

**Criminal Code Amendment (Trafficking in Persons Offences) Act 2005 (Cth)
Further Submission on Servile Marriage**

**Submitted by World Vision Australia¹
Endorsed by Australian Women Lawyers**

Submitted to: Margaret Joseph
[Departmental Liaison Officer, Office of the Minister for Justice and Customs](#)
By email: Margaret.Joseph@ag.gov.au

Contact:
Kirsty Nowlan
Manager, Policy & Advocacy
World Vision Australia
kirsty.nowlan@worldvision.com.au
03 9287 2383 / 0413 701 021

Lee-May Saw
Australian Women Lawyers
imsaw@idx.com.au
0417 693 239



¹ This submission has been written by Kayte Fairfax, World Vision Australia Policy officer on child trafficking, and Lee-May Saw, Australian Women Lawyers.

Introduction

World Vision Australia welcomes the opportunity to make a further submission to the Attorney General's Department in relation to the issue of the trafficking of women and children into servile marriage. The recent media reports of cases of Australian children trafficked overseas for arranged marriages in Lebanon has been of great concern². The act of sending Australian children abroad for the purpose of servile or forced marriage by parents, wider family, community or others is a criminal act and a form of child trafficking that violates a broad range of children's rights under the United Nations Convention on the Rights of the Child and the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.

World Vision and its submission partners' concerns about servile marriage were first raised in our submission³ to the Attorney General's Department on the Exposure Draft Criminal Code Amendment (Trafficking in Persons Bill) 2004 in October 2004, and again at the Hearing of the Senate Legal and Constitutional Legislation Committee in February 2005. Servile marriage is a particularly traumatic form of exploitation that often leaves women and girl marriage partners with very few rights and means of escape.

A global study into servile marriage identified several factors that wives have to face⁴:

1. the marriage includes an exchange of significant economic value over which the bride has no control,
2. the bride has no input into the choice of husband and no right of refusal,
3. the wife is a minor, her husband significantly older, and/or the bride lives with the in-laws,
4. the wife is not allowed to control her own fertility,
5. the wife does not have equal parental rights,
6. the wife has less control of or access to inherited property or income,
7. the wife is subject physical abuse and violence without legal or societal recourse,
8. the wife may be subjected to humiliation or abuse by her husband which is condoned by society because of her inferior position,
9. the wife is secluded and her behaviour restricted,
10. the wife is threatened with violence, divorce or withholding of necessities in order to make her work more,
11. the wife is not allowed to leave the marriage either by threat of force or social disapprobation.

Clearly, the risk to child wives of these factors being exacerbated would be greatly increased. For example, an Indonesian study into the early marriage of girls (12 or 13 years old), an ongoing cultural tradition in some regions, found that the practice may lead to early divorce, which can leave girls more vulnerable to trafficking, especially into the sex industry⁵. Girls married at a young

² 'Children exported as brides', *The Australian* 2/8/05, front page; 'Brides of Islam', *The Age*, 2/8/05, p11

³ World Vision's seven submission partners for the submission dated 28 October 2004 were Save the Children, UNICEF Australia, Child Wise, Plan, CCF Australia, Baptists World Aid Australia and Christian Blind Mission International.

⁴ Wijers and Lap-Chew, 73-74, 1999 *in* Trafficking of Women and Children in Indonesia, R. Rosenberg (ed) p103, available at <http://www.icmc.net/files/traffreport.en.pdf>

⁵ This paragraph summarised from 'Trafficking of women and children in Indonesia' R. Rosenberg (Ed), p109, *ibid*

age leave school, and without an adequate education, often lack the skills to find jobs or other economic means of survival. Girls divorced at an early age often lack an independent income, increasing their vulnerability to trafficking as they often have to leave the home villages to find work. If they have children, they often have to leave them behind with their family while they work overseas or in a large Indonesian city.

The Home Office of the United Kingdom makes a distinction between forced and arranged marriage, citing duress as a defining factor:

A forced marriage is one where one or both parties are coerced into a marriage against their will and under duress. Duress includes both physical and emotional pressure...very different from arranged marriage, where both parties give their full and free consent to the marriage⁶.

