Submission to the Justice and Electoral Committee: Marriage (Court Consent to Marriage of Minors) Amendment Bill

1. Research for this submission was carried out by Law Reform student volunteers from the Wellington Community Justice Project (**WCJP**), a law student-lead society and registered charity at Victoria University of Wellington.

2. The WCJP aims to improve access to justice in the wider community, and provide volunteers with opportunities to develop their legal skills through volunteer projects. Law Reform is one of four teams within the WCJP with their primary focus on legislative changes and policy developments.

3. The WCJP supports the Marriage (Court Consent to Marriage of Minors) Amendment Bill (**the Bill**) but makes several recommendations which we believe are necessary to eliminate, as far as possible, forced marriages for minors.

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I Background

[1] Although the legal age for marriage in New Zealand is 18, the current law allows those aged 16 –17 years to marry with the consent of a parent.[1] Statistics indicate that this occurs about 80 times each year in New Zealand. It is estimated that 80% of these 16–17 year olds are female.[2] Thus, forced marriage for minors is a real thing in New Zealand and needs to be eradicated.

II Reasons in support of the Bill

A Significant step towards eradicating forced marriage for minors

[2] The Bill adds a layer of protection where parental protection fails, in requiring court consent after ascertaining the consent of the marrying individuals. This goes a long way towards eliminating coercion and thus forced marriages.

[3] Forced marriage is an issue which is not widely known or addressed. Rather, it is an aspect of society often hidden from public view and thus portrayed as a non-issue or a culture-specific one. In reality many cultures do not actually condone forced marriage,[3] but it is still a problem present in New Zealand society.

[4] At its heart, forced marriage is a form of domestic violence if not involving actual abuse, rape and isolation. Resistance is often met with physical and emotional harm. Essentially, forced marriage is slavery. Moreover, forced marriages at a young age pose a major risk to the health of female victims, whose developing emotional and physical faculties are not always equipped for childbirth.[4]

[5] Furthermore, it must be asked at the age of 16–17 how much of the decision to marry comes from the individual themselves? How much about the lifelong nature of the decision do they comprehend? What motives would propel someone into marriage at that dependent and vulnerable age? They are surely different to the motives one might have at 20 or over. Family pressure may always be a factor in the equation but the

[1] Marriage (Court Consent to Marriage of Minors) Amendment Bill 2017 (256-1) Digest No. 2478.
[2] Office of the Clerk "Should teen marriages need court approval? Have your say" (press release, 9 June 2017).
[3] Priyanca Radhakrishnan "Unholy Matrimony: Forced Marriage in New Zealand" (BA (Masters) Thesis, Victoria University of Wellington, 2012).
[4] World Health Organisation "Child, early and forced marriage legislation in 37 Asia-Pacific countries" (2016).

weight of it may vary at different stages in life. When a person is still financially and emotionally dependent on their parents, as most 16–17 year olds are, can they really be said to have given their full and informed consent? Such a large part of their lives and wellbeing are reliant on the will of their parents. In the majority of cases, parents have the best interests of their children at heart and thus will not exert pressure adverse to their well-being. Unfortunately, we must recognise that there are exceptions and where minors are not being protected by their parents the state must step into that role.

B Arguments against the Bill are unconvincing

[6] The Family and Whānau Violence Legislation Bill, which makes coercion to marry a criminal offence with a possible jail sentence, is another bill which addresses the issue of forced marriage.[5] It has been argued that the current Bill is unnecessary in light of this. Especially as the Family and Whānau Violence Legislation Bill goes further towards the heart of the issue, by not limiting the solution to a specific age group but instead recognises that individuals of any age group may be coerced or forced into an unwanted marriage. Be that as it may, outlawing coercion to marry will be very difficult to regulate. Making it a crime may go some way towards deterrence, but detection remains a significant hurdle. It might be more effective if the current Bill was enacted to aid in detection and the scheme in the Family and Whānau Violence Legislation Bill was used in conjunction to penalise any coercion found by the court in the course of an application for consent to the marriage.

