

**Submission
No 100**

**INQUIRY INTO MODERN SLAVERY ACT 2018 AND
ASSOCIATED MATTERS**

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Inquiry into the *Modern
Slavery Act 2018* and
associated matters

Legal Aid NSW submission to
the Legislative Council Standing
Committee on Social Issues

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Legal Aid 
NEW SOUTH WALES

Table of Contents

About Legal Aid NSW	2
Introduction	3
Government agency obligations	3
Modern Slavery Risk Orders	4
New aggravated offence	5
Digital platforms and child abuse material	7
New slavery and slavery-like offences	7
Apprehended Violence Orders	8
ATTACHMENT A: Case studies.....	10

About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 24 offices and 221 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with LawAccess NSW, community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 29 Women's Domestic Violence Court Advocacy Services.

This submission has been prepared with input from Legal Aid NSW's Family Law

Division, Criminal Law Division and In-house Counsel Unit.

Legal Aid NSW's Family Law Division provides legal assistance and social work support to young people and adults who have experienced or are at risk of forced marriage and has sought changes to the law to better protect victims of forced marriage. Legal Aid NSW also chairs the NSW and Commonwealth Government Working Group to Prevent Forced Marriage, which it established in 2016.

Legal Aid NSW provides state-wide criminal law services through the in-house Criminal Law Practice and through legal aid funding to private practitioners.

Legal Aid NSW welcomes the opportunity to make a submission to the Inquiry into the *Modern Slavery Act 2018* (NSW) and associated matters.

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Introduction

Legal Aid NSW supports the objectives of the *Modern Slavery Act 2018* (NSW) (**Modern Slavery Act**) to prevent, detect and prosecute modern slavery offences and to establish a NSW Anti-Slavery Commissioner, who will play an important role to assist victims of modern slavery, raise awareness of modern slavery practices and encourage action to combat them.¹

With reference to the Inquiry's terms of reference, this submission comments on the Modern Slavery Act and the consultation draft of the *Modern Slavery Bill 2019* (**amendment Bill**). In summary, Legal Aid NSW:

- Supports provisions in the Modern Slavery Act for the Anti-Slavery Commissioner to develop codes of practice and for the NSW Procurement Board to issue directions.
- Supports the repeal of s 29 (modern slavery risk orders).
- Does not support the introduction of new aggravated offences with higher penalties or the creation of statutory alternative verdicts.
- Supports the repeal of the new offence of administering a digital platform used to deal with child abuse material, for which there are existing Commonwealth offences.
- Does not support the creation of new slavery and slavery-like offences in the *Crimes Act 1900* (NSW) (**Crimes Act**) where they duplicate existing Commonwealth offences.
- Supports amendments to the *Victims Rights and Support Act 2013* (NSW) (**Victims Rights and Support Act**) that will ensure victims of modern slavery acts can access the NSW victims support scheme.
- Supports amendments that enable victims of forced marriage to access Apprehended Violence Orders under the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) (**CPDV Act**) and submits that further protections are needed to protect young people from forced marriage.

Government agency obligations

Legal Aid NSW is a government agency to which the Modern Slavery Act's new procurement and annual reporting obligations will apply. The Modern Slavery Act creates

¹ The Modern Slavery Act defines a modern slavery offence as committing, attempting to commit or inciting a range of offences in the *Crimes Act 1900* (NSW), *Human Tissue Act 1983* (NSW) and the *Criminal Code Act 1995* (Cth). Listed in Schedule 2 of the Modern Slavery Act, these offences include new and existing offences, including slavery, servitude, sexual servitude, forced labour, human trafficking and debt bondage.

a new obligation for government agencies to take reasonable steps to ensure that the goods and services it procures are not the product of modern slavery,² and to include a statement of the steps taken in annual reports and a statement of any action taken on issues raised by the Anti-Slavery Commissioner.³

Legal Aid NSW supports provisions in the Modern Slavery Act for the NSW Procurement Board to issue directions and for the Anti-Slavery Commissioner to develop publicly available codes of practice.⁴ Directions on reasonable steps to be taken to ensure that goods and services procured are not the product of modern slavery, and codes of practice to guide government agencies in identifying, monitoring and remediating modern slavery in their supply chain, will be important sources of guidance to meet these new obligations.

Modern Slavery Risk Orders

The amendment Bill proposes to repeal s 29 of the Modern Slavery Act.⁵ Section 29 is aimed at addressing the future risk of a person convicted of a modern slavery offence through ‘modern slavery risk orders’: orders prohibiting the person from engaging in conduct described in the order. It would allow a court that convicts a person of a modern slavery offence to constrain the liberties of the person, in addition to any sentence served, to reduce or manage their risk of committing a further modern slavery offence.

