

Submission

on the

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

to the

Senate Legal and Constitutional Affairs Committee

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from

Slavery Links Australia Inc

July 2012



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LIST OF RECOMMENDATIONS

Recommendation 1

We respectfully request the Legal and Constitutional Committee to apply the Supplementary Convention 1956 in its consideration of the Crimes Legislation Amendment (Slavery, Slavery-Like Conditions And People Trafficking) Bill 2012

Recommendation 2

We respectfully request the Legal and Constitutional Committee to encourage the Joint Committee on Human Rights to develop early expertise in particular with regard to operation of the Supplementary Convention and its compatibility

Recommendation 3

We respectfully request the Committee to consider how the slave-making systems of child trading and peonage might be included in the Bill

Recommendation 4

Child trading should be part of the current reform package; or scheduled to be researched and included soon

Recommendation 5

Serfdom / peonage should be part of the current reform package; or scheduled to be researched and included soon

Recommendation 6

We ask the Committee to consider how consent can be framed so that the parties to marriage give consent which expresses their own interests as individuals

Recommendation 7

We ask the Committee to consider how the Bill can make explicit that a married person may not be transferred to another or inherited

Recommendation 8

We also ask the Committee to establish a framework for program development to facilitate processes for change to assist communities to differentiate arranged marriage from forced marriage and servile marriage

Recommendation 9

We request the Committee to consider how Australia could apply policy models which recognise that forced marriage involves exercise of the powers of ownership i.e. forced marriage is slavery. These models include: Injunctive relief, a protective unit, a research effort, restoration and protection, civil-plus-criminal provisions

Recommendation 10

We request the Committee to consider how Australian policy can make it possible for mediation to occur only after both parties and all family or clan members have consented to accept / facilitate the end of the marriage (or engagement)

Recommendation 11

Slavery Links recommends that the Committee consider how to inform young people directly, using 'their' sort of technology; in a way that will enable them to keep each other informed about arranged marriage, forced marriage and protective behaviours.

Recommendation 12

With reference to the indica of slavery that were developed by the International Criminal Tribunal for the Former Yugoslavia (ICTFY): We request the Committee to consider how it might be possible to embed the indica in those parts of the legislation that refer to slavery

Recommendation 13

We request the Committee to re-address the problem of 'ownership in marriage' and consider the following ways to define the problem:

- Forced marriage is an event. It occurs where meaningful consent has not been given. It is strictly defined under the 1956 anti slavery convention.**
- Servile marriage [or another suitable term instead of 'servile'] is an ongoing relationship where one party is treated as if property.**

We propose that the indica of slavery would differentiate ownership from every day family violence or abuse and exploitation. We submit that the measures of servility in the Bill (coercion, deception and threat) do not adequately encapsulate the powers of ownership that apply in forced marriage and [servile] marriage

1. Preamble

This submission refers to slavery offences and Section 270 of the Commonwealth Criminal Code Act 1995 (Criminal Code).

We request an opportunity to give oral evidence to the Committee in relation to slavery and this submission.

1.1 Sources for our submission

The submission has been drawn from information compiled for the book Australians and modern slavery which was published by Slavery Links Australia Inc in 2011.

This submission also draws on a submission and action plan provided to the Attorney General's Department by Roscoe Howell, Robert Evans and Kaye Hargreaves and dated 23 February 2011.

1.2 Matters not covered

This submission does not cover an important aspect about which the Committee and Ministers do need to be informed at some stage: namely marriage and consent among Aboriginal, Pacific Islander and Torres Strait Islander communities.

1.3 The significance of the Supplementary Convention on slavery

The Supplementary Convention 1956 defines slavery in terms of ownership, as did the original in 1926.¹ We ask the Committee to refer back to the anti-slavery Conventions because they are the places where slavery is defined; and they are the international anti-slavery instruments that Australia is obliged to implement.

1.4 Slavery involves a change of state: from free to un-free

There are many violent, exploitive or abusive relationships in the world. Slavery is in a class of its own because it involves exercise of the powers of ownership. Slavery is different from every day crimes against the person. Slavery involves a change of state – from free to unfree. This is why slavery is a crime against humanity.

1.5 What this means for the legislation

Some aspects of slavery covered by the Conventions are not covered. Further the Bill places slavery on a continuum, which may be problematic (see Section 8).

