



Submission No 34

**Inquiry into Slavery, Slavery-like conditions and People
Trafficking**

Organisation: Anti-Slavery Australia



Inquiry into Slavery, Slavery-like Conditions and People Trafficking

**Joint Standing Committee on Foreign Affairs,
Defence and Trade**

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Anti-Slavery Australia
Faculty of Law
University of Technology, Sydney
PO Box 123, Broadway NSW 2007

W: antislavery.org.au

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I. ANTI-SLAVERY AUSTRALIA, UNIVERSITY OF TECHNOLOGY, SYDNEY

Anti-Slavery Australia welcomes the opportunity to provide this submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade in response to the Inquiry into Slavery, Slavery-like conditions and People Trafficking.

Anti-Slavery Australia at the University of Technology, Sydney is a specialist law, research and policy centre dedicated to advancing the rights of people who have experienced slavery, slavery-like practices, including forced marriage, and people trafficking. Anti-Slavery Australia includes a law practice which provides legal advice and representation to men, women and children who have been trafficked or enslaved in Australia. The law practice has operated for 10 years and clients have access to legal staff who are qualified solicitors and migration agents.

Anti-Slavery Australia works with many organisations including the Law Council of Australia, academics, unions and other groups such as ACRATH, Australian Red Cross, the Good Shepherd Network, Salvation Army, Scarlet Alliance and World Vision. Anti-Slavery Australia convenes the Sydney Trafficking Response Network.

Anti-Slavery Australia received funding from the Australian government, through the *Proceeds of Crime Act 2002* (Cth), to raise awareness of all forms of slavery and people-trafficking and to develop and deliver a national online learning program for practitioners in the legal, health, social work and teaching professions, community members, and front-line government and law enforcement agencies.

In 2011 we established the Anti-Slavery Australia Freedom Awards to recognise contributions of individuals and organisations for innovative and effective initiatives to combat slavery and trafficking.



2011 Award Recipients: Maree Marsh (for Sr Louise Cleary), Francesca Pagani (Australian Red Cross), Dr Dianne Heriot, Sister Pauline Coll, Kelly Hinton (Project Respect), Sr Margaret Ng (SOSJ), Fiona McLeod, SC, The Hon Brendan O'Connor MP, Merima Trbojevic (DIAC), Dr Anne Gallagher, AO, Federal Agent Jennifer Cullen, Jenny Stanger (Salvation Army), and Jules Kim (Scarlet Alliance).

The director of Anti-Slavery Australia was appointed to the ongoing NSW Community Relations Committee Inquiry into the Exploitation of Women through Trafficking.

This submission draws upon our research, publications and experience representing people who have been trafficked into a wide range of exploitative situations. Anti-Slavery Australia is directed at the mission of preventing slavery, slavery-like conditions and people trafficking and protecting those who experience such serious harm. Anti-Slavery Australia is staffed by an energetic and dedicated team: Vicky Boutas, Ruth Chandler, Katie Fitzgerald, Maree Marsh, Beau Neilson, and Cinda Viranna with law placement students Louis Do and Cassandra Jenkins.

Acknowledgements

This submission was prepared by Associate Professor Jennifer Burn, director of Anti-Slavery Australia with researchers Arani Ahmed, Joanne Wilton and research contributions from participants in *The Law of Slavery and Human Trafficking*, a new subject in the UTS Law Faculty: Alexandra Arellano, Philippa Austin, Samantha Bloom, Samuel Chua, Sefakor Dokli, Sarah Edwards, Henrietta Farrelly-Barnett, Hollie Harber, Rachel Ho, Saddam Hossain, Gemma McMahon, Jessie McPherson, John Price, and Hollie Walls.

II. SUMMARY

- 2.1. Anti-Slavery Australia commends the Australian Government for the long-standing commitment and development of effective strategies to prevent slavery, slavery-like conditions and people trafficking, and the bipartisan support that such measures attract. Over the last decade, Anti-Slavery Australia has worked with government and community organisations to improve responses to these human rights abuses. Anti-Slavery Australia has identified six areas for further engagement to ensure that responses to these grave human rights abuses continue to be best practice and framed within a human rights and victim-centred approach.
- 2.2. The case for a national compensation scheme has been on the agenda of law policy bodies, the wider community and the Commonwealth for over 30 years, with a strong push in the last decade. **Part one** of this submission sets out the case for a national compensation scheme bringing together a compelling body of international, domestic and academic material, focussed on the need for a comprehensive compensation scheme for victims of Federal crimes.
- 2.3. Men, women and children who experience the human rights abuses of slavery, slavery-like conditions and people trafficking require support and assistance. To that end, Australia has developed a trafficking visa scheme and support program for trafficked victims. **Part two** of our submission draws on experience and research and makes recommendations about improvement of support programs and the need for further development based on a rights-centred and victim-based approach. Recommendations include community involvement, further research and awareness-raising. Without clear avenues for compensation, financial support and housing, mental and physical health support, and victim-based visa considerations, those who experience slavery, servitude, trafficking, forced labour and forced marriage will continue to be under-supported.
- 2.4. Forced marriage is a slavery-like practice and an emerging issue in Australia. **Part three** of this submission addresses forced marriage while noting that forced marriage is under-researched and under-reported. We commend the proposed offence of forced marriage in the Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012, and observe that criminal legislation is only one part of an effective response to forced marriage. We believe that a comprehensive response to forced marriage can be framed in consultation with the wider community. We also consider that civil remedies, as an adjunct to criminalisation, should be available to victims of forced marriage. Working with communities, especially young people, to develop sound and effective community

education, is essential in meeting the primary aim of preventing forced marriage and providing protection for those who experience forced marriage.

- 2.5. In **Part four** we address the Commonwealth legislative scheme dealing with slavery, slavery-like conditions and people trafficking, and note that the states and territories currently criminalise conduct that could fall within the Commonwealth scheme. We recommend more coordination between state and federal authorities to ensure that every person who experiences the human rights abuses of slavery, slavery-like conditions and people trafficking is identified and then provided with effective and continuing support.
- 2.6. We conclude in **Part five** with observations on the vulnerabilities of migrant workers, strategies to combat forced labour in the supply chain and the need for directed, effective and evaluated community awareness-raising. We observe that parallel responses to exploitation in the workplace have been developed in industrial and criminal law, and conclude that these parallel developments should be linked through legislation and cooperation between federal and state law enforcement agencies dealing with the offences of slavery, slavery-like conditions and people trafficking.

III. RECOMMENDATIONS

Recommendation 1: Australia’s response to slavery, slavery-like conditions and people trafficking

We recommend that the human rights of the victim are placed at the centre of efforts to address trafficking in Australia and that responses to slavery and trafficking are consistent with international human rights principles and Australia’s human rights obligations.

Recommendation 2: Visa protection of enslaved and trafficked people identified by Australian law enforcement agencies

We recommend that the current framework of visa support of people who have experienced slavery, slavery-like conditions and people trafficking be strengthened in the following ways:

- That any person identified by law enforcement as a ‘suspected victim of human trafficking’ may access a visa and support for 90 days, instead of the current 45 days;
- Witnesses who have made a contribution to the criminal justice process and who would be in danger if they return to their home country may be offered a permanent visa. Investigations of complex crimes can be time-consuming, involve multiple jurisdictions and require translation and interpretation of foreign language material. An unforeseen consequence is that victims may experience uncertainty about their long-term security and face continued separation from their family members, often young children, for long periods of time. We recommend that the currently operating informal policy about the timing of a recommendation to consider offering a permanent visa, (usually within three months of a decision to charge or not to charge a person with a criminal offence) should be reviewed;
- Additionally, we believe that in some circumstances there may be factors that should be taken into account, in the absence of a contribution to a police investigation or a criminal prosecution, such that the grant of a permanent visa may be appropriate.

Recommendation 3: First response to people in conditions of slavery, slavery-like conditions and who are victims of human trafficking

We recommend that the decision to provide initial victim support should extend beyond state and federal law enforcement agencies to include other recognised agencies.

Recommendation 4: National Compensation Scheme

We recommend the establishment of a national compensation scheme for victims of slavery, trafficking and related crimes.

Recommendation 5: Community awareness

We recommend:

- The development of a targeted, evaluated and coordinated broad-based community awareness program addressing slavery, slavery-like conditions and people trafficking;
- That information be provided to all people entering Australia about their rights and entitlements under Australian law, including information about the Emergency Triple 000 phone number, and workplace protections;
- That targeted multilingual information and services be developed about slavery, slavery-like conditions, including forced marriage, and people trafficking.

Recommendation 6: Domestic Workers Convention

We recommend that the Australian Government considers ratification of the International Labour Organisation's *Convention Concerning Decent Work for Domestic Workers* (16 June 2011).

Recommendation 7: Forced marriage

We recommend that the Australian Government:

- Establish a framework for the development of best practice guidelines and awareness-raising materials on forced marriage for government agencies and NGOs in consultation with the community working group;
- Ensure that the safety and long-term well-being of people who are at risk of, or have experience of, forced marriage is at the heart of the response to forced marriage by investing in culturally appropriate and targeted outreach services;
- Establish a consultative group to consider the introduction of civil protection orders and the expansion of the jurisdiction of the *Family Law Act 1975* (Cth);
- Introduce civil protection orders to ensure that people who are facing forced marriage or are in a condition of forced marriage can obtain orders protecting their rights;
- Consider amending the family violence provisions in Division 1.5 of the *Migration Regulations 1994* (Cth) to ensure they fully protect women (or men) who are forced to marry their partner and consider a complementary system of protection for people who have suffered forced marriage.¹

¹ These recommendations draw on the recommendations made in the Anti-Slavery Australia submission to the Attorney-General's Department, *Consultation on Forced and Servile Marriage* (February 2011).

Recommendation 8: Referral to the National Roundtable on People Trafficking

We recommend that the Australian Government National Roundtable on People Trafficking include as part of its agenda:

- The consideration of ethical supply chains and procurement policies and engage with business, trade unions and faith-based groups;
- The consideration of how to better coordinate complementary state and federal legislative responses, and support systems;
- The consideration of a framework that links industrial law to the criminal law by developing formalised liaison and referral between, inter alia, the Fair Work Ombudsman and the Australian Federal Police;
- The establishment of a national compensation scheme for victims of slavery, trafficking and related crimes;
- The establishment of a mechanism for consultation about initiatives aimed at preventing forced marriage and protecting those in forced marriage.

Recommendation 9: Ongoing review of criminal law

We recommend that Divisions 270 and 271 of the *Criminal Code Act 1995* (Cth) be reviewed in 5 years.

IV. SLAVERY, SLAVERY-LIKE CONDITIONS AND PEOPLE TRAFFICKING

4.1. Australia is a signatory to major international treaties and conventions that address slavery, slavery-like practices, human trafficking and forced labour. Trafficking is defined in Article 3 of the *United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing the Convention on Transnational Organised Crime* (the Trafficking Protocol).² Trafficking in persons is defined in the Trafficking Protocol as:

...the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of 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.³

4.2. Slavery and slavery-like practices are defined in a number of international conventions and treaties, such as the *International Convention to Suppress the Slave Trade and Slavery* 1926, and the *Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery* 1956. Forced labour is specifically defined and prohibited in the *Forced Labour Convention* 1930 and the *Abolition of Forced Labour Convention* 1957.

4.3. Australia is a signatory to the *Convention on the Elimination of All Forms of Discrimination Against Women* which requires that States take all measures to suppress all forms of trafficking in women⁴ and the *International Covenant on Civil and Political Rights*. Further, Australia is a signatory to the *Convention on the Rights of the Child*, and the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*.

4.4. In an international context, Australia is a destination country for women, children and men trafficked for exploitation. In Australia, fewer than 400 people have been officially identified as being trafficked in the period of 2005 to 2011.⁵ The majority of people identified have been women exploited in the sex industry, however there have been increasing reports of men and women trafficked into other industries and experiencing other forms of exploitation such as forced labour in

² *United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing the Convention on Transnational Organised Crime*, 15 November 2000.

³ *Ibid* Article 3(a).

⁴ *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, Article 6.

⁵ *Trafficking in Persons: The Australian Government Response July 2010-June 2011* (2011).

the hospitality industry, agriculture and in private homes.⁶ There have been reported cases of forced marriage⁷ and a reported case of organ trafficking.⁸ We anticipate that the 400 identified victims is under-representative of the full nature and extent of slavery, slavery-like conditions and people trafficking within Australia. With increased awareness of slavery and slavery-like practices, and the introduction of new legislation,⁹ we anticipate the figure of identified trafficked people will grow.

- 4.5. Australia has developed a commendable response to people trafficking and slavery. Over the past decade there have been a number of key reforms improving legislation and access to support for victims of trafficking. Throughout, measures to combat trafficking have received bi-partisan support. In Australia, this year we have seen the release of draft legislation following significant community consultation and two Parliamentary inquiries; the Senate inquiry into the Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012, this current inquiry, and an ongoing New South Wales inquiry. Australia co-chairs the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crimes, and supports projects such as the Asia Regional Co-operation to Prevent People Trafficking Project. Australia has established the National Roundtable on People Trafficking, and developed a number of resources, such as the Anti-Human Trafficking Community Resource and Guidelines for NGOs Working with Trafficked People.
- 4.6. This inquiry calls for a focus on Australia's efforts to address trafficking through prosecution, protection and support, as well as ways to encourage effective international action and international best practice to address all forms of slavery, slavery-like conditions and people trafficking. **Part one** of this submission will outline the case for a national compensation scheme that meets Australia's obligations, addresses international criticism and endorses the call of many government and community bodies over the past decade for its establishment.

⁶ Frances Simmons and Jennifer Burn 'Evaluating Australia's Response to all Forms of Trafficking: Towards Rights-centred Reform' (2010) 84(1) *Australian Law Journal* 712; Jennifer Burn, Frances Simmons and Sam Blay 'Combating Trafficking: Australia's Response to Modern Day Slavery' (2005) 79 *Australian Law Journal* 543; *Trafficking in Persons: The Australian Government Response July 2010-June 2011*, Report of the Anti-People Trafficking Interdepartmental Committee (2011); *The Australian Government Response May 2009-June 2010* (2010).

⁷ See for example *Kreet & Sampir* [2011] FamCA 22; *Madley & Madley and Anor* [2011] FMCAfam 1007; *Kandal & Khyatt & Ors* [2010] FamCA 508; *Department of Human Services & Brouker and Anor* [2010] FamCA 742.

⁸ Natalie O'Brien 'Organ Trafficker's death closes case' (2012) SMH 25 March 2012 <<http://www.smh.com.au/national/organ-traffickers-death-closes-case-20120324-1vqvn.html>>.

⁹ The Senate Committee has recommended the passing of the *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012*; The Senate Legal and Constitutional Affairs Committee, *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012*, Report (September 2012) Recommendation 4.

Part two of the submission makes observations on the trafficking visa system and victim support, with comparative studies of Italy, the United Kingdom, and the United States. **Part three** considers best practice responses to the emerging issue of forced marriage. **Part four** addresses the legislative environment and the criminalisation of slavery, slavery-like conditions and people trafficking. **Part five** concludes with a brief discussion about the vulnerabilities of migrant workers, the challenge of ensuring that goods and services in the Australian supply chain are slavery free, and the ongoing and significant need for community awareness raising on all forms of slavery, slavery-like practices, including forced marriage, and human trafficking.

