

2 November 2018

Slavery Links Australia Inc

TO: legcon.sen@aph.gov.au

Dr Sean Turner, Committee Secretary
Senate Legal and Constitutional Affairs
References Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Dr Turner

References Committee Inquiry regarding the adequacy of current Australian policy settings and legal frameworks regarding dowry and dowry abuse¹

Slavery Links Australia Inc (Slavery Links) would be grateful if the Chair of the Senate Legal and Constitutional Affairs (LACA) References Committee, Senator Pratt, would receive this submission to its inquiry into the practice of dowry and the incidence of dowry abuse in Australia. The Submission, strictly, is out of time.

The Submission is confined to one aspect of the Committee's Inquiry, namely forced marriage (in the specific context of dowry). The subject of forced marriage appears in the Committee's Terms of Reference (c) and (e). Slavery Links gave evidence to the LACA Legislation Committee regarding forced marriage in context of the Crimes Legislation Amendment Bill, 2012. We thank the Parliament for offering some continuity on this aspect.

This Submission is made in November 2018, after reading several Submissions already made. This is also after the date (21 September 2018) on which the Committee took evidence in Melbourne. If an additional Hearing date can be arranged, Slavery Links would be delighted to assist the Committee by giving evidence in person.

The present Submission is confined to seven points as follows:

1. Strengthening the offence of forced marriage
2. Forced marriage is a form of slavery, a serious crime
3. Preserving the standing of slavery as a crime against humanity
4. Who should be the 'subject' of action against forced marriage
5. Distorted attitudes that underpin slavery need to be challenged
6. What can Australia learn from *The Dowry Prohibition Act, 1961* (India)?
7. Commonwealth-State issues

I look forward to hearing from you.

Yours sincerely

Roscoe Howell
Founding Director

¹ The practice of dowry and the incidence of dowry abuse in Australia. Go to:
https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/DowryAbuse

SENATE REFERENCES COMMITTEE INQUIRY

REGARDING THE ADEQUACY OF CURRENT AUSTRALIAN POLICY SETTINGS AND LEGAL FRAMEWORKS
REGARDING DOWRY AND DOWRY ABUSE

Submission:

The aspect of forced marriage and servitude

2 November 2018

Synopsis

Australia has been warned about ‘a historical legacy of women as, in substance, the property of their male relatives’. Research is needed to assess how forced marriage and dowry relate to this attitude.

The term ‘forced marriage’ has a strict legal meaning that should be preserved, and applied rigorously.

An offence of ‘servile marriage’ should be defined, to express ‘servitude’ in intimate relationships.

The Modern Slavery Bill, 2018 should be confined to businesses and supply chain management. It should define ‘modern slavery’ in terms of the offences in Division 270 and Division 271 of the *Criminal Code Act, 1995*. The Modern Slavery Bill, 2018 should not apply to intimate relationships.

Recent applications by Victoria (‘forced marriage’) and New South Wales (‘modern slavery’) use the language of slavery but they are not slavery as strictly defined. The High Court has set a standard regarding slavery, not to ‘debase the currency of language’ and not ‘banalise crimes against humanity’ (see page 11). The Inquiry should affirm the strict meaning of slavery as a crime against humanity.

Australia has benefitted from a decade of settled jurisprudence since *R v Tang* (2008) 237 CLR 1. The Inquiry should encourage the Attorney General to work with State and Territory counterparts to preserve the standing of Division 270 of the *Criminal Code Act, 1995* and the definitions therein.

Community-based change – Annex

Encouraging long term cultural change regarding forced marriage is desirable. A few community-based programs have been found effective in addressing forced marriage in South Asia. Slavery Links has identified them in an Annex to this Submission. Such community programs employed strategies of bottom-up change. Cultural change is not a substitute for criminal enforcement; it is a complement.

From:

Slavery Links Australia Inc

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(i)

Glossary

<p>Forced marriage in the United Nations <i>Supplementary Convention, 1956</i> (the Supplementary Convention, the slavery Convention)</p>	<p>Article 1 (c) Any institution or practice whereby:</p> <p>(i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or</p> <p>(ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or</p> <p>(iii) A woman on the death of her husband is liable to be inherited by another person;</p>
<p>Forced marriage in the <i>Criminal Code Act, 1995</i> (the Commonwealth Code, the Code)</p>	<p>270.7A Definition of forced marriage</p> <p>(1) A marriage is a forced marriage if one party to the marriage (the victim) entered into the marriage without freely and fully consenting:</p> <p>(a) because of the use of coercion, threat or deception; or</p> <p>(b) because the party was incapable of understanding the nature and effect of the marriage ceremony.</p>
<p>Servitude in the <i>Criminal Code Act, 1995</i> (the Commonwealth Code, the Code)</p>	<p>270.4 Definition of servitude</p> <p>(1) For the purposes of this Division, servitude is the condition of a person (the victim) who provides labour or services, if, because of the use of coercion, threat or deception:</p> <p>(a) a reasonable person in the position of the victim would not consider himself or herself to be free:</p> <p>(i) to cease providing the labour or services; or</p> <p>(ii) to leave the place or area where the victim provides the labour or services; and</p> <p>(b) the victim is significantly deprived of personal freedom in respect of aspects of his or her life other than the provision of the labour or services.</p>
<p>The term ‘exploitation’ in the <i>Criminal Code Act, 1995</i> (the Commonwealth Code, the Code)</p>	<p>271.1A Definition of exploitation</p> <p>For the purposes of this Division, exploitation, of one person (the victim) by another person, occurs if the other person’s conduct causes the victim to enter into any of the following conditions:</p> <p>(a) slavery, or a condition similar to slavery;</p> <p>(b) servitude;</p> <p>(c) forced labour;</p> <p>(d) forced marriage;</p> <p>(e) debt bondage.</p>
<p>The term ‘forcing’ as used in this Submission</p>	<p>In this Submission the term ‘forcing’ refers to:</p> <ul style="list-style-type: none"> • Slavery offences in Division 270 of the <i>Criminal Code Act 1995</i>; and • The offence of forced marriage, which is defined in Division 270 of the <i>Criminal Code Act, 1995</i> (slavery); and (differently) in Article 1 (c) of the <i>Supplementary Convention, 1956</i>. • ‘Exploitation’ which is defined in terms of slavery and slavery-like offences (s. 271.1A of the Code).