¹ Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery 1956. Article 7 reads:

For the purposes of the present Convention:

(a) "Slavery" means, as defined in the Slavery Convention of 1926, the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, and "slave" means a person in such condition or status

2. Referral and scope of the Inquiry

2.1 Process for referral

This Submission refers to the Crimes Legislation Amendment (Slavery, Slavery-Like Conditions And People Trafficking) Bill 2012.² An Explanatory Memorandum³ was provided by the Attorney General to the House of Representatives. The Attorney General's Second Reading Speech was made on 30 May 2012⁴.

On 19 June 2012 the Senate referred the Bill 2012 to the Senate Legal and Constitutional Affairs Committee for inquiry and report. Committee Secretary circulated an invitation to make a written submission by 31 July 2012. The Committee is due to report on 13 September 2012.

2.2 Scope of the Inquiry

The Bill amends the Criminal Code Act 1995, the Crimes Act 1914, the Migration Act 1958, the Proceeds of Crime Act 2002 and the Telecommunications (Interception and Access) Act 1979. The Bill also establishes a continuum of slavery and slavery-like offences. The Explanatory memorandum summarises the Bill's intent as follows: It

- establishes new offences in the Criminal Code of forced labour, forced marriage, organ trafficking, and harbouring a victim
- ensures the slavery offence applies to conduct which renders a person a slave, as well as conduct involving a person who is already a slave
- extends the application of the existing offences of deceptive recruiting and sexual servitude so they apply to non-sexual servitude and all forms of deceptive recruiting
- increases the penalties applicable to the existing debt bondage offences, to ensure they are in line with the serious nature of the offences
- broadens the definition of exploitation under the Criminal Code to include all slavery-like practices
- amends the existing definitions to ensure the broadest range of exploitative conduct is criminalised by the offences, including psychological oppression and the abuse of power or taking advantage of a person's vulnerability, and
- improve(s) the availability of reparations to victims.

² The text used for this Submission was found at:
http://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r4840_first-reps/toc_pdf/12110b01.pdf;fileType=application%2Fpdf

³ The text of the Memorandum used for this Submission was found at:
http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4840_ems_e18ea7e8-91f4-4c8d-958c-bddb635b505a/upload_pdf/369090.pdf;fileType=application%2Fpdf

⁴ Chamber, 30 May 2012, Hansard Pp 6225 – 6227. The text used for this Submission was found at:
http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/4a17e30d-c43b-48b9-83ed-4280fc00314c/0041/hansard_frag.pdf;fileType=application%2Fpdf

3. General endorsement of the intent of the draft legislation

Slavery Links endorses action which will bring Australian laws into harmony with our obligations under the anti-slavery Conventions. The draft legislation is one more step along the way and we support this.

However ...

However, some aspects of slavery defined by the anti-slavery Conventions are not covered in the proposed legislation (refer to Section 4 and Section 5 below).

Also program development will be required to implement the Bill, when passed. Experience shows that criminal sanctions, individual case-finding and victim support need to be complemented and supported by community-based change. Members of the Committee might refer to examples and case studies in Australians and modern slavery; or we can give oral evidence on this point if that is preferred.⁵

We now turn to one apparent reason why the provisions of the Supplementary Convention may not have been applied fully in the Crimes Legislation Amendment (Slavery, Slavery-Like Conditions and People Trafficking) Bill 2012.

⁵ Australians and modern slavery's 300 pages give case examples that show how to construct viable anti-slavery programs that are community based and that operate in a human rights context. We want to give evidence on this point, the potential for development of meaningful community programs

4. The Human Rights (Parliamentary Scrutiny) Act 2011

The Explanatory Note proposes that the Bill is “compatible with the human rights and freedoms recognised or declared in the international instruments listed in Section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.” The instruments listed in Section 3 do not include the Supplementary Convention or its parent.

4.1 Slavery and the ICCPR

The International Covenant on Civil and Political Rights (ICCPR) is listed in Section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011. We recognise and accept that slavery is referred to in the ICCPR. Article 8 of the ICCPR states:

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited
2. No one shall be held in servitude

4.2 The Supplementary Convention is essential reading

Yet it is only by reading the Supplementary Convention that any meaningful understanding can be given to Article 8. Surely it would be better to include the Supplementary Convention in Australia’s human rights equation generally; and to include it in deliberations with respect to the Crimes Legislation Amendment (Slavery, Slavery-Like Conditions and People Trafficking) Bill 2012.

Recommendation 1

We respectfully request the Legal and Constitutional Committee to apply the Supplementary Convention 1956 in its consideration of the Crimes Legislation Amendment (Slavery, Slavery-Like Conditions And People Trafficking) Bill 2012

4.3 Other consequences of excluding the Supplementary Convention

Excluding the Supplementary Convention from the Human Rights (Parliamentary Scrutiny) Act appears to deprive Australians in two ways.