A study into forced marriage in the United Kingdom found that young women, taken out of school to be married overseas, suffered from the loss of educational opportunities, and were sometimes not allowed to return to the UK until they were sixteen – the legal age of marriage in the UK, or were pregnant, to make it even harder for them to leave the relationship⁷. The Working Group reported cases where young women had had their passports removed on arrival in their new spouse's country and cases where women suffered domestic abuse over several years and felt unable to leave. It noted the 'loving manipulation' used by parents in the majority of cases to gain their children's 'consent' to a forced marriage⁸. The Group also identified isolation as 'one of the biggest problems facing victims of forced marriage', where many women felt they had no one to talk to about their situation – very similar feelings to women who had suffered domestic abuse⁹.

In summary, UNICEF has identified three key concerns relating to the impact of early marriage on children¹⁰:

1. the denial of childhood and adolescence
2. the curtailment of personal freedom and lack of opportunity to develop a full sense of selfhood
3. the denial of psychosocial and emotional well-being, reproductive health and educational opportunity

World Vision continues to urge the Government to adopt a pre-emptive, rights-centered approach to child trafficking that provides the highest level of protection for children under Australian law, in full compliance with Australia's obligations under the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, the United Nations Convention on the Rights of the Child, and other relevant instruments of international law.

Obligations under the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children

⁶ United Kingdom Home Office <http://www.homeoffice.gov.uk/comrace/race/forcedmarriage/> (accessed 26 September 2005)

⁷ 'A Choice by Right', Working Group into Forced Marriage, United Kingdom Home Office, 2000, p.15 available at <http://www.homeoffice.gov.uk/docs/frcdmrgs.pdf>

⁸ Ibid, p11

⁹ Ibid, p14-15

¹⁰ Early marriage: Child spouses, UNICEF, Innocenti Digest No.7, March 2001, p9. Available at <http://www.unicef-icdc.org/publications/pdf/digest7e.pdf>

World Vision agrees that the passage of the Criminal Code Amendment (Trafficking in Persons Offences) Bill 2005 through both Houses of Parliament in June this year was a significant step in ensuring that Australia meets its obligations under the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the "Trafficking Protocol").¹¹ In our view it is particularly significant that the passage of the Bill allowed the rights of child victims of trafficking to be comprehensively provided for under the Criminal Code Act 1995 (Cth) (the "Criminal Code").

In our submission to the Attorney-General's Department on the Exposure Draft Criminal Code Amendment (Trafficking in Persons Bill) 2004 (the "Exposure Draft"), we raised our concerns that adherence to the Trafficking Protocol required improvements to the Exposure Draft.¹² It was our view that trafficking offences (and policy responses) should encompass broad forms of exploitation including forced or servile marriage.¹³ Our submission to the Senate Legal and Constitutional Legislation Committee Hearing, 23 February 2005, further expressed this view, and was supported by the Australian Human Rights and Equal Opportunity Commission's written response to the questions on notice posed by the Committee¹⁴.

The Senate and Legal Constitutional Legislation Committee accepted these views, recommending that 'the definition of 'exploitation' in the Bill be amended to include an express reference to servile marriages'¹⁵. However, this recommendation was not taken up and adopted in the Criminal Code Amendment (Trafficking in Persons Offences) Act 2005 (Cth) (the "Act"). Therefore while the adoption of some of the Committee's recommendations ensured that the Act went much further than the Exposure Draft in addressing World Vision's concerns, our view stands: that the serious nature of the trauma and abuse faced by child victims of servile marriage requires that trafficking into marriage be expressly addressed in the Criminal Code. Until then, the risk remains that servile marriage will not be effectively prevented and prosecuted, that child and adult victims of servile marriage will not be adequately protected by the law, and that Australia's obligations under the Trafficking Protocol will not be met.

Article 5, paragraph 2, of the Trafficking Protocol requires each State Party to the Protocol to:

adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally.¹⁶

Article 3, paragraph (a), defines "trafficking in persons" for the purposes of the Protocol. This means:

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of

¹¹ Australia, House of Representatives, *Parliamentary Debates* (2005) [Internet - <http://www.aph.gov.au/hansard/reps/dailys/dr210604.pdf> (Accessed 23 August 2005.)], at 31.

