



Human Trafficking and Slavery in NSW

Post-hearing Responses to the
Parliament of New South Wales
Legislative Council

Select Committee on Human Trafficking In New South Wales

Anti-Slavery Australia
Faculty of Law
University of Technology Sydney
PO Box 123, Broadway NSW 2007

Anti-Slavery Australia welcomes the opportunity to provide further information to the Legislative Council Select Committee on Human Trafficking.

In response to the questions of Legislative Council Select Committee on Human Trafficking (the Committee) during the hearing of 6 March 2017 (the hearing), we provide the following:

1. Statistics on the use of the Anti-Slavery Australia online E-Learning Course
2. The opportunity to adapt New South Wales Apprehended Domestic Violence Orders to protect adults facing forced marriage.
3. Information on elimination of slavery and human trafficking from New South Wales public procurement supply chains through amendments to the New South Wales Procurement Policy Framework.

Pursuant to the request of the Chair, attached is the Anti-Slavery Australia Policy Paper on the need for an Australian Anti-Slavery Commissioner.

1. ANTI-SLAVERY AUSTRALIA E-LEARNING COURSE STATISTICS

The Anti-Slavery Australia E-Learning Course is the first free Australian online training program for frontline workers from community organisations, government, teachers, health care professionals and law enforcement, dealing with slavery and human trafficking. The E-Learning Course was funded by the Commonwealth Government and was launched on 25 March 2014. The E-Learning Course offers comprehensive training on human trafficking, slavery and slavery-like practices including forced labour and forced marriage. The course also covers principles for working with trafficked people and details available support, indicators, and referral pathways.

Modern Day Slavery


Activity 1 of 6 in Modern Day Slavery

Slavery is universally accepted as a crime against humanity. The **Universal Declaration of Human Rights** states in **Article 4**:

‘No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.’

Slavery takes away a person’s freedom, it dehumanises them and places them in a system of control and abuse.

When many people think about slavery, this type of imagery is brought to mind:



Am I not a man and a brother

Figure 1: Activity 1 of the Modern Day Slavery Quest

As of March 2017:

- 1930 people have signed up for the E-Learning course,
- 50,984 lessons have been completed, including 6,134 lessons since October 2016.

The response to the E-Learning Course has been overwhelmingly positive. As of January 2017, 80% of people who have completed the E-Learning Course would recommend it to a friend or colleague, and 80% of people felt that they had a strong understanding of slavery and human trafficking after completing the course.

2. ADAPT APPREHENDED DOMESTIC VIOLENCE ORDERS TO PROTECT ADULTS FACING FORCED MARRIAGE

In our previous submission to the Inquiry into Human Trafficking and Slavery in New South Wales, we recommended that the New South Wales government develop civil remedies and protections for adults facing forced marriage.¹ The most effective protection could be achieved through the enactment of protection orders similar to the Forced Marriage Protection Orders available in the United Kingdom (as referred to at 3.1 of Anti-Slavery Australia's previous submission). In the absence of such orders, New South Wales's current provisions regarding Apprehended Domestic Violence Order (ADVO) could be expanded, to make them more accessible to adults who are facing forced marriage. Anti-Slavery Australia makes the following recommendation further to our submission, and evidence given to the Committee during the hearing.

2.1. Gaps in current civil protection framework

While it is difficult to know the prevalence of forced marriage in Australia due to under-reporting, known statistics indicate that forced marriage cases will continue to increase in the medium term²:

- a) since criminalisation in 2013, the Australian Federal Police (AFP) have received notification of more than 116 possible forced marriage cases. There have been no convictions under the *Criminal Code 1995* (Cth) provisions;³
- b) from 2013-2015, the AFP investigated 41 cases of forced marriage. Nine cases related to persons over 18 and 32 to persons under the age of 18;⁴
- c) the AFP received 69 referrals relating to forced marriage in 2015-16, which represented 41% of all human trafficking referrals received;⁵
- d) the Australian Red Cross has assisted 23 individuals who were wanting to leave or avoid a forced marriage through its Support for Trafficked People Program (STPP);⁶

¹ Anti-Slavery Australia, Submission 9 to Legislative Council Select Committee on Human Trafficking, *Inquiry into Human Trafficking in New South Wales*, 17 February 2017, 18-19, [3.1].