- ➔ Firstly it deprives us of the wisdom embedded in the Supplementary Convention; and does so at the very time that Australian governments are grappling with how to address the presence of slavery in this country
- ➔ Secondly it may (be used as an excuse to) exclude slavery from up-front consideration by
 - the Parliamentary Joint Committee on Human Rights
 - the Human Rights Education Framework and or
 - the Universal Periodic Review, next scheduled at the Human Rights Council in 2015

These exclusions deprive the Parliament and Government of an opportunity to assess just how well Australia is doing in some respects; to strengthen or change direction where required; and to trumpet our success where we can.

4.4 Action that might be taken to address the other consequences

On 4 January 2012 the Attorney General issued a media release⁶ which encouraged the Parliamentary Joint Committee to develop its role and expertise early in its operation. It would appear to be consistent with a range of interests for the Joint Committee to be encouraged to engage with the Supplementary Convention.

Recommendation 2

We respectfully request the Legal and Constitutional Committee to encourage the Joint Committee on Human Rights to develop early expertise in particular with regard to operation of the Supplementary Convention and its compatibility

⁶ The media release is at <http://www.attorneygeneral.gov.au/Media-releases/Pages/2012/First%20Quarter/4-January-2012---Human-Rights-check-for-new-laws.aspx>

5. What do the anti-slavery Conventions require from us?

The Supplementary Convention defines slavery in terms of ownership, as did the original 1926 Convention (see Footnote 1). Being owned is a change of state, from free to unfree. Being owned is what makes slavery a crime against humanity.

In our submission it is essential that slavery offences in the Bill are framed in terms used by the Supplementary Convention (or at least with substantial regard to the Convention). In this way we re-iterate Recommendation 1, that the Committee apply the Supplementary Convention 1956 in its consideration of the Crimes Legislation Amendment (Slavery, Slavery-Like Conditions And People Trafficking) Bill 2012

5.1 Four systems of slavery

The Supplementary Convention 1956 defines four systems⁷ of slavery, which are

- child trading
- debt bondage
- forced marriage and
- serfdom or peonage.

By defining slavery in terms of these systems the Convention recognises that whole groups or classes of people may be trapped by forces which make them vulnerable to being enslaved. Groups may be excluded from the mainstream based on their caste, disability, gender, race or religion.

By defining slavery in terms of systems that have persisted for generations, the Convention directs attention to the actions that can be taken to change the way the slave-making system operates, especially by ensuring that groups are not excluded based on their caste, disability, gender, race or religion.⁸ The Supplementary Convention places the crime of slavery into a human rights context where a response to slave-making systems calls forth a range of responses ranging from legal to development of positive rights⁹ (such as those expressed by Nobel Prize winner Amartya Sen in his welfare economics and his book *Development and Freedom*).

⁷ In this regard the Supplementary Convention is a thoroughly modern instrument. Systems thinking was developed during the 1940s by the allied powers in World War II, which ended only a decade before the Convention was made.

⁸ In Australians and modern slavery we identify four “engines” that allow these systems to persist and keep them operating. The four “engines operate in a summative way: that is, to be effective an anti-slavery program needs to address:

- Poverty and
- Powerlessness and
- Crime / corruption and
- Conflict

⁹ For a discussion of positive rights in relation to slavery, see: Rachel Harris (2008) ‘Modern-day slavery in Australia: The Queen v Wei Tang’, Sawyer Lecture, Australian National University

5.2 All four slave-making systems should be included in the Bill

The draft Bill does not cover child trading or peonage – systems of slavery that are defined in the Supplementary Convention. The draft Bill refers to the slave-making system of forced marriage, but covers it only partially (see Section 6). Slavery Links asks the Committee to consider that Australia is obliged to address these systems.

Recommendation 3

We respectfully request the Committee to consider how the slave-making systems of child trading and peonage might be included in the Bill

To be specific, the apparent gaps are as follows:

5.3 Child trading

Child trading is known to occur in our region. As the UN Office of High Commissioner for Human Rights points out, profits are to be made by the illicit transfer of children from poor homes to rich.¹⁰

Child trading is not the same as trafficking. Child trading is an ancient system whereby poor families placed children in the hope of keeping them fed and housed.