¹² World Vision Australia, Submission No. 12, Attachment A, 28 October 2004 [Internet - http://www.aph.gov.au/senate/committee/legcon_ctte/trafficking/submissions/sub12attach_a.pdf (Accessed 3 March 2005.)], at 6.

¹³ World Vision Australia, above, at 13-14.

¹⁴ Australian Human Rights and Equal Opportunity Commission, 1 March 2005, www.hreoc.gov.au/legal/submissions/criminal_code_trafficking_bill_qonn.html

¹⁵ Recommendation 8, report by The Senate Legal and Constitutional Legislation Committee, March 2005, p20.

¹⁶ Art 5, para 1, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime (the "Trafficking Protocol").

vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.¹⁷

“Exploitation” for the purposes of the Protocol is defined to include the practices listed in Article 3, paragraph (a), *at a minimum*.¹⁸ This includes slavery or practices similar to slavery.

As noted in oral evidence from the Human Rights and Equal Opportunity Commission (HREOC) at the Inquiry into the Bill conducted by the Senate Legal and Constitutional Legislation Committee, “servile marriage” is defined as:

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.¹⁹

The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, to which Australia is a signatory, indicates that servile marriage is a practice similar to slavery.²⁰ Until it is clear that servile marriage is a criminal offence under Australian law, Australia’s obligations under the Trafficking Protocol to adopt legislative and other measures to establish servile marriage as a criminal offence will not be met.

Obligations under the United Nations Convention on the Rights of the Child

As we stated in our submission on the Exposure Draft, the rights of the child should be at the centre of Australian law and policy responses on trafficking that may relate to children.²¹ Because Australia has acceded to the Convention on the Rights of the Child (“CRoC”), it is obliged to conform with Article 4 of the Convention and ensure that its domestic legislation conforms with the principles of CRoC. The following obligations under CRoC support a response to the practice of servile marriage under Australian law and policy:

- Article 4: undertaking all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the Convention;
- Article 8: undertaking to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by the law without any interference;
- Article 9: ensuring that a child shall not be separated from his or her parents against their will except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child;

¹⁷ Art 3, para (a), Trafficking Protocol.

¹⁸ Further discussion of how servile marriage might be more effectively provided for under the Criminal Code, is below, at 7-9.

¹⁹ Art 1, para(c), Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery; Australian Human Rights and Equal Opportunity Commission, Submission, 1 March 2005 [Internet - http://www.hreoc.gov.au/legal/submissions/criminal_code_trafficking_bill_gonn.html#endnote6 (Accessed 9 September 2005.)].

²⁰ Art 1, para (c), Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery.

²¹ World Vision Australia, above, n 2, at 3.

- Article 11: duty to take all measures to combat the illicit transfer and non-return of children abroad;
- Article 19: duty to take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has care of the child;
- Article 20: child's entitlement to special protection and assistance by the state where they are temporarily or permanently deprived of their family environment, or where they cannot be allowed to remain in that environment for their own best interests;
- Article 34: undertaking to protect the child from all forms of sexual exploitation and sexual abuse;
- **Article 35: duty to take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form;**
- **Article 36: duty to protect the child against all forms of exploitation prejudicial to any aspects of the child's welfare;**
- **Article 39: duty to take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation or abuse, torture or any other form of cruel, inhuman or degrading treatment or punishment, or armed conflicts.**

Impact of the Marriage Act 1961 (Cth)

Recommendation 8 of the final report of the Senate Legal and Constitutional Committee in March this year was that:

the definition of 'exploitation' in the Bill be amended to include an express reference to servile marriages.²²

This was not adopted into the Act, but it was flagged for further attention as:

it was recognised that this may have been beyond the scope of the bill because its effect in relation to the Marriage Act is unclear.²³

Marriages to Minors Generally

- Sections 23(e) and 23B(e) of the Marriage Act provide that a marriage is void if either of the parties are not of marriageable age.
- Section 11 provides that a person is of marriageable age if they have attained the age of 18 years.