² Australian Government, Interdepartmental Committee on Human Trafficking and Slavery, The Australian Government Response 1 July 2015-30 June 2016, 24.

³ Australian Government, Interdepartmental Committee on Human Trafficking and Slavery, The Australian Government Response 1 July 2015-30 June 2016, 20.

⁴ Laura Vidal, 'Comment: Forced marriage in Australia - gender equality has a long way to go', *Special Broadcasting Service* (online), 8 March 2016 <<http://www.sbs.com.au/news/article/2016/03/08/comment-forced-marriage-australia-gender-equality-has-long-way-go>>.

⁵ Australian Government, Interdepartmental Committee on Human Trafficking and Slavery, The Australian Government Response 1 July 2015-30 June 2016, 1.

- e) in 2015-16, the Australian Red Cross received 13 (out of 38) new referrals for clients suspected of being in a forced marriage situation within the STPP;
- f) there have been approximately six cases before the Federal Courts in which a forced marriage, or threatened forced marriage, has prompted requests for orders under the *Family Law Act 1975* (Cth) or *Marriage Act 1961* (Cth) for protection or relief;⁷ and
- g) in the United Kingdom in 2016, the Forced Marriage Unit gave advice or support regarding a possible forced marriage in 1,428 cases. Just over a third of these cases (34%) involved victims aged from 18 to 25 years old.⁸

Anti-Slavery Australia's Submission to the Committee outlined the need for a framework of civil protections and remedies for survivors, or people facing forced marriage.⁹ This section will provide additional analysis of the gaps that have been identified in the protections provided to people at risk of forced marriage in New South Wales.

The current legislative provisions at both the State and Commonwealth level do not provide adequate protection to adults to prevent forced marriage in Australia or overseas. Under the *Family Law Act 1975* (Cth), courts have the power to make certain orders which protect *children* from forced marriage, such as parenting orders and injunctions preventing removal or harassment of the child,¹⁰ and orders for delivery of travel documents to the Court.¹¹ However, the power to make orders made under the *Family Law Act 1975* expires when a child turns 18, marries or enters into a de facto relationship and injunctions can only be sought in the context of parent/child or marital relationships.¹² For adults, the only family law provisions which can provide relief are in the form of applications to nullify marriages on the grounds of lack of consent or one or more of the parties not being of marriageable age. However, this relief is only available after a forced marriage has taken place and the *Family Law Act 1975* contains no preventative protection.¹³

2.2. The current protection order legal framework in New South Wales

⁶ Email from Andrea Zakarias, National Program Officer - Support for Trafficked People Program, Red Cross (26 July 2016).

⁷ *Kandal v Khyatt* (2010) 43 Fam L R 344; *Department of Human Services v Brouker* (2010) 44 Fam L R 486; *Kreet v Sampir* (2011) 44 Fam L R 405; *Madley v Madley* [2011] FMCAfam 1007 (1 April 2011); 1008440 [2010] RRTA 1136 (17 December 2010); *Essey & Elia* [2013] FCCA FamCA 742; *Anthony & Kellett* [2016] FCCA 3368.

⁸ Forced Marriage Unit Statistics 2016, UK Foreign & Commonwealth Office dated 9 March 2017, 3.

⁹ *Ibid*, 1.

¹⁰ *Family Law Act 1975* (Cth), Part VII, Divisions 5 and 6.

¹¹ *Family Law Act 1975* (Cth), s 67ZD.

¹² See, *Family Law Act 1975* (Cth), ss 65H, 68B and 114(1).

¹³ *Family Law Act 1975* (Cth) Part VI.

