Submission No 48

INQUIRY INTO MODERN SLAVERY ACT 2018 AND ASSOCIATED MATTERS

Organisation: Good Shepherd Australia New Zealand and Monash University

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Submission to the Inquiry into the Modern Slavery Act (2018) (NSW) and associated matters

New South Wales Legislative Standing Committee on Social Issues

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Australia New Zealand

MONASH University

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About us

Trafficking and Slavery Research Group, Monash University

Monash University is known globally as a highly reputable research institution. Members of the Faculty of Arts, Department of Criminology have been producing high-quality, academic research on human trafficking within Australia and the region for over a decade. A new, joint initiative between Monash Arts and Business, the Trafficking and Slavery Research Group brings together experts from the fields of human trafficking, migration and supply chains to conduct joint research that will strengthen the evidence base for government and corporate action on modern slavery. Specifically, the Group is working with a variety of organisations to adopt an impact measurement approach to modern slavery and human rights reporting. Our long-term objective is to support organisations to go beyond compliance and focus on measurable positive outcomes for rights-holders and in turn, strengthen the evidence base for corporate responses to these issues in supply chains over time. Led by Associate Professor Marie Segrave and Managing Director Heather Moore, the team brings decades of expertise to inform this new body of work.

Good Shepherd Australia New Zealand

Good Shepherd Australia New Zealand was established to address the critical, contemporary issues facing women, girls and families. We work to advance equity and social justice, and to support our communities to thrive. We aspire for all women, girls and families to be safe, well, strong and connected. A central part of our purpose is to challenge the systems that entrench poverty, disadvantage and gender inequality. The Women's Research, Advocacy and Policy (WRAP) Centre does this through a range of research, policy development and advocacy activities.

Good Shepherd has had special consultative status with the United Nations Economic and Social Council (ECOSOC) since 1996.

Introduction

We wish to thank the committee for this opportunity to provide feedback on the *Modern Slavery Act (2018)* (NSW) (the Act) and Regulations. Despite an extensive inquiry conducted by the Legislative Council's Select Committee on Human Trafficking in 2017, there was little opportunity to contribute to the formation of this legislation because of its progression as a Private Members' Bill.

New South Wales (NSW) is the first state or territory jurisdiction to introduce legislation proscribing modern slavery and related forms of abuse. As such, this legislation presents a great opportunity to commit to a vision of what the states and territories can do to enhance Australia's response to modern slavery.

Our first recommendation is that the NSW Government proceed with the Act in a form that will achieve its intent and purpose. In addition to the issues identified in the Department of Premier and Cabinet submission, there are further considerations required for the Act to achieve its objectives.

This submission provides information and recommendations with regard to three terms of reference:

(1) Term of Reference (a): Ways to ensure the operability and effectiveness of the criminal justice and victim support provisions of the law (i.e. operational response);

(2) Term of References (a), (b), (g): Ways to ensure the operability and effectiveness of the transparency in supply chains (TISC) provisions of the law; and

(3) Term of Reference (i): NSW conceptualisation of and response to forced marriage.

We strongly encourage engagement with research and evidence to drive further decisions about progressing the implementation of the Act, and a commitment to reviewing the implementation of the Act over time.

We welcome the opportunity to provide oral evidence in relation to any of the matters raised in this submission.

Recommendations

(1) Expand the explanatory note to the Act to clarify the rationale behind the creation of parallel modern slavery offences within the Crimes Act and how the Act is intended to address objects set out in Section 3.

(2) Adopt the full suite of modern slavery offences from the *Commonwealth Criminal Code (1995)* (Cth) within the *Crimes Act (1900)* (NSW) to ensure consistency in policing responses and the application of state resources to address all forms of modern slavery.

(3) Implement frameworks and commensurate funding for cross-sector collaboration and victim/survivor support, as outlined in the interim Anti-Slavery Commissioner's Strategic Plan.[1] These resources should be part of ongoing agency budgets to ensure implementation efforts are coordinated and meet future demands for victim/survivor support. This should be done prior to the modern slavery offences coming into effect.

(4) Ensure implementation of victim/survivor support services is underpinned by comprehensive service provision, with all external services open to tender by locally-based non-government organisations with expertise in social, housing and legal support.

(5) Consider either of the following options when making a decision about Section 24:
   a. If the state decides to maintain Section 24, reporting entities should receive a comparable amount of preparation, education and support as what has been and continues to be provided by the Commonwealth (i.e. 12-18 months);

   b. If the state decides to delay or remove Section 24, the state should maintain and strengthen its commitment to minimising risk of modern slavery in state government supply chains, including investments, and lead a national approach through COAG where all states and territories participate in and shape a coordinated response over time.

