



Rights of Women Consultation Response: Forced Marriage (Civil Protection) Bill

About Rights of Women

Rights of Women is a well established and expanding not-for-profit feminist women's organisation committed to informing, educating and empowering women on the law and their legal rights. We are a membership organisation, with almost 200 members, both individual women and other women's organisations. Our activities include producing publications, organising conferences and training courses and undertaking policy and research work. We run two national confidential legal advice lines for women provided by women, one general advice line specialising in family law issues, including domestic violence, and another on criminal law and procedures in relation to sexual violence. /

Forced Marriage (Civil Protection) Bill

Rights of Women support Lord Lester's Forced Marriage (Civil Protection) Bill. The Bill seeks to protect survivors/victims of forced marriage against serious abuse by using civil remedies in the family courts. The Bill has been prepared by Lord Lester of Herne Hill QC, together with Southall Black Sisters and a team of leading family lawyers working in this field.

Rights of Women's Position on Forced Marriage

Violence against women is a key area of Rights of Women's work, both in terms of service provision and policy work. We are concerned that violence against all women, and particularly that experienced by Black and Ethnic minority (BME) women, is addressed appropriately and effectively. In line with international human rights laws, Rights of Women considers forced marriage to be a form of violence against women which violates a number of rights, including rights to freely enter into marriage, and to bodily and sexual integrity.

It is Rights of Women's position that specific forms of violence which BME women experience disproportionately, such as forced marriage are part of a universal continuum of violence against women, which cuts across all boundaries, including race, ethnicity, religion, culture and class. Violence against women is a violation of internationally guaranteed human rights, rights which the UK has agreed to (such as the UN Convention on the Elimination of All Forms of Discrimination Against Women and the Beijing Platform for Action), and which are included in UK law under the Human Rights Act 1998.

1 Sexual Violence and Criminal Law Legal Advice Line: 020 7251 8887 (open Mondays 11am-1pm and Tuesdays 10am-12pm). Legal Advice Line: 020 7251 6577 (open Tuesdays, Wednesdays and Thursday 2-4pm and 7-9pm and Friday 12-2pm).

Rights of Women believes that the Government has an obligation under international law to exercise due diligence in addressing all forms of violence against women, including forced marriage. Please see below, 'The Need for a Legal Definition of Violence Against Women'.

In Rights of Women's response to the Government's 2005 consultation on the criminalisation of forced marriage,² we stated that rather than creating new offences, it is important to implement the current criminal laws, where applicable, but also to secure women's access to civil justice. Women and children need to have the option of using civil remedies which can help create a safe space for them. Civil law remedies can protect and empower women, and importantly unlike criminal sanctions, allow them to initiate and cease proceedings. We therefore welcome the opportunity to contribute to this consultation on the creation of a civil remedy for forced marriage.

An Important Note on Stigmatisation

Before responding to the consultation questions, Rights of Women would like to take this opportunity to address concerns raised by some that a forced marriage specific law is racist or stigmatises those communities where such human rights abuses occur. As a feminist organisation concerned with the protection and safety of women, Rights of Women strongly disagrees with the use of such concerns as a reason not to support the Forced Marriage Bill.

As noted above, it is Rights of Women's position (and that of United Nations bodies) that forced marriage is a form of violence against women. According to international human rights law arguments, violence against women cannot be justified by culture, religion or ethnicity. To view forced marriage as an issue of race or ethnicity, culture or religion, masks the violence experienced by Black and Minority ethnic women. 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 cultural barriers in terms of access to services, protection, support and legal justice. Thus many women, who have experienced forced marriage, have found it difficult to access assistance, support and protection, particularly from State bodies and institutions such as the police, social services, and the courts. It is therefore vital that women who have hitherto been marginalised from protection are able to apply for a remedy and access justice. The creation of a specific civil remedy for forced marriage is not about singling out certain communities, but rather is about redressing this historical marginalisation. It is about recognising that BME women who fear being forced into marriage are a specific group that have historically been marginalised or excluded from the legal process and who often face very real barriers in terms of accessing assistance.