There are two relevant personal violence orders available in New South Wales, Apprehended Personal Violence Orders, and Apprehended Domestic Violence Orders for when the applicant is in a domestic relationship with the perpetrator. Apprehended Violence Orders (AVO) may be sought by a young adult or the police to impose prohibitions or restrictions on persons (usually family members or relatives) to ensure the safety and protection of the person and their children. AVO can be made:

- a) to prohibit or restrict approaches by the perpetrator of violence to the victim of violence;¹⁴
- b) to prohibit or restrict access by the perpetrator of violence to premises in which the victim of violence lives or works or which the victim of violence frequents;¹⁵
- c) to prohibit or restrict the perpetrator of violence from being in a locality specified in the order;¹⁶
- d) to prohibit the perpetrator of violence from contacting, harassing, threatening or intimidating the victim of violence,¹⁷ and
- e) to prohibit the perpetrator of violence from damaging property of the victim of violence.¹⁸

In New South Wales, the court may make an AVO if it is satisfied on the balance of probabilities that the applicant has reasonable grounds to fear, and in fact fears, any one of the following factors:

- a) the commission by a perpetrator of a personal violence offence against the victim; or,
- b) the engagement of the perpetrator in conduct in which the perpetrator intimidates the victim,¹⁹ or stalks the victim.²⁰

2.2.2. The Current New South Wales framework of Apprehended Violence Orders and Forced Marriage

¹⁴ *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s35(2)(a); *Property (Relationships) Act 1984* (NSW) s53(a) (refers to orders for 'personal protection').

¹⁵ *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s35(2)(b); *Property (Relationships) Act 1984* (NSW) s53(b)(i), 53(c).

¹⁶ *Property (Relationships) Act 1984* (NSW) s53(b)(ii).

¹⁷ *Crimes (Domestic and Personal Violence) Act 2007*(NSW) s35(2)(f); See also *ibid* s 36.

¹⁸ *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s35(2)(e).

¹⁹ In the case of Domestic Violence Orders, this criterion extends to a person with who the victim has a domestic relationship. See, *Ibid*, s16(b)(i).

²⁰ *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s16(1)

While there is potential for AVO to provide some protection to adults facing forced marriage, they are ill suited to the specific situations of forced marriage because the conduct which often causes forced marriages is complex and not necessarily addressed by the requirement for intimidation, stalking or the potential commission of a personal violence offence. The coercion, threats or deception which can have the effect of negating consent can be subtle. Such conduct does not generally fall neatly within the forms of behaviour and conduct subject to the protective jurisdiction of the AVO framework.

Even if a court order in the nature of an AVO is made, it is doubtful that such an order is a sufficient deterrent to family members who may be intent on ensuring that a forced marriage takes place. These circumstances can be difficult to manage in the case of a young person who does not have any other familial support apart from that of the perpetrator (or perpetrators) against whom an AVO may be sought. Furthermore, AVO do not address overseas conduct. This is problematic as adults facing forced marriage may be threatened or coerced to travel overseas to marry.²¹

Another major barrier to people facing forced marriage applying for an AVO is that only the police or potential victim may apply for such orders. As such, the onus may be upon the potential victim to bring their family members' conduct to the attention of the police or the Courts, as there are no provisions for an interested party to obtain standing to apply on their behalf such as a government agency.

The largest obstacle to obtaining an AVO in forced marriage cases is that the grounds for seeking such orders focus on fear of intimidation or the commission of a personal violence offence (such as assault, sexual assault, sexual servitude or kidnapping) against the victim. A personal violence offence does not include the offence of forced marriage. The types of behaviour contemplated in personal violence offences can accompany or be engaged in prior to a forced marriage but fail to address more pressing issues unique to survivors or potential victims of this crime. In particular, having reasonable grounds to fear intimidation or stalking when often victims have been in the same household as a perpetrator.

In addition, an Apprehended Violence Order also does not allow for prevention of removal of the victim from the country through inclusion on the Family Law Watch List or allow for surrender of passports.

²¹ Trafficking In Persons: The Australian Government Response 1 July 2015 – 30 June 2016' (Eighth Report Of The Interdepartmental Committee On Human Trafficking And Slavery, Commonwealth of Australia, 2016) 23.

2.3. Forced Marriage Prevention Orders in the United Kingdom

By contrast, the *Family Law Act 1996* (UK) (**UK Act**)²² in England and Wales allows for a victim of any age to apply for Forced Marriage Protection Orders (FMPO) is sensitive to the unique context in which forced marriages occur; complex familial relationships and related cultural issues, overseas conduct and pressure to travel to other jurisdictions for the offence to occur.

