Fast Changing, Culturally Diverse Nation' (Media Release, 27 June 2017) <<http://www.abs.gov.au/ausstats/abs@.nsf/lookup/Media%20Release3>>.

¹⁸ Simmons and Burn, above n 8.

¹⁹ See, eg, Marianne Hester et al, '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)' (Report, Home Office, August 2007); Yunas Samad and John Eade, 'Community Perceptions of Forced Marriage' (Report, Community Liaison Unit, Foreign and Commonwealth Office, 2002). Regarding the last aspect, see Nora Groce, Dina Gazizova and Angela Hassiotis, 'Forced Marriage among Persons with Intellectual Disabilities' (Working Paper No 27, Leonard Cheshire Disability and Inclusive Development Centre, December 2014); Rachael Clawson, 'Safeguarding People with Learning Disabilities at Risk of Forced Marriage: Issues for Inter-agency Practice' (2013) 16(3) *Social Work & Social Sciences Review* 20; Rachael Clawson and Rachel Fyson, 'Forced Marriage of People with Learning Disabilities: A Human Rights Issue' (2017) 32 *Disability & Society* 810.

²⁰ See, eg, Attorney-General's Department, above n 8, 4.

²¹ Fauzia Shariff, 'Towards a Transformative Paradigm in the UK Response to Forced Marriage: Excavating Community Engagement and Subjectivising Agency' (2012) 21 *Social & Legal Studies* 549, 557.

²² Moira Dustin and Anne Phillips, 'Whose Agenda Is It?: Abuses of Women and Abuses of "Culture" in Britain' (2008) 8 *Ethnicities* 405.

²³ Alexia Sabbe et al, 'Forced Marriage: An Analysis of Legislation and Political Measures in Europe' (2014) 62 *Crime, Law and Social Change* 171.

criminal law, states across the European Union show a ‘trend to criminalise forced marriage’²⁴ (rather than seek to use existing criminal offences, such as assault, false imprisonment, and blackmail), and a similar trajectory is also present in jurisdictions such as Australia and Canada.²⁵ Australia’s criminal provisions, introduced in 2013, make it a federal criminal offence to be party to or cause someone to enter into a marriage without freely and fully consenting, by the use of coercion, threat or deception or because the party was incapable of understanding the nature and effect of the marriage ceremony.²⁶ Outside criminal law, a number of European states have introduced immigration law measures, such as minimum age or integration requirements that act as hurdles in marriage migration cases.²⁷ National civil laws are typically involved insofar as they declare the invalidity of marriages that concluded without valid consent by both parties (or provide for the possibility of divorce).²⁸

It is often suggested that the UK has developed the most sophisticated and wide-ranging non-criminal legal response.²⁹ The *Forced Marriage (Civil Protection) Act 2007* (UK) c 20 was introduced specifically to aid victims and those threatened with forced marriage via civil remedies. A Forced Marriage Protection Order (‘FMPO’) can be applied for to prevent a forced marriage from taking place or to protect a victim from the effects; it may include measures such as confiscation of passports or restrictions on contact with the victim.³⁰ A specialised unit, now called the ‘Forced Marriage Unit’ (‘FMU’) was set up, initially with a focus on helping British nationals at risk of forced marriage

²⁴ European Union Agency for Fundamental Rights, ‘Addressing Forced Marriage in the EU: Legal Provisions and Promising Practices’ (Report, 2014) 7. Examples of countries that have specifically criminalised forced marriage include Norway, Austria, Belgium, Denmark, Germany, Scotland, England, Northern Ireland, Wales and Sweden: *Straffeloven* (Norway) § 253; *Criminal Code* (Austria) § 106a [Federal Ministry of Justice (Austria) trans, *Strafgesetzbuch*]; *Code pénal* [Penal Code 2016] (Belgium) art 391sexies; *Straffeloven* [Penal Code No 873 of 09/07/2015] (Denmark) § 260; *Strafgesetzbuches* (Germany) § 240(4); *Anti-social Behaviour, Crime and Policing Act 2014* (UK) c 12, ss 121–2; *Human Trafficking and Exploitation (Criminal Justice and Victims) Act (Northern Ireland) 2015* (UK) c 2, s 16; *Penal Code* (Sweden) No 1962:700 [Norman Bishop trans, *Brottsbalken* (1962:700) (1962), ch 4 § 4a. Note that this trend is likely to be further reinforced by the *Istanbul Convention*, which creates an obligation to criminalise the intentional conduct of forcing someone to enter into a marriage: above n 10, art 37.

²⁵ Canada criminalised forced marriage in 2015: see Karlee Anne Sapoznik Evans, ‘Forced Marriage in Canada: To Criminalize or Not to Criminalize?’ (2017) 6 *Canadian Journal of Human Rights* 49.

²⁶ Forced marriage is defined widely in s 270.7A of the *Criminal Code Act 1995* (Cth), covering eg, cultural and religious marriages; s 270.7B includes the offences of causing a forced marriage and being party to one (but not as a victim).

²⁷ Sabbe et al, above n 23.

²⁸ Psaila et al, above n 3, 41.

²⁹ Catherine Dauvergne and Jenni Millbank, ‘Forced Marriage as a Harm in Domestic and International Law’ (2010) 73 *Modern Law Review* 57, 63–7; Khatidja Chantler, ‘Recognition of and Intervention in Forced Marriage as a Form of Violence and Abuse’ (2012) 13 *Trauma, Violence, & Abuse* 176, 176.

³⁰ About background and criticism of the law, see Aisha Gill and Sundari Anitha, ‘The Illusion of Protection? An Analysis of Forced Marriage Legislation and Policy in the UK’ (2009) 31 *Journal of Social Welfare & Family Law* 257; see also Kaye Quek, ‘A Civil Rather than Criminal Offence? Forced Marriage, Harm and the Politics of Multiculturalism in the UK’ (2013) 16 *British Journal of Politics and International Relations* 626. Note that Scotland introduced a civil remedy via the *Forced Marriage etc (Protection and Jurisdiction) (Scotland) Act 2011* (Scot) asp 15 in 2011.

abroad.³¹ The UK example highlights the importance of developing measures that *prevent* coercive pressures and allow people to *leave* already concluded forced marriages.³² In the immediate context, services to support, protect and assist those at risk as well as those already married have been advocated (including public helplines, psychological assistance, and housing options, as well as training for officials on how to recognise the signs of an impending forced marriage).³³ Longer term prevention must aim at removing the structural drivers of forced marriage and encouraging what is likely to be ‘a lengthy process of inter-generational social change’ that addresses the power relations and social and economic pressures behind forced marriage.³⁴ This in turn necessitates meaningful community engagement that transforms attitudes, including those to young women’s roles in families.³⁵

The complex nature of forced marriage underscores the importance of developing comprehensive prevention strategies that are built on the slowly expanding knowledge base of this neglected form of gender-based violence. However, the overwhelming state response so far has been to prioritise the use of criminal law in the hope that it acts as a deterrent, indeed even in the UK where forced marriage was criminalised in 2014.³⁶ Forced marriage has become framed predominantly as a criminal issue as part of a wider shift in discourse in western countries regarding immigration, national identity, and women’s rights since the turn of the century.³⁷ A renewed focus on individual rights and equality, in a context of rising anti-immigrant/anti-Muslim sentiments, has focused attention, in both Europe and Australia, on ‘cultural practices’ or ‘honour crimes’ (eg, ‘honour killings’)³⁸ and reinforced efforts to control migrant communities seen as lacking ‘integration’.³⁹ Highlighting forced marriage as human rights abuse has on the one hand acted as a catalyst for taking action, triggering an ongoing search for appropriate and effective responses, but on the other hand arguably accentuated the inclination towards criminalisation and even possible misuse of

³¹ See also Dustin and Phillips, above n 22, 411. Initially called the Community Liaison Unit, the unit was based in the Foreign and Commonwealth Office – it was renamed in 2005 and is now a joint Foreign and Commonwealth Office and Home Office unit: HM Government (UK), ‘The Right to Choose: Multi-agency Statutory Guidance for Dealing with Forced Marriage’ (November 2008), 4.

³² Mohammad Mazher Idriss, ‘Forced Marriages – The Need for Criminalisation?’ (2015) 9 *Criminal Law Review* 687, 701.

³³ Simmons and Burn, above n 8, 1005.

