

Modern Slavery Bill 2018

Inquiry by the Senate Legal and Constitutional Affairs Legislation Committee

18 July 2018

Submission from Slavery Links Australia Inc

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as a community Association

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Glossary:

In this submission, the abbreviation JSCFADT refers to the Joint Standing Committee for Foreign Affairs, Defence and Trade

01 **Summary**

02 This Submission goes in particular to the aspects of simplicity and consistency in the draft
Modern Slavery Bill. Slavery Links requests an opportunity to give evidence in person.

03 **Thanks to Parliament**

04 Slavery Links thanks the Parliament for moving the offence of debt bondage from Division
271 (Trafficking) to Division 270 (Slavery) in the *Criminal Code Act, 1995* ('the Code'). The
offence of debt bondage is now to be found in section 270.7C.

05 This welcome change was recommended by Slavery Links and taken up by the JSCFADT
Inquiry in 2017. The change will reduce possible confusion. It clarifies the 'Hierarchy of
Slavery Offences' created in the Code. Relevantly, it also re-affirms the connection between
Australian law in the Code and the United Nations Supplementary Convention, 1956.

06 **WHERE THE DRAFT BILL IS NOT 'FIT FOR PURPOSE'**

07 The Submission makes three very simple points regarding change yet to be made:

08 **Use a consistent definition of slavery**

09 Slavery is defined in the *Criminal Code Act, 1995*. The definition of slavery used in the
Modern Slavery Bill should be consistent with the definition of slavery used in the Criminal
Code. Businesses, anti-slavery organisations and slaves themselves need a coherent legal and
policy framework. The draft Bill creates definitional inconsistency. This would create legal
uncertainty and would be unfair. The definition in the Modern Slavery Bill should read:

10 ***modern slavery*** means conduct which would constitute an offence under Division
270 or 271 of the *Criminal Code*.

11 **Continuing the work of the JSCFADT committee in 2013 and 2017: Parliamentary Scrutiny
for the Supplementary Convention**

12 Members of the Senate Committee will be concerned to find that the Supplementary
Convention, 1956 – slavery – is not on Australia's list of 'core' human rights treaties. The
action requested is simple and straightforward: to amend Section 3 of the Human Rights
(Parliamentary Scrutiny) Act, No 186 of 2011, by adding to the list of treaties:

13 (h) The Supplementary Convention, 1956 [ATS No. 3]

14 In Slavery Links' submission, this would continue the work that the Joint Standing Committee
initiated with its 2013 report, 'Trading Lives' and the 2017 report 'Hidden in Plain Sight'.

15 **Statutory office of Commissioner**

16 In the United Kingdom, the independent statutory Commissioner has performed important
roles with respect to public awareness; policy development; integration of anti-slavery
services; and education of police, Crown prosecutors, defence counsel, business and other
actors in the anti-slavery system.

A review of the UK Modern Slavery Act by the Joint Standing Committee for Foreign Affairs
Defence and Trade affirmed the need for an Independent Commissioner (see Appendix 2).

In the Submission of Slavery Links, an Independent Commissioner is required in Australia.

17 **1. WHO IS SLAVERY LINKS AUSTRALIA INC., AND WHY?**

18 Slavery Links Australia Inc is an incorporated association. Its work refers to slavery as defined
in the United Nations Supplementary Convention, 1956 and Division 270 of the Criminal
Code Act, 1995 ('the Code'). The Convention is where Australia gets its definition of slavery.¹

19 The focus on Australia is warranted because, in a global economy, Australia is exposed to the
ancient slave-making systems that operate in the Indo-Asia-Pacific region. (These systems of
servitude include child trading, debt bondage, forced labour, forced marriage and serfdom.)
Australia is exposed through crime, cultural practices, labour migration, trade and tourism;
meaning that Australia can be part of the problem as well as part of the solution.

20 The essential cases (for example *R v Tang* (2008) 237 CLR 1 and *R v Kovacs* [2007] QCA 14)
refer to people who came to Australia as free persons and were enslaved by Australians in
full view of other Australians who did not recognise what was happening and who did not
know how to assist. Accordingly, Slavery Links does research, publishes information, and runs
workshops, seminars and exhibitions in order to educate families, communities and
businesses about how Australia connects to slavery, how to recognise it and how
community-based and other evidence-based responses can address it. Our work is especially
aimed at decision makers (who need to become more slavery-aware) and their decision rules.

21 As the web site notes: Slavery Links seeks ways to minimise the harms of slavery and ways to
control them. Slavery Links intends to produce:

- better business decisions
- more informed consumers; and
- more engaged members of Non-Government Organisations.

22 We aim to increase community awareness, increase community action and assist
organisations to recognise their anti-slavery roles more fully.

23 Where Parliament is concerned, Slavery Links contributed to meeting proceedings of the
Joint Standing Committee on Foreign affairs, Defence and Trade (JSCFADT) Human Rights Sub
Committee in 2010-11; and in 2011-12 addressed a meeting of elected members which was
convened under the remit of the United Nations association of parliamentarians.