(6) Include a provision for ongoing improvement, via a three-year review, as in the Commonwealth *Modern Slavery Act (2018)* (Cth). This would guarantee a review of the evidence after three years, and an opportunity to make necessary amendments.

(7) Ensure the Anti-Slavery Commissioner's office is sufficiently resourced to support, monitor and enforce reporting. At present, the Commissioner is part-time, has limited staff and has an extensive mandate.

[1] Step-by-step guides for how to do this are provided in the reference list, see specifically: US Department of Justice and UNODC.

(8) Ensure that a program of support is available to victim/survivors of forced marriage regardless of willingness or capacity to report to law enforcement.

(9) Where it is determined that the introduction of the 'Child Forced Marriage' offence will not trigger a specialised response within the state child protection framework, amend the *Child and Young Persons (Care and Protection) Act (1998)* (NSW) to include forced marriage explicitly as a 'circumstance' under Section 23.

(10) Enact the amendment to the *Crimes (Domestic and Personal* Violence) Act (2007) (NSW) to include the specific reference to forced marriage as in the *Commonwealth Criminal Code (1995)* (Cth) alongside a robust implementation framework that includes targeted training and capacity building for the family violence workforce in NSW including lawyers, police, the judiciary and frontline responders.

(11) Include an 'Airport Watchlist Order' provision within the suite of protections available with the Apprehended Violence Order framework that will evolve as a result of the amendment to the *Crimes (Domestic and Personal Violence) Act (2007)* (NSW).

Term of Reference (a): the operability of the proposed Anti-Slavery scheme

We see no reason why the *Modern Slavery Act (2018)* (NSW) (hereafter 'the Act') should not be 'operable' as long as all legal inconsistencies, as identified by the government, are resolved. We are generally supportive of the amendments proposed in the bill in relation to the above mentioned Terms of Reference and offer some additional considerations to the Committee.

Operational Response under the *Modern Slavery Act (2018)* (NSW)

Defining 'operability' in terms of the extent to which the law may be implemented so as to achieve its intended aims, the primary issues for consideration should be:

- How the state will manage cross-sector collaboration and potential jurisdictional conflicts between state and Commonwealth agencies and provide opportunities for civil society to also engage in victim identification and support;
- How the state will identify and support victims of any state modern slavery offences;
- Will the state move to provide financial compensation and/or to pursue remuneration for those who have been a victim of slavery, regardless of whether a prosecution is pursued/a conviction is achieved;
- How the state will manage and resolve immigration status issues that arise; and
- How the state will resource these activities.

These issues should not be cause to retract NSW's Anti-Slavery scheme; rather, they provide a roadmap for clarifying and implementing a state scheme that not only sits naturally alongside the federal scheme, but also enhances it and provides a model for other states.

The creation of parallel modern slavery offences provides an enormous opportunity to raise awareness and mobilise the efforts of key state actors who, due to the community-based nature of their work, are in a better position than their federal counterparts to identify and assist people at risk of or impacted by modern slavery. Whilst state police and prosecutors may charge under Commonwealth offences, incorporating modern slavery offences into the state Crimes Act sets a clear mandate and may also activate other state agencies, such as health and workplace safety, who are likely to encounter victims, but are either not currently doing so or are not referring them to appropriate sources of support. The key will be ensuring there is a solid framework to guide cooperation and decision-making, discussed further below.

It is unclear why only certain offences from the *Commonwealth Criminal Code (1995)* (Cth) were introduced into the *Crimes Act (1990)* (NSW). If the intention

is to mobilise state actors to identify, disrupt and prevent future cases of modern slavery, the authors suggest it would be more sensible to adopt the full suite of modern slavery offences in Divisions 270 and 271 to ensure a clear mandate for state agencies. This is likely to require adapting the 'child forced labour' and 'child forced marriage' offences to conform with the Commonwealth's aggravated offences.

Cross-Sector Collaboration

There is extensive international evidence demonstrating that a locally-based, multi-agency response to trafficking and slavery yields better criminal justice and victim/survivor outcomes (Northeastern University, 2012; OHCHR, 2002; UNODC, 2008). Indeed this approach was endorsed by the 2017 inquiry into human trafficking by the Select Committee on Human Trafficking and the NSW Community Relations Commission in its 2013 inquiry into the exploitation of people through trafficking, in all its forms in NSW, which recommended the state government: "should establish protocols for comprehensive collaboration between all levels of government, to create clear pathways of responsibility and procedures in identifying and responding to victims of trafficking, slavery and exploitation" (New South Wales Government, 2013).