³⁴ Anne Phillips and Moira Dustin, ‘UK Initiatives on Forced Marriage: Regulation, Dialogue and Exit’ (2004) 52 *Political Studies* 531, 545.

³⁵ Sowe, above n 6.

³⁶ *Anti-social Behaviour, Crime and Policing Act 2014* (UK) c 12. About the decision to create a separate criminal offence, see, eg, Aisha K Gill and Anicée Van Engeland, ‘Criminalization or “Multiculturalism without Culture”?’ Comparing British and French Approaches to Tackling Forced Marriage’ (2014) 36 *Journal of Social Welfare & Family Law* 241; Ruth Gaffney-Rhys, ‘The Development of the Law Relating to Forced Marriage: Does the Law Reflect the Interests of the Victim?’ (2014) 16 *Crime Prevention and Community Safety* 269.

³⁷ Irem A Ebeturk and Oliver Cowart, ‘Criminalization of Forced Marriage in Europe: A Qualitative Comparative Analysis’ (2017) 58 *International Journal of Comparative Sociology* 169.

³⁸ Dustin and Phillips, above n 22.

³⁹ Scott Poynting and Victoria Mason, ‘The New Integrationism, the State and Islamophobia: Retreat from Multiculturalism in Australia’ (2008) 36 *International Journal of Law, Crime and Justice* 230.

human rights arguments for political anti-immigration purposes.⁴⁰ Sherene Razack, among others, has criticised this ‘culturalising’ of issues such as forced marriage that obscures the multiple factors, including economic and political, that give rise to and sustain this type of violence.⁴¹

Most jurisdictions where forced marriage has been criminalised have so far seen very few prosecutions, let alone convictions.⁴² This, and the emphasis on ‘sending a message’, suggests the possibility that the rapid spread of the criminal justice framing and response is largely symbolic.⁴³ In other words, the response to rising awareness of young people being pressured into marriage has been to criminalise it in the hope that that in the long run criminalisation will support general deterrence (or even just to show that something is being done), without examining in depth whether criminal law is the most appropriate response to forced marriage as one reasonably rare but extremely complex manifestation of gender-based violence.⁴⁴ To create real alternatives for those affected, it is also important to understand the social, economic, and cultural dynamics that underpin forced marriage. Instead, some responses have arguably resulted in detrimental outcomes that have exacerbated victims’ marginalisation or even created new vulnerabilities.⁴⁵ At the same time, it may be argued, as with other forms of gendered violence, that engagement with criminal justice processes is, despite its harmful impacts, in part, also a necessary countermeasure to historic and current state indifference to or complicity in gender-based violence.⁴⁶ Effective responses to serious gendered harms require, in some cases at least, the use of criminal law, if not *just* the criminal law. The question then becomes one that is concerned with the overall response and the appropriate role of criminal law as part of it.

III ADDRESSING VULNERABILITY TO FORCED MARRIAGE

Victims of forced marriage are in many ways some of the most vulnerable individuals in society. Vulnerability – with its ethical and interdisciplinary appeal⁴⁷ – is therefore a concept with obvious potential for analysing forced

⁴⁰ Sabbe et al, above n 23; Ebeturk and Cowart, above n 37.

⁴¹ Sherene H Razack, ‘Imperilled Muslim Women, Dangerous Muslim Men and Civilised Europeans: Legal and Social Responses to Forced Marriages’ (2004) 12 *Feminist Legal Studies* 129; see also Gill and Anitha, above n 30.

⁴² For a discussion on the limited application of criminal law in the European context, see Psaila et al, above n 3, ch 6.

⁴³ Dustin and Phillips, above n 22, 420.

⁴⁴ Anitha and Gill, above n 4.

⁴⁵ Anne Wijffelman, ‘Child Marriage and Family Reunification: An Analysis under the *European Convention on Human Rights* of the Dutch *Forced Marriage Prevention Act*’ (2017) *Netherlands Quarterly of Human Rights* 1; Ebeturk and Cowart, above n 37, 187.

⁴⁶ Julie Goldscheid and Debra J Liebowitz, ‘Due Diligence and Gender Violence: Parsing Its Power and Its Perils’ (2015) 48 *Cornell International Law Journal* 301; about forced marriage, Haenen, above n 8, 255; Quek, above n 30, 639.

⁴⁷ Aniceto Masferrer and Emilio García-Sánchez (eds), *Human Dignity of the Vulnerable in the Age of Rights: Interdisciplinary Perspectives* (Springer, 2016).

marriage and assessing the ramifications of legislation trying to respond to forced marriage. In human rights discourse, the notion of vulnerability is often used to draw attention to the heightened susceptibility of some individuals or groups to certain kinds of harms – though in theory everyone is vulnerable to having their human rights violated, it is seen to be especially useful in drawing attention to the protection needs of groups such as children, women, persons with disabilities, or ethnic minorities.⁴⁸ However, it has also been argued that ostensibly universal human rights are articulated in terms that actually marginalise the most vulnerable subjects.⁴⁹ The longstanding invisibility of gender-based violence is an obvious example of this – perpetrated by private individuals, it has until relatively recently escaped scrutiny as a human rights violation.⁵⁰ Forced marriage is in a slightly different position, as the right to freely enter into marriage to found a family is one guaranteed by international human rights law.⁵¹ However, it is fair to say that the reality of forced marriage has only recently been attracting serious attention in most western countries, and discussion over how to draw the line between, for instance, permissible family influence on marital decisions and impermissible pressure, let alone how states ought to respond to the latter, is still ongoing in most jurisdictions.

Martha Fineman has sought to reconceptualise vulnerability and analyse the responsibilities of state institutions in remedying it. She is critical of how vulnerability is now conceived as a characteristic of specific ‘vulnerable populations’ (‘youth deemed “at risk”’, ‘single mothers’, or ‘the elderly’) the response to whom is paternalistic or stigmatising.⁵² This is misleading and pernicious, as it obscures similarities between ‘vulnerable populations’ and others not so defined. Fineman argues that the concept should be freed from its negative connotations and recognised as a universal, inevitable, enduring aspect of the human condition.⁵³ Her ‘vulnerable subject’ recognises that we are all vulnerable as embodied creatures who are inexorably embedded in social relationships and institutions (unlike the mythical autonomous, independent, and self-sufficient liberal subject).⁵⁴ However, though vulnerability is universal,

⁴⁸ Alexander H E Morawa, ‘Vulnerability as a Concept of International Human Rights Law’ (2003) 6 *Journal of International Relations and Development* 139; Bryan S Turner, *Vulnerability and Human Rights* (Pennsylvania State University Press, 2006); Roberto Andorno, ‘Is Vulnerability the Foundation of Human Rights?’ in Aniceto Masferrer and Emilio García-Sánchez (eds), *Human Dignity of the Vulnerable in the Age of Rights: Interdisciplinary Perspectives* (Springer, 2016) 257.

⁴⁹ Peroni and Timmer, above n 2.

⁵⁰ Goldscheid and Liebowitz, above n 46.

⁵¹ ICCPR art 23; ICESCR art 10.

⁵² Martha Albertson Fineman, ‘Equality, Autonomy, and the Vulnerable Subject in Law and Politics’ in Martha Albertson Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate, 2014) 13, 16. See also Florencia Luna, ‘Elucidating the Concept of Vulnerability: Layers not Labels’ (2009) 2(1) *International Journal of Feminist Approaches to Bioethics* 121.

⁵³ Martha Albertson Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (2008) 20 *Yale Journal of Law and Feminism* 1. See also Martha Albertson Fineman, ‘The Vulnerable Subject and the Responsive State’ (2010) 60 *Emory Law Journal* 251; Martha Albertson Fineman, ‘Beyond Identities: The Limits of an Antidiscrimination Approach to Equality’ (2012) 92 *Boston University Law Review* 1713.

⁵⁴ See also Turner, above n 48, 25.

individuals' experience of our human frailty is particular – its precise form is affected by, for instance, relationships, resources, and institutions.⁵⁵ From this perspective, forced marriage is, then, one manifestation of human beings' universal vulnerability to physical and psychological coercion and pressure – and more specifically, one form of violence against women as well as a demonstration of structural inequalities and family and community dynamics that can create intense pressures and expectations regarding marriage.⁵⁶ As girls and young women from some minority backgrounds are most commonly, if not exclusively, at risk of forced marriage (and typically from their immediate family), gender, age and one's position as part of a family/community are central to understanding the particularity of vulnerability to forced marriage.