24 Slavery Links contributed to Inquiries by the JSCFADT Committee in 2012-3 and 2017
regarding slavery; and the JSCFADT Inquiry on Women in the Asia-Pacific. Slavery Links has
contributed to other Inquiries, such as that regarding surrogacy (by the Standing Committee
on Social Policy and Legal Affairs) and that regarding Fair Trade (Worker Rights) (by the
Senate Foreign Affairs, Defence and Trade Committee).

¹ Refer to the *Criminal Code Act, 1995* section **270.1 Definition of slavery**

'For the purposes of this Division, **slavery** is the condition of a person over whom any or all of the powers
attaching to the right of ownership are exercised, including where such a condition results from a debt or
contract made by the person.'

25 **2. USE A CONSISTENT DEFINITION OF SLAVERY: THE BILL SHOULD AFFIRM AUSTRALIAN LAW**

26 **2.1 The definition in the Modern Slavery Bill should read:**

27 *modern slavery* means conduct which would constitute an offence under Division
270 or 271 of the *Criminal Code*.

28 Slavery is defined in the *Criminal Code Act, 1995*. The definition of slavery used in the
Modern Slavery Bill should be consistent with the definition of slavery used in the Criminal
Code. Businesses, anti-slavery organisations and slaves themselves need a coherent legal and
policy framework. The draft Bill creates definitional inconsistency. This would create legal
uncertainty and would be unfair. What is the uncertainty? Where is the unfairness?

29 **2.2 As to the definition of ‘modern slavery’ in the Bill:**

- 30 • The Bill’s definition correctly refers to the law (Division 270 or 271 of the Code).
- 31 • The definition refers to Conventions² which are not themselves law. Conventions should
not be part of the definition; the reference(s) should be deleted. Why?
- 32 ○ Conventions are aspirational statements which carry an obligation to legislate but
are left ‘open’ so that individual countries can legislate as each sees fit.
- 33 ○ A Court of law might refer to a Convention³ if it wants to be assisted in interpretation
of domestic law; but it is unreasonable to expect a business to interpret a
Convention in this way.
- 34 • Moreover the definition is unfair in the sense of disturbing the level playing field that law
creates. If the definition refers to a Convention, it would be open to each in-house
counsel to make his or her own interpretation of the law in the light of that Convention. It
would create a confusion of competing interpretations. It would create a let-out excuse
for a non-compliant business.

35 Businesses need minimum turbulence (i.e. minimum change that is bred from uncertainty) in
their legal environments. Businesses deserve appropriate certainty. The definition of modern
slavery should be confined to the definition in Australian law (Division 270 or 271 of the Code).

36 **2.3 As to the Bill excluding reference to the slavery Convention:**

37 The JSCFADT Inquiry report, Hidden in Plain Sight, correctly identified, as relevant
international instruments, the two slavery Conventions (the League of Nations Slavery
Convention, 1926 and the United Nations Supplementary Convention, 1956).

- 38 • This identification was correct because Australia’s definition of slavery derives from the
slavery Convention(s). It is there for all to see in Division 270 of the Code. The definition
works. It has been tested in the High Court, in Tang’s Case (*R v Tang* (2008) 237 CLR 1).

39 So why does the Modern Slavery Bill refer to two conventions but exclude reference to the
slavery Convention? We address this error in Sections 2.4-2.5 (see over the page).

² Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and
Children, 2000 ([2005] ATS 27); and Article 3 of the ILO Convention (No. 182) concerning the Prohibition and
Immediate Action for the Elimination of the Worst Forms of Child Labour, 1999 ([2007] ATS 38)

³ Maxwell, Chris (2012) Judges and Human Rights, Address by Justice Chris Maxwell, President of the Court of
Appeal, to the Queen’s Inn Dinner, Queen’s College, University of Melbourne, 4 May 2012

40 In defining modern slavery, the Bill refers to two conventions but excludes reference to the slavery Convention. This omission is significant. The apparent rationale for the omission is spurious.

41 **2.4 Apparent use of ‘mental reservation’ by UNODC to obscure an important part of the story**

42 ‘Mental reservation’ is a tactic of evasion. It is improper. It is used when there may be:

43 *‘...circumstances in which you can use an ambiguous expression realising that the person who you are talking to will accept an untrue version of whatever it may be.’⁴*

44 What ambiguity is there in the case presented by UNODC? The JSCFADT Inquiry report stated:

45 3.15 In its submission, the UNODC noted that the definition of trafficking in persons *‘already includes forced labour, slavery or practices similar to slavery, and servitude as forms of exploitation in trafficking in persons’*. The UNODC further noted that the Convention and Protocol *‘provide an existing international legal basis for formal and informal international cooperation for what is very often a cross-border crime’*.⁵ (italic emphasis added)

46 **Ambiguity No 1: The Trafficking Protocol did not supersede the slavery Convention**

47 UNODC invites the reader to assume that the Trafficking Protocol is some sort of new testament that has superseded the ‘old’ slavery Convention. The invitation is misleading and wrong.