Rights of Women believes that arguments based on stigmatisation cannot be used to deny women justice. The same argument can be made in relation to any work which seeks to challenge violence against women within BME

² See 'Forced Marriage: A Wrong Not a Right, Right of Women Response to the Home Office-Foreign and Commonwealth Office Consultation on Criminalisation', available at www.rightsofwomen.org.uk

communities. As such this stigmatisation argument can and is used to challenge the valuable work of many BME women's organisations providing support, advocacy and advice for women. Indeed, the issue of stigmatisation has consistently been used by many individuals, organisations or "community representatives" under the banner of cultural cohesion, calling for self-policing and the labelling of any type of State intervention or protection as racist. Rights of Women is very concerned that women's organisations, and particularly BME women's organisations, do not align themselves with those who have traditionally opposed their work to challenge violence against BME women.

Further, we believe that criticisms of the Forced Marriage Bill based on stigmatisation of a particular community or religion, simply serves to perpetuate the myth that forced marriage occurs in only these communities/religions. This contradicts the evidence of both the Government, the police, statutory sector agencies and women's organisations, which have reported cases from Middle Eastern, African, Turkish, Kurdish, Chinese and other communities.

The Need for a Legal Definition of Violence Against Women

It is Rights of Women's strongly held position that the above arguments on the relationship between violence against women, ethnicity, culture and religion, signal the need for a definition of violence against women in UK law. This would clarify that matters such as forced marriage are an issue of violence against women, and that ethnicity and culture etc, are relevant to understanding barriers and access. Right of Women has consistently called for a statutory definition of violence against women based on the United Nations Declaration on the Elimination of Violence against Women, which reads:

"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 experience. As the UN Special Rapporteur and other human rights bodies, have further explained, violence against women includes forced marriage and other specific forms of violence against women that BME women experience disproportionately.

CONSULTATION QUESTIONS

1. Do you consider that the Bill should be incorporated into the Family Law Act or should it remain a free-standing measure? What do you think are the advantages and disadvantages of either approach?

Rights of Women believes that the Bill should remain as a free-standing measure. Rights of Women notes the concerns made by some, including women's groups, that a forced marriage specific remedy could be used to stereotype or exoticise. However, as noted above, we strongly oppose the argument that this fear should be used to stop the passage of the Forced Marriage Bill and the creation of a remedy for women who have thus far been denied protection and justice. As a women's organisation, our primary aim is that violence against women is addressed, and that women, including BME women, are provided with protection and access to justice. Rights of Women believe that the creation of a specific civil remedy for forced marriage is not about singling out certain communities. Rather, it is about recognising that BME women who fear being forced into marriage are a specific group that have historically been marginalised and often denied justice.

Rights of Women believe that domestic violence and forced marriage are both forms of violence against women, as noted above. However, we are not convinced that a violence against women perspective means that it is appropriate for the Forced Marriage Bill (FMB) to be incorporated into the Family Law Act 1996 (FLA).

The legal concepts contained within the FMB are very different to those contained within the FLA. For example:

- The Forced Marriage Bill is seeking to create different remedies to those under the Family Law Act. The FMB creates a preventative injunction, which aims to stop a forced marriage from occurring. Whereas the FLA contains orders aimed at stopping something which has already occurred, such as seeking the cessation of domestic violence or the removal of a perpetrator from a home.
- The FMB allows for compensation to be awarded in certain circumstances, which the FLA does not permit.
- The FMB allows a woman to seek an injunction against any person in relation to the forced marriage. However, the FLA only allows a woman

to seek an injunction against ‘associated persons’ which has a specific legal meaning, and is unlikely to include extended family members or community leaders. Conversely, the FMB would allow an injunction to be sought against such persons.