Fineman's counterpoint to vulnerability is resilience. She argues that the universality of vulnerability puts the onus on state institutions to respond by supporting resilience, redressing disadvantage, and ameliorating vulnerability.⁵⁷ Regarding forced marriage, it is clear that the responsive state has to step in, but whether criminal justice is the best way or even a necessary component is contested. Coker has argued, in the context of domestic violence, that criminal justice interventions that seek to empower victims may also increase their sense of powerlessness by enhancing state control over the lives of women who are already most vulnerable (eg, because of race or class).⁵⁸ It is well-established that many victims of family violence are put off by the official legal response and the inadequate solutions, typically separation, which do not address the economic and social dependencies that underpin their situation.⁵⁹ Merry has also noted that to make use of the current legal avenues, women experiencing violence need to see themselves in a different way (as victims of criminal activity who can and should turn to the legal system for help) and that women often waver before accepting that identity (if they do).⁶⁰ This is crucial in the context of forced marriage in light of the so-called 'one chance rule' – the reality that victims often only seek outside help once, meaning there may be one chance to stop a forced marriage from taking place.⁶¹ To build resilience, it is therefore crucial to develop a range of meaningful options that make it as likely as possible for anyone at risk of a forced marriage to be able to resist what may be long-lasting pressures on them and, to the extent possible, minimise the adverse social consequences of that resistance (retribution, social ostracism, etc).

⁵⁵ Fineman, 'Vulnerable Subject', above n 53, 10; Fineman, 'Responsive State', above n 53, 268–9.

⁵⁶ Anitha and Gill, above n 4, 166.

⁵⁷ Fineman, 'Responsive State', above n 53, 269. See also Fineman, 'Equality, Autonomy, and the Vulnerable Subject', above n 52.

⁵⁸ Donna Coker, 'Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review' (2001) 4 *Buffalo Criminal Law Review* 801.

⁵⁹ Kimberly D Bailey, 'Lost in Translation: Domestic Violence, "The Personal Is Political," and the Criminal Justice System' (2010) 100 *Journal of Criminal Law and Criminology* 1255. In the Australian context, the failures of the system are summarised in Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol I.

⁶⁰ Sally Engle Merry, 'Rights Talk and the Experience of Law: Implementing Women's Human Rights to Protection from Violence' (2003) 25 *Human Rights Quarterly* 343.

⁶¹ HM Government (UK), 'The Right to Choose: Multi-agency Statutory Guidance for Dealing with Forced Marriage' (June 2014) 1.

Vulnerability, despite its usefulness in expressing our human needs and fragility, is a concept that has to be employed with awareness of its risks, many of which come from its openness to interpretation. Munro has pointed out that discourses grounded in amorphous notions of ‘vulnerability’ can be over-inclusive: in certain contexts, such as sex work and sexual assault, emphasising victims’ vulnerability has led to increased surveillance, and encouragement to self-manage to avoid risks.⁶² Over-emphasis on culture or religion, for instance, may have results that repress both individuals and communities and seek to absolve the state from providing meaningful redress or redistribution. However, vulnerability can also be employed in ways that are under-inclusive. If classification as ‘vulnerable’ is used as a criterion for legal assistance (eg, to target those most in need), those (mis)characterised as not vulnerable, perhaps under overly narrow definitions, may receive no or only limited recognition of the factors that make them vulnerable, if they are not included as readily identifiable factors (such as being under the age of majority).⁶³ The concept of vulnerability must thus be used with care. In the context of forced marriage, it requires alertness to the commonly present (but not exclusive) identity markers (such as gender, age, and background) but also the social and economic realities of those affected. For instance, for young people from refugee and recent migrant backgrounds, it may include limited knowledge about the legal system and available options, fear/distrust of people in positions of authority, socioeconomic and educational disadvantage, limited language skills and social networks, and experiences of racism and discrimination.⁶⁴

Mackenzie warns further that protective interventions responding to vulnerability can be, and historically have been, used to justify coercive or objectionably paternalistic policies and institutions. Instead, she advocates for an ethics of vulnerability that fosters autonomy in a relational sense, seeking to counter social relations of domination, oppression and exclusion and supporting individuals to maximise their capacity to exercise their autonomy, including by devising alternative courses of action.⁶⁵ Luna has also highlighted the nature of vulnerability as a relational as well as dynamic concept.⁶⁶ She suggests that remedying vulnerability should be approached flexibly, not using the concept as a fixed label (attached to certain groups) but thinking in terms of layers of vulnerability. In other words, one should try to identify and distinguish the various layers of vulnerability that individuals may have – for instance, via their

⁶² Vanessa E Munro, ‘Shifting Sands? Consent, Context and Vulnerability in Contemporary Sexual Offences Policy in England and Wales’ (2017) 26 *Social & Legal Studies* 417.

⁶³ Jess Mant and Julie Wallbank, ‘The Mysterious Case of Disappearing Family Law and the Shrinking Vulnerable Subject: The Shifting Sands of Family Law’s Jurisdiction’ (2017) 26 *Social & Legal Studies* 629.

⁶⁴ Annabelle Allimant and Beata Ostapiej-Piatkowski, ‘Supporting Women from CALD Backgrounds Who Are Victim/Survivors of Sexual Violence’ (ACCSA Wrap No 9, Australian Centre for the Study of Sexual Assault, 2011).

⁶⁵ Catriona Mackenzie, ‘The Importance of Relational Autonomy and Capabilities for an Ethics of Vulnerability’ in Catriona Mackenzie, Wendy Rogers and Susan Dodds (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford University Press, 2013) 33.

⁶⁶ Luna, above n 52.

gender, age, poverty, social isolation, and migrancy – and then think of various ways to avoid or minimise any negative impact of those layers on their ability exercise agency.⁶⁷ This underscores the importance of adopting multiple approaches for diverse vulnerabilities rather than seeking to find one solution to suit everyone's needs. This is very important regarding the complex dynamics around forced marriage, that may involve combinations of vulnerabilities that are highly specific to the individual case (for instance, the presence of disability or sexual orientation that add a factor not present in some other cases).

Finally, and importantly, any analysis of victimhood and vulnerability has to take into account that western feminist practices have been accused of fetishising cultural difference, colonising, and ghettoising non-western women as the collective 'Other'.⁶⁸ Kapur, in her critique of victimisation language, argues that the focus on non-western women as particularly vulnerable to violence essentialises gender and culture, depicts non-western women as 'perpetually marginalized and underprivileged' and invites responses that have little to do with promoting women's rights.⁶⁹ Kapur also questions the feminist focus on legal strategies as ways to seek empowerment, arguing it has had contradictory results for women's human rights.⁷⁰ Vulnerability can slide into affirming the liberal subject, who is contrasted with those who are considered as vulnerable.⁷¹ These risks are pronounced if certain cultures are perceived as inherently sexist and oppressive, a framing seen in Australia as well as elsewhere.⁷² Evidence from many contexts suggests women from marginalised minorities may not wish to further stigmatise their communities by contacting authorities.⁷³ Vulnerability therefore has to be approached not as fixed and essential, but requiring careful analysis of relationships of domination and subordination, including racial discrimination, that can put at risk communities as well as individuals. Multiple approaches – legal and non-legal – that address layers of vulnerability and encourage self-determination must be combined with support for the collective resilience of marginalised communities that have been targeted for suspicion and control.

⁶⁷ Ibid.

⁶⁸ Chandra Mohanty, 'Under Western Eyes: Feminist Scholarship and Colonial Discourses' (1988) 30 *Feminist Review* 61. See also Razack, above n 41.

⁶⁹ Ratna Kapur, 'The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-colonial Feminist Legal Politics' (2002) 15 *Harvard Human Rights Journal* 1, 6.

⁷⁰ Ratna Kapur, 'Revisioning the Role of Law in Women's Human Rights Struggles' in Saladin Meckled-García and Başak Çali (eds), *The Legalization of Human Rights: Multidisciplinary Perspectives on Human Rights and Human Rights Law* (Routledge, 2005) 93, 101.

⁷¹ Alexandra Timmer, 'A Quiet Revolution: Vulnerability in the European Court of Human Rights' in Martha Albertson Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate, 2014) 147.