PART ONE: VICTIMS COMPENSATION AND REPARATIONS

V. THE CASE FOR A NATIONAL COMPENSATION SCHEME

- 5.1. Over the past 10 years, Australia has taken major steps towards fulfilling its international human rights obligations with respect to slavery and human trafficking through improved “prevention, detection, investigation and criminal prosecution of offenders.”¹⁰
- 5.2. The gap in Australia’s response is the accessibility and availability of reparations to identified victims. In particular, payments of compensation. The existing Australian compensation framework is not only inadequate for victims of slavery and human trafficking but for all victims of Federal offences. Prior to 1990 the main complainant or ‘victim’ of Federal offences was the Commonwealth rather than natural persons.¹¹ However, Federal legislation has more recently evolved toward codifying some of Australia’s international human rights obligations,¹² resulting in an increased number of ‘natural person’ victims.

Australia’s international obligations

- 5.3. In 2004 Australia ratified the *United Nations Convention against Transnational Organized Crime*¹³ and in 2005 ratified the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime* (Trafficking Protocol)¹⁴, both of which require State parties to provide effective access to remedies for victims of trafficking.
- 5.4. Australia is also a signatory to the 1985 “*Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*”¹⁵ which states that “when compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation... (to victims and their families)”¹⁶ and goes on to state that “the establishment, strengthening and expansion of national funds for compensation to victims should be encouraged.”¹⁷

¹⁰ Pamela Stewart, ‘Tortious Remedies for Deliberate Wrongdoing to Victims of Human Trafficking’ (2011) 34 *University of New South Wales Law Journal* 898, 904; see also Frances Simmons and Jennifer Burn ‘Evaluating Australia’s Response to all Forms of Trafficking: Towards Rights-centred Reform’ (2010) 84(1) *Australian Law Journal* 712; *Trafficking in Persons: The Australian Government Response July 2010-June 2011*, Report of the Anti-People Trafficking Interdepartmental Committee (2011).

¹¹ Sam Garkawe and Michael O’Connell, ‘The Need for a Federal, Australia-Wide Approach to Issues Concerning Crime Victims’ (2007) 18(3) *Current Issues in Criminal Justice* 489, 490.

¹² *Ibid.*

¹³ *United Nations Convention against Transnational Organised Crime*, opened for signature 15 November 2000, [2004] ATS 12, (entered in to force 29 September 2003).

¹⁴ Opened for signature 15 November 2000, 2337 UNTS 319 (entered into force 25 December 2003).

¹⁵ United Nations General Assembly Resolution (A/RES/40/34) 29 November 1985.

¹⁶ *Ibid.* 12.

¹⁷ *Ibid.* 13.

- 5.5. This view of the General Assembly was reaffirmed through the 2006 *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*.¹⁸ Article 16 of the Guidelines states:

States should endeavour to establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligation.

- 5.6. Whilst the Guideline only recommends, rather than requires, States to provide national compensation funds for victims, Article 2 states:

If they have not already done so, States shall, as required under international law, ensure that their domestic law is consistent with their international legal obligations by:

...(b) Adopting appropriate and effective legislative and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice;

(c) Making available adequate, effective, prompt and appropriate remedies, including reparation, as defined below...

- 5.7. In Australia, there are currently eight different state and territory schemes providing financial compensation for victims of crime.¹⁹ These different schemes consider different categories of harm, time limits, and levels of award.²⁰ The current inconsistencies in the Australian state and territories compensation frameworks are an impediment to victims of slavery and human trafficking in obtaining the “fair, effective and prompt” access to justice, in keeping with international best practice. Accordingly, Australia is falling short of its international human rights obligations in the area of appropriate remedies.

Comments of the Special Rapporteur on Trafficking in Persons, especially women and children

- 5.8. In the Special Rapporteur’s November 2011 mission to Australia Report it was noted that while victims of crimes are able to access compensation under state and territory schemes, remedies vary from state to state, with different eligibility requirements, different time frames, different caps on the maximum compensation

¹⁸ United Nations General Assembly Resolution (A/RES/60/147) 21 March 2006.

¹⁹ *Victims of Crime(Financial Assistance) Act 1983* (ACT); *Victim Support & Rehabilitation Act 1996* (NSW); *Crimes (Victims Assistance) Act 2006* (NT); *Victims of Crime Assistance Act 1996* (Vic); *Criminal Injuries Compensation Act 2003* (WA); *Victims of Crime Assistance Act 2009* (Qld); *Victims of Crime Act 2001* (SA); *Victims of Crime Assistance Act 2009* (Qld); *Victims of Crime Act 2001* (SA); *Victims of Crime Assistance Act 1976* (Tas).

²⁰ Jennifer Burn, *Committee Hansard*, 29 August 2012, 27.

and different access to compensation for pain and suffering. Furthermore, she noted that some schemes require a psychological assessment to prove damage and loss, which many victims are reluctant to undergo given their fear of re-traumatisation.²¹

5.9. The Special Rapporteur noted that the establishment of a comprehensive federal compensation scheme was an overarching recommendation of the public consultation, one that was echoed at the National Roundtable on People Trafficking. If implemented, this recommendation would be in accordance with the obligations of Australia with respect to remedies under the Trafficking Protocol and international human rights law.²²

5.10. Two of the final recommendations of the Special Rapporteur's report to Australia are:²³

(g) Establish, at the Federal level, a comprehensive national compensation scheme for victims of trafficking.

(h) Strengthen criminal justice capacity to identify and confiscate assets and proceeds of trafficking-related crimes, and develop mechanisms and procedures to enable assets and proceeds to be used for continuing support to victims of trafficking.

5.11. Importantly, the report made the following recommendations in relation to reparations and victims of trafficking accessing compensation:²⁴

States should establish legislative provisions for the confiscation of assets and proceeds of trafficking offences, and for the use of such assets and proceeds to compensate trafficked persons. States should also adequately train law enforcement officials in identifying, tracing, freezing and confiscating assets connected to the crime of trafficking.

Where State-funded compensation schemes for victims of crime exist, States should abolish eligibility criteria which have the effect of preventing trafficked persons from seeking compensation, such as nationality and long-term residence requirements. Where no compensation scheme exists, States should consider establishing one that provides compensation to trafficked persons and using confiscated assets and tax deductible voluntary donations to finance such a scheme. Compensation through such a scheme should be available to all groups of trafficked persons on a non-discriminatory basis.

²¹ Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo. Submission to the UN Human Rights Council 18 May 2012 (A/HRC/20/18).

²² Ibid.

²³ Ibid 82.

²⁴ Ibid 70 and 71.

- 5.12. The Special Rapporteur reported to the General Assembly on the right to an effective remedy for trafficked people,²⁵ noting that in the course of preparing the report, she had been made aware that:

...despite the fundamental guarantee of the right to an effective remedy under international law, there remains a large gap in practice between legal provisions and their implementation in relation to trafficked persons.²⁶

- 5.13. In Chapter III of her April 2011 report the Special Rapporteur outlined a thematic analysis of the right to an effective remedy for trafficked persons²⁷. The four remedies of restitution, recovery, compensation, and guarantees of non-repetition are mirrored in the Trafficking Protocol.

RESTITUTION

- 5.14. In the context of trafficking, these measures would include the release of the trafficked person from detention; return of property including travel documents; recognition of legal identity; and assistance and support, including voluntary repatriation to the victim's country of origin if desired. The Special Rapporteur noted that some measures of restitution, particularly those associated with repatriation needed to be dealt with cautiously and urged State Parties to take a victim-centred approach to such a remedy.

RECOVERY (REHABILITATION)

- 5.15. The Special Rapporteur stated that while “many States have made positive progress in establishing and providing services to support recovery of trafficked persons, a number of challenges remain in ensuring that these services are provided in a manner that is non-discriminatory and enhances the human rights of trafficked persons.”²⁸ The Special Rapporteur also noted that there is empirical evidence to suggest that the minimum period of ‘recovery and reflection’ for a trafficked person is 90 days.²⁹

COMPENSATION

- 5.16. The Special Rapporteur outlined the various compensation avenues available:
- a. Criminal, civil or industrial legal proceedings: the Special Rapporteur noted that the making of compensation awards during criminal proceedings is the

²⁵ Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo. Submission to the UN Human Rights Council 13 April 2011 (A/HRC/17/35).

²⁶ Ibid 9.

²⁷ Ibid 20-41.

²⁸ Ibid 26.

²⁹ Ibid 27.

“exception rather than the rule”³⁰; that it is “extremely difficult for (victims) to receive compensation through civil proceedings (as they are)...time-consuming, expensive and complicated.”³¹

- b. State-funded compensation funds: the Special Rapporteur noted that State-administered schemes have generally been perceived as more favourable than legal proceedings, given that their processes are relatively streamlined, less bureaucratic and quicker; and compensation may be made without having to apprehend and convict a trafficker.³²
- c. Non-judicial methods: it was noted that in a number of cases, trafficked persons have obtained compensation from out-of-court settlements negotiated by governmental and non-governmental bodies.³³

GUARANTEES OF NON-REPETITION

5.17. The Special Rapporteur stated that the remedy of satisfaction and guarantees of non-repetition can be particularly important in compensating the dignity and reputation of the victim and places an onus on States to conduct prompt, efficient and independent investigations into human rights violations.

Australia’s calls for a national compensation scheme

5.18. Domestically, there have been recommendations for a Federal victims’ compensation scheme since as early as 1980 when the Australian Law Reform Commission (ALRC) outlined a detailed proposal for such a scheme. In their report the ALRC stated:

Potential *lacunae* in the protection afforded victims of crime injured within the jurisdiction of the Commonwealth, and the deficiencies and inequalities in the compensation which may be available to victims of Federal crimes under existing Australian State programs, lead us to the conclusion that a new Federal crime victim compensation scheme should be established. As a long term aim, compensation should be provided for victims of all Federal crime, violent and non-violent.³⁴

5.19. In their concluding paragraph, the ALRC summarised their position by stating:

...the existing levels of compensation provided for victims under other Australian schemes can operate unfairly both in their procedures and in the amounts awarded to victims and their dependants. The Commonwealth should avoid these errors. The time has come for a thoroughly new approach to supporting those who suffer injury

³⁰ Ibid 31.

³¹ Ibid 32.

³² Ibid 36.

³³ Ibid 39.

³⁴ Australian Law Reform Commission, ‘Sentencing of Federal Offenders’ *Report 15* (1980), 466.

as a result of crime in our society...Crime is an offence against the whole community and the community should shoulder its responsibility to the victims of crime.³⁵

- 5.20. The ALRC in 1980 went so far as to propose a Draft Bill to establish a national scheme which included clauses proposing the administration of such a scheme. Whilst written over 30 years ago, the proposal still appears to make economic sense, particularly in the current fiscal environment:

A Commonwealth Crimes Compensation Tribunal should be established. Because of the small workload likely to be experienced by a tribunal reviewing claims by victims of Federal and Territory crimes, an entirely new body and staff to perform this function should not be required. Instead, claims should be made to a tribunal, constituted by a person who for the time being constitutes a Commonwealth Employees' Compensation Tribunal. There should be a right of review of the decisions of the Tribunal in the Administrative Appeals Tribunal. There should be an appeal to the Federal Court of Australia on questions of law. Following the making of an order for compensation, a successful applicant should be entitled to payment of the sum ordered as a debt due and payable by the Commonwealth to the applicant.³⁶

- 5.21. In their 2006 report *Same Crime, Same Time; Sentencing of Federal Offenders*³⁷ the Australian Law Reform Commission referred back to their 1980 conclusion that a Federal victim compensation scheme was "desirable and should be established", although noted that the question was outside the parameters of their current sentencing enquiry.³⁸

- 5.22. In their recent report *Family Violence: A National Legal Response*³⁹ the Australian Law Reform Commission reiterated the importance of victims' compensation schemes:

Like restitution orders, victims' compensation schemes provide a more informal and efficient forum than civil litigation. They are also more effective in that victims have access to a pool of dedicated funds, whereas restitution from an offender depends upon the offender's capacity to pay.⁴⁰

- 5.23. The 2007-2008 Annual Report of Standing Committee of Attorneys-General stated that:

³⁵ Ibid 489.

³⁶ Ibid 482.

³⁷ Australian Law Reform Commission, 'Same Time, Same Crime: Sentencing of Federal Offenders' *Report 103* (2006).

³⁸ Ibid 277.

³⁹ Australian Law Reform Commission, 'Purposes of Law Relevant to Family Violence: Victims' Compensation' *Report 114/4*.

⁴⁰ Ibid 4.113.

Ministers requested a report on a comparison of victims’ rights schemes in jurisdictions, considering best practice approaches including a national approach to victims’ compensation.⁴¹

- 5.24. On 18 April 2011, the then President of the Law Council of Australia, Alexander Ward, wrote to the then Attorney-General The Hon Robert McClelland MP regarding the Attorney’s introduction of the Social Security Amendment (Supporting Australian Victims of Terrorism Overseas) Bill 2011 into the Australian Parliament.⁴² In that letter, the Law Council noted that:

the Bill raises equity issues in relation to other victims of overseas and/or Commonwealth crimes, who either do not have access, or have inadequate access, to State and Territory compensation schemes.

[...] The Bill is intended to address a gap in which victims have no redress to State and Territory compensation schemes because the crime occurred overseas. However, the Bill does not acknowledge that there is a much broader gap in Commonwealth legislation which affects many more people than just the victims of overseas terrorism. In short, there is no comprehensive compensation scheme for victims of Commonwealth crimes whether committed in Australia or abroad.⁴³

- 5.25. Further, in its submission to the Senate Legal and Constitutional Affairs Legislation Committee on both the Social Security Amendment (Supporting Australian Victims of Terrorism Overseas) Bill 2011 and the Assisting Victims of Overseas Terrorism Bill 2012 which was a Private Members Bill introduced by the Shadow Attorney-General Senator Brandis, the Law Council reiterated:

The Council is also of the view that the narrow focus of the schemes proposed in both Bills highlight the absence of a consistent and comprehensive scheme to compensate victims of Commonwealth crimes committed either at home or abroad.⁴⁴

- 5.26. In December 2011, the State Government of Victoria published their Government Response to the *Inquiry into People Trafficking for Sex Work*.⁴⁵ Recommendation 24 of the Response stated that:

While victims of sex trafficking are not necessarily excluded from the application of either scheme [the two Victorian schemes], each scheme has requirements for eligibility and respective limits on amount and type of compensation. Whether a trafficking victim is eligible will depend on the circumstances in each case.
....Consideration may also be given to whether a Commonwealth victims’

⁴¹ Attorney General’s Department, Annual Report 2007-2008.

⁴² Law Council of Australia, Submission to the Attorney General’s Department, Social Security Amendment (Supporting Australian Victims of Terrorism Overseas) Bill 2011 (18 April 2011).

⁴³ Ibid 1.

⁴⁴ Ibid.