- The FMB allows either a woman, a next friend or any other ‘concerned person’ to apply for an injunction. The concept of third party litigation is an important innovation (see question 9 below). In contrast, the FLA only allows those who are associated persons to seek remedies.³

Rights of Women believes that the very distinct conceptual differences between the FMB and the FLA demonstrate that these two pieces of law should not be joined or appended. We believe that the FLA is already a complex piece of legalisation which ordinary women find difficult to access (we run national outreach training on orders under the FLA as well as producing a do-it-yourself guide for women on obtaining an injunction under the FLA). We believe that joining the two pieces of legislation will create practical difficulties for women trying to secure remedies under both the FLA and the FMB (should it become law). We also believe that the practical difficulties this would create would go against one of the main advantages of the FMB: its ease of use for both victims and the courts.

Rights of Women believes that the issue of joining the FMB to the FLA highlights, once again, the need for a statutory definition of violence against women, which encompasses all types of violence against women, drawing on the UN definition (see above).

2. Do you think that the time limit for nullity petitions in cases of forced marriage should be extended? What do you think the time limit should be, or should there be no time limit at all? What are the arguments for and against a time limit? Should a forced marriage be void rather than voidable?

Rights of Women is not convinced that the time limit for nullity petitions should be extended for cases of forced marriage. Such a reform would create a hierarchy of claims for nullity petitions outside the current three year limitation period. Rights of Women believe that the better course of action would be to either not have a time limit for all nullity petitions, or to reform the exception to the time limit rule. Currently the exception to the time limit rule requires that a judge is satisfied that the petitioner (person seeking the annulment) has experienced a mental disorder within the three year period and that it would be just to grant permission for annulment proceedings outside of the three-year time limit. One possible reform could be to remove the need for the petitioner to have experienced a mental disorder, and to base the exception on whether or not granting permission for proceedings outside of the time limit would be fair.

³ Section 60 of the FLA 1996 contains a provision on third party applications. However, this provision has never been implemented.

Rights of Women believes that forced marriages should continue to be considered voidable marriage, falling within the “duress” ground for such marriages. Where a nullity order (or decree) has been sought, irrespective of whether a marriage is void or voidable, a woman will have access to ancillary relief, i.e. financial orders in relation to property and finances. However, with void marriages, a nullity order is not strictly required, which means that the parties to the marriage may treat it as having never happened. Thus if a forced marriage is treated as void, a woman in this situation who does not have a nullity order (for example, if she did not know this was available) may be particularly vulnerable and without access to resources because she has not sought ancillary relief. In contrast, for a voidable marriage to be annulled a nullity order must be sought; the marriage is only annulled once an order has been obtained from a court. Rights of Women therefore believe that forced marriage should continue to be considered voidable, not void.

3. What should be the status of the forced marriage guidance? For example, should public authorities or other persons be under a duty to have regard to the guidance? Should courts be required to take the guidance into account when determining any judicial review proceedings in which the guidance is relevant (for example, immigration decisions)?

Rights of Women supports the statutory status of the forced marriage guidance. The guidance that is currently available for the police, social services, and education professionals are excellent guides to legal obligations and good practice. However, as these useful resources are only ‘guidance’ they have no statutory footing and agencies are not required to refer to the guidance when dealing with a forced marriage case. The discretionary nature of the guidelines is very problematic, as it means the service victims/survivors receive is very sketchy. It is important that State agencies understand that forced marriage is unlawful and that they do have a responsibility to address this abuse of human rights, by challenging its occurrence and providing protection for victims/survivors. Creating a duty for public authorities and other bodies subject to guidance would be a positive move in addressing the current “postcode” lottery. An additional problem with the forced marriage guidelines is implementation (see question 6, below).

4. Do you think that guidance on forced marriage should be issued to these groups? Are there other groups, bodies or individuals who should be expressly included in this list?

Rights of Women agrees with the list of agencies outlined in the consultation document, namely:

- the police;
- immigration officers and providers of immigration advice and immigration services;
- local authorities;
- educational establishments providing full or part-time school or further education;

- NHS bodies;
- the Legal Services Commission
- the Legal Services Board;
- the Bar Council; and
- the Law Society of England and Wales; and
- any others designated by the Secretary of State.