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<p>The term 'modern slavery' in Australia</p>	<p>In Australia the term 'modern slavery' refers to the Modern Slavery Bill 2018. In 2018, Slavery Links requested and the Senate Legislation Committee recommended that 'Modern Slavery' should be defined in terms of the existing definitions in Division 270 and 271 of the <i>Criminal Code Act, 1995</i> (with the possible addition of a reference to the <i>Migration Act</i>).</p>
<p>The term 'modern slavery' in Britain</p>	<p>In Britain the term 'modern slavery' is characterised as 'exploitation'. The UK Act refers to the European Convention on Human Rights; but the terms 'slavery' and 'exploitation' are not defined. The UK Act does not refer to the definitions in the <i>Supplementary Convention</i>. The UK Act is inoperable.</p>
<p>The term 'dowry' in the <i>Dowry Prohibition Act, 1961</i> (India)</p>	<p>2. Definition of 'dowry'. (<u>underline added</u>) In this act, 'dowry' means <u>any property or valuable security given or agreed to be given either directly or indirectly:</u> a. by one party to a marriage to the other party to the marriage; or b. by the parents of either party to a marriage or by any other person, to either party to the marriage or to any other person; at or before or any time after the marriage in connection with the marriage of said parties <u>but does not include dower or mahr in the case of persons to whom the Muslim Personal Law (Shariat) applies.</u></p>
<p>The term 'dowry' in the <i>Justice Legislation Amendment (Family Violence Protection and Other Matters) Act, 2018</i> (Victoria)</p>	<p>The term 'dowry' is used in the Victorian Act NOTE: <u>The term 'dowry is not defined</u> in the Act, the Explanatory memorandum or the Second Reading Speech</p>
<p>Behaviour identified in the <i>Family Violence Protection Act, 2008</i> (Victoria) as being associated with 'entering a marriage' and with 'dowry'. NOTE: The Second Reading Speech characterises 'entering a marriage' in this way as being a 'forced marriage'.</p>	<p>SECTION 5 (1). Meaning of family violence [inserted by the <i>Justice Legislation Amendment (Family Violence Protection and Other Matters) Act, 2018</i> (Victoria).] Example 1 – (<u>underline added</u>) "1 The following behaviour may constitute family violence under paragraph (a)— • using coercion, threats, physical abuse or emotional or psychological abuse to cause or attempt to <u>cause a person to enter into a marriage</u>; • using coercion, threats, physical abuse or emotional or psychological abuse to <u>demand or receive dowry</u>, either before or after a marriage."</p>
<p>The term 'modern slavery' in New South Wales: Under <i>The Modern Slavery Act, 2018</i> [NSW] Section 5 Definitions, a modern slavery offence means ... an offence listed in Schedule 2 ...</p>	<p>Schedule 2 provides for offences as follows:</p> <ul style="list-style-type: none"> • An offence against the selected sections of the <i>Crimes Act, 1900</i> (including sexual servitude and child abuse) • An offence against the section 32 of the <i>Human Tissue Act, 1983</i> (trading in tissue) • An offence against selected sections of the Commonwealth Criminal Code, Division 270 and 271 <p><u>NOTE:</u> NSW claims Extraterritorial application.</p>

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01 1. STRENGTHENING THE OFFENCE OF FORCED MARRIAGE

02 Forced marriage is defined as a slavery-like condition in the United Nations *Supplementary Convention, 1956*,² Article 1. The *Supplementary Convention* is the place where slavery is defined; and the source of the definition of slavery in the *Criminal Code Act, 1995* (the Code).

03 Slavery Links thanks the Parliament for strengthening the offence of forced marriage through the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015.

04 Slavery Links submits that further strengthening is required to respond to servile marriage (a situation of ongoing 'forcing'³ that can be defined in terms of the existing 'servitude' offence.

05 1.1 Continuity from the Senate Inquiry in 2012-13

06 In 2012-13 the Senate Legal and Constitutional Affairs Legislation Committee conducted an Inquiry (the 2012 Senate Inquiry) regarding Provisions of the Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill (the 2012 Bill).⁴ Slavery Links contributed to that Inquiry. Slavery Links sought to define a forced marriage as a wedding event of the sort described in the *Supplementary Convention 1956*; and to differentiate that from a situation of ongoing 'forcing' that can develop and continue after a wedding event.

07 1.2 Consideration of slavery in intimate relationships in 2012-13

08 Senators will recall asking for clarification in 2012 about how slavery and servitude offences would apply to circumstances of slavery and servitude within intimate relationships.⁵

09 At the time, the Attorney General's Department adopted a particular view about how to define slavery in context of a marriage.⁶

² Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery. Adopted by a Conference of Plenipotentiaries convened by Economic and Social Council resolution 608(XXI) of 30 April 1956, and done at Geneva on 7 September 1956. Go to:

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/SupplementaryConventionAbolitionOfSlavery.aspx>

³ 'Forcing': Slavery Links uses this term to refer to the hierarchy of slavery offences in Division 270 of the *Criminal Code Act, 1995*, viz.: debt bondage-deceptive recruiting-forced labour-servitude-slavery.

⁴ Parliament of the Commonwealth of Australia (2012) Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012 [Provisions]. The Senate. Legal and Constitutional Affairs Legislation Committee September 2012. Cited below as 'The 2012 Senate Inquiry'.

⁵ 'Recommendation 1. 3.84 The committee recommends that the Attorney-General's Department revise and reissue the Explanatory Memorandum to clarify that the proposed slavery and servitude offences in the Bill apply to circumstances of slavery and servitude within intimate relationships (including marriage and de facto relationships).'

⁶ The Department asserted that the 'generic' definitions of offences would suffice. Para 3.22, page 17 of the 2012 Senate Inquiry noted:

'The offences are drafted broadly so that they can apply in the context of a marriage...If the underpinning offending behaviour exists then the fact that it occurs in the context of a marriage frankly would not be relevant...The only thing I would say is that we quite deliberately wanted to avoid a situation where we start talking about specific context. To cite a simple example, in a murder offence you do not say it is murder with a blunt instrument or with a firearm.'