In her previous role with The Salvation Army, one of the authors presented this evidence in a discussion paper to the National Roundtable on Trafficking and Slavery, making the case for a decentralised, nationally-consistent framework for Australia's operational response to human trafficking (Moore, 2018):

> The "task force" approach is considered best practice by the UN Office on Drugs and Crime (UNODC), which details a range of examples tailored to local contexts in its Toolkit to Combat Trafficking in Persons (UNODC, 2008) [including Australian-funded projects under the Australia-Asia Program to Combat Trafficking in Persons (AAPTIP)].
>
> A study of the United Kingdom's law enforcement response to trafficking found that Cross-Sector Intelligence Sharing Hubs were a key element to successful prosecutions, noting the various strengths and perspectives of stakeholders and the benefits of working in a coordinated rather than isolated way' (Annison, 2013).
>
> Another study, out of the United States, found that multidisciplinary anti-trafficking working groups, or task forces, are more likely to discover human trafficking and achieve successful prosecution of perpetrators (Northeastern University, 2012). [A similar] study found law enforcement agencies participating in multi-agency human trafficking task forces are 'more likely to have training, protocols for case coordination and specialised units or personnel devoted to human trafficking investigations and are more likely to perceive human trafficking as a problem in their community. Additionally, these agencies are more likely to have investigated cases of human trafficking' (Farrell, McDevitt & Fahy, 2008).

Citing numerous examples from the United Kingdom and the United States, the paper also argued the case for greater local leadership:

'The [U.S.] federal government has provided strong national leadership in the fight against human trafficking, but responses from local law enforcement remain essential to the successful identification and investigation of these crimes. Municipal, county and state police are familiar with their local communities and are involved in routine activities that will likely bring them into contact with human trafficking victims and offenders....Effectively responding to human trafficking requires local law enforcement officers to recognize potential victimization and provide services to victims who may have been historically under-served by or had poor relationships with law enforcement (e.g. migrants, immigrant community members, and poor women and girls)' (Farrell, McDevitt & Fahy, 2008).

[According to another publication]: '…it is local law enforcement and other community-based entities, rather than federal agencies, that are most likely to first encounter victims of human trafficking. And, while trafficking in humans is largely a hidden crime, trafficking victims are in plain sight if you, as the first responder, know what to look for' (National Sheriffs Association, 2008).

Research…from the Office of the [UK] Independent Anti-Slavery Commissioner and the University of Nottingham's Rights Lab identified a high demand for increased coordination of partnership work at a national, regional and local level. Partnerships surveyed for the report identified emerging good practice in the areas of learning, awareness raising, and support for victims and survivors, joint operations, governance and training (Office of the Anti-Slavery Commissioner and University of Nottingham, 2017).

Despite the international evidence for greater involvement from local actors, Australia's National Action Plan to Combat Human Trafficking and Slavery (2015-2019) does not include a strategy to drive this work and does not assign any tasks or outcomes to states and territories (Commonwealth of Australia, 2014). It does however identify *strengthening connectedness with states and territories* as a key area of focus, and early consultations for the next Action Plan suggest this will be a priority for the next Plan, due to begin in 2020. Thus, the NSW Government should not shy away from this opportunity to make the Act a catalyst for greater state/territory participation in Australia's response to trafficking, a strategy the authors believe will greatly enhance victim identification and support as well as criminal justice outcomes.

It is the authors' understanding that the Interim Anti-Slavery Commissioner will set a strategy for cross-sector collaboration in her Strategic Plan. The authors strongly support this approach but recommend that this plan be complete, with necessary sign-offs and support from state agency heads, as well as discrete funding, prior to modern slavery offences within the Act coming into effect.

Victim Support

Equally critical to the success of the Act is a strategic framework for victim/survivor support. The proposed hotline may fulfill one aspect of this framework, as long as it is appropriately resourced and designed to serve victim/survivor interests, privacy and agency above other priorities, notably border protection.[2] However, a hotline alone cannot fully provide for protection. Particular questions that should be answered before enacting the Act include:

- What NSW police and other responders will be expected to do when a potential victim comes to their attention;
- Who will provide crisis and long-term support, including social, legal and housing assistance and how should government agencies and law enforcement contact them;
- How the state will manage cases that emerge without police involvement or where victim-survivors are not able or willing to immediately involve police in their matters; and
- How the state scheme will be harmonised with the federal Support for Trafficked People Program (STPP) and Human Trafficking Visa Framework;
- How NSW is going to negotiate visa requirements more broadly;
- How the state will respond to issues that are brought to the attention of the Hotline that are not state-bound (i.e. not involving someone in NSW or activities that occurred in NSW) and how decisions will be made regarding the best interest of the victim in relation to cases where NSW and Commonwealth law apply;
- How the state can advance a COAG discussion regarding how to build a state-commonwealth partnership that ensures all victims receive unconditional support, as is done for other victims of crime, including sexual assault and family and gender-based violence; and
- What the consequences are for victims whose cases do not progress and those who do in relation to visa status and outcomes.