⁴⁵ State Government of Victoria *Inquiry Into People Trafficking for Sex Work – Government Response* (December 2011).

compensation scheme may be established to compensate victims for these Commonwealth offences. This question may be considered through the Standing Council on Law and Justice.⁴⁶

5.27. This issue was considered by the Standing Council on Law and Justice's predecessor, the Standing Committee of Attorneys-General, in 2009 when there was a recommendation to establish such a scheme. Although victims' remedies remains on their list of active enquiries on their website, it is unclear whether the issue is progressing.⁴⁷

5.28. During evidence to the Senate Legal and Constitutional Affairs Legislation Committee public hearing on the Assisting Victims of Overseas Terrorism Bill 2012 and the Social Security Amendment (Supporting Australian Victims of Terrorism Overseas) Bill 2012, the Co-Director of Criminal Law and Human Rights at the Law Council of Australia, Rosemary Budavari, indicated that the Commonwealth must consider either the establishment of a national compensation scheme for victims of Federal crimes, or a harmonising of state based compensation schemes. She stated:

by singling out one particular group of offences within the Commonwealth Criminal Code, there is an equity issue in relation to victims of other offences under our legislation. ... a number of organisations have been advocating for a considerable period of time that there should be a better Commonwealth compensation scheme overall... so what we would be suggesting is that there needs to be a public consultation on a general Commonwealth victims compensation scheme... I think our submission refers to the fact that a previous Minister for Home Affairs, Bob Debus, indicated that the government was prepared to undertake such a consultation process, but that did not come to fruition. The other approach we have suggested in our submission ... is to look at harmonising existing state and territory victims compensation schemes. ... we would encourage your committee to make recommendations about either the investigation of a Commonwealth victims compensation scheme or whether the process underway through the Standing Council on Law and Justice could in fact address how state and territory schemes might be able to be extended to some victims of Commonwealth offences.⁴⁸

5.29. Most recently, several of the submissions to the Senate Legal and Constitutional Affairs Committee on the Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012 called for a Federal victims' compensation scheme to be established. These included:

⁴⁶ Ibid 17.

⁴⁷ Attorney General and Justice, Standing Council on Law and Justice, 'Current Projects and Achievements' <http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/pages/scag_achievements>.

⁴⁸ Rosemary Budavari, *Committee Hansard* 19 April 2012.

1. Anti-Slavery Australia: “Australia is required to provide trafficked people with access to effective remedies (Trafficking Protocol & ICCPR) and yet there is no clear process that would allow victims of trafficking to claim compensation...it would be helpful if the Committee recommended that Australia develops a national compensation scheme for victims of trafficking.”⁴⁹
2. Project Respect: “Trafficking is a Federal offence; however, compensation is only accessible through State schemes. Compensation schemes for those who have been trafficked vary between the States, resulting in different entitlements depending on which State a person was trafficked into, different timeframes in which a victim is eligible to apply and further complicated when they have been trafficked between different States of Australia (in Project Respect’s experience, this is increasingly common as a method to avoid detection).” Project Respect recommended that a federal compensation scheme be developed for all victims of trafficking.⁵⁰

5.30. The subsequent Senate Committee report recommended:

the Australian Government further investigate the establishment of a federal compensation scheme for victims of slavery and people trafficking.⁵¹

5.31. The Report quoted the evidence which Associate Professor Jennifer Burn provided to the Senate enquiry on the unsatisfactory system of relying on state compensation schemes for victims of Federal offences:

Across Australia there are eight different schemes providing financial compensation for victims of crime. There are different time limits, categories of harm considered and levels of award, leading to inconsistencies across jurisdictions and differences in outcomes. The problem can be put simply: the amount of compensation available to victims of federal trafficking offences depends on the place in Australia where the offence took place.⁵²

Expert academics on a national compensation scheme

5.32. In a March 2007 paper,⁵³ Michael O’Connell, the South Australian Commissioner for Victims’ Rights and Sam Garkawe, Associate Professor at the School of Law and Justice, Southern Cross University, contended for a Federal, Australia-wide approach to victims of Federal crimes as well as a harmonisation of the current

⁴⁹ Anti-Slavery Australia, *Submission 28*, 9.

⁵⁰ Project Respect submission to Senate Legal and Constitutional Affairs Committee on the Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012.

⁵¹ The Senate Legal and Constitutional Affairs Committee, *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012*, Report (September 2012) 3.88.

⁵² *Committee Hansard*, 29 August 2012, p.27.

⁵³ Sam Garkawe and Michael O’Connell, ‘The Need for a Federal, Australia-Wide Approach to Issues Concerning Crime Victims’ (2007) 18(3) *Current Issues in Criminal Justice* 489.

State based support services to victims of state and territory crimes. Noting that prior to the 1990's the Commonwealth itself was the victim of most Federal crimes, they went on to state that:

Since the 1990's however, there are a number of Federal crimes that are directed against natural persons as victims, including terrorist related offences, international crimes such as genocide, crimes against humanity and war crimes, and crimes related to sexual servitude and people smuggling. It is thus essential that 'victims' entitlements' such as compensation, their rights during the criminal justice system, support services and other significant help for victims be granted at the Federal level.⁵⁴

- 5.33. In a 2011 paper published in the *University of NSW Law Journal*, Pam Stewart, a senior lecturer in the Faculty of Law at the University of Technology, Sydney stated:

The establishment of a federal compensation scheme for victims of federal crimes would be a constructive and valuable measure to provide a certain pathway to compensation for victims of trafficking and slavery. Such a scheme would certainly ensure that Australia meets its international legal obligations to victims and would underscore Australia's commitment to human rights.⁵⁵

- 5.34. M. Cherif Bassiouni, Emeritus Professor of Law at DePaul University and President Emeritus of the International Human Rights Law Institute which he founded in 1990, wrote in 2006:

States and their national legal systems serve as the primary vehicle for the enforcement of international human rights and humanitarian law. Accordingly, the existence of State duties to provide a remedy and reparations forms the cornerstone of establishing accountability for violations and achieving justice for victims.⁵⁶

- 5.35. Dr Anne Gallagher notes that the international tide is beginning to turn with State parties recognising the link between proceeds of trafficking crimes and compensation for victims

International and regional policy instruments and the pronouncements of human rights bodies provide some indication that States are beginning to accept the notion that confiscated proceeds of trafficking crimes should be returned, in some form or another, to the victims whose exploitation has made such profits possible.⁵⁷

⁵⁴ Ibid 490.

⁵⁵ Pamela Stewart, 'Tortious Remedies for Deliberate Wrongdoing to Victims of Human Trafficking' (2011) 34 *University of New South Wales Law Journal* 898.

⁵⁶ Mahmoud Cherif Bassiouni, 'International Recognition of Victims' Rights' (2006) 6 *Human Rights Law Review* 203, 231

⁵⁷ Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, 2010) 403.

United Nations models for national compensation schemes

5.36. The United Nations Office on Drugs and Crime (UNODC) has developed a Model Law Against Trafficking in Persons.⁵⁸ Part VII of the Model Law deals with the issue of compensation for victims. In the commentary regarding the establishment of state-based compensation funds, it is noted that the preference is for State parties to have a general fund for victims of crime. These provisions are marked “mandatory” in the model law rather than “optional.” The commentary and proposed Articles are set out below:

Article 29. Compensation for victims of trafficking in persons

1. Without prejudice to the power of the court to order an offender to pay compensation to a victim of trafficking in persons under article 28 of this Law, the [competent authority] shall make arrangements for the payment of compensation to, or in respect of, persons who have been identified as victims of trafficking in accordance with the procedures established under article 18 of this Law. Such arrangements shall specify, inter alia:
 - (a) The circumstances under which compensation may be paid;
 - (b) The basis on which compensation is to be calculated and the amount of compensation payable taking into account any compensation received or sums recovered under article 28 of this Law;
 - (c) The fund from which payments shall be made;
 - (d) The application procedure for payment of compensation; and
 - (e) A procedure for review and appeal of decisions with respect to claims for compensation.
2. The [competent authority] shall ensure that victims of trafficking are able to apply for payment of compensation under this article even where the offender is not identified, caught or convicted.
3. [For use where a specific fund must be established] For the purpose of making compensation payments to victims of trafficking in accordance with this article, the [competent authority] shall establish a fund for victims and designate administrators of the fund. Administrators of the fund shall accept payments to the fund from:
 - (a) Moneys allocated to the fund in accordance with [relevant fiscal law];
 - (b) Moneys confiscated and proceeds from the sale of goods or assets confiscated under the provisions of national law;
 - (c) Voluntary payments, grants or gifts to the fund;
 - (d) Income, interest or benefits deriving from investments of the fund; and
 - (e) Any other source designated by the administrators of the fund.
4. [For use where an appropriate victim compensation fund already exists] The [competent authority] shall ensure that the administrators responsible for [the fund] have authority to make payments to victims of trafficking in accordance with this article.

⁵⁸ United Nations Office on Drugs and Crime, *Model Law Against Trafficking in Persons*, 2009.

5. The immigration status or the return of the victim to his or her home country or other absence of the victim from the jurisdiction shall not prevent the court from ordering payment of compensation under this article.

5.37. In 2008, as part of their Global Programme against Trafficking in Human Beings, UNODC published the *Toolkit to Combat Trafficking in Persons*⁵⁹ to assist State parties to comply with the Organized Crime Convention and the Trafficking Protocol, both of which Australia has ratified. The *Toolkit to Combat Trafficking in Persons* addresses the issue of restitution and compensation for victims⁶⁰ and states:

State-funded or state-subsidized compensation schemes have the great advantage of providing a guaranteed payment of compensation to the victim and it is not necessary for a specific perpetrator to be located or identified...Compensation schemes may be funded from several sources including: fines, confiscated property of the perpetrators, tax revenues, other means of State funding, donations from private individuals and institutions. In order for such funds to assist victims effectively:

- There should be no exclusion on the grounds of “illegality” (given that people who are trafficked rarely have legal status in their destination country);
- The process should be simple and efficient;
- Victims should be protected from re-victimisation by the court process to the greatest extent possible.⁶¹

International models for national compensation schemes

EUROPE

5.38. The Council of Europe *Convention on Action against Trafficking in Human Beings*⁶² is comprehensive in its approach to compensation and legal redress. Article 12 (2) of the Council Directive 2004/80/EC of 29 April 2004 allows for EU citizens to make compensation claims for cross-border situations with regards to violent international crimes. It requires that:

All Member States shall ensure that their national rules provide for the existence of a scheme on compensation to victims of violent intentional crimes committed in their respective territories, which guarantees fair and appropriate compensation to victims.

⁵⁹ United Nations Office on Drugs and Crime, *Toolkit to Combat Trafficking in Persons*, 2008.

⁶⁰ Ibid 8.17.

⁶¹ Ibid 437.

⁶² Council of Europe *Convention on Action against Trafficking in Human Beings* (CETS No. 197) May 2005.

- 5.39. A 2008 Polish report entitled *Compensation for Trafficked and Exploited Persons in the OSCE Region*, published by the Organisation for Security and Co-operation in Europe Office for Democratic Institutions and Human Rights, referred to the availability of national compensation schemes in the report's Executive Summary:

In addition to the ability to claim from the trafficker/exploiter, in France, the UK, Romania and the US there is also the possibility to claim compensation from a state fund. Payments out of such funds are usually restricted to victims of crimes of violence or where injury has been sustained. These systems usually compensate specified types of material (financial) loss although in France and the UK other types of damage (such as "pain and suffering") can also be claimed. These mechanisms are relatively straightforward in terms of procedure and they guarantee payment. However, access to them is restricted by nationality and character requirements, which have been used to invalidate claims of trafficked persons. In the UK and France there are well-established NGOs with expertise in assisting victims in making claims from these funds.⁶³

- 5.40. The 2008 Polish report went on to state that advice services regarding a trafficked persons' rights and how to access those rights are an essential element in the right to compensation, and that support services for essential needs such as housing and medical assistance should be provided during the compensation claim. It further noted a variety of factors which affect compensation claims, such as evidence, or the failure of the State to seize assets, as well as jurisdictional issues in seizing assets when the perpetrator and victim are in different States. It highlighted the importance of the rule of law:

a compensation system can only function as well as the judicial and administrative environment in any specific country, so it is important that a culture of independence, competence and efficiency exists, especially within the judicial and prosecutorial services.⁶⁴

SWITZERLAND

- 5.41. The *Federal Victim Support Act* (Switzerland) was entirely revised and became operative on 1 January 2008. This Act is the statutory basis for providing assistance to victims of human trafficking and for compensating NGOs for specialised victim assistance services they provide on commission by the cantons. Article 9(1) of the Act stipulates that when establishing and operating victim assistance centres, the cantons are required to take into consideration the different needs of various victim groups, a term that subsumes victims of human trafficking. The cantons are free to operate public or joint assistance centres or to commission private assistance centres.⁶⁵

⁶³ Office for Democratic Institutions and Human Rights, *Compensation for Trafficked and Exploited Persons in the OSCE Region*, 2008, 10.

⁶⁴ Ibid.

⁶⁵ Swiss Coordination Unit against the Trafficking in Persons and Smuggling of Migrants, <http://www.ksmm.admin.ch/ksmm/en/home/themen/menschenhandel/meilensteine_mh.html>

UNITED KINGDOM

5.42. The United Kingdom is a member of the Council of Europe and is a signatory to the *Council of Europe Convention on Action against Trafficking in Human Beings*⁶⁶ (European Trafficking Convention). The Group of Experts on Action against Trafficking in Human Beings (GRETA) is the Council of Europe's monitoring body to ensure compliance by States who have ratified the Convention.

5.43. On 12 September 2012, GRETA delivered their 'First evaluation round' Report concerning the implementation of the Convention by the UK.⁶⁷ Article 15(4) of the Convention provides:

Each Party shall adopt such legislative or other measures as may be necessary to guarantee compensation for victims in accordance with the conditions under its internal law, for instance through the establishment of a fund for victim compensation or measures or programmes aimed at social assistance and social integration of victims, which could be funded by the assets resulting from the application of measures provided in Article 23 [Art 23 relates to the confiscation of proceeds of crime].

5.44. In their September 2012 report, GRETA outlined the four avenues available for victims of trafficking to claim compensation in the UK.⁶⁸ These avenues are:

- (i) Through prosecutors requesting a compensation order upon conviction in appropriate cases under Sections 130-132 of the *Powers of the Criminal Courts (Sentencing) Act 2000*;
- (ii) Through confiscation and compensation under Section 13(2) of the *Proceeds of Crime Act 2002*;
- (iii) Through the victim suing the offender in civil courts;
- (iv) Through the Criminal Injuries Compensation Authority (CICA). This authority administers a national compensation scheme which awards a maximum of 500,000 GBP to victims of violent crimes including physical injury, mental injury and disease. The scheme requires the victim to report the crime to a public authority but does not require a prosecution.⁶⁹

5.45. GRETA noted that there is a lack of statistics on compensation claims through any of these avenues, making assessment difficult.⁷⁰ However, they noted that compensation through avenues (i) and (iii) was extremely rare and that although there had been some payments through the national scheme there were numerous barriers to victims seeking compensation, including information not being available to victims in a language they understood.

⁶⁶ Council of Europe *Convention on Action against Trafficking in Human Beings* (CETS No. 197) May 2005.

⁶⁷ GRETA (2012) 6, *Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the United Kingdom*, Strasbourg, 12 September 2012.

⁶⁸ *Ibid* 291.

⁶⁹ *Ibid*.

⁷⁰ *Ibid* 292.

- 5.46. GRETA also noted that the 2008 UK Criminal Injuries Compensation Scheme “does not recognise victims of trafficking as a separate category of applicants”⁷¹ meaning that victims of slavery-like conditions, including humiliation and the constant fear for their life, may not be entitled under the tariff. GRETA noted that the UK authorities have indicated they conducted a public consultation to review the compensation scheme from January to April 2012 and will be informing GRETA of the outcome.⁷²

⁷¹ Ibid 294.

⁷² Ibid.

