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13 January 2012

Assistant Secretary
Border Management and Crime Prevention Branch
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

By Post and Email: peopletrafficking@ag.gov.au

Dear Assistant Secretary

CRIMES LEGISLATION AMENDMENT (SLAVERY, SLAVERY-LIKE CONDITIONS AND PEOPLE TRAFFICKING) BILL 2012

I write on behalf of the Criminal Law Committee and the Family Law Committee of the Queensland Law Society in relation to the draft *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012* ("the Bill")

Forced Marriage – Civil Provisions

The Society supports points 38 and 39 of the Forced and Servile Marriage Discussion Paper that civil provisions are preferable to criminal provisions as "...victims will be encouraged to seek protection because it does not involve reporting family members to the police." The Society also supports the establishment of a Forced Marriages Unit, similar to the UK model, as education and awareness is likely to be a better deterrent than criminal sanctions.

However if the Bill proceeds, the Society makes the following comments.

Forced Marriage Offences

The forced marriage offences adopt a different test in relation to the threshold of consent to freely enter into marriage than that which applies under the *Marriage Act 1961* (Cth).

Presently under s23B(1)(d) of the *Marriage Act* a marriage is considered void if:

"the consent of either of the parties is not a real consent because:

(i) it was obtained by duress or fraud;

- (ii) that party is mistaken as to the identity of the other party or as to the nature of the ceremony performed; or
(iii) that party is mentally incapable of understanding the nature and effect of the marriage ceremony;...”

The test of “real consent” under s23B is a high threshold test as “... the provisions of s23B do not concern circumstances arising before the time of the marriage ceremony unless they are still in existence at the time of the marriage ceremony.”¹ If the Court is satisfied one party has not given real consent, the marriage is considered void. If the celebrant has reason to believe the marriage would be void, the celebrant may be fined or be sentenced to 6 months’ imprisonment.²

However, the proposed clauses 270.7A and 270.7B adopt a different wording to determine the threshold for consent and the scope for a person to commit the offence of forced marriage.

The proposed clause 270.7A of the Bill defines forced marriage as one that:

*“...because of the use of coercion, threat or deception, one party to the marriage (the **victim**) entered into the marriage without freely and fully consenting.”*

Whilst “freely and fully consenting”³ is an internationally recognised term, it remains untested in Australia. As the term may lend itself to a liberal or conservative interpretation as to what constitutes “full consent,” the Society strongly recommends that there be statutory guidance with a definition of consent and “free and full consent” in the Bill. Alternatively, there should be consistency between the two pieces of legislation.

The forced marriage offence is also very broad in that a person may be caught under the Bill, even the other party to the marriage, notwithstanding that person did not “engage in conduct which causes another person to enter into a forced marriage.”⁴ Unless the other party has a reasonable excuse, the effect of this clause places an onus on the non-victim party to the marriage to satisfy themselves that the marriage is entered into “freely and with full consent.” The Society is concerned that this broadly defined provision may have significant and unintended consequences and may be subject to abuse. The Society therefore recommends that the parameters of what constitutes a forced marriage be clarified.

Marriage of a Minor pursuant to the Marriages Act 1961

A further issue for consideration is how clause 270.7B of the Bill is to operate in very rare circumstances where a Judge or Magistrate has provided consent and/or authorised the marriage of a minor pursuant to sections 12-16 of the *Marriages Act 1961*. Whereas clause 270.7B(3) provides the person who is a party to a marriage may raise the defence of reasonable excuse, the clause is silent on whether the same defence may be raised for Court sanctioned marriages for a minor. The Society therefore recommends a clarification of clause 270.7B in this context to make clear that the defence of reasonable excuse is available in the context of court sanctioned marriages for minors.

Jurisdiction and Standing

¹ Dickey, Anthony, *Family Law* (2002) Lawbook Co, 4th edition, p 137; *In the Marriage of Teves and Campomayor* (1994) 122 FLR 172 at 183-184.

² s100 *Marriage Act 1961* (Cth).

³ Art 16 *Universal Declaration of Human Rights*.

⁴ Clause 270.7B(1) of the Bill.

It is foreseeable that the people that may be caught by this legislation might be those travelling to Australia, and thereafter seek asylum, a temporary visa or refugee status. The Society recommends that if the Bill proceeds that the Committee consider the issue of jurisdiction and extending standing to persons seeking asylum, persons on temporary visas and refugees.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Senior Policy Solicitor, Binny De Saram on (07) 3842 5885 or b.desaram@qls.com.au or our Policy Solicitor Louise Pennisi on (07) 3842 5872 or l.pennisi@qls.com.au

Yours faithfully

Annette Bradfield
Deputy President