



# **Parliamentary inquiry into a better family law system to support and protect those affected by family violence**

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Submission to the Standing Committee on Social Policy and Legal Affairs

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*Anti-Slavery Australia welcomes the opportunity to provide submissions to the Standing Committee on Social Policy and Legal Affairs for the Parliamentary inquiry into a better family law system to support and protect those affected by family violence. Established in 2003, Anti-Slavery Australia is a research, policy and legal centre at the University of Technology Sydney with the mission to abolish human trafficking, slavery and slavery-like practices such as forced labour and forced marriage in Australia. Anti-Slavery Australia provides legal advice and representation to men, women and children who have experienced human trafficking, slavery, slavery-like conditions and forced marriage in Australia.*

## **Acknowledgements**

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## ATTACHMENTS

Frances Simmons and Jennifer Burn, “Without Consent: Forced Marriage in Australia” [2013] 36(3) *Melbourne University Law Review* 971.

Anti-Slavery Australia, *Hidden from view: Slavery in the home*, (2016) Research Note.

## EXECUTIVE SUMMARY

This submission is made to the Standing Committee on Social Policy and Legal Affairs (**‘the Committee’**) inquiry into a better family law system to support and protect those affected by family violence (**‘the Inquiry’**). Anti-Slavery Australia is a law, policy and legal practice centre based within the Faculty of Law at the University of Technology Sydney. This submission draws upon Anti-Slavery Australia’s research and publications, as well as our advocacy and legal casework experience with survivors of human trafficking, slavery and slavery-like practices in Australia.

This submission addresses these extreme forms of human rights abuses in the context of domestic and intimate relationships, and with the recognition that in these environments crimes of human trafficking and slavery can intersect with other forms of family violence.

Human trafficking, slavery and slavery-like practices are Commonwealth offences under divisions 270 and 271 of the *Criminal Code Act 1995 (Cth)* (**‘Criminal Code’**). The Criminal Code criminalises slavery, servitude, forced labour, debt bondage, human trafficking and forced marriage. This submission will refer to these types of exploitation as human trafficking, slavery and or forced marriage in addressing the following terms of reference:

1. how the family law system can more quickly and effectively ensure the safety of people who are or may be affected by family violence, including by:
  - a. facilitating the early identification of and response to family violence; and
  - b. considering the legal and non-legal support services required to support the early identification of and response to family violence;
2. how the capacity of all family law professionals—including judges, lawyers, registrars, family dispute resolution practitioners and family report writers—can be strengthened in relation to matters concerning family violence; and
3. the potential for a national approach for the administration and enforcement of intervention orders for personal protection, however described.

In response to the terms of reference, Anti-Slavery Australia makes the following recommendations:

- (1) Measures and programs that assist in the identification and protection of victims of family violence within the family law system should recognise the intersection between family violence and cases of human trafficking, slavery and forced marriage in Australia.
- (2) To ensure that potential victims of forced marriage of any age are able to access adequate protections throughout Australia, forced marriage protection orders should be introduced.
  - a. These orders should provide a pathway to access the Family Law Watchlist, where there is a concern that a victim or potential victim of a forced marriage will be unlawfully removed from the country (regardless of their age).
  - b. To ensure the efficacy of these forced marriage protection orders, and to address the complex interactions between State and Territory and Commonwealth frameworks, Anti-Slavery Australia supports efforts to create a national database of court orders. Anti-Slavery Australia recommends that this database include family violence orders, child protection orders, family court orders, and if introduced, forced marriage protection orders. This will assist in the early identification, and consistent, comprehensive protection of persons who may be subject to human trafficking, slavery or forced marriage in Australia in the context of family or domestic relationships.
- (3) To strengthen the capacity of all family law professionals in relation to human trafficking, slavery and forced marriage matters that involve family violence, regular and comprehensive training should be conducted to ensure that extreme exploitation in the context of family and domestic relationships is identified and responded to appropriately.
  - a. This training should be supported by appropriate resources and awareness-raising materials.

# 1. HUMAN TRAFFICKING AND SLAVERY IN AUSTRALIA

Human trafficking, slavery and forced marriage are grave human rights abuses that occur in countries around the world. These extremely exploitative practices are complex and hidden, and therefore the prevalence of human trafficking and slavery can only be estimated. In 2012, the International Labour Organisation ('ILO') estimated that there are 21 million people around the world who are victims of forced labour, with 19 million of these people suffering exploitation by private individuals and enterprises.<sup>1</sup>

Survivors of human trafficking and slavery often face lasting physical and psychological impacts. The trauma experienced by survivors is amplified by adverse economic and social outcomes that stem from exploitation, which can further isolate survivors and may act as an obstacle to recovery. In many ways, these outcomes can be exacerbated in the context of intimate, family or domestic relationships.<sup>2</sup>

## 1.1. Australia's international obligations

The Australian government has international obligations to identify, address and prevent human trafficking and slavery, pursuant to international instruments including:

- *The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organised Crime ('the Trafficking Protocol');*
- *The International Covenant on Civil and Political Rights;*
- *The International Covenant on Economic, Social and Cultural Rights;*
- *The Convention on the Elimination of All forms of Discrimination against Women;*
- *The Convention on the Rights of the Child;*
- *The Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery;* and
- ILO forced labour conventions.<sup>3</sup>

The Australian response to human trafficking and slavery is coordinated through the government's *National Action Plan to Combat Trafficking and Slavery 2015-2019* ('**National Action Plan**') which provides the national policy framework for combatting

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<sup>1</sup> International Labour Organization, *Forced labour, modern slavery and human trafficking*, <<http://www.ilo.org/global/topics/forced-labour/lang--en/index.htm>>.

<sup>2</sup> Allison Munro, 'Slavery and servitude within intimate relationships' (2013) 38(1) *Alternative Law Journal* 44, 45.

<sup>3</sup> These include the *Forced Labour Convention, 1930* (No. 29) and the *Worst Forms of Child Labour Convention, 1999* (No. 182).

human trafficking and slavery in Australia. The National Action Plan is underpinned by five key principles that frame the Australian response.<sup>4</sup>

1. Australia is to respond to human trafficking and slavery in a comprehensive, effective, timely and coordinated manner in line with international obligations.
2. Australia is to provide holistic, victim-centred support to trafficked people, without discrimination and provide access to effective remedies.
3. Australia is to strive to be a regional leader in deterring and combatting human trafficking and slavery, working cooperatively with regional and international governments.
4. Australia is to encourage and promote a collaborative response to human trafficking and slavery, through participation of government, civil society, business, industry, unions and the community.
5. Australia is to maintain a strong compliance framework, promoting investigation, prosecution and enforcement of civil sanctions against offenders.

In line with the National Action Plan, and Australia's international obligations, the Australian government has developed a number of criminal and civil response frameworks to address human trafficking and slavery in Australia. Human trafficking, slavery and slavery-like practices are criminal offences under divisions 270 and 271 of the Commonwealth Criminal Code. At a Federal level, matters that involve labour exploitation in the workplace may also come within the provisions of the *Fair Work Act 2009* (Cth), while cases involving migration may be dealt with pursuant to the *Migration Act 1958* (Cth). There are also a number of civil responses that are particularly relevant in cases involving forced marriage, including provisions under the *Marriage Act 1961* (Cth) (**'Marriage Act'**) and the *Family Law Act 1975* (Cth) (**'Family Law Act'**).

Alongside these Federal responses are relevant State and Territory legislation, including State-based crimes legislation, child protection schemes and apprehended violence or restraining order schemes (**'intervention orders'**), with varying levels of protection available in each jurisdiction.

While these frameworks provide a robust source of protections for victims of human trafficking and slavery, there is a need to enhance the capacity and consistency of these frameworks to ensure that the complex and unique circumstances that inevitably surround cases of human trafficking and slavery in Australia are addressed, and that the human rights of victims and survivors are protected.