VI. PROPOSED MODELS FOR AN AUSTRALIAN FEDERAL VICTIMS' COMPENSATION SCHEME

Model 1 - Federal Tribunal

This model would entail either the establishment of a new Federal tribunal to administer a Federal victims' compensation scheme or increasing the jurisdiction of a current Federal tribunal or other administrative body to determine compensation claims by victims of Federal crimes.

Taking into account the tight fiscal environment and the relatively small number of Federal victims of crime, as compared with the cost of funding a new tribunal, we believe that increasing the jurisdiction of a current tribunal or other administrative body would be the most cost-effective and appropriate way forward.

One possibility may be through the administrative function of Comcare. Pursuant to the *Asbestos-related Claims (Management of Commonwealth Liabilities) Act 2005*, Comcare assumes and manages asbestos-related conditions liabilities of the Australian Government.

A possible solution may be to draft an amendment to Part II of the *Safety, Rehabilitation and Compensation Act 1988* which deals with payments of compensation to include provisions for Comcare to administer compensation payments to victims of Federal offences.

Alternatively, separate Federal victim's compensation legislation could be enacted with either Comcare or the Fair Work Ombudsman as the administering body.

Model 2 - Ex-gratia payments

In several states of Australia, ex-gratia payments are available to victims of crime where their circumstances would exclude them from claiming under the state victims' compensation scheme. For example, in South Australia ex-gratia or discretionary payments may be awarded by the Attorney-General as an alternative to claiming victims of crime compensation. The Victims Support Service South Australia has published an information guide for victims (*Victims of Crime Compensation* July 2011) which states:

You may be eligible to claim a Discretionary Payment if the level of emotional and psychological and/or physical trauma sustained does not meet the minimum threshold for a VOCC payment. A payment may also be awarded to victims who have incurred a small out of pocket expense as the result of a crime that is not recoverable from any other source (e.g. insurance).

Model 3 - State tribunal exercising Federal jurisdiction

In their recent submission to the Senate Legal and Constitutional Affairs Committee on the Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012 before the Parliament, the Uniting Church in Australia Synod of Victoria and Tasmania included as an annexure their previous comprehensive policy paper on compensation for victims of trafficking in Australia. In this paper they noted that:

...survivors of human trafficking cannot access compensation by virtue of their status as victims of a Commonwealth offence. They must instead frame their claims as victims of lesser state criminal offences which state compensation schemes recognise. Thus there is no clearly defined legal avenue through which survivors of trafficking can seek compensation. This means Australia is currently not compliant with its obligations under Article 6.6 of the Palermo Protocol which requires state parties to ensure their domestic legal system contains pathways for survivors of trafficking to obtain compensation.

The policy paper went on to outline a number of possible pathways to compensation for victims of trafficking. One of these pathways was to suggest that:

if states could be funded to compensate victims of federal as well as state crimes they could alter the eligibility requirements so that a survivor may apply for state-funded compensation in the state they are currently residing in if they are a survivor of a federal, rather than state, criminal offence. There is a need for state based victims of crime compensation tribunals to add trafficking to their list of compensable violent crimes...Perhaps the biggest challenge associated with implementing these proposals to reform state crimes compensation schemes is the difficulty involved in achieving uniformity between the various states and territories.

The paper goes on to say however that due to the inconsistencies between state and territory legislation and the unwillingness of some states to harmonise their approach in this area:

ensuring each state and territory enacts the reforms in a uniform manner is at best difficult, and at worst unachievable.

Another option would be for the Commonwealth to nominate one state or territory scheme and legislate for that particular scheme to exercise Federal jurisdiction. This would of course depend on the agreement of the relevant state or territory government and appropriate funding arrangements.

Model 4 - Payments through appropriation

The Assisting Victims of Overseas Terrorism Bill (2012) (Cth) which is currently before the Senate provides for payments to be made to such victims from the Consolidated Revenue Fund through appropriation by the Parliament. This would also be an option for a more comprehensive Federal victims' compensation scheme.

Section 13 of the Assisting Victims of Overseas Terrorism Bill (2012) (Cth) states:

Appropriation

(1) Payments under the framework are payable out of money appropriated by the Parliament for the purpose.

(2) Despite anything else in this Act, this Act does not create an entitlement to payment under this Act unless and until the Consolidated Revenue Fund has been appropriated for the purpose of this Act.

- 6.1. In conclusion, Anti-Slavery Australia recommends the establishment of a national compensation scheme for victims of slavery, slavery-like conditions and people trafficking and has outlined four suggested models for consideration by the Australian government. We welcome the opportunity to contribute further to any consultation about this important issue.

PART TWO: TRAFFICKING VISA SYSTEM AND SUPPORT PROGRAM

The Australian government established a system of visa support for victims of trafficking in January 2004. Following monitoring, evaluation and widespread consultation by officers of the Department of Immigration and Citizenship, the framework was amended with effect from July 2009.⁷³ Enslaved or trafficked people may also be eligible for another visa including a Protection visa on refugee grounds or the provisions relating to complementary protection.

VII. VISA SYSTEM FOR TRAFFICKED PEOPLE

The trafficking visa scheme contains three different visas.

- 7.1. The Bridging F Visa (Class WF) is available if ‘an officer of the Australian Federal Police, or of a police force of a State or Territory, has told Immigration, in writing, that the applicant has been identified as a suspected victim of human trafficking’ or is a member of the person’s immediate family.⁷⁴ This visa may be granted regardless of whether the person will assist in police investigations,⁷⁵ and holders of a Bridging F Visa can access the Victim Support Program run by the Australian Red Cross. The Bridging F visa is ordinarily valid for 45 days.⁷⁶
- 7.2. A second Bridging F visa is available in circumstances where ‘a person is willing but not able to assist police because of their current mental, physical or emotional state’.⁷⁷ However, the Special Rapporteur notes that an additional bridging visa is usually only granted in circumstances where the applicant can evidence extreme trauma.⁷⁸
- 7.3. If an unlawful non-citizen is likely to be removed from Australia, a Commonwealth Criminal Justice Stay Certificate may be issued if the Attorney-General considers that it should be issued for the purposes of ‘the administration of criminal justice in relation to an offence against a law of the Commonwealth’. A Certificate will stay the non-citizen’s removal from Australia.⁷⁹ If a Criminal Justice Stay Certificate is in force, a Criminal Justice Stay Visa may be provided to the non-citizen⁸⁰ at the absolute discretion of the Minister for Immigration.⁸¹

⁷³ Jennifer Burn and Frances Simmons (2009) ‘Prioritising protection: A new visa framework for Trafficked People’ *Immigration Review* 41(3) 10.

⁷⁴ Migration Regulations 1994, Schedule 1, item 1306(3)(d)(i)(ii).

⁷⁵ DIAC, PAM3:Act – Compliance and Case Resolution – Program Visa – Bridging F visas ‘There is no requirement that they be willing to assist with an investigation’, para 2.2.

⁷⁶ Migration Regulations 1994, Schedule 2, clause 060.511(3)(b)(ii).

⁷⁷ DIAC, PAM3:Act – Compliance and Case Resolution – Program Visa – Bridging F visas, para 2.2.

⁷⁸ Report of the Special Rapporteur in Trafficking in Persons, especially women and children, Joy Ngozi Ezeilo Report to Human Rights Council on the Mission to Australia, 18 May 2012 A/HRC/20/18/Add.1, [54].

⁷⁹ Migration Act 1958 (Cth), Sections 141, 147.

⁸⁰ Migration Act 1958 (Cth), Section 157.

⁸¹ Migration Act, 1958 (Cth), Section 158.

- 7.4. A Witness Protection (Trafficking) (Permanent) visa may be offered to a trafficked person if the Attorney General certifies they have ‘made a contribution to, and cooperated with, the prosecution of a person who was alleged to have trafficked a person or who was alleged to have forced a person into exploitative conditions (whether or not the person was convicted)’ or an investigation that the Commonwealth Director of Public Prosecutions has decided not to prosecute;⁸² and the Minister is satisfied they would be in danger if returned home.⁸³ The grant of a Witness Protection (Trafficking) (Permanent) visa allows the person and their immediate family to live in Australia permanently; to travel and enter Australia on the visa for 5 years; and to access Medicare and income support.⁸⁴

VIII. EVALUATION OF CURRENT TRAFFICKING VISA FRAMEWORK

- 8.1. A suspected victim may be granted a Criminal Justice Stay Visa at the expiry of the Bridging F Visa, if the person is willing and able to contribute to a prosecution or investigation. The Criminal Justice Stay Visa allows the holder to remain in Australia for the duration of criminal investigations or court proceedings. The holder will have continued access to the Support for Trafficked Victims program run by the Australian Red Cross.
- 8.2. Trafficking investigations can be complex and protracted. Victim-witnesses who hold the Criminal Justice Stay Visa face uncertainty for their future, and concern for the safety of their family, particularly young children. The Criminal Justice Stay Visa does not provide victim-witnesses who are afraid of the consequences of giving evidence against their traffickers with any guarantee that they will receive further visa protection after the prosecution has been completed. Compounding this adverse effect on the victim-witness is the anxiety and uncertainty created if the holder of the Criminal Justice Stay Visa has family or children who remain in their country of origin. There is no mechanism within the Criminal Justice Stay Visa for that visa holder to be reunited with his or her family in Australia. This has contributed to the ongoing trauma experienced by trafficked people assisting police.
- 8.3. The current practice of issuing a permanent visa to victim-witnesses is guided by policy that a decision to consider requesting a Witness Protection (Trafficking) (Permanent) visa will be made within 3 months of a decision to prosecute or not to prosecute. We recommend the consideration that a permanent visa is issued

⁸² Migration Regulations 1994, Regulation 2.07AK.

⁸³ Migration Regulations 1994, Regulation 2.07AK.

⁸⁴ Migration Regulations 1994, Regulation 2.07AK.

earlier than current practice, within 6 months of the grant of a Criminal Justice Stay Visa.

Compassionate Circumstances

- 8.4. We recommend the consideration of a grant of a permanent visa in compassionate circumstances, where victims of trafficking are unable to participate in a criminal investigation.

IX. SUPPORT PROGRAM FOR TRAFFICKED PEOPLE

- 9.1. Article 6.3 of the Trafficking Protocol states:

3. 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:
 - (a) Appropriate housing;
 - (b) Counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand;
 - (c) Medical, psychological and material assistance; and
 - (d) Employment, educational and training opportunities.

- 9.2. The Australian Government's Support for Trafficked People Program (Support Program) is currently run by the Australian Red Cross. The Support Program provides support along four assessment streams which address the minimum requirements of Article 6.3(a)-(d) of accommodation, financial assistance, access to health care and counselling, access to interpreters, and access to legal services, with increased support in all areas dependent on the stage of the program and visa status.⁸⁵ Entry into the program requires identification by the Australian Federal Police that the person is a 'suspected victim of human trafficking' or is required to stay in Australia for 'the administration of justice'.⁸⁶ A suspected victim may access the Support Program regardless of the visa type that they hold. Continuing support for those not on a valid visa is linked to the trafficking visa framework and ongoing contribution to police investigations.

- 9.3. The Special Rapporteur on her visit to Australia expressed concern that "all ongoing support services are dependent on a contribution to the criminal justice process or investigation."⁸⁷ The linking of support to the criminal justice process undermines a human rights based approach to the protection of trafficked

⁸⁵ See Department of Families, Housing, Community Services and Indigenous Affairs, *Anti-People Trafficking Strategy* (4 July 2012) <<http://www.fahcsia.gov.au/our-responsibilities/women/programsservices/reducing-violence/anti-people-trafficking-strategy>>.

⁸⁶ Ibid.

⁸⁷ Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo. Submission to the UN Human Rights Council 13 April 2011 (A/HRC/17/35) 53.

victims, and as the Special Rapporteur notes, it “does not represent an adequate acknowledgment of their status as victims.”⁸⁸

Regrettable impact of the visa type on social security and compensation payments

- 9.4. In light of the link between visa status and social security entitlement, we observe that while victim-witnesses who hold the Criminal Justice Stay visa or who are granted the Witness Protection (Trafficking) (Permanent) visa are eligible to access Medicare and limited social security payments, they are disadvantaged in comparison with holders of other visas granted on refugee or protection grounds. If a victim-witness is certified by the Attorney-General as having made a contribution to a police investigation or criminal prosecution they may be granted the permanent visa, but the visa type is restricted and they are subject to the 2 year waiting period for more favourable Centrelink payments.
- 9.5. Additionally, if a victim-witness holds a Witness Protection (Trafficking) (Permanent) visa and is in receipt of Special Benefit social security payments, then any compensation that they receive, for example, through a statutory victims' compensation scheme, will be treated as income and the Special Benefit will cease during the time that the compensation award is exhausted through day to day living expenses.
- 9.6. By comparison, when a Protection visa is granted to an asylum seeker, he or she is not subject to the 2 year wait period. A better framework would be to reclassify the Witness Protection (Trafficking) (Permanent) visa for social security payments, in the same way that a Protection visa is classified.

Reflection and recovery period

- 9.7. The Special Rapporteur notes that appropriate consideration of compassionate and humanitarian factors under Article 7 of the Trafficking Protocol should be reflected in States providing, at minimum, a 'reflection and recovery' period that allows “trafficking persons to regain physical and psychological stability and to reflect on available options.”⁸⁹ This period of reflection is integral to the process of recovery for victims of trafficking, as well as providing an opportunity to make informed decisions on their safety and well-being, and their ability to assist in further criminal investigations.⁹⁰
- 9.8. Article 6 of the Trafficking Protocol encourages States to consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking. This will include access to housing; counselling and information in

⁸⁸ Ibid.

⁸⁹ Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo. Submission to the UN Human Rights Council 13 April 2011 (A/HRC/17/35) 50.

⁹⁰ Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo. Submission to the UN Human Rights Council 13 April 2011 (A/HRC/17/35) 27; see also Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, 2010) 321.

the language of the victim; medical, psychological and material assistance; employment, educational and training opportunities.

- 9.9. The current Bridging F Visa of 45 provides for a 45 day period of ‘reflection and recovery’ during which time victims have access to emergency accommodation, support funds, physical and psychological support services, and legal assistance. An additional Bridging F Visa of 45 days may be granted in some circumstances, but as the Special Rapporteur notes, this is in situations where extreme trauma is evidenced.⁹¹
- 9.10. The Special Rapporteur notes that there is empirical evidence to suggest that a ‘reflection and recovery’ period should be a minimum of 90 days to ensure recovery of victims to a level where they may thoughtfully make these decisions, and provide more reliable information to police investigations.⁹² She states in her report to Australia that “A 45-day reflection period may not be an adequate time period for persons who have been trafficked to reflect and make critical decisions. An initial automatic reflection period of 90 days for all persons would be more appropriate and in accordance with article 6 of the Trafficking Protocol.”⁹³
- 9.11. Anti-Slavery Australia supports the recommendation that the initial and automatic reflection period given to a person identified as a victim of trafficking be extended to 90 days.
- 9.12. The 90 day period should be allowed to the person regardless of whether or not they can or will assist in an investigation. Anti-Slavery Australia recommends that this period be intended for reflection, and not intended to be investigatory time. We recommend that during this period, persons may be interviewed by police only in exceptional circumstances, such as protecting the human rights of others.

Identification of suspected victims of trafficking

- 9.13. Article 7 of the Trafficking Protocol requires states to “give appropriate consideration to humanitarian and compassionate factors” when considering measures to permit trafficked persons to remain in their territory. As the Special Rapporteur notes in her report to Australia, “any person who does not engage

⁹¹ Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo. Submission to the UN Human Rights Council 18 May 2012 (A/HRC/20/18) 54.