²² Australia, Senate Legal and Constitutional Legislation Committee, *Criminal Code Amendment (Trafficking in Persons Offences) Bill 2004 [2005]* [Internet - http://www.aph.gov.au/Senate/committee/legcon_ctte/trafficking/report/index.htm (Accessed 23 August 2005).], at 20.

²³ Australia, House of Representatives, above, n 1, at 34.

- Section 95(1) makes it an offence for a person to go through a form of ceremony of marriage with a person who is not of marriageable age. A penalty of 5 years imprisonment applies to this offence.
- Section 95(2) makes it an offence for a person to go through a form of ceremony of marriage with a minor unless the minor has previously been married, or written consent from a person whose consent to the marriage of the minor is required under the Marriage Act has been given or dispensed with in accordance with the Marriage Act. The penalty for this offence is a fine of \$500 or imprisonment for 6 months.

Exceptions: marriage of minors aged 16-18 years

Part II of the Marriage Act 1961 (Cth) (the “Marriage Act”) addresses the issue of marriageable age and marriages to minors. It allows marriages involving minors aged 16-18 years to occur in exceptional circumstances.

Section 5 defines a “minor” as someone who has not attained the age of 18 years. However, marriage of a minor who has attained the age of 16 years but has not attained the age of 18 years can be authorised by order of a Judge or magistrate in exceptional circumstances under section 12. The operation of sections 13 and 14 means that marriages involving minors in these circumstances cannot be solemnized without the consent of: one or both parents; the person who has custody of the minor under order of a court; the guardian or guardians of the minor; a prescribed authority; or one or both adoptive parents. The person or persons whose consent is required depends on the familial circumstances of the minor.

Under section 15 a prescribed authority may dispense with the consent of the person or persons whose consent to the marriage of a minor is required, where a minor applies to the prescribed authority in writing and the prescribed authority:

- (a) is satisfied that it is impracticable, or that it is impracticable without delay that would, in all the circumstances of the case, be unreasonable, to ascertain the views of that person with respect to the proposed marriage;
- (b) has no reason to believe that that person would refuse his or her consent to the proposed marriage; and
- (c) has no reason to believe that facts may exist by reason of which it could reasonably be considered improper that the consent should be dispensed with.²⁴

Where a person or persons whose consent to a marriage of a minor is required and this consent is refused, or where an application by a minor under section 15 is refused, section 16 allows the minor to apply for consent from a Judge or magistrate in place of the consent from such person or persons.

Consent and nullification of the marriage

²⁴ s 15(1) *Marriage Act 1961* (Cth).

Sections 23(1)(d) and 23B(1)(d) of the Marriage Act provide that a marriage is void if the consent of either of the parties was not a real consent because:

- (i) it was obtained by duress or fraud;
- (ii) that party was mistaken as to the identity of the other party or as to the nature of the ceremony performed; or
- (iii) that party was mentally incapable of understanding the nature and effect of the marriage ceremony.²⁵

In relation to minors the Marriage Act has two primary purposes:

- To allow for a marriage to be made void where either party is not of marriageable age
- In exceptional circumstances, to allow for and administer marriage where one or both marriage partners are minors aged 16 to 18 years.

The Marriage Act allows minors aged 16-18 years old to marry if they wish to, rather than protecting them from any harm that may arise out of the marriage. It does not recognise the trauma involved in the situation seen recently in Australia – where a child has been sent overseas to marry within their family's country of origin, due to community parental and/or community expectation and pressure, rather than their free, informed will, and has suffered within that marriage.

Marriages solemnized in a foreign country

Part VA of the Marriage Act allows marriages solemnized in a foreign country to be recognised as valid in Australia, where such a marriage is recognised as valid under the local law of the foreign country in which it was solemnized, at the time it was solemnized.

However, Section 88D provides that a marriage solemnized in a foreign country shall *not* be recognised as valid in Australia if amongst other things:

- one of the parties was, at the time of the marriage, domiciled in Australia – either of the parties was not of marriageable age;²⁶
- the consent of either of the parties was not a real consent for a reason set out in subparagraph 23B(1)(d)(i), (ii) or (iii).

