



Modern Slavery Bill 2018

Submission to the Senate Legal and Constitutional
Affairs Committee

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Anti-Slavery Australia
Faculty of Law
University of Technology Sydney
PO Box 123, Broadway NSW 2007
www.antislavery.org.au

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Anti-Slavery Australia welcomes the opportunity to provide submissions to the Senate Legal and Constitutional Affairs Committee on the Modern Slavery Bill 2018.

Anti-Slavery Australia is the only specialist legal, research and policy centre in Australia dedicated to the abolition of slavery, human trafficking and slavery-like practices such as forced marriage and forced labour. Anti-Slavery Australia is part of the Faculty of Law at the University of Technology Sydney.

Anti-Slavery Australia provides access to comprehensive legal advice, representation and assistance to people who have experienced trafficking or slavery in Australia, including advice about immigration, citizenship, human rights, employment law, family law, criminal law, and victims’ compensation.

Acknowledgements

Prof Jennifer Burn, Director, Anti-Slavery Australia, University of Technology Sydney.

Prof Paul Redmond, Anti-Slavery Australia, University of Technology Sydney.

Carolyn Liaw, Researcher, Anti-Slavery Australia.

EXECUTIVE SUMMARY

Anti-Slavery Australia welcomes the opportunity to provide comments on the Modern Slavery Bill 2018.

Anti-Slavery Australia commends the Australian Government's proposal to establish a modern slavery reporting requirement that requires large entities to report on the risks of modern slavery in their operations and supply chains and the actions businesses have taken to address those risks including due diligence and remediation processes.

Anti-Slavery Australia commends the lead taken by the Government in including public procurement by requiring the Government to report on modern slavery risks in government supply chains and actions taken to address those risks.

Anti-Slavery Australia welcomes the broad definition of 'entities' and that the definition of 'modern slavery' refers to the offences in Divisions 270-271 *Criminal Code Act 1995* (Cth) as well as the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol)*¹ and the *ILO Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*.² Anti-Slavery Australia also welcomes the Government's commitment to establish and maintain a Modern Slavery Statements Register and the establishment of a Business Engagement Unit within the Department of Home Affairs.

This submission draws upon Anti-Slavery Australia's research and advocacy as well as our legal casework experience with survivors of human trafficking and slavery within Australia.

Anti-Slavery Australia provides further comment on the modern slavery reporting requirement; and makes recommendations addressing:

- the benefit of an Anti-Slavery Commissioner; and
- establishment of a National Compensation Scheme.

1. HUMAN TRAFFICKING AND SLAVERY IN AUSTRALIA

1.1. About human trafficking and slavery in Australia

Human trafficking and slavery are illegal and clandestine, making comprehensive data on the numbers of people living in slavery or slavery-like conditions in Australia difficult to estimate.³ However, between 2004 and 30 June 2017, the Australian Federal Police received 841 referrals relating to human trafficking and slavery-related offences in

¹ *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, opened for signature 15 November 2000, 2237 UNTS 319 (entered into force 25 December 2003).

² *Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*, opened for signature 17 June 1999, 2133 UNTS 161 (entered into force 19 Nov 2000)

³ Anti-Slavery Australia, Submission No 156 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry into Establishing a Modern Slavery Act in Australia*, June 2017, 12.

Australia.⁴ This includes human trafficking, child trafficking, forced marriage, forced labour and other forms of criminal labour exploitation. In recent years, Australian authorities have found men and women exploited in varied industries including sex work, domestic work, hospitality, agriculture and construction industries as well as within intimate or family relationships.⁵ In 2017 alone, Anti-Slavery Australia assisted 82 clients who had been trafficked to/from Australia and/or faced slavery-like conditions in Australia, including forced marriage, servitude and forced labour (see Figure 1).



Figure 1: Forms of human trafficking and slavery experienced by Anti-Slavery Australia's clients in 2017.

Individuals and communities are vulnerable to human trafficking and slavery due to environmental, economic, social and contextual factors, such as poverty, inequality, discrimination and gender-based violence.⁶ These factors disproportionately affect groups that are already disempowered within society, including women, children, migrants, refugees and people in occupations with low visibility or legal protections, including domestic workers and sex workers.⁷ In *Hidden in Plain Sight: An inquiry into establishing a Modern Slavery Act in Australia (Hidden in Plain Sight)*, the Joint Standing Committee on Foreign Affairs, Defence and Trade noted that 'anecdotal evidence suggests modern slavery is particularly prevalent in migrant communities across a range of industries'.⁸ This is reflective of the client profile of Anti-Slavery Australia's legal service. In 2017, Anti-Slavery Australia's clients originated from over 40 different countries (including Australia). See Figure 2.