⁷² Kiran Grewal, 'Australia, the Feminist Nation? Discourses of Gender, "Culture" and Nation in the "K Brothers" Gang Rapes' (2012) 33 *Journal of Intercultural Studies* 509; Anne Aly and David Walker, 'Veiled Threats: Recurrent Cultural Anxieties in Australia' (2007) 27 *Journal of Muslim Minority Affairs* 203; Dustin and Phillips, above n 22.

⁷³ Bailey, above n 59, 1291.

IV EXAMINING THE AUSTRALIAN LEGAL RESPONSE

A Criminalisation with a Side of Immigration and Child Protection

The current approach to forced marriage as a distinct harm has emerged in response to concerns that surfaced in the last decade that ‘Australian girls’ were being taken overseas to marry.⁷⁴ Many of the acts involved in forced marriage were already criminal offences under state law (rape, assault, false imprisonment, etc) and there were relevant provisions also under the *Marriage Act 1961* (Cth).⁷⁵ Nonetheless, a discussion paper was released in 2010 to consider options for possible reform⁷⁶ and forced marriage was eventually criminalised in 2013, as part of a broader reform focused on plugging gaps in the existing legislation dealing with human trafficking, slavery, and forced labour.⁷⁷ The *Crimes Legislation Amendment (Slavery, Slavery-Like Conditions and People Trafficking) Act 2012* (Cth) criminalised a range of conduct around forced marriage, with further amendments made in 2015 to expand the definition of ‘forced marriage’ and to increase the penalties.⁷⁸ Forced marriage is defined in section 270.7A as one where one party (the victim) entered into the marriage without freely and fully consenting either because of the use of coercion, threat or deception or because they were incapable of understanding the nature and effect of the marriage ceremony.⁷⁹ The maximum penalty for causing a forced marriage or being party to one (as not the victim) is seven years (or nine years for an aggravated offence).⁸⁰ Because forced marriage is also defined as ‘exploitation’,⁸¹ where the victim is taken overseas for the purpose of the forced marriage, trafficking offences with higher maximum penalties can also apply (up to 25 years’ imprisonment).⁸²

The Government’s 2010 discussion paper identified some of the risks of the criminalisation strategy, namely that: a criminal approach to perpetrators (often parents) might isolate victims from their family and community; the offence might be difficult to prosecute due to evidential difficulties (including victims’ reluctance to cooperate to incriminate their families); criminalisation might result

⁷⁴ Australian Broadcasting Corporation, above n 4.

⁷⁵ The *Marriage Act 1961* (Cth) contains provisions on marriages being void, eg, because consent is obtained by duress or force or because a party was not of marriageable age (s 23); it also contains relevant offences, targeting marriage celebrants (pt VII). For discussion, see Attorney-General’s Department, above n 8, 12.

⁷⁶ Attorney-General’s Department, above n 8.

⁷⁷ Simmons and Burn, above n 8, 986.

⁷⁸ *Crimes Legislation Amendment (Powers, Offences and Other Measures) Act 2015* (Cth). A rebuttable presumption was also introduced that a person under the age of 16 does not understand the nature and effect of a marriage ceremony.

⁷⁹ The forced marriage offences in the *Criminal Code* extend to all forms of marriage. These include, as per section 270.7A(2), cultural and religious marriages, registered relationships and marriages that take place in Australia or overseas where the person exercising the coercion, threat or deception is an Australian citizen or permanent resident.

⁸⁰ See *Criminal Code* s 270.7B. Aggravated offences are defined in section 270.8 and include situations where the victim is under 18.

⁸¹ *Criminal Code 1995* (Cth) s 271.1A.

⁸² See *Criminal Code 1995* (Cth) s 271.4 (trafficking of children).

in victims being taken overseas to marry; and the enforcement of a new offence might be resource-intensive.⁸³ At the same time, it considered that criminalisation ‘would send a clear message to the community’, might encourage victims to speak out, and lead authorities to better understand forced marriage.⁸⁴ Before the 2013 laws, the Australian Federal Police (‘AFP’) had investigated only three cases of forced or child marriage. Though the numbers are still very small, in 2015–16 the reported figures more than doubled from 33 in 2014–15 to 69 out of 169 AFP investigations into human trafficking, slavery and slavery-like offences.⁸⁵ Forced marriage offences thus account for a significant proportion (41 per cent) of reports into slavery-like offences. However, despite the increase in investigations there has only been one prosecution.⁸⁶ The first conviction was achieved in 2017 when a 34-year-old Melbourne man, a Rohingya refugee, pleaded guilty to going through a formal ceremony of marriage with a person not of marriageable age (14 years of age) and was sentenced to 18 months’ imprisonment.⁸⁷ Even with the recent growth in initial reports, the low number of prosecutions suggests the criminal route is not encouraging victims to follow through with the criminal process.

The AFP, which investigates cases of forced marriage, has a central role in providing initial advice to people who are in or at risk of a forced marriage. The AFP can refer individuals to the Support for Trafficked People Program, administered by the Department of Social Services and currently delivered by the Australian Red Cross. Forced marriage victims are now the largest number of new referrals.⁸⁸ If the AFP is notified, the victim/person at risk can receive ongoing assistance (24/7), including housing, counselling and legal advice. Though the initial assessment phase is available for everyone, those who seek help via the general family violence hotline, 1800RESPECT,⁸⁹ must also be assessed by the AFP to get into the Support for Trafficked People Program. As the AFP determines eligibility for the government-funded program targeted at forced marriage victims, it serves as a gatekeeper. Moreover, accessing more than immediate support has been tied to a ‘report or nothing’ deal, with no automatic avenue available for those who did not wish to cooperate with a criminal investigation (though the AFP could refer a person to service providers, who have tried to provide tailored services, within available resources). This

⁸³ Attorney-General’s Department, above n 8, 16. See also Simmons and Burn, above n 8.

⁸⁴ Attorney-General’s Department, above n 8, 16.

⁸⁵ Commonwealth, ‘Trafficking in Persons: The Australian Government Response 1 July 2015–30 June 2016’ (Eighth Report of the Interdepartmental Committee on Human Trafficking and Slavery, 2016) 20.

⁸⁶ Ibid.

⁸⁷ Adam Cooper, ‘Man Who “Married” 14-Year-Old Faces 14 More Days in Jail, Then Immigration Detention’, *The Age* (online), 21 September 2017 <<http://www.theage.com.au/victoria/man-who-married-14yearold-faces-14-days-in-jail-then-immigration-detention-20170921-gylwfs.html>>. The Imam who solemnised the marriage was found guilty of solemnising an invalid marriage under the *Marriage Act 1961* (Cth) (upheld on appeal: *Omerdic v Angland* [2018] VSC 174).

⁸⁸ Trafficking in Persons, above n 85, 33.

⁸⁹ The Government Business Enterprise Medibank Health Solutions is currently the service provider, while the Department of Social Services (‘DSS’) has the responsibility for the delivery of the 1800RESPECT service <https://www.1800respect.org.au/live/Medibank-1800RespectCMS/media/1342/backgrounder_1800respect.pdf>.

meant that to be assisted to find safe long-term support and shelter options, those at risk needed to accept that the perpetrators, often their immediate families, would face criminal investigation and possible prosecution. In February 2018, however, the government announced a 12-month trial that allows victims of forced marriage to access assistance for an extended period of time *without* having to participate in the criminal justice process.⁹⁰

Forced marriage cases with a migration aspect can also prompt immigration law responses to complement the criminal justice dimension.⁹¹ For instance, a migrant may be seeking to escape a forced marriage (either prospective or one that has already been entered into) or a migrant who has been forced to marry may sometimes be open to other forms of exploitation, such as trafficking or servile marriage.⁹² The vulnerability that is associated with migration into exploitative situations, such as those aimed at keeping a person in domestic servitude or exploiting them for sexual services, can be extreme, owing to multiple factors such as social isolation and the lack of support, contacts and language skills needed to seek solutions.⁹³ The current criminal framework does capture part of the vulnerability involved in this kind of exploitative marital captivity, though the offence itself is framed in terms of a one-off rather than continuing conduct (in other words, the question is one of lacking genuine consent at the point in time of entering into a marriage, not one of continuing to be in a non-consensual union).⁹⁴ The trafficking-based framework is also linked with certain migration responses. For instance, migrants in forced marriages may be eligible for a temporary visa under the system in place for the protection of human trafficking victims.⁹⁵ The government also provides outreach materials for some new migrants, including those on family visas, which alert migrants to the illegality of forced marriages and point them towards useful resources.⁹⁶

⁹⁰ Australian Government Department of Social Services, *Increased Support for Forced Marriage Victims* (4 May 2018) <https://www.dss.gov.au/sites/default/files/documents/05_2018/d18_479015-forced-marriage-stream-trial.pdf>.