Why the Marriage Act 1961 (Cth) is not an appropriate measure against cases of child servile marriage

1. Servile marriage is not explicitly listed as a reason to void a marriage – for adults, or children aged 16-18 years.

The Marriage Act is limited to covering only some aspects of servile marriage where there is fraud and deception. To properly address the trauma and abuse that both adults and children face in such marriages, it should recognise servile marriage as a stand-alone reason for nullification of a marriage, *unrelated to consent*, for both adults and minors.

²⁵ ss 23(d), 23B(d) *Marriage Act 1961* (Cth).

²⁶ s 88D(2)(b) *Marriage Act 1961* (Cth).

2. **The focus on consent is not consistent with principles under the Trafficking Protocol**

Consent is clearly a central concept under the Marriage Act, particularly in relation to the marriage of minors and the nullification of certain marriages. By contrast, Article 3(b) of the Trafficking Protocol provides that consent of an adult victim to an act of exploitation covered by the Protocol is irrelevant where threats or use of force or other forms of coercion, abduction, fraud, deception, or abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits are used to obtain the victims consent. Article 3(a) of the Trafficking protocol recognises servile marriage as an exploitative end purpose of trafficking, as a 'practice similar to slavery'.

A much broader range of actions renders consent to an act of trafficking under the Protocol irrelevant, compared to the range of actions that renders consent to marriage void under the Marriage Act. Sections 23(1)(d) and 23B(1)(d) of the Marriage Act therefore **does not capture the full range of means that can be used to pressure women and girls into (servile or otherwise) marriage** – whether of an adult or minor aged 16-18 years.

Issue of consent is not relevant to children aged under 18 years under the Trafficking Protocol

The Marriage Act also works to allow consent of a minor to apply in certain circumstances where there are no exceptions to the circumstances where consent is irrelevant under the Protocol. Under the Marriage Act, a marriage to a child victim of trafficking whose consent to the marriage had been obtained by duress or fraud would be void. However, consent of a minor aged 16 to 18 years who is a victim of trafficking into marriage, which has been obtained by any of the means provided for under the Protocol other than duress and fraud, would *not* make a marriage to the child victim void under the Marriage Act.

Therefore while Sections 23(1)(d) and 23B(1)(d) of the Marriage Act does seek to protect children aged 16-18years, as well as adults, from forced marriage, **it does not conform with the protection norms for children established by the Trafficking Protocol**. The Marriage Act enables children aged 16-18 years to marry with parental permission or a substitute for parental permission recognised under its provisions, but applies provisions to void a marriage equally to adults and children aged 16 years and above. In contrast, Article 3(d) of the Trafficking Protocol defines a child as aged under 18 years, and Article 3(c) specifies that 'the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered 'trafficking in persons' even if this does not involve any of the means set forth in subparagraph (a) of this article'. The Marriage Act therefore has a protection gap in cases in cases involving Australian children (citizens or permanent residents) aged 16-18 years who, for example, have seemingly 'consented' to an arranged marriage overseas within standard family expectations and cultural norms, to actually find themselves in a servile marriage on destination.

World Vision therefore recommends that sections 23(1)(d) and 23B(1) of the Marriage Act be amended to read as follows, to encompass the broad range of means contemplated

by the Protocol and to ensure that all marriages to victims of trafficking who are minors and adults are void (suggested amendments marked up):

Grounds on which marriages are void

- (1) A marriage to which this Division applies that takes place after the commencement of section 13 of the *Marriage Amendment Act 1985* is void where:
- (a) either of the parties is, at the time of the marriage, lawfully married to some other person;
 - (b) the parties are within a prohibited relationship;
 - (c) by reason of section 48 the marriage is not a valid marriage;
 - (d) the consent of either of the parties is not a real consent because:
 - (i) it was obtained by duress, or fraud, threats, use of force or other forms of coercion, deception, abuse of power, abuse of a position of vulnerability, the giving or receiving of payments or benefits, or by any other means for the purpose of exploitation;
 - (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; or
 - (e) either of the parties is not of marriageable age;
- and not otherwise.

