

*Crimes Legislation
Amendment (Slavery, Slavery-
like Conditions and People
Trafficking) Bill 2012*

**Senate Legal and Constitutional Affairs
Committee**

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Introduction

1. The Law Council is pleased to provide the Senate Legal and Constitutional Affairs Committee (the Committee) with this submission in response to its inquiry into the *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012* (the Bill). The Law Council welcomes the introduction of the Bill and is pleased that the Government is taking steps to strengthen the criminal law in this area.
2. The Law Council notes that the Bill was also referred to the House Standing Committee on Social Policy and Legal Affairs (the House Committee) for inquiry and report, but that in light of the concurrent inquiries into the Bill, the Chair of the House Committee, the Hon Graham Perrett MP, made a statement on 28 June 2012 noting that it would be an inefficient use of House Committee resources for it to continue its inquiry.¹
3. The Law Council notes that the purpose of the Bill is to ensure that exploitative behaviour such as that demonstrated in slavery, people trafficking and related activities, is captured and criminalised. To do this, the Bill introduces offences relating to forced labour, organ trafficking, forced marriage and harbouring a victim of slavery or trafficking and related offences.
4. The Bill also clarifies existing offences relating to such exploitative behaviour under the *Criminal Code Act 1995* (Cth) (the Criminal Code) and amends definitions in the Criminal Code in order to enhance the operational effectiveness of the offences. In addition to this, it increases the scope of reparation orders to individual victims of Commonwealth offences, including slavery, people trafficking and related offences.²
5. The Law Council supports all efforts to prevent the practices of slavery, people trafficking and related activities. It considers that Australia's response to these issues should reflect international best practice and be consistent with Australia's international legal obligations.
6. The Law Council has made a number of submissions in relation to Australia's response to people trafficking, slavery and related activities. These include submissions to:
 - the Commonwealth Attorney-General's Department (AGD) on the Exposure Draft of the *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012* (the Exposure Draft) on 20 January 2012;³

¹ See Oral Report by the Chair of the House Standing Committee on Social Policy and Legal Affairs, Mr Graham Perrett MP, House of Representatives Hansard Transcript, 28 June 2012. Available from http://parlinfo.aph.gov.au/parlInfo/download/chamber/hansardr/38b26896-2425-4184-83c1-0584f5b1cf86/toc_pdf/House%20of%20Representatives_2012_06_28_1147_Official.pdf;fileType=application%2Fpdf

² Explanatory Memorandum, *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012*, p. 1. Available from http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4840_ems_e18ea7e8-91f4-4c8d-958c-bddb635b505a/upload_pdf/369090.pdf;fileType=application%2Fpdf.

³ Law Council of Australia, Submission to Commonwealth Attorney-General's Department, *Exposure Draft – Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012*, 20 January 2012. Available from http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=F824861E-F961-E5B9-B626-510645D3D66A&siteName=lca.

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- the AGD in response to its 2011 consultation (the 2011 Consultation) on the *Criminal Justice Response to Slavery and People Trafficking; Reparation and Vulnerable Witness Protections* on 3 March 2011;⁴ and
 - this Committee in response to its inquiry into the *Criminal Code Amendment (Trafficking in Persons) Bill 2005* (Cth) on 18 February 2005.⁵
7. The Law Council has also participated in the Australian Government's National Roundtable on People Trafficking since it was established in 2008.
8. The Law Council considers that the Bill makes significant progress in a number of areas, and particularly welcomes the following aspects:
- Inclusion of a definition of 'coercion' in relation to slavery, trafficking and related offences to reflect the fact that such offences can be committed where offenders use force, duress, detention, psychological oppression, abuse of power, or take advantage of a person's vulnerability.⁶
 - The introduction of offences relating to servitude generally.⁷
 - The introduction of forced labour,⁸ forced marriage,⁹ organ trafficking,¹⁰ and harbouring a victim of slavery, trafficking and related offences.¹¹
 - The introduction of further circumstances of aggravation for slavery-like offences.¹²
 - The inclusion of a reference in the Bill's explanatory memorandum to the operation of section 5.6 of the Criminal Code in relation to fault elements for physical elements of the offences where these are not specified in the offence itself; and
 - The inclusion of the word 'receives' in the 'harbouring a victim' offence to bring the wording of that offence into line with the terminology used in the relevant United Nations (UN) Trafficking Protocol.¹³

These aspects of the Bill are discussed further below.

⁴ Law Council of Australia, Submission to Commonwealth Attorney-General's Department, *Criminal Justice Response to Slavery and People Trafficking; Reparation and Vulnerable Witness Protections*, 3 March 2011. Available from http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=5C22F383-ACEA-1276-C626-B2D0B78C5564&siteName=lca.

⁵ Law Council of Australia, Submission to Senate Legal and Constitutional Affairs Committee, *Criminal Code Amendment (Trafficking in Persons) Bill 2005*, 18 February 2005. Available from http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/completed_inquiries/2004-07/trafficking/submissions/sublist.htm.

⁶ Proposed s 270.1A, *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012*

⁷ Ibid., proposed sections 270.4 and 270.5

⁸ Ibid., proposed section 270.6A

⁹ Ibid., proposed section 270.7B

¹⁰ Ibid., proposed sections 271.7A, 271.7B, 271.7C, 271.7D, 271.7E

¹¹ Ibid., proposed sections 271.7F and 271.7G

¹² Ibid., proposed section 270.8

¹³ Ibid., proposed section 271.7F; see also *Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against Transnational Organized Crime*, adopted by the United Nations General Assembly resolution 55/25 of 15 November 2000, entry into force 29 September 2003. Australia ratified this protocol on 14 September 2005. Available from http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf.

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9. Notwithstanding these positive aspects of the Bill, the Law Council remains concerned about a number of outstanding issues raised in response to the 2011 Consultation and the Exposure Draft. These issues are not addressed in the Bill or in any related legislative or policy initiatives. In particular, the Law Council is disappointed at the Government's failure to address the need for adequate remedies, assistance and protection for victims. These issues are discussed below.

Current offences relating to Slavery, Slavery-like offences and Trafficking

10. There are a number of provisions in the Criminal Code that criminalise slavery, people trafficking and related activities. These provisions are found in Division 270 (slavery and related offences) and Division 271 (people trafficking and related offences) and include offences related to:
- possession of a slave, engaging in slave trading, entering into a commercial transaction involving a slave, or exercising control or direction over or financing any act of slave trading or commercial transaction involving a slave;¹⁴
 - sexual servitude and deceptive recruiting for sexual services;¹⁵
 - people trafficking into or out of Australia and domestic trafficking;¹⁶
 - trafficking in children;¹⁷ and
 - debt bondage.¹⁸
11. These offences currently attract penalties ranging from 12 months to 25 years imprisonment.
12. Criminal Code offences form only part of the Government's response to people trafficking and forced labour issues. State and Territory criminal offences are also used in an effort to combat these types of crimes. Indeed, on some occasions, State or Territory offences such as assault, kidnapping and sexual assault may be used in conjunction with the Commonwealth offences.
13. In addition to these offences, individuals who knowingly or recklessly allow a non-citizen who does not have work rights to work, or refer them to someone else for work, can be charged with an offence under sections 245AA to 245AK of the *Migration Act 1958* (the Migration Act). Other measures to address exploitative behaviour in relation to vulnerable workers may be taken under workplace legislation.

¹⁴ Section 270.3, *Criminal Code Act 1995*(Cth)

¹⁵ *Ibid.*, sections 270.6 and 270.7

¹⁶ *Ibid.*, sections 271.2, s.271.3, 271.5 and 271.6

¹⁷ *Ibid.*, sections 271.4 and 271.7

¹⁸ *Ibid.*, section 271.9

Expansion of the scope of slavery, trafficking and related provisions

14. The Law Council welcomes the expansion of the scope of Division 270 in relation to slavery and related offences. The proposed provisions recognise the variety of circumstances which may now constitute enslavement including a range of physical and psychological threats, coercion and deception.
15. The Law Council is pleased to see the replacement of the existing offences relating to sexual servitude with more general servitude offences.¹⁹ Servitude relates to the condition of a victim who provides labour or services if, because of the use of coercion, threats or deception:
 - a reasonable person in the victim's position would not consider himself or herself to be free to cease to provide the labour or services, or to leave the place where they are provided; and
 - the victim is significantly deprived of personal freedom in aspects of his or her life other than the provision of the labour or services.²⁰
16. One of the Law Council's Constituent Bodies, the Law Society of Western Australia (LSWA) has suggested that a non-exclusive list of examples in the legislation may be of assistance in determining in what circumstances the threshold test is met in relation to whether a victim is significantly deprived of personal freedom. Alternatively, such a list could be included in the Bill's Explanatory Memorandum.
17. The Bill recognises that servitude may exist whether or not escape from servitude is possible and whether or not an attempt at escape has been made. These provisions are consistent with the High Court's reasoning in *R v Tang*,²¹ and the reasoning of the Queensland Court of Appeal in *R v Kovacs*.²²
18. The Law Council welcomes the introduction of the proposed aggravated slavery-like offences provision, section 270.8, which includes aggravating circumstances related to:
 - The victim being under 18.
 - The victim being subject to cruel, inhuman or degrading treatment.
 - The offender engaging in conduct that gives rise to a danger of death or serious harm to the victim or another person and being reckless as to that danger.
19. The proposed aggravated slavery-like offences provision gives effect to Australia's obligations under a range of conventions including the Convention on the Rights of the Child²³ and the International Covenant on Civil and Political Rights.²⁴

¹⁹Proposed sections 270.4 and 270.5, *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012*

²⁰*Ibid.*, proposed section 270.4

²¹*R v Wei Tang* [2008] HCA 39; (2008) 237 CLR 1

²²*R v Kovacs* [2008] QCA 417

²³Article 4, *Convention on the Rights of the Child* (CRC) opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

²⁴Article 7 and Article 24 (1): *International Covenant on Civil and Political Rights* adopted by UN General Assembly Resolution 2200A (xxi) of 16 December, 1966, entered into force 23 March 1976, 999 UNTS 171, 6 ILM 368 (1967).

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20. The Law Council also welcomes the Government's focus on forced labour both in and outside of the trafficking context. Indeed, the need for this broader approach is reflected in recent Australian case law²⁵ which appears to have expanded the application of the traditional trafficking offences "to forms of trafficking beyond exploitation in the commercial sex industry".²⁶
 21. The Law Council also welcomes the proposed amendment of the definition of 'sexual service' in the Dictionary to the Criminal Code. 'Sexual service' is currently defined as 'the commercial use or display of the body of the person providing the service for the gratification of others'. The proposed amendment removes the word 'commercial' and reflects the recognition that victims may be exploited in relation to sexual services even if there is no commercial aspect involved. A number of the trafficking offences involve the provision of sexual services by the victim.²⁷
 22. The Law Council also welcomes the expansion of the scope of Division 271 (trafficking and related offences) through the application of expanded definitions, as discussed below, and through the introduction of offences relating to organ trafficking and harbouring a victim of slavery, trafficking and related offences.