- 48 • Slavery is defined in terms of ‘ownership’. That is what makes slavery a crime against humanity.
- 49 • The terms ‘slavery’ and ‘servitude’ are contained within the definition of ‘exploitation’ at s 271.1A as it applies to trafficking in the Code: but exploitation is not an element of slavery or slavery-like offences within Division 270.
- 50 • Exploitation may *result* in slavery, servitude etc, and is an element of *some* trafficking offences described in Division 271 (eg s 271.2(1B) where a trafficker in persons is reckless as to whether a victim will be exploited – that is, where the victim of trafficking will be made a slave, subjected to forced labour and so on).
- 51 • In other words, a person who is trafficked may *also* be exploited – that is, reduced to a condition of slavery, forced labour, debt bondage and so on – but a person may be reduced to slavery (and thus, exploited) without being trafficked.
- 52 • We repeat: slavery and slavery-like offences can be present *without* trafficking. This aspect was canvassed by the JSCFADT in 2012-13 and settled with the then Attorney General’s Department as indicated in Text Box 1 following Section 2.5.
- 53 • The terms ‘slavery’ and ‘servitude’ are used in many places; but they can only be understood with reference to the Supplementary Convention, 1956, where they are defined.

⁴ Kieran Tapsell (2014) *Potiphar’s Wife: The Vatican’s Secret and Child Sexual Abuse* (ATF Press: Adelaide), page 59.

⁵ Cited in the JSCFADT report ‘Hidden in Plain Sight’ as UNODC, *Submission 195*, p. 3.

- 54 • There are essential differences between slavery and trafficking. That is why Australian law differentiates Division 270 of the Code from Division 271. Each is founded on a different convention. Each addresses a different problem.
- 55 • Several essential differences between slavery and trafficking were set out in 2012 by The Bellagio–Harvard Guidelines on the Legal Parameters of Slavery⁶ (a paper from world anti-slavery experts, which has been reproduced in Appendix 1 of this submission).
- 56 As to standing: the Bellagio process included Jean Allain, then of Queen’s University, Belfast and lately of Monash University. Allain continued his work on the question of ownership. His work on the *travaux préparatoires* was considered by the High Court in Tang’s Case.
- 57 In summary: the Trafficking Protocol is not a substitute for the Supplementary Convention.
- 58 Ambiguity No 2: The Trafficking Protocol does not have the legal standing of the slavery Convention. The slavery Convention carries obligations *erga omnes*. It has *jus cogens* status.
- 59 The UNODC submission, and reference to it by the JSCFADT Inquiry report, apparently carried over into the Bill, could be construed as suggesting that the Trafficking Protocol, ‘provide[s] an *existing international legal basis* for formal and informal international cooperation for what is very often a *cross-border crime*’. (italic emphasis added)
- 60 The Bali Process on trafficking shows that this is true, as far as it goes. Regrettably UNODC omits an important aspect of the legal standing of the Convention *vis a vis* the Protocol.
- 61 Unlike the Protocol, the slavery Convention carries obligations *jus cogens* and *erga omnes*.⁷
- 62 • ‘*Erga omnes*’ means that every country is required to act in accordance with the slavery Convention whether or not the country has ratified.
- 63 • ‘*Jus cogens*’ refers to certain fundamental, overriding principles of international law, from which no derogation is ever permitted. Anti-slavery is such a principle.
- 64 The Trafficking Protocol may perhaps *complement* the slavery Convention. It is not a *substitute*.

⁶ Members of the Research Network on the Legal Parameters of Slavery (2012) The Bellagio–Harvard Guidelines on the Legal Parameters of Slavery, 3 March 2012. Go to: https://glc.yale.edu/sites/default/files/pdf/the_bellagio-harvard_guidelines_on_the_legal_parameters_of_slavery.pdf

⁷ Bales, Kevin and Robbins, Peter T., (2001) ‘“No one shall be held in slavery or servitude”: A critical analysis of international slavery agreements and concepts of slavery’, Human Rights Review, 1 January 2001. For a general discussion see also Bassiouni, M. Cherif (1997) International Crimes: Jus Cogens And Obligatio Erga Omnes, in Law and Contemporary Problems, Vol. 59: No. 4

65 **2.5 Interference in Australian legal policy / lawmaking by the UNODC**

66 There is a third respect in which the slavery Convention and the Trafficking Protocol differ;
and a third way in which evidence from UNODC has disrespected Australian legal policy.