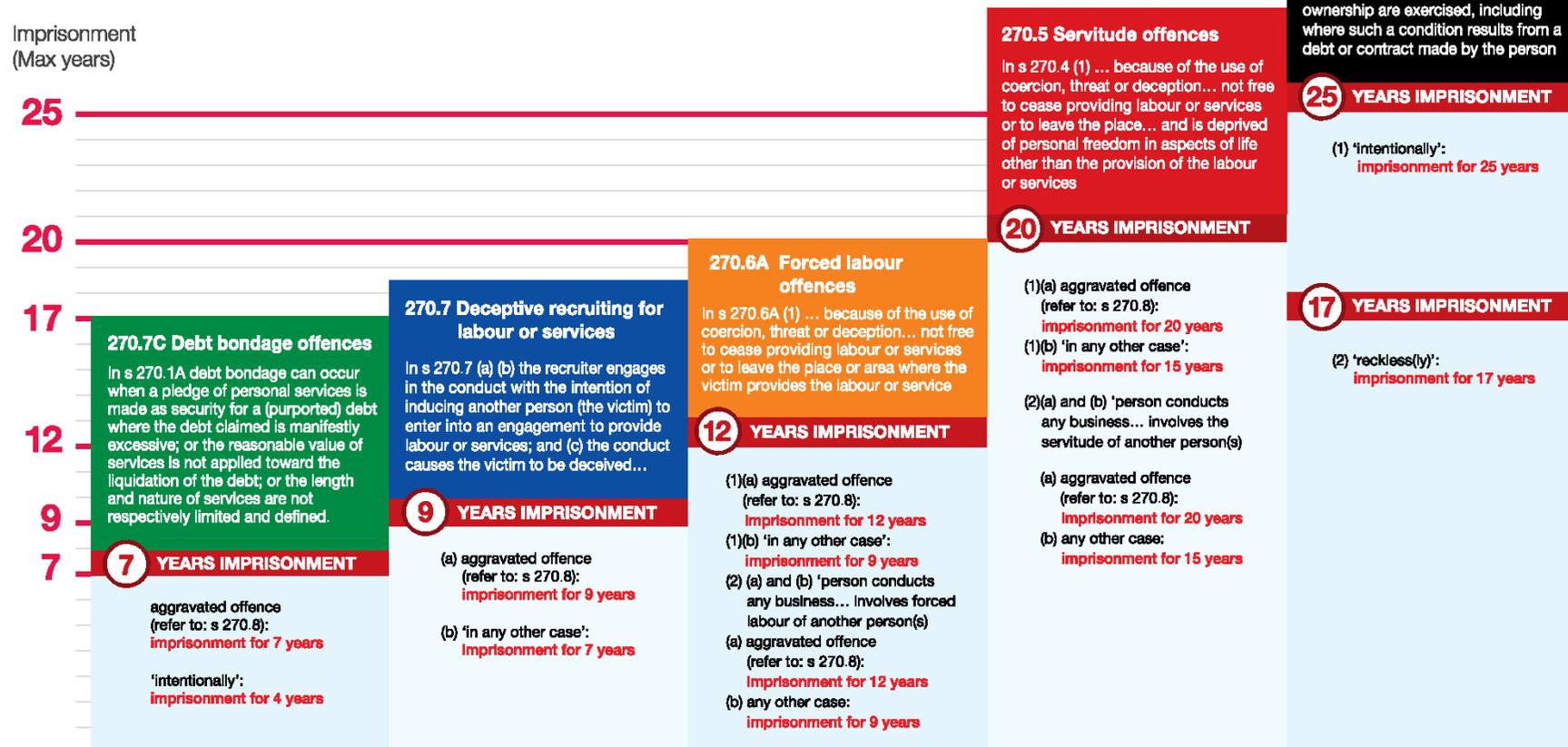
- 10 The 2012 Bill resulted in the creation of an offence of forced marriage; and the creation of slavery-like offences⁷ in (the amended) Division 270 of the *Criminal Code Act 1995*. Slavery Links refers to these as the 'Hierarchy of Slavery Offences in the Criminal Code' (Chart 1).
- 11 The 'forced marriage' offence was created in s. 270.7A of the *Criminal Code Act, 1995*. It was defined in a 'generic' way, in terms of a mindset (consent), and not in terms of the three-limb description of forced marriage conduct to be found in the *Supplementary Convention, 1956*, Article 1(c) (i), (ii) and (iii) (where, in effect, a woman is sold, transferred or inherited).
- 12 We return to that aspect in Section 5 below.
- 13 1.3 2015: Further consideration of slavery in intimate relationships:
Recognising 'age' or 'mental in capacity' as reasons for an 'inability to consent to marry'
- 14 In 2015 the forced marriage offence was strengthened by the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill, 2015. Senators will recall that Schedule 4 of the Bill addressed situations where one party to a supposed marriage was unable to consent to a marriage due to tender years or intellectual disability.⁸
- 15 1.4 Recognising slavery in intimate relationships in terms of the Hierarchy of Slavery Offences
- 16 Of significance for this Submission is the way that Parliament constructed the penalties for the revised forced marriage offence. The Explanatory memorandum for the 2015 *Crimes Legislation Amendment* (see Note 8), Para 16, described that:
- 17 '16. The penalties will be increased to seven years and nine years imprisonment [for a base offence and a maximum of seven years imprisonment for an aggravated offence] respectively, to ensure the forced marriage offences align with the most serious slavery-related facilitation offence of deceptive recruiting for labour or services. The increase also reflects the seriousness of forced marriage as a slavery-like practice, a form of gender-based violence and an abuse of fundamental human rights.' (Underline added)
- 18 The alignment of forced marriage with deceptive recruiting and its placement in context of other offences in the Hierarchy of Slavery Offences (see Chart 1) was a notable advance.
- 19 This amendment was welcome. However it continued the idea of a forced marriage as a wedding event. This Submission now turns to consider servile marriage (a situation of ongoing 'forcing' that, we submit, can be defined in terms of the existing 'servitude' offence).

⁷ The 2012 Senate Inquiry, Page 6, Para 2.6: 'Subdivision C establishes a new range of 'slavery-like offences', which are defined as servitude offences, forced labour offences, deceptive recruiting for labour or services, and forced marriage offences.'

⁸ Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015. Explanatory memorandum, Page 12: 'Since forced marriage was criminalised in 2013, referrals to the Australian Federal Police have included matters of children aged as young as 12 who purported to 'consent' to a marriage. Anecdotal evidence from other jurisdictions suggests that people with intellectual disabilities may be forced into marriages they do not have the capacity to consent to, including as a means of securing care arrangements'.

Go to: <https://www.legislation.gov.au/Details/C2015B00035/Explanatory%20Memorandum/Text>

The hierarchy of **slavery offences** in the *Commonwealth Criminal Code*



20 1.5 The need for an offence of 'servile marriage'

21 In addition to an offence of 'forced marriage' (a wedding event), Slavery Links submits that
provision be made for an offence of servile marriage; that is an ongoing situation where
power relations in a marriage degrade to the extent that the day to day experiences of one
partner amounts to servitude which that partner for cultural reasons cannot escape.

22 In the *Supplementary Convention, 1956*, Article 1, servitude is a slavery-like condition. In the
Criminal Code Act, 1995, s. 270.5, servitude has been defined (in a different way from the
Convention) as an offence where a person is put to work, oppressed at work and beyond,
and cannot escape (see Chart 1). The Senate should think of servile marriage in these terms.

23 Such situations of ongoing oppression in context of a 'forced marriage', but distinct from the
occasion of the wedding, may meet the criteria for slavery established by the High Court of
Australia (see Section 2.2 and discussion at Para 51). Take for example ongoing experiences
that are described by the Royal Australian and New Zealand College of Psychiatrists (RANZCP:
Submission 09), by Dr Manjula O'Connor (Submission 16) and the exploratory research study
for the Australian Institute of Criminology (AIC) by Lyneham and Bricknell (see Note 9).

24 1.6 Framing servile marriage: a mix of domestic servitude with a sexual component

25 *As to the sexual component of servile marriage:*

26 There is a sexual component in forced marriage (an event) and also in the degraded ongoing
relationship that Slavery Links describes as 'servile marriage'. In a servile marriage, a sexual
component may continue even after the intimate relationship has broken down:

27 'While forced marriage in itself may be a form of sexual abuse (The Crown Prosecution
Service nd), victim/survivors also reported actual or attempted sexual assault, forced
exposure to pornography, and forced and unwanted pregnancy within their marriages.
These abuses were most commonly perpetrated by husbands but, in a small number of
cases, were also perpetrated by fathers in law (sic) and other male relatives of the husband.'⁹

28 One option (if the Inquiry wishes to consider the sexual aspect of servile marriage) would be
to think by analogy with rape in marriage; the analogy being that ongoing consent to marriage
cannot be taken for granted. In Slavery Links' submission this analogy would be as follows:

29 The criminal law has long been able to reach into the marriage contract and punish
criminal acts. Perpetrators of murder, assault and battery, for example, are unable to
claim any immunity from prosecution on the basis of the contract. Marital rape (in all its
expressions) has seen its criminalisation across all Australian jurisdictions; the common
law 'impossibility' has long been removed (see *The Queen v L* (1991) 174 CLR 379).

30 Why ought expressions of slavery or slavery-like offences find similar safe harbour from
prosecution simply because one party is married to the other? If one party exercises any
or all of the powers of ownership in the context of marriage (and non-consensual sexual
activity is likely to be a recurring fact), then arguably an offence has been committed.

⁹ Lyneham, Samantha & Samantha Bricknell (2018) 'When saying no is not an option: Forced marriage in
Australia and New Zealand', Australian Institute of Criminology. Canberra. Research Reports no. 11. Go to:
<https://aic.gov.au/publications/rr/rr11>, page 44

31 The concept of 'servile marriage' could embody the state created by such offending behaviour.

32 *As to the component of domestic work in servile marriage:*

33 Lyneham and Bricknell use the term 'domestic servitude' as a description of oppressive work, similar to the way it is used in the ILO Convention on domestic work.¹⁰ In addition they describe restrictions on movement, social isolation and denial of opportunities that equate to the Criminal Code offence of servitude (i.e. deprived of freedom in aspects of life beyond work).

