



Submission to the review of the

2017 Children and Community Services Act 2004

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Anti-Slavery Australia welcomes the opportunity to provide submissions to the review of the 2017 Children and Community Services Act 2004. 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.

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CONTENTS

EXECUTIVE SUMMARY	3
KEY RECOMMENDATIONS	4
1. FORCED MARRIAGE IN AUSTRALIA.....	5
1.1. Prevalence of Forced Marriage in Australia	5
1.2. Relationship between forced marriage and human trafficking.....	7
2. RESPONSES TO FORCED MARRIAGE IN WA	7
2.1. WA Child Protection	8
2.1.1. Mandatory Reporting in WA.....	9
2.1.2. Protection orders	12
2.1.3. Standing to make an application for a protection order	14
2.1.4. Types of Protection Orders	15
2.2. Family Court and Child Protection proceedings in matters involving the forced marriage of children	17
2.2.1. Parenting Orders	18
2.2.2. Child-related injunctions.....	19
2.2.3. Other types of orders under the Family Law Act	19
2.2.4. Intersection between the courts	20
3. IDENTIFICATION AND RESPONSE MECHANISMS TO PROTECT CHILDREN FROM FORCED MARRIAGE IN WA	22
3.1. Training of Department Officers	22
3.2. Materials and resources	23
APPENDIX A – TABLE OF COMMONWEALTH AND STATE PROVISIONS	1

ATTACHMENT

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

EXECUTIVE SUMMARY

This submission is made to the WA Department for Child Protection and Family Support (**the Department**) in response to the terms of reference guiding the 2017 review of the *Children and Community Services Act 2004* (**the Child Protection Act**). This submission draws upon Anti-Slavery Australia's research and publications, as well as advocacy and legal casework experience with survivors of forced marriage in Australia. Anti-Slavery Australia is a university based, law, policy and legal practice centre within the Faculty of Law at the University of Technology Sydney, New South Wales. In this submission, Anti-Slavery Australia identifies key areas for consideration in the context of children and forced marriage in Western Australia, including:

- *Term of reference 3: Any changes necessary to support the safety and wellbeing of adults and children subject to family and domestic violence*
 - Recognising forced marriage as a form of family and domestic violence
 - Understanding the prevalence of forced marriage in Australia
 - Identifying and responding to circumstances where a child may be subjected to forced marriage
 - Identifying and protecting children who may be trafficked out of Australia for the purpose of forced marriage.
- *Term of reference 5: Issues relating to the intersection between child protection proceedings under part 5 of the Act and proceedings in the Family Court*
 - The efficacy of existing schemes to deal with matters of forced marriage in Western Australia
 - The need for amendments to be made to the *Child Protection Act*.

The focus of this submission will be on forced marriage, including individuals in danger of forced marriage, or individuals who have already been forced into a marriage. Reports indicate that age is not a barrier to forced marriage, and individuals of all ages may be forced into a marriage. This submission will focus on the forced marriage of children under the age of 18.

KEY RECOMMENDATIONS

- (1) To better protect children who are at risk of forced marriage, existing mandatory reporting provisions could be expanded by:**
 - a. Including any circumstance where it is suspected that a child will be at risk of significant harm.**
 - b. Defining significant harm to include the risk of forced marriage.**
 - c. Defining forced marriage with reference to the *Criminal Code Act 1995 (Cth)*.**

- (2) To ensure that children who may be at risk of forced marriage are recognised as children “in need of protection”, section 28 of the *Child Protection Act* could be expanded to include references to forced marriage, the risk of forced marriage and psychological harm as a result of exposure to family and domestic violence.**
 - a. To ensure that all children who may be at risk of forced marriage are offered protection under the *Child Protection Act*, additional provisions may be considered, allowing third parties to make applications for protection orders in circumstances where there is a belief, on reasonable grounds, that a child is in need of protection.**

- (3) To better prevent and protect against child forced marriage, a new type of Protection Order (Forced Marriage) could be created within the *Child Protection Act* that applies in circumstances where a child is at risk of forced marriage.**
 - a. In the absence of this type of order, the effective protection of children who are at risk of forced marriage can be achieved through amendments to the Protection Order (Supervision) provisions of the *Child Protection Act* which would allow orders to make conditions that apply to relevant third parties. These amendments would supplement the amendments outlined in recommendation 2 of this submission.**

- (4) To provide a prompt and effective response in circumstances where a child is at risk of forced marriage, measures should continue to be taken to streamline Court proceedings in circumstances where there are parallel Family Court and Children’s Court matters.**

- (5) To effectively identify and respond to cases of forced marriage in Western Australia, the Department could create specific resources and factsheets about forced marriage, and implement Department training and awareness programmes.**

1. FORCED MARRIAGE IN AUSTRALIA

Forced marriage is a form of gender-based violence and is a human rights abuse.¹ In 2013, the article, “Without Consent: Forced Marriage in Australia” was published in the Melbourne University Law Review, examining the Australian response to forced marriage.² A copy of this article is attached. In the same year, the *Criminal Code Act 1995* (Cth) (**Criminal Code**) was amended to introduce provisions defining forced marriage as a federal offence.³ Following further amendments in 2015,⁴ the Criminal Code now defines forced marriage as a situation 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.⁵

The federal forced marriage offence includes a rebuttable presumption that a person under the age of 16 is presumed to be incapable of understanding the nature and effect of the marriage ceremony.⁶

Forced marriage is also a type of domestic or family violence and forms part of a pattern of domestic violence that includes emotional or psychological abuse, physical abuse, sexual abuse, economic or financial abuse, female genital mutilation and honour-based violence.⁷ In line with international best practice, Anti-Slavery Australia recognises that domestic and family violence prevention, including protection against forced marriage, requires a multi-agency response incorporating criminal, civil and child protection schemes.