[7] Another argument put forward suggests that having a blanket ban on marriage of minors may be a simpler solution. However, this ignores the reality that the physical and mental development of individuals varies and thus such a rule may arbitrarily restrict autonomous decisions to marry between two fully consenting individuals. The Bill as proposed allows for this while still protecting individuals who may not be mature enough to make such a decision.

[5] Family and Whānau Violence Legislation Bill 2017 (247-1), cl 97.

C Consistency with the international position

[8] Most countries have the legal age of marriage at 18 to 21 years of age, with many having exceptions if parental consent is obtained.[6]

[9] Australian law requires Court consent as well as parental consent for 16–18 year olds wanting to marry someone over 18. Taking part in forcing a marriage is also a criminal offence under the Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013 (Cth).[7] In the Netherlands, marriages where one of the parties is under 18 are not recognised and it is also a criminal offence to force someone to marry.[8] Similarly, in the United Kingdom, forcing marriage has been made a crime. Further sanctions in the form of Forced Marriage Protection Orders are also available.[9]

[10] The World Health Organisation has stated in their report on "Child, early and forced marriage legislation in 37 Asia-Pacific countries" that ending forced child marriages requires not only a raising of the minimum age for marriage in legislation but also efforts to address the root causes of it.[10]

[11] In light of all this, the current Bill is a step in the right direction for New Zealand. It updates our laws to align with that of more progressive jurisdictions and with international conventions.

III Recommendations

A Introduction

[12] First, the WCJP recommends that the Bill should include a requirement for pre-marital counselling. This part of the submission will consider the matter from the position as if the minor has been forced to apply to the Family Court, as that is where issues will arise. Secondly, the WCJP argues that the Bill goes further than the aims it is trying to achieve by reducing parental input further than is necessary.

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[6] World Health Organisation, above n 4.
[7] Section 270.7B.
[8] Government of the Netherlands "Tackling forced marriage" <www.government.nl/topics/forced-marriage/tackling-forced-marriage>.
[9] Anti-social Behaviour, Crime Policing Act 2014 (UK) c 20, s 120.
[10] World Health Organisation, above n 4, at 15.

[13] Two further issues are raised, but they are not discussed to the same extent as the first two submissions. The first deals with a technical error in the Bill, and the second asks what will happen in the case of the application being declined if it is found that there is coercion.

B Pre-marital counselling

[14] Whilst the Bill will improve the legal protections for minors, it may not address the issue in practice. When there is an application to the court for consent to the marriage of minors, the only actual requirement which comes from cl 18 is that the applicant must be given opportunity to be heard. There is discretion as to other requirements. There is still a risk that there will be sufficient pressure upon the applicant such that they will claim to consent to the marriage and will not speak up against the marriage. This is especially so if the minor has already been coerced into applying for the consent of a Family Court Judge. Great effort would need to be made to ensure that the minor's trust and confidence is gained, so that they feel they can be open with the judge. This is especially important when we consider that significant pressure will be put upon the minor. We are concerned that the court environment may not best facilitate the building of trust and confidence, and implementing a system which will actually work may require work to be done outside of the court.

[15] An alternative is to require the parties to participate in premarital counselling sessions. These sessions would help ensure that the parties to the marriage understand what they are committing to, and would be a mechanism for helping to detect whether there is some coercion or undue pressure upon the minor(s). Part of this could involve working with the minor(s) individually to help mitigate pressure from the other party to the proposed marriage, parental pressure and any other pressure.

[16] The implication here is that the counsellor would either support the minor in the hearing, or be permitted to provide evidence based upon the communications between the minor and the counsellor during the counselling sessions.

[17] This implication would require a review of s 46L of the Care of Children Act 2004, which would likely prohibit such disclosure. However, it would be consistent with the

general principles of the 2004 Act and the UN Convention on the Rights of the Child, both of which seek the protection of minors from exploitation. It is also consistent with the New Zealand Association of Counsellors – Code of Ethics; in particular, the exceptions to confidentiality in s 6.2, to allow the disclosure of such important information after effort is made to achieve consent to disclosure from the minor. Disclosure without the consent of the minor could be justified in the circumstances as it may be necessary to prevent the exploitation of the minor.