Child trading is defined in terms of a child being placed by a parent or guardian. If a child is removed or relocated, a parent does not necessarily have knowledge of actions taken by a guardian. Further, a guardian may be remote or relatively powerful and able to obscure or obfuscate the child's situation. Stories of child trading are not limited to China, India and poorer Asian countries. A recent case in Pennsylvania (USA) showed that even a Court-based position of guardian *in loco parentis* can be abused for financial gain.¹¹ Australia, too, may be involved.¹²

While children are notionally protected from movement between countries, several countries in Australia's region have not signed the Hague Conventions. There have been news reports of children brought to Australia and adopted apparently in good faith but where a child appears to have been traded before being entered into the

¹⁰ To quote the UN Office of the High Commissioner for Human Rights, Fact Sheet No. 14 Contemporary Forms of Slavery:

"Unscrupulous go-betweens have found that large profits can be made by arranging the transfer of children from poverty-stricken homes to people with means ...[it] takes on the character of trading in children."

Go to: www.ohchr.org/Documents/Publications/Factsheet14en.pdf

¹¹ David Stout (2011) Pennsylvania Judge in "Cash for Kids" Scandal Sentenced to 28 Years, Main Justice, August 11, 2011, Go to: <http://www.mainjustice.com/2011/08/11/pennsylvania-judgein-cash-for-kids-scandalsentenced-to-28-years/> Cited in *Australians and modern slavery*, Page 49. Extract in the book used with permission from Mary Jacoby of Main Justice

¹² On 22 and 29 August 2008 the Herald Sun reported that "30 children kidnapped in India were sold to an adoption agency which farmed them out to parents. 13 are in Australia." Indian sources commented too. See http://bharatsite.com/australia/2008_08_01_archive.html

inter-country adoption process. In Slavery Links' submission, child trading should not be ignored. Australia is required to implement the Convention it signed.

Recommendation 4

Child trading should be part of the current reform package; or scheduled to be researched and included soon

5.4 Peonage (or serfdom)

Peonage amounts to serfdom. It is a condition of being tied to the land. In modern times peonage can be seen as a relict part of Spanish colonial administrations. It is extant in countries such as the Philippines.

In *R v Wei Tang*,¹³ comments from the Bench in May 2008 indicated that the High Court was not disposed to consider peonage as an issue in that case.

However in 2012, four years after *Wei Tang*, Australia imports numbers of so-called skilled labourers from the Philippines; and we need to come to grips with the forces that may be applied to these workers by interests from their home country.

It appears likely that the forces attached to serfdom can express ownership at a distance, just as the forces attached to a debt bond can do. Australian law needs to take account of these forces.

Recommendation 5

Serfdom / peonage should be part of the current reform package; or scheduled to be researched and included soon

5.5 Forced marriage

Unlike child trading and peonage, forced marriage is mentioned in the Crimes Legislation Amendment (Slavery, Slavery-Like Conditions and People Trafficking) Bill 2012. While the Bill uses the term 'forced marriage' it may not be clear to a reader just what part(s) of the Supplementary Convention are and are not being covered.

Forced marriage is defined in the Supplementary Convention. It is not defined in any of the instruments listed in Section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011. It is therefore essential to have regard to the Supplementary Convention if Australians are going to meet our international obligations as regards slavery.

We turn to that question in Section 6, following.

¹³ *R v Wei Tang* can be found at [2008] HCA 39; 82 ALJR 1334. Go to: <http://www.austlii.edu.au/au/cases/cth/HCA/2008/39.html>

R v Wei Tang is often referred to as a trafficking matter or (mis)used as a case that bolsters arguments for an anti-trafficking frame of action. In fact *Wei Tang* was about slavery. Slavery is about ownership. Trafficking is about exploitation, where so much deception is used that no meaningful consent can be given. It is Slavery Links' policy not to conflate slavery (ownership) with trafficking (exploitation).

In *Australians and modern slavery* we show that many slaves are enslaved 'in place' but not trafficked

6 Forced marriage in the Supplementary Convention

The book Australians and modern slavery discusses forced marriage at several points.¹⁴ So does this submission. See Section 6.1 ff and Section 8.2 following.

6.1 A three-limb definition in the Supplementary Convention

In our submission the 1956 UN Convention against slavery should be the reference point for Australian law in relation to forced marriage. The Supplementary Convention has three limbs. It requires states to ban any practice where:

- A woman without right to refuse is promised or given in marriage
- (Others) have the right to transfer her to another person
- A woman on the death of her husband is liable to be inherited by another

These limbs refer to real customary or cultural practices that have developed in circumstances where there is no access to what Australians would regard as social security for women, wives, mothers or widows; where polygamy and temporary marriage are accepted forms; where men are deemed to have paramount custody and property rights in the event of separation or divorce.