⁴ Interdepartmental Committee on Human Trafficking and Slavery, Australian Government, *Trafficking in Persons: The Australian Government Response – 1 July 2015 – 30 June 2016*, 20; Australian Federal Police, Annual Report 2016 – 17 (2017) 52 <<https://www.afp.gov.au/sites/default/files/PDF/Reports/amended14122017-afp-annual-report-2016-2017.pdf>>

⁵ Australian Government, Submission No 89 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry into Establishing a Modern Slavery Act in Australia*, June 2017, 2.

⁶ Anne T. Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, 2010) 415.

⁷ Ibid.

⁸ Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Hidden in Plain Sight: An inquiry into establishing a Modern Slavery Act in Australia (Hidden in Plain Sight)* (2017), 63.



Figure 2: Top countries of origin for Anti-Slavery Australia's clients in 2017.

1.2. Australia's response to human trafficking and slavery

Human trafficking and slavery are criminalised in Australia under Divisions 270 and 271 of the *Criminal Code Act 1995* (Commonwealth). State and Territory offences such as sexual assault and deprivation of liberty offences may be used in conjunction with the Commonwealth offences.⁹

Australia's *National Action Plan to Combat Human Trafficking and Slavery 2015-19* contains a whole-of-community response to human trafficking and slavery. The implementation of the *National Action Plan to Combat Human Trafficking and Slavery 2015-19* is overseen by the Interdepartmental Committee on Human Trafficking and Slavery, which is comprised of a number of Commonwealth Departments and agencies.

Australia also has an *International Strategy to Combat Human Trafficking and Slavery* that details a whole-of-government strategy to being a regional leader in preventing and addressing human trafficking and slavery.

Whilst robust framework exists, there remain gaps in Australia's response. The Bill provides an opportunity to remedy some of these, particularly relating to the establishment of an Anti-Slavery Commissioner and a national compensation scheme.

⁹ Interdepartmental Committee on Human Trafficking and Slavery, Australian Government, *Trafficking in Persons: The Australian Government Response – 1 July 2015 – 30 June 2016*, 19.

2. PROPOSED MODERN SLAVERY BILL

Modern slavery in the supply chains of goods and services produced and consumed in Australia is a serious violation of human rights and Australia's criminal law. Anti-Slavery Australia welcomes and supports the proposal that establishes a modern slavery reporting requirement (reporting requirement) in Australia.

Anti-Slavery Australia proposes strengthening the Bill to more effectively meet the central objective of the Bill – 'to combat modern slavery in the supply chains of our goods and services'.¹⁰

2.1. Entities required to report

The proposed Bill requires that entities based or operating in Australia, with an annual consolidated revenue of more than \$100 million, report annually on the risks of modern slavery in their operations and supply chains. The Assistant Minister's second reading speech, noted that the Bill builds upon and improves on similar legislation overseas.¹¹ However, the \$100 million threshold is significantly higher than the total turnover of £36 million (approximately AU\$ 64.5 million) required by the *Modern Slavery Act 2015* (UK) (UK Act)¹² and the \$50 million total turnover prescribed by the *Modern Slavery Act 2018* (NSW) (NSW Act).

In Anti-Slavery Australia's previous submissions to the Attorney-General's Department Public Consultation on the Modern Slavery Reporting Requirement¹³ and the Joint Standing Committee on Foreign Affairs, Defence and Trade Inquiry into establishing a Modern Slavery Act in Australia,¹⁴ we recommended a threshold of \$25 million, consistent with the definition of a large proprietary company in the *Corporations Act 2001* (Cth).¹⁵

In the alternative, Anti-Slavery Australia recommends lowering the threshold to \$50 million. This would be closer to the threshold for global companies that are also required to report under the UK Act¹⁶ and ensure consistency of domestic supply chain reporting requirements.¹⁷ We note that a threshold of \$50 million was recommended by the Joint Standing Committee on Foreign Affairs, Defence and Trade in *Hidden in Plain Sight*.¹⁸ This would also accord with the submissions of the Australian Human Rights

¹⁰ The second reading speech for the Modern Slavery Bill 2018 (Alex Hawke, Assistant Minister for Home Affairs).

¹¹ *Ibid.*

¹² *Modern Slavery Act 2015* (UK) c 30, s 54(2); *Modern Slavery Act 2015 (Transparency in Supply Chains) Regulations 2015* (UK) SI 2015/1833 reg 2.

¹³ Anti-Slavery Australia, Submission to the Attorney-General's Department, *Modern Slavery Reporting Requirement – Public Consultation*, 30 October 2017, 10-11.

¹⁴ Anti-Slavery Australia, Submission No 156 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry into establishing a Modern Slavery Act in Australia*, June 2017. 81.

¹⁵ *Corporations Act 2001* (Cth) s 45A(3).

¹⁶ *Hidden in Plain Sight*, above n 8, 103-104.