34 The introduction to Lyneham's and Bricknell's study puts it this way:

35 Text Box 1: Experiences while married, Lyneham and Bricknell, page xi¹¹

Victim/survivor case files and interviews revealed a wide range of abusive, violent, controlling and exploitative experiences while married. These included:

- physical and verbal abuse;
- sexual abuse;
- financial abuse;
- restrictions on movement and social isolation;
- domestic servitude; and
- denial of education and employment.

These abuses were most commonly perpetrated by the husband and members of his family, mainly parents-in-law.

36 Examples in the report illustrate the visceral quality of domestic work in servile marriage:

37 'Victim/survivors described being forced to take care of all the domestic duties and housework, which included the cleaning, washing, cooking and caring for other members of the household. One victim/survivor told of how she was restricted from communicating with anyone outside the household, and was expected to take care of the domestic duties ...'¹²

38 'Another victim/survivor was made to look after her father-in-law who lived with her after she was married. Her father-in-law would sleep in the same room as her, and she described her living arrangements as being as if she had a second husband to take care of. She was only permitted to speak when her father-in-law allowed her to, and he would not talk to her for significant periods of time, sometimes up to one week ...'¹³

¹⁰ International Labour Organisation (2011) Convention concerning decent work for domestic workers (Entry into force: 05 Sep 2013) Adoption: Geneva, 100th ILC session (16 Jun 2011). Go to: http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_157836.pdf

¹¹ Lyneham, Samantha & Samantha Bricknell (2018) Op.Cit., page xi

¹² Ibid., page 47

¹³ Ibid., page 48

- 39 'While the majority of victim/survivors were only required to perform domestic work,¹⁴ one victim/survivor was also forced to work illegally on a fruit farm to earn money for her husband and his family. This victim/survivor was made to rise at 4.30 am each day to begin household tasks, such as cooking for a family of seven, packing their lunches, washing their clothes by hand, and dusting and sweeping the house. She would then work at the fruit farm during the day, after which she had to make dinner and tidy up the house. She never received any payment for working on the fruit farm as her husband collected the money.'¹⁵
- 40 These examples illustrate another aspect of forced labour-servitude as it is understood in the Criminal Code: the survivor/victim in effect could not escape. While Lyneham and Bricknell do not use the term, it appears their respondents were dealing with an attitude of 'irrevocable consent' to marriage; a doctrine that was described by the English Court of Appeal as 'anachronistic and offensive' in *The Queen v R* (1991) 2 WLR 1074. Lyneham and Bricknell identified further barriers to exiting a marriage which contributed to an inability to escape:
- 41 'In summary, the predominant reasons for not seeking assistance were: fear and/or normalisation of violence; pressure to stay in the relationship from threats of ostracism by family, friends and the community; and a lack of independence and financial capability.'¹⁶
- 42 The above three examples describe restrictions which went beyond the 'work place' and extended into many or most aspects of the life of the victim/survivor. The examples go beyond forced labour and into the Criminal Code's conception of servitude, where one is deprived of personal freedom in aspects of life other than the provision of labour and services. This work-type aspect of servile marriage could well be defined in terms of the servitude definition to be found in s. 270.4 of the *Criminal Code Act, 1995* (see Chart 1).
- 43 1.7 Recommendation: Servile marriage
- 44 Slavery Links recommends that the Senate Inquiry proposes that an offence of servile marriage be added to the definition of forced marriage in the Criminal Code s. 270.7A; to cover an ongoing situation where power relations in a marriage degrade to the extent that the day to day experiences of one partner amount to servitude¹⁷ which that partner for cultural reasons cannot escape.

¹⁴ i.e. domestic work in the matrimonial home

¹⁵ Ibid., page 48

¹⁶ Ibid., page 58. The most poignant of these reasons was: 'believing that their experiences of abuse, isolation, surveillance and domestic service constituted a normal marital relationship.' That illustrates why cultural change is required. See Section 4 of this Submission

¹⁷ Following the definition of servitude in s. 270.4 of the Code: ... because of the use of coercion, threat or deception ...does not consider himself or herself to be free:

(i) to cease providing the labour or services; or

(ii) to leave the place or area where the victim provides the labour or services; and

(b) the victim / survivor is significantly deprived of personal freedom in respect of aspects of his or her life other than the provision of the labour or services.

45 1.7 Possible application of 'exploitation' to forced and servile marriage

46 In Australia, the term '**exploitation**' is defined in terms of slavery and slavery-like offences
(s. 271.1A of the Code).¹⁸ 'Exploitation' appears in this Submission because:

- 47 • It is a useful bridging term that connects the Australian phenomenon of trafficking
(Division 270 of the Code) with the slavery offences that are found in Division 270.
- 48 • It draws attention to the 'other' person; the person whose conduct causes the victim to
enter into any of the slavery-like conditions; the person who uses 'culture' to oppress.
- 49 • The abuses described in Text Box 1 'were most commonly perpetrated by the husband
and members of his family, mainly parents-in-law'.
- 50 ○ Arguably, these examples illustrate that persons from family, village, faith
community and the wider community can act on the victim / survivor to deter escape
from the conditions of a servile marriage.
- 51 ○ The High Court of Australia has described such conduct with regard to the *indicia* of
slavery (discussed in Section 2.2), with specific examples that may be relevant to
servile marriage including 'control of movement', 'control of physical environment',
'psychological control', 'measures taken to prevent or deter escape', 'force', 'threat
of force or coercion' and other extreme forms of over-control.
- 52 ○ We encourage the Senate to consider how such improper over-control could be
exerted by the 'others' who are connected to the marriage; and how such controlling
influence could be covered by the definition of exploitation in the Criminal Code.

53 1.8 Recommendation: Exploitation

54 Slavery Links recommends that the Senate, in its consideration of policy settings,¹⁹ consider
how the Australian construct of 'exploitation' can be applied with regard to servile marriage.

¹⁸ Criminal Code, s. 271.1A Definition of exploitation:

For the purposes of this Division, exploitation, of one person (the victim) by another person, occurs if the other
person's conduct causes the victim to enter into any of the following conditions: (underlining added)

- (a) slavery, or a condition similar to slavery;
- (b) servitude;
- (c) forced labour;
- (d) forced marriage;
- (e) debt bondage.

¹⁹ The committee's focus is on ... the adequacy of current Australian policy settings and legal frameworks
regarding dowry and dowry abuse ... including (Reference c) potential links to family violence, pretext for
arranged marriage, forced marriage, modern day slavery. Go to:

https://www.apf.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/DowryAbuse

55 2. FORCED MARRIAGE IS A FORM OF SLAVERY, A SERIOUS CRIME

56 The term 'forced marriage' has a strict legal meaning that should be preserved, and applied rigorously. The diluted applications (illustrated in the Glossary) should be avoided, as follows:

57 Forced marriage is a form of slavery. Forced marriage is identified as a slavery-like condition in the United Nations *Supplementary Convention, 1956*,²⁰ Article 1. In Australian law, forced marriage is defined in the *Criminal Code Act, 1995* (the Code) in Division 270 (Slavery and slavery-like offences). The slavery offences are located in Chapter 8 of the Code which refers to offences against humanity and related offences. Slavery goes beyond 'everyday' violence and abuse. Slavery happens when one person in effect owns another.²¹

58 The aspect of 'ownership' is what makes slavery a crime against humanity.²² The slavery Conventions carry obligations *erga omnes*. Freedom from slavery has *jus cogens* status.²³

59 • 'Erga omnes' means that every country (and, arguably, each political/government unit) is required to act in accordance with the slavery Convention whether or not the unit has ratified.