Failure to install timely and appropriate supports for victim/survivors and people at risk will serve to reinforce the well-documented problems victims face when going through the criminal justice system, including re-victimisation and re-traumatisation (Herman, 1992; US Department of Justice, 2008). They may also deter engagement with support systems that are meant to protect people, prevent further abuse and, with the cooperation of victim witnesses, ultimately hold perpetrators accountable.

[2] Further considerations for operating a victim-centred modern slavery hotline were recently outlined in an article by Phil Bennett, a technologist supporting the UK Modern Slavery Hotline. Bennett, P (2019) National modern slavery helplines: what's behind the number? https://www.philbennett.me/modern-slavery-helplines#.

The first step is ensuring a coordinated response is in place, where first responders have the knowledge, skill and operational framework to respond in a way that causes no further risk or harm to a victim/survivor. Establishing a collaborative framework as described in the previous section is a reliable way to consistently deliver training and protocols for effective victim engagement and referral.

The second step is ensuring that an unconditional response is in place. There will be victim/survivors or people at risk who come to the attention of the NSW hotline or other responders who are reluctant or unwilling to involve or engage with the police in the first instance out of fear or mistrust of authorities—a barrier well documented in the literature (Annison, 2013; David, 2007; UN Human Rights Council, 2012; US Department of Justice, 2008) and in previous government inquiries (NSW Government, 2013; NSW Select Committee, 2017; Commonwealth of Australia, 2017a; Commonwealth of Australia, 2017b). As such, first responders need to be able to respond immediately to secure the safety and well-being of a victim/survivor of a modern slavery offence and there should be an independent framework in place to facilitate this. Police should also have a vetted service provider network to refer to where a person is presumed to be a victim/survivor, but is unable or unwilling to engage with police.

At least ten years' of international best practice recommends connecting victims/survivors as soon as possible with appropriate organisations that can educate them about their rights and responsibilities; assist in providing for their basic needs; and help to reduce their anxiety and fear, particularly toward law enforcement (National Sheriffs Association, 2008). It is also strongly recommended that victims/survivors be allowed time to receive crisis support and counselling "without having to make an immediate statement to police on [their] status… [thus enabling them] to make informed decisions (UNODC, 2008). Having a trusted victim service provider conduct a parallel interview is also suggested to help alleviate the victim's fear of law enforcement…" (US Department of Justice, 2008).

The international evidence has been endorsed within the Australian context, where non-governmental members of the National Roundtable on Trafficking and Slavery and other groups have long argued for greater separation between support and cooperation with the criminal justice system. Advocates and service providers with decades of experience have provided evidence that the requirement to cooperate with the Australian Federal Police in order to access ongoing essential supports acts as a deterrent to engaging with the very system intended to protect victims and uphold their rights (Commonwealth of Australia, 2017a; Commonwealth of Australia, 2017b).

For example, when forced marriage was first criminalised in 2013, it was assumed that victims or people at risk would access protection through the Support for Trafficked People program; however, over time, there are signs that the program is not fit for purpose, with a number of clients leaving the program prematurely because they do not see prosecution of their families as a desirable alternative to forced marriage (The Salvation Army et al, 2017). The Commonwealth Government has sought to address this through extension of the previous 90-day limit to 200 days; however, this is only delaying what must ultimately be the same decision. Unfortunately there is no publicly available data

on the official attrition rate due to the cooperation requirement, nor is there outcomes-tracking of those who prematurely exit the program. As discussed further in the next section, Commonwealth and NSW attempts to make the best of a system that is inherently flawed would be better spent designing an evidence-based response built on the experience of other jurisdictions that have demonstrated success.

Ironically, modern slavery offences are the only form of victim-based crime in Australia where the government imposes this requirement on victims, which is particularly troubling given the inherent nature of force and coercion in the crime itself. The opportunity before the NSW government is to build a model that prioritises protection above all else in order to secure victim-survivors, return their self-agency, and allow them to make an informed and self-determined decision to cooperate as a key stakeholder in the criminal justice process. While new to Australia, this approach is not new in other countries and has been proven to be more effective in securing criminal justice outcomes for offenders (US Department of Justice, 2008).