These practices need to be addressed. They occur in cultures and communities that are established in Australia / coming to Australia. We submit that cultural ceremonies are likely taking place where women (and men and families) believe they are subject to cultural practices, that cultural rules are paramount.

Forced marriage is upheld by systems of belief that a woman is subordinate, that her identity is not personal but familial. As Justice Spigelman pointed out, there are cultures where women are regarded as property, treated as if owned.¹⁵ Moreover, some important countries that represent those cultures have reservations as to international law, on the basis of a belief that women are not equal.¹⁶

This is not what is required by Australian civil and family law. In our submission, 'women-as-property' is not a situation where cultural relativism can be allowed.

¹⁴ Section 2 of the book defines forced marriage. Section 3.4 discusses forced marriage in Australia. Section 5 discusses programs to counter forced marriage. Section 8.4 places forced marriage in context of official attempts to control slavery. The following points derive from discussions in those places.

¹⁵ Hon J J Spigelman AC (2010) Violence Against Women: The Dimensions Of Fear and Culture, Inaugural Address to the Law, Governance And Social Justice Forum, Faculty Of Law, University Of New South Wales, Sydney, 15 April 2010

Also: Spigelman (2010b) continued the theme of relationship in his article 'The forgotten freedom: Freedom from fear' in International and Comparative Law Quarterly, Vol 59, July pp 543-570

¹⁶ Spigelman points out two flaws in CEDAW, as follows:

A). CEDAW makes no reference to violence. Nor to acute forms of violence such as honour killings.
B). Bangladesh, Egypt and Libya opt out in part: "The Government ... of Bangladesh does not consider as binding upon itself the provisions of Articles II ... as they conflict with Sharia Law based on the Holy Quran and Sunna"

6.2 The first limb: Consent

The draft legislation deals with the first limb. [Appropriately, the draft Bill does not use genderised language.¹⁷] We ask the Committee to consider spelling out what is meant by 'consent'. In Australia we expect to frame consent in an individual way; we assume that the parties to marriage do consent in the sense of expressing their own individual interests. We can no longer make that assumption.

In a cultural ceremony, 'consent' may take account of the other or wider needs and interests of family or clan. If we intend to protect the parties to marriage we need to ensure that parties understand they are giving consent as individuals, without regard to the needs or interests of family or clan. Further we need to ensure that the role of celebrants supports this (see below). How?

Recommendation 6

We ask the Committee to consider how consent can be framed so that the parties to marriage give consent which expresses their own interests as individuals

6.3 The second and third limbs

Regrettably the draft Bill is silent on the question of transfer and inheritance of a party to marriage. The Explanatory Memorandum mentions this, but not the Bill.

For the sake of the women and men who are exposed to risk and in order to implement Australia's human rights obligations as a signatory, we submit that it is imperative for the Committee to consider how the Bill can make explicit that a married person may not be transferred to another or inherited.

Recommendation 7

We ask the Committee to consider how the Bill can make explicit that a married person may not be transferred to another or inherited

6.4 Marriage celebrants and parties to the marriage

In order to uphold the primacy of Australian marriage law and family law, we submit that the Committee needs to consider whether a civil or faith-based celebrant authorised under Australian law should be required to give explicit guidance as to three things that may not be apparent to the parties in a cultural ceremony:

- ➔ The individualised meaning of consent,
- ➔ The application of civil law to the marriage; and
- ➔ The application of family law in the event of separation.

¹⁷ Appropriate because in Britain some 15-17 per cent of persons seeking refuge from forced marriage were men. Both parties suffer and families are diminished when forced marriage occurs

7. Community engagement and community-based change in relation to forced marriage

Recommendation 8

We also ask the Committee to establish a framework for program development to facilitate processes for change to assist communities to differentiate arranged marriage from forced marriage and servile marriage

As we indicated in Section 3 above, program development will be required to implement the Bill, after it has passed. Criminal sanctions, individual case-finding and victim support are important actions to take on an individual scale. These need to be complemented and supported by community-based change. Members of the Committee might refer to examples and case studies in Australians and modern slavery (see Note 5); or we can give oral evidence on this point if that is preferred.

It needs to be made clear to Australians generally and to cultural communities that cultural marriage is not marriage within Australian civil law, it is unlawful under the Conventions to which Australia is a signatory; and that Australia's treaty obligations require this to be dealt with for all in Australia. These points need to be developed as well with potential and actual individual victims.