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<sup>4</sup> Australian Government, *National Action Plan to Combat Human Trafficking and Slavery 2015-19*, 1 December 2014, 18.

## 1.2. Human trafficking, slavery and family violence

Through Anti-Slavery Australia's legal practice, we have seen that survivors of human trafficking and slavery are exploited in both commercial and domestic settings. In 2013, amendments to the Criminal Code broadened the definition of servitude to include labour or services other than sexual services, and introduced the offence of forced labour.<sup>5</sup> In 2016, Anti-Slavery Australia published a research note, 'Hidden from view: slavery in the home'.<sup>6</sup> This research note (attached) analyses the application of Australia's laws against servitude in the context of a recent servitude case in the United Kingdom. The research identifies the parallels between the slavery-like practice of servitude and circumstances involving family violence. It examines whether exploitation in a domestic context would be considered labour or services pursuant to division 270 of the Criminal Code.

Anti-Slavery Australia has also identified an emerging trend of Australian citizens and residents who are trafficked out of the country and abandoned overseas, and who are subsequently unable to return to Australia. It is our experience that these cases often occur within the context of family violence. The following case study is based on the experiences of an Anti-Slavery Australia client, and is one example of the intersection between family violence and human trafficking and slavery. Key information has been changed to preserve client confidentiality.

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<sup>5</sup> *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013* (Cth).

<sup>6</sup> Anti-Slavery Australia, *Hidden from view: Slavery in the home*, (2016) Research Note, available online at <<http://www.antislavery.org.au/images/pdf/Publications/2016%20-%20Hidden%20from%20View%20Slavery%20in%20the%20home.pdf>>.

### **Case Study: Domestic servitude and Human Trafficking**

Elle married an Australian citizen and was sponsored to Australia on a partner visa. This temporary visa allowed her to travel to Australia and live with her husband and his family for a period of about two years at which time the relationship would again be assessed to determine whether it was genuine by the Department of Immigration and Border Protection before a permanent visa could be granted.

During her time in Australia, Elle was beaten by her husband's family, and forced to remain inside the family home where she was required to perform domestic work. Elle soon became pregnant. She was beaten regularly during her pregnancy and was told that the child was unwanted. Her child was born in Australia, as an Australian citizen, and suffered a serious medical condition requiring frequent medical attention. After the child's birth, Elle suffered continued physical and psychological abuse. Elle was also illiterate, and her husband and his family had considerable control over most aspects of her life.

After 18 months living in these conditions, Elle was asked to accompany her mother-in-law on a trip to her husband's homeland. Elle was initially reluctant to go, as she did not have any family in that country. She was eventually convinced to go on a short trip with her mother-in-law, taking her young child with them. After five days, Elle's mother-in-law abandoned Elle and her child at a shopping centre, taking their passports with her. Elle was forced to sell her jewellery to pay for a place to stay, but soon became homeless. She was found by police crying in a park, holding her daughter. She felt great shame, and initially was unable to explain how she had ended up in this situation.

### **1.3. Prevalence of human trafficking and slavery in Australia**

Human trafficking and slavery occur throughout Australia.<sup>7</sup> Since 2004, the Australian Federal Police ('AFP') have received over 691 referrals relating to human trafficking and slavery matters. Historically, the majority of victims of trafficking were identified as women from nearby Asian countries who had been exploited in the sex industry. However, recent years have seen the profile of victims in Australia change and recently identified victims of human trafficking have included male and female victims from countries around the world who have suffered exploitation in a range of industries as well as within family or domestic relationships.<sup>8</sup> In the 2015-16 financial year, 76.9 percent of referrals to the AFP for matters of human trafficking and slavery related to exploitation other than sexual exploitation, in industries such as agriculture, construction, hospitality, domestic service and in circumstances including forced marriage.<sup>9</sup>

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<sup>7</sup> 'Trafficking In Persons: The Australian Government Response July 2015 – 30 June 2016' (Eighth Report Of The Interdepartmental Committee on Human Trafficking And Slavery, Commonwealth of Australia, 2016) 3.

<sup>8</sup> Ibid. 4.

<sup>9</sup> Ibid. 3-4.

Anti-Slavery Australia has provided legal and migration advice to almost 300 women, men and children who have been identified as survivors of human trafficking and slavery in Australia. Of our current clients 77.6 percent are female while approximately 5.8% are children (under the age of 18 years).

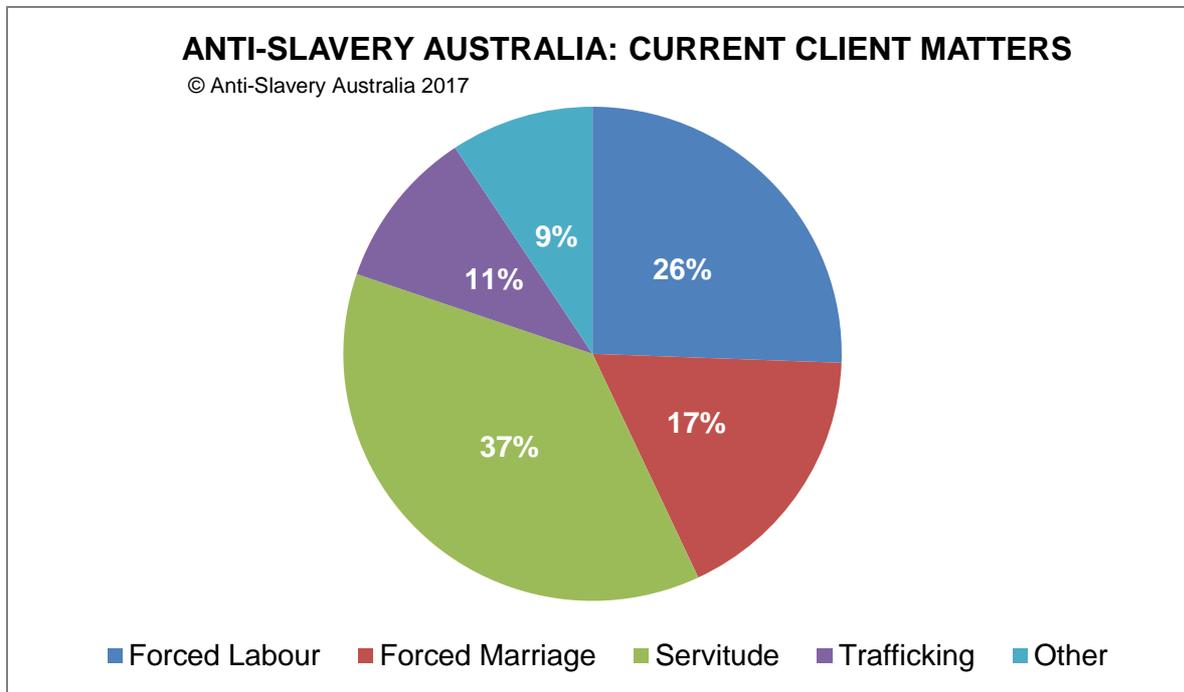


Figure 1.1: Current client matters as of 9 June 2017 (Source: Anti-Slavery Australia).<sup>10</sup>

Our current clients come from 30 countries around the world, with the highest numbers coming from India, reflecting broader migration trends throughout Australia.<sup>11</sup>

<sup>10</sup> “Other” matter types include legal and migration casework conducted for family members of identified suspected victims of human trafficking, slavery or forced marriage in Australia.

<sup>11</sup> See, for example, the Australian Government Department of Immigration and Border Protection’s ‘Australia’s migration programme – Country ranking 2014-15’ (2015) <<https://www.border.gov.au/ReportsandPublications/Documents/statistics/country-ranking-2014-15.pdf>>.