1.1. Prevalence of Forced Marriage in Australia

It is difficult to identify the prevalence of forced marriage in Australia. In the 2015-16 financial year, the Australian Federal Police (**AFP**) received 69 new referrals relating to forced marriage matters, compared to 11 referrals in the 2014-15

¹ The Interdepartmental Committee on Human Trafficking and Slavery, The Australian Government, *Trafficking in Persons: The Australian Government Response 1 July 2015 – 30 June 2016*, [2016] 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>>.

² Frances Simmons and Jennifer Burn, “Without Consent: Forced Marriage in Australia” [2013] 36(3) *Melbourne University Law Review* 971.

³ See the *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013* (Cth).

⁴ See the *Crimes Legislation Amendment (Powers, Offences and Other Measures) Act 2015* (Cth) sch 4.

⁵ *Criminal Code Act 1995* (Cth) s 270.7A(1).

⁶ *Ibid* s 270.7A(4).

⁷ Frances Simmons and Jennifer Burn, above n 2, 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>>.

financial year.⁸ While reported Australian cases of forced marriage show that forced marriage affects children and adults, most of the referrals received by the AFP have involved Australian citizens under the age of 18. In most of these cases, relatives have been identified as the parties organising marriage between children and individuals overseas.⁹

In 2015, with funding provided by the Commonwealth Attorney General's Department, Anti-Slavery Australia launched Australia's first website dedicated to forced marriage prevention, information and legal advice: My Blue Sky. Since its launch in 2015, Anti-Slavery Australia has received over 20 requests for assistance and legal advice through the My Blue Sky website, by email and SMS. A number of these matters were subsequently referred to the Australian Federal Police.

Anti-Slavery Australia notes that the issue of forced marriage is not isolated to any one Australian State or Territory. Forced marriage matters constitute approximately 12% of Anti-Slavery Australia's current active client profile. These matters involve clients residing across Australia, including New South Wales, South Australia, Victoria and Western Australia.

It is important to emphasise that these figures are by no means a comprehensive estimate of the scope of the problem of forced marriage in Australia. There are well-documented barriers that may prevent potential victims of forced marriage from seeking assistance with the result that instances of forced marriage in Australia are both under-identified and under-reported. In Anti-Slavery Australia's experience, barriers preventing victims from reporting forced marriage include:

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

These barriers are often more significant in circumstances where the potential victims of forced marriage are under the age of 16. For these children, barriers to reporting are often compounded by a desire not to exacerbate domestic conflict, or to avoid causing perceived harm to parents by cooperating with the police.

⁸ The Interdepartmental Committee on Human Trafficking and Slavery, above n 1, 20.

⁹ Ibid 23.

As the Interdepartmental Committee on Human Trafficking and Slavery notes:

The cooperation of suspected victims is essential to the investigation and prosecution of human trafficking and slavery-related offences [including forced marriage]... Because the prosecution of matters involving human trafficking and slavery relies heavily on the evidence of individual victims, corroboration of that evidence is frequently necessary to meet the high standard of proof in criminal proceedings. It is often challenging to corroborate this evidence.¹⁰

1.2. Relationship between forced marriage and human trafficking

Through My Blue Sky and other avenues of referrals, Anti-Slavery Australia 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.

2. RESPONSES TO FORCED MARRIAGE IN WA

Forced marriage practices occur throughout Australia. As such, there has been a national response to forced marriage, primarily focussing on its criminalisation at a Commonwealth level. Accompanying these national legislative changes has been the increasing use of existing family law frameworks to assist in the protection of children who face the possibility of forced marriage in Australia and overseas. Family law responses to the issue of forced marriage can be seen to operate alongside provisions of State and Territory Child Protection and Apprehended Violence Order schemes.

This section will seek to evaluate current responses to forced marriage in Western Australia, outlining key recommendations that may be considered to ensure the efficacy of the *Child Protection Act* in addressing issues of forced marriage.

Anti-Slavery Australia notes that pursuant to the *Family Court Act 1997 (WA)* (**Family Court Act**) the Family Court of Western Australia has federal jurisdiction to exercise functions prescribed by the Commonwealth *Family Law Act*. Additionally the Court may exercise jurisdiction under State legislation including the *Adoption Act 1994*, the *Surrogacy Act 2008* and the *Children and Community Services Act 2004*¹¹ Further, section 63 of the *Restraining Orders Act 1997 (WA)* allows a court hearing proceedings under Commonwealth or State family law legislation to make a restraining order against a party to the proceedings or any

¹⁰ Ibid 25.

¹¹ *Family Court Act 1997 (WA)* ss 35-36.

other person who gives evidence in the proceedings.¹² For an individual child facing forced marriage, both State and Commonwealth courts may exercise a protective jurisdiction. In Anti-Slavery Australia's experience of similar frameworks, such as in NSW, webs of legislation can be difficult to navigate and there may be opportunities to streamline legislation to make sure that children are protected as completely as possible.