¹⁷ *Modern Slavery Act 2018* (NSW) s 24.

¹⁸ *Hidden in Plain Sight*, above n 8, 103-104.

Commission,¹⁹ Law Council of Australia,²⁰ Australian Lawyers for Human Rights,²¹ Advisory Committee of the Modern Slavery Registry²² and others, to the Attorney-General's Department Public Consultation on the Modern Slavery Reporting Requirement.

2.2. Promoting compliance

Consistent with the UK Act, the current Bill does not contain any penalties or sanctions for failure to comply with the reporting requirements. Anti-Slavery Australia recommends that the Government adopt the recommendation by the Joint Standing Committee on Foreign Affairs, Defence and Trade, and introduce penalties and compliance measures for entities that fail to comply with the reporting requirements.²³ The serious risk of human trafficking and slavery being supported and hidden by complex supply chains necessitates a stronger regulatory framework. We recommend that the Bill contain measures, such as civil or criminal penalties, to promote reporting and deter non-compliance. Additionally, we support the Joint Standing Committee on Foreign Affairs, Defence and Trade's recommendation that the Government only procure from entities that have completed a modern slavery statement; such a measure would incentivise reporting.²⁴

Maria Grazia Giammarinaro, the United Nations Special Rapporteur on trafficking in persons, especially women and children, recommends that states adopting transparency in supply chains legislation '[e]stablish sanction mechanisms for companies that fail to fulfil their obligations, and equip law enforcement agencies with the resources necessary to follow up on reports of lack of compliance'.²⁵

The evidence from the UK suggests that a lack of penalties for failing to submit a 'slavery and human trafficking statement'²⁶ has resulted in low levels of compliance. Like the Government's Bill,²⁷ the UK Act's supply chain transparency measures sought to facilitate a 'race to the top'.²⁸ However, this has not been the case. Three years since the UK Act's enactment, only approximately half of the 9,000-11,000 organisations that the UK Government estimates are required to report, have produced a 'slavery and human trafficking statement'.²⁹ Of the statements submitted, only 19% meet all the

¹⁹ Australian Human Rights Commission, Submission to the Attorney-General's Department, *Modern Slavery Reporting Requirement – Public Consultation*, 20 October 2017, 6-7.

²⁰ Law Council of Australia, Submission to the Attorney-General's Department, *Modern Slavery Reporting Requirement – Public Consultation*, 2 November, 15-16.

²¹ Australian Lawyers for Human Rights, Submission to the Attorney-General's Department, *Modern Slavery Reporting Requirement – Public Consultation*, 20 October, 10-12.

²² Advisory Committee of the Modern Slavery Registry, Submission to the Attorney-General's Department, *Modern Slavery Reporting Requirement – Public Consultation*, 2.

²³ *Hidden in Plain Sight*, above n 8, 135-136.

²⁴ *Ibid* 107.

²⁵ Maria Grazia Giammarinaro, *Report of the Special Rapporteur on trafficking in persons, especially women and children*, UN Doc A/HRC/35/37 (28 March 2017) 19.

²⁶ *Modern Slavery Act 2015* (UK) c 30, s 54

²⁷ Explanatory memoranda, *Modern Slavery Bill 2018* (Cth) 23, 35, 39, 44-45, 52-53, 57.

²⁸ Home Office, Government of the United Kingdom, *Transparency in Supply Chains etc.: A Practical Guide*, 5 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/649906/Transparency_in_Supply_Chains_A_Practical_Guide_2017.pdf>.

²⁹ Business & Human Rights Resource Centre, *Modern Slavery Registry* <<https://www.modernslaveryregistry.org/>>. See also William Meade, *Mind the Corporate Transparency Gap*, CORE (4 April 2018) <<http://corporate-responsibility.org/mind-corporate-transparency-gap/>>; Parliament of the United Kingdom, *Measuring success of the strategy and new legislation* (2 May 2018).

minimum requirements of the UK Act i.e. published on the organisation's website, signed by a director and approved by the board.³⁰ Additionally, 'most statements do not go further than general commitments and broad indications of processes' and most say nothing about the company's risk assessment processes and 'do not identify priority risks, whether in terms of countries, supply chains or business areas.'³¹

Reliance on market and reputational consequences for failing to comply with reporting requirements is a weak regulatory tool (as evident from the figures of the UK experience above). Leveraging reputational risk only goes so far and does not apply equally to all entities as this principally impacts consumer-facing entities such as retailers.³² Naming and shaming organisations and informing consumer choice is not always effective.³³ Some research has shown that a very low percentage (3-10%) of consumers are 'willing to modify their purchasing decisions based on social or environmental criteria'³⁴ or they may be altogether indifferent.³⁵