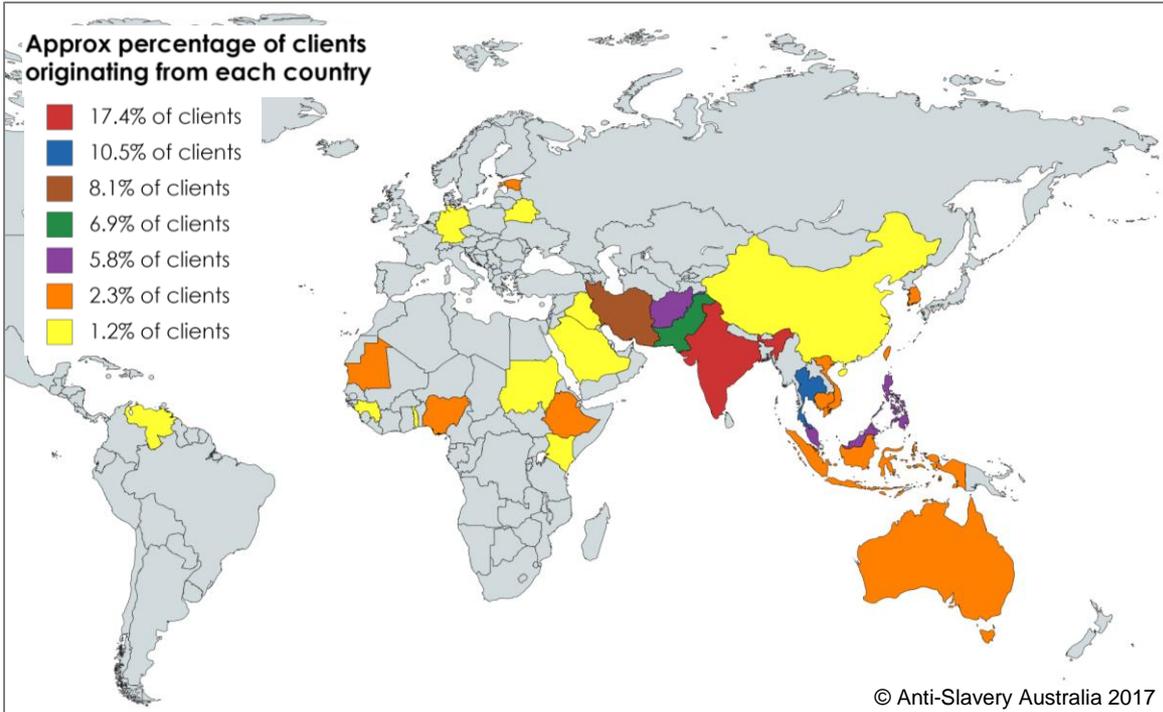


Figure 1.2: Distribution of current clients by country of origin as of 9 June 2017 (Source: Anti-Slavery Australia).



Figure 1.3: Current clients (top ten countries of origin) as of 9 June 2017 (Source: Anti-Slavery Australia).

## 1.4. Forced marriage and family violence

Forced marriage is a human rights abuse and is recognised as a form of gender-based violence.<sup>12</sup> In 2013, the Criminal Code was amended to include the federal offence of forced marriage as a slavery-like practice under division 270. Following further amendments to the Criminal Code in 2015,<sup>13</sup> forced marriage is now defined as a practice where:

[O]ne party to the marriage (the *victim*) entered into the marriage without freely and fully consenting:

- (a) because of the use of coercion, threat or deception; or
- (b) because the party was incapable of understanding the nature and effect of the marriage ceremony.<sup>14</sup>

The Criminal Code includes a rebuttable presumption that a child, under the age of 16 is incapable of understanding the nature and effect of the marriage ceremony.<sup>15</sup>

Forced marriage is also considered to be a form of domestic or family violence, and can occur within a pattern of family violence that includes emotional, psychological, physical, sexual, economic or financial abuse, as well as female genital mutilation and honour-based violence.<sup>16</sup> It is therefore necessary that family violence prevention, including the identification and protection of victims of forced marriage, includes a holistic review of all relevant agencies and service providers to assess the efficacy of intersecting criminal, civil and child protection measures. The case study below demonstrates how State and Commonwealth law enforcement and civil proceedings may overlap in a forced marriage matter. Identifying information has been changed to preserve client confidentiality.

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<sup>12</sup> 'Trafficking In Persons: The Australian Government Response July 2015 – 30 June 2016' above n 7, 1; UNHCR Division of International Protection Services, 'UNHCR Handbook for the Protection of Women and Girls' (UNHCR Handbook, United Nations High Commission for Refugees, 6 March 2008) 194 <<http://www.unhcr.org/en-au/protection/women/47cfae612/unhcr-handbook-protection-women-girls.html>>.

<sup>13</sup> *Crimes Legislation Amendment (Powers, Offences and Other Measures) Act 2015* (Cth) sch 4.

<sup>14</sup> *Criminal Code Act 1995* (Cth) s 270.7A(1).

<sup>15</sup> *Ibid* s 270.7A(4).

<sup>16</sup> Frances Simmons and Jennifer Burn, "Without Consent: Forced Marriage in Australia" [2013] 36(3) *Melbourne University Law Review* 971, 975; Domestic Violence London: A Resource for Health Professionals, *What is Domestic Violence/Forms of Domestic Violence*, (2017) National Health Service <<http://www.domesticviolencelondon.nhs.uk/1-what-is-domestic-violence-/18-forced-marriage.html>>.

### **Case Study: Forced marriage**

Jane was a 14 year old girl residing in Australia with her parents and an older, male cousin. In 2016, Jane informed her school teacher that her family was planning for her to be married by the next school year. Jane also called State police officers and informed them that her cousin had just returned from a trip to their home country, where he had planned marriages for her and some of her young, female relatives. Jane said that should her cousin's plans be successful, she would be forced into a marriage against her will. She had been told by her cousin and other family members that this type of marriage was expected in their culture and that Jane would be travelling to her home country to participate in a marriage ceremony. When she initially refused, Jane's cousin shouted at her, pushed her against a wall and slapped her across the face. Although Jane mentioned that she had extended family living interstate, she was apprehensive about seeking their help, as she feared they would also force her into a marriage. Jane informed police that her cousin held her passport.

The AFP were informed and a case was opened. Jane was placed on the Red Cross Support for Trafficked People Program. A court order was made under the *Family Law Act* that requested Jane be placed on the Family Law Watchlist administered by the AFP. Concurrent to this order, an application was made to the State's Children's Court regarding guardianship over Jane. Jane was placed in foster care while the matter was being decided.

Jane was not comfortable staying in foster care; she also did not want to continue to assist with child protection proceedings. She made the decision to move interstate to join her extended family. It is unclear whether they will attempt to force her into a marriage. She is also now being investigated by the Department of Immigration and Border Protection about her visa status.

## **1.5. Prevalence of forced marriage in Australia**

It is difficult to accurately identify the prevalence of forced marriage in Australia. The fact that it often occurs within traditional communities and families, coupled with its relatively recent criminalisation at a Federal level, means that the extent to which it is practiced in Australia is unknown. In the 2015-16 financial year, the AFP received 69 new referrals relating to forced marriage matters representing 40.8% of total referrals made to the AFP on human trafficking and slavery related matters during that period.<sup>17</sup> In comparison, 11 referrals were made in 2013-14 for forced marriage matters represented 15.7 percent of human trafficking and slavery referrals for that year.<sup>18</sup>

It is important to recognise that these figures are not a comprehensive estimate of the scope of the problem of forced marriage in Australia. There are many, well-documented

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<sup>17</sup>'Trafficking In Persons: The Australian Government Response July 2015 – 30 June 2016' above n 7, 20.