The following case study is a useful resource to understand how this network of legislation and child protection agencies may apply in circumstances where a child is at risk of forced marriage. Key information has been changed to preserve the identity of the parties involved.

CASE STUDY

Jane was a 14 year old girl residing in Western 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 Western Australian 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. 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 airport watch list administered by the AFP. Concurrent to this order, an application was made to the Western Australian 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.

2.1. WA Child Protection

State and Territory agencies are responsible for the investigation and reporting of child abuse and In Western Australia, the Department assists in the

¹² *Restraining Orders Act 1997* (WA) s 63(2).

administration of the *Child Protection Act*. This Act contains provisions that impose a duty on certain people to report the sexual abuse of children.¹³

The *Child Protection Act* also facilitates the grant of protection orders where the Court finds a child is in need of protection.¹⁴ Under the *Child Protection Act* there are four types of protection orders that may be granted:¹⁵

- Protection order (supervision)
- Protection order (time-limited)
- Protection order (until 18)
- Protection order (special guardianship)

Parties to protection proceedings include the child, each parent of the child, the Chief Executive Officer CEO or a prescribed authority, and any other person considered by the Court to have an interest in the wellbeing of the child.

2.1.1. Mandatory Reporting in WA

The *Child Protection Act* contains provisions that require certain people to report the sexual abuse of children including doctors, nurses, midwives, police officers, teachers and boarding supervisors.¹⁶ Under these provisions, a report should be made where the person forms the belief on reasonable grounds that the child has suffered from sexual abuse or is the subject of ongoing sexual abuse.¹⁷

A report must be made to the Department as soon as possible after the person forms the requisite belief. It is an offence for a person not to report under these provisions, with the penalty being a fine of \$6,000.¹⁸ The legislation also contains provisions that outline the form of the required report, and various penalties for failure to comply with these provisions.¹⁹

Anti-Slavery Australia submits that these provisions may be too narrow to protect children from forms of serious harm or abuse that may occur outside of sexual abuse, including the serious harm associated with the forced marriage of a child. Forced marriage is a serious practice, and has a long-term impact on all victims, and in particular vulnerable children. From our work with survivors of forced marriage, we have identified the following impacts that remain with the individual:

¹³ *Children and Community Services Act 2004 (WA)* div 9A, s 124B.

¹⁴ *Ibid* s 43.

¹⁵ *Ibid* s 45.

¹⁶ *Ibid* s 124B(1).

¹⁷ *Ibid*.

¹⁸ *Ibid*.

¹⁹ *Ibid* s 124C.

- **Physical impacts** – including domestic violence, sexual assault, honour-based violence and forced pregnancy
- **Psychological impacts** – including trauma, mental illness, self-harm, suicidal ideations and lasting fear
- **Social impacts** – including cultural and linguistic isolation, emotional abuse and discontinued education
- **Economic impacts** – including a lack of financial control, economic dependence on the spouse, lower earning capacity or loss of employment, forced labour and domestic servitude.

In light of the serious harm faced by children who have been forced to marry or are at risk of forced marriage, Anti-Slavery Australia recommends that mandatory reporting in WA be extended to circumstances where the child is at risk of significant harm.

A useful example of such a provision is the *Children and Young Persons (Care and Protection) 1998* (NSW) which contains provisions requiring mandatory reporting by a person or manager in an organisation, that works to provide health care, welfare, education, children’s services, residential services, or law enforcement, wholly or partly, to children.²⁰ Reports are to be made where the person suspects on reasonable grounds that a child is at risk of significant harm.²¹

Under the New South Wales provisions, “at risk of significant harm” is defined as current concerns for the safety, well-being and welfare of a child or young person because of circumstances including where:²²

- The child’s basic physical or psychological needs are not being met or are at risk of not being met;
- The child is at risk of being physically or sexually abused or ill-treated;
- The child is living in a household where they are at risk of domestic violence and as a consequence they have suffered or are at risk of suffering psychological harm; and/or
- The parent or caregiver has behaved in a way that puts the child at risk of psychological harm.

This definition of “at risk of significant harm” provides a greater scope for mandatory reporting, and Anti-Slavery Australia recommends that similar

²⁰ *Children and Young Persons (Care and Protection) 1998* (NSW) s 27.

²¹ *Ibid.*

²² *Ibid* s 23.

provisions be inserted into the *Child Protection Act*. However, to ensure the efficacy of the provisions where a child is at risk of forced marriage, Anti-Slavery Australia recommends that the proposed provisions include a specific reference to the risk of forced marriage as a circumstance that may constitute a risk of significant harm.

Further, it is important to recognise that forced marriage practices are not limited to legal or registered marriages recognised under Australian law. The Commonwealth offence of forced marriage addresses this issue by defining a marriage to include:²³

- a marriage recognised under a law of a foreign country;
- a registered relationship under the laws of a foreign country, if the relationship is the same or similar to a registered Australian relationship; or
- a marriage or relationship that may be considered void, invalid, or not recognised by Australian law, for any reason.

The insertion of similar provisions into the *Child Protection Act* will ensure that mandatory reporting requirements will include circumstances where a child is forced into a marriage, even where this marriage is to occur overseas, or where it would be considered void, invalid or not recognised by Australian law.

