

NEWHAM ASIAN WOMEN'S PROJECT
FORCED MARRIAGE CIVIL PROTECTION BILL
RESPONSE TO THE CONSULTATION ON AMENDMENTS TO FAMILY
LAW ACT¹
MARCH 2007

About Newham Asian Women's Project

Newham Asian Women's Project (NAWP) is a London-based charity which was established in the mid 1980's to address issues of domestic violence within the South Asian community. We believe our involvement in working with and supporting South Asian women and girls at a grassroots level for the past two decades has provided us with insight into their needs specifically in the context of all forms of domestic violence, sexual abuse and self-harm. Consequently, over the years our services have been strategically developed to provide a holistic approach to issues that affect our client base. Our support services include safe refuge housing, counselling programmes, youth projects and activities, mental health support, legal advice, education, training and career development. We deal with about 150 enquiries related to forced marriage (FM) every year.

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¹ Imkaan, a second tier national charity, specialising in domestic violence, who support Asian women and children experiencing domestic violence, have fully endorsed NAWP's response to the consultation.

Background

In 2005, the Joint Foreign and Commonwealth Office and Home Office Forced Marriage Unit (JFCO/HO/FMU), consulted on proposal to create a specific criminal offence related to forced marriage. Newham Asian Women's Project welcomed and supported the need to create early intervention and preventative mechanisms to combat such marriages. At the time we argued that, on balance, we did not believe that creating a specific offence would be the most effective way to deter this harmful practice and provide adequate protection for victims. In agreement with many other key organisations (i.e. Ashiana, Rights of Women and Southall Black Sisters) working in this area, we stated that such legislation would be problematic.

1. Advantages of Making Amendments within the Family Law Act of 1996

We welcome the efforts of Lord Lester of Herne Hill QC in recognising that the issue of forced marriages needs more committed attention than it has received, and thus we support proposals to amend the Bill.

However, we would like to raise some issues in regards to tightening the content to avoid "implementation problems". The procedure for obtaining injunctive relief appears to be similar to that for obtaining injunctive relief in other domestic violence situations under the Family Law Act, and for this reason, it would be a natural extension to incorporate the provisions into the Family Law Act. The courts, the police and family lawyers are already familiar with the workings of the Family Law Act and such incorporation would involve minimal "disruption" and costs – and most importantly, swifter adoption by those seeking this redressal. It would be a fairly simple exercise to amend the current documentation and procedures that already exist on an application under the Family Law Act to include forced marriage.

In our experience, civil remedies for violence and abuse seem to offer the possibility of better outcomes: There is a lower standard of proof, and the woman is the subject of her own actions, rather than merely an object of proceedings. It also has been evident in our front-line work that civil remedies provide the necessary scope to encourage public discourses and legal understandings of violence against women. Encouraging the use of civil law in forced marriage cases therefore may lead to more effective remedies for survivors. However, to make sure that civil remedies do offer protection, there should be training and guidance available from the Law Society and other professional bodies regarding the use of the proposed new Part 4A of the Act in cases of forced marriage. Non-governmental organizations (NGOs) should be equally equipped to support victims through prevention and education/awareness work so as to avoid "implementation problems".

More importantly, creating a prohibition on forced marriages and providing an injunctive relief for breach of the prohibition within the ambit of FLA places it in the same legislation that provides for non-molestation order and other injunctions that are widely used in situations of domestic violence. We have long argued that forced marriage should be seen as a form of domestic

violence so that the structures, policies and services that are now available to survivors of domestic violence are made available to survivors of this specific form of domestic violence, namely, forced marriage.

By placing the sections relating to forced marriages within FLA, it will be easier for applicants to use one single piece of legislation. It is not difficult to anticipate that many potential applicants of injunctions for breach of the prohibition of forced marriages will need to get a non-molestation order and other order(s) available under Part IV of FLA. In fact, we know of examples of cases where women facing a potential forced marriage have gone to court for getting a non-molestation order section 42 of FLA and it will be easier for them to use the same legislation for obtain forced marriage specific injunctions as provided in the draft Bill.

Disadvantages of a Free-Standing Measure

In our view, a free-standing law on forced marriages will not achieve any greater purpose than an amendment in the FLA. By creating a specific legislation on forced marriages, a distinctive law on the issue will be created instead of recognising forced marriages as a form of domestic violence. For better response to survivors of forced marriages, there is a growing need to integrate the responses, services and remedies available to *all* forms of domestic violence.