<sup>18</sup> Ibid. 20; Trafficking In Persons: The Australian Government Response July 2013 – 30 June 2014' (Sixth Report Of The Interdepartmental Committee on Human Trafficking And Slavery, Commonwealth of Australia, 2014) 18.

barriers that can prevent victims and potential victims of forced marriage from seeking assistance. Consequently instances of forced marriage in Australia are under-identified and under-reported. Anti-Slavery Australia's experience in assisting survivors of forced marriage has highlighted key barriers preventing victims from reporting forced marriage, including:

- Fear of being disowned;
- Fear of being ostracised from communities;
- Anxiety over displacement or isolation from family;
- Fear of reprisals from family or community members;
- Linguistic and cultural barriers; and
- Lack of information and access to services.

These barriers are significant in cases where the potential victim of forced marriage is under 18, or is in the 18 to 25-age bracket, and may be compounded by a desire not to disrupt domestic relationships, or exacerbate domestic conflict. There may also be a desire to avoid causing perceived harm to parents through police involvement in the matter.

As Figure 1.4 below demonstrates, forced marriage can affect both children and adults, although most referrals received by the AFP have involved Australian citizens under the age of 18. In a majority of these referrals, relatives have been identified as the parties organising the marriage of children, often intending the marriage ceremony to take place overseas.<sup>19</sup> Anti-Slavery Australia's forced marriage clients are predominantly young adults (between the ages of 18 and 25). This cohort often cannot benefit from the same protections which are available to minors in Australia (under the age of 18).

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<sup>19</sup> 'Trafficking In Persons: The Australian Government Response July 2015 – 30 June 2016' above n 7. 23.

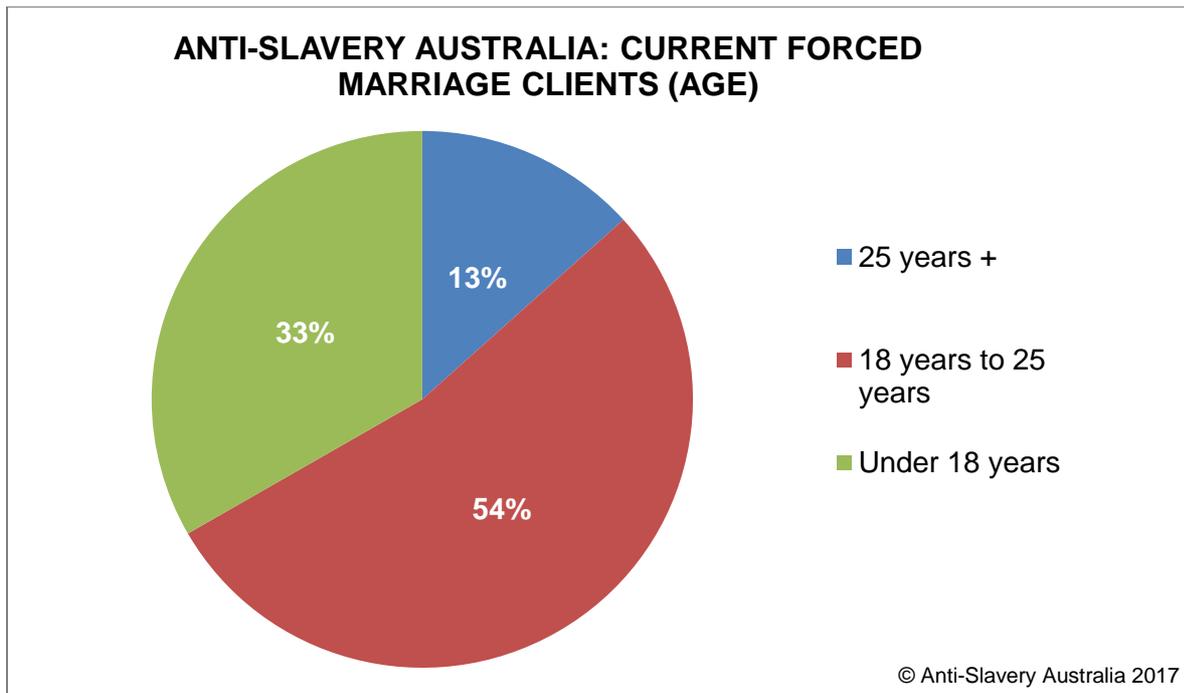


Figure 1.4: Current forced marriage clients by age as of 9 June 2017 (Source: Anti-Slavery Australia).

The issue of forced marriage is not isolated to any one Australian State or Territory. Forced marriage matters constitute 17.4 percent of Anti-Slavery Australia’s current client profile. These matters have involved clients who reside across Australia in New South Wales, Victoria, South Australia and Western Australia.

Through Anti-Slavery Australia’s forced marriage website, My Blue Sky (discussed further below) and other avenues of referrals, our organisation has encountered several cases involving Australian citizens or visa holders who have been deceived into travelling overseas for the purpose of forced marriage. This form of trafficking is usually facilitated by family members, often parents, who take their children overseas on what is ostensibly a holiday, or a visit to see extended family members.

**Recommendation:**

Measures and programs that assist in the identification and protection of victims of family violence within the family law system should recognise the intersection between family violence and cases of human trafficking, slavery and forced marriage in Australia.

## 2. THE FAMILY LAW RESPONSE TO HUMAN TRAFFICKING, SLAVERY AND FORCED MARRIAGE IN AUSTRALIA

### 2.1. Legal and non-legal support and protections for victims of human trafficking, slavery and forced marriage

In Australia there are comprehensive criminal law, visa and government support frameworks that are available to assist individuals who have been identified as suspected victims of trafficking and slavery by the AFP.<sup>20</sup> However, outside of interactions with law enforcement, there are few avenues for victims to seek protection and assistance in Australia.

In 2013, an article titled “Without Consent: Forced Marriage in Australia” was published in the Melbourne University Law Review, which examined the Australian response to forced marriage. The article (attached) identifies key areas of concern within the existing Australian response and in particular highlights the need for an enhanced, national civil framework to assist victims and potential victims of forced marriage to seek assistance and protection.

With particular reference to the *Family Law Act*, Anti-Slavery Australia has identified key gaps in the existing system that must be addressed to ensure that emerging forms of human trafficking, slavery and forced marriage are identified and addressed in the existing family law system in cases where exploitation intersects with family violence. These gaps include:

- The need for a unified, national system through which victims and potential victims of forced marriage can access protection orders; and
- Accessibility of Family Law Watchlist orders (**‘Watchlist orders’**) under the family law framework.

### 2.2. Existing protections under the *Family Law Act*

The Commonwealth *Family Law Act* contains provisions relating to the grant of various orders that may be relevant in circumstances where a child may be forced into a marriage. Two key orders are:

- 1) Parenting orders,<sup>21</sup> and
- 2) Child-related injunctions.<sup>22</sup>

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<sup>20</sup> For further information on Australia’s visa frameworks.

<sup>21</sup> *Family Law Act 1975* (Cth) s64B

<sup>22</sup> *Family Law Act 1975* (Cth) s68B.

### 2.2.1. Parenting Orders

Parenting orders may be made by a Court exercising its jurisdiction under the *Family Law Act*, and can deal with various aspects of parenting including any aspect of the care, welfare or development of the child, and any aspect of parental responsibility.<sup>23</sup> In making a parenting order, the court must have regard to the child's best interest as a paramount consideration.<sup>24</sup> This includes consideration of the risk of family violence when contemplating the child's best interests, and allows the court to include in an order, any relevant safeguards that it considers necessary to ensure the safety of parties affected by the order.<sup>25</sup> The *Family Law Act* defines family violence as:

...violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the **family member**), or causes the family member to be fearful.<sup>26</sup>

Parenting orders expire when the child turns 18, or if a child enters into a de facto or marital relationship.<sup>27</sup> It should be noted that a child can apply for a parenting order under section 65C of the *Family Law Act*.