KEY RECOMMENDATION

- To better protect children who are at risk of forced marriage, existing mandatory reporting provisions could be expanded by:
 - a. Including any circumstance where it is suspected that a child will be at risk of significant harm.
 - b. Defining significant harm to include the risk of forced marriage.
 - c. Defining forced marriage with reference to the *Criminal Code Act 1995 (Cth)*.

²³ *Criminal Code Act 1995 (Cth)* s 270.7A(2).

2.1.2. Protection orders

Applications for protection orders can only be made by the Chief Executive Officer (CEO) of a prescribed authority (including the Department).²⁴ The Court may grant a protection order, upon application, where it finds that a child is in need of protection.²⁵

The provisions specify 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.²⁶

Anti-Slavery Australia recommends that these provisions be expanded to better reflect the range of circumstances that may place a child in need of protection. This would include, for example, psychological harm, and would make specific reference to children who are at risk of forced marriage. Provisions could also be introduced that address the psychological harm or the risk of psychological harm that arises due to exposure to domestic or family violence.

To better protect children at risk of forced marriage, a form of family or domestic violence, the definition of this phrase should incorporate specific references to forced marriage. Anti-Slavery Australia notes that the *Child Protection Act* defines an act of family and domestic violence as having the same meaning given in the *Restraining Orders Act 1997 (WA)*. Recent amendments made to provisions of the *Restraining Orders Act* redefine family violence as (emphasis added):

- (a) violence, or a threat of violence, by a person towards a family member of the person; or
- (b) any other behaviour by the person that **coerces or controls the family member or causes the member to be fearful.**²⁷

While this new definition of family violence is broader than the previous definition, with potential for these provisions to be used to require offenders to attend behavioural change or intervention programs, it is unclear if or how this new definition of family violence will relate to circumstances where a child may be forced into a marriage.

For this reason, provisions could be introduced into the *Child Protection Act* that explicitly defines forced marriage, with reference to section 270.7A of the Commonwealth *Criminal Code*.

²⁴ *Children and Young Persons (Care and Protection) 1998 (NSW)* s 44.

²⁵ *Ibid* s 45.

²⁶ *Ibid* s 28(2)(c).

²⁷ *Restraining Orders and Related Legislation Amendment (Family Violence) Act 2016 (WA)* s 7 (inserting s5A into the *Restraining Orders Act 1997 (WA)*).

KEY RECOMMENDATION

- To ensure that children who may be at risk of forced marriage are recognised as children “in need of protection”, section 28 of the Child Protection Act could be expanded to include references to forced marriage, the risk of forced marriage and psychological harm as a result of exposure to family and domestic violence.

2.1.3. Standing to make an application for a protection order

Noted above, under the *Child Protection Act*, only the CEO of the Department may make an application for a protection order in Western Australia.²⁸ However, due to the clandestine nature of forced marriage practices, as noted in the case study above, it is not always practicable for Child Protection agencies, to undertake such applications, particularly where the child is afraid to seek assistance, or refuses to cooperate with the agency and wishes to remain with their family.

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.²⁹ 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.

... 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.³⁰

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...³¹ [a] third pillar of protection for the victim.³²

In an Australian child protection context, the *Children and Young People Act 2008* (ACT) contains provisions that allow applications to the Children’s Court for a care and protection order by third parties, being parties other than the director-general.³³ An “other applicant” of this type can make an application where:³⁴

- The applicant believes on reasonable grounds that the child is in need of care and protection;
- The applicant has consulted with the director-general, and the director-general has not applied for this type of order; and
- The applicant has leave of the Children’s Court to make the application.

²⁸ Ibid s 44.

²⁹ *Family Law Act 1996* (UK) s 63C(2).

³⁰ United Kingdom, *Parliamentary Debates*, House of Commons, 10 July 2007, vol 462, col 1382-1383 (Mrs Cryer).

³¹ United Kingdom, *Parliamentary Debates*, House of Commons, 10 July 2007, vol 462, col 1383 (Dominic Grieve).

³² United Kingdom, *Parliamentary Debates*, House of Commons, 10 July 2007, vol 462, col 1383 (Bridget Prentice).

³³ *Children and Young people Act 2008* (ACT) s 425(1).

³⁴ Ibid.

To assist in the adequate protection of children at risk of forced marriage, Anti-Slavery Australia submits that similar provisions could be included in Western Australia's *Child Protection Act*. This facilitates applications to the Court by relevant third parties who believe on reasonable grounds that a child is in need of care and protection due to forced marriage, and may include non-government service providers or extended family members who encounter the child. To ensure that there is no abuse of process, applicants could be required to have leave of the Children's Court of Western Australia.

KEY RECOMMENDATION

- To ensure that all children who may be at risk of forced marriage are offered protection under the *Child Protection Act*, additional provisions may be considered, allowing third parties to make applications for protection orders in circumstances where there is a belief, on reasonable grounds, that a child is in need of protection.

2.1.4. Types of Protection Orders

Protection Order (Forced Marriage)

Anti-Slavery Australia recommends the introduction of civil protections that would facilitate the protection of all individuals, regardless of their age, from forced marriage or the threat of forced marriage.