This amendment would allow consent to a marriage of a minor aged between 16-18 years, or an adult, to be rendered void, where the minor or adult is forced into marriage or is married for the purpose of exploitation.

3. Limited extraterritorial reach – trafficking out of Australia

The Marriage Act does not recognise a case where a child is trafficked to a foreign country and no longer domiciled in Australia. Because of this it would not allow marriage to a child who is no longer domiciled in Australia to be nullified. Instead, it allows a marriage solemnised on foreign soil to be nullified where either party is not of marriageable age, but this nullification would only have practical effect if the parties to the marriage migrate to Australia and seek to have their marriage recognised in Australia. The Marriage Act reacts to an act of marriage by rendering it void if it does not comply with its provisions. A pre-emptive approach would extend the territorial reach of the Act and allow for nullification of a marriage conducted overseas involving an Australian minor, whether or not one or both partners were domiciled in Australia.

World Vision urges the Government to further investigate the relationship between, and impact of, the concept of domicile of choice and the level of protection offered under the Marriage Act to Australian adults and minors trafficked overseas into forced or servile marriage.

4. Non-equivalence of offences

Offences for marrying a minor under sections 95(1) and (2) only target the conduct of the party who marries the minor. World Vision considers that all parties involved in the chain of trafficking should be recognised as accomplices to an act of trafficking a child into a situation of servile marriage, and not only the party who marries the child. A pre-emptive approach to the trafficking of children into servile marriage would require that attempts to traffic a child for the purpose of servile marriage,

and attempts to marry a child who has been trafficked for such a purpose, are subject to an appropriate penalty.

5. Non-equivalence of penalties

The penalties for marrying a minor under section 95 are:

- section 95(1): 5 years imprisonment
- section 95(2): either a \$500 fine or imprisonment for 6 months

These penalties are far below the 25 year term of imprisonment penalty for offences of child trafficking that were introduced by the Criminal Code Amendment (Trafficking in Persons Offences) Act.

6. Conclusion

While the current regime of the Marriage Act may be an appropriate means of administering the act of marriage, we submit that it does not adequately address the trauma and abuse that both adults and children face in addition to the act of marriage in cases of servile marriage. The appropriate means of creating criminal offences relating to trafficking into servile marriage is by further amendment of the Criminal Code. The Marriage Act is not an appropriate measure for addressing the criminal aspects of trafficking into servile marriage.

Why the Criminal Code Act 1995 (Cth) is the appropriate measure against cases of child servile marriage

World Vision submits that Government's acknowledgment of the trafficking of children for the purpose of servile marriage as a crime²⁷, and compliance with Australia's obligations under the Trafficking Protocol, dictates that the offence of child trafficking for the purpose of servile marriage be expressly dealt with under the Criminal Code, where other offences of trafficking of children are already provided for. **World Vision therefore recommends** that recommendation 8 of the Report of the Senate Legal and Constitutional Legislation Committee be adopted, 'the definition of 'exploitation' in the Bill be amended to include an express reference to servile marriages'²⁸.

Definition of 'exploitation' in the Criminal Code

Adoption of recommendation 8 of the Report of the Senate Legal and Constitutional Legislation Committee requires amendment to the definition of 'exploitation' in the Dictionary in the Criminal Code. World Vision recommends that the definition be amended to read (suggested amendment marked up):

- exploitation**, of one person (the **victim**) by another person (the **exploiter**), occurs if:
- (a) the exploiter's conduct causes the victim to enter into slavery, forced labour, **marriage** or sexual servitude; or

²⁷ Transcript of doorstep, Senator the Hon. Chris Ellison, Minister for Justice and Customs, 2/8/05

²⁸ Recommendation 8, report by The Senate Legal and Constitutional Legislation Committee, March 2005, p20.

- (b) the exploiter's conduct causes an organ of the victim to be removed and:
 - (i) the removal is contrary to the law of the State or Territory where it is carried out; or
 - (ii) neither the victim nor the victim's legal guardian consented to the removal and it does not meet a medical or therapeutic need of the victim.

