

Forced Marriage: A Wrong Not a Right Right of Women Response to the Home Office-Foreign and Commonwealth Office Consultation on Criminalisation

Background

Rights of Women is an Industrial and Provident society, which was founded in 1975 to promote the interests of women in relation to the law. We specialise in advising in family law, especially domestic violence and Children Act matters. Rights of Women works to attain justice and equality by informing, educating and empowering women on their legal rights. We are a membership organisation and our activities include producing publications, organising conferences and training courses and undertaking policy and research work. We run a free national confidential telephone legal advice line for women, specialising in family law issues, including domestic violence.

General Overview

As an organisation we are concerned about violence against *all* women, and are particularly concerned that violence against Black and Ethnic minority (BME) women is addressed appropriately and effectively, with the safety and protection of women being the highest priority. We therefore welcome the opportunity to contribute to the Government consultation on the criminalisation of forced marriage. We have chosen not to respond to the individual questions set out in the consultation paper, as we believe the framing of each of the questions simplifies what is in actual fact a highly complex matter, and to attempt to dissect the issues into the questions outlined fails to recognise this complexity and masks the inter-connected nature of the answers to many of the questions raised. We have therefore decided to submit a general position paper outlining our opposition to the criminalisation of forced marriage, drawing on legal, policy and practical arguments. We have not entered into a discussion of each of the four options for criminalising forced marriage, as laid out in the consultation document; such a critique is incompatible with our position that a specific criminal offence is neither necessary nor desirable.

Further, our rejection of the proposed criminalisation of forced marriage, should not be read as condoning the abuse, nor as a call for “non-interference” in communities where forced marriage occurs. Rights of Women bases its rejection of the criminalisation on legal and policy arguments, developed from a woman-centred approach. It is our opinion that an offence of forced marriage is not necessary in light of current criminal law. Further, we advocate non-criminalisation from a violence against women perspective, under which the abuse is viewed through the gendered lens in which it occurs, rather than through the paradigm of race, ethnicity, culture or religion. Rights of Women, are however aware that there may be individuals, organisations or “community representatives” that will also oppose forced marriage under the banner of cultural cohesion, calling for self-policing and labelling State intervention as racist. Rights of Women cannot impress strongly enough our disassociation from such arguments and those that make them. The superficial agreement on opposition to forced marriage is precisely that, superficial and based on fundamentally diametric justifications.

Forced marriage, domestic violence and violence against women

Rights of Women oppose the criminalisation of forced marriage; a position that is underpinned by a woman-sensitive approach which seeks to ensure the safety and protection of women. Forced marriage involves the breach of a number of international human rights norms, including the violation of rights to freely enter into marriage, and to bodily and sexual integrity. All available evidence, including that of the Government Forced Marriage Unit, demonstrates that women are the

overwhelming victims of forced marriage. Whilst we accept that the same evidence suggests that a small minority of forced marriage victims are male; we do not accept that this translates into the consideration of forced marriage as a gender neutral abuse. In this regard, we would like to express our disappointment in the terminology used in the consultation document, which after stating that the majority of victims are female, goes on to consistently employ gender neutral language throughout the document. The Government must recognise that the overwhelming majority of forced marriage victims are female and acknowledge the gendered nature of this form of violence. Gender violence can only be combated effectively and appropriately by employing strategies which are woman-centred and appreciate the nuances of such abuse.

At present, all the State agencies involved (or perhaps more appropriately, those agencies that have a role to play) in addressing forced marriage are working from various definitions of violence against women or domestic violence. With such a variance in the fundamental question of what constitutes violence against women, it is little wonder that there is a lack of coordinated and effective action from bodies such as the police, social services, housing departments, and the criminal justice system. We note that some State agencies have sought to address this in recent years, and are keen to ensure that abuses such as forced marriage are included within broader and re-formulated definitions of domestic violence. For example, we welcome the Association of Chief Police Officers clarification that their domestic violence definition includes abused such as forced marriage and "honour crimes". However, the very use of definitions which explicitly single out violence suffered by BME women, feeds into the "separateness" and "othering" of such abuses. Rather than simply seeking to criminalise specific manifestations of abuse, the more cogent approach would be for the Government to adopt a clear definition of violence against women, encompassing all manifestations of gendered violence, and applying across all State departments, bodies and agencies. In this regard we strongly urge the Government to adopt the definition of violence against women contained within the United Nations Declaration on the Elimination of Violence against Women, under which:

"violence against women" means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life' (Article 1).