Legal Aid NSW supports the repeal of s 29. There is insufficient rationale and evidence to support the introduction of the new risk order regime.⁶ Further, its provisions do not adequately safeguard minimum criminal justice guarantees, namely the presumption of innocence, to protect against the arbitrary deprivation of personal liberty and other fundamental rights.⁷ As stated in the NSW Government submission: ‘Risk-based and prevention-oriented orders are complex and challenge fundamental principles of justice, including the presumption of innocence. They should not be introduced lightly.’⁸

Instead, the amendment Bill proposes to address the future risk of a person convicted of

² By inserting s 176(1A) in the *Public Works and Procurement Act 1912* (NSW).

³ By inserting cl 8(1)(b1) and (b2) in the *Annual Reports (Statutory Bodies) Regulation 2015* (NSW).

⁴ Modern Slavery Act, Part 3, [27] and Sch 5.6, [3] and [4].

⁵ Amendment Bill, Schedule 1, [18] and [3].

⁶ We note that neither the *Hidden in Plain Sight* report of the Commonwealth parliamentary Inquiry into Establishing a Modern Slavery Act in Australia (December 2017) nor the report of the Commonwealth parliamentary Inquiry into human trafficking, slavery and slavery-like practices (July 2017) recommended the introduction of modern slavery risk orders.

⁷ “After serving any sentence of imprisonment lawfully imposed, an offender has the right to personal liberty. That is “the most fundamental and important of all common law rights”. It is one which “cannot be impaired or taken away without lawful authority and then only to the extent and for the time which the law prescribes.”: *Williams v The Queen* 161 CLR 278 at 292 per Mason and Brennan JJ, cited in *State of New South Wales v Donovan* [2015] NSWSC 1254 per McCallum J at [2] (upheld on appeal in *State of New South Wales v Donovan* [2015] NSWCA 280 at [58]).

⁸ NSW Government submission enclosed with the terms of reference, 8.

sexual servitude offences⁹ through the existing risk management scheme in the *Crimes (High Risk) Offenders Act 2006* (NSW) (**HRO Act**).

The HRO Act relevantly provides that applications for an extended supervision order (**ESO**) or continuing detention order (**CDO**) can be brought against a person who is an offender serving a sentence of imprisonment for an 'offence of a sexual nature'. The amendment Bill proposes to broaden the definition of 'offence of a sexual nature' in s 5(2) of the HRO Act to include sexual servitude offences, thus enabling the State to apply to the Supreme Court for a supervision or detention order against a person serving a sentence of imprisonment for sexual servitude.

Legal Aid NSW opposes the expansion of the HRO Act's preventative supervision and detention order scheme to bring further cohorts of offenders within its scope. There are other means by which convicted offenders within this cohort can be kept under supervision, including parole, apprehended violence orders and, where sexual offending against a child is involved, sex offender registration. The intention of ESOs and CDOs, which are extraordinary measures, is to protect the community from reoffending by a very small group of serious sex offenders and violent offenders who present with the most serious risk to the community. The HRO Act's scheme currently applies to high risk sex offenders and high risk violent offenders. No evidence has been presented to support the extension the scheme to this further and different cohort of offenders.¹⁰

We note that Legal Aid NSW has previously expressed concern about the inadequate safeguards in the HRO Act to protect against the unjust deprivation of liberty, particularly in light of concerns about the accuracy of risk assessment methods.¹¹ We maintain that the HRO Act requires improved procedural safeguards, including an independent body to review risk assessments.¹²

New aggravated offence

Legal Aid NSW does not support the introduction of new aggravated offences with higher penalties.

Under current NSW law, it is an offence punishable by up to 14 years imprisonment to use a child under 14-years-old for the production of child abuse material, to cause or procure a child of that age to be so used, or having care of a child of that age, consenting to or

⁹ Crimes Act, Division 10A, ss 80B-80F. This offence was introduced by the *Crimes Amendment (Sexual Servitude) Act 2001*.

¹⁰ We note that offenders of sexual servitude offences may differ from other sexual offenders currently covered by the HRO Act scheme in that they may have a more commercial rather than sexual predatory motivation for offending. As such, management of their rehabilitation and risks will differ.