If a person contravenes a parenting order, the Court may issue a warrant for the arrest of the alleged offender.<sup>28</sup> The *Family Law Act* contains other provisions relating to the contravention of an order that allows the Court to; make an order requiring the contravener to enter into a bond; impose a fine; or require the contravener to pay the relevant costs incurred by another party in the matter.<sup>29</sup>

When a parenting order is in force, or proceedings are pending, a party to the proceedings or a person acting on the request of a party to the proceedings must not remove the child concerned from Australia.<sup>30</sup> Removal from the country in breach of the relevant provisions may result in a penalty of 3 years imprisonment. Obligations are also imposed on owners of aircraft and vessels where they are served with a statutory declaration of the order made, or where they are aware that proceedings are pending in the matter.<sup>31</sup>

The Court may request the AFP to place the child on the Family Law Watchlist, in what is known as a Watchlist order.<sup>32</sup> A child may also be placed on the Watchlist by application of a party in pending proceedings. The Watchlist is designed to alert the AFP to the movement of a child through international departure points in Australia. Often a Watchlist order will address and restrain a named individual, including their

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<sup>23</sup> *Family Law Act 1975* (Cth) s64B(a)(i).

<sup>24</sup> *Family Law Act 1975* (Cth) s65AA.

<sup>25</sup> *Family Law Act 1975* (Cth) s60CG.

<sup>26</sup> *Family Law Act 1975* (Cth) s4AB.

<sup>27</sup> *Family Law Act 1975* (Cth) s65H.

<sup>28</sup> *Family Law Act 1975* (Cth) s65Q.

<sup>29</sup> *Family Law Act 1975* (Cth) s70NEB.

<sup>30</sup> *Family Law Act 1975* (Cth) s 65Y & 65.

<sup>31</sup> *Family Law Act 1975* (Cth) s 65ZA.

<sup>32</sup> See orders made in *Madley & Madley and Anor* [2011] FMCAfam 1007 (1 April 2011) and *Kandal & Khyatt & Ors* [2010] FMCAfam 508.

agents, from removing the child from the country. Frequently, the Watchlist Order will be made to operate for a period of two years, or until the child reaches 18 years of age. The AFP have stated that there are currently over 11,000 names on the Family Law Watchlist.<sup>33</sup>

In the matter of *Madley & Madley and Anor*<sup>34</sup> the Federal Magistrates Court of Australia noted that:

The application is one that is becoming increasingly common both before this Court and the Family Court.<sup>35</sup>

### **2.2.2. Child-related injunctions**

Under the *Family Law Act*, a relevant Court is able to make orders or grant injunctions that it considers are appropriate for the welfare of the child.<sup>36</sup> The purpose of an injunction can include;<sup>37</sup>

- the personal protection of the child, a parent of the child or a person with whom the child is to live with, spend time with or communicate with under a parenting order; or
- the restraint of a person from entering or remaining in a place of residence, employment or education of the child, a parent of the child or a person with whom the child is to live with, spend time with or communicate with under a parenting order.

Where a court has ordered a personal protection injunction and a police officer believes on reasonable grounds that this injunction has been breached then the officer may arrest the party without warrant.<sup>38</sup> It should be noted that a breach under these provisions relates to causing or threatening to cause bodily harm or harassing, molesting or stalking that person.<sup>39</sup>

### **2.2.3. Other types of orders under the Family Law Act**

There are a number of other orders that may be relevant in circumstances where a child may be forced into a marriage in Australia or trafficked overseas. These include:

- Orders for delivery of passports;<sup>40</sup>

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<sup>33</sup> Judge S.H. Scarlett RFD, *Watch List Orders – A Paper for a CLE Seminar for Family Law Practitioners* (28 November 2013) Federal Circuit Court of Australia <<http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/reports-and-publications/speeches-conference-papers/2013/paper-scarlett-watch-list-orders>>.

<sup>34</sup> [2011] FMCAfam 1007 (1 April 2011).

<sup>35</sup> *Madley & Madley and Anor* [2011] FMCAfam 1007 (1 April 2011) at [4].

<sup>36</sup> *Family Law Act 1975* (Cth) s68B(1).

<sup>37</sup> *Family Law Act 1975* (Cth) s68B(1).

<sup>38</sup> *Family Law Act 1975* (Cth) s68C.

<sup>39</sup> *Family Law Act 1975* (Cth) s68C.

<sup>40</sup> *Family Law Act 1975* (Cth) s67ZD.

- Interim or procedural orders to protect children where there has been family violence, or where there is a risk of family violence;<sup>41</sup>
- Orders for the location and recovery of a child;<sup>42</sup> and
- Injunction in circumstances arising out of a marital relationship.<sup>43</sup>

### **2.3. Intersection between the family law system and State and Territory jurisdictions**

The Council of Australian Governments ('COAG') advisory panel on reducing violence against women and their children released its final report in 2016. A key recommendation of the report was that:

Commonwealth, state and territory governments should agree to work together to improve the intersections between family law, child protection and family violence legal systems by implementing the respective elements of the recommendations of the Family Law Council's interim report on families with complex needs.<sup>44</sup>

The recommendation outlined two specific measures that should be undertaken to achieve this recommendation including:

- Introducing measures to increase information sharing between family courts and other agencies; and
- Developing a national database of court orders.<sup>45</sup>

Anti-Slavery Australia supports this recommendation, in recognition of the complex interaction between the Federal family law system and State and Territory-based family violence and child protection processes in matters involving human trafficking, slavery and forced marriage.

#### **2.3.1. State and Territory intervention orders**

State and Territory intervention orders vary by jurisdiction, and are available to adults who seek protection in circumstances of personal or domestic violence.<sup>46</sup> The differences between jurisdictions means, however, that victims and potential victims of human trafficking, slavery and forced marriage have varying levels of protection available to them under these State and Territory-based schemes.

For example, in New South Wales, adult victims or potential victims of human trafficking and forced marriage, who may be experiencing family violence, can seek an

<sup>41</sup> *Family Law Act 1975* (Cth) s67ZBB.

<sup>42</sup> *Family Law Act 1975* (Cth) sub-div C.

<sup>43</sup> *Family Law Act 1975* (Cth) s114.

<sup>44</sup> COAG, *COAG Advisory Panel on Reducing Violence against Women and their children*, Final Report (2016) 124.

<sup>45</sup> *Ibid.*

<sup>46</sup> Apprehended Violence Orders (NSW), Intervention Orders (Vic and SA), Violence Restraining Orders (WA), Protection Orders (Qld), Domestic Violence Orders (ACT and NT) and Family Violence Orders (Tas).

apprehended domestic violence order (**‘ADVOs’**). This order can prevent a person who has or has had a domestic relationship with the victim from assaulting, threatening, stalking or intimidating the victim, as well as restricting or prohibiting access to premises where the victim lives or works.<sup>47</sup> However, for an ADVO to be made, the court must be satisfied that on the balance of probabilities, the victim has reasonable grounds to fear, and does in fact fear, the commission of a personal violence crime by the other person, or the engagement of the other person in conduct where the victim will be intimidated or stalked.<sup>48</sup> The *Crimes (Domestic and Personal Violence) Act 2007* defines “personal violence offence” as specific offences under the *Crimes Act 1900* (NSW) (**‘Crimes Act’**).<sup>49</sup> The Federal crimes of human trafficking, slavery and forced marriage are not included in this definition. While some cases of extreme exploitation may involve personal violence offences, such as kidnapping or sexual assault pursuant to the *Crimes Act*, these elements are certainly not present in all circumstances of human trafficking, slavery and forced marriage.