67 The text box over the page records evidence given by the Attorney Generals Department to
the JSCFADT in 2012-2013. These elements of the Department now reside in the Department
of Home Affairs; but there is continuity as to the aspects of the law and responsibility to
which reference is being made. There are three key features of the transcript:

- 68 • In evidence given on 9 October, 2012, the Department admitted that it avoided use of
the term 'slavery'.
- 69 • The Department was called back to give further evidence on 14 May 2013. The Department
undertook to use the term 'slavery' in the name of its work unit and on web pages.
- 70 • Thirdly the Department acknowledged a key difference between slavery and trafficking. A
person can be enslaved in the place where he or she lives or works. Slavery is defined in
terms of 'ownership'. There is no necessary element of movement in being enslaved. The
phenomenon of slavery differs in this regard from the related but different phenomenon
of trafficking.

71 In evidence to the JSCFADT Inquiry in 2017, it seems UNODC was trying to 're-litigate' the
2012 Inquiry. Slavery Links Australia Inc expresses deep concern to the Senate Legal and
Constitutional Committee's Legislation Committee regarding the disrespect shown by UNODC
regarding this aspect of Australian legal policy and the operation of our system of justice.

Text Box 1: JSCFADT Inquiry Transcript: Extract from Attorney-General's Department evidence 2012-13

Canberra, Tuesday 9 October 2012

Mr Iain Anderson, First Assistant Secretary, Criminal Justice Division

Ms Rebekah Kilpatrick, Director, People Trafficking Section, Criminal Justice Division

Ms Danica Yanchenko, Senior Legal Officer, People Trafficking Section, Criminal Justice Division

Melissa Parke Chair

Senator STEPHENS: I understand that there is a government action plan being developed around slavery.

Ms Kilpatrick: When the government began tackling trafficking, they set up an action plan in 2003. We are now revising and reissuing that action plan.

Senator STEPHENS: Where does this revised action plan stand on the issue of slavery and slavery-like conditions?

Ms Kilpatrick: It will encompass the full suite of exploitative behaviours but will encompass slavery and slavery-like practices as well as trafficking.

Senator STEPHENS: Does it use the word 'slavery' or does it use 'exploitative practices'?

Ms Kilpatrick: At this stage the revised action plan is in its infancy, so I do not think we have gone as far as to settle the nuance of the language yet.

Senator STEPHENS: My concern would be that to water down the language and to be more non-specific by using 'exploitative practices' would detract from the concerns that people have around the human rights issues around slavery and slavery-like conditions. I would hate to think that we would be being delivered up a government action plan that did not actually mention what it was fundamentally about.

Mr Anderson: That will be a matter for the government, but I also note that some people might respond to a term like 'slavery' and simply dismiss it out of hand and say, 'Slavery doesn't happen in Australia,' whereas people trafficking does have a certain resonance with people. They understand that trafficking does go on. We also do not want undersell it or lose any of the audience by using terms that they might think do not relate to Australia, even though we can reasonably say that they do.

Senator STEPHENS: It would be a concern to me if we were moving away from a direct tackling of the issue by fudging the language. I will put that on the record for now.

I would like to concur with the deputy chair's concerns about the lack of detail, and it would be very helpful if you could provide some more information around the numbers. We have some initial stuff. Since 2004 there have been 350 investigations and assessments.

=====

Canberra, Tuesday, 14 May 2013

Attorney-General's Department

Mr Iain Anderson, First Assistant Secretary, Criminal Justice Division

Ms Rebekah Kilpatrick, Director, People Trafficking Section, Criminal Justice Division

In terms of terminology the Australian government has revised the terminology used in the strategy to combat slavery and human trafficking. There was concern raised by stakeholders that the term 'people trafficking' did not necessarily represent the full suite of offences and was also often confused with people smuggling. The formal phrase is in fact now 'human trafficking, slavery and slavery-like practices' to more accurately reflect the importance of forms of exploitation that do not require an element of movement. Slavery, of course, does not necessarily require movement whereas trafficking does entail movement. Today I will be talking about slavery and human trafficking. We are making that change to terminology through websites, through titles of the interdepartmental committee, and it will be reflected in the revised National Action Plan.

72 **3. COMPLETING THE WORK OF THE JSCFADT COMMITTEE IN 2013 AND 2017: APPROVING**
PARLIAMENTARY SCRUTINY FOR THE SUPPLEMENTARY CONVENTION

73 **3.1 Recommendation 33 of the 2017 JSCFADT Inquiry**

74 The Inquiry report 'Hidden in Plain Sight' recommended that the Human Rights (Parliamentary
Scrutiny) Act 2011 be amended to add the 1956 Supplementary Convention on the Abolition
of Slavery⁸ to the list of core human rights treaties considered by the Parliamentary Joint
Committee on Human Rights (PJCHR). The PJCHR undertakes Parliamentary Scrutiny.

75 Slavery Links recommended the action; and the Inquiry took up that recommendation.
Regrettably it appears that no action has been taken to bring about this necessary change.