⁹² Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo. Submission to the UN Human Rights Council 13 April 2011 (A/HRC/17/35) 27; Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo. Submission to the UN Human Rights Council 18 May 2012 (A/HRC/20/18) 54.

⁹³ Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo. Submission to the UN Human Rights Council 18 May 2012 (A/HRC/20/18) 54.

with the [Australian Federal Police] will automatically be excluded from the programme.”⁹⁴

- 9.14. Victims of trafficking have often suffered serious harm and abuse at the hands of their traffickers, including physical and psychological harm that in many cases extends to on-going physical and psychological injury months to years after their removal from a trafficking situation. In many cases victims of trafficking have instilled in them a fear of government authorities such as immigration officials and police. They are often threatened with further harm to themselves or their families, as well as threats of deportation, if they contact the police. It is our experience that linking initial access to support through identification of a person as a ‘suspected victim of trafficking’ by the Australian Federal Police centres the Australian response as prosecution-centred rather than rights-centred.

International Models

ITALY

- 9.15. Italy has two main instruments to guide its response to victims of trafficking support, the *National Law on Migration (Legislative Decree No 286 of 1998)* (Legislative Decree 286/98), and *Law n. 228 of 2003 “Provisions against the Trafficking in Human Beings”* (Law 228/03).
- 9.16. Article 13 of *Law 228/03* provides victims of trafficking with entry to an initial three month program that provides accommodation, social assistance and health care services. The initial three months can be extended by a further three months if it is applicable under the system. This support is available to Italian and foreign victims of slavery, servitude and trafficking.
- 9.17. At the completion of the article 13 program, the victim may receive continued support under the article 18 program of Legislative Decree 286/98. This grants a six month temporary residence permit to foreigners who may need protection and assistance “to escape from the situation of abuse and conditioning perpetrated by the criminal organisation and to participate in a social assistance and integration scheme.”⁹⁵ This six month duration may be renewed for one year or a longer period if required for judicial purposes.
- 9.18. The temporary residence permit under the article 18 program is not conditional on the victim’s willingness to co-operate with law enforcement or judicial authorities. Once a victim is identified by authorities they may choose one of two

⁹⁴ Joy Ngozi Ezeilo, Special Rapporteur, *Report of the Special Rapporteur on trafficking in persons, especially women and children – Addendum – Mission to Australia*, UN GAOR, 20th sess, Agenda Item 3, (UN Doc A/HRC/20/18/Add.1) 53.

⁹⁵ *Immigration Consolidation Act (Legislative Decree 25 July 1998, n. 286)*, (Italy) art. 18, 1.

paths: the ‘judicial path’ or the ‘social path’. The judicial path provides victims the option of cooperating with law enforcement agencies in their investigations and any prosecutions. The social path allows victims to remain on the program without contributing to an ongoing investigation. Access to pursue the social path requires a statement submitted on behalf of the victim by an accredited NGO or by the social services of a local authority.

- 9.19. The program, ‘Program of Social Assistance and Integration’, is managed by the Interministerial Committee for the Implementation of article 18. This program aims to propose policies, evaluate, fund and supervise projects of social assistance and integration that targets victims of trafficking. The services provided to trafficked victims include accommodation, counselling services, education, employment and training opportunities.
- 9.20. The Interministerial Committee also funds the *azioni di sistema* initiative which provides research, publications, outreach programs, and seminars as part of a broader national anti-trafficking system. The *azioni di sistema* initiative also runs a Voluntary Repatriation Program in collaboration with the International Organisation for Migration. A national toll free number against trafficking is also provided.
- 9.21. This system has a strong victims centred approach. However, it is important to note that the Italian system does not cover the protection of families of victims in the legislation.

UNITED KINGDOM

- 9.22. The UK runs its support for victims of trafficking program through the National Referral Mechanism (NRM). The first points of contact for victims of trafficking are considered ‘First Responders’. A first responder is a person or organisation who refers a person into the NRM for the purpose of assessment as a victim of trafficking. First responders may include the police, local authorities, the National Health Service, organisations that are experts on trafficking (e.g. the Salvation Army, Local Authority Children’s Services, Migrant Helpline, etc.) and certain government departments.
- 9.23. The assessment process requires the completion of a referral form by the First Responders which are then assessed by a relevant ‘Competent Authority’ of which there are two in the UK. The United Kingdom Human Trafficking Centre (UKHTC) takes referrals from police, local authorities and NGOs. The United Kingdom Border Agency (UKBA) takes referrals which have been identified along the immigration process.

- 9.24. The UKHTC and UKBA must determine whether there are reasonable grounds for believing that a person referred is a victim of human trafficking within 5 days. The UKHTC or UKBA may seek further information from the first responder. Once the determination is made, the victim is granted a 45 day recovery and reflection period during which time they can access accommodation and support.
- 9.25. During this 45 day period UKHTC and UKBA make a conclusive decision as to whether the person is a victim of trafficking. This decision is made on a balance of probabilities. Once this is determined, there are three potential outcomes:
1. The victim may be granted discretionary leave to stay in the UK for one year in order to allow them to co-operate fully in any police investigation and subsequent prosecution. This discretionary leave may be extended if required.
 2. The UKBA may consider a grant of discretionary leave for the victim to stay in the UK, depending on the victim's personal circumstances.
 3. If the victim is from outside the European Economic Area (EEA), the victim can receive help and financial assistance to return home through the UK Border Agency Assisted Voluntary Return of Irregular Migrants process. If they are an EEA national, UKHTC will put them in touch with their embassy and any relevant NGOs who may be able to help.

UNITED STATES

- 9.26. The Office to Monitor and Combat Trafficking in Persons was created under the *Trafficking Victims Protection Act 2000 (TVPA)* with the aims of protecting victims, preventing trafficking, and prosecuting traffickers. The United States has created the Presidential Interagency Task Force and the Office to Monitor and Combat Trafficking in Persons at the US Department of State to oversee the implantation of the TVPA, however the coordination of anti-trafficking efforts are broadly administered by various federal and state departments.
- 9.27. Support for victims of trafficking under the TVPA can be accessed through a certification process by which:
- The person must have been subjected to a severe form of trafficking in persons as defined in the TVPA;
 - The person must be willing to assist in every reasonable way with the investigation and prosecution of the trafficking case, or is unable to cooperate with such a request due to physical or psychological trauma; and
 - The person must be physically present in the United States.

- 9.28. While the United States has a comprehensive system in place, this system has been criticised in the following ways:⁹⁶
- There is a strong reliance on non-government organisations without adequate community funding;
 - There has been a failure to adequately protect victims of sex trafficking if they refuse to give or are unable to give useful information to authorities regarding their traffickers;
 - There is inadequate training of border police to identify those vulnerable to trafficking;
 - There are no guidelines in place to determine “reasonable” levels of assistance to investigations and prosecutions;
 - The decision to grant certification is made by an agent that also determines the victim’s ability to be a compelling witness.

Best practice response for Australia

- 9.29. We recommend that there be a minimum 90 day reflection and recovery period after identification as a suspected victim of trafficking. This is discussed further below.
- 9.30. We recommend that an initial period of support under the Support Program be triggered by any agency that has been given authority to identify victims of trafficking. ‘Authorised agencies’ could include the Australian Federal Police, state police, and other agencies with relevant experience.
- 9.31. We recommend that the authorised agencies make a secondary referral to an assessment agency that is constituted of law enforcement, non-government organisations and anti-trafficking organisations. This assessment agency refers suspected victims to the Support Program run by the Australian Red Cross.
- 9.32. We restate our recommendations of an alternate visa pathway for people who cannot contribute to an on-going police investigation. This visa pathway should include the earlier consideration of a permanent visa and a visa on compassionate grounds.

⁹⁶ See Whitney Shinkle, Institute for the Study of International Migration ‘Protective Trafficking Victims: Inadequate Measures?’ *Transatlantic Perspectives on Migration*, Policy Brief 2, Georgetown University (August 2007); Jayashri Srikantiah ‘Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law’ (2007) 87 *Boston University Law Review* 157; April Rieger ‘Missing the Mark: Why the Trafficking Victims Protection Act Fails to Protect Sex Trafficking Victims in the United States’ (2007) 30 *Harvard Journal of Law and Gender* 231.

Figure 1. Anti-Slavery Australia 2012.



PART THREE: RESPONDING TO FORCED MARRIAGE

X. FORCED MARRIAGE⁹⁷

10.1. Forced marriage is not yet defined in any international legal treaty or by Australian law.⁹⁸ A forced marriage occurs where a marriage is entered into without the full and free consent of one or both parties, where the marriage occurs as a result of duress, coercion or fraud.

10.2. The term ‘forced marriage’ includes ‘servile marriage’, which is specifically prohibited in the 1956 Supplementary Convention:

(c) Any institution or practice whereby:

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

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

(iii) A woman on the death of her husband is liable to be inherited by another person.⁹⁹

10.3. Forced marriage is a form of gender-based violence, which the United Nations High Commissioner for Refugees defines as:

Sexual and gender-based violence (SGBV) refers to violence that is directed against a person on the basis of her or his gender or sex. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion, and other deprivations of liberty, whether occurring in public or in private life. While women, men, boys, and girls can all be victims of gender-based violence, women and girls are the main victims.¹⁰⁰

10.4. Under the *UN Convention on the Elimination of all forms of Discrimination Against Women* (CEDAW) all appropriate measures should be taken to “modify the social and cultural patterns of conduct of men and women” so as to eliminate “prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women”.¹⁰¹ States are obliged to “exercise due

⁹⁷ Section 10 of this Submission draws on the Anti-Slavery Australia submission to the Attorney-General’s Department, *Consultation on Forced and Servile Marriage* (February 2011).

⁹⁸ Attorney-General’s Department, *Discussion Paper: Forced and Servile Marriage* (2010) 3.

⁹⁹ *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, 226 (adopted 7 September 1956) Article 1 (a)(i).

¹⁰⁰ UNHCR, *UNHCR Handbook for the Protection of Women and Girls*, January 2008, at page 201, available at: <<http://.unhcr.org/refworld/docid/47cfc2962.html>>. For a discussion on how forced marriage as a gender-related form of persecution in refugee law jurisprudence see Catherine Dauvergne and Jenni Millbank ‘Forced Marriage as a Harm in Domestic and International law’ (2010) 73(1) *Modern Law Review* 57; Millbank, Jenni and Dauvergne, Catherine, ‘Forced Migration and the Exoticization of Gendered Harms in United States Asylum Law (2011) *Columbia Journal of Gender and Law* 19(3).

¹⁰¹ *Convention on the Elimination of All Forms of Discrimination Against Women* 660 UNTS 195; G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), Art 5(a).

diligence to prevent, investigate and ... punish acts of violence against women whether these are perpetuated by the State or private actors.”¹⁰² Women in situations of forced marriage may feel unable to leave the marriage because of social stigma, a sense of responsibility for their children, family pressure, financial constraints, fears of violence or deportation and a lack of legal information about their options.¹⁰³

- 10.5. While there is no reliable research about the nature or extent of forced marriage in Australia, recent court cases illustrate that young people in Australia have been faced with forced marriage.¹⁰⁴

Forced marriage, arranged marriage and sham marriages

- 10.6. Forced marriage and arranged marriages are different. In an arranged marriage both spouses fully and freely agree to enter into a marriage that was organised by their families. Forced marriages are conducted without the full and free consent of one or both parties and the marriage is entered into as a result of duress, which can take the form of physical or psychological pressure.¹⁰⁵
- 10.7. Care must also be taken to distinguish between the practice of forced marriage and the fraudulent practice of sham marriage, where an Australian citizen or permanent resident fraudulently claims to be in a genuine relationship in order to sponsor their “spouse” or “partner” to migrate to Australia.¹⁰⁶ Such sham marriages may be arranged by traffickers to facilitate the movement of people to Australia for exploitation.¹⁰⁷

¹⁰² UN, *Declaration on the Elimination of Violence against Women*, GA res 48/104 85th plen mtg, (1993), Arti4 (c) and art 1 (defining gender-based violence).

¹⁰³ Anti-Slavery Australia submission to the Attorney-General’s Department, *Consultation on Forced and Servile Marriage* (February 2011).

¹⁰⁴ See *Department of Human Services & Brouker and Anor* [2010] FamCA 742 (Mushin J found that both of the children proposed to be married were not of marriageable age within the terms of the *Marriage Act 1961* (Cth) and made a parenting order restraining the child’s parents from removing her from Australia, placing her on the Airport Watch List and prohibiting the parents from applying for a passport for the child until she was eighteen years old); *Kandal & Khyatt & Ors* [2010] FMCAfam 508; *Kreet & Sampir* [2011] FamCA 22; *Madley & Madley and Anor* [2011]; *Police save Sydney Girl from forced marriage (2010) ABC News*, <<http://.abc.net.au/news/stories/2010/06/03/2916750.htm>> at June 3 2010.

¹⁰⁵ See ABC Radio, *The Law Report, Forced Marriage*. Interview with Jennifer Burn – Anti-Slavery Project, 30 November 2010. <<http://www.abc.net.au/rn/lawreport/stories/2010/3077803.htm>>

¹⁰⁶ Department of Immigration and Citizenship, *Partner Visa: Onshore Temporary and Permanent (Subclass 820 and 801)*, Department of Immigration and Citizenship, <<http://www.immi.gov.au/migrants/partners/partner/820-801/>> at 21 February 2011.

¹⁰⁷ In Australia’s first reported case of trafficking for domestic servitude a married couple in Queensland arranged a sham marriage in order to bring a woman from the Philippines to Australia to work as a domestic servant. Upon arrival the woman was exploited and repeatedly raped. Following numerous appeals, in February 2010, Zoltan Kovacs entered a plea of guilty and was resented to eight years imprisonment for slavery offences. Following a retrial Melita Kovacs was again found guilty and resented to four years imprisonment. In March 2010, she sought leave to appeal her sentence in the Supreme Court see Attorney-General’s Department, *Discussion Paper: Forced and Servile Marriage*, (2010).

Legislative Response to Forced Marriage

- 10.8. The Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012 introduces a stand-alone offence of ‘forced marriage’ which is defined at 270.7A as:

... a marriage is a *forced marriage* if, because of the use of coercion, threat or deception, one party to the marriage (the *victim*) entered into the marriage without freely and fully consenting.

- 10.9. The proposed new offence centres on “free and full consent” at the entry into the marriage. It does not address the removal of consent after the marriage, or a situation of servile marriage which can occur after two parties have consensually entered into a marriage, or a situation of servitude within an intimate relationship. This issue has been raised by a number of community stakeholders as noted in the Senate Report to the Inquiry into Slavery and People Trafficking in September this year.¹⁰⁸

- 10.10. The Attorney-General’s Department has responded that servile marriage would be covered in the existing slavery offences, and in some cases, covered by the new forced marriage offence.¹⁰⁹ Further, the Attorney-General’s Department explained that the slavery or servitude offences included in the Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012 would extend to non-commercial relationships, such as intimate relationships. This could be included in an amendment to the Explanatory Memorandum.¹¹⁰

- 10.11. In our submission to the Senate Inquiry we supported the introduction of the forced marriage offence into the Criminal Code. We restate here that part of our submission dealing with forced marriage:

The proposed forced marriage offence will criminalise the slavery-like practice of forced marriage. The Bill [Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012] provides that ‘a marriage is a forced marriage if, because of the use of coercion, threat or deception, one party to the marriage (the victim) entered into the marriage without freely and fully consenting.’ Importantly, coercion is defined to include any of the following: force, duress, detention, psychological oppression, abuse of power or taking advantage of a

¹⁰⁸ Senate Report, 3.2, 3.13-3.16, 3.20-3.21.