⁹¹ There may be a migration dimension even if the victim is not a migrant, as the person coerced to marry may also be faced with forced or reluctant sponsorship of a visa for a spouse who is currently overseas: Jelenic and Keeley, above n 5, 26.

⁹² Samantha Lyneham and Kelly Richards, 'Human Trafficking Involving Marriage and Partner Migration to Australia' (Report No 124, Australian Institute of Criminology, 2014). Servile marriage involves a person being sold, transferred or inherited into marriage: see art 1(c) of the *1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery*, opened for signature 7 September 1956, 226 UNTS 3 (entered into force 30 April 1957).

⁹³ Australian Catholic Religious Against Trafficking in Humans, Submission No 21 to Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry into Slavery, Slavery-Like Conditions and People Trafficking*, 26 September 2012, 12.

⁹⁴ In reality, forced marriage rarely relies on one-off use of force, but is a process involving prolonged emotional pressures: see Haenen, above n 8, 250.

⁹⁵ For a description of the current visa system, see Trafficking in Persons, above n 85, 39–41.

⁹⁶ These include the Australian Government Department of Social Services, Family Safety Pack <<https://www.dss.gov.au/family-safety-pack>> (see especially the factsheet titled 'Forced and Early Marriage') and the booklet, Department of Immigration and Citizenship, 'Beginning a Life in Australia: Welcome to Australia' (2012) <https://www.dss.gov.au/sites/default/files/documents/02_2014/eng_access.pdf> which include information about forced marriage laws.

Finally, though research is limited, referrals suggest many of those most at risk of forced marriage are under 18 years of age.⁹⁷ The specific needs of minors and the additional layer of vulnerability that young age can bring in terms of dependency on parents and inability to resist ongoing and sometimes intense familial pressures are partially acknowledged via the role of state child protection authorities responding to child abuse, and via the jurisdiction of the Family Court and the Federal Circuit Court of Australia issuing protective and preventative orders for children at risk of forced marriage (on the basis of the *Family Law Act 1975* (Cth)). These orders can, for instance, involve measures to prevent a child being taken overseas for an arranged marriage (such as being placed on the Family Law Watch List) and seizure of the child's Australian passport.⁹⁸ The availability of child protection measures and protective orders goes some way towards capturing the special needs of children and offers some protection for the reasonably common cases where minors are at risk of being taken overseas to be married.⁹⁹ However, there is currently no civil protection order, like that in the UK, available for young women aged over 18 years of age who are at risk of forced marriage. Some limited measures are available for their protection: it is, since October 2016, possible to create border alerts specific to forced marriage and these have also been made for adults.¹⁰⁰ In theory those vulnerable adults could also seek to get a domestic violence prevention order, though these are not designed with the specific dynamics of forced marriage in mind.¹⁰¹

The most immediately striking feature of the response outlined in this section is that it is primarily built on and associated with criminal law, and specifically with the Commonwealth response to human trafficking, slavery and slavery-like practices, defined as transnational criminal justice issues. The federal framework for these offences entails a criminal justice and law enforcement response, with only limited attention given to protection needs and long-term prevention efforts.¹⁰² Forced marriage has been added to this framework, without changing its underlying approach, priorities, or resources. By virtue of this framework, associated with both criminal justice and measures to protect sovereignty and the integrity of borders, forced marriage is also framed predominantly as an issue of (often gendered) exploitation, criminal justice, and immigration (rather than, for instance, primarily as an issue of family violence or child protection). The trafficking-related criminal justice framework does fit those forced marriage cases that most resemble trafficking cases (eg, those associated with international borders or situations where a migrant has already experienced exploitation or other harmful result).¹⁰³ However, until the 2018 trial (which may or may not

⁹⁷ Trafficking in Persons, above n 85, 23.

⁹⁸ Attorney-General's Department, above n 8.

⁹⁹ Jelenic and Keeley, above n 5, 26.

¹⁰⁰ Parliamentary Joint Committee on Law Enforcement, Parliament of Australia, *An Inquiry into Human Trafficking, Slavery and Slavery-Like Practices* (2017) 77–8.

¹⁰¹ Simmons and Burn, above n 8, 998. These include, in Victoria, Family Violence or Personal Safety Intervention Orders and, in New South Wales, Apprehended Domestic Violence Orders.

¹⁰² For an overview, see Andreas Schloenhardt and Jarrod Jolly, *Trafficking in Persons in Australia: Myths and Realities* (LexisNexis Butterworths, 2013) ch 4.

¹⁰³ See Sapoznik Evans, above n 25, for a contrast with the Canadian approach.

signal a permanent change), it also treated victims with exactly the same suspicion as trafficking victims who are, usually, migrants, and often migrants in breach of visa conditions. In a framework built around concerns over migration, security, and the threat of organised crime, they had to do something to deserve protection (that is, cooperate with the criminal prosecution of perpetrators).¹⁰⁴

The current federal response is thus rather lopsided, and moreover, its primacy has crowded out alternative framings and approaches (for instance, the use of state criminal law or attempts to ensure that forced marriages are identified and responded to appropriately by child protection authorities). The need for better interagency and interstate cooperation has been acknowledged, but can only go so far, even with proper resourcing.¹⁰⁵ In the trafficking framework, vulnerability is largely conceptualised as vulnerability to criminal exploitation by relative strangers, such as employers seeking to exploit migrants for economic gain, as opposed to family members.¹⁰⁶ Thus, those at risk are expected to come forward under an assumption that turning to the legal system for help is both straightforward and a rational choice to make in the circumstances. Even in trafficking cases, where the perpetrators are typically non-relatives, this expectation is frequently characterised as problematic due to the relative powerlessness of trafficking victims.¹⁰⁷ It is even more so in forced marriage cases, where family dynamics are typically at the heart of the issue. Little consideration has been given to what outcomes victims seek, how their vulnerabilities could be mitigated and who would be best placed to help and how. Until recently, as discussed above, only the particular risks involved for children (defined as those under 18 years of age) have been specifically recognised. Gender has been relevant only insofar as the trafficking framework is itself gendered (because of its original association with commercial sexual exploitation, the trafficking framework associates migrant women with victimhood more closely than men).¹⁰⁸

It should be noted that this response is, however, still evolving: as the 2018 trial suggests, the government has acknowledged some of the limitations of the current framework (indeed, a key area of focus for the current Action Plan on trafficking and slavery is to refine the response, including the provision of support and referral pathways for those in or at risk of forced marriage).¹⁰⁹

¹⁰⁴ Kamala Kempadoo, 'From Moral Panic to Global Justice: Changing Perspectives on Trafficking' in Kamala Kempadoo, Jyoti Sanghera and Bandana Pattanaik (eds), *Trafficking and Prostitution Reconsidered: New Perspectives on Migration, Sex, and Human Rights* (Paradigm Publishers, 2005) vii, xv; Heli Askola, 'Violence against Women, Trafficking, and Migration in the European Union' (2007) 13 *European Law Journal* 204, 212.

¹⁰⁵ Parliamentary Joint Committee on Law Enforcement, above n 100, 84–5.

¹⁰⁶ Salvation Army, Supplemental Submission No 25.1 to Parliamentary Joint Committee on Law Enforcement, *Inquiry into Human Trafficking, Slavery and Slavery-Like Practices*, January 2017, 4.

¹⁰⁷ Schloenhardt and Jolly, above n 102, ch 7.

¹⁰⁸ Kempadoo, above n 104, vii; Jyoti Sanghera, 'Unpacking the Trafficking Discourse' in Kamala Kempadoo, Jyoti Sanghera and Bandana Pattanaik (eds), *Trafficking and Prostitution Reconsidered: New Perspectives on Migration, Sex, and Human Rights* (Paradigm Publishers, 2005) 3; Bernadette McSherry & Susan Kneebone, 'Trafficking in Women and Forced Migration: Moving Victims Across the Border of Crime into the Domain of Human Rights' (2008) *International Journal of Human Rights* 12.