The *Family Law Act* requires the Court to ensure that orders made in the context of family law proceedings are consistent with any State and Territory family violence orders.<sup>50</sup> However, it is the parties to the proceedings who are obliged to inform the court of the presence of a State or Territory family violence order.<sup>51</sup> The *Family Law Act* provides that where there is an inconsistency between an order or injunction made by the Family Court and a family violence order, the family violence order will be considered invalid.<sup>52</sup> Moreover, while State and Territory courts have the power to revive, vary, discharge or suspend existing orders when making a family violence order,<sup>53</sup> this is rarely done.<sup>54</sup>

Anti-Slavery Australia supports recommendations made by the COAG advisory panel on reducing violence against women and their children, that a national database of court orders be created to ensure consistency between orders pursuant to the *Family Law Act* and existing State and Territory intervention orders. However, to enhance the efficacy of this database, State and Territory family violence provisions should be harmonised to provide consistent protections to victims and potential victims of family violence across all jurisdictions, particularly where family violence intersects with Commonwealth crimes of human trafficking, slavery and forced marriage.

### **2.3.2. State and Territory child welfare proceedings**

State and Territory agencies are responsible for the investigation and reporting of child abuse and State and Territory child protection legislation facilitates the grant of

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<sup>47</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW) Part 8.

<sup>48</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s16(1).

<sup>49</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s4..

<sup>50</sup> *Family Law Act 1975* (Cth) s60CG(1)(a).

<sup>51</sup> *Family Law Act 1975* (Cth) s60CF.

<sup>52</sup> *Family Law Act 1975* (Cth) s68Q.

<sup>53</sup> *Family Law Act 1975* (Cth) s68R.

<sup>54</sup> COAG above n 44, 123.

protection orders through the relevant Courts of each jurisdiction. Child protection legislation varies between jurisdictions and in some States and Territories the threat of a child being trafficked overseas for the suspected purpose of forced marriage or abandonment may not be sufficient to trigger the involvement of State and Territory-based child protection agencies.

The capacity of State and Territory protection orders to assist potential victims of forced marriage or trafficking varies in each jurisdiction. For example, in Western Australia, child protection legislation specifies that a child is “in need of protection” where they have suffered or are likely to suffer physical abuse, sexual abuse, emotional abuse or neglect, and the child’s parents have not protected or are unlikely to protect the child from harm or further harm.<sup>55</sup> Anti-Slavery Australia notes that potential trafficking or forced marriage may not be covered under these provisions, particularly in circumstances where there are no indicators of abuse or neglect of the child. Moreover, State and Territory child protection agencies can only assist children under the age of 18.

South Australian child protection legislation contains provisions that demonstrate the capacity of State legislation to protect children from a specific type of harm. Section 26B of the *Children’s Protection Act 1993 (SA)* creates grounds for the making of orders to protect children who may be at risk of female genital mutilation. Examples of the types of orders that may be made under this section include orders for:

- Preventing a person from taking the child from the State; or
- Requiring that the child’s passport be held by the Court; or
- Providing for the periodic examination of the child to ensure that the child has not been subject to female genital mutilation.<sup>56</sup>

These provisions demonstrate how gaps in State and Territory child protection legislation may be addressed through the introduction of orders to protect children against specific forms of harm in an Australian context. The need to address forced marriage as a particular form of harm faced by children and young adults in Australia is addressed further in section 2.4 below.

While the *Family Law Act* contains provisions that allow the court to make orders relating to parental responsibility,<sup>57</sup> child protection proceedings are usually conducted under state and territory schemes, and proceedings are initiated by the relevant child protection agencies. In the 2010 report, *Family Violence – A National Legal Response*, the Australian Law Reform Commission outlined the overlapping concerns of federal family law jurisdiction and state child protection legislation. The report outlines

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<sup>55</sup> *Children and Community Services Act 2004 (WA)* s28(2)(c).

<sup>56</sup> *Children’s Protection Act 1993 (SA)* s26B(1).

<sup>57</sup> *Family Law Act 1975 (Cth)* s 65C.

proposals to close the gap between family law and child protection through the expansion of the jurisdiction of Children's Courts.<sup>58</sup> In 2014, a pilot project was introduced in WA that sought to better integrate Family Court and child protection proceedings to streamline the process for children and their families. The project targets to individual cases where the best interest of the child would involve WA child protection services intervening in Family Court proceedings to seek protection orders.<sup>59</sup> The upcoming review of this project will provide valuable insight into the effectiveness of integrated court systems.

Anti-Slavery Australia recommends that further research and consideration should be undertaken on the need for greater integration between State and Territory and Federal court proceedings where there are overlapping family law and child welfare matters. This may include a review of existing information sharing mechanisms, and the capacity of these systems to identify and assist children at risk of human trafficking, slavery and forced marriage at the earliest possible opportunity.

#### **2.4. National forced marriage protection orders**

To remedy the disparities created through State and Territory intervention order and child protection schemes and the intersections with the family law system, Anti-Slavery Australia recommends the introduction of national civil protections that would facilitate the protection of all individuals in Australia, regardless of their age, from forced marriage or the threat of forced marriage. These orders would provide an avenue for protection that is standard across all jurisdictions, and may be a suitable alternative to the varying protections offered under State and Territory legislation. The implementation of a national civil protection scheme may also assist victims and potential victims of forced marriage to seek assistance outside of the criminal justice process, overcoming some of the barriers to reporting that are noted in section 1.5 of this submission.

The introduction of national civil protections is considered in the Australian government's National Action Plan. Action item 70 examines the need to maintain Australia's criminal, civil and regulatory frameworks, and includes measures that:

Consider the need for additional civil measures within the family law system to provide a remedy for people in, or at risk of forced marriage.<sup>60</sup>

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<sup>58</sup> Australian Law Reform Commission, *Family Violence – A National Legal Response*, Report no 114, (2010) vol 1, 922.

<sup>59</sup> See 'Review of the *Children and Community Services Act 2004*' (Department for Child Protection and Family Support, Government of Western Australia, 2016) 37

<<https://www.dcp.wa.gov.au/ccsactreview/Documents/Legislative%20Review%20Consultation%20Paper.pdf>>

<sup>60</sup> Australian Government, *National Action Plan to Combat Human Trafficking and Slavery 2015-19*, 1 December 2014, 66 [70.2].

### **2.4.1. Purpose and content of forced marriage protection orders**

To ensure that civil protections are available to both children and young adults (who represent the largest demographic of forced marriage matters in Australia),<sup>61</sup> forced marriage protection orders ('**FMPOs**') should be introduced in line with comparable provisions found in the United Kingdom family law framework. For example, Australian FMPOs, similar to the UK model, would serve the explicit purpose of:<sup>62</sup>

- protecting a person from being forced into a marriage or from any attempt to force them into a marriage; or
- protecting a person who has already been forced into a marriage.

The FMPO would contain any relevant conditions that the Court would deem appropriate to achieve this stated purpose, and may for example, include restrictions on the removal of the person from Australia, and the requirement that the person's passport be surrendered to the court. While these protections are currently available to some children through the existing family court system, an FMPO would make these protections available to all victims and potential victims of forced marriage, regardless of their age.

The conditions of the order should apply to conduct both in Australia, and outside of the country, and may include terms that relate to respondents and any other persons who are or may be involved in the matter.<sup>63</sup> The duration of such an order would be a specified amount of time, until the order is varied or until it is discharged.<sup>64</sup>

### **2.4.2. Standing to apply for forced marriage protection orders**

Often the forced marriage of children and young adults is orchestrated by parents, guardians or family members.<sup>65</sup> It is therefore necessary that civil protections, such as the introduction of FMPOs, recognise the role of extended family members and other third parties in the protection of persons who may be forced into a marriage in Australia and overseas. The United Kingdom provisions relating to the grant of Forced Marriage Protection Orders under the *Family Law Act 1996* (UK) state that applications to the court can be made by the person who is to be protected by the order, or a relevant third party.<sup>66</sup> This capacity for a third party application was introduced as:

... an essential provision that offers protection to women who fear making an application because of intimidation, or even because they have been imprisoned against their will.

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<sup>61</sup> See Figure 1.4 of this submission.

<sup>62</sup> *Family Law Act 1996* (UK) s 63A(1).