76 **3.1 Why did Slavery Links' recommend such Scrutiny to the JSCFADT in 2017?**

77 Para 53-56 of Slavery Links' submission to the Inquiry referred to the case in favour of
Parliamentary Scrutiny for the Supplementary Convention, 1956. It read:

78 'Members of the Joint Standing Committee will be aware that Bills may be subject to
Parliamentary Scrutiny, whereby proposed legislation is tested against the provisions
of 'core' human rights treaties to ensure that Australia meets our human rights
obligations. This work is undertaken by the Parliamentary Joint Committee on
Human Rights. The 'core' human rights treaties are listed in the Human Rights
(Parliamentary Scrutiny) Act, 2011.

79 Members of the Joint Standing Committee may be surprised to find that the
Supplementary Convention, 1956 – slavery – is not on Australia's list of 'core' human
rights treaties. This means that slavery is not directly eligible for consideration during
the process of Parliamentary Scrutiny, the process which encourages Parliamentarians
to think about each new Bill that comes before them. Moreover, it means that slavery
has not been directly eligible for some grants or some actions (such as inclusion in
options created for the school curriculum by the Australian Human Rights Commission).

80 **3.2 The perverse and regrettable effect on the Modern Slavery Bill of this failure to act**

81 There is a perverse, and regrettable, irony in the Explanatory memorandum for the Modern
Slavery Bill. It is contained in the section regarding Parliamentary Scrutiny of the Bill:

82 Text Box 2: Statement of Compatibility for the Modern Slavery Bill, 2018

**STATEMENT OF COMPATIBILITY FOR A BILL THAT RAISES HUMAN
RIGHTS ISSUES**

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Modern Slavery Bill 2018

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments
listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

⁸ '... and other related international instruments addressing modern slavery ...'. But see Section 2 of this
Submission which identifies the Supplementary Convention 1956 as the instrument which refers to *slavery*.

83 The Explanatory memorandum asserts that the Modern Slavery Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* ('the Scrutiny Act').

84 • But the slavery Convention is not one of the human rights treaties listed in section 3 of the Scrutiny Act.

85 • Article 8 of the International Covenant on Civil and Political Rights (ICCPR) is listed in the Scrutiny Act.

86 • ICCPR does use the terms 'slavery' and 'servitude'.

87 • However the terms 'slavery' and 'servitude' can only be understood with reference to the slavery Convention, the Supplementary Convention, 1956.

88 Slavery Links invites Senators to contemplate that the Modern Slavery Bill has been scrutinised with regard to treaties on:

89 • Civil and Political Rights;

90 • Economic, Social and Cultural Rights;

91 • Discrimination Against Women;

92 • Racial Discrimination;

93 • Rights of the Child;

94 • Rights of Persons with Disabilities; and

95 • Torture

96 but without regard to the slavery Convention.

97 This does not make sense. It borders on the bizarre. It did not make sense in 2012-13, when the Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013 was also subject to Scrutiny without regard to the Supplementary Convention.

98 The JSCFADT Report 'Hidden in Plain Sight' correctly identified that the Supplementary Convention should of itself be eligible for Parliamentary Scrutiny. Why? We repeat: the Supplementary Convention defines slavery and also defines the conditions of servitude viz.: child trading, debt bondage, forced labour, forced marriage and serfdom. These are the slave-making systems to which Australia is exposed in the Indo-Asia-Pacific.

99 **3.3 Action to be taken with respect to Parliamentary Scrutiny**

100 When Parliamentarians and public servants are not informed about slavery, not required to think about slavery in the routine business of Scrutiny, then action becomes less likely.

101 The remedial action requested is simple and straightforward: to amend Section 3 of the Human Rights (Parliamentary Scrutiny) Act, No 186 of 2011, by adding to the list of treaties:

102 (h) The Supplementary Convention, 1956 [ATS No. 3]

103 In Slavery Links' submission, this would continue the work that the Joint Standing Committee initiated with its 2013 report, 'Trading Lives' and the 2017 report 'Hidden in Plain Sight'.

104 **4. ESTABLISH A BASIS FOR THE STATUTORY OFFICE OF COMMISSIONER**

105 **4.1 Evidence from the United Kingdom**

106 A review of the UK Modern Slavery Act showed that the independent statutory
Commissioner performed important roles with respect to public awareness; policy
development; integration of anti-slavery services; and education of police, Crown
prosecutors, defence counsel, business and other actors in the anti-slavery system.

107 **4.2 Slavery Links' Submission called for a Commissioner**

108 In the Submission of Slavery Links, an Independent statutory Commissioner is required in
Australia. Para 80-81 of Slavery Links Submission to the JSCFADT Inquiry noted:

109 'A suitably modified, statutorily described position of Commissioner would be vital to
the administration of an Australian anti-slavery Act. The UK Commissioner's
promotion and monitoring of open reporting on supply chains by corporations
(required at s 54 of the UK Act), and the 'prevention, detection, investigation and
prosecution of slavery...' (s 41(1)), are two examples of relevant, adaptable
responsibilities of such a Commissioner relevant to contemporary and future
Australian experience.

