



Submission to the statutory review of the *Victims Rights and Support Act* 2013 (NSW)

NSW Department of Communities and Justice

25 July 2022

Anti-Slavery Australia

Faculty of Law
University of Technology Sydney
PO Box 123 Broadway
NSW 2007
www.antislavery.org.au

1. Summary

Anti-Slavery Australia, at the University of Technology Sydney, welcomes the opportunity to make a submission to the statutory review of the *Victims Rights and Support Act 2013* (NSW) (the Act).

This submission draws upon Anti-Slavery Australia's research and advocacy as well as our extensive experience in working with and providing legal advice and assistance to victims and survivors of modern slavery in Australia since 2003.

This submission will focus primarily on amendments to the Act made by the *Modern Slavery Act 2018* (NSW), as well as make recommendations to better enable victim-survivors to access support in NSW.

2. About Anti-Slavery Australia

Anti-Slavery Australia is the only specialist legal, research and policy centre in Australia working to end modern slavery. For 19 years, our team has been providing pro bono legal and migration services to people who have experienced or are at-risk of modern slavery in Australia; engaging in research and advocacy grounded in the firsthand experience of survivors; and delivering training on modern slavery to frontline service providers, government, community, law enforcement, business, students and educators.

3. Modern Slavery

In Australia, the *Modern Slavery Act 2018* (Cth) defined 'modern slavery' as human trafficking; slavery; servitude; forced labour; debt bondage; deceptive recruitment for labour or services; forced marriage; and the worst forms of child labour.¹ These are all crimes and grave human rights abuses. Modern slavery is criminalised by the *Criminal Code 1995* (Cth)² and the offences are investigated by the Australian Federal Police (AFP) and prosecuted by the Commonwealth Department of Public Prosecutions (CDPP).

It is difficult to estimate the numbers of people in modern slavery. However, globally, it is estimated that over 40.3 million people are either in forced labour or forced marriages, and that 73 million children are in the worst forms of child labour.³ We note that these estimates were published before the Covid pandemic and it is likely that the true prevalence of modern

¹ *Modern Slavery Act 2018* (Cth) s 4.

² *Criminal Code 1995* (Cth) divisions 270 and 271.

³ International Labour Organisation and Walk Free Foundation, *Global Estimates of Modern Slavery* (2017); International Labour Organisation, *Global Estimates of Child Labour* (2017).

slavery would be much higher. In Australia, the Australian Institute of Criminology estimates that up to 1,900 people may be in modern slavery and that only 1 in 5 victims is ever detected.⁴ This year, Anti-Slavery Australia has already provided advice or assistance to over 200 people experiencing modern slavery in Australia. In the 2021 year we assisted over 400 people. The majority of our caseload are people who live in NSW or Victoria.

According to data, the most common form of modern slavery in Australia is forced marriage.⁵ In recognition of this, in 2015 Anti-Slavery Australia, with Australian Government support, established My Blue Sky, Australia's first dedicated forced marriage portal providing information, support and legal advice to people in or at risk of forced marriages. In our experience, people who are forced into marriage often experience domestic violence at the hands of their partner, which can include physical and sexual violence, restrictions of their freedom, financial abuse, and also reproductive coercion. In our experience, forced marriage often occurs in tandem with trafficking, where the person may be trafficked from Australia overseas to be forced into marriage in another country.⁶

Anti-Slavery Australia commends the NSW Government's inclusion of modern slavery as a compensable category in the NSW *Victims Rights and Support Act 2013*. This recognises the harm and trauma experienced by victim-survivors of modern slavery and the need to enhance their access to support and recognition.

The extension of the victims support scheme to victim-survivors of modern slavery commenced on 1 January 2022, after the *Modern Slavery Bill 2021* (NSW) (the Bill) was passed in November 2021. The Bill introduced modern slavery offences⁷ as acts that, if they occurred in NSW and resulted in an injury, would enable a survivor to apply for financial assistance, counselling costs or a recognition payment.

The Second Reading speech noted that the amendments were made to: "include an 'act of modern slavery' to give effect to the intent of making victims support generally available to victims of acts of modern slavery committed in New South Wales."⁸

For a victim-survivor to access the scheme, four requirements must be satisfied:

1. The act must have been committed in NSW (s19A(1) of the Act).

⁴ Australian Institute of Criminology *Estimating the dark figure of human trafficking and slavery victimisation in Australia* (2019).

⁵ Joint Standing Committee on Foreign Affairs, Defence and Trade *Hidden in Plain Sight* (2017) 112.