[18] Premarital counselling can be a useful supplementary tool that provides insight into a proposed marriage, which a hearing may struggle to achieve. In California, the courts are empowered to require the parties to go through premarital counselling, but they do have discretion.[11] The courts in Utah allow the requirement for premarital counselling to be waived if it is not reasonably available.[12] However, we recommend that they be compulsory in New Zealand. Consideration will have to be given as to where the burden of cost will lie. More importantly, the inability of applicants to pay for the premarital counselling is a poor excuse to not have premarital counselling, even though it is a consideration which is expressly permitted in the California Family Code.[13] This is because premarital counselling is an important mechanism for protecting minors.

[19] Regardless of the decision the Select Committee comes to, on the issue of the role of parents, applicants for a marriage between minors should be required to attend pre-marital counselling. The counselling should be aimed at ensuring that minors understand the implications of contracting to marriage, and that they are not being coerced or taken advantage of.

C The role of parents

[20] The explanatory note of the Bill focuses upon the prevention of forced marriages. In its current form, it would help to prevent this. But it goes further than it needs to in order to achieve this goal.

[11] Cal Fam Code § 304.
[12] Utah Code Ann § 30.1.9.
[13] At § 304.

[21] The Bill will result in parents having substantially less control than they currently do and far less control and input than in other jurisdictions. Although the explanatory note of the Bill is clear in wanting to prevent forced marriages, it does not deal with scenarios where parents disapprove of their child's marriage as a minor. This reduced influence is clearly not an intended consequence of the Bill, and it is a matter which should be given express consideration.

[22] Under s 18 of the Marriage Act 1955, parents and guardians of individual minors have control over the granting of consent for minors to marry. This is subject to appeal to a Family Court Judge who can dispense of the requirement for the permission of a parent or guardian where they refuse their consent.[14] Although there is no actual decisive power resting in a parent's ability to withhold consent, the consent of parents is of considerable significance in the current law. Clause 5 of the Bill will remove all of this and have a complete substitution of it with the consent of a Family Court Judge alone. This clause does require that parents be given the opportunity to be heard "so far as is reasonably practicable". However, this is a significantly decreased role compared to the current status of their interest. It also goes further than necessary for the purpose of preventing forced marriages as that aim could be achieved by requiring both parental consent and a Family Court Judge's consent.

[23] It has been said that Utah's approach to premarital counselling "effectively promotes healthy marriages for minors and strikes a balance between state *parens patriae* authority, parental authority, and a minor's individual rights."[15] Utah law requires the consent of a parent or guardian in addition to judicial approval.[16] This requirement is also found in other jurisdictions.[17] It is important to note that while regulating marriage and protecting minors is a priority, the interests of parents are equally important too. The proposed Bill will greatly reduce the influence of the parents and increase the influence of the state in domestic matters. It appears that the Bill will lead to a large step away from what is international practice.

[14] Marriage Act 1955, s 19.
[15] Pamela E. Beatse "Marital Rights for Teens: Judicial Intervention That Properly Balances Privacy and Protection" (2009) 2 Utah L. Rev 625 at 633.
[16] Utah Code Ann, above n 12.
[17] Cal Fam Code, above n 11, at § 302; and Marriage Act 1961 (Cth), ss 12–14.

[24] The Bill goes too far when it could be drafted to allow parents to retain the ability to prevent minors from marriage by withholding consent, subject to appeal to the Family Court. Thus, as is the case in the jurisdictions already mentioned, parental consent would be required along with approval of the Family Court. Although allowing appeal of a parent's decision to withhold consent can arguably lead to the same result as just requiring a Family Court Judge's consent. However, this greater priority and weight to the views of a parent, than what they will have under the Bill. It would be an approach similar to that taken by the Marriage Act 1961 (Cth).[18] This would also better balance parental interests and minor autonomy than what the Bill in its current form will provides.