7.1 Can European policies on forced marriage be applied in Australia?

Australia has not done the basic research required to assess the scale and scope of forced marriage in this country. All we can say with certainty is that Australia's immigrant communities have diverse cultural practices and attitudes to marriage.

British policy

Can British policy be applied here as a substitute for our own research?

No. Australia is not Bradford. The Moslem-focussed approach of British research and or policy¹⁸ will not suffice.

European research

In the European Union, where some research has been done, Council Resolution 1468¹⁹ illustrated that forced marriage occurs in diverse settings. The resolution applied to countries that have failed to act on forced marriage. The list included: Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Croatia, the Czech Republic, Estonia, Georgia, Hungary, Latvia, Lithuania, Moldova, Montenegro,

¹⁸ For example Aisha Gill and Sundari Anitha (Eds.) (2011) Forced marriage: Introducing a social justice and human rights perspective (Zed Books, London). In December 2011 Aisha Gill made a presentation at the Queen Victoria Women's Centre, auspiced by Australian Women Against Violence. Section 5.3.3 of Australians and modern slavery refers to a number of academic publications about forced marriage; and provides a succinct review of current research.

¹⁹ Council of Europe, Parliamentary Assembly Resolution 1468, 5 October 2005, Go to: <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta05/eres1468.htm>

Poland, Romania, the Russian Federation, Serbia, Slovak Republic, Slovenia, and the Ukraine. Australia accepts immigrants from these countries and other countries where forced marriage appears to occur.

Forced marriage is not uniform. It takes different forms in Britain, eastern Europe, central Asia, north Africa and south Asia. Despite the obvious variations, the examples provided in Australians and modern slavery do affirm our argument that **poverty**, the **powerlessness** of women and the distortion of **conflict** management processes do contribute to the ongoing **crime**, which enable systems of forced marriage to persist. In turn, an appreciation of systems affirms the need to supplement or complement crime-case-finding with community-based approaches to cultural change.

7.2 Can British legislation on forced marriage be adapted for Australia?

Yes. Some of it has merit. Injunctive relief, a protective unit, a research effort, restoration and protection, civil-plus-criminal provisions.

- ➔ We agree that injunctive relief such as a forced marriage protection order which relates to conduct in and outside Australia would be useful to protect and remove the victim
- ➔ We agree that expertise should be collected together, that training and publicity are required. The United Kingdom's Forced Marriage Unit appears to be a useful model
- ➔ We commend a rationale for civil provisions plus criminal penalties to be considered
- ➔ Because consent lies at the heart of marriage, we favour an approach which upholds the civil law (without religious or cultural exception), promotes education and encourages openness

Recommendation 9

We request the Committee to consider how Australia could apply policy models which recognise that forced marriage involves exercise of the powers of ownership i.e. forced marriage is slavery. These models include: Injunctive relief, a protective unit, a research effort, restoration and protection, civil-plus-criminal provisions

Now we turn to the role of mediation in a slavery context. There has been debate in the literature about the role of mediation in forced marriage. We do not agree that mediation is appropriate for reasons including the following:

7.3 Caution: Mediation has risks

There are risks in assuming that mediation is an appropriate mode. It is not appropriate where a woman or man seeks to leave or avoid a marriage where clan or family hold that cultural interests are paramount. The risks are real, all the more so because Australian born persons (or persons imbued in the assumptions of the Family Law Act) may not recognise the risks.

Forced marriage involves an assumption of ownership that over-rides individual wishes in the interests of family or clan or other third party. In framing policy it is essential to assume that a party leaving (or wishing to leave) a forced marriage is vulnerable; and that it is necessary to protect him and / or her.

In our submission an appropriate way to protect a victim is as follows:

- ➔ Ensure that the escaping party has a safe place to live, unconditionally, away from family or clan or other third party
- ➔ Define the purpose of mediation in terms of building a basis for ongoing or continuing relationships that are not related to marriage / which accept that the marriage / engagement will not continue
- ➔ In many cases such acceptance may not be immediate and in that case mediation would not occur for months or years after the vulnerable party has left the marriage / engagement

Therefore policy needs to make it possible for practitioners to ensure that mediation only occurs after both parties and all family or clan members have consented to accept / facilitate the end of the marriage (or engagement)

Recommendation 10

We request the Committee to consider how Australian policy can make it possible for mediation to occur only after both parties and all family or clan members have consented to accept / facilitate the end of the marriage (or engagement)

7.4 Why not do what will actually work?

Think of what actually happens in Australia when young people have a problem. They do what people often do – find out what is happening, consider what might be possible. They talk to friends, (perhaps) to trusted adults and maybe to people with authority.