¹⁰⁹ Commonwealth, *National Action Plan to Combat Human Trafficking and Slavery 2015–19* (2014).

Though community engagement and education are recognised as the most appropriate means of addressing forced marriage, they are still at the early stages.¹¹⁰ The federal government awarded almost \$500 000 in funding to three non-government organisations ('NGOs') for the purposes of outreach, education and awareness-raising between 2014 and 2017.¹¹¹ It remains to be seen whether these limited improvements will turn into sustained action to support victim protection, awareness raising, and prevention work of NGOs.¹¹² The Parliamentary Joint Committee on Law Enforcement recommended last year that the government should continue to fund organisations to do outreach and prevention work on forced marriage issues and consider the inclusion of education on forced marriage in schools.¹¹³ However, questions have also been raised as to whether sufficient funding will be allocated, when even existing means to counter are under stress. These concerns include the questionable recent policy and operational decisions around 1800RESPECT (resulting in the withdrawal by Rape & Domestic Violence Services Australia from the 1800RESPECT counselling service, amid concerns over counselling practices). Concerns about the lack of counsellors with adequate qualifications and sufficient funding have since been expressed by a Senate inquiry examining the governance of the service.¹¹⁴

B Missed Vulnerabilities and Inadequate Responses

When viewed with attention to the many vulnerabilities forced marriage victims experience, it is clear that the current approach to forced marriage captures and addresses only very partially the range of factors and circumstances that make individuals vulnerable to marrying against their will. Considering that the overall trend identified by the AFP is largely made up of cases involving Australian citizens or residents under the age of 18 (but also those above that age), with relatives alleged to have organised, or be about to organise, a marriage without their free and full consent,¹¹⁵ questions arise as to how well a response built on the framework developed around trafficking and slavery deals with these specificities. In other words, there are crucial ways in which most forced marriage victims are rather different from those who are trafficked into Australia

¹¹⁰ Available resources now include the downloadable Forced Marriage Community Pack (available at: <<https://www.homeaffairs.gov.au/about/crime/human-trafficking/forced-marriage>>; also available in Arabic, Dari, Farsi, Somali, Tamil and Urdu), the <mybluesky.org.au> website (hosted by Anti-Slavery Australia) and the 'My Rights – My Future: Forced Marriage' curriculum kit for secondary schools (available at <<https://www.mybluesky.org.au/wp-content/uploads/2016/04/ACRATH-School-Curriculum-Kit-2016-1.pdf>>).

¹¹¹ Trafficking in Persons, above n 85, 10.

¹¹² There are many community organisations in addition to the Red Cross that are involved in educating communities and raising awareness in this area, including: Good Shepherd, the Australian Muslim Women's Centre for Human Rights, and Australian Catholic Religious Against Trafficking in Humans ('ACRATH'). These organisations are also loosely associated via the Victorian and New South Wales Forced Marriage Networks.

¹¹³ Parliamentary Joint Committee on Law Enforcement, above n 100, 81.

¹¹⁴ Senate Finance and Public Administration References Committee, Parliament of Australia, *Delivery of National Outcome 4 of the National Plan to Reduce Violence Against Women and Their Children* (2017).

¹¹⁵ Trafficking in Persons, above n 85, 23–4.

and exploited in forced labour and therefore have different needs. The most obvious of these is that they have a close family connection to the perpetrators and may not be willing to accept the risk that if they contact the AFP, their parents or other close family members may be prosecuted and that they themselves may be cut off from their families and communities.¹¹⁶ If the special circumstances and dynamics of forced marriage cases are not recognised as part of the design of the response, it cannot maximise its potential to help those at risk change their circumstances or diminish their sense of powerlessness.

Importantly, forced marriage is the one offence among human trafficking, slavery and slavery-like offences where, according to available information, the majority of individuals seeking support do so before the harm (marriage) takes place.¹¹⁷ Unlike with trafficking and other harms targeted by the current criminal legislation, tackling forced marriage is largely about *prevention*. The emphasis therefore ought to be not on criminal investigation, but on the best available combination of strategies that can stop forced marriages from taking place. In the current system, prevention efforts, however, take place in the shadow of criminalisation and law enforcement. To prevent parental coercion from resulting in a forced marriage, the person at risk must be willing to leave their family and be assessed by the AFP, and until the 2018 change, the ‘charges or nothing’ system required active cooperation in any investigation. The framework, with its focus on police involvement and criminal investigation, rather than on supporting the (potential) victim, thus substituted one source of coercion (family) with another (the police).¹¹⁸ When referrals to housing, counselling, legal, financial and other support required instigating charges, victims were effectively coerced into doing so in order to obtain help; even now, if they wish to resolve the situation without submitting to the marriage, the AFP must be involved.¹¹⁹ This does not address the vulnerabilities of those who do not wish to contact the AFP, for instance because they are ashamed, afraid of the police, or reluctant to cut family ties.¹²⁰ Rather than empowering the victim by giving them more options, the system asks them to resolve the situation with little acknowledgement of what consequences that entails for them.

The crucial difference from human trafficking, slavery and slavery-like offences, is therefore the role that family (parents) play both as an important source of vulnerability but also as an essential part of the lives of those at risk of forced marriage. Many forced marriage victims are not migrants but Australian citizens who, in theory, have access to all the normal protections associated with

¹¹⁶ Supplemental Submission No 25.1, above n 106, 4.

¹¹⁷ Synod of Victoria and Tasmania, Uniting Church in Australia, Synod of South Australia et al, Submission No 25 to Parliamentary Joint Committee on Law Enforcement, *Inquiry into Human Trafficking, Slavery and Slavery-Like Practices*, January 2017, 3; Australian Catholic Religious Against Trafficking in Humans, Submission No 18 to Parliamentary Joint Committee on Law Enforcement, *Inquiry into Human Trafficking, Slavery and Slavery-Like Practices*, February 2016, 7; Jelenic and Keeley, above n 5.

¹¹⁸ Submission No 25, above n 117, 3.

¹¹⁹ Department of Home Affairs, Australian Government, *Forced Marriage* (2018) <<https://www.homeaffairs.gov.au/about/crime/human-trafficking/forced-marriage>>.

¹²⁰ Centre for Multicultural Youth, Submission No 452 to Royal Commission into Family Violence (Victoria), May 2015, 4.

citizenship.¹²¹ However, they are typically young people from close-knit communities who are extremely vulnerable to ongoing and at times extreme pressure from parents, other family members, and others around them.¹²² Recognition of this layer of vulnerability is crucial for understanding why so many do not seek help via the AFP mechanism, but approach, eg, teachers or doctors. The pressures in immediate and extended family contexts may be ‘subtle’, yet ‘protracted’ and come from a number of sources.¹²³ Fear of threats and violence, shame, uncertainty over sources of help, reluctance to get parents into trouble and concerns over what will happen to siblings all play a role.¹²⁴ They also create a situation where the line between valid consent and impermissible coercion, freedom and constraint, can be difficult to capture in legal terms.¹²⁵ The current system, which encourages victims simply to decide to exit, does not capture the complexity of family dynamics, including desire to protect siblings, and leaves too many with a choice that carries ‘impossibly high’ costs.¹²⁶ It also imposes the whole burden of resolving conflict on the individual, in contrast to approaches that would seek to give those at risk the necessary support options that allow them to at least try to renegotiate their family situation, thus changing the power dynamics underlying forced marriage.

The neutral discourse that emphasises that forced marriage is ‘*not* the same as an arranged marriage’,¹²⁷ ‘not confined to any particular ethnic or religious group’,¹²⁸ and that ‘[a]nyone can be a victim of forced marriage’¹²⁹ also keeps any cultural dynamics completely out of discussion. The obvious motive here is well-meaning – not marginalising already stigmatised communities – but it too comes at a cost. It means the response fails to acknowledge *any* role for cultural understandings in underpinning marriage decisions.¹³⁰ In particular, it does not deal with the realities where expectations of parental authority and communal involvement in marriage decision-making are part of the situation those at risk must negotiate. In other words, framing marriage decisions as a matter of individual choice may not work very well with communities where there is a continuum between free and not-free decisions (eg, due to a norm of parental involvement or social conservatism, or the role of emotional appeals by immediate and extended family).¹³¹ In such contexts, the decision may be about finding consensus and an acceptable compromise.¹³² To say that culture plays a role in the dynamics of forced marriage is *not* to say that all marriages in some

¹²¹ Trafficking in Persons, above n 85, 23–4.