To accomplish such a vision, the state should look to engage existing support services that have experience assisting victims of trafficking and other crimes, as well as other vulnerable groups, to participate in state planning. The state should also consider tendering for services drawing on the wealth of experience of local NGOs with transferrable skill in case management, counselling and housing services. It should not be assumed that this can be thought out later, in a strategic plan that may or may not be endorsed and fully resourced with distinct funding.

These matters should be considered and decided ahead of enacting offences that will inevitably produce victims who will require immediate assistance. Not doing so is counter-intuitive, and would undermine the very intention of the Act.

To be clear, we are not suggesting that the state create a distinct victim support framework from the Commonwealth. Rather, the state should look to harmonise as much as possible, but also to improve upon and address limitations of current responses. In The Salvation Army's submission to the Select Committee's 2017 Inquiry into Human Trafficking, one of the authors spoke to how states can do this, citing model legislation out of California and other comparable jurisdictions:

> In the United States, the federal Trafficking Victims Protection Act was enacted in 2000. Subsequently, most states have passed parallel laws, criminalising trafficking and slavery as state offences as well. The *California Trafficking Victims Protection Act* (2005) (CTVPA) and the *Access to Benefits for Human Trafficking and Other Serious Crime Victims Act* (2006) are regarded as model state laws and include unique features not present in federal legislation.
>
> For instance, establishing human trafficking as a felony under Penal Code section 236.1, the CTVPA:
>
> - Provides for mandatory restitution to the victim;
> - Directs the Attorney General to give human trafficking high priority along with other crimes;
> - Allows a trafficking victim to bring a civil action against his/her trafficker;

- Provides for human trafficking victim-caseworker privilege; and
- Established a state-wide task force, the California Alliance to Combat Trafficking and Slavery (CA ACTS) to analyse and report on California's response to human trafficking.

The Access to Benefits for Human Trafficking and Other Serious Crime Victims Act allows non-citizen human trafficking victims to access state-funded social services such as cash assistance, employment assistance, and other social services for up to one year. After one year, the bill allows these services to continue if the victim attempts to remain in the US legally.

State legislation may also enable states to target limited resources onto problems or risks specific to their unique jurisdictions, such as greater representation of high-risk industries or areas with higher concentration of vulnerable workers. Examples of state-based planning and reporting are available from a range of U.S. states (Los Angeles Regional Taskforce; Texas Human Trafficking Prevention Taskforce; City of Seattle Taskforce) as well as British Columbia, which developed its own anti-trafficking action plan (British Columbia, 2013). Additionally, state plans may assist local governments to identify their own risk and develop city-specific plans within a larger context (The Salvation Army, 2017).

In conclusion, several of the provisions outlined above are already considered by the Act and are set to be progressed through the office of the NSW Anti-Slavery Commissioner. However, timing is crucial here and the state must ensure frameworks are in place to coordinate and provide support ahead of enactment of modern slavery offences. This submission raises additional ideas and considerations which the state should consider to garner even greater benefits from the Act.

Recommendations

(1) Expand the explanatory note to the Act to clarify the rationale behind the creation of parallel modern slavery offences within the Crimes Act and how the Act is intended to address objects set out in Section 3.

(2) Adopt the full suite of modern slavery offences from the *Commonwealth Criminal Code (1995)* (Cth) within the *Crimes Act (1900)* (NSW) to ensure consistency in policing responses and the application of state resources to address all forms of modern slavery.

(3) Implement frameworks and commensurate funding for cross-sector collaboration and victim/survivor support, as outlined in the interim Anti-Slavery Commissioner's Strategic Plan[3]. These resources should be part of ongoing agency budgets to ensure implementation efforts are coordinated and meet future demands for victim/survivor support. This should be done prior to the modern slavery offences coming into effect.

[3] Step-by-step guides for how to do this are provided in the reference list, see specifically: US Department of Justice and UNODC.

(4) Ensure implementation of victim/survivor support services is underpinned by comprehensive service provision, with all external services open to tender by locally-based non-government organisations with expertise in social, housing and legal support.