Young people have good instincts. With access to resources, when armed with information and with support of friends, many are capable of being assertive in expectation of protecting themselves. They deserve support.

Slavery Links has developed a grant application to develop the sort of technology that young people use to keep themselves informed.

Police save Sydney girl from forced marriage⁴⁵

- ABC News

A 17-year-old Sydney girl has saved herself from being forced to go to Lebanon for an arranged marriage by calling the Australian Federal Police (AFP).

Federal police say the girl sounded frightened when she called them about a month ago. She then explained her plight — her mother had booked her on a flight from Australia to Lebanon in mid-May, where she was to be married.

The girl, who cannot be named, said she had heard about the airport watch list and wanted to be placed on it so that there was no way she would be able to leave the country.

The AFP took the matter to the Federal Magistrates Court which handed down its judgement last week.⁴⁶

It banned her family from taking her from Australia and ordered them not to threaten her.

Extract from Australians and modern slavery, p 78

Recommendation 11

Slavery Links recommends that the Committee consider how to inform young people directly, using 'their' sort of technology; in a way that will enable them to keep each other informed about arranged marriage, forced marriage and protective behaviours.

8. Differentiating slavery, servility and forcing when the Bill currently proposes a 'continuum' of oppressed states

In this Section we ask the Committee to re-consider how to differentiate slavery from forms of servility. As the Explanatory Memorandum puts it, the Bill

“establishes a continuum of slavery and slavery-like offences – with an offence of slavery at the most grave end of the spectrum, and an offence of debt bondage at the less grave end of the spectrum.”

The continuum ranges from a slavery-like state (where freedom is restricted) through to lesser states of forcing that confine a victim to work or the work place. This approach is tidy from the point of view of the administration of justice: if a serious or aggravated offence cannot be proven then the decider of fact can revert to considering a lesser offence. The approach is tidy; but not necessarily sound.

In her Second Reading speech, the Attorney General indicated that the Bill is about *exploitation* (emphasis added).

“These measures will establish a continuum of offences criminalising exploitative conduct ranging from slavery to debt bondage. The definition of 'exploitation' in the Criminal Code will be expanded to cover broader forms of exploitation including debt bondage, forced labour, forced marriage, and all forms of servitude including non-sexual servitude.” (See Hansard, Page 6266)

In our submission, *exploitation* is not the same as *slavery*. We accept there may be a continuum as to the seriousness of crimes against the person. We argue that there is not a 'continuum' between such every-day crime and making someone a slave.

8.1 Slavery is a change of state

As we point out in Section 1.4, slavery involves a change of state: from free to un-free. This change of state differentiates slavery from crimes against the *person*. The change of state from free to un-free is what makes slavery a crime against *humanity*.

The Bill does retain the definition of slavery, as per the Supplementary Convention. Section 270.1 defines slavery as “the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised”. In *R. v Wei Tang* the High Court²⁰ referred to eleven indicia of slavery²¹ that had been developed by the International Criminal Tribunal for the Former Yugoslavia (ICTFY).

²⁰ Well, actually Gleeson CJ, according to Rachel Harris (2008) 'Modern-day slavery in Australia: The Queen v Wei Tang', Sawyer Lecture, Australian National University

²¹ The trial, by the International Tribunal for the Former Yugoslavia, (Prosecutor v. Kunarac, Kovac and Vukovic, Case No IT-97-25-T, Judgement, ¶353 and nn. 955-57 [Mar. 15, 2001]) was cited in Anne Gallagher (2009) Human Rights and Human Trafficking: A Quagmire or Firm Ground? A response to James Hathaway, *Virginia Journal of International Law*, Vol 49, No 4, page 807. Copies of Gallagher's article can be found online

The indica of slavery which came from ICTFY and were used by the High Court were:

- Control of movement
- Control of environment
- Psychological control
- Control of escape
- Force
- Threat of force or coercion
- Durance (duration)
- Assertion of exclusivity
- Subjection to cruel treatment and abuse
- Control of sexuality, and
- Forced labour

It cannot be assumed that the High Court will necessarily apply the indica from ICTFY in a future case. In our submission, it may be appropriate to embed the indica of slavery in those parts of the legislation that refer to slavery. In arguing this, we are mindful of the next-most-serious-state described by the Bill (servility); mindful that the indica of servility have to do with coercion, deception and threat. We are asking the Committee to consider that the indica from ICTFY illustrate a more serious case.