Key advantages which FMPO have over existing New South Wales provisions for AVO are:

- a) Applications for an FMPO may be made by the protected person, a relevant third party such as organisations seeking to assist victims or any other person with the leave of the court.²³
- b) An FMPO under both the UK and Scottish Acts can contain prohibitions, restrictions or requirements and such other terms as the court considers appropriate for the purposes of the order²⁴ and relate to conduct within and outside the relevant country.²⁵ In the commentary on FMPOs specific to England and Wales, potential orders that the broad powers could encompass include orders:
 - a) seizing the respondent's passport;
 - b) requiring the respondent to reveal the whereabouts of a protected person or victim;
 - c) preventing the respondent having contact with the victim;
 - d) allowing the victim to assume a new identity;

²² Part 4A of the *Family Law Act 1996* (UK) was introduced by the *Forced Marriage (Civil Protection) Act 2007* (UK) and came into force on 25 November 2008. The *Forced Marriage etc (Protection and Jurisdiction) (Scotland) Act 2011* (**Scottish Act**) authorises the making of FMPOs for victims and persons at risk of a forced marriage and largely reflects the provisions of the UK Act.

²³ *Family Law Act 1996* (UK) ss 63C(2)-(3); *Forced Marriage etc (Protection and Jurisdiction) (Scotland) Act 2011* ss 3(1)-(2).

Under section 63C(7) of the *Family Law Act 1996* (UK), 'relevant third party' means a person specified, or falling within a description of persons specified, by order of the Lord Chancellor. The Lord Chancellor made the *Family Law Act 1996 (Forced Marriage)(Relevant Third Party) Order 2009* (UK) which established that a local authority is specified as a relevant third party for the purposes of applying for an FMPO, and that 'local authority' means a county council in England; a metropolitan district council; a non-metropolitan district council for an area for which there is no county council; the council of a county or county borough in Wales; a London borough council; the Common Council of the City of London; and the Council of the Isles of Scilly, *Family Law Act 1996 (Forced Marriage)(Relevant Third Party) Order 2009* (UK), s 2.

²⁴ *Family Law Act 1996* (UK) s 63B(1), *Forced Marriage etc (Protection and Jurisdiction) (Scotland) Act 2011* s 2(1).

²⁵ *Family Law Act 1996* (UK) s 63B(2), *Forced Marriage etc (Protection and Jurisdiction) (Scotland) Act 2011* s 2(2).

- e) ordering that a marriage may not take place;
- f) ordering that the victim may not be taken out of the country; and
- g) granting a personal protection order.²⁶

An FMPO can be made even where a respondent has not been given notice of the proceedings, called an 'ex parte order' in the UK and an 'interim order' in Scotland.²⁷ It must be "*just and convenient*"²⁸ or "*equitable*"²⁹ to make such an order and a court must have regard to all the circumstances, including any risk of significant harm to the protected person or another person if the FMPO is not made immediately.³⁰

Breaches of FMPOs are offences in all these jurisdictions.³¹

2.4. Potential to broaden current Apprehended Violence Order legal framework

Anti-Slavery Australia recommends that the New South Wales government adapt the AVO framework to provide prevention and protection mechanisms for adults facing forced marriage. There are two key areas of the current AVO framework that require amendment in order to provide for the particular needs of people facing forced marriage:

- the expansion of the definition of personal violence offences to capture the crime of forced marriage, and
- the expansion of the powers of the court to make an order regarding the forfeiture of a passport or travel document, to ensure that a potential victim is not taken overseas and forced to marry.

2.4.1. Forced marriage as a personal violence offence

Anti-Slavery Australia recommends that the Commonwealth offence of forced marriage be added to the list of personal violence offences, the reasonable fear of which may give rise to an Apprehended Violence Order. Currently, a court may make an AVO if the court is satisfied that the person has reasonable grounds to fear intimidation or the commission of a personal violence offence (such as assault, sexual assault, sexual

²⁶ Mary Welstead 'Forced Marriage: Bifurcated Values in the UK' (2009) *The Denning Law Journal* Vol 21 49-65, 60-61.