Term of Reference (a), (b), (g): Supply Chain provisions under the *Modern Slavery Act (2018)* (NSW)

The Committee will be aware that the Commonwealth *Modern Slavery Act (2018*) (Cth) came into effect 1 January 2019 and its reporting requirement came into effect 1 July 2019. This followed two years of government inquiry and extensive stakeholder consultation which educated people about the reality of modern slavery, socialised the concept of corporate disclosure on modern slavery and foraged an unprecedented national conversation on the issue. The Government also produced draft reporting guidance for consultation and held a two-day conference to bolster awareness of and capacity to fulfil the new legislative obligation. Whilst some organisations still feel some uncertainty, the process that led to the federal law secured substantial buy-in and good will.

Compared with the Commonwealth, the NSW Select Committee on Human Trafficking Inquiry did not include supply chains in its terms of reference and did not explore this issue in great depth. As a Private Members Bill, the Act was passed in four short months with little, if any, public consultation, including with business stakeholders who would be impacted. That is not to say that business should dictate their own obligations to respect human rights; rather, reporting, and the action that informs reporting, is more likely to be substantive where business is supported to do so. The principle underpinning disclosure legislation is not just to get information, but to get useful information. To do this, entities with reporting obligations require extensive guidance and support coupled with sufficient lead-time to take substantive action so reports are, in turn, substantive.

With sufficient support and time, there is no reason why the anti-slavery scheme should create undue impost on businesses generating $50-100 million in annual turnover. The review of the UK's *Modern Slavery Act (2015) (UK)* identified the need to embed modern slavery reporting into business culture to facilitate better reporting, so the state should endeavour to provide the necessary guidance and support for business to do this. For example, the Act's provisions to align reporting with businesses' financial years is helpful and the government should work with business to find other ways to embed modern slavery risk assessment into standard management processes, including procurement and supplier engagement.

Recommendations

(5) Consider either of the following options when making a decision about Section 24:

a. If the state decides to maintain Section 24, reporting entities should receive a comparable amount of preparation, education and support as what has been and continues to be provided by the Commonwealth (i.e. 12-18 months);

b. If the state decides to delay or remove Section 24, the state should maintain and strengthen its commitment to minimising risk of modern slavery in state government supply chains, including investments, and lead a national approach through the Coalition of Australian Governments (COAG) where all states and territories participate in and shape a coordinated response over time.

A clear benefit to such an approach would ensure that smaller businesses across the country (not just in NSW) would eventually bear modern slavery reporting obligations. It would also prevent inconsistent schemes across the states should others decide to pass similar legislation. Additionally, noting the significance of NSW in the national economy, concentrating on state supply chains may arguably yield greater benefits than focusing on commercial organisations, many of which will already be impacted as a supplier of companies reporting under the Commonwealth Act.

The limitation with this option is that there is no guarantee the Commonwealth will do this, thus losing the opportunity to engage a new cohort of business that should be reflecting on their human rights impacts. Should the state opt for this approach, the authors strongly recommend the state should maintain and strengthen its commitment to minimising risk of modern slavery in state supply chains, including investments, and lead a national approach through COAG where all states and territories participate in and shape a coordinated response over time.

(6) Include a provision for ongoing improvement, via a three-year review, as in the Commonwealth *Modern Slavery Act (2018)* (Cth). This would guarantee a review of the evidence after three years, and an opportunity to make necessary amendments.

(7) Ensure the Anti-Slavery Commissioner's office is sufficiently resourced to support, monitor and enforce reporting. At present, the Commissioner is part-time, has limited staff and has an extensive mandate.

Term of Reference (i): any other related matter- Forced Marriage

Forced Marriage in Australia

Forced marriage was initially introduced into the *Criminal Code Act (1995)* (Cth) in 2013. The practice is defined and understood under Australian law as a practice of slavery. The national strategy to address forced marriage is included in Australia's National Action Plan to Combat Human Trafficking and Slavery (2015-2019).

Under the *Criminal Code Act (1995)* (Cth), forced marriage is defined as:

> A marriage entered into without free and full consent of one, or both of the parties involved, as a result of coercion, threat or deception. The definition applies to legally recognised marriages as well as cultural or religious ceremonies and registered relationships; regardless of age, gender or sexual orientation.
>
> Offences apply to marriages which:
>
> - Occur in Australia (and)
> - Outside of Australia involving an Australian Citizen or Resident.

Amendments introduced to the *Commonwealth Criminal Code Act (1995)* (Cth) in 2015 included the introduction of a 'Rebuttable Presumption'. The original intent behind the introduction of this amendment was to make the consent of the child irrelevant. However, this amendment has posed some practice challenges, which has led to the proposed amendments in the Child Sexual Exploitation Legislation Amendment Bill (2019) (Cth) which seek to expand the definition of forced marriage to include all marriages entered into under the age of 16 years thereby removing the rebuttable presumption.