As an organisation providing advice and support to survivors of domestic violence, we have often experienced that statutory agencies, including police and social services do not treat cases of forced marriages as a form of domestic violence. Owing to this restricted understanding of forced marriage, it is common for survivors of forced marriage to not receive same service as any other survivor complaining of domestic violence might. To give a concrete example to illustrate this point, early this year, we had a client who had fled a potential forced marriage and was homeless as a result. We approached the local Homeless Persons Unit to request for temporary accommodation for this client in absence of any appropriate refuge space being available for her. This client's application was rejected and the local authority stated in a letter to our client, "you have a disagreement with your parents about marriage issues but that does not constitute domestic violence".

There are various examples like the one noted above, which elaborate the limited understanding that agencies have about forced marriages, which is seen as a culture-specific issue alone rather than a form of domestic violence. Such limited understanding on the part of service providers and in particular, by statutory agencies and public bodies leads to inconsistent response by these agencies to survivors of different forms of domestic violence.

It is not clear why a free-standing act should be any easier for victims to use and understand. The actual wording of the Act will remain essentially the same. Surely, if there is to be any simplification, it should be in the language of the Act. Furthermore, an assumption is being also made that victims will be "going it alone" when in fact the vast majority will rely upon family lawyers to

make the applications for them. In addition, there have been various 'DIY Injunction kits' available for survivors of domestic violence to apply for injunctions under the FLA and similar kits can be made available for the proposed Part 4A of the Act.

2. Nullity Petitions

The time limit available to make a nullity petition in cases of forced marriage should be extended. The argument for such extension is that it takes the victim time to arrive at a stage where she is able to take action against her forced marriage. This requires substantial support from agencies and her own empowerment. Shortly after her forced marriage she is vulnerable and could suffer any form or combination of violence which will continue to subjugate her within the relationship. She may not be in a position to seek a nullity in her existing circumstances. A forced marriage should be voidable rather than void. From the perspective of women we see, it is clear that they are more likely to pursue nullity where the forced marriage is voidable especially where they may be children resulting from the forced marriage. While service providers and other professionals may be comfortable using terms such as forced marriage, it must be remembered that this terminology is not readily used by perpetrators or victims. A voidable marriage will subsist until formally dissolved by the court. The advantage of a void marriage is that it will be treated as never having existed and no formal decree is required to dissolve the marriage. However, unless both parties reasonably believed that the marriage was valid and the husband is domiciled in England and Wales, the children of such marriage will be treated as illegitimate. There should be no time-limit but there should be a legal presumption that the longer the marriage, the more likely it is that it was valid and the onus would have to be on the victim to overturn such presumption. One could end up with a scenario in which a wife who has been married 20 years asserts that her marriage was forced. In such circumstances a court would be very reluctant (and rightly so) to dissolve the marriage because it was forced. The victim may have to demonstrate, for example that the threat that existed before had been removed for example, by the death of a relative responsible for the pressure to remain married.

3. Forced Marriage Guidance

Below, we provide some examples of guidance on Forced Marriage which are neither exhaustive nor comprehensive, but presented as an indication of the kind of guidance we expect to see developed alongside the implementation of the amendment to the Act. With any law, there must be guidance and that guidance should be monitored for compliance and linked to the monitoring within a statutory framework. An Act alone, or any amendment is not good enough especially when it come to issues such as forced marriage which may confuse professionals in the field.

3.1 Police, Social Services and Educational Institutions

From our experience, we have observed that awareness about the existence of guidelines is minimal among the professionals in Section 2.3.1 of the consultation document. Where professionals are actually aware of the guidelines, they may not have received enough training in how to implement the guidelines. There is an urgent need to take appropriate measures to implement the existing guidelines. We receive regular requests from school teachers and social workers to advise them on how to approach a case of forced marriage but while we will continue to provide support to those who seek assistance, we are of the view that such piecemeal responses will not take us far in providing standard and holistic responses to the sensitive issue of child protection and gender violence. It is also pertinent to mention here that the departments concerned may want to produce further editions of the guidelines and include more case-studies so that clear examples of action to be taken are included in the guidelines. We further believe that guidance should be put on a statutory footing to ensure that it is enforced and implemented and that it ultimately services as an example of shared good practice.

3.2 Housing

In situations where a young person is made homeless owing to abuse and/or threats of forced marriage, our experience of referring such a person to the local council for housing assistance has not always been positive. Many housing departments (as illustrated above) do not recognise forced marriage as a form of domestic violence. There is also a danger that a potential forced marriage might be seen as a 'teenager's disagreement with the parents' resulting in inappropriate response to such young person. Because of this, we are of the view that clear guidelines are required for them. We are aware that local authority housing departments, where they continue to exist, may not have the appropriate resource available to young people. The response that we have often received, given the reduction in stock from local authorities, has been that 'we just have not got enough sustainable housing options available'. That is, housing of good standard quality in accessible areas: factors that contribute to sustainable tenancies. We suggest that guidance to housing authorities should include advice and referral to alternative housing providers and monitoring of take-up of referrals made in forced marriage cases through a duty in respect of homelessness or the equivalent. In terms of a longer term solution, we suggest that local authorities should set explicit housing allocation targets in their strategic plans, for young people and women fleeing domestic violence.