We would also like to add the Judicial Studies Board and Housing Departments and Agencies. It is important that guidance is issued for the Judicial Studies Board, which can be used by the Family Committee and incorporated in the Family Law Bench Book, which is the guide for judges on law, process and procedures. Further, we believe it is important that housing is an area which is specifically highlighted so that it is not overlooked. It is crucial that Housing Departments/Agencies are made aware that forced marriage is a form of violence against women, and that like domestic violence it is an issue which needs to be included in any assessment of housing need and provision.

5. Do you think that forced marriage guidance should cover these matters? Are there other matters which should be addressed by guidance?

Rights of Women agrees that the issues highlighted in the consultation document should be included within forced marriage guidelines.

- the difference between arranged and forced marriages;
- the legal framework under Part 4A of the Family Law Act 1996;
- the role of the police, social services, immigration officers, and education, health and other professionals in preventing and dealing with cases of forced marriage; and
- the impact of forced marriage on the victim's education, health and employment opportunities.

In addition, Rights of Women suggests that the following issues are incorporated into guidance:

- the legal framework under the Children's Act 1989
- the inherent jurisdiction of the High Court, as it applies to children in wardship cases and to adults.

Further, we think that it is important that the guidelines for each of the agencies identified above are consistent in their content and style. It is important that each of the agencies can understand their specific role and that of other in assisting a victim/survivor of forced marriage. In this regard, we assume that any future guidance would be developed by the Government's Forced Marriage Unit which has produced the exiting documents. Development of future guidance should include consulting with those women's groups, particularly BME women's groups, that have experience in addressing forced marriage.

6. Do you think that the forced marriage guidance should be monitored? Do you have any suggestions for the effective monitoring of forced marriage guidance?

Rights of Women strongly believes that forced marriage guidelines need to be subject to a monitoring and evaluation process. The guidelines which currently exist have much to commend them. However, as they are only guidance and are not monitored or evaluated, there is no objective process of assessing how well (or not) they are working. This is clearly not acceptable.

We believe that determining the specifics for a process would benefit from wide-ranging consultation. However, in the interim Rights of Women believe that the monitoring and evaluation process should be standardised throughout the various agencies subject to guidance and that the process should involve both internal and external mechanisms, in particular drawing on the expertise and experience of women's groups working to address forced marriage.

7. Do you think that threats and benefits to third parties should be covered by the Bill?

Rights of Women supports the inclusion of threats and benefits to third parties. Violence against women can be perpetrated in this manner. It is our understanding that threats to a third party can be a very real factor in a significant number of forced marriage cases, as for example where a sibling or a non-approved of partner may be threatened.

8. Do you think that the Lord Chancellor should be able to make appropriate decisions about the levels of court where action may be taken to obtain an injunction or compensation?

Rights of Women is not convinced by the need for this provision to be included in the Bill. We are concerned at placing such discretion in the hands of a Minister. We believe the more cogent approach for determining the appropriate level of court to hear a forced marriage case would be to use a procedure similar to that currently used for Children's Act proceedings, as set out in the Children Act (Allocation of Proceedings) Order 1991.

Accordingly, all county court judges with a "ticket" (i.e. special training and guidance) can hear cases involving the Children Act and other family law issues, such as domestic violence. As Rights of Women believes that forced marriage is a form of violence against women, like domestic violence, we advocate the use of family ticketed judges to hear applications for injunctions and other remedies under the Forced Marriage Bill. With regard to transfers to the High Court, Rights of Women suggests the following allocation of proceedings, similar to article 12 of the 1991 Order, which has both discretionary and mandatory elements. Accordingly a discretionary transfer could be made where it is in the best interests of the applicant (whether she or a third party is applying on her behalf). Alternatively, where the following

issues exist, it could be mandatory that the case be transferred to the High Court:

1. any case which may involve the Hague Convention or Brussels II (within Europe);
2. any case which may involve enquiry into the domestic law of a non-Convention country;
3. any case in which there have been previous High Court proceedings;
4. wardship.