¹²² Centre for Multicultural Youth, above n 120, 4.

¹²³ Haenen, above n 8, 322.

¹²⁴ Jelenic and Keeley, above n 5, 25; see also Centre for Multicultural Youth, above n 120.

¹²⁵ Anitha and Gill, above n 4.

¹²⁶ Phillips and Dustin, above n 34, 545.

¹²⁷ Parliamentary Joint Committee on Law Enforcement, above n 100, 72 (emphasis in original).

¹²⁸ Department of Health and Human Services, Victorian State Government, *Child Protection Manual* (22 November 2017) <<http://www.cpmanual.vic.gov.au/advice-and-protocols/advice/high-risk/forced-marriage-advice>>.

¹²⁹ Department of Home Affairs, above n 119.

¹³⁰ Anitha and Gill, above n 4.

¹³¹ Ibid.

¹³² Shariff, above n 21.

cultures are forced or that forced marriage is a ‘cultural practice’: the cultural dynamic is only one part of the equation. In other words, cultural expectations are relevant, but not determinative for when forced marriages take place. Eliminating this aspect altogether from analysis, however, is not likely to lead to good results in terms of designing tools and systems supporting a young person to negotiate marriage decisions.¹³³

In the current framing, the needs of those at risk have been an afterthought, when they ought to be the starting point. Concerns have been expressed regarding child marriage that state or territory child protection, insofar as even involved, also forms part of the criminal justice response.¹³⁴ The requirement to contact the AFP (and possibly cooperate with legal processes) recognises only few vulnerabilities and may create new ones. These may relate to the harmful impacts of formally contacting investigative authorities (let alone contributing to the prosecution of family members).¹³⁵ Young people who leave home may be at risk of homelessness because housing appropriate for young people (who have been suddenly deprived of support networks) may not be available.¹³⁶ Living alone and away from families and communities also creates vulnerabilities and may increase pressures to return to a dangerous family situation.¹³⁷ Addressing the multiple vulnerabilities of affected individuals therefore requires extraordinarily effective co-ordination between all levels of government and services (health, schools, housing, police, etc). These protection issues are exacerbated for young women over 18 years of age, who are no longer children in the eyes of the law. As the Australian Immigrant and Refugee Women’s Alliance points out, such young women may be vulnerable because of ‘cultural and linguistic diversity, lack of appropriate service provision and support networks, poor health and lack of access to adequate education, employment and transport options’ and may also be at risk because of mental health issues or physical and psychological disability.¹³⁸

In this regard, it is worth noting that although the introduction of UK-style FMPOs has recently received support,¹³⁹ this alone will not be a panacea, though it may well constitute a necessary step forward (as might broadening the Family Court’s jurisdiction to allow it to issue orders to protect those over the age of majority). As Gill and Anitha have noted, even civil protection orders are still a legalistic response that assumes that the law can solve what is a complex social problem; yet the law cannot transform the conditions of domination and subordination under which forced marriage thrives, including unequal power relationships in families and the pressures of social and community

¹³³ Ibid.

¹³⁴ National Children’s and Youth Law Centre, Submission No 63 to Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry into Slavery, Slavery-Like Conditions and People Trafficking*, 13 May 2013, 1–2.

¹³⁵ Trafficking in Persons, above n 85, 38.

¹³⁶ Ibid.

¹³⁷ Supplemental Submission No 25.1, above n 106, 5.

¹³⁸ Australian Immigrant and Refugee Women’s Alliance, Submission to Attorney General’s Office, *Consultation on Forced and Servile Marriage*, 25 February 2011, 9.

¹³⁹ Parliamentary Joint Committee on Law Enforcement, above n 100, 78.

expectations.¹⁴⁰ Even in the UK, it is common for practitioners in this area to struggle when deciding how to intervene, as there is a lack of awareness of the legal options both among victims and front line professionals, and claims of poor monitoring and enforcement of protection orders have also been made.¹⁴¹ The development of new legal options must be complemented with resources and adequate services.¹⁴² It also needs to recognise that in the same way as many victims do not want their parents to be prosecuted, some do not want to start civil proceedings either. In any case, any introduction of protection orders or similar measures would need to be accompanied by sufficient resources, the development of best practices in multi-agency coordination, training on cultural sensitivity and gender-based violence and the willingness to adapt clinical practices on the basis on new information.

When a forced marriage has already taken place, the victims often come to family violence services, which are not equipped to recognise it in a forced marriage context, despite domestic/family violence being a common theme in relation to many forced marriage cases.¹⁴³ Forced marriage is a complex form of gender-based violence, which must be recognised as such to address the specific vulnerabilities of those trapped in forced marriages. Many forced marriage victims may even be more reluctant than the victims of more commonly recognised forms of family violence to trust authorities as members of marginalised communities with negative experiences with the criminal justice process.¹⁴⁴ Other factors that distinguish forced marriage include the complex roles played by intergenerational and extended family relations, community dynamics and women's (mothers') possible roles as abuse perpetrators (especially against daughters).¹⁴⁵ At present, women's refugees may not be able to identify cases correctly and provide appropriate support.¹⁴⁶ The Victorian Royal Commission into Family Violence noted that some forms of abuse experienced by women in culturally and linguistically diverse ('CALD') communities, including forced marriage, are not readily recognised.¹⁴⁷ It also observed that both mainstream services and specialist family violence services struggle to provide culturally appropriate, responsive services for CALD victims, and that there are limited services specific to CALD victims.¹⁴⁸ Many are likely to be left in marital captivity and facing prolonged domestic violence.

It is clear that some suggestions, such as locating efforts to address forced marriage in Australia within the Government's National Plan to Reduce Violence

¹⁴⁰ Gill and Anitha, above n 30.

¹⁴¹ Gaffney-Rhys, above n 36.

¹⁴² Gill and Anitha, above n 30.

¹⁴³ Jelenic and Keeley, above n 5, 26.

¹⁴⁴ Gill and Anitha, above n 30.

¹⁴⁵ Rachael Aplin, 'Exploring the Role of Mothers in "Honour" Based Abuse Perpetration and the Impact on the Policing Response' (2017) 60 *Women's Studies International Forum* 1.

¹⁴⁶ Australian Immigrant and Refugee Women's Alliance, above n 138, 11–12.

¹⁴⁷ Royal Commission into Family Violence, above n 59, vol V, 122.

¹⁴⁸ *Ibid.*

against Women and Their Children, are worth considering.¹⁴⁹ The National Plan to Reduce Violence against Women and Their Children 2010–2022 speaks of services needing to meet the demands of diverse groups of women, including women from culturally different backgrounds.¹⁵⁰ The (current) Third Action Plan 2016–2019 does not explicitly address forced marriage but gives some attention to culturally and linguistically diverse women and relevant areas such as prevention and education.¹⁵¹ The Victorian Royal Commission was more specific and recommended that the statutory examples of family violence be amended to include forced marriage and dowry-related abuse.¹⁵² However, rather than frame forced marriage as a unique problem of the ‘other’, intersectionality and recognition of common causes such as gender inequality should be treated as central to policy on violence against women.¹⁵³ This would on the one hand allow policy to be developed in ways that tap into the ‘vast experience in victim/survivor care, community education and development of resources’ of the family violence sector and on the other hand better ensure that this sector can respond to all forms of family violence.¹⁵⁴ Moves to address this layer of vulnerability have to be carried with care, so as not to cast suspicion on migrant communities that have a history of been intrusively targeted with homogenising culturalist arguments over their alleged lack of integration and suspect values.¹⁵⁵

As Kapur points out, law has been a ‘useful discourse in the struggle for women’s human rights, but the extent of its power to bring about social change must be measured against the very real constraints of particular and material contexts’.¹⁵⁶ These involve, obviously, the limits of the law to deal with conceptually difficult cases, such as fluctuating pressures based on familial expectations and emotional blackmail.¹⁵⁷ They also include a lack of awareness and research about the scope of the phenomenon and a lack of dedicated resources such as training for service providers and others who may encounter those at risk (including health, disability, homelessness, and education services, etc) and sufficiently funded support services. As the above discussion makes clear, the psychological unwillingness to point the finger towards family members, especially when that means starting a criminal investigation, remains a big constraint. Severing the criminal response from access to guaranteed long-term support, as is now done on a trial basis, is a step forward. The core question that remains open now is what sort of services and strategies could be tried in situations where individuals do not wish to or are unable to leave their families

¹⁴⁹ Anti-Slavery Australia, Submission No 34 to Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry into Slavery, Slavery-Like Conditions and People Trafficking*, 9 October 2012, 46.