60 • 'Jus cogens' refers to certain fundamental, overriding principles of international law, from which no derogation is ever permitted. Freedom from slavery is such a principle.

61 2.1 Crime needs to be identified and prosecuted

62 It is in the national interest for the perpetrators of serious crime to be prosecuted. A failure to prosecute, treating a crime as if it was a civil matter, can require the survivor to negotiate a settlement with the perpetrator. Slavery Links wrote about this in 2012,²⁴ in the context of

²⁰ Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery. Adopted by a Conference of Plenipotentiaries convened by Economic and Social Council resolution 608(XXI) of 30 April 1956, and done at Geneva on 7 September 1956. Go to:

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/SupplementaryConventionAbolitionOfSlavery.aspx>

²¹ 270.1 Definition of slavery

For the purposes of this Division, slavery is the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including where such a condition results from a debt or contract made by the person.

²² As enunciated by Gleeson CJ in the leading judgment in Tang's Case, *R v Wei Tang* (2008) 237 CLR 1, Para 28

²³ Bales, Kevin and Robbins, Peter T., (2001) "'No one shall be held in slavery or servitude": A critical analysis of international slavery agreements and concepts of slavery', *Human Rights Review*, 1 January 2001. For a general discussion see also Bassiouni, M. Cherif (1997) *International Crimes: Jus Cogens And Obligatio Erga Omnes*, in *Law and Contemporary Problems*, Vol. 59: No. 4

²⁴ In 2012, Slavery Links considered this type of category error, when the criminal aspect of a case is not recognised or dealt with. Refer to: Howell, Roscoe and Robert Evans (2012) "How the Court system might encounter forms of slavery in Australia" Paper delivered at the Conference of the Australian Institute of Judicial Administration entitled "Doing Justice for Young People – Issues and Challenges for Judicial Administration in Australia and New Zealand". 23-25 August 2012, Brisbane. Go to: <http://library.slaverylinks.org/wp-content/uploads/sites/2/2013/07/How-the-court-system-might-encounter-forms-of-slavery-in-Australia.pdf>

the possibility that cases (that were treated as occupational health or workplace relations matters and heard in Magistrates Courts) could have features where 'forcing' had occurred at work but the aspect of 'forcing' was not heard by the Court.

63 Since developing this paper in 2012, Slavery Links has continued a two-part policy that:

- 64 • The criminal aspect of a case should be recognised and dealt with.
- 65 • Survivors should be protected by the Court process, not exposed to negotiation.

66 Slavery Links' policy, developed with respect to the workplace, applies equally well to forced marriage. We commend it to the Senate Inquiry.

67 The Australian Institute of Criminology report affirms a related advantage, that the prosecution of high-profile cases encouraged a broader comprehension of forced marriage:

68 'While there was some understanding of the incidence of forced marriage in Australia and New Zealand, a broader comprehension of this practice did not emerge until the criminalisation of the practice in Australia and exposure of the issue in high-profile cases in both countries. Since early 2013, when forced marriage became a criminal offence in Australia, perceptions around who is complicit, who is affected and the context for forced marriage have been scrutinised. As new cases of forced marriage are reported, this understanding will continue to be refined.'²⁵

69 2.2 The *indicia* are stringent, rigorous legal tests for identifying slavery

70 The aspect of 'ownership' is what sets slavery apart from 'everyday' violence and abuse. Slavery is not part of a continuum.²⁶ Slavery involves a change of state, from free to unfree.

71 The High Court of Australia has provided a stringent legal test that can be applied in a rigorous way to differentiate 'everyday' violence and abuse from the extreme forms of over-control that occur in slavery.²⁷ That test can be found in Tang's case, *R v Tang* (2008) 237 CLR 1 Para 28, where the High Court of Australia listed eleven *indicia* of slavery as follows:

²⁵ Lyneham, Samantha & Samantha Bricknell (2018) *Op. Cit.*, page 92

²⁶ It is not appropriate to harness the specific and rare circumstances of forced marriage in order to 'leverage' change and attract resources to the field of generalist family welfare services; as proposed by Good Shepherd: '... expand the definition of domestic and family violence nationally to include forced marriage—this will open up opportunities for wider multi-sectoral engagement and information and support services ...'

Refer to page 11 of: Good Shepherd Australia New Zealand (GSAANZ) and inTouch Multicultural Centre Against Family Violence (2018) 'The practice of dowry and the incidence of dowry abuse in Australia.' Submission to the Standing Committee on Legal and Constitutional Affairs.

²⁷ *R v Tang* (2008) 237 CLR 1 Para 28:

'The [Yugoslav] Trial Chamber, after an extensive review of relevant authorities and materials, concluded that enslavement as a crime against humanity in customary international law consisted of the exercise of any or all of the powers attaching to the right of ownership over a person; the actus reus of the violation being the exercise of any or all of such powers and the mens rea consisting in the intentional exercise of such powers. The Trial Chamber identified, as factors to be taken into account, control of movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour.' (Underline added)

- 72 • control of movement,
- 73 • control of physical environment,
- 74 • psychological control,
- 75 • measures taken to prevent or deter escape,
- 76 • force,
- 77 • threat of force or coercion,
- 78 • duration [i.e. durance],
- 79 • assertion of exclusivity,
- 80 • subjection to cruel treatment and abuse,
- 81 • control of sexuality and
- 82 • forced labour.

83 These tests can be applied to discern what happens when one person is, in effect, owned by another. As the High Court put it (see Note 20):

84 'enslavement as a crime against humanity in customary international law consist[s] of the exercise of any or all of the powers attaching to the right of ownership over a person.'

85 The *indicia* in the above list are powers of this sort, any or all of which might be used to express (in effect) ownership of one person by another, at work or in an intimate relationship. Section 3 over the page considers an important requirement: to preserve the standing of slavery as a crime against humanity. Unhappy living arrangements or exploitive working conditions are not slavery.

86 3. PRESERVING THE STANDING OF SLAVERY AS A CRIME AGAINST HUMANITY

87 Slavery involves a change of state, from free to unfree. Its meanings and applications should be preserved, consistent with the *Supplementary Convention, 1956*; and applied rigorously.

88 Unhappy living arrangements or exploitive working conditions are not slavery. Does it matter that a State government or a charity seeks to define unhappiness as if it was slavery? Yes. This would debase the very concept of slavery as, in effect, 'ownership'. The leading judgement by Gleeson CJ in *R v Tang* (2008) 237 CLR 1 Para 32 stated: (underline added)

89 '32. It is important not to debase the currency of language, or to banalise crimes against humanity, by giving slavery a meaning that extends beyond the limits set by the text, context, and purpose of the 1926 Slavery Convention. In particular it is important to recognise that harsh and exploitative conditions of labour do not of themselves amount to slavery. The term "slave" is sometimes used in a metaphorical sense to describe victims of such conditions, but that sense is not of present relevance. ... Powers of control, in the context of an issue of slavery, are powers of the kind and degree that would attach to a right of ownership if such a right were legally possible, not powers of a kind that are no more than an incident of harsh employment, either generally or at a particular time or place.' (underline added)

90 Slavery is not on a continuum of 'everyday' violence or abuse.²⁸ It should not be propagated, diluted or expanded in order to embrace phenomena such as domestic and family violence.²⁹

91 3.1 Slavery, in its strict sense, can be communicated to the public

92 One challenge in slavery is to educate the public (who are potential jurors³⁰). Slavery Links has demonstrated that exacting terms such as 'slavery', 'servitude', 'forced labour' and 'forced marriage' can be communicated in a rigorous way to interest groups,³¹ members of the public³² and to students³³.