International obligations and the need for forced labour offences

23. The Bill proposes to include a new definition of 'forced labour'²⁸ and three new offences related to forced labour: 'causing a person to enter into or remain in forced labour';²⁹ 'conducting a business involving forced labour';³⁰ and 'deceptive recruiting for labour or services'.³¹ These extend the current minimum wage and conditions protections of the Fair Work Act³² beyond situations of employment and are welcomed.
24. As noted by the Law Council in its submission on the Discussion Paper, Australia has an obligation under the International Labour Organisation Convention No 29 on Forced or Compulsory Labour (the ILO Convention) to 'suppress' forced labour.
25. Under the ILO Convention, 'forced labour' is defined 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 or herself 'voluntarily'".³³
26. In addition to this obligation:
 - the *International Covenant on Civil and Political Rights* (ICCPR) provides that no one shall be required to perform compulsory or forced labour (in addition to the right not to be held in slavery or servitude);³⁴ and

²⁵Op.cit., *R v Kovacs*

²⁶A. Schloenhardt and J. Jolly, 'Honeymoon from Hell: Human Trafficking and Domestic Servitude in Australia', *Sydney Law Review*, Vol. 32, p.672, available from http://sydney.edu.au/law/slr/slr_32/slr32_4/Schloenhardt_and_Jolly.pdf

²⁷Sub-sections 271.2 (2), 271.2 (2A), 271.2 (2B) and 271.2 (2C), *Criminal Code Act 1995* (Cth).

²⁸Proposed Section 270.6, *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012*

²⁹Ibid., proposed Section 270.6A(1)

³⁰Ibid., proposed Section 270.6A(2)

³¹Ibid., proposed Section 270.7

³²*Fair Work Act 2009* (Cth).

³³Article 2(1), *ILO Convention No 29 on Forced or Compulsory Labour*, available from <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C029>

³⁴Op.cit., *International Covenant on Civil and Political Rights*, Articles 8.1, 8.2 and 8.3.

- the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) protects the right to freely choose one's work, and to just and favourable conditions of work.³⁵

27. Furthermore, the United Nation's *Recommended Principles and Guidelines on Human Rights and Human Trafficking* emphasises the need to separately criminalise forced labour as part of a broader legal framework which addresses trafficking.³⁶ The United Nations Office on Drugs and Crime (UNODC)'s *Model Law against Trafficking in Persons* also specifically criminalises the use of forced labour and services.³⁷

Current and proposed definitions in the Criminal Code

28. In its submission in relation to the 2011 Consultation³⁸, the Law Council expressed concern at the lack of a separate offence which criminalises forced labour, and suggested that the current definitions of 'forced labour' and 'threat' in the Criminal Code could be adapted to create a new forced labour offence.

29. For the purpose of establishing 'exploitation'³⁹ under the trafficking and related offences, the Criminal Code currently defines 'forced labour' as:

"...the condition of a person who provides labour or services (other than sexual services) and who, because of the use of force or threats:

a) is not free to cease providing labour or services; or

b) is not free to leave the place or area where the person provides labour or services".⁴⁰

30. A 'threat' under the trafficking and related offences is currently defined as:

"...a threat of force; or a threat to cause a person's removal from Australia, or a threat of any other detrimental action; unless there are reasonable grounds for that action".⁴¹

31. The Law Council has previously highlighted the need for the Criminal Code to address the fact that labour can be forced not only through the use of force or threats, but through other coercive or deceptive means. Indeed, it has been found that "many victims enter forced labour situations initially of their own accord, albeit

³⁵ Articles 6.1 and 7, *International Covenant on Economic, Social and Cultural Rights* (United Nations General Assembly resolution 2200A (XXI) on 16 December 1966, New York; entry into force 3 January 1976, Australia signed 18 December 1972 and ratified 10 December 1975, available at

<http://www2.ohchr.org/english/law/cescr.htm>

³⁶ Guideline 4, *United Nations Recommended Principles and Guidelines on Human Rights and Human Trafficking*, Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council (United Nations E/2002/68/Add.1) 20 May 2002, available at

[http://www.unhcr.ch/huridocda.nsf/\(Symbol\)/E.2002.68.Add.1.En?Opendocument](http://www.unhcr.ch/huridocda.nsf/(Symbol)/E.2002.68.Add.1.En?Opendocument)

³⁷ Article 11, United Nations Office on Drugs and Crime, *Model Law against Trafficking in Persons*, 30 June 2009, available at

http://www.unodc.org/documents/humantrafficking/UNODC_Model_Law_on_Trafficking_in_Persons.pdf

³⁸ Op.cit., Law Council of Australia, *Submission on the Consultation on the Criminal Justice Response to Slavery and People Trafficking; Reparation and Vulnerable Witness Protections*

³⁹ See Dictionary to the *Criminal Code Act 1995* (Cth)

⁴⁰ Section 73(2), *Criminal Code Act 1995*(Cth)

⁴¹ Ibid., Section 271.1

through fraud and deception, only to discover later that they are not free to withdraw their labour. They are subsequently unable to leave their work owing to legal, physical or psychological coercion. Initial consent may be considered irrelevant when deception or fraud has been used to obtain it”.⁴²

32. The Bill proposes to insert a new definition of ‘forced labour’ so that for the purposes of Division 270 of the Criminal Code (slavery and related offences), ‘forced labour’ would be defined as:

“...the condition of a person (the victim) who provides labour or services if, because of the use of coercion, threat or deception, a reasonable person in the position of the victim would not consider himself or herself to be free:

- a) to cease providing labour or services; or*
- b) to leave the place or area where the victim provides labour or services.”⁴³*

33. This definition applies whether the coercion, threat or deception is used against the victim or another person.⁴⁴ Additionally, the victim may be in a condition of forced labour whether or not escape from the condition is practically possible for the victim; or the victim has attempted to escape from the condition.⁴⁵
34. The Law Council supports this expansion of the forced labour definition. Indeed, the acknowledgement that a victim may be in a condition of forced labour whether or not it is practically possible for them to escape or attempt to escape, would appear to cover situations similar to that considered by the Court in *R v Kovacs*.⁴⁶
35. One of the grounds of appeal in this case was that the guilty verdicts against the appellants were unreasonable because the victim in this case had a “degree of personal freedom inconsistent with the existence of slavery as defined in the Code.”⁴⁷ This was due to the fact that the victim was not prevented from leaving the store or house where she worked for the Kovacs couple; was not locked in her room; was able to send and receive letters; knew that money was being sent to her family in the Philippines; and was also able to call people on the telephone.⁴⁸
36. The Queensland Court of Appeal rejected this argument, finding that the freedom that the defence alleged the victim to have was ultimately “illusory or non-existent.”⁴⁹
37. Although the victim in this case had attempted to escape from the Kovacs couple two months after she arrived, she was found by them, forcibly returned and had her passport confiscated by Ms Kovacs.⁵⁰ It was four months after she commenced work with the Kovacs couple that she was able to successfully escape.

⁴² International Labour Organisation, *A global alliance against forced labour: A global report under the follow up to the ILO declaration on fundamental principles and rights at work*, 2005, Geneva, p.5, available from www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_081882.pdf

⁴³ Proposed section 270.6(1) *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012*

⁴⁴ *Ibid.*, proposed section 270.6(2)

⁴⁵ *Ibid.*, proposed section 270.6(3)

⁴⁶ *Op.cit.*, *R v Kovacs*

⁴⁷ *Ibid.*, at para 46.

⁴⁸ *Ibid.*, at para 44.

⁴⁹ *Ibid.*, at para 46.

⁵⁰ *Ibid.*, at paras 12-13.

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38. In addition to introducing a new definition of ‘forced labour’, the Bill also proposes to amend the definition of ‘threat’ so that for the purposes of Divisions 270 (slavery and related offences) and 271 (trafficking and related offences), ‘threat’ means:
- a) “a threat of coercion; or
 - b) a threat to cause a person’s deportation or removal from Australia; or
 - c) a threat of any other detrimental action, unless there are reasonable grounds for the threat of that action in connection with the provision of labour or services by a person”.⁵¹
39. The Bill also introduces a definition of ‘coercion’ which includes coercion by any of the following:
- a) force;
 - b) duress;
 - c) detention;
 - d) psychological oppression;
 - e) abuse of power;
 - f) taking advantage of a person’s vulnerability.⁵²
40. The Law Council supports the inclusion of ‘coercion’ in the definitions so that the definitions better reflect situations which do not involve overt threats but instead involve psychological coercion or abuse of a victim’s vulnerable position.
41. Article 2 of the ILO Convention defines ‘forced labour’ 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 or herself ‘voluntarily’”.⁵³ According to the ILO, the ‘menace’ referred to in this definition can take a number of different forms ranging from physical violence or restraint; death threats addressed to the victim or relatives; or subtler forms of menace, sometimes of a psychological nature.⁵⁴
42. Therefore, to the extent that ‘menace’ can be subtle, involving psychological coercion rather than actual threats or violence, and that a victim’s ‘consent’ may not exist where fraud, deception or coercion occur, the inclusion of ‘coercion’ in the definitions of ‘forced labour’ and ‘threat’ proposed in the Bill could be described as more closely aligning the Criminal Code definition of ‘forced labour’ with the ILO’s definition.
43. In addition to the requirement that the work or service be exacted from a person under the menace of penalty, the ILO definition also requires the person in question to undertake this work or service involuntarily. According to the ILO, subtle forms of coercion can play a role in causing a person to undertake work or service involuntarily.⁵⁵ Indeed, it has been found that employers often think of ways “that they can effectively control and manipulate a person in order to take advantage of

⁵¹Proposed section 270.1A, *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012*

⁵²*Ibid.*, proposed section 270.1A

⁵³*Op.cit.*, Article 2(1), *ILO Convention No 29 on Forced or Compulsory Labour*

⁵⁴*Op.cit.*, *A Global Alliance Against Forced Labour*, pp.5-6

⁵⁵*Ibid.*

their unpaid services, even without the need to use any overt demonstration of force to make any overt threat.”⁵⁶