110 Note: Much of the likely efficacy of an Australian anti-slavery statute will depend
upon the exercise of the functions of the Commissioner.'

111 **4.3 The JSCFADT Inquiry called for a Commissioner**

112 The JSCFADT review of the UK Modern Slavery Act showed that the independent statutory
Commissioner performed roles that were essential for policy development, integration of
services, education of business and other anti-slavery actors and public awareness.

113 In Para 4.59 of its report, Hidden in Plain Sight, the JSCFADT's Recommendation No 6
indicated that the Australian Government should establish an Independent Anti-Slavery
Commissioner under the proposed Modern Slavery Act with powers and resources to
undertake the functions that have been listed in Appendix 2. Slavery Links supports this.

114 **4.4 The JSCFADT recommended a review of the Modern Slavery Act after three-years'**

115 Recommendation No 7 of the JSCFADT (see Appendix 2) recommended a review of the
Modern Slavery Act after three-years' of operation. Slavery Links supports this.

116 **4.5 Consideration of Penalties**

117 The Bill has no clause concerning sanctions for breaches of the reporting regime. Perhaps
something is envisaged for inclusion in the Rules that may be made under any Act that
emerges; in its current form, however, cl 24(2) specifically excludes the possibility that the
Rules can (a) 'create an offence or civil penalty', or 9b) 'provide powers of arrest detention'
etc. The burden for enforcement is placed upon the 'business community in Australia', which,
it is hoped, will 'take proactive and effective actions to address modern slavery.'
(*Explanatory Memorandum*, [2]).

118 Implementing Recommendations 6 and 7 would enable review of this situation; and lead to
further consideration of possible penalties in three years after the Bill's passage.

APPENDIX 1

The Bellagio–Harvard Guidelines on the Legal Parameters of Slavery

We, the Members of the Research Network on the Legal Parameters of Slavery,

Recognising that there has been a lack of legal clarity with regard to the interpretation of the definition of slavery in international law;

Conscious that the starting point for understanding that definition is Article 1(1) of the 1926 Slavery Convention which reads: “Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised”;

Recalling that this definition is reproduced in substance in Article 7(a) of the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery;

Also noting that the 1926 definition of slavery is once again reproduced in substance in the definition of enslavement found in Article 7(2)(c) of the 1998 Statute of the International Criminal Court and developed in more detail in the secondary legislation of the Court, in its Elements of Crimes;

Bearing in mind the provisions in international human rights law regarding slavery within the 1948 Universal Declaration and 1966 International Covenant on Civil and Political Rights; as well as the provisions regarding slavery in regional human rights conventions of the African, European, and Inter-American systems;

Considering the inclusion of slavery as an enumerated type of human exploitation in both the 2000 United Nations Palermo Protocol on Trafficking in Persons and the 2005 Council of Europe Convention on Action against Trafficking in Human Beings;

Mindful of the pronouncements and case-law related to slavery of international, regional and domestic courts;

Having met to consider the issue at the 2010 symposium entitled “The Parameters of Slavery” at the Rockefeller Foundation’s Bellagio Conference Center in Bellagio, Italy; having further deliberated in 2011 at a meeting under the auspices of the Harriet Tubman Institute for Research on the Global Migrations of African Peoples, York University, Canada; and came together once more at a 2011 symposium entitled: “The Legal Parameters of Slavery: Historical to the Contemporary” at Harvard University, under the auspices of the Charles Hamilton Houston Institute for Race and Justice, Harvard Law School; the Harvard Sociology Department; the W. E. B. Du Bois Institute;

Bellagio—Harvard Guidelines on the Legal Parameters of Slavery

Recommend the following Guidelines related to the legal parameters of slavery:

Guideline 1—The Legal Definition

The legal definition of slavery is found at Article 1(1) of the 1926 Slavery Convention, which reads: “Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”

Guideline 2—The Exercise of the Powers Attaching to the Right of Ownership

In cases of slavery, the exercise of “the powers attaching to the right of ownership” should be understood as constituting control over a person in such a way as to significantly deprive that person of his or her individual liberty, with the intent of exploitation through the use, management, profit, transfer or disposal of that person. Usually this exercise will be supported by and obtained through means such as violent force, deception and/or coercion.

Guideline 3—Possession Is Foundational to Slavery

Where there is a right of ownership in respect of a thing, ownership implies a background relation of control. That control is the power attaching to the right of ownership known as possession.

Possession is foundational to an understanding of the legal definition of slavery, even when the State does not support a property right in respect of persons. To determine, in law, a case of slavery, one must look for possession.

While the exact form of possession might vary, in essence it supposes control over a person by another such as a person might control a thing. Such control may be physical, but physical constraints will not always be necessary to the maintenance of effective control over a person. More abstract manifestations of control of a person may be evident in attempts to withhold identity documents; or otherwise to restrict free movement or access to state authorities or legal processes; or equally in attempts to forge a new identity through compelling a new religion, language, place of residence, or forcing marriage.