93 A precise idea of slavery can be communicated. There is no reason to bowdlerise it.

²⁸ Refer to: Good Shepherd Australia New Zealand (GSAANZ) and inTouch (2018) *Op. Cit.* On page 17, GSAANZ placed dowry abuse '... on a continuum of domestic and family violence... For example, financial and/or economic abuse almost always occurs in parallel with other violence such as sexual, physical and/or psychological.' The GSAANZ Submission correctly addressed forced marriage as a separate phenomenon at 'Term of Reference E.

²⁹ See 'forced marriage' in the Glossary (the NSW *Modern Slavery Act, 2018*; the *Justice Legislation Amendment (Family Violence Protection and Other Matters) Act 2018* (Vic).

³⁰ Attorney-General's Department (2011) *The Criminal Justice Response to Slavery and People Trafficking; Reparation; and Vulnerable Witness Protections*. Discussion Paper, Attorney-General's Department, Barton, ACT

³¹ Roscoe Howell (2012) "Speaking out about slavery: Workshops to run in your community" © Pamphlet, (Slavery Links Australia Inc, Brighton, Victoria). Go to: <http://library.slaverylinks.org/wp-content/uploads/sites/2/2013/07/Speaking-out-about-slavery-Workshops-to-run-in-your-community.pdf>

³² Slavery Links Exhibitions. Go to: <http://library.slaverylinks.org/exhibitions/>

³³ Mark Strachan (2014) "The Role of Slavery in Design Education" © ACUADS Conference 2014: 'The Future Of The Discipline', Melbourne, Australia, 2-3 October 2014, paper no. 9. Go to: <http://library.slaverylinks.org/wp-content/uploads/sites/2/2015/08/The-Role-of-Slavery-in-Design-Education.pdf>

94 4. WHO SHOULD BE THE 'SUBJECT' OF ACTION AGAINST FORCED MARRIAGE

95 A Council of Europe Resolution (No 1468 of 2005) listed twenty one countries in the
European sphere that have failed to act on forced marriage. They include countries from
which Australia has drawn generations of migrants:

96 Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic,
Estonia, Georgia, Hungary, Latvia, Lithuania, Moldova, Montenegro, Poland, Romania,
Russian Federation, Serbia, Slovak Republic, Slovenia and Ukraine.

97 In that sense, forced marriage should be construed as an 'Australian' problem. The subject of
action is 'us'; those who have migrated here. It is not useful to scapegoat some stereotype of
a 'naughty' Asian or African. To the contrary we can learn from Asian and African experience.

98 4.1 Evidence-based programs for community change have shown results in South Asia

99 In 2015 Slavery Links provided a Parliamentary Inquiry³⁴ with information about evidence-
based programs that had been found effective in addressing forced marriage in South Asia.
These were community programs, employing strategies of bottom-up change. An effective
process has been comprehended. There is no need for Australia to re-invent it.

100 The Appendix containing information about the studies³⁵ does not appear on the Committee
web site; and there has been no indication provided to Slavery Links of take-up by the
Department of Foreign Affairs and Trade. The Appendix will be resubmitted to this Inquiry.

101 4.2 Community-based change in Europe

102 As in Asia and Africa, Australian legislators have also recognised that there is value in the idea
of providing resources to support locally-directed processes of bottom-up cultural change at
community level. For example, the Joint Standing Committee on Migration:

103 '... was impressed by the District Mothers Program they witnessed in Germany (refer to
Chapter 8). This program trains and employs migrant women to assist migrant families
with integration, education and employment. The aim of the program is to enable these
women to reach out and act as mediators with other families within their cultural group
that are not yet in a position to work with local authorities.'³⁶

104 Such change is not a substitute for criminal enforcement; it is a complement for the long term.

³⁴ Slavery Links Australia Inc (2015) 'What does slave-making in the Indian Ocean - Asia Pacific mean for
Australian programs in Australia and overseas' Submission to the Joint Standing Committee on Foreign Affairs,
Defence and Trade, Human Rights Sub-Committee Inquiry into Human rights issues confronting women and
girls in the Indian Ocean – Asia Pacific region, from Slavery Links Australia Inc., P.O. Box 1357 Camberwell 3124

³⁵ An extract regarding these studies was provided from: Howell, Roscoe (2011) *Australians and Modern
Slavery*, (Slavery Links Australia Inc, Brighton, Victoria), With a Foreword by The Hon Catherine Branson QC,
former President of the Australian Human Rights Commission. Refer to the introduction on line at:
<http://library.slaverylinks.org/wp-content/uploads/sites/2/2013/07/AAMS-Extract.pdf>

³⁶ Parliament of The Commonwealth of Australia (2017) No one teaches you to become an Australian. Report of
the inquiry into migrant settlement outcomes. Joint Standing Committee on Migration. December, 2017. Go to:
https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024098/toc_pdf/NooneteachesyoutobecomeanAustralian.pdf;fileType=application/pdf

105 5. DISTORTED ATTITUDES THAT UNDERPIN SLAVERY NEED TO BE CHALLENGED

106 5.1 Slavery happens when one person treats another as being, in effect, owned

107 Values, beliefs and assumptions are distorted when they construe one party (often a woman) as subservient and possibly as property. The distorted attitude is expressed in a most distorted way in forced marriage. The *Supplementary Convention, 1956*, in Article 1(c), defined forced marriage in terms of conduct that treated a woman as if she was owned. The conduct was described as given being away in return for a benefit; being transferred; or being inherited.³⁷

108 In the *Criminal Code Act, 1995*, forced marriage is defined in terms of (lack of) consent.³⁸ This may be correct conceptually; but it lacks the visceral quality of the Convention's description.

109 5.2 Recommendation: A strengthened Explanatory memorandum

110 Slavery Links recommends that an Explanatory memorandum should identify the three limbs of forced marriage (Note 37), so that Courts can have a better grip on what actually happens.

111 5.3 A distorted attitude of woman-as-property also underlies a so-called 'honour' crime

112 A distorted attitude, that a woman is subservient, is related to another crime where a woman is treated like property. In a crime of so-called 'honour'; a woman can be punished for supposed misbehaviour on the basis that she is the emblem or carrier of dignity for a family. The woman is allowed no rights of her own; her innate dignity is withheld; she is only allowed whatever dignity derives from her position as wife and or mother.

113 A former Chief Justice of New South Wales described a general problem: (Underline added)

114 'There is now an extensive literature on crimes of honour, not only focussing on Islamic communities. Extensive research has been conducted with respect to these issues in Jordan, Palestine, Lebanon, Pakistan, Egypt and Iraq, but similar crimes of honour occur, or a legitimate defence of honour has been recognised, in Italy and in various jurisdictions of Latin America. Although it is the case that men can be victims of honour crimes, nevertheless, the entire idea of "honour" in this context, is generally based on a historical legacy of women as, in substance, the property of their male relatives.³⁹

³⁷ In the *Supplementary Convention, 1956* Article 1(c): Forced marriage is: Any institution or practice whereby:
(i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or
(ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or
(iii) A woman on the death of her husband is liable to be inherited by another person;'

³⁸ In the *Criminal Code Act, 1995*, s. 270.7A forced marriage is defined as follows:

(1) A marriage is a forced marriage if one party to the marriage (the victim) entered into the marriage without freely and fully consenting:

(a) because of the use of coercion, threat or deception; or

(b) because the party was incapable of understanding the nature and effect of the marriage ceremony.