44. The inclusion of ‘coercion’ in the relevant definitions acknowledges the fact that whilst some people may initially enter a forced labour situation of their own accord, this is usually due to forms of coercive behaviour on the part of the perpetrator.⁵⁷ In many instances, it is only after the victim has commenced the forced labour or service that they realise that they are not free to withdraw from their work due to physical, psychological and in some cases legal threats against them or their family.⁵⁸ In situations where this type of coercion is utilised, the ILO states that “initial consent may be considered irrelevant when deception or fraud is used to obtain it.”⁵⁹
45. One of the Law Council’s Constituent Bodies, the Law Society of South Australia (LSSA) has noted that the Bill does not directly refer to the fact that initial consent is nullified when the slavery, trafficking or related situation is entered into through coercion or deception. The Australian Human Rights Commission (AHRC) in its submission on the Exposure Draft made a similar observation and recommended that the Bill be amended in this regard.⁶⁰ The Law Council supports this recommendation.
46. The Bill inserts a new definition of ‘exploitation’ for Division 271 (trafficking and related offences).
47. The Criminal Code currently defines ‘exploitation’ as conduct that causes a person to enter into a situation of slavery, forced labour, sexual servitude or unlawful organ donation.⁶¹
48. The Trafficking Protocol definition of ‘exploitation’ includes:

*“...the exploitation or the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”*⁶²
49. In further defining forms of exploitation, the UNODC advises that legislators should refer to international conventions.⁶³ The *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery* (Supplementary Convention) assists in this regard, defining institutions and practices similar to slavery as including debt bondage, serfdom and the institutions of servile marriage and child exploitation.⁶⁴
50. The Bill proposes to introduce a new definition of exploitation for Division 271 of the Criminal Code (trafficking and related offences) so that exploitation occurs if the

⁵⁶ F. David, *Labour Trafficking*, AIC Research and Public Policy Series 108, 2010, p.49. Available from <http://www.aic.gov.au/documents/A/9/0/%7BA90867A2-1558-4B01-A233-34B3381D2F6D%7Drpp108.pdf>

⁵⁷ Op.cit., International Labour Organisation, *A Global Alliance Against Forced Labour*, pp.5-6

⁵⁸ Ibid.

⁵⁹ Ibid., p.6

⁶⁰ See http://www.hreoc.gov.au/legal/submissions/2012/20120120_trafficking.html#Heading75

⁶¹ See Dictionary to the *Criminal Code Act 1995* (Cth).

⁶² Op.cit., Art.3(a), *Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against Transnational Organized Crime*

⁶³ Op. cit., *Combating Trafficking in Persons: A Handbook for Parliamentarians*, p. 14

⁶⁴ Article 1, *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, Adopted by a Conference of Plenipotentiaries convened by Economic and Social Council resolution 608(XXI) of 30 April 1956 and done at Geneva on 7 September 1956.

other person's conduct causes the victim to enter into conditions of slavery or conditions similar to slavery; servitude; forced labour; forced marriage or debt bondage.⁶⁵

51. The Law Council supports the proposed extension of the definition of 'exploitation' for the trafficking and related offences. Not only does this provision better reflect the definition of 'institutions or practices similar to slavery' as outlined in Article 1 of the Supplementary Convention, but it also clarifies the elements of Australia's people trafficking offences.

Proposed test – 'reasonable person in the position of the victim'

52. One of the other proposed changes to the definition of 'forced labour' is the introduction of a new objective test so that a person will be considered a victim of forced labour if, because of the use of coercion, threat or deception, *a reasonable person in the position of the victim* would not consider himself or herself to be free to cease providing labour services or leave the place or area where they provide labour or services.⁶⁶ This new test also reflects the proposed changes to the servitude offences as noted above.
53. Researcher Fiona David has noted that there are questions around whether or not a worker's testimony or subjective belief that their work is involuntary is sufficient for a finding of forced labour or if there should instead be an objective element.⁶⁷ The Law Council notes that the Bill has sought to introduce an objective element into the definition used for the proposed forced labour offences.
54. The Law Council has previously noted the importance of ensuring that criminal offences are drafted with sufficient certainty in relation to the elements to be proved. Whilst the objective test would appear to provide this certainty, the Law Council suggests that the Committee considers an alternative test based on the relevant United States (US) legislation.⁶⁸
55. The Law Council notes that the relevant US legislation uses a different formulation of an objective 'reasonable person' test in the definition of 'serious harm' for the purposes of their forced labour offence. The US legislation defines 'serious harm' as:

"...any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm."⁶⁹

56. To the extent that the US legislation provides some clarification regarding what constitutes a reasonable person, the Law Council submits that the Committee should consider recommending that proposed section 270.6(1) be amended so that it reads:

⁶⁵ Proposed section 271.1A, *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012*

⁶⁶ *Ibid.*, proposed section 270.6

⁶⁷ *Op. cit.*, F. David., *Labour Trafficking*, p.7

⁶⁸ United States Code, Title 18, Part 1, Chapter 77, section 1589(c)(2). Available from http://www.law.cornell.edu/uscode/uscode_sec_18_00001589----000-.html

⁶⁹ *Ibid.*

” For the purposes of this Division, **forced labour** is the condition of a person (the **victim**) who provides labour or services if, because of the use of coercion, threat or deception, a reasonable person of the same background and in the same circumstances as the victim would not consider himself or herself to be free:

(a) to cease providing the labour or services; or

(b) to leave the place or area where the victim provides the labour or services.”

57. Such an amendment may remove any ambiguity that may arise in relation to the characteristics of a ‘reasonable person in the position of the victim’. A similar argument can be made in relation to the inclusion of the ‘reasonable person’ test for the proposed ‘servitude’ definition.⁷⁰

Proposed forced labour offences in the Criminal Code

58. The Bill uses the proposed ‘forced labour’ definition in the new forced labour offences of ‘causing a person to enter into or remain in forced labour’;⁷¹ ‘conducting a business involving forced labour’;⁷² and ‘deceptive recruiting for labour or services’.⁷³

59. Under the Bill, a person commits an offence if:

a) “the person engages in conduct; and

b) the conduct causes another person to enter into or remain in forced labour.”⁷⁴

60. The penalty for this offence is imprisonment for 12 years in the case of an aggravated offence or imprisonment for 9 years in any other case.

61. A person will also commit an offence if:

a) “the person conducts any business; and

b) the business involves the forced labour of another person (or persons).”⁷⁵

62. The penalty for this offence is imprisonment for 12 years in the case of an aggravated offence or imprisonment for 9 years in any other case.

63. The Bill also proposes to include a new aggravated offence provision for slavery-like offences:⁷⁶ a slavery-like offence being defined as an offence against any of the servitude, forced labour, deceptive recruiting for labour or services; or forced marriage offences.⁷⁷

⁷⁰ Proposed section 270.4, *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012*

⁷¹ *Ibid.*, proposed section 270.6A(1)

⁷² *Ibid.*, proposed section 270.6A(2)

⁷³ *Ibid.*, proposed section 270.7

⁷⁴ *Ibid.*, proposed section 270.6A(1)

⁷⁵ *Ibid.*, proposed section 270.6A(2)

⁷⁶ *Ibid.*, proposed section 270.8

⁷⁷ *Ibid.*, proposed section 270.8(5)

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64. A person will commit this aggravated offence if they commit a slavery-like offence against another person and any of the following applies:
- *“the victim is under 18;*
 - *the offender, in committing the offence, subjects the victim to cruel, inhuman or degrading treatment;*
 - *the offender, in committing the offence, engages in conduct that gives rise to a danger of death or serious harm to the victim.”⁷⁸*
65. The Law Council submits that the introduction of the forced labour offences in the Bill is a positive step forward in ensuring Australia better complies with its international obligations. One of the Law Council’s Constituent Bodies, the LSSA has noted that the introduction of these offences will not only bring Australia into line with its obligations under the ILO Convention but also with obligations under the ICESCR and the ICCPR. These obligations are noted above.⁷⁹
66. The introduction of these offences also goes a long way to bridging the gap that currently exists between the Criminal Code offences of slavery (maximum penalty of 25 years imprisonment) and the debt bondage offence (12 months imprisonment or two years for aggravated offences⁸⁰) that have previously been relied on for forced labour prosecutions.
67. The introduction of these specific forced labour offences may play a role in overcoming the situation where extreme cases of exploitation have been inappropriately dealt with (for example, through civil rather than criminal channels), or not pursued at all in the past. The Law Council also hopes that the proposed forced labour offences might assist with increasing professional awareness of the issue, and also help to ensure Australia’s domestic consistency with international best practice. In other words, these new offences will help to ensure “that the laws criminalise the end ‘exploitative’ purpose of trafficking in people...along with the more complex process itself”.⁸¹

Proposed ‘deceptive recruiting’ offence

68. One of the other new offences proposed in the Bill is that of ‘deceptive recruiting for labour or services’, whereby:

“A person (the recruiter) commits an offence if:

- a) the recruiter engages in conduct; and*
- b) the recruiter engages in conduct with the intention of inducing another person (the victim) to enter into an engagement to provide labour or services; and*

⁷⁸ Ibid., proposed section 270.8(1)

⁷⁹ See discussion at p.7 of this submission.

⁸⁰ The Law Council notes that the penalty for the offence of debt bondage is increased to 4 years under proposed section 271.8, and proposed section 271.9 repeals the existing aggravated debt bondage offence and replaces this with a new aggravated debt bondage offence with a penalty of 7 years imprisonment.

⁸¹ Op.cit., F. David, *Labour Trafficking*, p.xii.

c) *the conduct causes the victim to be deceived about:*

- i. *the extent to which the victim will be free to leave the place or area where the victim provides the labour or services; or*
- ii. *the extent to which the victim will be free to cease providing the labour or services; or*
- iii. *the extent to which the victim will be free to leave his or her place of residence; or*
- iv. *if there is or will be a debt owed or claimed to be owed by the victim in connection with the engagement – the quantum, or the existence, of the debt owed or claimed to be owed; or*
- v. *the fact that the engagement will involve exploitation or the confiscation of the victim's travel or identity documents; or*
- vi. *If the engagement is to involve the provision of sexual services – that fact or the nature of the sexual services to be provided (for example, whether those services will require the victim to have unprotected sex).⁸²*

69. The Law Council supports the introduction of a lower level offence alongside the forced labour offence. As well as covering victims who belatedly find that they are to undertake work of a sexual nature, the introduction of this new offence also reflects the fact that individuals often consent to undertaking particular work, only to find that the conditions are considerably more exploitative than those to which they originally agreed. The Law Council supports the wording used in this proposed provision so that it deals with broader cases of labour exploitation in addition to sexual services.

