

CENTRE FOR CHILD AND FAMILY LAW REFORM

1 In December 2001 the Centre for Child and Family Law Reform prepared a paper making various proposals for legislation in relation to the problem of forced marriage. Not long before the government's Working Group on Forced Marriage party had published its report A Choice by Right, and over the next few years a consensus developed that legislation was required. In this paper we summarize developments since 2001 and make suggestions for amendment of both law and practice.

2 Our starting point is the recognition that forced marriage is a serious interference with the human rights of those forced into marriages "without their free and full consent". (Universal Declaration of Human Rights, Article 16(2)). We recognise the important distinction between forced marriages and arranged marriages, which are, by their nature, consensual. There are a myriad of circumstances in which a marriage can be forced, ranging from emotional, financial and intellectual pressure to kidnapping and threatening to kill.

3 In 2005 the Forced Marriage Unit (FMU) was created as a joint Home Office and Foreign & Commonwealth Office initiative. Later that year it issued a consultation Forced Marriage – A Wrong Not a Right. The paper sought views on whether a specific criminal offence would help combat forced marriage. In June 2006 the Government decided against introducing legislation to this end.

4 In November 2006 Lord Lester introduced the Forced Marriages (Civil Protection) Bill to provide for remedy by way of an injunction to prevent a person from forcing another into marriage and to protect a person after a forced marriage. The Government took up the Bill at Grand Committee stage in April 2007, and the Forced Marriage (Civil Protection) Act 2007 ("the Act") came into on 25 November 2008. It operates by inserting additional sections into to the Family Law Act 1996.

5 Inevitably it has taken time for knowledge of the powers available under it and the associated procedures to be disseminated among stakeholders, principally the courts, police forces, local authorities, and voluntary organisations. Fifteen county courts have been designated to deal with applications for forced marriage protection orders (FMPOs). The courts chosen to handle these cases were selected as being, on the demographic characteristics of their catchment areas, most likely to receive applications for a FMPO, based on information from the FMU.

6 In November 2008 statutory guidance entitled The Right to Choose was issued pursuant to section 63Q of the Family Law Act. This guidance states that it is targeted at directors and senior managers of agencies involved in dealing with forced marriage cases, and covers matters such as training, inter-agency working, and outreach work. It is not intended to be consulted by front-line practitioners. The chapter in relation to services for vulnerable adults is quite limited in relation both to procedure and legal remedies.

7 In June 2009 the Ministry of Justice produced Multi-Agency Practice Guidelines directed at professionals working within health, education, police,

children's social care, adult social care and local housing authorities to encourage multi-agency partnership working. This guidance, intended to supplement the statutory guidance, is comprehensive and sensible. In particular, it counsels caution in organizing family group conferences and is disclosing information to family members or other third parties. Authorities are urged to liaise with the FMU in any case with a foreign dimension, and to refer to a family panel solicitor if "specific legal advice" is required.

8 Section 63A of the Act provides that proceedings may be commenced by a "relevant third party" ("RTP") without leave of the court. In November 2008, a public consultation asked what need existed for relevant third parties, what type of people or organisations should act and what safeguards were required. Generally respondents supporting conferring RTP status on local authorities in order to enhance existing work to protect adults and children. The Government's response published on 13 November 2008 set out its plans to designate local authorities as an RTP once safeguards were in place, and this provision was implemented on 1 November 2009.

9 November 2009 also saw publication of One Year On, an assessment of the first year since implementation of the Act. In 2008 the FMU received some 1600 reports of forced marriages, of which 420 became cases. In 2009 the FMU gave advice or support to 1682 cases, of which 86 percent of these cases involved females.

10 To the end of October 2009, 83 applications had been made under the Act. Although the report acknowledges some difficulties with recording, 18 are recorded as "adult victims", 39 as "child victims", 15 as third party applications, and 11 as "other applicants". Of the total 13 are recorded as being made while the person to be protected was outside of the United Kingdom. The majority of applications were dealt with ex-parte; orders were made in a substantial majority of cases, and a power of arrest was attached to most of these. In only 4 cases were applications recorded as having been withdrawn, suggesting that the greatest difficulty is encountered prior to the making of the application.