Anti-Slavery Australia recommends that entities that fail to prepare a modern slavery statement, prepare an incomplete statement or make a deceptive, misleading or fraudulent statement be subject to sanctions or penalties. Guidance could be taken from the provisions of the Australian Consumer Law concerning misleading and deceptive conduct (section 18), the exculpatory provisions of the *Illegal Logging Prohibition Act 2012* (Cth) and the civil penalty provisions of the *Corporations Act 2001* (Cth). Anti-Slavery Australia notes that the NSW Act contains maximum penalties of \$1.1 million for failing to prepare a modern slavery statement,³⁶ failing to make modern slavery statements public³⁷ and providing false or misleading information.³⁸

In promoting compliance and providing entities with an opportunity to implement effective supply chain due diligence, Anti-Slavery Australia recommends that penalty provisions only come into effect 12 months after the commencement of the reporting requirement. Additionally, the Government could support entities in their reporting requirements by publishing a list of entities required to report; as recommended by the Joint Standing Committee on Foreign Affairs, Defence and Trade.³⁹

³⁰ *Modern Slavery Act 2015* (UK) c 30, s 54; Business & Human Rights Resource Centre, *Modern Slavery Registry* <<https://www.modernslaveryregistry.org/>>.

³¹ See Evidence to the Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, Sydney, 23 June 2017, 12 (Prof Paul Murray Redmond, AM, Member, Management Committee, Anti-Slavery Australia); Ergon Associates, *Reporting on Modern Slavery: The current state of disclosure* (May 2016) <<http://ergonassociates.net/wp-content/uploads/2017/06/Reporting-on-Modern-Slavery2-May-2016.pdf?x74739>>; Ergon Associates, *Modern slavery statements: One year on* (April 2017) <http://ergonassociates.net/wp-content/uploads/2016/03/MSA_One_year_on_April_2017.pdf?x74739>.

³² Law Council of Australia, Submission to Attorney-General's Department, *Modern Slavery in Supply Chains Reporting Requirement*, 2 November 2017, 25.

³³ Stephen John New, 'Modern slavery and the supply chain: the limits of corporate social responsibility?' (2015) 20 *Supply Chain Management: An International Journal* 697, 700; Gary Craig, 'The UK's Modern Slavery Legislation: An Early Assessment of Progress' (2017) 5(2) *Social Inclusion* 16, 22.

³⁴ Anti-Slavery Australia, Submission to Attorney-General's Department, *Modern Slavery in Supply Chains Reporting Requirement*, 2017, 21-22. See also Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation: Theory, Strategy and Practice* (Oxford University Press, 2011) 120.

³⁵ New, above n 33, 700.

³⁶ *Modern Slavery Act 2018* (NSW) s 24(2).

³⁷ *Ibid* s 24(6).

³⁸ *Ibid* s 24(7).

³⁹ *Hidden in Plain Sight*, above n 8, 127-129.

See also [Anti-Slavery Australia's submission to the Attorney-General's Department Public Consultation on the Modern Slavery Reporting Requirement](#) and [Anti-Slavery Australia submission no 156 to the Joint Standing Committee on Foreign Affairs, Defence and Trade Inquiry into establishing a Modern Slavery Act in Australia](#).

3. STRENGTHENING THE MODERN SLAVERY BILL

Anti-Slavery Australia proposes additional measures that would strengthen Australia's response to human trafficking and slavery.

3.1. Anti-Slavery Commissioner

Anti-Slavery Australia recommends that the Bill include the establishment of an independent Anti-Slavery Commissioner to monitor, oversee and coordinate Australia's response to human trafficking and slavery; raise awareness and provide education and guidance on human trafficking and slavery; conduct inquiries of systemic abuses in Australia; and receive and investigate complaints from individuals and organisations with a sufficient interest.⁴⁰

Anti-Slavery Australia notes that the UK Act and the NSW Act established independent Anti-Slavery Commissioners.⁴¹ The primary functions of the Independent Anti-Slavery Commissioner in the UK is to encourage good practice in:

- (a) the prevention, detection, investigation and prosecution of slavery and human trafficking offences;
- (b) the identification of victims of those offences.⁴²

The functions of the Anti-Slavery Commissioner under the NSW Act includes:

- (a) to advocate for and promote action to combat modern slavery,
- (b) to identify and provide assistance and support for victims of modern slavery,
- (c) to make recommendations and provide information, advice, education and training about action to prevent, detect, investigate and prosecute offences involving modern slavery,
- (d) to co-operate with or work jointly with government and non-government agencies and other bodies and persons to combat modern slavery and provide assistance and support to victims of modern slavery,
- (e) to monitor reporting concerning risks of modern slavery occurring in supply chains of government agencies and commercial organisations,

⁴⁰ See also Anti-Slavery Australia, Submission No 156 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry into Establishing a Modern Slavery Act in Australia*, June 2017, 62-68; Anti-Slavery Australia, Submission No 9 to the Parliamentary Joint Committee on Law Enforcement, *Inquiry into Human Trafficking*, 5-11; Anti-Slavery Australia, Submission to the Attorney-General's Department, *Modern Slavery Reporting Requirement – Public Consultation*, 30 October 2017, 27-28.