¹¹ Legal Aid NSW has previously opposed the expansion of the scope of the high risk offender cohort and expressed concern about insufficient safeguards in the HRO Act: see Legal Aid NSW submission to the Review of the Crimes (High Risk Offenders) Act 2006 (August 2016), available at http://www.legalaid.nsw.gov.au/__data/assets/pdf_file/0016/25414/Legal-Aid-NSW-Submission-to-the-Crimes-High-Risk-Offenders-Act-2006-NSW-Statutory-Review.pdf.

¹² *Ibid*, p 21.

allowing the child to be so used.¹³ It is an offence punishable by up to 10 years imprisonment to use a child who is of or above 14-years-old for the production of child abuse material, to cause or procure a child of that age to be so used, or having care of a child of that age, to consent to or allow the child to be so used.¹⁴ The Modern Slavery Act would create a new offence of using a child for the production of child abuse material in circumstances of aggravation with a maximum penalty of 20 years imprisonment.¹⁵

We submit that relevant factors proposed as circumstances of aggravation are already considered in sentencing for existing offences, pursuant to s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW). Section 21A also provides for ‘any other objective or subjective factor that affects the relative seriousness of the offence’ to be considered. The criminality involved in the aggravated forms of the offences are already appropriately encompassed by the maximum penalty of 14 years imprisonment.¹⁶

We support consistency between the list of aggravated factors for child sexual offences. We note that the order of the list of aggravated factors in s 66DE(2) of the Crimes Act (Aggravated sexual act–child between 10 and 16) differs from the order of the list of aggravated factors in the new s 91G(3A).

Regarding the proposed new offence:

- We query s 91G(3B), which provides that ‘it is not necessary to prove that the accused knew the age of the child concerned’. This provision is inconsistent with the approach taken in other child sexual assault offences, which is that a person who has an honest and reasonable, but mistaken, belief regarding the age of the child is not criminally responsible for an offence if he/she would not have been responsible if that belief were correct.¹⁷
- We do not support the introduction of s 91G(3C), which provides that if on the trial of an offence under s 91G(3), the trier of fact is not satisfied that the offence is proven but is satisfied that the person has committed an offence under ss 91G(1) or 91G(2), it may find a person guilty of those offences. Legal Aid NSW does not support the creation of statutory alternative verdicts. They introduce unnecessary complexity and have the potential to complicate trial processes. If the Crown seeks to rely upon an alternative verdict, it should be included in the indictment.

¹³ Crimes Act, s 91G(1).

¹⁴ Crimes Act, s 91G(2).

¹⁵ Modern Slavery Act, Schedule 4[2], which would insert s 91G(3) into the Crimes Act, with circumstances of aggravation defined as involving any one or more of the factors in s 91G(3A).

¹⁶ We note that the amendment Bill (Schedule 1, Item [25]) proposes an amendment to clarify one of the circumstances of aggravation (s 91G(3A)(h)). If the new aggravated offences are retained, we do not oppose this amendment.

¹⁷ *CTM v R* [2008] HCA 25.

Digital platforms and child abuse material

The Act would create new offences of: administering a digital platform used to deal with child abuse material, encouraging the use of a digital platform to deal with child abuse material and providing information about avoiding detection.¹⁸

The amendment Bill proposes to repeal the new offence of administering a digital platform used to deal with child abuse material because of inconsistency with the existing Commonwealth offence. Legal Aid NSW supports its repeal. In addition to concerns about inconsistency, the new offence as drafted appears to criminalise the actions of a person who does anything to maintain or facilitate use of the platform and who is aware it is being used to deal with child abuse material, even where the person does not have the capacity to prevent that use of the platform. As identified in the NSW Government submission, existing Commonwealth offences remain available to NSW law enforcement agencies to use in relation to offences relating to child abuse material on digital platforms.

We also support the minor amendments the amendment Bill proposes to make to the other two new offences, to align them with equivalent Commonwealth offences.

New slavery and slavery-like offences

The Modern Slavery Act creates new 'slavery and slavery-like offences': holding a person in slavery or servitude, requiring a child to perform forced or compulsory labour, causing a child to enter into a forced marriage, and entering into forced marriage with a child.¹⁹

The amendment Bill proposes to amend these offences to remove potential constitutionally problematic inconsistencies with equivalent existing Commonwealth offences.²⁰

Legal Aid NSW does not generally support the introduction of new offences in NSW criminal law that duplicate existing Commonwealth criminal offences. We submit that these new offences should be repealed where they duplicate existing offences in the *Criminal Code Act 1995* (Cth) (**Commonwealth Criminal Code**).²¹ If they are not repealed, we support the amendments to the new offences proposed by the amendment

¹⁸ Modern Slavery Act, Schedule 4, [3], which would insert ss 91HAA, 91HAB and 91HAC into the Crimes Act.