Preference for the term 'marriage' vs 'servile marriage'

World Vision recommends the amendment of the definition of 'exploitation' to include the term 'marriage' rather than 'servile marriage' to ensure all aspects of forced and servile marriage are covered. Although the terms 'forced marriage' and 'servile marriage' are often used interchangeably, both may share characteristics but differ in other respects. In addition, the definition of servile marriage contained in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, and put forward by HREOC has two limitations:

1. it only refers to marriage between adults
2. it refers specifically to men and women in relation to exploitative conditions and acts.

If the Attorney General's Department does adopt recommendation 8 of the Report of the Senate Legal and Constitutional Legislation Committee **so that the term 'servile marriage' rather than 'marriage' is used, World Vision recommends** the following definition be adopted in the Dictionary in the Criminal Code and expanded to include elements that acknowledge the conditions in which servile marriage occurs (suggested amendments marked up):

servile marriage is:

Any institution or practice whereby:

- (i) A **person**, 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 **spouse** of a **person**, **their** family, or **their** clan, has the right to transfer **their spouse** to another person for value received or otherwise; or
- (iii) A **person** on the death of **their spouse** is liable to be inherited by another person.²⁹
- (iv) **This includes any institution or practice involving a person aged between 16-18 years of age.**

Elements of servile marriage which World Vision recommends be considered in expanding this definition are:

- that the person's spouse is significantly older than the person;
- that the person is not allowed to control their own fertility;
- that the person does not have equal parental rights;

²⁹ Art 1, para (c), Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery; Australian Human Rights and Equal Opportunity Commission, Submission, 1 March 2005 [Internet - http://www.hreoc.gov.au/legal/submissions/criminal_code_trafficking_bill_qonn.html#endnote6 (Accessed 9 September 2005.)].

- that the person has less control of or access to inherited property or income than their spouse;
- that the person is subject physical abuse and violence without legal or societal recourse;
- that the person may be subjected to humiliation or abuse by their spouse which is condoned by society because the person is perceived as being of inferior position;
- that the person is secluded and their behaviour restricted;
- that the person is threatened with violence, divorce or withholding of necessities in order to make them work more;
- that the person is not allowed to leave the marriage either by threat of force or social disapprobation.

Definition of “Sexual Service” in the Criminal Code

“Sexual service” for the purposes of child trafficking offences under the Criminal Code is defined under sections 271.4(3) and 271.7(2) to mean:

the use or display of the body of the person providing the service for the sexual gratification of others.

While the exclusion of a requirement that such services must be of a commercial nature ensures that this definition is broader than the definition of “sexual service” for offences involving the trafficking of adults under the Criminal Code, World Vision questions whether this definition is broad enough to cover all aspects of child servile marriage.

Section 5 of the Marriage Act defines marriage as:

the union of a man and woman to the exclusion of all others, voluntarily entered into for life.

World Vision recommends that the definition of marriage in section 5 of the Marriage Act be amended to read as follows, so that it expressly includes unions between minors aged 16-18 years old (suggested amendments marked up):

“marriage” means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life. This includes unions consistent with the requirements of this Act where one of the parties to the marriage is aged between 16-18 years old.

Servile marriage involves an act of marriage accompanied by acts that often include sexual services. However, this is typically also accompanied by acts of assault, intimidation, domestic violence, and other kinds of physical, emotional and psychological harm.³⁰

World Vision submits that the definition of ‘sexual service’ does not adequately cover all aspects of servile marriage and would prevent trafficking of children into servile marriage from being prosecuted until the child had performed sexual services. While jurisdictional limitations may prevent prosecution of parties directly involved with a case of servile marriage where a minor is

³⁰ Wijers and Lap-Chew, 73-74, 1999 *in* Trafficking of Women and Children in Indonesia, R. Rosenberg (ed) available at <http://www.icmc.net/files/traffreport.en.pdf>

trafficked from Australia into a situation of servile marriage which occurs overseas, World Vision emphasises the importance of ensuring that agents in Australia involved with trafficking the child overseas can be prosecuted under the Criminal Code as accomplices to offences of trafficking of children and adults. Attempting to implicitly cover acts of servile marriage under the definition of 'sexual service' is not consistent with a pre-emptive approach to all aspects of servile marriage, and further supports amendment of the definition of "exploitation" to expressly include exploitation for the purpose of marriage. **World Vision further recommends** that the amended definition of 'marriage' under the Marriage Act which we have proposed (above) be adopted by the Criminal Code and inserted into the Dictionary in the Criminal Code.