⁴¹ *Modern Slavery Act 2015* (UK) c 30, s 40; *Modern Slavery Act 2018* (NSW) s 6.

⁴² *Modern Slavery Act 2015* (UK) c 30, s 41.

- (f) to monitor the effectiveness of legislation and governmental policies and action in combating modern slavery,
- (g) to raise community awareness of modern slavery,
- (h) to exercise such other functions as are conferred or imposed on the Commissioner by or under this or any other Act.⁴³

Anti-Slavery Australia observes that the Government intends to establish a Modern Slavery Business Engagement Unit within the Department of Home Affairs with the primary role 'to work with the business community to support the effective implementation of the reporting requirement', which will include monitoring compliance with the reporting requirement and administering the Modern Slavery Statements Register.⁴⁴ Anti-Slavery Australia submits that the role of an Anti-Slavery Commissioner would complement the functions of the Modern Slavery Business Engagement Unit.

Anti-Slavery Australia recommends that the Government adopts and builds upon the recommendations of the Parliamentary Joint Committee of Law Enforcement and the Joint Standing Committee on Foreign Affairs, Defence and Trade, and establish an independent Anti-Slavery Commissioner with the powers and resources to undertake functions including but not limited to:

- overseeing the implementation of the *National Action Plan to Combat Human Trafficking and Slavery 2015-19* and future plans;
- overseeing the effectiveness of Commonwealth legislation and policies intended to reduce the prevalence of human trafficking and slavery;
- ensuring survivors have access to appropriate support;
- providing education, guidance and awareness training;
- providing education and guidance to entities required to prepare modern slavery statements;
- improving coordination between government agencies in identifying and prosecuting human trafficking and slavery;
- providing independent oversight of the response to combatting human trafficking and slavery across all sectors, and identifying gaps and solutions; and
- raising community awareness.⁴⁵

As discussed in Anti-Slavery Australia's previous submissions, establishing a single, dedicated body charged with overseeing and coordinating Australia's response, monitoring compliance with relevant laws, and with powers to inquire, investigate and

⁴³ *Modern Slavery Act 2018* (NSW) s 9.

⁴⁴ Explanatory memoranda, *Modern Slavery Bill 2018* (Cth) 53-54.

⁴⁵ *Hidden in Plain Sight*, above n 8, 87-91; Parliamentary Joint Committee on Law Enforcement, Parliament of Australia, *An inquiry into human trafficking, slavery and slavery-like practices* (2017) 39-42.

provide recommendations, can only strengthen Australia's overall response to human trafficking and slavery and promote systemic change.⁴⁶

3.2. Victim support

Anti-Slavery Australia strongly recommends that the Bill include the establishment of a national compensation scheme. We have long recommended the establishment of a national compensation scheme.⁴⁷ Victims' compensation schemes provided by each of the eight States and Territories are an inadequate remedy for victims of human trafficking and slavery as they are not designed to provide a remedy to victims of Commonwealth offences against the person. State and Territory schemes vary with regards to categories of harm, time limits and amounts of compensation available; this had led to varied outcomes for victims.

A national compensation scheme will ensure that Australia fulfils principle 2 of the *National Action Plan to Combat Human Trafficking and Slavery 2015-19* by establishing a consistent and effective remedy. A national compensation scheme will also reflect Australia's obligations under international law, including:

- article 6(6) of the *Trafficking Protocol*, which requires each state party to ensure that its domestic legal system provides victims of human trafficking with the possibility of obtaining compensation for damages suffered;⁴⁸
- article 25(2) of the *United Nations Convention Against Transnational Organized Crime*, which requires each state to 'establish appropriate procedures to provide access to compensation and restitution for victims of offences' covered by the Convention;⁴⁹
- article 12 of the *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, which states that '[w]hen compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to: Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes;

⁴⁶ Anti-Slavery Australia, Submission No 156 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry into Establishing a Modern Slavery Act in Australia*, June 2017, 62-68; Anti-Slavery Australia, Submission No 9 to the Parliamentary Joint Committee on Law Enforcement, *Inquiry into Human Trafficking*, 5-11.

⁴⁷ Anti-Slavery Australia, *Establishment of a National Compensation Scheme* (2016) Policy position paper no. 2, available online at <<http://www.antislavery.org.au/images/pdf/Publications/2016%20-%20The%20case%20for%20a%20national%20compensation%20scheme.pdf>>; Anti-Slavery Australia and the Law Council of Australia, *Establishing a National Compensation Scheme for victims of Commonwealth crime* (2016) available online at <<http://www.antislavery.org.au/images/FINAL%20REPORT%20-%20ASA%20-%20LCA%20The%20Case%20for%20a%20National%20Compensation%20Scheme.pdf>>; Anti-Slavery Australia, Submission No 156 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry into Establishing a Modern Slavery Act in Australia*, June 2017, 50-61.