⁶ See for example AFP Media Release (March 2021) available at <https://www.afp.gov.au/news-media/media-releases/first-exit-trafficking-conviction-australia>.

⁷ As defined by the *Modern Slavery Act 2018* (NSW) which refers directly to the *Criminal Code 1995* (Cth) and the *Crimes Act 1900* (NSW).

⁸ Second Reading Speech to the *Modern Slavery Amendment Bill 2021* (NSW), (17 November 2021).

2. The act must have occurred in the course of the commission of an offence or other conduct constituting 'modern slavery' within the meaning in the *Modern Slavery Act 2018* (NSW) (s19A(1)(a) of the Act). Schedule 2 of the *Modern Slavery Act 2018* incorporates the offences contained in the Commonwealth *Criminal Code 1995*, including slavery, servitude, forced labour, forced marriage and trafficking.
3. Section 19A(1)(b) requires that the act must involve subjecting one or more persons to any form of slavery, servitude or forced labour of a child within the meaning of s93AB of the *Crimes Act 1900* (NSW). Section 93AB of the *Crimes Act 1900* (NSW) provides that "slavery" and "servitude" have the meanings given to them in the *Criminal Code 1995* (Cth).
4. Finally, the act must have resulted in the injury or death of one of those persons (s19A(1)(c)). Section 18 of the Act describes injury as meaning actual bodily harm, grievous bodily harm or psychological or psychiatric harm, but does not include injury arising from loss or damage to property.

Anti-Slavery Australia recommends clarifying and amending the current definition of 'act of modern slavery' in the legislation. As it stands, the requirement that the act must involve subjecting one or more persons to any form of slavery, servitude or forced labour of a child within the meaning of section 93AB of the *Crimes Act 1900* (NSW), limits the acts of modern slavery that must have occurred to make a person eligible. Significantly, this requirement excludes forced marriage, trafficking in persons, domestic trafficking in persons, trafficking in children, deceptive recruiting for labour or services, debt bondage, organ trafficking and domestic organ trafficking.

Recommendation 1: amend the Act to include all forms of modern slavery

Anti-Slavery Australia recommends that section 19A of the *Victims Rights and Support Act 2013* be amended so that "or" exists between 19A(1)(a) and 19A(1)(b), rather than "and".

Anti-Slavery Australia recommends that the definition of "victim of crime" in section 5(1) of the *Victims Rights and Support Act 2013* (NSW) specifically refers to sections 5(1)(a) and 5(1)(b) of the *Modern Slavery Act 2018* (NSW).

4. Other barriers to justice for survivors of modern slavery

Jurisdiction

The cross-jurisdictional nature of many modern slavery and human trafficking offences presents a potential barrier to victim-survivors accessing support under the NSW scheme. We acknowledge the importance of a strong nexus to NSW for access to victims support,

however we recommend further clarity with respect to acts of modern slavery in acknowledgement of the very nature of such offences, which often occur across borders. This is illustrated by the following case study:

Zainab is an Australian permanent resident. Just before her 18th birthday, she was trafficked to her home country and forced to marry. She came back to Australia and lived in her forced marriage before she was finally able to safely leave the marriage with the support of the AFP. Under the current Victims Rights and Support Act, there are questions over whether the act of modern slavery ‘occurred’ in NSW, as the forced marriage itself occurred overseas, but Zainab has continued to suffer harm since her return to NSW.

As well as the need for forced marriage to be included in the definition of ‘act of modern slavery’, Zainab’s case demonstrates that further clarity in the legislation is required for acts of modern slavery with a cross-jurisdictional component.

Recommendation 2: clarify that ‘acts of modern slavery’ that have a nexus to NSW are included in the scheme

Anti-Slavery Australia recommends that the scheme specify that ‘acts of modern slavery’, where the act commenced in NSW or occurred in part in NSW, be included in the scheme. This could be facilitated by amending section 19A(1) to read “act of modern slavery means an act, *part of an act* or series of related acts including planning of an act or series of related acts committed in, or *partly within*, New South Wales”.

Powers of inquiry

Section 12 of the *Victims Rights and Support Act 2013* (NSW) sets out the powers of the Commissioner of Victims Rights to compel or request information relevant to the exercise of functions under the Act. Anti-Slavery Australia is aware of applications for recognition payments being denied or obfuscated because the Commissioner was unable to locate, through investigations or enquiries, reports to the AFP or a Commonwealth government authority.

Case study:

Amara experienced severe domestic violence and sexual servitude. She was kidnapped and repeatedly raped in two separate jurisdictions within Australia, one being NSW. The perpetrator was eventually convicted and imprisoned of Commonwealth modern slavery offences. Her application for victims support in NSW was refused on the basis of a lack of police reports to NSW police.