In addition, there is a lack of supportive housing for young girls. Most specialist refuges take women above the age of 18 years, leaving a gap for younger girls. There is a need for refuge places for young girls up to the age of 18 years. Existing providers like Newham Asian Women's Project should be considered within local development plans and national affordable housing targets with resources released to accommodate need.

3.3 Assistance with Educational Grants.

Despite forcing their child into a marriage, many parents want higher education for their children and give support in fees and other expenses. In our experience, many young women find themselves in situations where they can protect themselves from a possible forced marriage by escaping from their parents' home but at the cost of their academic careers, due to lack of continuing finance. Many survivors of forced marriages find themselves in a very difficult situation (often leaving them in serious emotional turmoil due to loss of contact with their [birth] family) and find themselves in a situation where they have to abandon academic pursuits due to lack of financial assistance. The situation is exacerbated for young girls of less than 18 years and in full-time education, as the availability of state welfare benefits for them is minimal. In many cases, access to higher education may be the way to empowerment and may be an exit route from the cycle of abuse. We are of the opinion that young girls fleeing forced marriage should have access to educational grants, should they want to continue with their education.

4. Threats and Benefits to Third Parties

See 6

5. Jurisdiction of Courts

The only courts who should entertain such applications should be the County Court and High Court. They are much better equipped to deal with family applications than the Family Proceedings Court with experienced judges that deal exclusively with family matters. The decision on the choice of court should not be left to the Lord Chancellor as there is a risk that he may base his decision on the choice of court on the most cost effective route (i.e. the Family Proceedings Court) rather than the most effective one.

6. Role of Third Parties

Newham Asian Women's Project believes that it is up to the individual whether or not they wish to apply to the court for an order under any forced marriage legislation and it would be wholly inappropriate for any third party, NAWP or otherwise, to effectively force a victim to apply for redress in such circumstances. Even if consent is given we do not believe that it would be appropriate for organisations like NAWP to apply on behalf of victims in light of the issue of confidentiality.

NAWP strongly disagrees with the remedies being open not only to the victim but also "any other concerned person". This is a considerable departure from the current law where any application for any remedy can only be brought by the person seeking redress or where the person is a minor (or suffering a mental incapacity) by his "Litigation Friend." "Concerned Person" has been very widely defined and it is open to abuse (even with the safeguard

that any such concerned person must seek the specific permission of the court.)

It is not inconceivable that a concerned person could abuse the provisions of the Act in the following circumstances:

- Where an embittered ex partner who falsely alleges that the “victim” is being subjected to a forced marriage
- Where the local authority brings proceedings on behalf of a victim because they have had to re-house the victim at their expense and wish to seek “compensation” to cover that victim’s housing costs (we note that local authorities have been specifically mentioned as an appropriate concerned persons).
- Social Services or School approaching Court for an order this provision in a situation where they think that a young person is being forced into a marriage without understanding the context fully. For example, there might be an arranged marriage, which a social worker might interpret as being forced or situations where a teacher without being aware of the cultural situation at a pupil’s home becomes concerned and interprets it as a forced marriage situation.

7. Civil Proceedings and Compensation

We are of the opinion that compensation should be made available to victims and potential victims of forced marriages and believe that no additional limitation is required on the right to receive compensation, in addition to those outlined under Section 63E (3).

8. Public Funding (i.e. Legal Aid)

There have been several cuts in access to public funding in the last few years, especially in areas of family law and immigration – two issues that affect South Asian women and girls escaping domestic violence and forced marriage. Divorce cases and sometimes cases related to nullity of marriage are only undertaken under the ‘legal help’ scheme, which only allow for a fixed number of hours’ work by the solicitors, leaving women who want to contest divorce or plead nullity without access to legal representation and, in effect, without access to justice. Similarly, with the changes brought in by the Office of Immigration Service Commissioner relating to the practice of immigration law, there are very few firms of solicitors who undertake immigration work with the assistance of public funding. This has had a serious impact on non-British women who want to avail themselves of the domestic violence concessions in the immigration rules. We are of the opinion that public funding should be more easily accessible in the area of immigration law.

The income assessment for entitlement to public funding means that even women on low incomes are unable to access public funding. It is important to bear in mind that many women escaping domestic violence and forced marriage may be responsible for bringing up a child or have other educational expenses; or they have to set up a new home. They therefore need to maintain an income to meet their needs and in the process lose out in securing public funding.