³⁹ Spigelman Hon JJ (2010) Violence Against Women: The Dimensions Of Fear and Culture, Inaugural Address to the Law, Governance And Social Justice Forum, Faculty Of Law, University Of New South Wales, Sydney, 15 April 2010, page 30

115 5.4 Do Australian practices of dowry and or bride price characterise women as subservient?
Do dowry practices reinforce gender inequality or promote it?

116 Dowry and bride price (wealth) are practices that involve a financial transaction at marriage. Do these practices also carry a distorted idea of inequality? Apparently. Are these practices related in a causal way to 'crime-by-subservience'? We do not have evidence of this in Australia.

117 • The Royal Australian and New Zealand College of Psychiatrists (RANZCP: Submission 09) asserts that dowry 'is a practice that may encourage gender inequality', and 'can diminish the role of women as an engaged and informed participant'. Yet the College admits to a dearth of hard evidence available regarding:

118 ○ the nature of dowry in Australia and

119 ○ the extent of dowry abuse (page 2).

120 • In the Australian Institute of Criminology's study of forced marriage: 'Only one (forced) marriage involved a dowry or other type of exchange for the victim/survivor to wed.'⁴⁰ This was an exploratory study; not a statistically representative sample of referrals to the police. The study referred to 6 interviews with 7 victim/survivor participants; and ten victim/survivor case files (refer to page vi). It seems that a connection in Australasia between forced marriage and the practice of dowry is yet to be established.

121 • There has been an academic study of dowry among the Indian diaspora of Britain; a:
122 'study of 'traditional dowry expectations as an accepted custom in terms of economic interaction between families in society ... highlights the fact that dowry as a custom might not be as problematic as it has been made out to be by rather myopic attempts at lawmaking. I therefore emphasise that modernist law making on dowry has introduced a conflict of expectations which cannot be resolved as originally planned by those who wish to use law as a method of social engineering.'⁴¹

123 5.5 Is there an evidence-based 'causal' link between dowry and forced marriage in Australia?

124 That is not known. Research would be needed to appreciate the connection in Australia.

125 5.6 The State of Victoria is acting as if a proven link exists between forced marriage and dowry

126 Victoria has created an ersatz offence of 'forced marriage', that is in fact an expression of 'everyday' abuse (see the Glossary). The offence appears as an 'Example' in the *Justice Legislation Amendment (Family Violence Protection and Other Matters) Act 2018*. The Second Reading Speech characterises 'entering a marriage' in this way as being a 'forced marriage'

127 The Victorian offence is not forced marriage as understood in the *Criminal Code Act, 1995*.

⁴⁰ Lyneham, Samantha & Samantha Bricknell (2018) 'When saying no is not an option: Forced marriage in Australia and New Zealand', Australian Institute of Criminology. Canberra. Research Reports no. 11. Page 38. Go to: <https://aic.gov.au/publications/rr/rr11>

⁴¹ Arya, Anwesha (2012) Dowry in tradition and text: sastra, statute and the 'living law' of dowry sadacara in India. PhD submission, Department of the Study of Religions, School of Oriental and African Studies, SOAS, University of London, September 23rd 2012. Go to: <https://core.ac.uk/download/pdf/17184810.pdf>

128 The Committee's Reference (h) refers to laws and practices in international jurisdictions.

129 6. WHAT CAN AUSTRALIA LEARN FROM THE *DOWRY PROHIBITION ACT, 1961* (INDIA)?

130 6.1 What is dowry in India?

131 Dowry is defined in the *Dowry Prohibition Act, 1961*⁴² (and prohibited thereby).⁴³

132 Dowry arose in a distant past⁴⁴ throughout South Asia. It developed at a time when there was no social security system to protect women and children. The *Dowry Prohibition Act, 1961* was (in part) intended to protect women and children. Section 6 of the *Dowry Prohibition Act, 1961* required third parties to ensure that dowry (already in existence at the time) would be applied for the benefit of the wife or heirs.

133 Unlike ancient India, Australia has a social security system. There is no need for dowry here.

134 6.2 The prohibition on dowry does not apply universally in India

135 The *Dowry Prohibition Act, 1961* does not apply universally in India.

136 • Under Section 1, the Act 'extends to the whole of India except the State of Jammu and Kashmir'. We note that Jammu and Kashmir is a Moslem-majority state.

137 • Under Section 2 (b) of the Act, the term dowry 'does not include dower or mahr in the case of persons to whom the Muslim Personal Law (Shariat) applies'. Moslems are exempt.

138 6.3 Universal rights need to be applied universally

139 Parliaments in Australia would need to proceed with care to define dowry; and to consider how other 'wedding' payments would be treated. In the Submission of Slavery Links, there can be no 'cultural' exemption in Australia from any provisions of the civil and criminal law.

140 6.4 The legal standing of dowry in Australia

141 The Government of Victoria has construed dowry as an aspect of family violence. The term 'dowry' is used in the *Justice Legislation Amendment (Family Violence Protection and Other Matters) Act, 2018* (Victoria). However 'dowry' is not defined in the Act, the Second Reading Speech or the Explanatory memorandum. This flawed approach should be repealed.

⁴² As defined in s. 2 of the *Dowry Prohibition Act, 1961* (India), (Go to: <http://wcd.nic.in/act/dowry-prohibition-act-1961>): 'dowry' means 'any property or valuable security given or agreed to be given either directly or indirectly:

a. by one party to a marriage to the other party to the marriage; or

b. by the parents of either party to a marriage or by any other person, to either party to the marriage or to any other person; at or before or any time after the marriage in connection with the marriage of said parties but does not include dower or mahr in the case of persons to whom the Muslim Personal Law (Shariat) applies. (underline added)

⁴³ 3. Penalty for giving or taking dowry.-

(1) If any person, after the commencement of this Act, gives or takes or abets the giving or taking of dowry, he shall be punishable with imprisonment for a term which shall not be less than five years, and with the fine which shall not be less than fifteen thousand rupees or the amount of the value of such dowry, whichever is more: Provided that ...'

⁴⁴ Doniger, Wendy (2010) 'The Hindus: An alternative History' (Oxford: Oxford University Press)

142 7. COMMONWEALTH-STATE ISSUES

143 7.1 Investment in Tang's Case left a beneficial legacy

144 Tang's Case (*R v Tang* (2008) 237 CLR 1) was a slavery case; a matter of serious crime. Wei Tang was prosecuted in a Victorian Court under Division 270 of the *Commonwealth Criminal Code Act, 1995* (slavery). The case went to the High Court of Australia and was returned to Victoria for sentencing.

145 The one-off spending in Tang's Case was substantial,⁴⁵ but no more than can be found in numbers of cases to do with money (banking, contract, insurance, trade and so on).

146 The legacy of Tang's Case has been a beneficial strengthening of Australia's understanding of slavery-as-serious-crime. In that sense, the money spent on Tang's Case was an investment in Australia's future.⁴⁶ Through Tang, the High Court provided us with robust Australian jurisprudence.

147 • Usefully the Court articulated slavery as defined in the *Supplementary Convention 1956*; which is the source of the definition of slavery in Australia's Criminal Code. It is also the instrument that defined the ancient slave-making *systems* that still persist in the Indo-Asia-Pacific region (child trading; debt bondage; forced marriage and serfdom). These are the *systems* to which, in a global economy, Australia is exposed.