Article 2 of the Declaration further states that violence against women encompasses, but is not limited to:

- '(a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;
- (b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;
- (c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.'

Such a definition is specific enough to be enforceable, and at the same time flexible enough to encompass the wide ranging manifestations of violence that women are subjected to. This definition avoids the fragmented and compartmentalised approach which currently exists in the UK.

Violence against Women in Black and Minority Ethnic Communities

Whilst Rights of Women does not subscribe to the rhetoric that forced marriage is an issue of community relations, race, ethnicity or religion, we do recognise that these may be factors in addressing forced marriage, presenting very real cultural barriers in terms of access to services, protection, support and legal justice. To view forced marriage as simply an issue of race or ethnicity, culture or religion, masks the violence suffered by Black and Minority ethnic women. Further, to specifically criminalise forced marriage, in isolation from other forms of violence against women, compounds the perception that violence against women in BME communities is somehow qualitatively different to violence against women in majority communities.

The exoticisation of violence against women in BME communities contributes to the feeling of attack that such communities are already under, which in turn feeds into the more conservative traditionalist elements of such communities that perpetrate abuse against women, such as forced marriage, in the name of cultural cohesion. We strongly disassociate ourselves from such individuals and organisations that may also disagree with the criminalisation of forced marriage, but do so on the basis of completely different and converse reasons. To oppose the criminalisation of forced marriage is not to justify the practice of forced marriage; rather we are seeking to apply a legal analysis to the question, an analysis which draws on our experience of addressing *all* forms of violence against women over the last thirty years.

Using the Existing Criminal Law

From a legal perspective some of the most compelling arguments against the creation of a forced marriage offence is found in the history of using the criminal justice system to address domestic violence. Domestic violence is not in itself a free-standing crime. Rather, there are a range of criminal law offences which deal with violence and abuse (physical, sexual, and in some cases psychological) separate from the motive for committing those acts. Thus as with domestic violence there are a number of criminal offences which may be applied where a forced marriage is threatened or has occurred. For example, parents who take their child abroad for the purpose of forcing a marriage may be charged with child abduction under the Child Abduction Act 1984 or with the common law offence of kidnapping, both of which apply to parents as the perpetrators of the offence.¹ Where there has been confinement, false imprisonment charges may be laid, and other offences may also be relevant such as assaults, including sexual assaults, and theft (for example withholding identification or banking documents to prevent escape). Further, where the victim is a child there are a range of child cruelty and education-related offences which can apply.

This leads us to question the necessity of creating a practice-specific offence given that there are a range of offences that are already on the statute books which are not being utilised in combating forced marriage. Given this analysis of the current law, we are not convinced of the need or desirability of creating criminal law specifically to address violence within BME communities, as opposed to the creation of an offence of violence against women, drawing on the UN definition outline above. Under international human rights law the Government is obligated to protect women from violence, and to exercise due diligence in addressing this violence. This includes the duty to investigate, charge and prosecute violence against women under the criminal law. The translation of this

¹ Child abduction see section 2(2), Child Abduction Act and *Re KR (A Child) (Abduction: Forcible Removal By Parents)* [1999] 4 All ER 954. For kidnapping see *R v D* [1984] 2 All ER 449; although permission to bring charges of kidnapping, as opposed to child abduction, against the parents of a child requires the permission of the Director of Public Prosecutions (section 5 Child Abduction Act 1984).

obligation into practice does not necessarily require the implementation of practice-specific criminal offences, but can be achieved through the use of current criminal offences.