In 2018, the response to forced marriage in Australia began to diversify with Victoria recognising forced marriage as a statutory example of family violence under Section 5 of the *Family Violence Protection Act (2008)* (Vic). This was a direct outcome of the Victorian Royal Commission into Family Violence. South Australia introduced a specific criminal offence of 'child marriage' under the *Criminal Law Consolidation Act (1935)* (SA). Given the newness of these legislative changes the impact and effect remains unknown.

The true extent of forced marriage in Australia is unknown as available data is not comprehensive. Recent data released by the Australian Institute of Criminology and the Walk Free Foundation (Lyneham, Dowling & Bricknell, 2019) indicates that in 2016-17 the Australian Federal Police received 70 referrals to their Human Trafficking and Slavery investigative teams nationwide—accounting for 47 per cent of their case work. In a recent briefing provided by the Australian Federal Police in Perth (July 2019), it was reported that since criminalisation 325 referrals of forced marriage have been received, with 81 of these occurring within the financial year 2018-19.

The common trend concerning forced marriage in Australia involves Australian residents of citizens under or close to the age of 18 being forced into a marriage overseas, with the expectation that the individual will sponsor their spouse for migration to Australia. Often, relatives are alleged to have organised or be organising a marriage without free and full consent.

Under Australia's current approach, individuals at risk or who have experience forced marriage must engage with the Australian Federal Police in order to access a government funded support program. There have been recent changes to make the support program more accessible to individuals, however, referral to this program continues to be maintained by the Australian Federal Police.

Anecdotal evidence from both law enforcement and community organisations shows that many individuals who do not wish to engage with law enforcement for fear that their family members will face a criminal prosecution; as a consequence, they are unable to access appropriate support.

To date, there remain no prosecutions under the criminal legislation. Whilst criminalisation sparked a number of initiatives led by the Australian Government and civil society, there is growing acknowledgement that in order to holistically address the practice, legislation is only one part of a complex and comprehensive response to best support individuals and their families. Young people aged 16-18 years represent a significant number of those at risk, and a more nuanced intervention is required (See for example, Vidal, 2017; Triggs & Vidal, 2018)

The Modern Slavery Act (2018) (NSW) - Section 93 AC

The Act seeks to introduce a new offence under *the Crimes Act (1900)* (NSW) of 'Child Forced Marriage'; it is unclear why the offence has been limited only to children, as anecdotal evidence and our practice experience shows that individuals experience an increased risk of forced marriage the nearer they are to reaching age 18.

It is unclear how this particular legislative introduction provides strength to the existing framework held by the Commonwealth (outside of an increased penalty for an aggravated offence); or improves protection for individuals who have experienced or are at risk of forced marriage. It also does not address the gaps in protection that exist for individuals over the age of 18, including the ability to access a Family Law Watch List Order, preventing travel outside of Australia, which currently cannot be extended beyond the age of 18 under the *Family Law Act (1975)* (Cth).

As noted above, there remains an ongoing barrier to accessing support via the Commonwealth framework as it requires a referral from law enforcement. It is unclear whether or not the Commonwealth support program will be available for individuals reporting in the State of NSW; regardless, the NSW response has not addressed this barrier. Indeed, there has been no specific mechanism put in place for children who report forced marriage to the police.

NSW has missed an opportunity to provide a response to forced marriage that fills the gaps of the existing Commonwealth response and provides greater opportunities for individuals in NSW who are at risk of or who have experienced forced marriage.

In considering the offence of 'Child Forced Marriage', we recommend that the Committee respond to the following questions:

- How does the introduction of this offence improve protection for individuals, including, how they will access support when coming forward to law enforcement? Support must be provided to individuals regardless of reporting to law enforcement.

- How will the State of NSW respond to forced marriage disclosures by individuals over the age of 18 years?

- Will the introduction of this offence trigger a specialised response by the Department of Communities and Justice in undertaking their child protection responsibilities? If this does not trigger such a response, an amendment is also required to the *Child and Young Persons (Care and Protection) Act (1998)* (NSW) to recognise forced marriage explicitly as a circumstance under Section 23.

Modern Slavery Amendment Bill (2019) (NSW)

Good Shepherd Australia New Zealand recently released an analysis of the opportunities to respond to forced marriage within Australia's domestic and family violence framework (Vidal, 2019). Here, Good Shepherd highlights that:

> The interpretation of the law in most States and Territories is open to the inclusion of forced marriage in general terms such as in the description of harm, abuse, coercion, control or inciting fear. The challenge that has been identified by this generalist approach is that without specific training on recognising a practice like forced marriage, it is not readily applied or successfully argued (Vidal, 2019, p. 11).