In the absence of these types of civil protections, it is our recommendation that a new type of protection order be introduced under division 3 of the *Child Protection Act*. This protection order (forced marriage) would be available in circumstances where a child is in need of protection due to the risk that they would be forced into a marriage. In line with comparable provisions found in the United Kingdom,³⁵ this forced marriage order would serve the explicit purpose of:

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

The order would contain any relevant conditions that the Court would deem appropriate to achieve the stated purpose. These conditions may be imposed on the child, if they are capable of understanding the conditions, the child's parent(s), an adult living with the child and any party acting on behalf of, or at the request of

³⁵ *Family Law Act 1996* (UK) s 63A(1).

the child's parent(s) or an adult living with the child. The conditions should apply to conduct both in Western Australia, and outside of the State.

The duration of such an order would be a specified amount of time, until the order is varied, until it is discharged or until the child turns 18 years of age. Provisions should be made that allow applications for other types of protection orders to occur prior to the expiration of the protection order (forced marriage).

Protection Order (Supervision)

In the absence of a protection order (forced marriage), provisions relating to a protection order (supervision) (**supervision order**) may be amended to provide adequate protection to children who are at risk of forced marriage. In its current form, a supervision order provides for the supervision of a child by the CEO for a specific period of time and does not affect the parental responsibility for the child except to the extent required to give effect to the order.³⁶ The order facilitates family unity by allowing the child to reside with their parents, but also provides access to the child for supervision purposes at any reasonable time by the Department.³⁷ The Department notes that supervision orders may be suitable where:³⁸

- parents acknowledge the protective issues
- there is no risk of immediate harm to the child, and
- ongoing risks can be managed through an agreed safety plan that is adhered to, maintained and monitored.

The supervision order may provide conditions that apply to the child, if the child is capable of understanding the conditions, the child's parent(s) or an adult living with the child.³⁹

With reference to the case study of "Jane", Anti-Slavery Australia notes that the use of this type of protection order may be suitable in circumstances where a child is at risk of forced marriage but is not in any immediate threat of danger, and wishes to reside in their family home. The use of a supervision order would allow service providers to work with parents to ensure that they understand forced marriage as not only a Commonwealth offence, but a form of family and domestic violence. The order would assist the Department in effectively preventing instances of forced marriage by allowing parents to participate in the construction

³⁶ *Children and Community Services Act 2004 (WA)* s 47.

³⁷ *Ibid* s 52.

³⁸ Department for Child Protection and Family Support, *12.1 Protection Order (Supervision)* (22 November 2016) <<https://manuals.dcp.wa.gov.au/CPM/SitePages/Procedure.aspx?ProcedureId=199>>.

³⁹ *Ibid* s 50.

of a safety plan, and providing a mechanism for supervisions should the risk of forced marriage grow to become an imminent concern.

However, it is Anti-Slavery Australia's experience that in circumstances where a child is at risk of forced marriage, there is the potential that extended family members will become involved, and act as agents for the parents in securing the child's marriage in Australia or overseas. For example, in the case study provided, it was Jane's older cousin who had planned and arranged her marriage overseas.

It is worth noting that the *Family Law Act* recognises the potential role of third parties in removing children from the country, by placing restrictions on "a person who is acting on behalf of, or at the request of, a party."⁴⁰

To ensure that protection orders (supervision) remain relevant in circumstances where a child may be forced into a marriage, we submit that the scope of the orders be increased to provide conditions that apply to a person who is acting on behalf of or at the request of the child's parents, or an adult living with the child.

KEY RECOMMENDATION

- To better prevent and protect against child forced marriage, a new type of Protection Order (Forced Marriage) could be created within the *Child Protection Act* that applies in circumstances where a child is at risk of forced marriage.
 - a. In the absence of this type of order, the effective protection of children who are at risk of forced marriage can be achieved through amendments to the Protection Order (Supervision) provisions of the *Child Protection Act* which would allow orders to make conditions that apply to relevant third parties. These amendments would supplement the amendments outlined in recommendation 2 of this submission.

2.2. Family Court and Child Protection in the forced marriage of children

Alongside child protection legislation, 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:

- Parenting orders,⁴¹ and
- Child-related injunctions.⁴²

⁴⁰ *Family Law Act 1975* (Cth) ss 65Y, 65Z.

⁴¹ *Family Law Act 1975* (Cth) s 64B

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 a variety of aspects of parenting including any aspect of the care, welfare or development of the child, and any aspect of parental responsibility.⁴³ In making a parenting order, the court must have regard to the child's best interest as a paramount consideration.⁴⁴ 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.⁴⁵ 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.⁴⁶

Parenting orders expire when the child turns 18, or if a child enters into a de facto or marital relationship.⁴⁷ It should be noted that a child may be a party applying 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.⁴⁸ 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.⁴⁹

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.⁵⁰ 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.⁵¹

The Court may request the AFP to place the child on the Family Law Watch List, in what is known as a Watch List order.⁵² A child may also be placed on the

⁴² Ibid s 68B.

⁴³ Ibid s 64B(a)(i).

⁴⁴ Ibid s 65AA.

⁴⁵ Ibid s 60CG.

⁴⁶ Ibid s 4AB.

⁴⁷ Ibid s 65H.

⁴⁸ Ibid s 65Q.

⁴⁹ Ibid s 70NEB.