Forced Marriage

70. The Bill proposes to include a definition of 'forced marriage'⁸³ and two offences related to forced marriage: causing another person to enter a forced marriage⁸⁴ and being a party to (but not the victim of) a forced marriage⁸⁵.

71. As noted by the Anti-People Trafficking Inter-Departmental Committee report,⁸⁶ a forced marriage is a marriage where one party does not give full and free consent and the marriage results from threats, deception, coercion and duress. Servile marriage has the additional component of exploitation, where the victim is treated as a chattel to be transferred into marriage or is directed to undertake involuntary labour for the benefit of the other party to the marriage.

⁸² Proposed section 270.7, *Crimes Legislation Amendment (Slavery, Slavery-Like Conditions and People Trafficking) Bill 2012*.

⁸³ *Ibid.*, proposed section 270.7A

⁸⁴ *Ibid.*, proposed section 270.7B(1)

⁸⁵ *Ibid.*, proposed section 270.7B(2)

⁸⁶ Anti-People Trafficking Interdepartmental Committee Third Report, *Trafficking in Persons: The Australian Government Response, 1 July 2010 – 30 June 2011*, 2011, p.7. Available from <http://www.ag.gov.au/Peoplettrafficking/Documents/Trafficking+in+Persons.pdf>

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72. The Bill responds to a range of community calls for the introduction of offences relating to forced and servile marriage but only addresses forced marriage.
 73. The definition of marriage in the Bill covers a range of relationships beyond formal marriage.⁸⁷
 74. One of the Law Council's Constituent Bodies, the Queensland Law Society (QLS) has suggested that the forced marriage offences are largely symbolic and may be difficult to enforce if victims marry or enter relationships overseas.
 75. The Law Council also anticipates that these offences may be difficult to enforce without extensive community education in relation to the rights of victims. In some cultures, for example, 'consent' may be assumed on behalf of the victim and the victim may be unaware of his or her legal rights.
 76. Nevertheless, these offences are a welcome first step towards the empowerment of victims and especially those in vulnerable communities in reasserting their fundamental rights to freedom and autonomy.

Harbouring victims of slavery, trafficking and related offences

77. The UN Trafficking Protocol definition of trafficking in persons refers to "recruitment, transportation, transfer, harbouring or receipt of persons".⁸⁸
78. The current international trafficking offences in the Criminal Code focus on a person who uses force to organise or facilitate:
 - the entry, proposed entry, or the receipt of another person into Australia; or
 - the exit or proposed exit of another person from Australia.⁸⁹
79. The current trafficking offences in the Criminal Code focus on the movement of a person, rather than a situation where one perpetrator has moved the victim and another then houses or 'employs' him or her under exploitative circumstances.
80. To remedy this, the draft legislation proposes to introduce an offence of harbouring a victim of slavery, trafficking and related offences.
81. Under the proposed provision, a person (the first person) commits an offence if:
 - "a) the first person harbours, receives or conceals another person (the victim); and*
 - b) the harbouring, receipt or concealing of the victim:*
 - i) assists a third person in connection with any offence committed by the third person (the third person offence); or*

⁸⁷ Proposed section 270.7A (2), *Crimes Legislation Amendment (Slavery, Slavery-Like Conditions and People Trafficking) Bill 2012*.

⁸⁸ Op.cit., Art. 3(a), *Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against Transnational Organized Crime*

⁸⁹ Section 271.2, *Criminal Code 1995*

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- ii) *furtheres a third person's purpose in relation to any offence committed by the third person (the third person offence); and*
- c) *the third person offence is an offence against this Division (apart from this section) or Division 270.*"

82. While the Law Council notes that Division 11.2 in conjunction with the offences under Divisions 270 and 271 of the Criminal Code would appear to capture this type of harbouring offence already, it appears that stand alone provisions in relation to a harbouring and receiving offence are desired to criminalise the behaviour of third parties who knowingly or recklessly harbour, receive or conceal a victim.⁹⁰
83. Division 11.2(1) of the Criminal Code states that a person who "aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly."⁹¹
84. The Law Council welcomes the use of the word 'receives' in the proposed harbouring offence as it is consistent with the language used in the UN Trafficking Protocol definition of 'trafficking in persons' which refers to "recruitment, transportation, transfer, harbouring or receipt of persons".⁹² The Law Council notes that the word 'receives' appears to have been inserted in response to submissions on the Exposure Draft.
85. One of the Law Council's Constituent Bodies, the QLS, has suggested that consideration should be given as to how the harbouring offence will work in practice. As discussed above in relation to the servitude offences, the Law Council suggests that a non-exhaustive list of examples of situations intended to be covered by the harbouring offence should be included in the Bill or its Explanatory Memorandum.

Other relevant legislation

86. The Law Council notes that there are also offences under the Migration Act where an employer, labour hire company, employment agency or other person knowingly or recklessly allows an unlawful non-citizen or a non citizen without work rights to work, or refers them for work.⁹³ Circumstances of aggravation for such offences include the prospective worker being exploited, which is currently defined as being in a condition of forced labour, sexual servitude or slavery. The Bill amends the definition of 'exploited' in the Migration Act to make it consistent with the definition in the Criminal Code.
87. In 2010, the then Minister for Immigration and Citizenship acknowledged that while there had been some success in detaining illegal workers, there had been little progress under the relevant provisions of the Migration Act in penalising employers and labour hire intermediaries who used them.⁹⁴ This being the case, the Australian Government commenced a review in May 2010 of the penalties facing Australian

⁹⁰ This issue was raised in a number of the submissions on *The Criminal Justice Response to Slavery and People Trafficking, Reparations and Vulnerable Witness Protections* available at <http://www.ag.gov.au/PeopleTrafficking>.

⁹¹ Section 11.2, *Criminal Code 1995*

⁹² Op.cit., Art. 3(a), *Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against Transnational Organized Crime*.

⁹³ Sections 245AA to 245AK, *Migration Act 1958*

⁹⁴ Former Minister for Immigration and Citizenship, Senator Chris Evans. "Illegal hire firms must face prosecution", Australian Government media release, 21 May 2010, available from <http://www.minister.immi.gov.au/media/media-releases/2010/ce10041.htm>

employers who use or refer illegal workers as prescribed under the Migration Act.⁹⁵ This review was conducted by independent legal expert Mr Stephen Howells and was completed in July 2011.⁹⁶

88. As part of the Government's response to Mr Howells' report, on 12 December 2011, the Minister for Immigration and Citizenship, the Hon. Chris Bowen MP, announced the Government's intention to legislate for new "civil penalties of up to \$50 000 and fines of up to \$10 000 for corporate bodies, and civil penalties and fines of up to \$10 000 and \$2000 respectively for individuals for the employing or referring of illegal workers."⁹⁷
89. In relation to the number of prosecutions that have been contested under sections 245AA to 245AK of the Migration Act to date, the most recent report of the Anti-People Trafficking Interdepartmental Committee suggests that one case was successfully prosecuted between July 2010 and June 2011 for "knowingly or recklessly allowing a person to work in breach of their visa conditions".⁹⁸
90. Despite the minimal use of these provisions, it does not appear that sections 245AA – 245AK will be repealed by the Government. The Law Council understands that the Government will shortly be releasing exposure draft legislation of amendments to the employer sanction provisions of the Migration Act in light of Mr Howells' recommendations.
91. The Law Council also notes the strong arguments that have been made in relation to the fact that the bulk of the current problem in Australia falls within areas of lesser labour exploitation.⁹⁹ The Law Council reiterates the points it has previously raised in relation to this issue insofar as these lesser labour exploitation offences may be more appropriately handled through Federal, State and Territory workplace legislation, the Migration Act, anti-discrimination and Occupational Health and Safety (OHS) legislation. Civil remedies (for example in tort) may also be available to individuals.
92. The Law Council considers that these lesser forms of exploitation, especially as they are experienced by vulnerable groups of migrant workers, warrant careful attention. This is largely due to the fact that:
- "...the areas of life and work where this unlawful conduct occurs are potential breeding grounds for more serious forms of exploitation. As such a focus on unlawful conduct against migrant workers in these sectors can be considered a legitimate response to concerns about more serious forms of exploitation, including labour trafficking".*¹⁰⁰
93. In recent years, the Australian Government has introduced key workplace relations and migration reforms such as the Fair Work Act¹⁰¹ and subclass 457 visa

⁹⁵ Ibid.

⁹⁶ S. Howells, *Report of the 2010 Review of the Migration Amendment (Employer Sanctions) Act 2007*, 2 March 2011. Available from http://www.immi.gov.au/media/publications/compliance/review-employer-sanctions/pdf/howells_report.pdf

⁹⁷ Minister for Immigration and Citizenship, the Hon. Chris Bowen MP, "New laws to get tough on hiring illegal workers", Australian Government media release, 12 December 2011. Available from <http://www.minister.immi.gov.au/media/cb/2011/cb181163.htm>

⁹⁸ Op.cit., Third Report of the Anti-People Trafficking Interdepartmental Committee, 2011, p.14.

⁹⁹ Op. cit., F. David, *Labour Trafficking*, p.x

¹⁰⁰ Ibid., p.xii

¹⁰¹ The *Fair Work Act 2009* (Cth) contains 10 National Employment standards that apply to all Federal employees. These standards guarantee the rights of all employees to certain employment conditions including

changes¹⁰² to improve protections for vulnerable workers, including migrant workers. However, as the Law Council mentioned in its submission to the 2011 Consultation there is a real question as to whether the most vulnerable groups of migrant workers are actually being informed of their rights, and indeed accessing these rights in practice.¹⁰³

94. There is a need to ensure cohesion in the overall response to the broad spectrum of behaviour which constitutes labour exploitation, particularly as it is experienced by vulnerable workers. To this end, the Law Council repeats its calls for an across the board review of the available mechanisms and resources to combat this problem and to:
- assess whether any gaps in coverage remain (or alternatively, avoid duplication of effort);
 - ensure that individuals do not fall through the gaps for practical reasons, for example, through lack of identification or wrongful referral; and
 - ensure that individuals are informed and able to access their rights.
95. One of the Law Council's Constituent Bodies, the LSWA, has noted that it understands that the Australian Federal Police (AFP) refer matters involving exploitative labour behaviour to the Fair Work Ombudsman where the nature of the behaviour does not fall within the scope of the slavery, trafficking or related offences. The Fair Work Ombudsman has the power to investigate issues relating to underpayment or non-payment of wages and entitlements and unlawful workplace discrimination.¹⁰⁴ The Law Council suggests that there needs to be consistency between the application of the proposed servitude and forced labour provisions and the current minimum employment standards in the Fair Work Act, as well as formalised information sharing arrangements between the Fair Work Ombudsman and AFP in relation to the investigation and prosecution of exploitative labour offences.
96. The Law Council reiterates its call for dedicated resources to be allocated to legal aid services which provide this type of advice to vulnerable groups at risk. The provision of such advice, combined with other key service supports may greatly assist in overcoming the current under-reporting of crime and broader exploitative misconduct which affects vulnerable workers.
97. The Law Council notes that the rights and protection of migrant workers in Australia were of significant concern to the Universal Periodic Review Working Group of the UN Human Rights Council, as evinced by the recommendations put to the Australian Government in March 2011.¹⁰⁵

leave, public holidays, termination notice and maximum weekly hours of work. In addition, the general protections scheme in Parts 3-1 of the Act enhances the range of options available to exploited workers and job applicants.