Good Shepherd also notes the limitations that may come from the lack of specificity in existing family violence responses with regard to forced marriage, however, we conclude that the opportunities in this particular instance outweigh the limitations and additional options to a suite of protections can only serve as a strength. This approach will also provide scope to increase the capacity of a greater number of frontline responses, provided resources can be allocated to building the existing family violence workforce to respond to forced marriage.

Apprehended violence orders in particular have significant advantages in addressing behaviour related to forced marriage; this is compared with a Forced Marriage Protection Order (FMPO) scheme which is currently being considered by the Commonwealth:

- A major advantage and possibly one that supersedes other considerations is that the family violence legal framework in Australia may already provide adequate forced marriage protections or may be easily amended to include forced marriage protections (for example, by specifically including forced marriage into existing definitions of family violence).
- In many instances where an FMPO scheme might appear to have an advantage over family violence protection, this could be mitigated or countered by inserting certain provisions into family violence protection orders.
- It is unclear which courts in Australia will have jurisdiction over the FMPO scheme. One aspect of the FMPO model in Scotland is that courts considering issues relating to forced marriage also have the power to make declaration of nullity of forced marriages at the same time as hearing an application for an FMPO. This may be problematic under Australian law because a declaration of nullity of marriage is only available under the *Family Law Act (1976)* (Cth), on the ground that the marriage has been void under the *Marriage Act (1961)* (Cth). It is unclear whether the same courts that might have jurisdiction under the FMPO scheme would be the same courts with jurisdiction under the Family Law Act and *Marriage Act (1961)* (Cth).
- In many cases, family violence protection would trigger a child protection response, whether voluntary or mandatory. Child protection law in Australia is multi-faceted and complex, and the interaction between child protection laws and family law has been described as an "especially fragmented system [where]…the boundaries between the various parts of the system are not always clear and jurisdictional intersections and overlaps are an inevitable, but, unintended consequence" (Australian Law Reform Commission, 2010). Using an existing family violence framework with established child protection reporting and response requirements would provide a strong alternative to introducing another stand-alone scheme where any child protection response needs to be embedded into the intricate system (Vidal, 2019, p.13)

To circumvent the limitations of the *Family Law Act (1975*) (Cth), we further recommend that the Apprehended Violence Order within NSW includes a provision similar to that of an Airport Watch List Order to provide a restriction on overseas travel for any person, regardless of age.

To this end, we endorse the amendment to *the Crimes (Domestic and Personal* Violence) Act (2007) (NSW) which provides specific reference to forced marriage as defined in the *Commonwealth Criminal Code (1995)* (Cth) thereby increasing the range of protections available to individuals impacted by forced marriage, including apprehended violence orders which would prohibit coercion, deceit or threats in relation to forced marriage. We recommend that this be paired with a robust implementation framework that includes targeted training and capacity building for the family violence workforce in NSW including lawyers, police, the judiciary and frontline responders.

Recommendations

(8) Ensure that a program of support is available to victim/survivors of forced marriage regardless of willingness or capacity to report to law enforcement.

(9) Where it is determined that the introduction of the 'Child Forced Marriage' offence will not trigger a specialised response within the state child protection framework, amend the *Child and Young Persons (Care and Protection) Act (1998)* (NSW) to include forced marriage explicitly as a 'circumstance' under Section 23.

(10) Enact the amendment to the *Crimes (Domestic and Personal* Violence) Act (2007) (NSW) to include the specific reference to forced marriage as in the Commonwealth Criminal Code (1995) (Cth) alongside a robust implementation framework that includes targeted training and capacity building for the family violence workforce in NSW including lawyers, police, the judiciary and frontline responders.

(11) Include an 'Airport Watchlist Order' provision within the suite of protections available with the Apprehended Violence Order framework that will evolve as a result of the amendment to the *Crimes (Domestic and Personal Violence) Act (2007)* (NSW).

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Legislation

Access to Benefits for Human Trafficking and Other Serious Crime Victims Act (SB 1569, 2006)

California Supply Chain Transparency Act (SB 657, 2010).

California Trafficking Victims Protection Act (AB 22, 2005).

Taskforce Examples

City of Seattle, Washington: www.seattleagainstslavery.org/.

Los Angeles Regional Human Trafficking Taskforce: http://lahumantrafficking.com/about-us/

US Department of Justice, Bureau of Justice Assistance Anti-Human Trafficking Taskforce Initiative: https://www.bja.gov/ProgramDetails.aspx?Program_ID=51