9. Do you think that third parties should be able to seek injunctions to protect forced marriage victims? What type of organizations should be allowed to take action on behalf of victims? Should the Bill spell out the types of organisations who may do so, or should this be left to the court's discretion in each case? Should the Bill include any other provisions in relation to third parties?

Rights of Women recognises that there are situations where women cannot, for a number of reasons, initiate legal proceedings on their own behalf. This may be particularly relevant to cases of forced marriage, where, for example, a woman may be being held against her will.

Rights of Women is cautious of the Forced Marriage Bill containing a statutory definition of what type of organisation should be permitted to bring third party applications. We are concerned to ensure that women's organisations providing support, advocacy, should be not be excluded from making third party applications. However, we recognise that women experiencing violence, including forced marriage, seek assistance from a variety of organisations and individuals. There is no standard type of organisation that a women may turn to, and the Forced Marriage Bill needs to be flexible enough to recognise this.

Rights of Women understands that several groups have expressed concern about the Bill's inclusion of third party applicants. However, we believe that analysis of current laws and procedures should mitigate against such concerns.

Firstly, a significant proportion of previous forced marriage cases which have already been heard in the High Court under its inherent jurisdiction, have used the mechanism of a "litigation friend" (formerly next friend). In English law a litigation friend can represent an applicant in court when the applicant is considered unable. This can be because she is a child or is considered to not have legal capacity, for example because she has a mental disability or illness or is a vulnerable adult. To our knowledge, this system has worked particularly well in forced marriage cases that have previously gone before the courts, especially where the applicant is not in England and Wales at the time of the case. Thus, the concept of a third party applications already exist in current forced marriage case law. Further, should the Bill be enacted, it would not affect the use of litigation friends in High Court cases which rely on the

court's inherent jurisdiction. Thus not including third party applications in the Bill could create inconsistency between forced marriage cases, depending on whether the remedy being used comes from the Bill or the High Court's inherent jurisdiction.

Secondly, all applications made to the civil (including family) courts can be struck out where the court considers the application to be 'frivolous, vexatious or otherwise an abuse of process.' This general power already operates as a potential safeguard in all civil cases, and would continue to do so in forced marriage cases under the Bill which may be brought by third parties.

Thirdly, as the Bill makes clear a 'concerned person' will have to apply to the court for permission to seek a remedy on the woman's behalf. This means that it will not simply be open to anyone to go to court and seek an injunction on a woman's behalf. The concerned person will have to convince the court that they are indeed a concerned person.

It may be that a legal test is for determining who constitutes a 'concerned person' is suggested by those cautious of third party applications, or indeed by the courts themselves. In this regard, Rights of Women would like to highlight our concerns over the use of the concept of consent. We believe that it would be inappropriate to incorporate the concept of consent into any legal test of who constitutes a 'concerned person'. This is for two reasons. Firstly, one of the main purposes of including third party applications is the recognition that women experiencing forced marriage may be unable to access the courts themselves, for example, where they are being held against their will. Secondly, women may also be unwilling to seek an injunction on their own behalf because they fear the consequences of such an action. However, a woman may still want protection and be willing to have another concerned person apply to the court on her behalf. Rights of Women believes that there is a real risk that incorporating the issue of consent provides an opportunity for perpetrators and others (including extended family or community members) to exert undue pressure on a woman to withhold or withdraw her consent. If it is decided that a test is required, Rights of Women suggests adapting the litigation friend test currently used in proceedings involving children and vulnerable adults (Civil Procedure Rules 1991, Rule 21). Thus, a concerned person would have a duty to fairly and competently conduct the application on behalf of the woman, and would be required to:

- not have an interest in the proceedings which is adverse to that of the woman; and
- all decisions she takes in the proceedings must be for the benefit of the woman.

10. Do you think that compensation should be available to victims and potential victims of forced marriage? If yes, do you think that there should be any additional limitations on the right to receive compensation, in addition to those already contained in section 63E(3)?