²⁷ *Family Law Act 1996* (UK) s 63D, *Forced Marriage etc (Protection and Jurisdiction) (Scotland) Act 2011* s 5.

²⁸ *Family Law Act 1996* (UK) s 63D(1).

²⁹ *Forced Marriage etc (Protection and Jurisdiction) (Scotland) Act 2011* s5(1).

³⁰ *Family Law Act 1996* (UK) s63D(2), *Forced Marriage etc (Protection and Jurisdiction) (Scotland) Act 2011* s5(3).

³¹ *Family Law Act 1996* (UK), s 63CA and *Forced Marriage etc (Protection and Jurisdiction) (Scotland) Act 2011*, s 9

servitude or kidnapping).³² However, these crimes are very different and are not necessarily a feature of all situations of forced marriage.

2.4.2. Mechanisms to prevent a potential victim being forced to marry overseas

The growing problem of Australian citizens being forced to marry overseas must also be addressed in the framework of civil legal protections. Anti-Slavery Australia recommends that the New South Wales government expand the power of the courts to make an order requiring the surrender of a potential victim's passport, or preventing further applications for a passport or travel document. This could draw upon the Victorian model of Family Violence Prevention Orders, which enables the court to direct a respondent to return a protected person's property.³³ To develop the NSW apprehended violence framework, Anti-Slavery Australia recommends that the New South Wales government consult the Commonwealth Attorney-General's Department about any jurisdictional issues relating to the ownership of passports that could affect the power of a NSW court to make an order in respect of an Australian Passport.

The expansion of preventative mechanisms for adult Australian citizens facing forced marriage overseas would close a significant gap in the civil protection framework for potential victims of slavery and human trafficking in New South Wales.

³² *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s16(1) (for Apprehended Domestic Violence Orders), s19(1) (for Apprehended Personal Violence Orders).

³³ *Family Violence Protection Act 2008* (Vic) s 86.

3. INTRODUCE GUIDELINES TO ELIMINATE HUMAN TRAFFICKING AND SLAVERY FROM NEW SOUTH WALES PUBLIC PROCUREMENT SUPPLY CHAINS

In the Anti-Slavery Australia submission to the Inquiry into Human Trafficking and Slavery in New South Wales we recommended that the New South Wales government review and audit the New South Wales public procurement policy framework in order to eliminate human trafficking and slavery from the supply chains of goods and services used by government departments. Further to Anti-Slavery Australia's submissions, we make the following recommendation concerning amendments to New South Wales' procurement policy.

New South Wales leads Australian states and territories in infrastructure investment, with a forecasted investment of over \$73 billion in 2016-2017. This inquiry represents an opportunity for the New South Wales Government to also lead Australian states and territories in the response to slavery and human trafficking in supply chains.

3.1. New South Wales Procurement Policy Framework

The 'NSW Procurement Policy Framework for NSW Government Agencies' (the Procurement Policy Framework), issued in July 2015, provides mandatory requirements for all government agencies and suppliers to government. The mandatory sections of the framework are government policy pursuant to section 176 of the *Public Works and Procurement Act 1912 (NSW)*.³⁴ The Procurement Policy Framework states that sustainable procurement practices involve the consideration of issues such as employee rights and ethical behaviour. The Procurement Policy Framework goes on to state:

"Principles guiding sustainable procurement can be used by agencies to develop sustainable procurement strategies, policies, guidance material, training and tools by... fostering a viable market for sustainable products and services by supporting businesses that support socially responsible suppliers, adopt ethical practices and demonstrate innovation."³⁵

However, these practices are discretionary. The mandatory requirement under sustainable procurement obliges agencies to ensure that value for money is being achieved through procurement practice.³⁶

³⁴ New South Wales Procurement Board, 'NSW Procurement Policy Framework for NSW Government Agencies' (July 2015) 2.

³⁵ Ibid 13.

³⁶ Ibid 12.