Rights of Women accepts the Government's assertions that the creation of a forced marriage offence has a symbolic value and would offer clarity to those State agencies that have a role in addressing forced marriage. However, these are not, in our opinion, sufficient reasons to enact criminal law. If the Government is concerned with aiding clarity and communicating the unlawfulness of forced marriage, this can be addressed through policy rather than abuse-specific additions to the criminal law which in practice have little substantive value. A comprehensive policy addressing violence against women, including forced marriage, which is consistently applied across all Government sectors, would provide the clarity that is required. As for symbolising the unlawfulness of forced marriage, this could also be achieved through a policy to address violence against women, and a commitment from the police and Crown Prosecution Service to approach the current law analytically and bring charges under existing offence without being distracted by the apparent or perceived motives for the abuse.

It has been argued (including in the consultation document) that much of the "force" involved in forced marriage is manifested as emotional or financial pressure or abuse, and as such the current criminal law does not adequately address the issue. Rights of Women however, calls for an analytical approach, examining each situation to determine whether other criminal offences have been commissioned such as actual bodily harm (where the harm can be constituted by the development of verifiable psychiatric illness²) or potentially fraud and deception related offences. Whilst these offences may not address the totality of the abuse that may be inflicted in forcing a marriage; however neither will any of the proposed offences, at least not without lowering the current threshold of criminality. Whilst Rights of Women urge the Government to fulfil its obligations to intervene and protect women from abuse and violence; we do not advocate addressing the human rights abuse of forced marriage by violating the rule of law and the right to certainty in the criminal law.

Rights of Women does not accept the Government's dissociation of forced marriage from violence against women in general, nor the lack of investigation, charging and prosecution under the current criminal law.

Whilst Rights of Women do not advocate the criminalisation of forced marriage we would nonetheless like to highlight the immense practical difficulties in implementing such an offence. Particular issues include the difficulty of proving the intent to force a marriage and the reliance on victims. With regard to the latter there are lessons to be learnt from work on domestic violence, where victims may not be willing to come forward. This may be compounded in the context of victims from BME communities, where there may be different pressures from the extended family and community impacting upon the woman's ability and willingness to come forward, as well as additional cultural barriers such as fear of racist policing and language barriers. It is widely recognised that reporting of forced marriage is low, and current figures are therefore not representative of the real magnitude of the abuse (as with violence against women generally). There is a very real possibility that in the context of specific criminalisation reporting may decrease further, and the abuse may be driven underground. There are also the very problematic evidential issues with regard

² In *R v Chan-Fook* [1994] 2 All ER 552 the Court of Appeal found that assault causing actual bodily harm, can include psychiatric injury (where confirmed by competent medical evidence). This was confirmed by the House of Lords in *R v Ireland* [1997] 4 All ER 225.

to proving the “force” of such marriages. Whilst Rights of Women support the Government’s assertion that forced and arranged marriages are not synonymous; unlike the Government we recognise that the divide is not clear cut. We find it is useful to consider arranged marriage and forced marriage upon a continuum of consent, acknowledging the grey area between the two. With these practical difficulties, there is the very real possibility, that should a law be enacted, it would be little more than a paper offence.

Working from a woman-centred legal perspective, we cannot see the utility of creating yet another criminal offence. Lessons should be learned from the experience of dealing with domestic violence through the law; namely, that what is required is a comprehensive strategy to address *all* forms of violence against women without compartmentalising specific manifestations into categories and subcategories such as rape and marital rape, domestic violence as intimate partner violence rather than intra-familial violence (which is further subdivided into natal family and family by marriage). This fragmentation of violence against women fails to recognise the complexity and inter-related manifestations of abuse that women suffer.