[25] An alternative is to give parents and guardians an absolute right to be heard. This would increase the weight of their input into the Family Court Judge's decision, particularly where their submissions are in counter to the application for consent. Even if the quasi-determinative power parents and guardians currently possess were repealed, their interests would retain significant importance. This approach is also clearer and less confusing than that described in the above paragraph, but it would result in less control for parents.

[26] If it is determined that the interests of parents and guardians should have more weight, we would endorse the second approach due to its greater clarity. Although it would not provide the same significance to parental interests as the first approach it would still increase the weight of the interests of parents and guardians from their current standing under the Bill. It would emphasise their views are still important considerations.

[27] The WCJP does not advocate one way or the other as to the importance that should be given to the views of parents and guardians. Rather, we wish to remind Parliament that the Bill is a significant change in emphasis, and that it may stray from its original intended purpose.

[18] Part II.

D Further issues

[28] Although the matters here are not discussed in the same depth as the matters above, they are nevertheless important to consider.

[29] First, the Bill purports to amend s 46(3) of the Care of Children Act 2004. This is confusing as s 46 has already been repealed, so there can be nothing to amend without the reintroduction of the old s 46. The Bill should be amended to remove what appears to be a technical error which could create confusion.

[30] The second matter is in regards to the steps taken after the declination of consent by a Family Court Judge where there is perceived coercion upon the minor. We raise this matter out of concern for the wellbeing of the child, which may still be at risk following such an outcome. Such risk would be even greater if a child were to speak out against the marriage, which is surely what is hoped for in this reform. The minor could be subject to further coercion, or to other harm in retaliation. Although we are unable to suggest any solutions as it is a problem which we came to realise only very recently, we believe it is an important matter for which solutions need to be found or created.

E Conclusion

[31] The proposed reform should go ahead, as it is very much necessary. However, it is unlikely that it will be sufficient to ensure the protection of minors. The proposed solution to this is to require the parties to go through pre-marital counselling, which will act as an additional protection, before any consent may be given by the Family Court Judge. The Bill should also be re-examined to see if it can better protect the interests of parents and guardians, which it arguably reduces too far.

[32] In addition to the above recommendations, there needs to be greater awareness, support and funding of organisations like Shakti, which are best placed to help the victims of forced marriages. Enactment of the Bill will help to increase awareness of the forced marriages as a significant issue, as well as raise awareness of refuges and other organisations which oppose forced marriage and look after its victims. Furthermore, it may raise awareness in the victims themselves, that they have a right not to be coerced or forced into a marriage they do not want and that they have the state's protection in

refusing. All of this would allow organisations such as Shakti to better advocate and prevent forced marriages.

IV Regulatory Problems

[33] In implementing this Bill, there arises several challenges to regulation.

[34] First, if the marriages are taking place outside of the New Zealand legal system, such as with cultural or religious marriage ceremonies not constituting a legal marriage, the protections of this Bill would be practically circumvented. Detection would be key, but difficult in such situations as the marriage may never really come to the notice of the court.

[35] Secondly, to what extent does the court need to probe or inquire into the consent of the party to the marriage before giving their consent?[19] If minors may be coerced into a marriage, may they not then also be coerced into convincing the court of their consent? It will also be difficult to distinguish between coercion and encouragement as it may be a matter of degree.

[36] Thirdly, this Bill does not prevent parents from waiting until their child is no longer a minor, to force them into marriage. Although it is to be hoped that by that time they will be less dependent and vulnerable.

V Legal age of marriage – 18 with no exceptions?

A Introduction

[37] While the WCJP supports the Bill for the strong stance it takes against the practice of forced marriage, we believe that it could go further. We recommend that the legal age of marriage in New Zealand should remain at 18 without any exceptions. As a result, 16–17 year-olds would be prevented from marrying.