3.2. Commonwealth Procurement Policy

Recent amendments to the Commonwealth Procurement code, which came into force on 1 March 2017, require Commonwealth officials to make reasonable enquiries as to the tenderers practices regarding ethical employment.

Officials must make reasonable enquiries that the procurement is carried out considering relevant regulations and/or regulatory frameworks, including but not limited to tenderers' practices regarding: a. labour regulations, including ethical employment practices; b. occupational, health and safety; and c. environmental impacts.³⁷

The Guidance provided by the Department of Finance provides tools and options that may be used by procurement officials in order to comply with the new rules. This includes guidance on the kinds of enquiries and requirements that procurement officials may make to satisfy rule 10.18. These include:

- a. *require that, as a part of their response, potential suppliers certify (e.g. via a statutory declaration or warranty) that they comply with the regulations and/or regulatory frameworks, as identified in the request documentation;*
- b. *require that successful suppliers provide assurance of compliance with the regulations and/or regulatory frameworks, such as by suppliers providing an independent audit report;*
- c. *undertake their own investigation to confirm that potential or preferred suppliers have not breached the regulations and/or regulatory frameworks, and do not have a judicial decision against them (not including decisions under appeal); and*
- d. *require that potential suppliers demonstrate their sustainability credentials.*³⁸

The Department of Finance guidance directs procurement officials to the Commonwealth Attorney-General's Department website, which outlines the criminal laws relating to labour exploitation, slavery and human trafficking.³⁹ The guidance also emphasises that the new procurement rules do not require additional comprehensive compliance auditing.

³⁷ Department of Finance 'Commonwealth Procurement Rules' (1 March 2017) <<https://www.finance.gov.au/sites/default/files/commonwealth-procurement-rules.pdf>> 10.18.

³⁸ Department of Finance 'Consideration of relevant regulations and/or frameworks' (16 February 2017) <<https://www.finance.gov.au/sites/default/files/guidance-new-rule-10-18-16.pdf>> [7]

³⁹ *Ibid* [10].

The rule is intended to ensure that there is reasonable evidence to give procurement officials sufficient confidence in the truth of representations made by suppliers.⁴⁰

3.3. Strengthening the Commonwealth Procurement Rules

Anti-Slavery Australia welcomes these amendments to the Commonwealth Procurement Rules. However, Anti-Slavery Australia has identified several areas in which the protections against human trafficking and slavery provided for in the Commonwealth Rules could be strengthened.

These areas include:

- a) Amending Commonwealth Procurement Rule clause 10.18 to specifically address human rights abuses including slavery and human trafficking.
- b) Developing clear guidelines for procurement officers to assist in the effective response to the risk of human trafficking and slavery in supply chains.
- c) Implementing a risk based due diligence framework that identifies the industries, products or countries known to be high-risk for human trafficking and slavery in supply chains.
- d) Emphasising the role of suppliers and potential suppliers in addressing slavery and human trafficking in their supply chains through measures such as :
 - i. Developing a Commonwealth Government “Suppliers Code of Conduct” which requires suppliers to adhere to key principles such as trafficking and slavery and supply chains.
 - ii. Implementing additional due diligence requirements in contracts exceeding a certain value, or involving industries, countries or products that are deemed to be a high-risk for slavery and human trafficking.

3.4. Due Diligence in New South Wales Public Procurement

Anti-Slavery Australia recommends the inclusion of a due diligence provision in the NSW Procurement Policy Framework, which may be modelled on the rule contained in paragraph 10.18 of the Commonwealth Procurement Rules. This provision should specifically address human rights abuses, including slavery and human trafficking in supply chains.

⁴⁰ Ibid [9].

A due diligence provision should also be supported by clear guidance from the Department of Finance to assist procurement officers and suppliers to develop effective responses to the risk of slavery and human trafficking supply chains.

3.4.1. Cost to taxpayers

A due diligence provision in the NSW Procurement Policy Framework would not add materially to the cost for taxpayers, as it would not require comprehensive compliance auditing. Rather, it would ensure that procurement officials are satisfied, on the basis of reasonable evidence that suppliers comply with labour regulations and ethical employment practices.