<sup>63</sup> *Family Law Act 1996* (UK) s 63B(2).

<sup>64</sup> *Family Law Act 1996* (UK) s 63F.

<sup>65</sup> *Trafficking In Persons: The Australian Government Response July 2015 – 30 June 2016* above n 7, 23.

<sup>66</sup> *Family Law Act 1996* (UK) s 63C(2).

... Other third parties—individuals or groups that are not so designated [under the legislative provisions]—would need to obtain leave from the court before their application could be made. That provision is designed to minimise the risk of a third party abusing the process.<sup>67</sup>

The provision has also been described as:

...important, because it allows a near relative to make an application if they are secure in the knowledge that somebody is being forced into a marriage...<sup>68</sup> [a] third pillar of protection for the victim.<sup>69</sup>

### **2.4.3. Breaches and enforcement of forced marriage protection orders**

Breaches of these types of orders should be considered an offence, and may be enforced by either State police or the AFP, particularly as the AFP have carriage of matters involving human trafficking, slavery and slavery-like matters.

Where a party to parenting order proceedings under the *Family Law Act* is concerned that a child will be unlawfully removed from the country, the Family Court may order that the child be placed on the AFP's Family Law Watchlist. These orders are available where the child is under 18 years of age. This is a key protection for minors who are at risk of being trafficked out of Australia for the purposes of forced marriage or to be abandoned overseas.

It is therefore necessary that FMPOs in Australia provide a pathway to access the Family Law Watchlist, where there is a concern that the victim or potential victim will be unlawfully removed from the country. Access to the Family Law Watchlist protection should be available to persons regardless of their age.

To further protect young people who are at risk of being unlawfully removed from Australia for the purpose of forced marriage, Anti-Slavery Australia recommends that further research be conducted into the introduction of an alert system that would notify the AFP of applications made for the grant of an Australian passport in the name of a person who is on the Family Law Watchlist.

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<sup>67</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 10 July 2007, vol 462, col 1382-1383 (Mrs Cryer).

<sup>68</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 10 July 2007, vol 462, col 1383 (Dominic Grieve).

<sup>69</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 10 July 2007, vol 462, col 1383 (Bridget Prentice).

**Recommendation:**

To ensure that potential victims of forced marriage of any age are able to access adequate protections throughout Australia, forced marriage protection orders should be introduced.

- These orders should provide a pathway to access the Family Law Watchlist, where there is a concern that a victim or potential victim of a forced marriage will be unlawfully removed from the country (regardless of their age).
- To ensure the efficacy of these forced marriage protection orders, and to address the complex interactions between State and Territory and Commonwealth frameworks, Anti-Slavery Australia supports efforts to create a national database of court orders. Anti-Slavery Australia recommends that this database include family violence orders, child protection orders, family court orders, and if introduced, forced marriage protection orders. This will assist in the early identification, and consistent, comprehensive protection of persons who may be subject to human trafficking, slavery or forced marriage in Australia in the context of family or domestic relationships.

### 3. STRENGTHENING THE CAPACITY OF FAMILY LAW PROFESSIONALS

It is likely that family law professionals in performing their duties will encounter indicators of human trafficking, slavery or forced marriage. Therefore, it is imperative that effective training, awareness and risk assessment tools are made available to family law professionals to ensure that they are able to identify and respond to instances of extreme exploitation as a form of family violence.

#### 3.1. Training of family law professionals

Professionals operating within the family law system must be trained to recognise the indicators of human trafficking, slavery and forced marriage in a domestic context, and in particular identify situations where a vulnerable person is at risk of trafficking or forced marriage. Training would incorporate an understanding of these forms of exploitative practices, an appreciation of cultural sensitivity in dealing with these matters, and an overview of the indicators, barriers to reporting and impact of human trafficking, slavery and forced marriage in Australia.

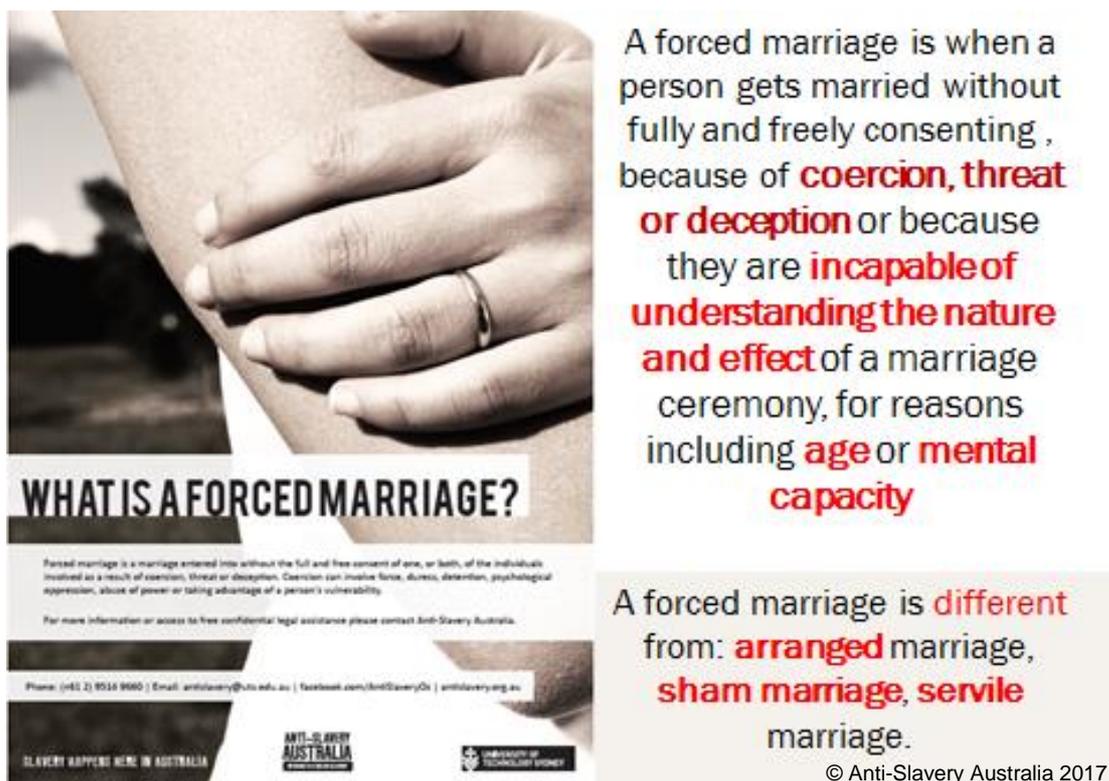


Figure 3.1: Examples taken from material presented in seminars and training sessions across Australia. (Left: Forced marriage training, Right: Human Trafficking and Slavery)

Anti-Slavery Australia has provided training to government officers, NGOs, legal professionals, law enforcement and others around Australia. This training has focused on issues relating to the identification of human trafficking, slavery and forced marriage, and outlined best practice responses.

Anti-Slavery Australia has provided training through our free, online eLearning course,<sup>70</sup> with over 50,980 online lessons completed to date. This course is designed to educate participants on the nature of human trafficking and slavery in Australia, and to assist users to identify and respond to these issues. It contains key information for frontline workers, such as community and social workers, healthcare professionals, government officers and teachers.