¹⁵⁰ Council of Australian Governments, *The National Plan to Reduce Violence against Women and their Children 2010–2022* (2010) 23.

¹⁵¹ Commonwealth, ‘Third Action Plan 2016–2019 of the National Plan to Reduce Violence against Women and their Children 2010–2022’ (Department of Social Services, 2016).

¹⁵² Royal Commission into Family Violence, above n 59, vol V, 122.

¹⁵³ Gill and Anitha, above n 30.

¹⁵⁴ Australian Catholic Religious Against Trafficking in Humans, Submission No 18, above n 117, 3.

¹⁵⁵ Poynting and Mason, above n 39.

¹⁵⁶ Kapur, above n 70, 111.

¹⁵⁷ Gill and Anitha, above n 30.

but need help to reduce the pressures to marry. Most western countries have gone down the punitive rather than preventative path, but it is the latter that is essential in devising alternatives that allow those at risk to successfully resist pressure to marry.¹⁵⁸ As with other forms of violence, this includes the need to think seriously about grassroots approaches that build on informal as well as formal networks and organisations in providing material and emotional support.¹⁵⁹

Early intervention and empowerment of the (potential) victim in ways that could de-centre law remain a challenge. Some have argued that forced marriage should be treated as a public health concern (involving both mental and physical health) – rather than police-led, the approach could be doctor-led, ensuring access to support services, such as counselling.¹⁶⁰ Another approach advocated by some is the use of restorative justice or mediation strategies.¹⁶¹ As noted by the Victorian Royal Commission, the use of such strategies is controversial in the context of family violence because the abuser can use mediation opportunities to exercise more violence and make promises that they are unlikely to keep.¹⁶² The Government's 2010 discussion paper flagged the possibility of mediation in forced marriage cases but warned about the possible risk to those at risk, highlighting the needs for special support for victims and training of highly skilled staff.¹⁶³ Indeed, as traditional forms of mediation do not work well in forced marriage cases, some countries have experimented with forms of cross-cultural transformative mediation, specifically designed to deal with the particularities of forced marriage. This entails dialogue involving social workers, women's shelters and other service providers with the aim of providing security to the victim and engaging the family in a dialogue process.¹⁶⁴ The aim of such mediation is to protect the vulnerable person, hear all the parties and try to renegotiate a compromise if possible. This is not appropriate for all cases and would require highly specialised staff and efficient multi-agency coordination, but may be useful in some cases, for instance, where exiting one's family would leave concerns over the continued vulnerability of siblings.

Dustin and Phillips have argued that any long-term strategies to counter forced marriage have to rely on working with and through the communities to achieve social change.¹⁶⁵ In the Australian context too, there is a need to involve communities in discussing issues surrounding parental involvement in marital

¹⁵⁸ Ebeturk and Cowart, above n 37, 187.

¹⁵⁹ Bailey, above n 59, 1299. Something like this is echoed by the New South Wales and Victorian Forced Marriage Networks, which provide platforms for key service providers, community leaders and government agencies to share knowledge and coordinate a collaborative response.

¹⁶⁰ Sabbe et al, above n 23, 184.

¹⁶¹ inTouch Multicultural Centre Against Family Violence, Submission No 612 to Victorian Royal Commission into Family Violence, 2015, 41.

¹⁶² Royal Commission into Family Violence, above n 59, Vol IV, 138. For analysis of when restorative processes can contribute to reducing and preventing family violence, see Heather Strang and John Braithwaite (eds), *Restorative Justice and Family Violence* (Cambridge University Press, 2002).

¹⁶³ Attorney-General's Department, above n 8, 19.

¹⁶⁴ Daniela Danna and Piera Cavenaghi, 'Transformative Mediation in Forced Marriage Cases' (2011) XVII(1) *Interdisciplinary Journal of Family Studies* 45.

¹⁶⁵ Phillips and Dustin, above n 34.

decisions.¹⁶⁶ Prevention work that is tailored to communities and engagement at grassroots level needs to be designed as part of a broader engagement plan that does not stigmatise entire communities on the basis of their presumed lack of integration or ‘cultural backwardness’ but engages in a dialogue about permissible and impermissible involvement in marriage decisions.¹⁶⁷ Drawing bright lines between minority and majority communities makes culture appear ‘immutable’ and makes it difficult to even look for solutions that ‘do not require dislocating women from their particular communities’.¹⁶⁸ Instead, prevention work should build on pre-existing networks and relationships at a local level. It should recognise and address vulnerabilities, including ideas in relation to women’s sexuality and marriageability.¹⁶⁹ Recognising that women are disproportionately impacted by forced marriage does not exclude boys and men from being victims (or indeed recognition that it may be more difficult for men to come forward).¹⁷⁰ It simply means strategies must be alert to the differences and similarities, which create varying vulnerabilities – including disapproval of sexual behaviour or orientation, or the need to organise care for a disabled child. Systematic attention to multiple vulnerabilities should be the starting point for designing effective interventions that can mitigate those vulnerabilities.

V CONCLUSION

The Australian government has been very strong in its messaging against forced marriages and uses federal criminal law to target forced marriage as part of its response developed for human trafficking and slavery. It is hoped that criminal law will convey the message that forced marriage is wrong. However, this reliance on criminal justice and trafficking legislation is not only ineffective as the sole response, as some victims are reluctant to contact the AFP, but criminal justice thinking has also had the effect of crowding out other possibilities. Responses need to be built on a foundation that asks what victims and those at risk of forced marriage want, what makes them vulnerable and who would be best placed to provide support for them in ways that maximise their agency. In short, the current criminalisation strategy relies overly on the hope of deterrence, but can in practice lead to loss of agency and even operate to exacerbate victims’ circumstances of vulnerability or marginalisation. It makes a promise to deal with the vulnerabilities of those at risk, which it cannot always deliver, and certainly not without major negative consequences to those it is seeking to protect. The current response requires a massive leap of faith from

¹⁶⁶ Sowe, above n 6.

¹⁶⁷ Poynting and Mason, above n 39.

¹⁶⁸ Anna Korteweg and Gökçe Yurdakul, ‘Islam, Gender, and Immigrant Integration: Boundary Drawing in Discourses on Honour Killing in the Netherlands and Germany (2009) 32 *Ethnic and Racial Studies* 218, 234–5.

¹⁶⁹ Aisha K Gill and Heather Harvey, ‘Examining the Impact of Gender on Young People’s Views of Forced Marriage in Britain’ (2017) 12 *Feminist Criminology* 72.

¹⁷⁰ See Yunas Samad, ‘Forced Marriage among Men: An Unrecognized Problem’ (2010) 30 *Critical Social Policy* 189; *ibid*.

those at risk, while providing few guarantees in return. This in turn encourages vulnerable people to remain in unsafe situations to maintain relationships and community ties, rather than building their resilience to resist, while trying to preserve as much of their existing life as possible.

It is necessary to start thinking about what resources could be mobilised to support individuals outside of the criminal justice framework. The question raises the same dilemma that arises in the context of other more common forms of family violence. That is, how to leverage the power of the state to improve the response to a serious form of abuse, but so that less emphasis is put on criminal justice measures and increased attention is paid to root causes and the needs of those affected.¹⁷¹ Reforms need to give attention to maximising the ability of those at risk to avoid forced marriage or escape from them, without further marginalising individuals by exposing them to risks such as isolation and homelessness. This may well require de-centring legal avenues and combining them with a much more prominent role and clear protocols for a range of early intervention and support avenues, prevention measures led by community-based organisations, and a range of awareness-raising activities that target both service providers (such as the health, education, homelessness, and disability sectors) and communities. A more effective response would start with the realities and the vulnerabilities of those at risk of forced marriage and dedicate sufficient resources for developing policies that make a difference to as many victims as possible. In that regard, it is essential to recognise that there can be no ‘one size fits all’ answer. The specific needs of children, the factors that also make young adults vulnerable and the role of gender inequality in underpinning this form of violence are just some of the aspects requiring sustained attention.

¹⁷¹ Goldscheid and Liebowitz, above n 46, 312–13.