11 Among its conclusions, the report recommended that further consideration should be given to increasing the number of court with forced marriage jurisdictions. Given the small number of applications made, we agree, and consider that this should take place as soon as practicable. However, it must be recognized that at this stage even those courts currently able to exercise the jurisdiction have not had significant experience of hearing applications under the Act. While applications can be relatively simple, they often involve layers of complexity and a need for understanding of matters infrequently encountered within domestic disputes. Beyond that, the technicalities of dealing with undisclosed evidence (currently, pursuant to guidance, the province of High Court Judges) or alternatively victims or family members abroad (to which the same could be said to apply) are matters of great sensitivity. It must be remembered that a case which seems simple at first instance can become complicated, and dangerous to the victim, very quickly. Accordingly, we propose that specialist training be provided to judiciary by practitioners experienced in the field and honour based violence experts, whether or not the number of forced marriage courts is to be increased

12 One of the positive developments since implementation has been the Forced Marriage Independent Domestic Violence Adviser (FM-IDVA) Pilot. IDVA projects run through voluntary agencies have existed since at least 2005. The Pilot involved making grants available to eleven voluntary support projects operating in 11 of the 15 areas covered by designated forced marriage county courts in order to enable them to dedicate a worker to forced marriage cases. The evaluation of the Pilot published in June 2010 was positive, although it concluded that it was not appropriate to confer RPT status on voluntary organisations.

Local Authorities

13 The role of local authorities is particularly important because they are the only bodies with RPT status. It is the experience of some practitioners that social workers and local authority legal departments may look at complaints of forced marriage in the context of care proceedings, and as such seek to surmount what is an imagined evidential threshold prior to issuing proceedings. There is some anecdotal suggestion by practitioners that more applications under the Act are made by police authorities, notwithstanding that they must apply for leave to make the application.

14 Further, the evaluation of the FM-IDVA Pilot noted some uncertainty as to the respective role of the IDVA and the local authority:

While the majority of [domestic violence] services were aware of the status of IDVAs in terms of making a third party application, it is evident that further clarification is required in that currently, only the local authority is the designated RTP and this means children's services and adult services and that the council/authority legal team could reasonably be expected to take the case to court, even if there was an IDVA service involved. This did not seem to be an issue where the IDVA service was employed by the authority. The council's legal team would issue the application with an affidavit from the IDVA in support.

15 If a local authority applies directly for an FMPO, then the difficulty and delay in locating a suitable solicitor and applying for legal aid can be avoided. This may be particularly important given the very uncertain status of family legal aid, and the likely diminution in the number of providers.

16 We propose that guidance should require that any local authority whose boundaries overlap those of a designated county court should employ at least one social worker to function as an FM-IDVA. The concept of a statutory advocate is already familiar under the Children Act. The presence of a local authority IDVA would provide a focal point for referrals by colleagues in the authority. It might also serve as a catalyst to stimulate awareness of the issue within the authority, helping to overcome what can sometimes be a division between children's services and adult services.

17 Finally in relation to children, in our view the government's Working Group concluded correctly that education and support for those involved, especially children, is essential. Local authorities have a crucial educational role to play in publicizing the problem of forced marriage and the steps which can be taken by or on behalf of

persons to be protected. In our initial paper we identified the possibility of legislative amendment as a means of encouraging social services departments in discharge of their obligations under Section 17 of the Children Act (“the CA”) in relation to children threatened with forced marriage. We proposed that the Secretary of State should be invited to use the powers given to him by Section 17(4) of the CA to amend Part 1 of Schedule 2 and that he should lay before Parliament an order amending Schedule 2 Part 1 of the CA by adding a new paragraph 1 (3) to the following effect:

Every local authority in discharge of its duty in relation to paragraphs 1(1) and 1(2) shall have regard to the services provided by them to the victims and potential victims of forced marriages.

In our view this amendment would still be helpful, and would complement the suggestion made above in relation to FM-IDVAs.

18 In relation to young people over 18, the matter is more complicated. The power given a local authority by the Act to apply for an order on behalf of a person to be protected is not subject to any upper or lower age limit. However, the Act confers no other power on the local authority, and imposes no duty to make an application, or even to investigate. Nor do the various community care and health statutes appear to permit services to be provided to a person to be protected who is not otherwise eligible to receive them.

19 There is government guidance regarding the protection of vulnerable adults, but this term lacks statutory definition. The definition employed in the 2000 guidance No Secrets: Guidance on developing and implementing multi-agency policies and procedures to protect vulnerable adults from abuse appears to be widely adopted. This refers to a person “who is or may be in need of community care services by reason of mental or other disability, age or illness; and who is or may be unable to take care of him or herself, or unable to protect him or herself against significant harm or exploitation”. Again, this does not appear directly relevant to forced marriage. In January 2010 the government announced following a consultation review of No Secrets that an Inter-Departmental Ministerial Group on Safeguarding Vulnerable Adults would be set up. It appears, however, that this has not happened.