⁵⁰ Ibid ss 65Y, 65.

⁵¹ Ibid s 65ZA.

⁵² See orders made in *Madley & Madley and Anor* [2011] FMCAfam 1007 (1 April 2011) and *Kandal & Khyatt & Ors* [2010] FMCAfam 508.

Watch List by application of a party in pending proceedings. The Watch List is designed to alert the AFP to the movement of a child through international departure points in Australia. Often a Watch List order will address and restrain a named individual, including their agents, from removing the child from the country. Frequently, the Watch List Order will be made to operate for a period of two years. The AFP have stated that there are currently over 11,000 names on the Family Law Watch List.⁵³

In the matter of *Madley & Madley and Anor*⁵⁴ 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.⁵⁵

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.⁵⁶ The purpose of an injunction can include;⁵⁷

- 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.⁵⁸ 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.⁵⁹

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 overseas. These include:

⁵³ 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>>.

⁵⁴ [2011] FMCAfam 1007 (1 April 2011).

⁵⁵ *Ibid* at [4].

⁵⁶ *Family Law Act 1975* (Cth) s 68B(1).

⁵⁷ *Ibid*.

⁵⁸ *Ibid* s68C.

⁵⁹ *Ibid*.

- Orders for delivery of passports;⁶⁰
- Interim or procedural orders to protect children where there has been family violence, or where there is a risk of family violence;⁶¹
- Orders for the location and recovery of a child;⁶² and
- Injunction in circumstances arising out of a marital relationship.⁶³

2.2.4. Intersection between the courts

Anti-Slavery Australia notes that the *Family Court Act* gives the Family Court of Western Australia all the power of the Children’s Court:

... [w]here a child the subject of proceedings appears to be a child in need of protection within the meaning of the Children and Community Services Act 2004.⁶⁴

Situations where a child is at risk of forced marriage often involve multiple agencies, evidenced in the case study of “Jane”, and therefore require protections that are available through both State and Commonwealth legislation. This impact may be enhanced by expanding the capacity of the Children’s Court to grant parenting orders per the provisions of the *Family Court Act* and the *Family Law Act*, in circumstances where all parties to a matter agree that this would be appropriate. 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 proposals to close the gap between family law and child protection through the expansion of the jurisdiction of Children’s Courts⁶⁵ However, it should be noted that this would require legislative change, and any such proposal should be considered in light of the existing capacity of WA Family Law Courts to exercise jurisdiction in certain child protection matters.

Anti-Slavery Australia commends actions taken to streamline the Family Court and Children’s Court processes, and notes that this approach is in keeping with an effective response to the forced marriage of children in Australia.

⁶⁰ Ibid s 67ZD.

⁶¹ Ibid s 67ZBB.

⁶² Ibid sub-div C.

⁶³ Ibid s 114.

⁶⁴ *Family Court Act 1997 (WA)* s 36(6).

⁶⁵ Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A National Legal Response*, ALRC Report No 114 (2010), NSWLRC Report No 128 (2010) vol 1, 922.

KEY RECOMMENDATION

- To provide a prompt and effective response in circumstances where a child is at risk of forced marriage, measures should continue to be taken to streamline Court proceedings in circumstances where there are parallel Family Court and Children's Court matters.

3. IDENTIFICATION AND RESPONSE MECHANISMS TO PROTECT CHILDREN FROM FORCED MARRIAGE IN WA

It is likely that Department officers in performing their duties will encounter indicators of forced marriage. Therefore, it is imperative that effective training, awareness and risk assessment tools are made available to Department officers to ensure that they are able to identify and respond to instances of forced marriage, and protect children who are at risk of forced marriage in Western Australia.

3.1. Training of Department Officers

Department officers must be trained to recognise instances of forced marriage, and identify situations where a child is at risk of forced marriage. Training would incorporate an understanding of forced marriage practices, an appreciation of cultural sensitivities in dealing with these matters, and an overview of the indicators, barriers to reporting and impact of forced marriage in Australia.

Anti-Slavery Australia has provided training to many NGOs and government agencies on issues related to human trafficking, slavery and slavery-like practices including forced marriage. In 2016 we conducted sessions at two Australian Red Cross multi-agency meetings in Perth about forced marriage.



WHAT IS A FORCED MARRIAGE?

Forced marriage is a marriage entered into without the full and free consent of one, or both, of the individuals involved as a result of coercion, threat or deception. Coercion can include force, duress, detention, psychological oppression, abuse of power or taking advantage of a person's vulnerability.

For more information or access to free confidential legal assistance please contact Anti-Slavery Australia.

Phone: (08) 21 9534 9600 | Email: antislavery@uts.edu.au | Facebook.com/antislavery08 | antislavery.org.au

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A forced marriage is when a person gets married without fully and freely consenting, because of **coercion, threat or deception** or because they are **incapable of understanding the nature and effect** of a marriage ceremony, for reasons including **age** or **mental capacity**

A forced marriage is **different** from: **arranged** marriage, **sham marriage**, **servile** marriage.

Figure 1 Example taken from material presented in seminars and training sessions across Australia.

Training is also available for individuals through Anti-Slavery Australia's online, free eLearning course.⁶⁶ This course is designed to educate participants on the nature of crimes of trafficking and slavery, and assist them in identifying and responding to these situations as they are encountered.