¹⁰² The *Migration Legislation Amendment (Worker Protection) Act 2008* introduced a greater level of protection for migrant workers who hold subclass 457 visas.

¹⁰³ Op. cit., F. David, *Labour Trafficking*, p.35.

¹⁰⁴ See <http://www.fairwork.gov.au/about-us/our-role/pages/default.aspx>

¹⁰⁵ See recommendations 86.83 – 86.87 in particular. United Nations General Assembly, Human Rights Council, Seventeenth Session, *Report of the Working Group on the Universal Periodic Review: Australia*, A/HRC/17/10, 24 March 2011, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/122/90/PDF/G1112290.pdf?OpenElement>

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98. The Australian Government provided its response to these recommendations in June 2011. In its response, the Australian Government reiterated its commitment to increasing efforts to prosecute trafficking offenders, including employers and labour recruiters who subject migrant workers to slavery-like conditions.¹⁰⁶
99. The Law Council submits that one of the ways that the Government could be seen to be meeting this commitment is by ensuring that legal aid services are adequately resourced to inform migrant workers of their rights so that these vulnerable people are more willing, and indeed more aware of the need to speak out against the people who have taken advantage of them.

Remedies and assistance for victims

100. As the Law Council noted in its submission on the exposure draft of the Bill,¹⁰⁷ the UN Trafficking Protocol¹⁰⁸ outlines the obligations of States Parties to “ensure that their domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.”¹⁰⁹
101. Australia also has obligations to provide effective remedies for victims of crime under the International Covenant on Civil and Political Rights (ICCPR)¹¹⁰ and the Universal Declaration of Human Rights.¹¹¹ Indeed, under Article 2(3) of the ICCPR, Australia has an obligation to ensure that:
- any person whose rights or freedoms are violated has an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;¹¹²
 - has his right determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;¹¹³
 - the authorities shall enforce such remedies when granted.¹¹⁴
102. Additionally, there have been calls for principles to be articulated at the federal level on how to protect the rights of victims of crimes which are at a minimum consistent with the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.¹¹⁵

¹⁰⁶ United Nations General Assembly, Human Rights Council, Seventeenth Session, *Report of the Working Group on the Universal Periodic Review: Australia - Addendum, Views on conclusions and/or recommendations, voluntary commitments and replies presented by State under review*, A/HRC/17/10/Add.1, 31 May 2011, available at

http://lib.ohchr.org/HRBodies/UPR/Documents/Session10/AU/A_HRC_17_10_Add.1_Australia_E.pdf

¹⁰⁷ Op.cit., Law Council of Australia, Submission on *Exposure Draft – Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012*, 20 January 2012.

¹⁰⁸ Op.cit., *Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against Transnational Organized Crime*.

¹⁰⁹ Ibid., Art 6.6.

¹¹⁰ Op.cit., Art.2(3) *International Covenant on Civil and Political Rights* for example.

¹¹¹ See Art.8, *Universal Declaration of Human Rights*, adopted by UN General Assembly Resolution 217 A(III) of 10 December 1948. Available from <http://www.unhcr.org/refworld/docid/3ae6b3712c.html>

¹¹² Op.cit., Art 2(3)(a), *International Covenant on Civil and Political Rights*

¹¹³ Ibid., Art 2(3)(b)

¹¹⁴ Ibid., Art 2(3)(c)

¹¹⁵ This Declaration emphasises that offenders should, where appropriate, make fair restitution to victims, their families and dependants. It also provides that judicial and administrative procedures should enable victims of crime to obtain redress through procedures that are fair, inexpensive and accessible.

103. One of the ways in which Australia has sought to meet its obligations under these international instruments is by providing courts with the discretion to make reparation orders for victims of crime.

Reparation Orders

104. The Law Council notes that the *Crimes Act 1914* (the Crimes Act) provides judicial officers with the power to order convicted federal offenders to make reparation to their victims at the time of sentencing. Such orders can be made in addition to the penalty that is ultimately handed down to the offender,¹¹⁶ and can take a variety of forms, including making reparation to:

- the Commonwealth or to a public authority of the Commonwealth, by way of monetary payment or otherwise, in respect of any loss suffered, or any expense incurred, by the Commonwealth or the authority as a result of the offence;¹¹⁷ or
- any person, by way of money payment or otherwise, “in respect of any loss suffered by the person as a direct result of the offence”.¹¹⁸

105. Section 21B(1)(d) of the Crimes Act limits the reparation that a victim can receive by restricting the reparation to loss suffered by the victim as a *direct result* of the offence. This differs to the operation of section 21B(1)(c) which provides that the Commonwealth (or a public authority of the Commonwealth) is eligible to receive reparation for any loss suffered or any expense incurred as a *result* of the offence.

106. The Law Council notes that Item 2 in Schedule 2 of the Bill addresses this difference by amending section 21B(1)(d) so that the loss suffered by a person no longer has to be as a *direct result* of the crime. Instead, the Bill proposes that a person may receive reparation for any loss suffered, or any expense they incur, *by reason of* the offence.¹¹⁹

107. The Law Council supports this amendment, but reiterates the concerns it raised with respect to this section in its submission on the exposure draft of the Bill: specifically, whether the proposed amendment goes far enough to ensure that non-economic loss such as pain and suffering is covered by the section.¹²⁰ It is unclear from the Bill’s explanatory memorandum whether this is in fact the case. The explanatory memorandum merely states that:

“The amendment allows an individual victim to be awarded reparations for any loss suffered or any expense incurred by reason of the offence. This ensures that reparation could be made in respect of individual victims of any federal offence for loss suffered by reason of the criminal conduct, even if the loss was not a direct result of the conduct.”¹²¹

¹¹⁶ See section 21B, *Crimes Act 1914*.

¹¹⁷ *Ibid.*, section 21B(1)(c)

¹¹⁸ *Ibid.*, section 21B(1)(d)

¹¹⁹ Item 2, Schedule 2, *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012*.

¹²⁰ *Op. cit.*, Law Council of Australia, Submission on the *Exposure Draft - Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012*, p.27.

¹²¹ *Op. cit.*, Explanatory memorandum to *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012*, p.64.

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108. Whilst it is possible that the phrase ‘any loss suffered’ is intended to include pain and suffering, the Law Council is of the view that the Bill and/ or its explanatory memorandum, should specifically state whether this is the case. The UN Special Rapporteur on Trafficking in Persons, especially Women and Children (the Special Rapporteur) made a similar recommendation in her final report on her recent mission to Australia, stating that section 21B(1)(d) should “explicitly state that it includes non-economic loss such as pain and suffering, which are very significant for trafficking victims.”¹²²
109. Given that slavery, trafficking and related offences are likely to result in non-economic loss, the Law Council submits that reparation should cover non-economic loss such as pain and suffering. A similar view was expressed by the Australian Law Reform Commission (ALRC) in its report on the sentencing of federal offenders.¹²³ In fact, the ALRC specifically recommended that federal sentencing legislation be amended to:
- “...clarify that judicial officers are authorised to order federal offenders to make reparation for any loss suffered by reason of an offence, whether the loss is economic or non-economic.”*¹²⁴
110. The Law Council suggests that the Committee recommend that the Bill, and/or its explanatory memorandum, be amended to clarify whether the phrase ‘any loss suffered’ in Item 2 of Schedule 2 of the Bill includes non-economic loss such as pain and suffering.
111. Notwithstanding the recommendation above, there are some additional difficulties with the provision of reparation to victims of people trafficking that the Law Council would like to draw to the Committee’s attention. Central to these is the fact that very few cases of people trafficking ever end up being prosecuted. It follows that very few cases reach the point in the judicial process where the Court could make a reparation order. According to the Australian Institute of Criminology, as at 30 June 2011, of 305 trafficking related investigations by the AFP, only 13 matters resulted in convictions; four defendants were currently facing charges before the courts; and 15 matters were finalised without resulting in a conviction.¹²⁵
112. Even if there is a successful prosecution in a people trafficking case, an order for reparation is discretionary and will depend on the Court’s consideration of the impact such an order will have on the offender, including their capacity to meet such an order. Furthermore, a reparation order will be of little benefit to a victim if the offender has no assets or has placed assets beyond reach.
113. The Law Council is unaware of any case for a pecuniary penalty order being sought under the provisions of the Fair Work Act¹²⁶ on behalf of a victim of forced labour.

¹²² See *Report of the Special Rapporteur on trafficking in persons, especially women and children, Mission to Australia*, 18 May 2012, A/HRC/20/18/Add.1, p.15. Available from http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A.HRC.20.18.Add.1_En.PDF

¹²³ Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103, 13 September 2006. Available from <http://www.alrc.gov.au/report-103>.

¹²⁴ *Ibid.*, Recommendation 8-2.

¹²⁵ J. Joudo Larsen and L. Renshaw, *People Trafficking in Australia*, Trends and Issues in Crime and Criminal Justice, No. 441, June 2012, p.2. Available from <http://www.aic.gov.au/en/publications/current%20series/tandi/441-460/tandi441.aspx>.