¹⁰⁹ Answer to question on notice, received 4 September 2012, p. 11.

¹¹⁰ Answer to question on notice, received 4 September 2012, p. 15. It is suggested the text read: ‘Where a person freely and fully consented to enter into a marriage, but was later coerced, threatened or deceived into remaining in the marriage, the new servitude and slavery offences, or existing State and Territory domestic violence legislation, may apply.’

person’s vulnerability. Criminalisation of forced marriage is one part of an effective strategy ... and should be adopted with a suite of companion measures dealing with the development of community education in a range of multilingual formats, clear protections ... access to legal advice, training of front-line government officers and community members. Such community initiatives are most effectively constructed in partnership with relevant partners.¹¹¹

Civil measures in response to forced marriage

10.12. In the UK, the Forced Marriage Unit was established within the Home Office and statutory guidance on forced marriage was issued under ‘The Right to Choose’ under s 63Q(1) of the *Forced Marriage (Civil Protection) Act 2007*. In our view, one of the greatest strengths of the Forced Marriage Unit is that it focuses on prevention and community.

10.13. Under the UK *Forced Marriage Civil (Protection Act) 2007* a Forced Marriage Protection Order (FMPO) can be made by or on behalf of a person facing or experiencing forced marriage:¹¹²

- The court can make its own application, or if family proceedings have commenced, a third party can make an application without leave of the court;
- Any other applicant seeking an FMPO can seek leave of the court;
- The orders can be made ex-parte and they have extraterritorial application.

Other responses to forced marriage

10.14. Criminalisation of conduct associated with forced and servile marriage may be one part of an effective response but decisions about best practice approaches must be part of a wider consultation with communities.¹¹³ Education and consultation with communities and government agencies is critical to overcome gendered stereotypes and cultural practices that can underpin the practice of forced marriage and is a necessary part of framing effective systems of prevention and protection.

¹¹¹ Anti-Slavery Australia submission to The Senate Legal and Constitutional Affairs Committee *Inquiry into the Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012*, Submission 28 (6 August 2012) 8.

¹¹² See Anti-Slavery Australia submission to the Attorney-General’s Department, *Consultation on Forced and Servile Marriage* (February 2011).

¹¹³ Anti-Slavery Australia submission to the Attorney-General’s Department, *Consultation on Forced and Servile Marriage* (February 2011).

- 10.15. The issue of forced marriage in Australia should be understood within the context of gender-based violence and integrated with ongoing work to prevent violence against women. Therefore efforts to address forced marriage in Australia may be appropriately located within the Australian Government’s National Plan to reduce violence against women and their children.¹¹⁴
- 10.16. There are currently no dedicated training or guidance programs for government agencies, NGOs, legal, education and health care professionals, on how to offer help and assistance to people facing or experiencing forced marriage. The safety and long-term well-being of people who come to the attention of these agencies must be at the heart of any response to forced marriage. Culturally appropriate legal, social and health services must be provided if there is to be an effective response. As recommended in the Australian Government’s National Plan, when vulnerable people seek help “the first door should be the right door”.¹¹⁵
- 10.17. We recommend:
- The development of training and awareness materials for government authorities, NGOs, legal, education and health care professionals who may come into contact with people facing forced marriage;
 - Australian guidelines on forced marriage for government authorities should be developed in consultation with NGOs that provide front-line services to women and men in situations of family violence. The Guidelines should address legal options and provide referral information.¹¹⁶

Child marriage and trafficking for child marriage

- 10.18. Article 35 of the *Convention on the Rights of the Child* require Australia to prohibit child marriage and the sale and traffic of children for any purpose.¹¹⁷ The UN Special Rapporteur on Trafficking in Persons has stated in 2007 that:

[s]ince children are, by definition, incapable of consent or of exercising the right of refusal, child marriage is forced marriage, and as such violates fundamental human rights standards and must therefore be strictly prohibited.¹¹⁸

¹¹⁴ Anti-Slavery Australia submission to the Attorney-General’s Department, *Consultation on Forced and Servile Marriage* (February 2011) 10; Australian Government Department of Families, Housing, Community Services and Indigenous Affairs, *National Plan to Reduce Violence Against Women and their Children 2010 to 2022* (2010).

¹¹⁵ Australian Government Department of Families, Housing, Community Services and Indigenous Affairs, *National Plan to Reduce Violence Against Women and their Children 2010 to 2022* (2010) 77.

¹¹⁶ Anti-Slavery Australia submission to the Attorney-General’s Department, *Consultation on Forced and Servile Marriage* (February 2011).

¹¹⁷ *Convention on the Rights of the Child*, Article 35; *Convention on the Elimination of All Forms of Discrimination against Women* Article 16(2).

- 10.19. In Australia it is an offence to marry a child under section 95 of the *Marriage Act 1961* (Cth)¹¹⁹ and section 11 provides that “[s]ubject to section 12, a person is of marriageable age if the person has attained the age of 18 years”.¹²⁰ Further, a marriage is void if it was obtained by duress or fraud or one party did not have the mental capacity to truly consent to the marriage.¹²¹
- 10.20. Children who are at risk of being forced into a marriage may seek protection through a parenting order obtained under the *Family Law Act*.¹²² The Act enables people under 18 who are at risk of forced marriage to seek protection by applying for parenting orders that prohibit the facilitation of the marriage.¹²³ These orders may be sought by the young person themselves or by “any other person concerned with care, welfare or development of the child”.¹²⁴

Ways to move forward

- 10.21. In Australia, there is currently no mechanism for adults facing or experiencing forced marriage to seek civil measures or remedies against their family members or other parties. The experience in the UK illustrates the critical role of civil protection orders in enabling vulnerable people to escape or avoid forced marriage.
- 10.22. We recommend creating a regime of civil protection orders to enable people to avoid or escape forced marriage. The Family Court and the Federal Magistrates Court should have jurisdiction to deal with applications for orders to protect people facing forced marriage or already in situations of forced marriage.¹²⁵
- 10.23. Forced marriage is a form of family violence. However, the family violence provisions are not designed to protect people who have been forced to marry their sponsoring partner. The family violence provisions of the *Migration*

¹¹⁸ Special Rapporteur on the human rights aspects of the victims of trafficking in persons, especially women and children, Sigma Huda, Report to the Human Rights Council (A/HRC/4/23) 24 January 2007, 21.

¹¹⁹ See *Marriage Act 1961* (Cth), s 95 (1) makes it an offence for a person to go through a form of ceremony of marriage with a person who is not of marriageable age (Penalty: imprisonment for 5 years) and s 95(2) makes it an offence for a person to go through a form of ceremony of marriage with a minor unless the minor has previously been married, or written consent from a person whose consent to the marriage of the minor is required under the Marriage Act has been given or dispensed with in accordance with the Marriage Act. The penalty for this offence is a fine of \$500 or imprisonment for 6 months.

¹²⁰ Section 12 permits a Judge or Magistrate of a State or Territory Court to authorise the marriage of a person aged between 16 and 18 in a matter in which “the circumstances of the case are so exceptional and unusual as to justify the making of the order”.

¹²¹ *Marriage Act 1961* (Cth), s 23(1).

¹²² See for e.g. *Department of Human Services & Brouker & Anor* [2010] FamCA 742.

¹²³ The definition of “a parenting order” in section 64B(2) of the *Family Law Act 1975* (Cth) includes: (i) any other aspect of the care, welfare or development of the child or any other aspect of parental responsibility for a child.

¹²⁴ *Family Law Act 1975* (Cth), s 65(1)(c); Anti-Slavery Australia submission to the Attorney-General’s Department, *Consultation on Forced and Servile Marriage* (February 2011).

¹²⁵ Anti-Slavery Australia submission to the Attorney-General’s Department, *Consultation on Forced and Servile Marriage* (February 2011).

*Regulations*¹²⁶ could be amended to enable a person to apply for a permanent partner visa on the basis that the person is the victim of forced marriage. We recommend amending the family violence provisions of the *Migration Regulations* to ensure they fully protect women (and men) who are forced to marry their sponsoring partner.

- 10.24. The Australian Government’s response to forced marriage must ensure people at risk of, or already in situations of forced marriage obtain protection and support, regardless of whether they are able or willing to assist police pursue criminal investigations. Under current law, the application of the Witness Protection Trafficking Framework may not generally be appropriate for people who have been forcibly married.¹²⁷
- 10.25. Community consultation, education and investment into research on the full nature of forced marriage in Australia must be part of any effective response. We recommend the development of training and awareness programs, and best practice guidelines, for government workers, non-government organisations and anti-trafficking organisations that may be first points of contact with people vulnerable to forced marriage.

¹²⁶ *Migration Regulations 1994* (Cth) Reg 1.21.

¹²⁷ *Migration Regulations 1994*, Reg 2.07AK. Applications for Witness Protection (Trafficking) (Permanent) (Class DH) visas. See generally Jennifer Burn and Frances Simmons ‘Prioritising protection — A new visa framework for Trafficked People’ (2009) 41(3) *Immigration Review* 10; Anti-Slavery Australia submission to the Attorney-General’s Department, *Consultation on Forced and Servile Marriage* (February 2011).

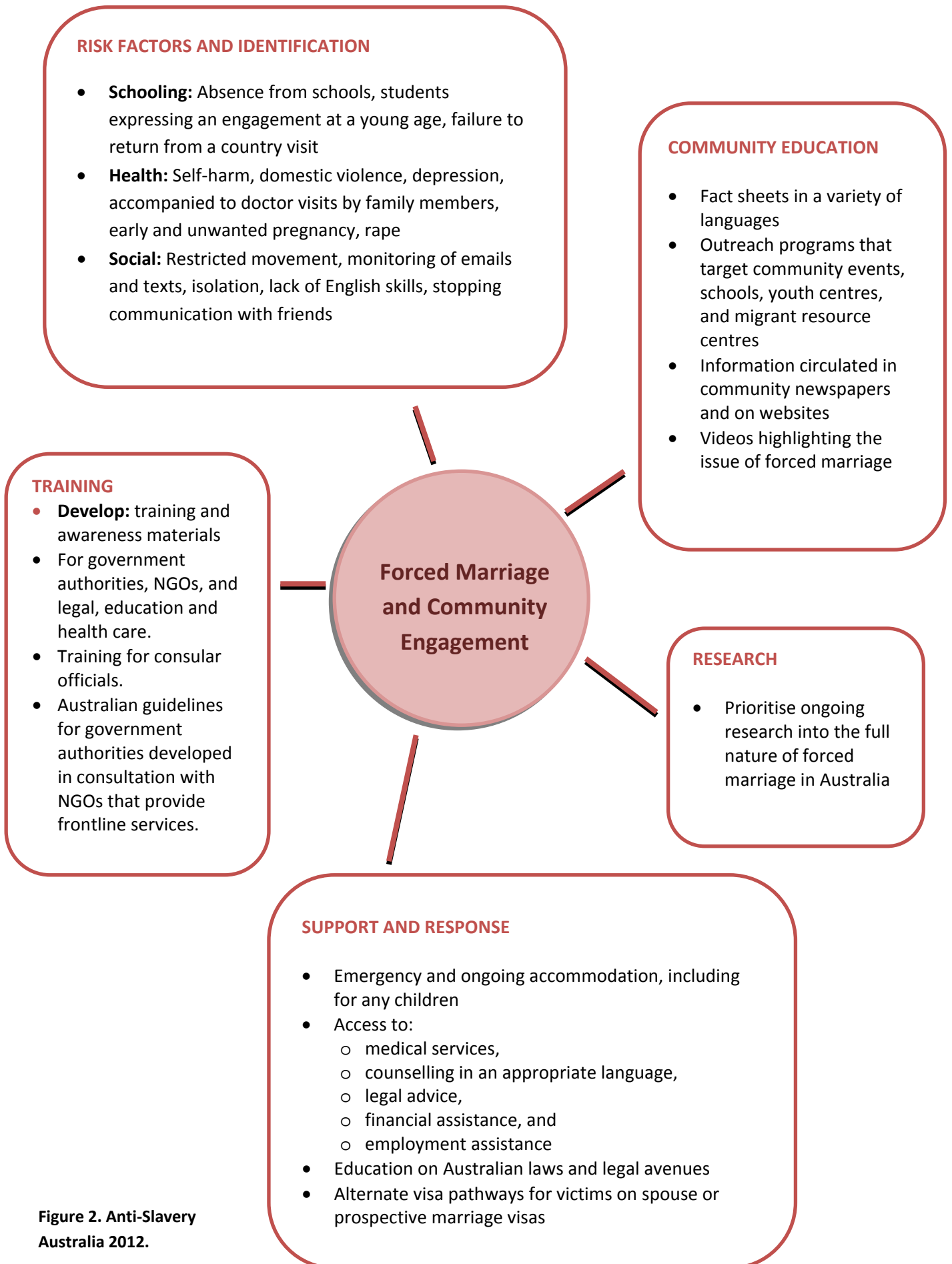


Figure 2. Anti-Slavery Australia 2012.

PART FOUR: THE LEGISLATIVE ENVIRONMENT

This part addresses the current legislative scheme provided for in Divisions 270 and 271 of the *Criminal Code Act 1995* (Cth) and proposed amendments to the Act set out in the Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012.

XI. SLAVERY

11.1. In the current legislation, the concepts of servitude, forced labour, servile marriage and debt bondage often overlap; the question of whether a person is in a condition of slavery depends on the *degree* of exploitation. Slavery is defined as ‘...the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including where such a condition results from a debt or contract made by the person.’¹²⁸ The High Court in *The Queen v Tang* identified four powers attaching to the right of ownership:

- The power to use a person’s labour in a substantially unrestricted manner;
- The entitlement to the fruits of a person’s labour without compensation commensurate to the value of the labour;
- The power to control a person’s movements; and
- The power to buy and sell a person.¹²⁹

11.2. The trafficking offences introduced in 2005 criminalised trafficking by means of force or use of threats or deception, or where a person is reckless as to whether another person will be exploited; as well as the introduction of offences of trafficking in children and domestic trafficking. These offences do not fully implement the *Trafficking Protocol*. There are gaps in relation to other forms of coercion; the abuse of power or a position of vulnerability; and the giving or receiving of payments to achieve consent of a person.¹³⁰

11.3. The **Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012** will have the effect of creating a hierarchy of criminal offences signalled in part by the differing severity of penalties. An important practical effect is that slavery offences will be reserved for the gravest crimes against humanity. The new offence of servitude under 270.5 addresses the condition of servitude, regardless of the form of servitude. The Bill will also introduce an expanded definition of coercion, and stand-alone offences of forced labour.

¹²⁸ Division 270.1 *Criminal Code Act 1995* (Cth).

¹²⁹ *The Queen v Tang* [2008] HCA 39.

¹³⁰ Frances Simmons and Jennifer Burn, ‘Evaluating Australia’s Response to all Forms of Trafficking: Towards Right-centred Reform’ (2010) 84(10) *Australian Law Journal* 712 at 721.

XII. SERVITUDE

12.1. Servitude is found in the *International Covenant on Civil and Political Rights*, the *Universal Declaration of Human Rights*, and is included in the Trafficking Protocol Article 3(a) under the definition of exploitation, which states:

Exploitation shall include, at a minimum, the exploitation of 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.