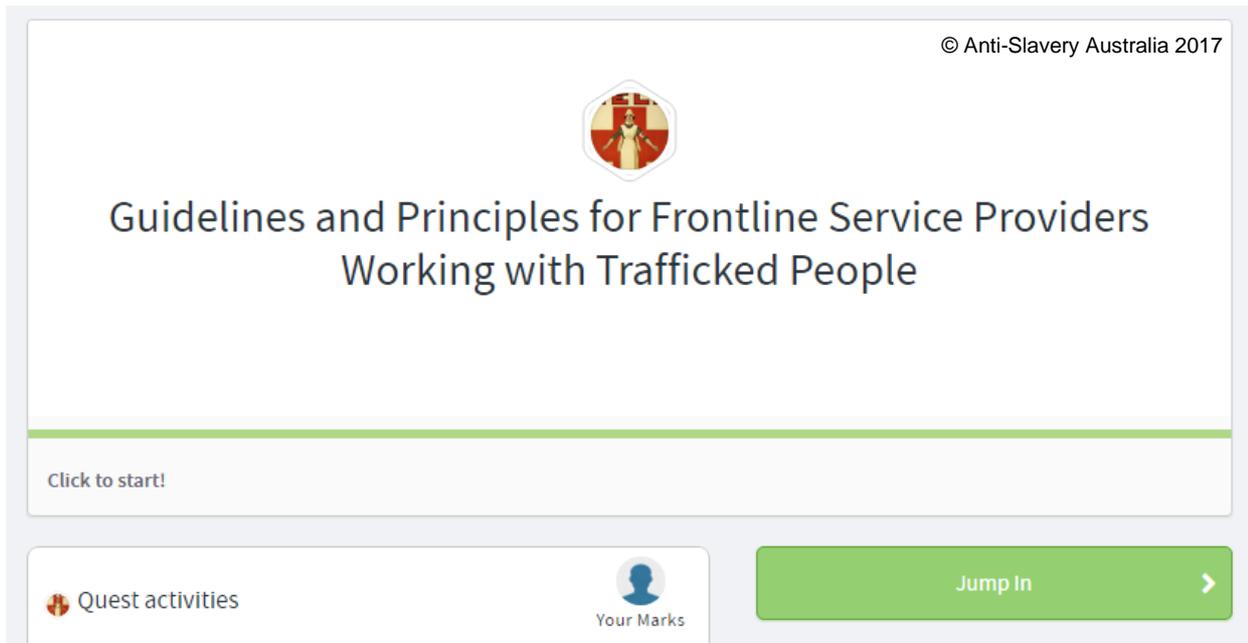


Figure 3.2: Image taken from Anti-Slavery Australia's eLearning course, Guidelines and Principles for Frontline Service Providers module.

Training programs, such as these also increase understanding about the types of supports and remedies which are available to victims of human trafficking, slavery, and forced marriage. This will assist family law professionals to refer victims to appropriate service providers that can assist them to access civil remedies, relevant legal services and, if applicable, statutory compensation schemes.

### 3.2. Awareness raising materials

To complement the training of family law professionals on the indicators of human trafficking, slavery and forced marriage, awareness raising materials should be produced and made available to victims and potential victims of these crimes. This is particularly necessary in the context of exploitation that occurs in the domestic setting, as victims and potential victims may be unaware of their rights, and have difficulty accessing information and assistance. As Figure 1.2 of this submission outlines, victims of human trafficking, slavery and forced marriage come from a diverse range of countries. It is therefore necessary that awareness raising materials are developed in consultation with communities, and are made available in community languages.

<sup>70</sup> Anti-Slavery Australia, *Australia's first ever free anti-slavery online course*, (2014) <<http://www.antislavery.org.au/e-learning.html>>.

A lack of awareness amongst migrant communities, vulnerable persons and migrant workers in Australia about human trafficking, slavery and slavery-like practices remains a key barrier preventing victim identification.

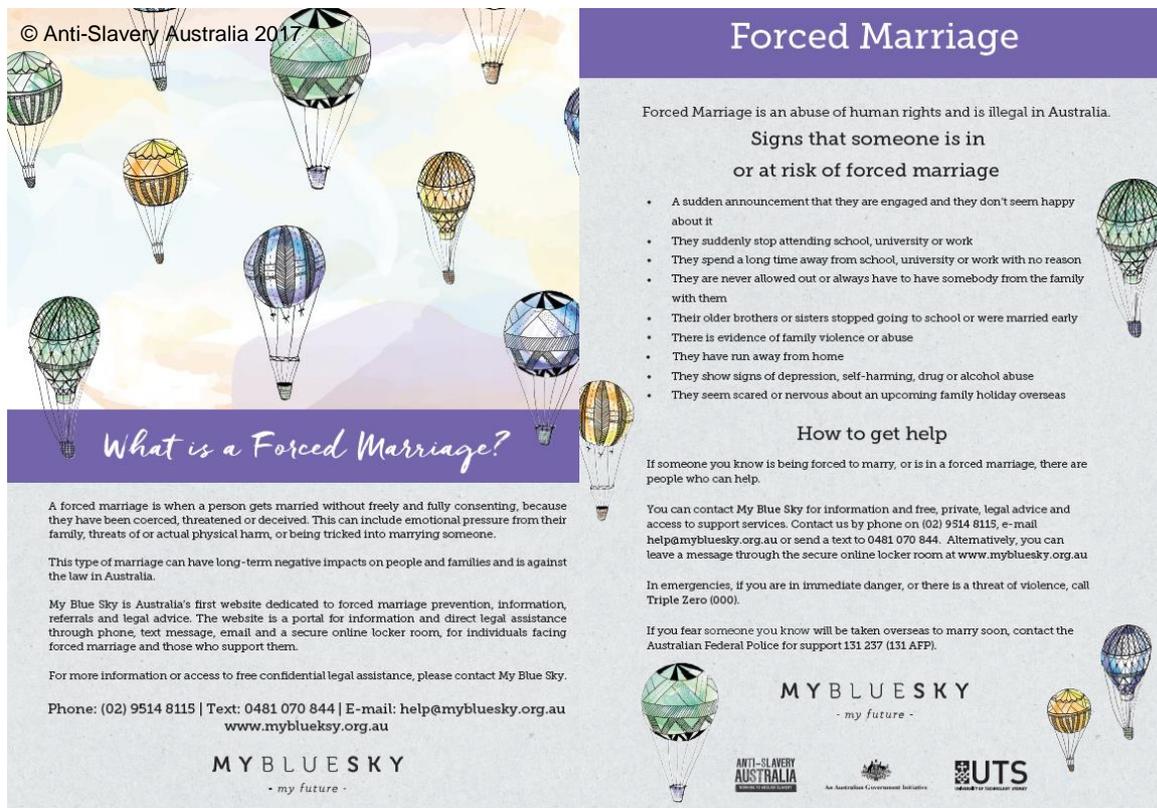


Figure 3.3: Anti-Slavery Australia, My Blue Sky A5 flyer translated into 7 community languages.

Anti-Slavery Australia has produced a number of resources to assist in the identification and prevention of situations of trafficking and slavery, including forced marriage, in Australia. These materials also serve to raise awareness on these clandestine crimes. Our forced marriage materials have been translated into seven community languages: Amharic, Arabic, Bengali, Dari, Farsi, Hindi, Punjabi and Urdu.

### 3.2.1. My Blue Sky

In 2015, with funding provided by the Commonwealth Attorney General's Department, Anti-Slavery Australia launched My Blue Sky, Australia's first website dedicated to forced marriage prevention, information and legal advice.<sup>71</sup> Since its launch in 2015, Anti-Slavery Australia has received approximately 25 requests for assistance and legal advice through the My Blue Sky website, by email, SMS or through the website's locker room facility. A number of these matters were subsequently referred to the Australian Federal Police. My Blue Sky contains resources available in a number of languages, and information accessible to children and young people. The website also contains a directory of service providers who are available to assist victims and potential victims of forced marriage in Australia.

<sup>71</sup> Anti Slavery Australia, 'My Blue Sky' <[www.mybluesky.org.au](http://www.mybluesky.org.au)>.

**Recommendation:**

To strengthen the capacity of all family law professionals in relation to human trafficking, slavery and forced marriage matters that involve family violence, regular and comprehensive training should be conducted to ensure that extreme exploitation in the context of family and domestic relationships is identified and responded to appropriately.

- This training should be supported by appropriate resources and awareness-raising materials.