⁴⁸ *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, opened for signature 15 November 2000, 2237 UNTS 319 (entered into force 25 December 2003).

⁴⁹ *United Nations Convention against Transnational Organised Crime*, opened for signature 15 November 2000, 2225 UNTS 209 (entered into force 29 September 2003).

The family, in particular dependents of persons who have died or become physically or mentally incapacitated as a result of such victimization⁵⁰ and

- part II article 2(3)(a) of the *International Covenant on Civil and Political Rights* which requires each state party to 'ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.'⁵¹

The need for a national compensation scheme was recommended by the former United Nations Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo, in her report following her mission to Australia⁵² and was recently noted by the Joint Standing Committee on Foreign Affairs, Defence and Trade in *Hidden in Plain Sight*⁵³ and in the *Trafficking in Persons Report* (2018).⁵⁴

Anti-Slavery Australia, Prof Jennifer Burn and Fiona McLeod SC have developed a model for framing the national compensation scheme. The model addresses: eligibility, time limits, standard of proof, determining body, amount payable and funding for the scheme. The model includes a mechanism for recovering the money paid to the survivor from the perpetrator and outlines visa considerations.

See [Attachment: National Compensation Scheme](#) for more information.

⁵⁰ *United Nations Declaration on the Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res 40/34, UN GAOR, 3rd Comm, 40th sess, 96th plen mtg, agenda item 98, Supp No 53, UN Doc A/RES/40/34 (entered into force 29 November 1985).

⁵¹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

⁵² Joy Ngozi Ezeilo, Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo, addendum: Mission to Australia, UN Doc A/HRC/20/18/Add.1 (18 May 2012) 16 [64].

⁵³ *Hidden in Plain Sight*, above n 8, 164-179.

⁵⁴ Office to Monitor and Combat Trafficking in Persons, US Department of State, *Trafficking in Persons Report 2018*, 80.

ATTACHMENT: MODEL FOR A NATIONAL COMPENSATION SCHEME

Consistent with the recommendations of the Joint Standing Committee on Foreign Affairs, Defence and Trade in its “*Hidden in Plain Sight*” report on establishing a Modern Slavery Act in Australia,⁵⁵ Anti-Slavery Australia (ASA), Prof Jennifer Burn and Fiona McLeod SC, strongly support the proposal to adopt a national compensation scheme to compensate victims of modern slavery under the new Modern Slavery Act for Australia.

A national compensation scheme will ensure that Australia effectively fulfils its obligations under international law by providing a unified framework that avoids the inconsistencies within the current varied State and Territory-specific crime compensation schemes.

Inadequacy of State and Territory-based schemes

Presently, each State and Territory in Australia provides their own statutory victims compensations schemes under their respective Victims of Crime Act.⁵⁶ However the lack of consistency amongst the schemes, with regards to categories of harm, time limits and compensation caps has led to varied outcomes for victims depending on the relevant jurisdiction. The schemes are also not designed to specifically address Commonwealth offences like human trafficking and slavery. Further, a victim who has been trafficked between multiple States and Territories may be required to make separate State-specific applications for compensation. A coordinated Commonwealth scheme would provide victims with timely, fair and effective access to justice and compensation without imposing on the victims the burden of managing inconsistent State and Territory schemes.

International obligations

The establishment of a Commonwealth compensation scheme would ensure that Australia fulfils its obligations under various international conventions and protocols,⁵⁷ namely to ensure the provision of compensation to survivors of trafficking and other human rights violations.

ASA recommends that a proposed compensation scheme can be modelled on two existing Commonwealth schemes: the *Defence Abuse Reparation Scheme (DARS)* and the *Australian Victims of Overseas Terrorism Payments Scheme (AVTOP)*. The

⁵⁵ December 2017

⁵⁶ *Victims of Crime Assistance Act 1996* (Vic) s 29; *Victims of Crime Assistance Act 2009* (Qld) s 54; *Victims of Crime Act 2001* (SA) s 18; *Victims of Crime Assistance Act* (NT) s 31; *Criminal Injuries Compensation Act 2003* (WA) s 9; *Victims of Crime Assistance Act 1976* (Tas) s 7; *Victims of Crime (Financial Assistance) Act 1983* (ACT) s 27; *Victims Rights and Support Act 2013* (NSW) s 40.