Preference not to introduce a separate offence of servile marriage into the Criminal Code Act 1995 (Cth)

World Vision notes the approach recommended by HREOC for express inclusion of servile marriage in the Criminal Code in the following manner:

- The Bill might define servile marriage using the definition from *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*. As is noted in the Explanatory Memorandum to the Bill, that international instrument was the source of the definition of 'debt bondage', so there is a precedent for that approach.
- The definition of exploitation in item 11 would be amended so as to read (suggested amendments marked up):

exploitation, of one person (the **victim**) by another person (the **exploiter**), occurs if:

- a. the exploiter's conduct causes the victim to enter into slavery, servile marriage, forced labour or sexual servitude...

(paragraph (b) would remain in the same terms).

That amendment would then flow through to the deceptive trafficking offences in proposed sections 271.2(2) and 271.5(2) and the trafficking in children offence in proposed section 271.4. That amendment would also flow through to the trafficking by force/threat offences in proposed sections 271.2(1) and 271.5(1) if those provisions were amended as per the Commission's suggestions in its written submission.

- A specific offence of engaging in conduct causing another person to enter into servile marriage (similar to the debt bondage offence in proposed section 271.8) could also be included in the Bill.³¹

World Vision prefers the approach of amending the definition of 'exploitation' to include the term 'marriage' and amending the Dictionary in the Criminal Code to include our recommended definition of 'marriage', which have outlined in the above section of this submission (above p13) because:

³¹ Human Rights and Equal Opportunity Commission, above, n 24.

- amending the definition of ‘exploitation’ to include the term ‘servile marriage’ rather than ‘marriage’ means that cases of servile marriage only will be covered by the Criminal Code, and not cases of forced marriage;
- creating a separate offence of servile marriage elevates servile marriage as an end purpose of exploitation above the other purposes of exploitation already provided for in the current definition of ‘exploitation’;
- debt bondage is not an end purpose of exploitation where servile and forced marriage is.

Servile Marriage and Slavery

The Senate Legal and Constitutional Legislation Committee has reported that HREOC has:

noted that the internationally accepted definition of ‘servile marriage’ is that it is a practice similar to slavery (that is not slavery per se) and has a different content to ‘forced labour’ as defined in the Bill.³²

Section 270.1 of the Criminal Code defines slavery as:

the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including whether such a condition results from a debt or contract made by the person.³³

This definition relies heavily on the concept of ownership, and the powers attaching to the right of ownership. Although, like the definition of “sexual service” this may cover some aspects of servile marriage, servile marriage has been found to typically involve the conditions mentioned above.³⁴ Attempting to implicitly classify servile marriage under the definition of slavery is inadequate. Once again, classifying servile marriage as slavery per se would not be consistent with a pre-emptive response to all aspects of servile marriage, and would not allow servile marriage to be prosecuted until there is evidence that the “powers attaching to the right of ownership” have been exercised.

Adults and servile marriage

World Vision notes that amending the definition of exploitation to include the terms ‘marriage’ or ‘servile marriage’ will impact the general offence of trafficking in adults under sections 271.2, 271.3, 271.5 and 271.6. World Vision maintains that any amendment of the Criminal Code to expressly provide for offences of forced and/or servile marriage of minors must occur alongside amendments providing for forced and/or servile marriage of adults. **World Vision therefore recommends** that the Government investigate the issue of amending the Criminal Code to expressly provide for cases of adult forced and servile marriage.

Australian Migration law and policy

World Vision recommends that the Government investigate the interaction between forced and servile marriage and Australian Migration law and policy, particularly Australian Migration law and policy relating to the issues of spouses, spousal visas and marriages of convenience.

³² Australia, Senate Legal and Constitutional Legislation Committee, above, n 8, at 17.

³³ s 270.1 *Criminal Code Act 1995* (Cth).

³⁴ Above, list of conditions in servile marriages, page 1.