Rights of Women believe it is important that women who have experienced forced marriage should be entitled to compensation. This should include those losses she incurs due to the actual, attempted or threatened forced marriage. The abuse of human rights alone justifies the need for compensation. In line with the United Nations, Rights of Women believes that that the State has a responsibility to use due diligence in addressing all forms of violence against women. This includes providing civil remedies and compensation. Compensation is particularly important for those who have experienced violence because the violence can have a lasting impact. For example, a woman may be disadvantaged by having been taken out of school by her parents for the purpose of a forced marriage. A forced marriage may have prevented a woman from obtaining a job or gaining other experience. These are important issues, particularly as a woman may have to find a new home, seek education and training, and other additional relevant costs.

The Forced Marriage Bill is innovative and provides new protection for victims/survivors of forced marriages which is not currently available. We therefore believe that the provision of compensation in the Bill should not be at a lower standard than is currently available under the Protection from Harassment Act 1997. Under the PFHA damages can be awarded for any financial loss resulting from harassment (as defined by the Act) as well as damages for anxiety. Rights of Women believes that the Bill's provision for compensation should be consistent with (if not higher) than the PFHA.

11. Should forced marriage victims be entitled to recover damage for financial loss?

Rights of Women believes that it is important that women who have experienced forced marriage should be entitled to recover damages for financial loss, for the same reasons as set out above.

12. Do you think that the existing scope for compensation under the Protection from Harassment Act provides an adequate remedy? Should the same court be able to award damages to a forced marriage victim, in addition to considering injunctive relief and/or nullity petitions, or should separate proceedings be required for compensation?

Rights of Women understands that one of the main advantages of the Forced Marriage Bill is its simplicity for both victims/survivors and the courts. We therefore believe that the same court should be able to award damages to a forced marriage victim, in addition to considering injunctive relief and/or nullity petitions. Requiring separate proceedings for compensation would not fulfil the aim of trying to create a simple and accessible remedy.

13. Should the Bill include a specific provision about legal aid?

It is Rights of Women's strongly held position that the Forced Marriage Bill (FMB) must contain a specific provision on entitlement to legal aid. In the current climate of civil legal aid reform, it is important that women will be able to access the remedy proposed by the Bill. A remedy on paper which cannot

be enforced by women (or third parties) is very unlikely to provide additional protection beyond what is currently available in civil law, which is a key motivation for the Bill. Such a provision would clarify that legal aid is available under the Bill (providing that applicable eligibility requirements are met) in line with the provision for legal aid for other family law remedies, such as those applied for under the Family Law Act 1996. Rights of Women believes that such a provision could help to ensure the remedy is accessed and should help reduce any confusion (and thus delay) in the provision of legal aid by the Legal Services Commission.

Rights of Women also strongly believe that the legal aid provision must make it clear that remedies contained in the FMB are to be considered part of the family law framework, akin to orders for domestic violence under the Family Law Act 1996. This is critical because the Government has very recently announced that complex family law cases, including domestic violence, will be exempt from some of the future legal aid reforms. This means that such cases will not be subject to fixed fees for legal aid, but instead they will continue to be paid for on an hourly basis.⁴ The Government also announced that “financial eligibility for legal aid for domestic violence victims will be improved in April 2007, with both income and capital limits able to be waived, by the LSC, on a discretionary basis.”⁵ Whilst Rights of Women believes that there are cogent legal and practical reasons why the Forced Marriage Bill should not be incorporated into the Family Law Act, we have made it clear that forced marriage and domestic violence are both forms of violence against women. We therefore strongly believe that access to justice for remedies for both forms of abuse should be the same, with the application of the same legal aid rules to both.

Conclusion

Rights of Women would like to highlight its support for the Forced Marriage (Civil Protection) Bill. This Bill is a significant step in ensuring that the law provides access to justice for the many victims/survivors of forced marriage who are currently denied justice.

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⁴ 'Improved legal aid for victims of domestic violence' Department for Constitutional Affairs Press Release 1 March 2007 (GNN ref 144595P), available at <https://www.gnn.gov.uk/content/detail.asp?ReleaseID=268003&NewsAreaID=2&NavigatedFromSearch=True>

⁵ As above.