⁵⁷ *United Nations Convention against Transnational Organized Crime*, opened for signature 15 December 2000, 2225 UNTS 209 (entered into force 29 September 2003) art 25(2); *Convention against torture and other cruel, inhuman or degrading treatment or punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) art 14(1); *United Nations Convention against Transnational Organized Crime*, GA Res 55/25, UN GAOR, 55th sess, 62nd mtg, Agenda item 105, Supp No 49, UN Doc A/RES/55/25 (entered into force 8 January 2001), Annex II art 6(6); *United Nations Declaration on the Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res 40/34, UN GAOR, 3rd Comm, 40th sess, 96th plen mtg, agenda item 98, Supp No 53, UN Doc A/RES/40/34 (entered into force 29 November 1985) art 12; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 2; *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) art 6.

structure of these schemes should be used as a template on which to model the proposed national compensation scheme.

Defining the scope of the scheme

It is proposed that the compensation scheme operate to compensate victims of slavery and slavery-like practices within the meaning of Divisions 270 and 271 of the Commonwealth *Criminal Code Act 1995*, which comprising the following conduct:

- slavery, being the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised;
- slavery-like practices, including servitude, forced labour, and deceptive recruiting for labour or services. This also includes forced marriage, where one or both parties to the marriage do not fully and freely consent because of coercion, threat or deception, or because they are incapable of understanding the nature and effect of a marriage ceremony, for reasons including age or mental capacity; and
- trafficking in persons, including trafficking people into, out of, and within Australia, and specific provisions for domestic trafficking, organ trafficking and trafficking in children; and
- debt bondage and harbouring a victim,

(for the purpose of this note, **Modern Slavery**).

Modern Slavery however does not encompass civil breaches of Australian workplace law, including, for example, failing to pay correctly or substandard working conditions.

ASA considers that the scheme should have the following features:

1. ELIGIBILITY

- 1.1.** Claimants need to establish that that they have been a victim of Modern Slavery as that term is defined under the Modern Slavery Act, but will not need to establish that an offence under the Act has been committed.
- 1.2.** Claimants need not be Australian citizens to make a claim, however the relevant conduct giving rise to the claim must have occurred in Australia.
- 1.3.** Claimants are eligible to make a claim, regardless of whether they are on the Support for Trafficked People Program.
- 1.4.** Claimants should be eligible for compensation if they have suffered harm as a consequence of being a victim of Modern Slavery. It is proposed that “harm” be defined to expressly include personal injury (both physical and psychological damage) and financial harm, but to exclude the expenses and services otherwise provided by the Support for Trafficked People Program.

- 1.5. Any compensation received under State or Territory crime or similar compensation schemes would be taken into account to avoid duplicity of compensation payments.

2. LIMITATION PERIOD

- 2.1. Claims for compensation must be lodged no more than 2 years from the date the claimant ceased to be a victim of Modern Slavery. Such a time period is consistent with other compensation schemes (such as AVTOP). It should be recognised that a period linked to the act of being enslaved as opposed to the date of injury may exclude claimants that suffer an injury that manifests some years after the events that gave rise to the injury. However, in balancing the interests of claimants with the need for administrative certainty, a limitation period structured on this basis is proposed with the additional element that the scheme administrators may extend the limitation time on a discretionary basis, to ensure that the objectives of the scheme are met. Additionally, it may be appropriate to include a significant long stop to provide a degree of certainty for funding.

3. STANDARD OF PROOF

- 3.1. The standard of proof is 'reasonable likelihood'. The standard should apply to both the establishing that the claimant has been a victim of Modern Slavery; and to establishing that the claimant has suffered harm as a consequence.
- 3.2. Currently, the State and Territory compensation schemes apply the civil standard of proof (balance of probabilities) when determining the validity of claims. The Royal Commission into Institutional Responses to Child Sexual Abuse recommended the 'reasonable likelihood' test as an appropriate standard of proof in considering any redress scheme for survivors of institutional child sexual abuse.⁵⁸
- 3.3. A standard lower than the balance of probabilities test is appropriate to reflect the fact that most applications would rest on victim testimony. The standard of 'reasonable likelihood', recommended by the Royal Commission is appropriate, given the difficulties and dangers for applicants having to establish offences.

4. DETERMINATION

- 4.1. The decision-making body of the compensation scheme should be a government department rather than a Court or Tribunal. This is similar to the AVTOP scheme where the decision making function has been delegated to the Department of Human Services.

The compensation scheme rules will set out the assessment criteria to be applied by the delegated person in making a determination. It is proposed that at a minimum, that criteria include the delegated person being satisfied that:

1. the claimant has been the victim of Modern Slavery;

⁵⁸ Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015) 41.

2. the claimant has suffered harm as a consequence of being the victim of Modern Slavery; and
3. sufficient supporting documentation has been provided by the claimant to enable the determination to be made.