12.2. The concept of servitude has been understood to prohibit a “particularly serious form of denial of freedom”.¹³¹ In 2010 the European Court of Human Rights found that “trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership” and treats “human beings as commodities to be bought and sold”.¹³²

12.3. Australia does not currently have a stand-alone offence of servitude. The current offence in division 270 of the *Criminal Code* prohibits slavery, sexual servitude and deceptive recruiting. International courts and commentators have drawn distinctions between slavery and servitude,¹³³ however the High Court of Australia has found it “unnecessary and unhelpful” to seek to draw boundaries between slavery and cognate concepts such as servitude, peonage, forced labour, or debt bondage and that the various concepts should not be understood as “mutually exclusive”.¹³⁴

Sexual servitude

12.4. Sexual exploitation is included in the *Trafficking Protocol* under the definition of exploitation at 3(a). Sexual servitude remains the most commonly identified and investigated form of trafficking in Australia, representing 70% of investigations from 2004 to 2011.¹³⁵

¹³¹ *Rantsev v Cyprus and Russia* [2010] ECHR 25965/04 (7 January 2010).

¹³² *Rantsev v Cyprus and Russia* [2010] ECHR 25965/04 (7 January 2010).

¹³³ For e.g., the *travaux préparatoires* of the ICCPR suggest the drafters narrowly construed the concept of slavery in art 8(1) as a “relatively limited and technical notion” which “implied the destruction of juridical personality” while the prohibition on servitude in art 8(2), was “a more general idea covering all possible forms of man’s domination of man”. MJ Bossuyt, *Guide to the Travaux Préparatoires of the International Covenant on Civil and Political Rights* (1987) 164-167; see also *Siliadin v France* (2006) 43 EHRR 16 bt cf *Rantsev* at [282] where the Court held that trafficking itself falls within the prohibition of slavery, servitude or forced and compulsory labour in article 4 of the European Court of Human Rights.

¹³⁴ *The Queen v Tang* (2008) 237 CLR 1, 29 (Gleeson CJ) observing that “[t]hose who engage in the traffic in human beings are unlikely to be so obliging as to arrange their practices to conform to some convenient taxonomy”.

¹³⁵ Anti-People Trafficking Interdepartmental Committee, ‘Trafficking in persons: the Australian Government response, 1 June 2010-30 June 2011’, third report of the Anti-People Trafficking Interdepartmental Committee, 2011.

- 12.5. Australia has legislated against sexual servitude under 270.6 and the deceptive recruiting for sexual services under 270.7 of the *Criminal Code*. Sexual servitude is defined as the condition of a person who, “because of use of force or threats: (a) is not free to cease providing sexual services; or (b) is not free to leave the place or area where the person provides sexual services.”¹³⁶
- 12.6. The Special Rapporteur in her report to Australia criticised the heavy focus on sexual servitude in legislation investigations, and recommended that the offence be expanded to cover various situations of servitude such as domestic or labour.¹³⁷ She further noted that the most notable deficiency in the legislation is that it could not be used against a person who has recruited or maintained a person in an exploitative non-sexual position but was not involved in the transportation.¹³⁸
- 12.7. The **Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012** removes the specific offence of sexual servitude and replaces it with 270.5 servitude offences. The new offence of servitude will capture servitude in any commercial or intimate context, and will extend to all types of sexual and non-sexual servitude, and all forms of deceptive recruiting.

XIII. FORCED LABOUR

- 13.1. The hierarchy of offences in the Criminal Code should contain a stand-alone offence of forced labour which fully implements Australia’s international obligations. Article 25 of the *Forced Labour Convention* 1930 (ILO No 29) obligates States to ensure “the illegal exaction of forced or compulsory labour shall be punishable as a penal offence” and to “ensure the penalties imposed by law” are adequate and strictly enforced.
- 13.2. Worldwide, forced labour is believed to be a larger problem than human trafficking. The International Labour Organisation (ILO) estimates that only 20 per cent of forced labour cases result from trafficking.¹³⁹ However, in Australia labour trafficking and forced labour are under-reported and the number of people who experience this type of exploitation is simply not known.¹⁴⁰

¹³⁶ Division 270.4(1) *Criminal Code Act 1995* (Cth).

¹³⁷ Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo. Submission to the UN Human Rights Council 18 May 2012 (A/HRC/20/18) 23.

¹³⁸ *Ibid.*

¹³⁹ ILO, *Global Alliance*, n 13, p 14.

¹⁴⁰ Fiona David, *Labour Trafficking*, Australian Institute of Criminology Research and Public Policy Series Paper No 108, xii.

13.3. The ILO No 29 and the *Abolition of Forced Labour Convention 1957*¹⁴¹ provide for the abolition of “forced labour”, which 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 voluntarily.

13.4. The ILO has identified six indicators of a forced labour situation:

- i. physical or sexual violence (including “emotional torture like blackmail, condemnation, using abusive language”) or threats of such violence;
- ii. restricted movement and/or confinement to the workplace;
- iii. debt bondage;
- iv. withholding or refusing to pay wages;
- v. the retention of passport and identity papers so that the worker cannot leave or prove his or her identity and status; and
- vi. threats of denunciation to the authorities.¹⁴²

13.5. The picture of labour trafficking in Australia is still unclear; it is under reported and has sometimes gone unrecognised.¹⁴³ Solid statistics do not exist. Only a handful of cases have been prosecuted and there are still “critical gaps in information”.¹⁴⁴ Frontline agencies and services have been sometimes unaware that Australia’s anti-trafficking laws could apply to the worst cases of labour exploitation.¹⁴⁵

13.6. The **Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012** contains a stand-alone offence of forced labour, and an offence of deceptive recruiting for labour or services. The elements of the offence of forced labour are clearly distinct from the slavery and servitude provisions. There has long been considerable support for a stand-alone offence of forced labour; many cases have not met the threshold of establishing slavery, but contained circumstances of exploitation that extended beyond the appropriateness of civil remedies.

13.7. We support the creation of the new offence of forced labour. The critical gaps in understanding of the full nature of forced labour within Australia negates the implementation of best practice procedures to combat and prevent forced labour, as well as protect people in forced labour situations. Further research is essential, as well as education of the community, employers, and all frontline workers.

¹⁴¹ Opened for signature 25 June 1957, 320 UNTS 291 (entered into force 17 January 1959).

¹⁴² International Labour Organisation, *Human Trafficking*, 20-21.

¹⁴³ See generally Fiona David, *Labour Trafficking*, Australian Institute of Criminology Research and Public Policy Series Paper No 108 (2010).

¹⁴⁴ *Ibid* xii.

¹⁴⁵ *Ibid*.

XIV. DOMESTIC SERVITUDE

- 14.1. Australia has not ratified the *Convention Concerning Decent Work for Domestic Workers*.¹⁴⁶ Many of the obligations surrounding minimum wage and conditions for domestic workers in Australia are established in other legislative instruments and processes, such as the *Fair Work Act 2009*. There are also formal avenues of complaint against unsatisfactory working conditions and an operational criminal justice system to prevent and prosecute situations of abuse, exploitation and violence.
- 14.2. The **Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012** does not refer explicitly to domestic workers or provide express protection for individuals in a domestic servitude situation. However, servitude is defined under section 270.4 and will extend to both commercial and private cases of domestic servitude.¹⁴⁷ Sections 270.6 and 270.6A define forced labour and establish a penalty regime for forced labour offences.
- 14.3. The low rate of referrals may indicate that many cases are remaining undetected. Increased education and community awareness would assist in bringing the issue of domestic servitude and the rights of domestic workers to the fore.
- 14.4. The *Convention Concerning Decent Work for Domestic Workers* offers specific protection to domestic workers and operates to protect domestic workers from slavery-like conditions. The Convention expressly establishes international obligations in respect of hours of work, remuneration, occupational health and safety, social security, minimum levels of information, child labour, live-in working conditions, migrant workers, private employment agencies and dispute resolution.
- 14.5. We recommend that the Government review its decisions on ratification of the Domestic Workers Convention.

XV. DEBT BONDAGE

- 15.1. The *Trafficking Protocol* includes debt bondage as a form of exploitation. Australia has obligations under a number of international instruments to

¹⁴⁶ *Convention Concerning Decent Work for Domestic Workers*, adopted by the International Labour Conference on 16 June 2011.

¹⁴⁷ The Senate Legal and Constitutional Affairs Committee, *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012*, Report (September 2012) 3.23.

criminalise practices which capture debt bondage, including The *International Convention to Suppress the Slave Trade and Slavery* 1926, the *Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery* 1956, the *ILO Conventions on Forced Labour* 1930, 1957, 1999, and the *International Covenant on Civil and Political Rights* 1999.

- 15.2. The **Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012** includes ‘debt bondage’ in an expanded definition of exploitation. It also introduces the aggravated offence of debt bondage under 271.9. The passing of these provisions is necessary if Australia is to fulfil its international obligations. It is essential for frontline workers to be aware that debt bondage is often an indicator of human trafficking.¹⁴⁸

XVI. TRAFFICKING IN CHILDREN

- 16.1. Australia has ratified the *Convention on the Rights of the Child*, the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, and the *Protocol to Prevent Suppress and Punish Trafficking in Persons Especially Women and Children*.
- 16.2. The Trafficking Protocol defines the trafficking of children as the recruitment, transportation, transfer, harbouring or receipt of children for the purpose of exploitation, at article 3(c). The *Convention on the Rights of the Child* specifically prohibits ‘the abduction of, the sale of or traffic in children for any purpose or in any form’ at article 35. Article 35 of the Convention requires States Parties to ‘take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.’ Under Article 34 children are to be protected from all forms of economic exploitation, sexual exploitation, and sexual abuse.

Unaccompanied Minors and Child Trafficking

- 16.3. The Special Rapporteur raised a number of issues in relation to trafficking in children in her report to Australia. Strict immigration controls make it difficult for children to be brought into the country without a legal guardian, but she noted that cases have occurred which raise it as a potential issue, and that there is a lack of data on child trafficking in Australia.¹⁴⁹ She further noted that many of the people charged with people smuggling identify as children, and may have been deceptively recruited and trafficked, but that the current measures used to

¹⁴⁸ *Debt Bondage and Trafficking in Women* (2005) Stop Violence Against Women, at 25 September 2012, <http://www.stopvaw.org/debt_bondage_and_trafficking_in_women>.

¹⁴⁹ Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo. Submission to the UN Human Rights Council 18 May 2012 (A/HRC/20/18) 4.13.

determine their age are nonetheless placing them in adult prisons.¹⁵⁰ There is also the concern that some child detainees who do not have proper documentation are not being identified as children upon their arrival to Australia.¹⁵¹

16.4. The Australian Human Rights Commission raised in their submission to the Committee on the Rights of the Child¹⁵² the concern over guardianship of minors in cases of children in immigration detention. The submission noted that the Minister may delegate the role of legal guardian to officers of the Department of Immigration creating a “fundamental conflict of interest”.¹⁵³ This may lead to the lack of identification of trafficked children. The submission further notes that there are no policy guidelines in Australia concerning the protection of the rights of child victims; a lack of ongoing support services for children unwilling or unable to assist in investigations; and a lack of funding for support services for the specific needs of child victims.¹⁵⁴

Legislative Responses to Child Trafficking

16.5. Current legislation covers slavery, sexual servitude and deceptive recruitment for sexual services, debt bondage and people trafficking, which can all be extended to child victims; as well as prohibiting the international and domestic trafficking of children.¹⁵⁵ Child sex tourism is also illegal under the *Crimes Act 1914*.¹⁵⁶

16.6. Earlier this year, the Committee on the Rights of the Child noted a number of gaps in the existing legislation and Government initiatives. These included:

- Lack of training of appropriate staff in the area of counselling and rehabilitation of victims of sale of children, child prostitution and child pornography;
- Lack of measures to prevent the commercial sexual exploitation of children and measures to protect vulnerable groups such as indigenous girls and homeless children;
- Underlying root causes of offences under the Optional Protocol, such as poverty, are not addressed;
- The sale of children is not defined and criminalised as a specific offence;
- Concern over the lack of investigations and prosecutions of the sale of children and child prostitution;

¹⁵⁰ Ibid 18.

¹⁵¹ Ibid 19.

¹⁵² The Australian Human Rights Council, *Submission to the Committee on the Rights of the Child* (August 2011).

¹⁵³ Ibid 109.

¹⁵⁴ Ibid 196.

¹⁵⁵ *Criminal Code 1995* (Cth).

¹⁵⁶ Part IIIA *Crimes Act 1914* (Cth).

- Concern that only corporations may be held liable for intentional or reckless acts relating to slavery;
- Extraterritorial jurisdiction in child sex tourism cases do not extend to children between the ages of 16 and 18 unless the offender is in a position of trust or authority; and
- Lack of specific reintegration and recovery services.¹⁵⁷

16.7. The **Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012** introduces aggravated offences of slavery-like offences, organ trafficking, harbouring a victim, and debt bondage, when the offences involve victims aged under 18 years. The existing offences of trafficking of children and domestic trafficking of children will remain unchanged. Neither the new offences nor remaining offences fully incorporate the recommendations of the Committee on the Rights of the Child, or respond to the criticisms of Australia's treatment of unaccompanied minors.

XVII. ORGAN TRAFFICKING

17.1. Trafficking in people for the purposes of organ removal is a comparatively new form of human trafficking. The kidney is the most illegally procured organ as it can be retrieved from living donors,¹⁵⁸ and is most commonly sought in situations of transplant tourism.¹⁵⁹ The *Trafficking Protocol* provides for the 'removal of organs' in its definition of exploitation. Australia as a party to the protocol is obliged to legislate against the trafficking in persons for organ removal.

17.2. The World Health Organisation states in its *Guiding Principles on Human Cell, Tissue and Organ Transplantation*¹⁶⁰ that the shortage of available organs has stimulated trafficking in both human organs and trafficking in persons for the purpose of organ removal.¹⁶¹ The Working Group on Trafficking in Persons noted that the *Trafficking Protocol* does not cover the removal of human cells and

¹⁵⁷ Committee on the Rights of the Child, *Concluding Observations: Australia* (CRC/C/OPSC/AUS/CO/1) 24 September 2012 [16], [20], [24], [26], [28], [30], [32].

¹⁵⁸ Australian Institute of Criminology Report <

http://www.aic.gov.au/en/publications/current%20series/mr/1-20/19/07_trafficking.aspx>

¹⁵⁹ The four modes of transplant tourism were described at the Second Global Consultation on Human Transplantation at the World Health Organisation: (1) The recipient travels to the donor's country and the removal takes place in the donor's country; (2) the donor travels to the recipient's country and the removal takes place in the recipient's country; (3) the donor and recipient travel from the same country to a second country where the removal takes place; (4) the donor and the recipient travel from two different countries to a third country where the removal takes place. See Yosuke Shimazono 'What is Left Behind?' Presentation at an Informal Consultation on Transplantations at the World Health Organization, May 2006 Geneva.

¹⁶⁰ The World Health Organisation, *Guiding Principles on Human Cell, Tissue and Organ Transplantation* (26 May 2008).