Recommendation 3: Request reports and information from the AFP and the CDPP

Ensuring that the Commissioner is able to directly seek information held by the Commonwealth to support applications in relation to acts of modern slavery or acts of violence in NSW removes an additional barrier from victim-survivors.

Anti-Slavery Australia recommends the specific inclusion of Commonwealth departments, agencies and law enforcement (including the AFP and CDPP) in section 3 as government agencies or authorities from whom the Commissioner may seek information.

In addition, internal policy and procedure for decision makers should direct them to actively seek this information. The Commissioner should ensure that information sharing agreements with Commonwealth agencies are established and allow for the expeditious production of information.

Evidentiary requirements

Anti-Slavery Australia acknowledges the advocacy of Women's Legal Service NSW around removing the additional evidentiary burden faced by victim-survivors to demonstrate injury, and we endorse their submission to this inquiry.

Acts of modern slavery are grievous crimes. The commission of such acts inevitably leads to harm to victim-survivors. Our clients experience loss of liberty and autonomy, financial exploitation as well as physical and psychological harm; with many victim-survivors grappling with trauma for many years, even after they have accessed safety and left the situation of modern slavery.

Case study:

Jon is a survivor of forced labour in the agricultural industry. He made a report to the AFP about his experiences, which included physical assaults. He did not hold a visa at the time of his exploitation, as the perpetrator controlled his immigration affairs, monitored his telephone and emails and confiscated his identity documents. Jon did not seek medical assistance for the injuries he sustained, as he did not have access to Medicare and did not believe he was eligible for treatment. He does not wish to undertake counselling as he wants to "focus on moving on and raising my family". Given he reported his experience to police, which amounted to both modern slavery and violent offences, he should not be compelled to provide medical evidence of a now historical physical injury, or re-visit his trauma and see a psychologist against his wishes.

Recommendation 4: Remove the need to separately prove injury

Anti-Slavery Australia submits that the requirement to demonstrate harm from the relevant act is an additional and unnecessary barrier to seeking justice for victim-survivors, and recommends removing this requirement.

Time limits

Section 40(1) of the Act requires that applications for financial support or recognition payments be made within two years after the relevant act of modern slavery, or, if the victim was a child when the act occurred, within 2 years after the day on which the child concerned turned 18 years of age.

Section 40(5) requires that applications for financial support or recognition payments be made within ten years after the relevant act of modern slavery involving domestic violence, child abuse or sexual assault; or where the victim was a child, within 10 years after the day on which the child concerned turned 18 years of age.

There are many reasons that a victim-survivor of modern slavery may be unable to seek assistance, including legal advice around eligibility for victim supports, in the years following the relevant act. This is often the case due to the trauma and health conditions that victim-survivors experience, due to their isolation from supports and assistance, language or cultural barriers, and a fear or mistrust of authorities including law enforcement. This is acknowledged by the fact that there is no statute of limitations with respect to the investigation of modern slavery offences.

It is our submission that in such circumstances, victim-survivors should not be prevented from accessing support by a time limitation to accessing the scheme. We note that in claims brought to the equivalent scheme in Victoria, certain matters can be taken into account to allow for an out-of-time applications. Matters that can be taken into account include the age of the applicant at the time of the alleged act of violence; whether the applicant is intellectually disabled or mentally ill; or whether the person who committed/is alleged to have committed the act of violence was in a position of power, influence or trust in relation to the applicant.⁹

⁹ Section 29(3) of the *Victims of Crimes Assistance Act 1996* (Victoria).

Recommendation 5: Allow for out of time applications to be considered in certain circumstances

Anti-Slavery Australia recommends that the scheme introduce an exception to the limitation period for claims to be brought for victim-survivors of modern slavery and acts of violence.

Procedural fairness

Anti-Slavery Australia also recommends strengthening procedural fairness safeguards in the Act to enable victim-survivors better access to justice.

We endorse the calls made by Women's Legal Service NSW in allowing for a presumption of an extension of time for survivors to provide further evidence.

Anti-Slavery Australia also recommends that section 42 of the Act be amended to include a procedural fairness mechanism whereby applicants are formally invited to provide further evidence or comment when the Commissioner is minded to refuse an application.

Recommendation 6: Afford applicants procedural fairness and a right to respond before dismissing an application

The Commissioner should put the reasons that they are considering dismissing an application for assistance to the applicant, before formal dismissal is made, to enable the applicant to be heard.

Contact

██
██