5. COMPENSATION

- 5.1. Compensation is capped at \$100,000. Under the DARS, a reparation payment is capped at \$50,000,⁵⁹ while under the AVTOP, compensation is capped at \$75,000.⁶⁰ Under State and Territory compensation schemes, the cap ranges from \$30,000 in Tasmania, to \$100,000 in South Australia. Accordingly, the proposed cap is consistent with existing compensation regimes.
- 5.2. Compensation awarded should be an 'exempt lump sum' for the purposes of income testing and should not affect a person's entitlement to social security benefits or other benefits. This is consistent with the DARS scheme⁶¹ and AVTOP scheme.⁶²

6. FUNDING

- 6.1. The scheme should be funded in a way consistent with Government objectives, and could be achieved by direct Government funding, through the proceeds of crime and/or through the establishment of a special fund.
- 6.2. It is estimated that the funding required to meet compensation payments will be no more than \$5 million per annum in the initial years of the scheme. This estimate is based on:
 1. the compensation cap value noted above (\$100,000 per claim); and
 2. the historic frequency of human trafficking offences referred to the Australian Federal Police. Between 2004 and 2017, the AFP received 840 referrals for human trafficking, slavery and slavery-like offences (an average of 65 cases per year), discounted to reflect that not all of those matters would have resulted in prosecutions.
- 6.3. It is reasonable to assume that there may be an initial "spike" in compensation claims as the community becomes aware of the legislation and the compensation scheme; however we think it also reasonable to assume a gradual decrease in claims over time, as compliance with the new law increases.

⁵⁹ Australian Government, 'Defence Abuse Reparation Scheme Guidelines', 12. The most serious category of abuse (Category 4) carries a maximum payment of \$45,000. An additional \$5,000 may be awarded where there has been mismanagement of the issue by Defence.

⁶⁰ *Social Security Act 1991* (Cth) s 1061PAD-E.

⁶¹ Australian Government Defence Abuse Response Taskforce, 'Financial Impact of Receiving a Reparation Payment' (Fact sheet, 2013)

www.defenceabusetaskforce.gov.au/Outcomes/Documents/Financial%20%20impact%20of%20receiving%20a%20reparation%20payment.pdf.

⁶² *Social Security Act 1991*(Cth) s 14A(1)(db).

7. RECOVERY OF COMPENSATION PAYMENT

- 7.1. Currently, the State and Territory schemes provide for an assignment of rights from the victim of the crime to the scheme administrator, thereby allowing the administrator to bring civil proceedings against the perpetrator of the crime to recover compensation paid to the victim.⁶³ This recovery payment is paid in priority to the scheme, with any excess amounts recovered being paid to the victim.
- 7.2. The *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* confers on the Operator of the redress scheme a right to recover the compensation paid to a victim from the participating institution responsible for the abuse of the victim.⁶⁴ The funding contribution is determined by the Operator on a quarterly basis and consists of two elements, namely:
1. The redress element, which covers the total amount of the institution's share of the costs of redress payments and the counselling and psychological component of redress in the quarter; and
 2. The scheme administrator element, which covers the total amount of the institutions contribution to the costs of the administrator of the scheme in the quarter.
- 7.3. It is recommended that, in line with the above provisions, a similar assignment of rights as appears in State and Territory schemes, or a redress scheme consistent with the *Redress Scheme for Institutional Child Sexual Abuse* should be adopted to enable recovery of compensation paid to a victim of Modern Slavery.

8. VISA CONSIDERATIONS

- 8.1. Currently if a person is identified as being a victim of human trafficking by an officer of the police force, the Department of Immigration and Border Protection can grant them a Bridging Visa F (BVF) for 45 days. The BVP can also be extended to allow them to stay in the country for the duration of a criminal justice process. Similarly the Referred Stay (Permanent) Visa can be granted to a trafficked person who has made a contribution to a criminal investigation and would be in danger if they returned to their country. However there are concerns that these visas are only available to victims who make an active contribution to a criminal investigation.
- 8.2. It is recommended that the Minister consider expanding the BVF, by granting a short-term visa to trafficking victims awaiting compensation under the proposed scheme, even after the criminal justice process has ceased or where there is no prosecution underway. ASA also recommends that the Bridging Visa E could be amended to allow a person to stay in Australia when an application for compensation is being determined.

⁶³ *Victims of Crime Assistance Act 1996* (Vic) s 51; *Victims of Crime Assistance Act 2009* (Qld) s 185; *Victims of Crime Act 2001* (SA) s 28; *Victims of Crime Assistance Act* (NT) s 56; *Criminal Injuries Compensation Act 2003* (WA) s 49; *Victims of Crime Assistance Act 1976* (Tas) s 7A; *Victims of Crime (Financial Assistance) Act 1983* (ACT) s 54; *Victims Rights and Support Act 2013* (NSW) s 59.

⁶⁴ *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth) s 149.