[38] We make this recommendation for three reasons. First, forced marriages are extremely harmful to the victim and are akin to slavery. Secondly, requiring parties to be at least

[19] Pete George "Is 'forced marriage' bill necessary?" (19 April 2017) Your NZ <https://yournz.org/2017/04/19/is-forced-marriage-bill-necessary/>.

18 before marrying better reflects New Zealand's international obligations. Thirdly, the arguments against increasing the age of marriage to 18 are unconvincing.

B Forced marriages are extremely harmful

[39] Shakti is a support and advocacy agency that is at the front line dealing with victims of forced marriages in New Zealand. The agency indicates that the overwhelming proportion of victims tend to be women and it is common for victims to have been emotionally and physically abused by their partner.[20] Shakti also indicates that a young marriage can cut short a woman's education and career aspirations, placing her in a vulnerable and reliant position.

[40] The consequences of forced marriage can be shocking to say the least. An advocate against forced marriage, Priyanca Radhakrishnan, even says "forced marriage is … a form of violence against women".[21] At the Bill's First Reading a number of Members also emphasised the 'slave-like' nature of being in a forced marriage.[22]

C New Zealand's international obligations

[41] Abolishing all marriages of those under 18 years would better reflect New Zealand's international obligations.

[42] The Convention on the Elimination of All Forms of Discrimination against Women (**CEDAW**) is known as an international bill of rights for women.[23] CEDAW often makes recommendations for nation states in order to end discrimination against women. In 2012 at a CEDAW Committee meeting, concluding statements sent a clear message to the New Zealand Government. The Committee urged New Zealand to "[r]evise the legal minimum age of marriage to 18 years without any exceptions for parental consent".[24]

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[20] New Zealand Family Violence Clearinghouse "Collaboration to address forced marriage in New Zealand; more action urged" (1 August 2013) <https://www.nzfvc.org.nz/news/collaboration-address-forced-marriage-new-zealand-more-action-urged>.
[21] Priyanca Radhakrishnan, above n 3.
[22] Marriage (Court Consent to Marriage of Minors) Amendment Bill 2017 (256-1) (First Reading, 7 June 2017).
[23] UN Women "Convention of the Elimination of All Forms of Discrimination against Women" <http://www.un.org/womenwatch/daw/cedaw/>.
[24] UN Committee on the Elimination of Discrimination Against Women (CEDAW) *Concluding observations of the Committee on the Elimination of Discrimination against Women* CEDAW/C/NZL/CO/7 (2012) at 11.

[43] The Universal Declaration of Human Rights (**UDHR**) recognises the right of free and full consent to marriage. Furthermore, the UDHR insists that consent is not 'free and full' when one of the parties involved is not sufficiently mature to make an informed decision.[25]

D Unconvincing counterarguments

[44] Some might argue that by abolishing marriage for those under 18 years might impinge on cultural values or personal autonomy. Marriage itself is understandably a treasured concept across cultures. However, marriage involving minors cannot be said to have a distinct cultural underpinning. Rather, it has evolved to become a "traditional practice … simply because it has happened for generations".[26] Nothing about this recommendation strips people of the ability to exercise their cultural practices; it merely insists that people wait another year or two to marry.

[45] This recommendation would be the best assurance against the practice of forced marriage in New Zealand. Marriage is a lifetime commitment. This recommendation would ensure that those entering marriage are mature to understand exactly what they are pledging to do. It would also avoid the costs associated with going through the consent process in the Family Court.

VI Concluding Remarks

[46] The WCJP supports the Bill because of its stance against forced marriage for minors. We hope that the Committee give our recommendations due consideration as this is an issue that affects one of the most vulnerable groups of people in our society.

[25] UNICEF "Child marriage is a violation of human rights, but is all too common" (February 2017) <https://data.unicef.org/topic/child-protection/child-marriage/#>.

[26] Girls Not Brides "Why Does Child Marriage Happen?" (2002) <www.girlsnotbrides.org/why-does-it-happen/>.