¹⁹ Modern Slavery Act, Schedule 4, [7]. It would insert ss 93AB(1)(a), 93AB(1)(b), 93AC(3) and 93AC(4) into the Crimes Act.

²⁰ Amendment Bill, Schedule 1, [31] and [32].

²¹ Section 93AB(1)(a) duplicates Criminal Code s 270.3 (which also carries a penalty of 25 years). Section 93AB(1)(b) duplicates Criminal Code s 270.6A, causing a person to enter into or remain in forced labour. The offence is aggravated if the victim is under 18, with a maximum penalty of 12 years. Section 93AC(3) duplicates Criminal Code s 270.7B(1), causing a person to enter into a forced marriage. The offence is aggravated if the victim is under 18, with a maximum penalty of 9 years. Section 93AC(4) duplicates Criminal Code s 270.7B(2), being a party to a forced marriage (but not being the victim). The offence is aggravated if the victim is under 18, with a maximum penalty of 9 years. The Commonwealth offence extends to adult victims of forced marriage, whereas the NSW offence is limited to child victims.

Bill, which seek to align the new offences with their Commonwealth equivalents.

Legal Aid NSW supports legislative amendments aimed at ensuring access to forms of financial support and counselling for victims of acts of modern slavery. Accordingly, to the extent that amendments to the Victims Rights and Supports Act or Crimes Act may be required to ensure that victims of acts of modern slavery can access the NSW victims support scheme, we would support such amendments.

Apprehended Violence Orders

The CDPV Act empowers courts to make Apprehended Violence Orders (**AVOs**) in appropriate circumstances to protect people from violence, intimidation and stalking.

In relation to the new slavery and slavery-like offences, the Modern Slavery Act would amend the CDPV Act to ensure that potential child victims of forced marriage can access AVOs if they experience coercion or threats to enter a forced marriage.²² The amendment Bill extends the changes to include adult victims of forced marriage.²³

The Modern Slavery Act and the amendment Bill would also amend the definition of 'intimidation' in the CPDV Act to include conduct amounting to coercion of a child to enter into a forced marriage (within the meaning of the proposed new offence) and coercion of a person to enter into a forced marriage (within the meaning of the Commonwealth Criminal Code).

Legal Aid NSW supports these amendments, which will provide a further protective mechanism for potential child and adult victims of forced marriage. However, the changes will not address all of the issues faced by victims of forced marriage, for whom the biggest risk is being removed from the jurisdiction.

Two case studies at **Attachment A** highlight some of the challenges young people can currently face in having appropriate protections implemented.

A further protective mechanism would be to extend who can make an application for an AVO under the CPDV Act, to include the Australian Federal Police (**AFP**) and NSW Family and Community Services. These agencies are often involved in situations of forced marriage. Giving them the ability to apply for these new AVOs would remove pressure from young people to apply for orders against their parents, in circumstances where the NSW Police have not applied for an AVO. In the experience of Legal Aid NSW, it is difficult for young people to apply for orders against their parents. We have found this when we have acted on direct instructions for young people under the *Family Law Act 1975* (Cth) when we have sought orders to prevent their travel overseas by seeking an Airport Watch

²² NSW Government submission enclosed with the terms of reference, p 19. The Modern Slavery Act would do this by including the new offence of child forced marriage in the definition of 'personal violence offence' in the CPDV Act (Schedule 5.3, [1]).

²³ Amendment Bill, Schedule 1, [33]-[37]. It would do this by including reference to the offences of forced marriage under the Commonwealth Criminal Code in the definitions of 'personal violence offence' and 'serious offence'

List (**AWL**) order.

Strengthened protections are also required at the federal level. Legal Aid NSW continues to advocate for law reform to implement a Commonwealth Forced Marriage Protection Order scheme. A scheme similar to that for forced marriage protection orders in the United Kingdom would allow the AFP to prevent travel for young people aged over 18 who are still vulnerable to forced marriage, often up to age of at least 25.

As outlined above, Legal Aid NSW does not generally support the creation of new offences in the Crimes Act, where equivalent offences exist in the Commonwealth Criminal Code. However, we support amendments that may be required to enable potential victims of forced marriage to access AVOs and for victims of all acts of modern slavery to access the NSW victims support scheme. We note that, if the new offences are retained, we support the amendment Bill's proposed changes to the new offence provisions and the CDPV Act, which remove potential inconsistencies between state and Commonwealth offences and reduce uncertainty regarding the scope of AVOs.