3.2. Materials and resources

To assist in the identification and response to forced marriage in Western Australia, risk assessment materials could be produced, alongside appropriate referral information. For example, the *Western Australia Family and Domestic Violence Referral Guide* and associated factsheets may be amended to ensure that forced marriage is recognised as a form of family and domestic violence.⁶⁷ Moreover, the *Western Australia Family and Domestic Violence Common Risk Assessment and Risk Management Framework* could be amended to include references to forced marriage and the risk of forced marriage for children in Western Australia.⁶⁸

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. Anti-Slavery Australia's forced marriage materials have been translated into seven community languages: Amharic, Arabic, Bengali, Dari, Farsi, Hindi, Punjabi and Urdu, facilitating the accessibility of these materials.

⁶⁶ Anti-Slavery Australia, *Australia's first ever free anti-slavery online course*, (2014) <<http://www.antislavery.org.au/e-learning.html>>.

⁶⁷ Department for Child Protection and Family Support, *Western Australian Family and Domestic Violence Referral Guide*, (2016) 1.

<<https://www.dcp.wa.gov.au/CrisisAndEmergency/FDV/Documents/Referral%20Guide%20June%202016.pdf>>.

⁶⁸ Department for Child Protection and Family Support, *Western Australian Family and Domestic Violence Common Risk Assessment and Risk Management Framework (2nd ed.)* (2015) <<https://www.dcp.wa.gov.au/CrisisAndEmergency/FDV/Documents/2015/CRARMFFinalPDFAug2015.pdf>>.

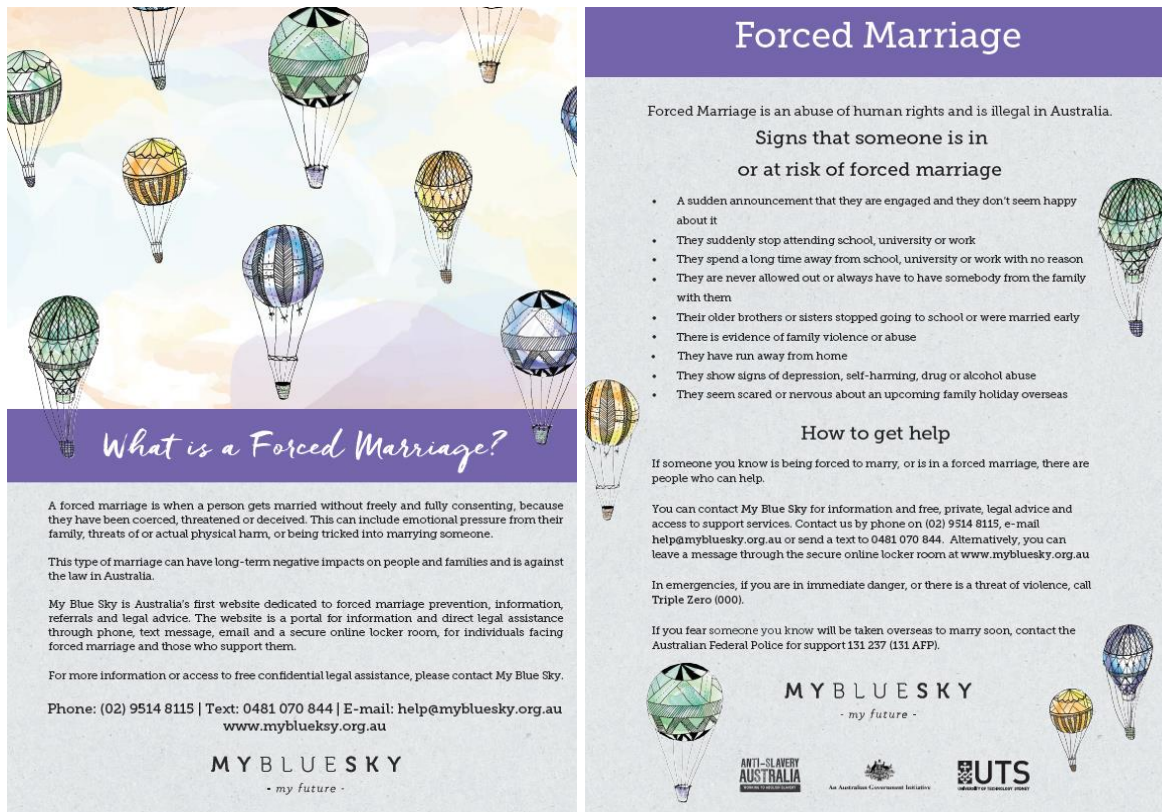


Figure 2 Anti-Slavery Australia, My Blue Sky A5 Flyer, translated into 7 community languages.

KEY RECOMMENDATION

- To effectively identify and respond to cases of forced marriage in Western Australia, the Department could create specific resources and factsheets about forced marriage, and implement Department training and awareness programmes.
 - a. Prepare a factsheet to accompany existing resources found under *The Western Australian Family and Domestic Violence Common Risk Assessment and Risk Management Framework* that outlines forced marriage as a form of family and domestic violence and provides key indicators of forced marriage.
 - b. Integrate information about forced marriage into existing Department resources.