¹⁶¹ *Ibid* 2.

tissues,¹⁶² and it is noted by Anne Gallagher that “trafficking in persons for the purpose of organ removal is technically and legally distinct from ‘trafficking’ in organs, cells and tissues.”¹⁶³

17.3. The UN General Assembly stated in 2005 that there has been a growth in the exploitation of vulnerable people:

for the purpose of trafficking in human organs, using violence, coercion, and kidnapping, especially kidnapping of children, with a view to exploiting them by means of organ transplant operations.¹⁶⁴

17.4. In Australia, the first case of attempted trafficking for the purposes of organ removal occurred in 2011; however medical transplant integrity procedures prevented the organ removal from taking place. The Special Rapporteur noted that while this is an isolated incident, the Government should remain alert and ensure that adequate safeguards are in place.¹⁶⁵

17.5. The current legislation against trafficking does not specifically cover the trafficking of organs or trafficking for the removal of organs. Offences of trafficking for the purpose of organ removal may be covered under the existing offences of trafficking in persons at 271.2, trafficking in children at 271.4, and domestic trafficking at 271.5, for the purposes of exploitation.¹⁶⁶

17.6. The **Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012** introduces the new offences, and aggravated offences, of organ trafficking. ‘Organ trafficking – entry and exit from Australia’ is introduced under division 271.7B(1) and (2), and covers the organisation, facilitation of entry or exit, or the receipt of another person; or when a person is reckless as to whether the conduct will result in the removal of an organ. This offence is aggravated if the victim is a minor; or there is intention that an organ will be removed as related to 271.7B(1) and 271.7B(2); or the offender subjects the victim to cruel, inhumane or degrading treatment; or engages in conduct, or is reckless as to conduct, that gives rise to a danger of death or serious harm.

¹⁶² UN Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Working Group on Trafficking in Persons, Fourth Session, *Trafficking in Persons for the Purpose of Removal of Organs*, UN Doc CTOC/COP/WG.4/2011/2 (29 July 2011) (UN Working Group) at [9].

¹⁶³ Gallagher A, *The International Law of Human Trafficking* (Cambridge University Press, New York, 2010) 40.

¹⁶⁴ Resolution adopted by the General Assembly on the report of the Third Committee (A/59/494), *Preventing, combating and punishing trafficking in human organs*, 59th Session (3 February 2005).

¹⁶⁵ Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo. Submission to the UN Human Rights Council 18 May 2012 (A/HRC/20/18) 15.

¹⁶⁶ *Criminal Code Act 1995* (Cth).

- 17.7. The offence, and aggravated offence, of domestic organ trafficking is introduced under 271.7D and 271.7E. The offence of domestic organ trafficking covers:
- (a) ...the organisation, or facilitation, of the transportation or proposed transportation of another person (the victim) from one place in Australia to another place in Australia; and
 - (b) the offender is reckless as to whether the conduct will result in the removal of an organ of the victim...
- 17.8. The offence is aggravated if the victim is a minor; or there is intention that an organ will be removed after the arrival of the person to a place where they have been transported, or during transportation; or the offender subjects the victim to cruel, inhuman or degrading conduct; or engages in conduct, or is reckless as to conduct, that gives rise to a danger of death or serious harm.
- 17.9. The **Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012** does not cover situations in which Australians may travel overseas to remove an organ from a trafficked person. The heavy reliance on transportation as a requirement of domestic organ removal may leave gaps in a number of areas, including: the removal of an organ of a person within Australia for the purpose of trafficking the organ; and cases where a person is recruited within Australia for the removal of their organ for either a domestic or foreign person. Lack of information on the level of transplant tourism that occurs of Australians seeking organs abroad is an area of concern.

PART FIVE: MIGRANT WORKERS, SUPPLY CHAIN, AND COMMUNITY CONSULTATION

XVIII. MIGRANT WORKERS

- 18.1. A total of 4,320,707 visas were granted in 2010-11, 95% of which were temporary visas. Some visas, such as subclass 457, the Business (Long-Stay) visa are specifically for foreign nationals who wish to work in Australia, while others, such as student visas, have work rights. The total number of student visas, working holiday, work and holiday, and subclass 457 visas granted was 534,595. Further, 3,543,883 temporary visitor visas were granted.¹⁶⁷
- 18.2. While most foreign nationals with work permission in Australia do not experience exploitation, it is evident that a small number of visa holders may be especially vulnerable to exploitation. In particular, the low number of work hours allowable to holders of student visas can lead to forced labour or exploitative conditions, where employers take advantage of students’ needs and fear of reporting extra work.¹⁶⁸
- 18.3. It is essential that there is awareness raising and information distribution to migrant workers and newly arrived persons about their legal rights and obligations, in the language that they speak or understand.

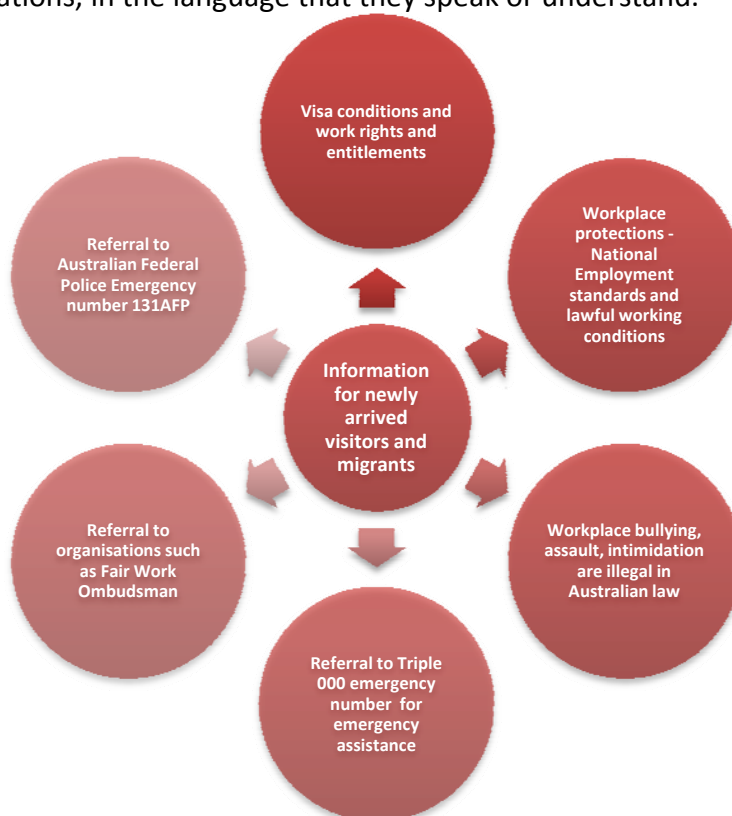


Figure 3. Anti-Slavery Australia 2012.

¹⁶⁷ Department of Immigration and Citizenship, *Annual Report 2010-2011* (2011) 2.

¹⁶⁸ See UNITE submission to the Senate Education, Employment and Workplace Relations Committee, *Inquiry into the Welfare of International Students*, Submission 77 (August 2009), and other submissions made to the Senate Inquiry on this issue.

XIX. SUPPLY CHAIN

19.1. Article 9(5) of the *Trafficking Protocol* requires State Parties to “adopt or strengthen legislative or other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons that leads to trafficking”.¹⁶⁹

19.2. The UN “*Protect, Respect and Remedy*” Framework for Business and Human Rights has formulated three core principles under its framework:

- The State duty to protect against human rights abuses by third parties, including those by companies;
- The corporate responsibility to respect human rights; and
- Access to effective remedy by victims through grievance mechanisms.¹⁷⁰

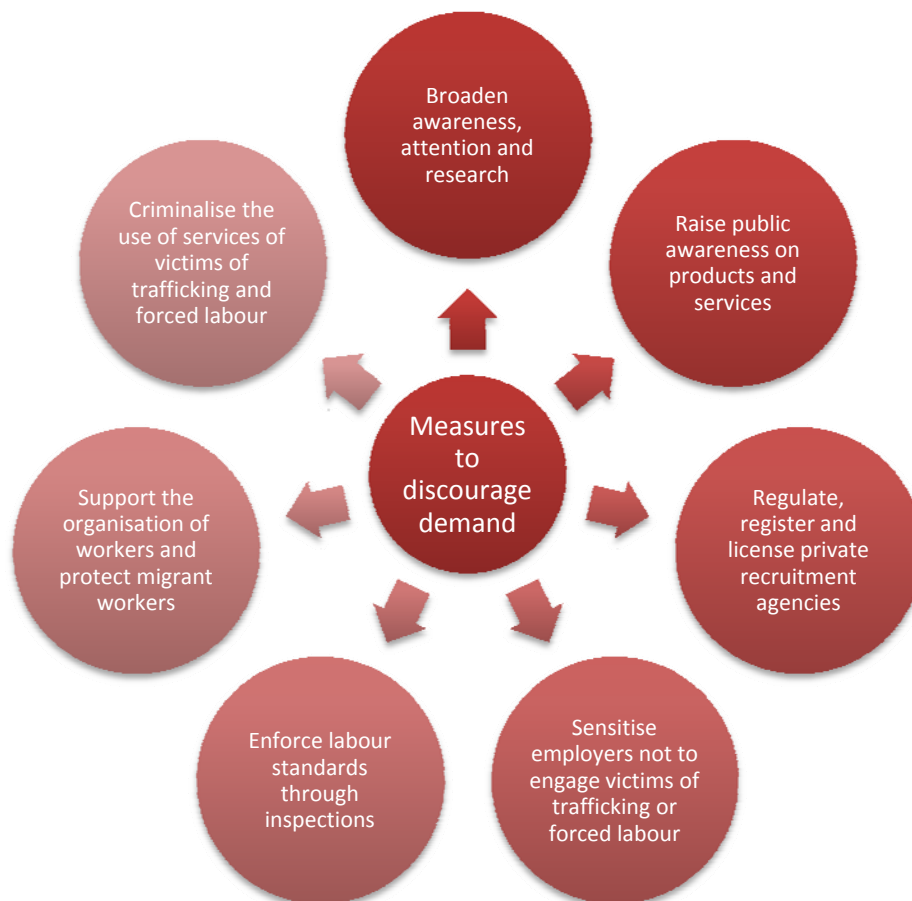


Figure 4. Source: UNODC *Model Law Against Trafficking in Persons* (2009), p67.

¹⁶⁹ Protocol to Prevent and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, 15 Nov 2000, U.N.T.S 319. See also ILO Convention No 29 on Forced Labour, the ILO Convention No 105 on the Abolition of Forced Labour and the ILO Convention No 182 on the Elimination of the Worst Forms of Child Labour. See also The Council of Europe Convention against Trafficking.

¹⁷⁰ Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework (21 March, 2011).



Figure 5. International Models to Combat Trafficking in the Supply Chain. Anti-Slavery Australia, 2012.

- 19.3. Australia has not yet considered developing measures to ensure the supply chain is free of trafficking, forced, and child labour. Australia has a role in reducing demand for goods and services produced by forced and trafficked labour, and to address demand as a key factor in any effective prevention strategy, through laws and policies on a range of matters, including immigration, employment, welfare, and economic development.¹⁷¹
- 19.4. We recommend that the Australian Government National Roundtable on People Trafficking include as part of its agenda consideration of ethical supply chains and procurement policies and engage with business, trades unions and faith based groups.
- 19.5. We recommend that the government consider how to better coordinate complementary state and federal legislative responses, and support systems.
- 19.6. We recommend that the government consider a framework that links industrial law to the criminal law by developing formalized liaison and referral between, inter alia, the Fair Work Ombudsman and the Australian Federal Police.

¹⁷¹ Anne T. Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, 2010) 437-9.

XX. COMMUNITY EDUCATION AND CONSULTATION

- 20.1. Anti-Slavery Australia is actively involved in community outreach programs to raise awareness of all forms of slavery, slavery-like conditions, forced marriage and trafficking.¹⁷²
- 20.2. In late 2009 Anti-Slavery Australia received a grant from the Australian government to raise awareness of all forms of trafficking in Australia by developing accurate, clear and effective information. Strategies used included further development of the Anti-Slavery Australia website, fact-sheets, outreach programs and participation in events.
- 20.3. To identify the level of knowledge in the Australian community about these issues we asked Roy Morgan Research to conduct a national telephone survey to measure the awareness of and attitudes to slavery in Australia. The aim of the research was to use the results to inform the development of strategies to raise awareness of all forms of trafficking in Australia. In response to the question ‘Do you think slavery happens in Australia’, just over half the representative sample believed that slavery took place in Australia. These respondents were more likely to be female (55%). There was a strong link between the belief that slavery happens in Australia and the age of the respondent. There were significant gaps in knowledge in the 14-24 age group and the group who were over 65 years.
- 20.4. We matched statistics about film attendance and found that the highest rate of cinema attendance was in the 14-24 age group where the awareness of slavery was low. We used this information to develop a film program to raise awareness of all forms of slavery and trafficking. The centrepiece of activities was the development of three community service announcements and four short films directed to raise awareness in the general Australian community, secondary school students, health professionals, and the legal profession.
- 20.5. These films are available on our website www.antislavery.org.au. The community service announcements were subtitled into Bahasa Malaysian, Chinese, Hindi, Korean, Tagalog, Thai and Vietnamese. One of the community service announcements was screened 9,000 times in cinemas all around Australia

¹⁷² For example, on 28 September this year Anti-Slavery Australia convened a Forced Marriage Community Consultation in conjunction with our community partner, the Good Shepherd network. Over 65 members of community organisations were invited to consult about experiences of forced and servile marriage within the context of their work. Almost every organisation in attendance, along with many unable to attend on the day, indicated that they have been in contact with clients who had experienced forced or servile marriage. This level of community engagement is essential to understand the nature of forced marriage within Australia and to develop an effective response in addressing this emerging issue. The forced marriage network will continue to meet to discuss best practice responses and community education strategies.

between September 2011 and November 2011. The CSAs were also screened on the Foxtel crime channel and on free to air television, especially the ABC, ABC1 and ABC 24. Full results from the preliminary survey and a post film distribution survey will be published shortly.



Anti-Slavery Australia, Labour trafficking – Image from Community Service Announcement

- 20.6. Community awareness raising must be relevant, targeted and evaluated. Throughout the development of the film material we were guided by a highly engaged consultation group. We believe that the Anti-Slavery Australia research in this area is a good example of effective community awareness raising.

CONCLUSION

Anti-Slavery Australia commends the Australian government for its leadership and commitment in addressing slavery, slavery-like conditions and people trafficking. The establishment of the National Roundtable on People Trafficking in 2008 and related meetings ensures regular and meaningful communication, consultation and collaboration between government and non-government agencies.

In this Submission, Anti-Slavery Australia has recommended:

- Establishment of a national compensation scheme for men, women and children who have experienced slavery, slavery-like conditions and people trafficking;
- Enhancement of the victim support to better protect enslaved and trafficked people;
- That criminalisation of forced marriage is one part of a broader response that includes the establishment of a consultative group, consideration of amendments to the *Family Law Act 1975* (Cth), provision of support to those experiencing forced marriage, and community engagement to ensure that responses are culturally sensitive and appropriate;
- That clear and multilingual information about the Australian legal system, rights and entitlements with referral information to the Fair Work Ombudsman be provided on entry to Australia;
- That a framework for better communications between the Australian Federal Police and the Australian Fair Work Ombudsman be formalised to strengthen current referral processes which may lead to more consistent identification of people who have been criminally exploited in the workplace; and
- That the development of effective and evaluated community awareness programs be prioritised.

Anti-Slavery Australia has been involved in the development of Australian responses to slavery, slavery-like conditions and people trafficking for a decade and we value the collaboration, good will and dedication of many individuals and organisations working together to end slavery and human trafficking.

Thank you for the opportunity to make this submission to the Committee.

Jennifer Burn, Director, Anti-Slavery Australia