20 On 24 February 2010 the Law Commission published its consultation paper Adult Social Care. The Commission considered (at paragraph 12.20) that “. . . in certain circumstances local authorities are already under a duty to investigate an adult at risk and consider whether services are necessary and what, if any, further action should be taken.” However, the duty would arise under the community care legislation, and the Commission went on to note (at paragraph 12.21) that, “The community care assessment duty was not framed primarily with adult protection cases in mind, and it is often an unsatisfactory mechanism for dealing with them.”

21 In this light the Law Commission concluded that the position should be clarified by statute. It proposed provisionally that “our future adult social care statute should place a duty on local authorities to make, or cause to be made, such enquiries as it considers necessary where it has reasonable cause to suspect that a person appears to be an adult at risk and consider whether there is a need to provide services or take any other action within its powers in order to safeguard that person from harm.” In then went on (at paragraph 12.41) to suggest a definition of “adult at risk” consisting of two limbs:

- (1) a person aged 18 or over and who:
 - (a) is eligible for or receives any adult social care service (including carers' services) provided or arranged by a local authority; or
 - (b) receives direct payments in lieu of adult social care services; or
 - (c) funds their own care and has social care needs; or
 - (d) otherwise has social care needs that are low, moderate, substantial or critical; or
 - (e) falls within any other categories prescribed by the Secretary of State or Welsh Ministers; and
- (2) is at risk of significant harm, where harm is defined as ill-treatment or the impairment of health or development or unlawful conduct which appropriates or adversely affects property, rights or interests (for example, theft, fraud, embezzlement or extortion).

To avert any possible uncertainty concerning whether assistance in relation to forced marriage constitutes an adult social care service, we consider that definition should be extended to include“(f) is or may be a person to be protected within the meaning of the Forced Marriage Act”. If the legislation sets out a comprehensive list of local authority powers in relation to adults, then assistance to persons to be protected should be included.

22 On 12 July 2010 the Department of Health published the White Paper, Equity and Excellence: Liberating the NHS. In that paper, the Government declared that it would publish in 2011 a further White Paper taking account of both the Law Commission proposals and the conclusions of the Commission on the Funding of Care and Support, due to report in the summer of this year. In November 2010 the Government published A Vision for Adult Social Care. It is envisaged that a Care and Support White Paper will be published toward the end of 2011, and a Social Care Reform Bill introduced in 2012. In order to put assistance to persons to be protected on a clear statutory footing, we consider that this bill should given effect to the Law Commission proposals set out above including the amendment we have suggested to the definition of “adult at risk”.

Legal Aid

23 Legal aid can pose problems in cases of forced marriage. Speed is often essential, and it may be difficult for a young person or a sympathetic adult to find a solicitor, let alone to collate evidence of means. To some extent this problem will be overcome if local authorities themselves commence proceedings as relevant third parties, although it would still be appropriate for the person to be protected to be represented.

24 In March 2009 the Legal Services Commission issued guidance in relation to forced marriage applications. Applications may be made only by providers holding family contracts. The Funding Code Criteria are the same as those in domestic violence cases. That is, “Legal Representation will be refused unless the likely costs are proportionate to the likely benefits of the proceedings, having regard to the prospects of obtaining the order sought and all other circumstances.” Practitioners report some refusals in forced marriage cases. Eligibility is also governed by the domestic violence rules. That is, there are no income or capitals limits above which

legal aid will not be available, although the applicant may be required to pay a contribution.

25 We consider that the person to be protected should be represented in all cases, akin to children in care proceedings. We suggest that legal aid should be made available without means or merits testing for the purpose of making applications under the Act. There is precedent for this approach in public law children proceedings and abduction proceedings. Given the limited number of applications made, and the likelihood that most applicants would be eligible under the means test, and it appears to us unlikely that this proposal would result in significant additional expenditure. In terms of forthcoming changes to the selection of legal aid providers, we consider that any firm which is able to make abduction applications should also be permitted to make forced marriage applications, as the expertise required is similar.

