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# The Criminal Justice Response to Slavery and People Trafficking; Reparation; and Vulnerable Witness Protection

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Anti-Slavery Project Submission

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## I. INTRODUCTION

The Anti-Slavery Project is a law and policy centre dedicated to advancing the rights of people who have experienced human trafficking and extreme forms of exploitation. We provide legal advice to over seventy trafficked people. We provide immigration advice to people who are applying for protection or humanitarian visas, and represent trafficked people seeking financial compensation.<sup>1</sup> This submission draws upon our experience representing people who have been trafficked into a wide range of exploitative situations.

On 18 February 2011 the Anti-Slavery Project hosted a seminar on the Criminal Justice Response and Reparations at the University of Technology Sydney Law Faculty. We hope this submission will assist the Australian Government to identify effective measures to prevent trafficking in persons and to protect, assist and provide access to adequate redress for victims, including the possibility of obtaining compensation.<sup>2</sup>

## II. SUMMARY

1. The people trafficking offences in division 271 of the *Criminal Code Act 1995* (Cth)(the *Criminal Code*) do not fully reflect Australia's obligations under the *United Nations Trafficking Protocol*.<sup>3</sup> To fully reflect Australia's obligations under the *Trafficking Protocol*, the definition of exploitation should be amended to capture "servitude" and "practices similar to slavery" and the *Criminal Code* should provide statutory guidance on the coercive methods commonly employed by traffickers.
2. The offences in division 270 prohibit extreme forms of exploitation such as slavery and sexual servitude. To fully implement Australia's international obligations to address extreme forms of exploitation, we recommend introducing specific offences of forced labour and servitude into division 270 of the *Criminal Code*. Consideration should also be given to introducing an offence of deceptive recruiting for labour services in situations where workers find themselves in exploitative working conditions.
3. While we welcome the opportunity to contribute to the review of the criminal justice response to people trafficking and slavery, we caution that the successes – and shortcomings – of Australia's response to people trafficking should not be seen through the narrow lens of the law enforcement. Instead, we must focus on protecting the rights of trafficked people and strengthening pathways to legal remedies outside the criminal justice system.
4. We note our concerns about the capacity of the visa framework for trafficked people to protect people who are afraid, for a wide range of reasons, of returning to their country of origin and to facilitate the timely reunion of families who have become estranged as a consequence of people trafficking. While we have not discussed these concerns in this submission, we note that they deserve closer attention and would welcome the opportunity to discuss these matters further.

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<sup>1</sup> The Anti-Slavery Project legal service is conducted by J.M Burn Solicitor, a legal service which has been seconded to the Anti-Slavery Project by the UTS Law Faculty.

<sup>2</sup> UN Human Rights Council, "Trafficking in Persons, Especially Women and Children: regional and sub-regional cooperation in promoting a human rights based approach to combating trafficking in persons," UN Doc. A/HRC/RES/14/2, June 23, 2010, at [2].

<sup>3</sup> *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.

5. We welcome the focus on the protection for vulnerable witness and the rights of victims of crime and support the development of a Federal Charter of Victims Rights that sets out the rights of victims of crime.
6. The Australian Government has invested more than \$50 million in anti-trafficking measures, but the issue of compensation for trafficking victims who have suffered harm in Australia has been neglected. While it is helpful to consider how the reparation provisions could be amended to improve the prospects of a trafficking victim seeking reparation from a convicted offender, we must also improve access to remedies outside the criminal justice system.
7. The Attorney-General's Department recognises that the "response to labour exploitation should provide for a mixture of civil and criminal remedies" but it does not seek views on how to ensure trafficked people can access effective legal remedies outside the criminal justice system. In our view, the question of how to improve access to justice for trafficked people so that they can obtain financial redress for the harm they have suffered deserves urgent attention.

### III. RECOMMENDATIONS

**Recommendation 1:** Conduct a review of Australia's legislative response to people trafficking, including pathways to compensation for trafficked people.

**Recommendation 2:** Ensure Division 270 of the *Criminal Code* fully implement Australia's international obligations to criminalise forced labour and "servitude" and practices similar to slavery.

- Introduce standalone offences of forced labour and "servitude".
- Amend the definition of "sexual service" so that the offence of sexual servitude captures non-commercial sexual exploitation.
- Consider introducing an offence of deceptive recruiting for labour services.

**Recommendation 3:** Ensure Division 271 of the *Criminal Code* fully implements Australia's obligations under the *United Nations Trafficking Protocol*.

- Clearly define coercion in the *Criminal Code* to capture the abuse of power or a position of vulnerability and the giving or receiving of payments of benefits to achieve the consent of a person having control over another person.
- Amend the definition of "exploitation" in the *Criminal Code* to cover "servitude" and "practices similar to slavery" including servile marriage.

**Recommendation 4:** Strengthen pathways to compensation for trafficked people.

- Amend the reparations provision in section 21B.
- Improve access to a range of existing legal remedies by mainstreaming the issue of compensation into the Australian Government anti-trafficking strategy.
- Ask the Standing Committee of Attorney-General's to examine whether State and Territory victims of crime compensation schemes can provide appropriate avenues for victim support and compensation for trafficking victims.

- Consider the introduction of a federal compensation scheme for victims of crime.
- Explore how to link the confiscation of offenders' assets by the Commonwealth with the financial compensation of trafficking victims.