Using Existing Civil Law

Rights of Women is keen to highlight that a legal approach to forced marriage does not automatically require recourse to criminal law; access to justice for victims of gender violence includes access to civil justice as well as criminal law. This is particularly important in cases of forced marriage as the victim will remain married to their husband irrespective of whether forced marriage is made a criminal offence. In such situations it is vital that women have access to legal advice in order to determine whether to seek dissolution of the marriage, and indeed the form of such dissolution, whether annulment (on the basis that it was entered into under duress and is thus voidable) or divorce is sought, *and* to have access to representation in such proceedings. In the current climate of diminishing civil legal aid, we would argue that Government resources could be better spent addressing these advice and representation costs rather than simply choosing the path of additional criminalisation.

With reference to forced marriage and civil law remedies, we also think that there are lessons which can be applied from domestic violence. One of the more cogent arguments in favour of creating an offence of forced marriage is the protection that it may offer women. However, as some thirty years of experience in addressing domestic violence has shown, the criminal law process is not victim centred and the protection of the woman is not the primary concern. Under the criminal law process, a woman who has been subjected to violence becomes a witness to the proceedings, which are brought in the name of and on behalf of the State, not the woman; this lack of control over the process may in some cases further the disempowerment of women. Thus experience in domestic violence cases has taught that women who have suffered abuse (which can include forced marriage) may wish to pursue civil remedies for protection, rather than turning to the criminal law. As with criminal law, civil law remedies can provide protection to women, as well as empowering them, providing the woman with the power to initiate and cease proceedings. In addition the various types of orders that can be imposed (for example non-molestation and occupation orders) can have a power of arrest attached to them; this places the intervention of criminal justice agencies solely at the feet of the perpetrator. However, as with dissolution of forced marriage, women require access to legal advice to make informed decisions about the type of protection they require, and once such decisions have been made, they require access to legal representation in civil law proceedings.

In relation to child-victims of forced marriage (under 16 years old), there are a range of orders which can be sought from the courts through public law proceedings. We urge the Government to seriously address the lack of action by social services in this area, and the continued confusion among practitioners as to what their responsibilities and options are in addressing forced marriage. This confusion remains despite the publication of the forced marriage guidance document for social services. This demonstrates the fact that it is not simply enough to produce the guidance, Government must proactively publicise such guidance and monitor its implementation in an ongoing process of evaluation; this is the case for all sectors, including the police.

Conclusion

Rights of Women opposes the criminalisation of forced marriage; a position that is underpinned by a woman-sensitive approach which seeks to ensure the safety and protection of women. Forced marriage is an issue of violence against women and to view it within the paradigm of race or ethnicity or religion conceals and silences the violence suffered BME women. Thus the creation of a specific offence of forced marriage is not, in our opinion desirable. It feeds into the perception of the exoticisation of violence against women in BME communities, and as such plays into the hands of so-called (male) community leaders, and indeed some State agents, that label interventions to protect BME women racist or advocate self-policing (which in reality simply perpetuates the abuse of forced marriage). Rights of Women are *not* advocating non-intervention, nor do we label intervention to protect victims of forced marriage as racist. Rather, we are extremely concerned that the abuse of forced marriage should be addressed without disassociating it from the wider context of violence against women. What is required is action against *all* violence against women and not simply arbitrarily focusing on and compartmentalising specific manifestations. We cannot see the rationality in creating an additional criminal offence, when there is a lack of implementation of the current law. What is required is a greater awareness, both among the public and within State agencies, that there are many criminal offences which can be used in addressing forced marriage. It is our opinion that forced marriage should be addressed within the parameters of the current criminal law, and that justice for victims of forced marriage can include civil as well as criminal justice, but access (and thus legal aid) to such justice must be enforceable and not simply a paper right. Finally, if the Government is truly committed to addressing violence against women, and not simply seizing upon specific abuses (and thus fragmenting the reality of abuse), we would advocate the enactment of a Violence Against Women Act which criminalises all violence against women, drawing upon the universal language of the UN Declaration on the Elimination of Violence Against Women.

Rights of Women
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