We are of the opinion that public funding should be more easily accessible to women in forced marriage and domestic violence situations and would like some assurances that this will be the case. What is the point of creating laws if there is no access to resources because of funding limitations? Further, there would be no logic in making public funding available for some parts of the Family Law Act but not others.

9. Additional Comments

9.1 Abolition of 'No Recourse to Public Funds' Rule

It is clear that there has been an effort by government to provide assistance to some immigrant women experiencing domestic violence. However, women with insecure immigration status, who have been subjected to gender-specific violence with no recourse to public funds, remain unprotected and have no access to government assistance. The most progressive changes have been prompted by women's groups campaigning for greater legal protection and economic assistance, the June 1999 abolition of the primary purpose rule being a notable case. Noticeable changes in legislation have been well meaning, but there remain serious problems in the implementation and unintended consequences of legislation. This clearly limits its effectiveness. While the government aims to protect those victims of forced marriage and other forms of domestic violence, there is also the politically driven need to be seen to be tough on illegal immigration. To this end we echo those suggestions put forward by many women's groups and further identified by Gill and Sharma (2005) who proposed the following in a recent paper to Women's Aid on No Access to Justice: Gender, Violence and Immigration Law in the UK. The suggestions relate to proposed legislative changes and include making changes to the Domestic Violence, Crime and Victims Act, in order to help (im)migrant women who face forced marriage and forms of gender-specific violence:

- All victims of domestic violence who are subject to immigration control should receive benefits and housing under the Housing Act 1996.
- The Government should retrieve these funds from spouses, provided that there is no further risk of harm to the victim or her family.
- The Domestic Violence Immigration Rule should be extended to all victims of domestic violence subject to immigration control.
- The types of evidence required to prove domestic violence under the Domestic Violence Immigration Rule should be extended, and include:

adjudicator decisions, victim and witness testimonies and reports and letters from voluntary and statutory sector agencies.

While the changes in the immigration rules have facilitated the granting of indefinite leave to remain to women who come on spousal visas after a marriage and face domestic violence, they do not have access to public funds. If such a woman was forced into the marriage and subsequently wants to find help and leave the abusive relationship, she finds herself in an extremely difficult situation as she is unable to access safe housing and welfare benefits. The non-availability of safe exit options obliges such a person to remain in her forced and often abusive marriage. We are therefore of the view that women in such circumstances should be given access to public funds.

9.2 Forced Marriage as part of the Violence against Women (VAW) Framework

We have consistently argued throughout that forced marriage should be perceived and treated as a form of domestic violence. The benefits of such a strategy are quite obvious:

- It fits into the existing framework
- The term domestic violence is already recognisable
- Existing legislation and remedies can be used for forced marriage as well
- Domestic violence is viewed as a wrong and a crime
- We would avoid 'culturalisation' of forced marriage (FM) as a form of violence separate from other forms of violence against women from the South Asian diaspora. In relation to this point it is evident from our work there is an urgent need by the government to address the racist logic that underpins the culturalist response to FM and that there should be a real commitment to addressing FM within an integrated definition as well as an integrated Violence Against Women strategy.
- FM would no longer be viewed as a culture-specific issue and would become just a part of wider discussion of domestic violence.

We are of the opinion that the definition of domestic violence should be expanded to include forced marriage as an instance of such abuse. All the initiatives on domestic violence will then be applicable to forced marriage and other forms of gender-related harmful practices.

There are various definitions of domestic violence accepted by a range of departments and agencies. We are of the view that Part 4A of the Family Law Act 1996 should itself contain a comprehensive definition of domestic violence which should include forced marriage amongst others (like dowry-related abuse and female genital mutilation) as forms of abuse. In the current framework, forced marriage is seen as a cultural issue rather than an issue of violence against women and of domestic violence. This means that survivors of forced marriage may not be able to access some of the services that may be available to survivors of domestic violence, which is unfair treatment.

9.3 Resources

There does need to be a committed recognition of the NGO sector in terms of resource support - currently there is minimal statutory resourcing of and investment in the specialist NGO sector. This sector is crucial in implementing activities aimed at eradicating forced marriage. Newham Asian Women's Project is one of the leading organisations in the UK which recognises that forced marriage violates a number of human rights and has a long history of combating all forms of violence against women and have been instrumental in garnering community support for women's rights. Our work is also rigorously infused within the framework of rights, principles and obligations, both nationally and internationally.

We would therefore like to seek some assurances:

- To ensure that the Bill will have the confidence of victims and that victims will come forward to report this conduct, sufficient support mechanisms must be put in place.
- Victims would be supported and sufficient resources allocated to ensure that support mechanisms operate effectively.
- It would be helpful if the civil remedy could be monitored to establish whether it was effective and whether it meets the needs of the victims for which it had been introduced.

Newham Asian Women's Project
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