¹²⁶ Section 546(3)(c), *Fair Work Act*

Victims' compensation and financial assistance schemes

114. In an effort to overcome the difficulties with reparation orders as remedies, alternative financial assistance and compensation arrangements such as State and Territory schemes are often a more appropriate avenue of redress for people trafficking victims. However, these schemes are also not without their difficulties, as discussed below. In these types of situations, it is crucial that victims of people trafficking and similar offences have access to appropriate legal advice so that they can be made aware of their options in relation to alternative means of redress.
115. In its submission on the exposure draft of the Bill, the Law Council expressed concern at the lack of a Commonwealth victims' compensation scheme for victims of Commonwealth crimes such as people trafficking.¹²⁷ The Law Council noted the importance of victims of people trafficking having access to financial assistance to support their rehabilitation and noted the particular benefits of a statutory victims' compensation scheme for victims of people trafficking offences.¹²⁸ The Law Council is disappointed that these concerns have not been addressed by the Government in the final version of the Bill or in any related Bill.
116. The Law Council is not alone in its calls for a Commonwealth victims' compensation scheme. The need for victims to be able to access compensation was also highlighted by the Special Rapporteur on her recent fact-finding mission to Australia.¹²⁹ Indeed, in her final report on her mission to Australia, the Special Rapporteur noted the lack of a comprehensive national framework for victims' compensation in Australia and ultimately recommended that the Government establish a Commonwealth compensation scheme for victims of people trafficking.¹³⁰
117. The Australian Human Rights Commission (AHRC) is also of the view that the Australian Government should establish a Commonwealth victims' compensation scheme.¹³¹
118. The Law Council acknowledges the tight fiscal environment in which the Government is currently operating, but submits that the establishment of a Commonwealth victims' compensation scheme warrants further consideration.
119. State and Territory compensation schemes vary considerably. This gives rise to situations where victims of the same Commonwealth crime in different States and Territories are subject to different rules and caps on the amount of compensation that they are entitled to receive. For example, in New South Wales (NSW), the Australian Capital Territory (ACT) and South Australia, the maximum amount of compensation available to a primary victim of crime is \$50,000.¹³² In Victoria, primary victims of crime can receive up to \$60,000, plus \$10,000 in special

¹²⁷Op.cit., Law Council of Australia, Submission on *Exposure Draft – Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012*, pp.29-30.

¹²⁸Op.cit., Law Council Submission, *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012*

¹²⁹UN Special Rapporteur in Trafficking in Persons, especially Women and Children, End of Mission Statement, 30 November 2011, available from

<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11664&LangID=E>

¹³⁰Op.cit., *Report of the Special Rapporteur on trafficking in persons, especially women and children*, p.21.

¹³¹Australian Human Rights Commission, *A Human Rights Approach to Trafficking in Persons*, 14 November 2011. Available from http://www.humanrights.gov.au/legal/submissions/2011/20111114_trafficking.html.

¹³²S. 14, *Victims of Crime (Financial Assistance Act 1983)* (ACT); s.19, *Victims Support and Rehabilitation Act 1996* (NSW); s.20, *Victims of Crime Act 2001* (SA).

assistance.¹³³ Primary victims of crime in Western Australia and Queensland can receive up to \$75,000 in compensation.¹³⁴ In contrast to this, the maximum amount of compensation available to primary victims in Tasmania and the Northern Territory is only \$30,000¹³⁵ and \$40,000¹³⁶ respectively. Payments for non-pecuniary loss under the various schemes also vary, resulting in higher payments being made in some jurisdictions compared to others.

120. The range of victims eligible for compensation and the timeframes for victims to make a compensation claim also differ between jurisdictions.¹³⁷ For instance, Western Australia, South Australia and the ACT do not provide compensation to secondary victims of crime.¹³⁸ However, victims' compensation legislation in the remaining states and territories does provide for the provision of compensation to secondary victims.¹³⁹
121. In terms of timeframes to lodge a compensation claim, NSW and Victorian victims of crime legislation provides that victims must generally lodge a claim for compensation within 2 years of the date of the crime.¹⁴⁰ In South Australia and Western Australia, victims generally have 3 years in which to lodge a claim.¹⁴¹ Applications may be lodged out of time in limited circumstances.¹⁴²
122. In addition to the differences in the compensation schemes outlined above, there are also additional eligibility requirements that victims must meet before they can make a claim for victims' compensation. Depending on the jurisdiction, a victim may be required to demonstrate that their conduct did not contribute to the crime¹⁴³ or report the crime to police before being considered eligible to access victims' compensation. In the ACT, victims are unable to claim compensation if they fail to report the crime to the police.¹⁴⁴ However, in other States and Territories such as NSW, Queensland and Victoria, compensation can be awarded if the victim can demonstrate that there were actually special circumstances that prevented them from reporting the crime.¹⁴⁵
123. Making it a requirement for victims of crime to report the offence to police before their claim for compensation is considered, can be problematic for victims of people trafficking or slavery-related crimes. Coercion and fear are often used by offenders in order to exploit their victims. As noted in the UNODOC's Anti Human Trafficking Manual, such coercion and control,

¹³³ ss.8 and 8A, *Victims of Crime Assistance Act 1996* (Vic).

¹³⁴ s.31, *Criminal Injuries Compensation Act 2003* (WA); s.38, *Victims of Crime Assistance Act 2009* (QLD).

¹³⁵ Reg.4, *Victims of Crime Assistance Regulations 2010* (Tas)

¹³⁶ Schedule 3, *Victims of Crime Assistance Regulations* (NT)

¹³⁷ For example, in NSW, victims must bring a claim within 2 years of the date of the crime. In South Australia, victims must bring a claim within 3 years from the date of the crime.

¹³⁸ Secondary victims of crime can include witnesses, and parents or guardians of children under the age of eighteen years who are subject to a violent act.

¹³⁹ s.11, *Victims of Crime Assistance Act 2006* (NT); s.8, *Victims Support and Rehabilitation Act 1996* (NSW); s.26, *Victims of Crime Assistance Act 2009* (Qld); s.9, *Victims of Crime Assistance Act 1996* (Vic); s.2(1), *Victims of Crime Assistance Act 1976* (Tas).

¹⁴⁰ s.29, *Victims of Crime Assistance Act 1996* (Vic); s.26, *Victims Support and Rehabilitation Act 1996* (NSW)

¹⁴¹ s.18(2)(a), *Victims of Crime Act 2001* (SA); s.9, *Criminal Injuries Compensation Act 2003* (WA).

¹⁴² For example, see s. 26, *Victims Support and Rehabilitation Act 1996* (NSW).

¹⁴³ See for example s.80, *Victims of Crime Assistance Act 2009* (Qld); s.30(1)(a), *Victims Support and Rehabilitation Act 1996*(NSW); s.52, *Victims of Crime Assistance Act 1996* (Vic)

¹⁴⁴ s.12(1)(c), *Victims of Crime (Financial Assistance) Act 1983* (ACT)

¹⁴⁵ s.43, *Victims of Crime Assistance Act 2006* (NT); ss.81 and 82, *Victims of Crime Assistance Act 2009* (Qld); s.30(1)(b), *Victims Support and Rehabilitation Act 1996* (NSW); s.38, *Criminal Injuries Compensation Act 2003* (WA); s.20(7), *Victims of Crime Act 2001* (SA); s.52(a), *Victims of Crime Assistance Act 1996* (Vic).

“...may be subtle, involving direct or implied threats or making the victim feel responsible for their own behaviour. Sexual exploitation victims may be given a small amount of money for what they do; others may be involved in petty crime such as stealing from shops, street begging or working in illegal industries, for example drug trafficking. This can lead to feelings of guilt and revulsion, which makes it even more difficult to tell anyone what has happened.”¹⁴⁶

124. Victims also report threats to family members in other countries and the primary need to establish secure living arrangements as reasons for delay in bringing applications for compensation. Victims may be apprehensive about approaching the police or acting in any other way which may upset the offender or jeopardise the safety of themselves or others.
125. Compensation schemes at the State and Territory level are further complicated by different definitions of certain terms depending on the jurisdiction where the compensation claim is being made.¹⁴⁷ For instance, in Victoria, Queensland and the Northern Territory, ‘mental injury’ is defined as a “mental illness or disorder,”¹⁴⁸ or a “recognisable psychological or psychiatric disorder.”¹⁴⁹ This differs from victims’ compensation legislation in other States and Territories which instead refer to mental injury as “mental or nervous shock”,¹⁵⁰ or “psychological or psychiatric harm.”¹⁵¹
126. It has been noted by some commentators that the use of more ‘restrictive’ definitions (such as that used in the Northern Territory for ‘mental injury’), could make victims ineligible for compensation if they are unable to demonstrate that they have a recognisable psychiatric disorder, or do not want to undergo a formal psychiatric assessment.¹⁵² This issue was also discussed by the Special Rapporteur in her report on her recent mission to Australia, where she noted the reluctance of many victims of people trafficking “to undergo psychological assessments given their fear of re-traumatization.”¹⁵³ The Law Council notes that regulations under the Migration Act allow victims of family violence to establish its occurrence and effects by means other than psychological assessment.¹⁵⁴
127. The Law Council’s advocacy in support of a Commonwealth victims’ compensation scheme is not confined to its work in relation to people trafficking. For instance, the Law Council has also emphasised the need for a Commonwealth victims’ compensation scheme in its recent advocacy¹⁵⁵ on the *Social Security Amendment*

¹⁴⁶ United Nations Office on Drugs and Crime, *Anti-human trafficking manual for criminal justice practitioners*, Module 3, 2009, p.4. Available from http://www.unodc.org/documents/human-trafficking/TIP_module3_Ebook.pdf.

¹⁴⁷ Isobelle Meyering, *Victim Compensation and Domestic Violence: A National Overview*, Stakeholder Paper 8, January 2010, p.5. Available from http://www.adfvc.unsw.edu.au/PDF%20files/Stakeholder%20Paper_8.pdf

¹⁴⁸ s.27(1)(b), *Victims of Crime Assistance Act 2009* (Qld); s. 3(1), *Victims of Crime Assistance Act 1996* (Vic)

¹⁴⁹ s.6(b), *Victims of Crime Assistance Act 2006* (NT)

¹⁵⁰ Dictionary in *Victims of Crime (Financial Assistance) Act 1983* (ACT) ; s.4, *Victims of Crime Act 2001* (SA); s.3, *Criminal Injuries Compensation Act 2003* (WA).

¹⁵¹ *Victims Support and Rehabilitation Act 1996* (NSW)

¹⁵² Op.cit., Isobelle Meyering, *Victim Compensation and Domestic Violence: A National Overview*, p.5.

¹⁵³ Op.cit., *Report of the Special Rapporteur on trafficking in persons, especially women and children*, p.16.

¹⁵⁴ See <http://www.immi.gov.au/media/fact-sheets/38domestic.htm>

¹⁵⁵ Law Council of Australia Submission to Senate Legal and Constitutional Affairs Committee, *Supporting Victims of Terrorism Overseas Bills*, 13 April 2012. Available from http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=legcon_ctte/overseas_terrorism/submissions.htm. See also Senate Legal and Constitutional Affairs Committee, Transcript of Hearing on *Social Security Amendment (Supporting Australian Victims of Terrorism Overseas) Bill 2012*, 3 May 2012. Available from

(*Supporting Australian Victims of Terrorism Overseas*) Bill 2012 (the Victims of Terrorism Bill).