Recommendation 12

With reference to the indica of slavery that were developed by the International Criminal Tribunal for the Former Yugoslavia (ICTFY): We request the Committee to consider how it might be possible to embed the indica in those parts of the legislation that refer to slavery

8.2 Does the 'continuum' apply to forced and servile marriage?

Forced marriage is defined as slavery in the Supplementary Convention. In our argument, forced marriage should be treated as slavery in the Bill. Forced marriage occurs where a woman is treated as if owned (see Section 6). In our argument, the indica of slavery from ICTFY would apply to forced marriage.

What, then, about servile marriage? Servile marriage is not defined in the Supplementary Convention. If we allow the logic of the Bill, then servile marriage would be defined as per other servile states. In the Explanatory memorandum:

"The servitude offences in new section 270.5 of the Criminal Code require that the victim must be significantly deprived of his or her personal freedom. As such, where it has not been proven that the victim was significantly deprived of his or her personal freedom, but the remaining elements of the offence of servitude have been proven, then the elements of the new offence of forced labour will have, in effect, been proven."

There is an appearance of neatness in the logic of the 'continuum' approach. The serious crime of servitude would involve three elements. If one element (loss of freedom) cannot be proven then the lesser charge of forced labour could be made.

Why not start with the experience of the slave?

In the alternative, if we start from the experience of the slave, if we allow the logic of the Supplementary Convention as to ownership, then we can think of

- Forced marriage as an *event* (a ceremony or a kidnap)
- Servile marriage as a *process*. The process may begin with the event of the forced 'wedding' ceremony or it may begin as a marriage sours and a party to the marriage comes to be treated as if owned.

Let us cite an example of servile marriage as a *process* of increasing ownership which followed a marriage that was freely entered into. The example can be found in *R v Kovacs*. This case "concerned a woman who had been brought to Australia, married under false pretences and effectively treated as a domestic slave".²²

Recommendation 13

We request the Committee to re-address the problem of 'ownership in marriage' and consider the following ways to define the problem:

- **Forced marriage is an event. It occurs where meaningful consent has not been given. It is strictly defined under the 1956 anti slavery convention.**
- **Servile marriage [or another suitable term instead of 'servile'] is an ongoing relationship where one party is treated as if property.**

We propose that the indicia of slavery would differentiate ownership from every day family violence or abuse and exploitation. We submit that the measures of servility in the Bill (coercion, deception and threat) do not adequately encapsulate the powers of ownership that apply in forced marriage and [servile] marriage

²² The Parliament of Victoria Drugs and Crime Committee Inquiry (2010), Inquiry into people trafficking for sex work, page 230, referred to the Queensland case of *R v Kovacs*

Attachment: Slavery Links

Slavery Links Australia Inc. is a not-for-profit community association, incorporated in Victoria. We have a Board, a five-year track record of public speaking, public education, research and advocacy.

How do we operate?

We transfer expertise. You add the language of slavery to existing operations. Be aware of slavery and rights. Make the necessary adjustments. Or bigger changes.

We work based on expertise (not mass membership at this stage). We are funded by the pro bono contributions of members and professional associates.

What difference do we make?

We intend to produce better business decisions, more informed consumers, more engaged members of Non Government Organisations. We aim to increase community awareness, increase community action and assist non-government and government organisations to recognise their anti-slavery roles more fully.

What can Australians do about slavery?

Slavery Links' call to action

1. Prepare families, teachers and others to protect marriage-with-consent
2. Support police, officials and others to protect workers and stop criminals
3. Educate Australian services to understand the experience of slavery. We can promote community inclusion and protect people while they build new lives
4. When you travel as a tourist or on business, learn to recognise slavery. Do not add to child labour, forced labour, sex trafficking or debt bonded labour
5. When you buy or consume, buy fair trade. Buy products that are slave-free
6. Invest in companies which uphold ILO labour standards & sustainable practice

Australians and modern slavery:

In 2011 Slavery Links published Australians and modern slavery by Roscoe Howell (300 pp). The Foreword, by The Hon Catherine Branson QC, President of the Human Rights Commission, states in part:

"As concerned citizens of the world, we should all seek to understand the sources of slavery, learn how our actions might inadvertently encourage slavery, be vigilant in identifying slavery and, to the extent that we can, take action to prevent this abhorrent practice."