Fundamentally, where such control operates, it will significantly deprive that person of his or her individual liberty for a period of time which is, for that person, indeterminate.

Cases of slavery are to be distinguished from those where, though there has been control exercised, it does not constitute control tantamount to possession, such as where employers make legitimate decisions about the management of workers.

Possession is foundational in that, not only is it a power attaching to the right of ownership, it also creates the factual conditions for the exercise of any or all of other powers attaching to the right of ownership, such as those set out in Guideline 4.

Guideline 4—Further Examples of Powers Attaching to the Right of Ownership

Where a person controls another such as he or she would control a thing owned, such possession makes possible the exercise of any or all of the powers attaching to the right of ownership.

Correlatively, the exercise of any or all of the powers attaching to the right of ownership may serve to indicate the presence of control of a person tantamount to possession, and so provide evidence of slavery.

The following are further examples of powers attaching to the right of ownership:

a. Buying, Selling or Transferring a Person

Buying, selling or otherwise transferring a person may provide evidence of slavery.

Having established control tantamount to possession; the act of buying, selling or transferring that person will be an act of slavery.

Evidence of slavery may also be found in similar transactions, such as bartering, exchanging, or giving or receiving a person as a gift, where control tantamount to possession has been established.

b. Using a Person

Using a person may provide evidence of slavery. Having established control tantamount to possession; the act of using that person will be an act of slavery.

Evidence of such use of a person may include the derived benefit from the services or labour of that person. In such cases, a person might be used by working for little or no pay, utilised for sexual gratification, or used by providing a service.

c. Managing the Use of a Person

Managing the use of a person may provide evidence of slavery. Having established control tantamount to possession; the act of managing that person will be an act of slavery.

Evidence of such management of the use of a person may include direct management such as a brothel owner delegating power to a day manager in a situation of slavery in the context of sex work.

d. Profiting from the Use of a Person

Profiting from the use of a person may provide evidence of slavery. Having established control tantamount to possession; the act of profiting from the use of that person will be an act of slavery.

Evidence of profiting from the use of a person may include cases where a person is mortgaged, lent for profit, or used as collateral.

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Evidence of profiting from the use of a person may also include making money or deriving any other kind of income or benefit from the use of the person. Such as the use of an agricultural worker in a situation of slavery, where the profit from the picking of a crop is taken or received by another whether in the form of wages or of the harvest.

e. Transferring a Person to an Heir or Successor

Transferring a person to an heir or successor may provide evidence of slavery. Having established control over a person tantamount to possession; the act of willing that person to a child or other heir or successor will be an act of slavery.

Evidence of such transferring of a person may include a case of inheritance where a woman, on the death of her husband, is deemed to be inherited by another person.

Evidence of such a transferring of a person may also include the conveying of a status or condition of a person to that of a successive generation, such as from mother to daughter.

f. Disposal, Mistreatment or Neglect of a Person

Disposing of a person following his or her exploitation may provide evidence of slavery. Having established control over a person tantamount to possession; the act of disposing of a person will be an act of slavery.

Mistreatment or neglect of a person may provide evidence of slavery. Having established control tantamount to possession, such disregard may lead to the physical or psychological exhaustion of a person, and ultimately to his or her destruction; accordingly the act of bringing about such exhaustion will be an act of slavery.

Evidence of such mistreatment or neglect may include sustained physical and psychological abuse, whether calculated or indiscriminate; or the imposition of physical demands that severely curtail the capacity of the human body to sustain itself or function effectively.

Guideline 5—Making a Determination as to whether Slavery Exists

The exercise of any or all of the powers attaching to the right of ownership just considered shall provide evidence of slavery, insofar as they demonstrate control over a person tantamount to possession.

Accordingly, in determining whether slavery exists in a given case, it is necessary to examine the particular circumstances, asking whether “powers attaching to the right of ownership” are being exercised, so as to demonstrate control of a person tantamount to their possession.

In evaluating the particular circumstances to determine whether slavery exists, reference should be made to the substance and not simply to the form of the relationship in question.

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The substance of the relationship should be determined by investigating whether in fact there has been an exercise of one or more of the powers attaching to the right of ownership. This will include a determination as to whether control tantamount to possession is present.

Guideline 6—Expropriation

Ordinarily exclusion from expropriation or “security of holding” would be deemed a power attaching to the right of ownership. However, as the State generally does not support a property right in persons, a negative obligation against the State generally no longer exists.

However, the State has at minimum the positive obligation to bring about the end of either the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.

The State may have further positive obligations with regard to the prohibition against slavery on the basis of domestic law as well as regional or international instruments.

Guideline 7—Terminology

The term “slavery” has often been utilised to describe circumstances that go beyond the legal definition as established by the 1926 Slavery Convention.