128. In its submission on the Victims of Terrorism Bill and its appearance before this Committee's hearing into that Bill, the Law Council noted that the federal financial assistance scheme proposed in the Victims of Terrorism Bill narrowly focused on overseas terrorist acts and was unlikely to fill the gaps in existing compensation schemes for victims of other federal offences such as people-trafficking or child sex tourism.¹⁵⁶ The Law Council expressed concern about the fact that victims of people trafficking receive only service-based support¹⁵⁷ if they cannot access State or Territory compensation schemes or another remedy, yet under the proposed Victims of Terrorism Bill, victims of overseas terrorism would be entitled to up to \$75,000 in financial assistance.
129. This lack of parity in the amount and type of compensation that victims of federal offences are able to access is of concern to the Law Council. The Law Council is of the view that a more consistent approach to compensating victims of Commonwealth offences occurring either within or outside of Australia is warranted and, in this regard, submits that the Committee should recommend that a single Commonwealth victims' compensation scheme be considered by the Government.
130. Alternatively, the Law Council submits that the Committee should recommend that the Government should review how effectively and consistently existing State and Territory compensation schemes operate in relation to victims of Commonwealth crimes.
131. The Law Council is aware that, pursuant to a November 2009 agreement by the then Standing Committee of Attorneys-General, work began to develop a national approach to victims' rights, including harmonising the existing State and Territory victims of crime schemes.¹⁵⁸ However, there appears to be no timetable to conclude this work.

Victims' access to legal advice and immunity from prosecution

132. As noted by the Law Council in its submission on the exposure draft of the Bill, the most appropriate remedy for a particular victim will depend on the facts of their case.¹⁵⁹ In this regard, it is important that the victim has access to legal advice so that they are provided with the opportunity to make an informed decision about what they should do next and/or what remedies are available to them.
133. Australia's obligation to make legal advice available to people trafficking victims is enshrined in a number of international instruments. Indeed, article 6.3(b) of the Trafficking Protocol specifically provides that:

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=legcon_ctte/overseas_terrorism/hearings/index.htm.

¹⁵⁶Ibid.

¹⁵⁷The Law Council notes that there are support programs in place for victims of people trafficking which provide assistance to meet the basic needs of people trafficking victims and to assist in their reintegration into the community. See for example the Support for Victims of People Trafficking Program administered by the Red Cross and funded by the Commonwealth Government, for further details see <http://www.ag.gov.au/Peopletrafficking/Pages/default.aspx>

¹⁵⁸See http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/pages/scag_achievements#Victims%20of%20Crime

¹⁵⁹Op.cit., Law Council of Australia, Submission on *Exposure Draft – Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012*, p.30.

“Each State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons, including, in appropriate cases, in cooperation with non-governmental organizations, other relevant organizations and other elements of civil society, and, in particular, the provision of:

(b) Counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand.”¹⁶⁰

134. The need for people trafficking victims to be provided with legal and other material assistance to facilitate their right to adequate and appropriate remedies is also reiterated in the UN Principles and Guidelines on Human Rights and Human Trafficking (the Guidelines). These Guidelines note that although victims of people trafficking have an international legal right to adequate and appropriate remedies,

“...this right is often not effectively available to trafficked persons as they frequently lack information on the possibilities and processes for obtaining remedies, including compensation, for trafficking and related exploitation. In order to overcome this problem, legal and other material assistance should be provided to trafficked persons to enable them to realize their right to adequate and appropriate remedies.”¹⁶¹

135. To effectively meet its international obligations in relation to the provision of legal assistance to victims of people trafficking and slavery-related crimes, it is critical that the Government provides community legal centres and organisations that undertake legal education services with sufficient resources to effectively engage with the communities at greatest risk of falling victim to these types of crimes.

136. The Law Council submits that the Committee should recommend that legal aid funding be increased to ensure that legal assistance and education can be effectively provided to groups who are vulnerable to people trafficking and slavery-related offences.

137. One of the Law Council’s Constituent Bodies, the LSSA has also observed that the AHRC has recommended that the Bill should be amended to reflect an optional provision in the *UNODC Model Law Against Trafficking in Persons* to ensure that trafficking victims are not charged, arrested, detained or prosecuted for offences committed by them to the extent that such involvement is a direct consequence of them having been a trafficking victim.¹⁶² The Law Council submits that the Committee should consider making a similar recommendation.

Victims’ immigration status

138. The Law Council is also disappointed that the Government has not addressed issues relating to victims’ immigration status in the Bill or any related policy or legislative initiatives. As noted in the Law Council’s submission to the 2011 Consultation, while reforms were implemented in 2009 in this area, a number of

¹⁶⁰http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf

¹⁶¹ See Guideline 9, *UN Recommended Principles and Guidelines on Human Rights and Human Trafficking*, Report of the UN High Commissioner for Human Rights to the Economic and Social Council, 20 May 2002. Available from <http://www.ohchr.org/Documents/Publications/Traffickingen.pdf>.

¹⁶² See http://www.hreoc.gov.au/legal/submissions/2012/20120120_trafficking.html#Heading75

members of the Law Council's Constituent Bodies have identified visa access as an ongoing concern for victims of people trafficking.

139. In particular, these members note the limited eligibility for visas for victims of trafficking under the People Trafficking Visa Framework (the Framework). While reforms in 2009 relaxed the previous regime for victims of trafficking, and gave greater accessibility to visas for trafficking victims, victims are generally still obliged under the Framework to contribute to a police investigation against the persons who trafficked them, in order to become eligible for visas. As observed by one of the Law Council's Constituent Bodies, the New South Wales Bar Association (NSW Bar), this not only makes a victim's ability to stay in Australia and access services dependant on the discretion of police and prosecutors, but also on arbitrary factors such as whether their traffickers are still in Australia. A human rights based approach would provide victims with a right to stay in Australia based on their need to access services. It would also enable them to stay as long as they need those services or if they are at risk of harm if deported.
140. Members are concerned that the Framework is an insufficient response to the problem of people trafficking because its limited visa options are too closely tied to the criminal justice system and the discretionary assessment of the value of the contribution of the victim's information and testimony to the criminal justice process. Their view is that it is inflexible and overly dependent on criminal justice investigations and prosecutions, as well as the support and discretion of Commonwealth officers for victims to access a visa.
141. Members are also concerned that the requirement that victims must contribute to an investigation may discourage victims from seeking a visa, as they may fear reprisals against themselves or against their families. They also note that even if a victim does give evidence, it must be demonstrated that he or she would be in danger upon returning home in order to be eligible for a Witness Protection (Trafficking) (Permanent) Visa. This may be difficult to establish, and may not take into account the possibility that the victim will be ultimately re-trafficked due to socio-economic factors.
142. More broadly, section 48A of the Migration Act has been raised by Law Council members as operating against victims of people trafficking. This section imposes a bar on reapplying for a protection visa if a previous application has already been refused. According to members, a typical example may involve a victim arriving in Australia on a tourist visa, and being required by her contact to sign a pre-completed protection visa application, without full information of its contents. The visa application is then refused. In members' experience, this leaves the victim with limited options further down the track after the circumstances of her exploitation have become clear.¹⁶³ In summary, members are concerned that the Framework contains undue emphasis on whether traffickers are investigated or prosecuted in order for victims to become eligible for visas – that is, the fate of the trafficking victims depends on the fate of their traffickers. Rather, they advocate greater consideration being given to what the victims have experienced in Australia, as part of a human rights-based approach to people trafficking.
143. One of the Law Council's Constituent Bodies, the NSW Bar has also raised a number of issues in relation to victims' immigration status. The NSW Bar has noted

¹⁶³ Feedback to the Law Council is that while the Minister may exercise his or her powers of discretion under section 48B so that section 48A does not apply, this is by no means certain. Moreover, in members' experience the victim often does not want to apply for a protection visa, and instead seeks another visa, such as a spouse visa. There is no discretion to waive the section 48A bar in these circumstances.

that it is apparent that the Bridging Visa F is central to the Framework as such a class of visa is granted to suspected trafficking victims identified by the AFP for a period of up to 45 days, to provide an “initial reflection period”. Thereafter, if a trafficking victim is willing and able to contribute to an investigation or prosecution, they will be granted a Criminal Justice Stay Visa. Other victims may be granted a second Bridging Visa F, but the Special Rapporteur has reported that in practice this only occurs if the victim can evidence “extreme trauma”. Victims with these visas have access to the Government’s Support for Trafficked People program.

144. The Special Rapporteur recently observed that:

“...to enter the programme and access any of the support services available, persons must be formally identified by the AFP as a suspected victim of trafficking: any person who does not engage with AFP will automatically be excluded from the programme. Moreover, beyond the initial assistance provided under the Bridging Visa F, all ongoing support services are dependent on a contribution to criminal justice process or investigation. The linking of ongoing support services to contribution to criminal processes should be removed, as it imposes an additional burden on victims of trafficking and does not represent an adequate acknowledgement of their status as victims.”¹⁶⁴

145. The Special Rapporteur recommended that the period for a Bridging Visa F be extended to 90 days. The Law Council supports this recommendation and submits that the Committee should recommend that the Government adopt this recommendation.

Other forms of assistance to victims

146. The NSW Bar has also noted Australia’s obligations under the UN Trafficking Protocol with respect to implementing “measures to provide for the physical, psychological and social recovery of victims” of people trafficking and related offences.¹⁶⁵ In this respect, Australia is required to have particular regard to the provision of:

- Appropriate housing;
- Counselling and information, in particular as regards legal rights, in a language that the victims of trafficking in persons can understand;
- Medical, psychological and material assistance; and
- Employment, educational and training opportunities.¹⁶⁶

147. In the interim, the Law Council is aware of an inconsistent and unintended approach to the administration of the Australian Government’s Support for Trafficked People program, administered by the Red Cross, with awards of victims of crime compensation reducing the amount available under the support program. These anomalies should be addressed as a matter of urgency and would in the long term be best addressed by a comprehensive national scheme.

¹⁶⁴Op.cit., *Report of the Special Rapporteur on trafficking in persons, especially women and children*, para.53, p.14.

¹⁶⁵Op.cit, Article 6.3, *Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against Transnational Organized Crime*

¹⁶⁶Ibid., Article 6. 3. See also Guideline 9 (1), *Recommended Principles and Guidelines on Human Rights and Human Trafficking*

148. As noted above, the Law Council acknowledges the provision of some service-based support for victims. However, the Law Council suggests that this support falls short of the requirements under the UN Trafficking Protocol and submits that the Committee should recommend that the Government examine the need for a comprehensive national framework for victim support.