Appendix A – Table of Commonwealth and State Provisions

	Children forced into a marriage	Children at risk of forced marriage
Commonwealth Legislation		
<i>Criminal Code Act 1995</i> (Cth) (Criminal Code)	<p>Forced marriage is a slavery-like offence.⁶⁹ Under Division 270 of the Criminal Code it is an offence to:⁷⁰</p> <ul style="list-style-type: none"> Engage in conduct that causes a victim to enter into a forced marriage, and Be party to a marriage (not the victim) that is a forced marriage. <p>Penalty: 7 years.⁷¹ Aggravated: 9 years.⁷²</p>	<p>Division 11 of the Criminal Code outlines circumstances where a person may be charged with an offence where they attempt to commit an offence under this legislation.⁷³</p>
<i>Marriage Act 1961</i> (Cth) (Marriage Act)	<p>A marriage is void where a party is not of marriageable age⁷⁴ or the consent of either party cannot be considered real consent, because:⁷⁵</p> <ul style="list-style-type: none"> Consent is obtained under duress or fraud, A party is mistaken as to the identity of the other 	N/A

⁶⁹ *Criminal Code Act 1995* (Cth) s 270.7A(1).

⁷⁰ *Ibid* s 270.7B (1) - (2).

⁷¹ *Ibid* s 270.7B(1).

⁷² *Ibid* ss 270.7B(1), 270.8.

⁷³ *Ibid* s 11.1(1).

⁷⁴ *Ibid* s 23B(1)(e).

⁷⁵ *Marriage Act 1961* (Cth) s 23B(1)(d).

Children forced into a marriage

Children at risk of forced marriage

party, or the nature of the ceremony to be performed

- A party is mentally incapable of understanding the nature and effect of the marriage ceremony

Family Law Act 1975 (Cth) **(Family Law Act)**

Under the *Family Law Act*, a Family Court in Australia may grant:

- Personal protection injunctions and other “marital relationship” injunctions;⁷⁶
- Interim or procedural orders to protect children where there has been family violence, or where there is a risk of family violence.⁷⁷

Where a child is at risk of forced marriage, the Court may also grant:

- Parenting orders;⁷⁸
- Child Injunctions;⁷⁹
- Orders for delivery of passports;⁸⁰
- Orders for the location and recovery of a child.⁸¹

⁷⁶ *Family Law Act 1975 (Cth)* s 68B.

⁷⁷ *Ibid* s 67ZBB.

⁷⁸ *Ibid* s 64B.

⁷⁹ *Ibid* s 114.

⁸⁰ *Ibid* s 67ZD.

⁸¹ *Ibid* sub-div C.

Children forced into a marriage

Children at risk of forced marriage

Western Australian Legislation

Criminal Code Act
Compilation Act 1913 (WA)

There are various offences that may be relevant where a child has been forced into a marriage. For example:

- The age of consent to for sexual conduct in WA is 16 years of age⁸²
- It is an offence to facilitate sexual offences against children outside of WA.⁸³

Offences that may be relevant where a child is at risk of forced marriage include (among others):

- Procuring, inciting or encouraging a child into sexual behaviour (under the age of 13)⁸⁴
- Procure, incite or encourage a child who is a lineal relative or defacto child to engage in sexual behaviour (under the age of 13).⁸⁵

Family Court Act 1997 (WA)
(Family Court Act)

The *Family Court Act* contains provisions related to the *Family Law Act*, and outlines that the Family Court of Western Australia has jurisdiction to exercise functions under federal and non-federal legislation.⁸⁶

*Children and Community
Services Act 2004 (WA)*
(Child Protection Act)

N/A

There are four types of protection orders that may be granted:

- Protection order (supervision)
- Protection order (time-limited)
- Protection order (until 18)
- Protection order (special guardianship)

⁸² *Criminal Code Act Compilation Act 1913 (WA)* s 321.

⁸³ *Ibid* s 187.

⁸⁴ *Ibid* s 320.

⁸⁵ *Ibid* s 329.

⁸⁶ *Family Court Act 1997 (WA)* div 1.

Children forced into a marriage

Children at risk of forced marriage

Restraining Orders Act 1997
(WA)

Contains recently amended provisions that define an act of family and domestic violence (this definition will apply to the *Child Protection Act*):⁸⁷

- (a) violence, or a threat of violence, by a person towards a family member of the person; or
- (b) any other behaviour by the person that coerces or controls the family member or causes the member to be fearful.

Under this legislation, a family violence restraining order (FVRO) may be issued where the Court is satisfied that:

- (a) the respondent has committed family violence against a person seeking to be protected and the respondent is likely again to commit family violence against that person in the future; or
- (b) a person seeking to be protected, or a person who has applied for the order on behalf of that person, has reasonable grounds to apprehend that the respondent will commit family violence against the person seeking to be protected.

The legislation notes that an FVRO may be made for the benefit of a child in circumstances of domestic violence.⁸⁸ While these new provisions provide a broader definition of family violence, the relevance of these provisions to circumstances where a child may be forced into a marriage has yet to be judicially determined.

⁸⁷ *Restraining Orders and Related Legislation Amendment (Family Violence) Act 2016* (WA) s 7; note also that the *Restraining Orders and Related Legislation Amendment (Family Violence) Act 2016* (WA) div 2 contains the relevant amendments to section 3 of the *Children and Community Services Act 2004* (WA).

⁸⁸ *Ibid* s 14.