In law, only “slavery” and “institutions and practices similar to slavery”, which is often abbreviated to “practices similar to slavery”, have standing and are defined in international law via the 1926 Slavery Convention and the 1956 Supplementary Convention.

Guideline 8—Distinction between Slavery and Forced Labour

The 1926 Slavery Convention recognises that forced labour can develop “into conditions analogous to slavery”.

Although forced or compulsory labour is defined by the 1930 Forced Labour Convention as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”; forced labour will only amount to slavery when, in substance, there is the exercise of the powers attaching to the right of ownership.

Slavery will not be present in cases of forced labour where the control over a person tantamount to possession is not present.

Guideline 9—Distinction between Slavery and ‘Institutions and Practices Similar to Slavery’

Article 1 of the 1956 Supplementary Convention recognises that the “institutions and practices similar to slavery”, that is, debt bondage, serfdom, servile marriages, or child exploitation; may be “covered by the definition of slavery contained in article 1 of the Slavery Convention of 1926”.

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The distinction between these servile statuses as defined by the 1956 Supplementary Convention in the following terms and slavery is that slavery is present where in substance there is the exercise of the powers attaching to the right of ownership.

It should be emphasised that slavery will only be present in cases of such “institutions and practices similar to slavery” where control over a person tantamount to possession is present.

The following are the conventional servitudes set out in the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery:

a. Debt bondage, that is to say, the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined;

b. Serfdom, that is to say, the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status;

c. Any institution or practice whereby:

i. A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or

ii. The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or

iii. A woman on the death of her husband is liable to be inherited by another person;

d. Any institution or practice whereby a child or young person under the age of eighteen years is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.

Guideline 10—When Slavery and Lesser Servitudes Are Present

Accepting that both slavery and lesser servitudes such as forced labour or “institutions and practices similar to slavery” may be found in substance in a particular circumstance; the manner to proceed is by making reference to that substance and not simply to the form, and first ask whether there has been an exercise of the powers attaching to the right of ownership. If so, then the more serious offence of slavery is present.

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If not, reference should be made to the legal definition of the lesser servitude which corresponds in substance to the particular circumstance in question.

Adopted on this day, 3 March 2012, by the Members of the Research Network on the Legal Parameters of Slavery.

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Appendix 2

Independent Commissioner: Recommendations of the JSCFADT Inquiry 2017

Extract from 'Hidden in Plain Sight', the report of the Joint Standing Committee. Go to:

[https://www.aph.gov.au/Parliamentary Business/Committees/Joint/Foreign Affairs Defence and Trade/ModernSlavery/Final_report/_recList6](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/ModernSlavery/Final_report/_recList6)

Recommendation 6

- 4.59 The Committee recommends that the Australian Government establish an Independent Anti-Slavery Commissioner under the proposed Modern Slavery Act with powers and resources to undertake the following functions, including but not limited to:
- overseeing the implementation of the *National Action Plan to Combat Human Trafficking and Slavery 2015-19* and any future plans to combat modern slavery;
 - monitoring and investigating compliance of government agencies with the *National Action Plan to Combat Human Trafficking and Slavery 2015-19* and existing modern slavery legislation;
 - ensuring victims of modern slavery, including children, have access to appropriate support services;
 - providing education, guidance and awareness training for government agencies and entities about modern slavery issues;
 - engaging with government and entities on the implementation and operation of the proposed supply chain reporting requirement and central repository;
 - collecting and analysing data on modern slavery in Australia;
 - undertaking legislated reviews of the proposed Modern Slavery Act at least every three years;
 - improving coordination between criminal justice agencies in identifying and prosecuting modern slavery cases;
 - providing advice on how to improve the proposed Modern Slavery Act, as well as responses to modern slavery, on an ongoing basis;
 - providing independent oversight of the response to combatting modern slavery across all sectors, and identifying gaps and solutions;
 - working with various agencies, law enforcement bodies, prosecutors and others to increase the identification and reporting of modern slavery crimes, and to bolster the prosecution rates for modern slavery offences;
 - raising community awareness of modern slavery; and
 - any other related matters.
- 4.60 The Committee recommends that the proposed Modern Slavery Act provide that the Commissioner be truly independent from government or any other body, such as the Australian Human Rights Commission or the Commonwealth Ombudsman, and oversee their own properly resourced and independent office. The Commissioner should report to Parliament.
- 4.61 The Committee recommends that the Commissioner's role complement the existing roles of the Attorney-General's Department and the Ambassador for People Smuggling and Human Trafficking. In developing the Commissioner position, consideration should be given to ensuring complementarity with the Ambassador position and avoiding an overlap of roles and responsibilities.

Recommendation 7

- 4.62 The Committee recommends that the Australian Government support the Independent Anti-Slavery Commissioner to undertake a legislated review of the proposed Modern Slavery Act three years after its commencement and every three years thereafter...