Protections for Victims

149. Article 6 of the Trafficking Protocol sets out obligations in relation to assistance to and protection of victims of people trafficking. In particular these include:

- In appropriate cases and to the extent possible under its domestic law, each State Party shall protect the privacy and identity of victims of people trafficking, including, inter alia, by making legal proceedings relating to such trafficking confidential;¹⁶⁷ and
- Each State Party shall ensure that its domestic legal or administrative system contains measures that provide to victims of trafficking in persons, in appropriate cases:
 - i. Information on relevant court and administrative proceedings;
 - ii. Assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence.¹⁶⁸

150. Great sensitivity is needed in handling cases which involve victims of people trafficking and related offences. The trauma of these crimes is exacerbated by the vulnerability of the victims, as researcher Anne Gallagher has emphasised:

“Victims of trafficking are in a unique position. Like other victims of crime, they may be deeply affected by their experience, but unlike other victims of crime, they may also have a tenuous migration status in a foreign country, where they may speak little of the language and know only people who exploited them... Trauma is generally compounded by fear – not just the very real fear of reprisals, but fear of being deported, of publicity, of the criminal justice process itself...”¹⁶⁹

151. Anne Gallagher highlights specific problems in support for trafficking victims and vulnerable witnesses in Australia in prosecutions.¹⁷⁰ These include:

- inconsistencies between the protections available to victims and witnesses between different jurisdictions and courts, for example, in the suppression of victims’ names;
- delays between the victim making a statement to authorities and trial; and
- the lack of a partnership between police and counsellors in the preparation and management of victim interviews.

¹⁶⁷ Ibid., Article 6.1

¹⁶⁸ Ibid., article 6.2

¹⁶⁹ A. Gallagher, ‘Prosecuting and Adjudicating Trafficking Persons Cases in Australia: Obstacles and Opportunities’, National Judicial College of Australia Twilight Seminar on Human Trafficking, State Library of NSW, 15 June 2009.

¹⁷⁰ Ibid.

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152. There have been calls for principles to be articulated at the federal level on how to protect the rights of victims of crimes which are at a minimum consistent with the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.¹⁷¹ Other jurisdictions in Australia have either incorporated victims' rights in legislation or adopted a charter of victims' rights or statement of principles for the minimum standards for the treatment of victims.¹⁷²
153. In June 1993, the then Standing Committee of Attorneys-General (SCAG) endorsed a National Charter for Victims' Rights in Australia. However, this was never enacted.¹⁷³
154. The Law Council considers that issues of victim and witness protection, including the use of victim impact statements, should be addressed more comprehensively in the light of the different classes of individuals affected under federal criminal offences.
155. Factors to be considered in relation to victim and witness protections include a number of competing principles and interests. These principles and interests include some of the central tenets which underpin the common law criminal justice system, such as:
- the need to serve the public interest, rather than the private interest, as the paramount factor influencing the State in criminal prosecutions. For example, tensions may arise between the victim's need for confidentiality and privacy on one hand, and the need for public accountability and transparency of process;
 - the need for greater recognition of the rights of victims in the criminal process,¹⁷⁴ while recognising that criminal matters have traditionally involved two adversaries: the State, in the representative capacity for the community, and the accused;
 - the need to maintain the independence of the prosecution. The traditional role of the prosecutor is not as agent for the victim, and may involve decisions which cause distress for the victim. For example, the prosecution may decide not to proceed with a case, or may be dependent upon the victim giving evidence for the case to succeed; and
 - the need to ensure that the fair trial rights of the accused are not jeopardised. For example, the right to cross-examine witnesses should not be too readily put aside because of the vulnerability of witnesses.

¹⁷¹ Anti-Slavery Project, *Submission to the National Consultation on Human Rights*, 15 June 2009, available at www.humanrightsconsultation.gov.au

¹⁷² *Victims of Crime Assistance Act 1996*(Vic) and *Victims Charter Act 2006*(Vic); *Victims Rights Act 1996*(NSW) and *Victims Support and Rehabilitation Act 1996*(NSW); *Victims of Crime Act 1994* (ACT) and *Victims of Crime (Financial Assistance) Act 1983*(ACT); *Victims of Crime Act 1994* (WA); *Victims of Crime Rights and Services Act 2006*(NT) and *Victims of Crime Assistance Act 2006* (NT); *Criminal Offence Victims Act 1995*(Qld); *Victims of Crime Assistance Act 2009* (SA); *Victims of Crime Assistance Act 1976*(Tas) and *Victims of Crime Compensation Act 1994*(Tas)

¹⁷³ It is noted however that in May 2010 SCAG endorsed model provisions on suppression and non-publication orders, and that these are sought to be implemented in the *Access to Justice (Federal Jurisdiction) Amendment Bill 2011* which is currently before parliament. In addition, the Commonwealth Director of Public Prosecutions has established a *Victims of Crime Policy*, which implements certain measures for victims of Commonwealth offences: see the Discussion Paper page 26.

¹⁷⁴ As observed in *P* (1992) 39 FCR 276.

156. The Law Council is concerned that the Bill does not address these principles at all in relation to the protection of victims and vulnerable witnesses. The Law Council recognises that there are some provisions which can be used to protect vulnerable witnesses in the *Evidence Act 1995*¹⁷⁵ and that there is support for victims and vulnerable witnesses through the Support for Victims of People Trafficking Program.¹⁷⁶ However, the Law Council is disappointed that no new provisions in this regard have been included in the Bill or any related policy or legislative proposals.

Victim Impact Statements

157. The Law Council is disappointed that the Bill does not provide for the use of victim impact statements in sentencing for people trafficking or slavery-related offences. The Law Council notes that one of the recommendations of the Parliamentary Joint Committee on the Australian Crime Commission's 2004 inquiry into Trafficking of Women for Sexual Servitude was that the use of victim impact statements should be considered for these types of offences.¹⁷⁷

158. The ALRC also recommended that comprehensive provisions for the use of victim impact statements in federal sentencing be enacted as part of its inquiry into federal sentencing laws in 2006.¹⁷⁸ The ALRC recommended that there be provisions:

- *“allowing a victim (whether an individual or corporation) to present particulars of any injury, loss or damage suffered as a result of the commission of a federal offence, including particulars of economic loss;*
- *precluding a victim from expressing an opinion about the sentence that should be imposed on a federal offender;*
- *allowing any facts stated in a victim impact statement to be verified where they are likely to be material to the determination of sentence but not by way of cross examination of the victim unless the court gives leave to do so; and*
- *precluding a court from drawing any inference about the harm suffered by a victim from the fact that a victim impact statement has not been made.”¹⁷⁹*

159. The Law Council supports the use of victim impact statements in the sentencing of offenders (particularly in relation to people trafficking, slavery and related offences) for a number of reasons.

160. First, the use of such statements provides victims with the opportunity, if they wish to make such a statement, to have their voice heard and to convey to the offender

¹⁷⁵ For example, sections 26 and 29

¹⁷⁶ This program is administered by the Australian Red Cross and is available to all victims of people trafficking in Australia who hold a valid Australian visa and agree to give evidence at trial. It provides health and welfare services throughout the court process. For more information see <http://fahcsia.gov.au/sa/women/progserv/violence/Pages/AntiPeopleTraffickingStrategy.aspx>

¹⁷⁷ See Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the Trafficking of Women for Sexual Servitude*, June 2004, Recommendation 4, p.53. Available from http://www.aph.gov.au/binaries/senate/committee/acc_ctte/completed_inquiries/2002-04/sexual_servitude/report/report.pdf.

¹⁷⁸ Op.cit, *Same Crime, Same Time: Sentencing of Federal Offenders*, p.42 and also Recommendation 14-1.

¹⁷⁹ Ibid., p.42.

the impact the crime has had on them. In this regard, the use of such statements may have a therapeutic effect on victims.¹⁸⁰

161. Secondly, the use of victim impact statements can provide the court with a more in depth understanding of the consequences of the offence on the victim. In some instances, victim impact statements can also enhance the deterrent effect of the sentencing process on the offender.¹⁸¹
162. As noted in its submissions on the exposure draft of the Bill and to the ALRC's Inquiry into the sentencing of Federal offenders,¹⁸² the Law Council believes there is a need for victim impact statements in the prosecution of people trafficking, slavery and related offences under the Criminal Code provided that sufficient safeguards are in place in relation to such statements.¹⁸³
163. Safeguards are necessary to make it clear that prosecutors and, if necessary, the trial judge, should scrutinise impact statements to prevent untested allegations of other criminality or misconduct being introduced into the sentencing process and to prevent the introduction of content that may be highly prejudicial, offensive, overly emotive or of low probative value.¹⁸⁴
164. The Law Council suggests that the Committee recommend that the Bill be amended to include provisions allowing the use of victim impact statements.

Conclusion

165. The Law Council is pleased that the Bill incorporates a number of the amendments suggested by the Law Council in its submission on the exposure draft of the Bill. The Law Council believes the Bill is a positive step towards the strengthening of the criminal law in relation to people trafficking and slavery-related offences.
166. Notwithstanding this, the Law Council is disappointed to see that the Government has not provided for the establishment of a Commonwealth victims' compensation scheme through this Bill or any related Bill, and is of the view that the protections for victims and/or vulnerable witnesses could also be strengthened.
167. The Law Council thanks the Committee for providing it with the opportunity to comment on the Bill and suggests that the Committee recommend that the Bill be passed subject to the recommendations outlined in this submission.

¹⁸⁰Law Council of Australia, Submission to Australian Law Reform Commission, *Discussion Paper No.70: Sentencing of Federal Offenders*, 17 March 2006, p.17. Available from http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=8A08B075-1E4F-17FA-D233-75CBF6B6BAD0&siteName=lca.

¹⁸¹Ibid.

¹⁸²Op.cit., Law Council of Australia, Submission on *Exposure Draft – Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012*, p.34. See also Law Council of Australia, Submission to Australian Law Reform Commission, *Discussion Paper No.70: Sentencing of Federal Offenders*, p.17.

¹⁸⁴ Ibid.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its constituent bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's constituent bodies. The Law Council's constituent bodies are:

- Australian Capital Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 56,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the constituent bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12 month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2012 Executive are:

- Ms Catherine Gale, President
- Mr Joe Catanzariti, President-Elect
- Mr Michael Colbran QC, Treasurer
- Mr Duncan McConnel, Executive Member
- Ms Leanne Topfer, Executive Member
- Mr Stuart Westgarth, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.