The disclosure of evidence

26 Practitioners have reported that difficulty may arise in relation to disclosure when an offence goes to trial. The person seeking protection by way of orders may also seek to remain in the bosom of his or her family, and would accordingly not wish the fact of the complaint to be revealed to the family members. Where such disclosure would give rise to a risk that the Article 2, 3 and 8 rights of the alleged victim would be infringed it has been deemed appropriate not to disclose the said evidence. This has been held to be an integral part of the protective function of the Act (A Chief Constable and AA v YK & others [2010] EWCA Fam 2438), and it is stressed in guidance.

27 In a straightforward case where material is disclosed to all parties of course no problem arises. However, where there are issues of disclosure (again, for example, A Chief Constable and AA v YK & others) this can then follow into the criminal proceedings, in which case it is entirely plausible that police officers involved in the proceedings under the Act might also play a part in the investigation and in subsequently giving evidence. In such a case it is possible that the officer giving evidence may, by virtue of his duty, be compelled to reveal evidence previously undisclosed in the Forced Marriage Act proceedings, to the detriment of the person to be protected. We understand that practitioners routinely advise a separation of investigative duties between those dealing with civil proceedings and any concurrent criminal investigation for the protection of the alleged victim. The conflict of the respective duties of an officer in such a situation may, however, be difficult to reconcile.

The Criminal Law

28 In our initial paper we noted that the Working Group did not support the creation of a new, freestanding offence of forcing a person to marry. This view is still widely shared by practitioners. First, individual criminal acts committed in the course of forcing someone to marry can often be the subject of criminal proceedings. Second, it is argued that possibility of criminal proceedings will deter persons to be protected from commencing forced marriage proceedings. We accept that these are persuasive arguments.

29 Mindful of those objections, the Working Group considered it preferable to support the legislative method adopted to deal with racial aggravated offences in the Crime and Disorder Act 1998, ("the CDA"). The CDA did not seek directly to criminalise racism, but rather to adopt a two-pronged attack against crimes motivated by racism. The first was to identify a number of specific offences were identified which are commonly used to further racist ends, offences with low or relatively low maximum sentences. To those offences were attached satellite offences, for example racially aggravated common assaults, that is, a common assault committed with a racist intent. The second prong was a general provision, in Section 82 of the CDA, which requires the court in any criminal matter which is racially aggravated to treat that motivation as a factor making the offence more serious. We consider as well that it should be provided that the court should state that it has treated the offence as so aggravated.

30 We remain of the view that the criminal law has a potentially important role to play. In part this is because concerns have been expressed about the effectiveness of the Act. It was reported recently (Times, 2.2.11, p3) that in only 5 of the 254 cases in which orders have been made steps have been taken against those who have breached an order, and that in none of these has a conviction been obtained. We consider that, as happened in relation to domestic violence, society must make it clear that forced marriage is unacceptable. Accordingly, we continue to support the approach suggested by the Working Group. Effect might best be given to this by incorporating the relevant provisions in a criminal justice statute.

31 However, pending the introduction of primary legislation, we consider that the issue of forced marriage should be considered further by the Sentencing Council. The guidelines produced by the Council specify aggravating factors in relation to various offences. In February 2008 the Sentencing Guidelines Council published its "definitive guideline" in relation to assault, including at paragraph 16 the comment that,

Where an offence was committed in the context of an attempted honour killing or in an effort to force a victim into an arranged marriage, the general aggravating factors 'abuse of trust' and/or 'abuse of power' will invariably be present and will be taken into account when assessing the seriousness of an individual offence.

32 This guideline remained in place following the replacement in April 2010 of the Sentencing Guidelines Council by the Sentencing Council, but will be replaced with effect from 13 June 2011 by a fresh definitive guideline. This new guideline considers particular offences in greater detail, but does not comment at equal length on general principles. Perhaps for this reason it appears to omit any specific reference to forced marriage. In our view this is unfortunate, and should be reconsidered by the Council at the earliest opportunity. Particularly in light of this, we consider further that the Council should ensure that the issue of forced marriage is considered whenever a guideline is developed or amended. We recognize, as Lord Ackner pointed out in the debate on the CDA [Hansard, 12.2.98, Vol 585: 1294-5] that, in the absence of providing for aggravated offences, there is a possibility that the issue might arise only following conviction, requiring the judge to deal with it by himself. Nonetheless, in our view the importance of deterring forced marriage outweighs any additional burden on the judge.

33 The Centre would be grateful for any comments on this paper. These should be directed to Lucy Cheetham, Chambers of Jonathan Cohen QC, 4 Paper Buildings, London EC4Y 7EX (020 7427 5243) lc@4pb.com.