148 • Moreover, the High Court construed the *indicia* of slavery, which are eleven tests that can be applied to discern the extreme forms of over-control to be found in slavery (where a person is in effect owned; or treated as if owned).

149 The *indicia* are listed in Section 2.2. They indicate how Parliament could be mindful of legal tests which would differentiate 'everyday' violence and abuse in a marriage from extreme forms that would amount to a forced marriage or a (yet-to-be-defined) servile marriage.

150 7.2 Commonwealth–State relations can be expressed through criminal prosecutions

151 Tang's Case illustrates a situation where offences defined in the Commonwealth Code are prosecuted in a State or Territory Court. Tang's Case was prosecuted in Victoria and then moved between the High Court and Victoria. The jurisprudence provided by Tang has enabled other slavery cases to be dealt with in effect at State or Territory level. Other cases have not had to move in this way. Continuity of jurisprudence provided by Tang contains costs in the present time; and the benefit will continue to accrue, going forward, providing Parliament ensures that the definition of slavery in Division 270 of the Code remains stable.

⁴⁵ This was spelt out in oral evidence from Slavery Links to the Joint Standing Committee on Foreign Affairs, Defence and Trade Inquiry entitled 'Adopting a Modern Slavery Act in Australia' on Wednesday 2 August 2017. Based on the recitation at the outset of *R v Tang* (2008) 237 CLR 1, there were two County Court trials, an appeal by Wei Tang against her convictions through the Victorian Court of Appeal, an appeal, from the Court of Appeal to the High Court of Australia, by the Commonwealth regarding a jurisdictional question about the Constitution and the interpretation of the Criminal Code, which was heard with a cross-appeal by Wei Tang; and from there back to Victoria.

⁴⁶ As a representative of Slavery Links remarked in oral evidence: 'Just where Ms Wei Tang got millions of dollars of funds to continue appealing – I do not know where the money came from. It is a really difficult area.'

152 We repeat: Tang's Case enabled Australia to economise on further proceedings to clarify Australian jurisprudence on slavery. States have played their part. Anti Slavery Australia has provided a summary of State-level convictions under Divisions 270 and 271 of the Criminal Code including possess a slave, (non-sexual) servitude and forced marriage cases.⁴⁷

153 7.3 Competence of the Commonwealth

154 The example of Tang's Case (*R v Tang* (2008) 237 CLR 1) showed how States and Territories can operate effectively in a framework of Commonwealth legislation to the benefit of all Australians. Following construction of the *Criminal Code Act, 1995*, a cooperative procedure seemed to be in place; and Division 270 of the Code (slavery) seemed to be one essential locus where the States and Territories cooperated in the competence of the Commonwealth.

155 7.4 Creation of ersatz slavery offences in Victoria and New South Wales

156 However two State initiatives occurred in 2018 that put paid to the notion of a cooperative sort of Federalism regarding slavery. After a decade of settled jurisprudence following Tang's Case, Victoria and New South Wales have launched into new territory and created ersatz slavery offences without regard for some of the fundamentals (refer to the Glossary):

- 157 • The *Family Violence Protection Act 2008*, Victoria

158 In an amendment to the *Family Violence Protection Act 2008*, Victoria constructed its own notion of 'forced marriage', contradicting that in Division 270, without regard to the slavery convention and the slave-like seriousness of the phenomenon.

159 The Victorian construct is somehow connected to 'dowry' yet the term 'dowry' is not defined – not defined in the Act; nor the Explanatory memorandum; nor the Second Reading Speech. An Australian judicial officer, who lacks guidance in the Victorian Act and refers to the *Indian Dowry Prohibition Act 1961* in order to seek clarity, could be led astray by the Indian Act in a manner that is un-Australian (see Section 6.2-6.3).

- 160 • The *Modern Slavery Act, 2018* (NSW)

161 Under The *Modern Slavery Act, 2018* (NSW), New South Wales has constructed its own definition of 'Modern Slavery'. As the Glossary indicates, this was done by collating a blancmange concoction of child sex and misuse of human tissue cobbled together with mention of a few offences from Division 270 of the Criminal Code, all without regard to the definition of slavery as 'ownership'.

162 Moreover, the NSW Act would override Tang's Case. It amends the NSW *Crimes Act, 1900* by inserting Section 93AB (Slavery, servitude and child forced labour):

163 1) A person is guilty of an offence if: (underline added)

164 (a) the person holds another person in slavery or servitude and the circumstances are such that the person knows or ought to know that the person is held in slavery or servitude ...

⁴⁷ Anti Slavery Australia (2018) Australian Case law. Go to:
<http://www.antislavery.org.au/resources/australian-case-law.html>

- 165 Clause 1(a) of the NSW Act reflects the views of Eames JA of the Court of Criminal Appeal in Victoria; views which were **considered in detail by the High Court of Australia⁴⁸ and rejected.**
- 166 The flaws disclosed in Para 157-164 are serious. The Attorneys-General will need to be engaged in addressing them. Overcoming the flaws will require all of the Commonwealth's sapiential authority and leadership.
- 167 7.5 Recommendation of Slavery Links re State offences that are ersatz slavery
- 168 In the Submission of Slavery Links, the Senate should encourage the Commonwealth Attorney General and the Shadow Attorney General to work with State and Territory counterparts to affirm the standing of offences in Division 270 (slavery) of the Criminal Code⁴⁹ and to address the problem of ersatz slavery. Ideally the Council of Attorneys-General would be enlisted.
- 169 Rather than to press for the States to conform independently, Senators have the option to press the Attorneys General for uniform Slavery and uniform Modern Slavery legislation. Senators might give consideration to existing models of uniform legislation:
- 170 • A 'template' (enacted in one jurisdiction and applied in other participating jurisdictions);
- 171 • 'mirroring' (eg *Evidence Act, 1995* (Cth)); and/or
- 172 • 'referring' (eg *Corporations Act, 2001* (Cth))
- 173 Whatever model or mix of models is adopted, Slavery Links submits that the problem needs to be addressed with some urgency and resolved as indicated in Note 49. The continuity of Australian jurisprudence, established by Tang's Case, should be protected; with Parliament ensuring that the definition of slavery and the Hierarchy of Slavery Offences in Division 270 of the Commonwealth Criminal Code (see Chart 1) remains stable.
- 174 7.6 Recommendation regarding the Modern Slavery Bill, 2018
- 175 The Modern Slavery Bill, 2018 has regard to supply chain management by large organisations (business and government).
- 176 The Modern Slavery Bill, 2018 should not apply to intimate relationships.

2 November 2018

⁴⁸ *R v Tang* (2008) 237 CLR 1 Para 36-42. In Para 41, Gleeson CJ quoted Eames JA as saying: '... the power must have been intentionally exercised as an owner of property would exercise power over that property, acting in the knowledge or belief that the victim could be dealt with as no more than a chattel.' Gleeson CJ rejected this.

⁴⁹ By 'standing', Slavery Links means that freedom from slavery has *jus cogens* status. It is an obligation *erga omnes*. Slavery is a crime against humanity whose strict meaning is set out in Division 270 of the *Criminal Code Act 1995* (the Code). The definitions in Division 270 should be applied with rigour and exactitude, and not bowdlerised. The continuity of Australian jurisprudence, established by Tang's Case, should be protected with Parliament ensuring that the definition of slavery remains stable.