#### IV. PEOPLE TRAFFICKING IN AUSTRALIA

8. In the last decade, Australia has introduced new criminal offences prohibiting slavery, sexual servitude, and people trafficking.<sup>4</sup> Since 2004, over 170 suspected victims of trafficking have received support from the Commonwealth Government Support Program for Victims of Trafficking.<sup>5</sup> Convictions have proved rare.<sup>6</sup> Initially, the response to trafficking was characterised by a preoccupation with trafficking into the sex industry.<sup>7</sup> Labour trafficking in Australia is under reported and, sometimes, unrecognized<sup>8</sup>
9. Labour trafficking exists on a spectrum of exploitation – from gross underpayment and sexual harassment to trafficking, forced labour and slavery. The picture of labour trafficking in Australia is still in soft focus. Solid statistics do not exist. Only a handful of cases have been prosecuted and, as David acknowledges, there are still “critical gaps in information”.<sup>9</sup> Frontline agencies and services are sometimes unaware that Australia’s anti-trafficking laws can apply to the worst cases of labour exploitation.<sup>10</sup>
10. While Australian law prohibits trafficking for forced labour, the formulation of the trafficking and slavery offences in the *Criminal Code* reflect a preoccupation with sex trafficking.<sup>11</sup> Although there is a specific offence of sexual servitude and deceptive recruiting, there are no stand-alone offences of servitude, forced labour or deceptive recruitment for labour services. The existing offence of sexual servitude only covers commercial sexual exploitation.

<sup>4</sup> In 1999, the *Criminal Code Amendment (Slavery and Sexual Servitude) Offences Act 1999* (Cth) introduced to the offences of slavery (s 270.3), sexual servitude (s 270.6) and deceptive recruiting for sexual services (s 270.7) into the Commonwealth Criminal Code. In 2005, the *Criminal Code Amendment (Trafficking in Persons Offences) Act 2005* (Cth) added the offences of trafficking in persons (s 271.2), trafficking in children (s 271.4), domestic trafficking in persons (s 271.5) and debt bondage arrangements (s 271.8). See further *R v Tang* (2008) 237 CLR 1; 82 ALJR 1334 (explaining the legal meaning of slavery); *Sieders v R; Somsri V R* [2008] NSWCCA 187 (explaining the meaning of sexual servitude).

<sup>5</sup> The majority of trafficking victims are located in New South Wales and Victoria with cases also in Queensland and the Australian Capital Territory.

<sup>6</sup> There have been thirteen convictions to date although some matters are still subject to appeal. Anti-People Trafficking Interdepartmental Committee, Australian Government, *Trafficking in Persons: The Australian Government Response: 1 May 2009 – 30 June 2010: The Second Report of the Anti-People Trafficking Interdepartmental Committee*, (2010), p 4, 31.

<sup>7</sup> See Dorevitch and Foster, “Obstacles on the Road to Protection: Assessing the Treatment of Sex-Trafficking Victims under Australia’s Migration and Refugee Law” (2008) 9 *Melbourne Journal of International Law* 1; Pearson E, “Australia” in *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights around the World* (2007, Global Alliance Against Trafficking in Women).

<sup>8</sup> See generally Fiona David, *Labour Trafficking*, Australian Institute of Criminology Research and Public Policy Series Paper No 108.

<sup>9</sup> *Ibid.*, xii.

<sup>10</sup> *Ibid.*

<sup>11</sup> Parliamentary inquiries into trafficking in Australia have focused on trafficking for sexual servitude: see eg, Senate Legal and Constitutional Legislation Committee, *Inquiry into Criminal Code Amendment (Trafficking in Persons Offences) Bill 2004* (2004); Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the trafficking of women for sexual servitude* (2004). The title of the Transnational Sexual Exploitation and Trafficking Team, established in 2003, reflected the focus of initial law enforcement efforts.

11. There is a heavy reliance on victim testimony to secure convictions. Providing evidence can be traumatic for trafficked people and support for vulnerable witnesses is critical. Traffickers leave their victims destitute and intensive support is necessary for people to be able to rebuild their lives and re-enter the workforce in jobs where they receive appropriate remuneration.
12. While the *Trafficking Protocol* promises States will provide trafficked people with the “possibility” of obtaining compensation,<sup>12</sup> the compensation awards to trafficked people in Australia can be counted on one hand.<sup>13</sup>

## V. OPTIONS FOR REFORM

### A. Fully implement Australia’s obligations under the United Nations Trafficking Protocol

13. The *Trafficking Protocol* obliges Australia to “adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of the Trafficking Protocol”.<sup>14</sup> The conduct that must be proscribed is described in article 3(a) of the *Trafficking Protocol*, which defines trafficking in persons 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.

14. In 2005, eight trafficking offences were introduced to implement Australia’s obligations under the *Trafficking Protocol*. These offences prohibit trafficking in persons to and from Australia by means of force or use of threats<sup>15</sup> or deception<sup>16</sup>, or in circumstances where a person is reckless as to whether another person will be exploited regardless of the means used.<sup>17</sup> An offence will occur where the trafficker deceives their victim about the fact that their entry or exit will involve the provision of sexual services, exploitation, debt bondage or the confiscation of the other person’s travel identity documents.<sup>18</sup> An offence will also occur in circumstances where there is an arrangement for the victim to provide sexual services and the victim has been deceived by the trafficker about the nature of the services to be provided, the extent to which victim is free to leave their residence or the place where he or she provides sexual services, the extent to which the person is free to cease providing sexual services, and the amount or existence of any debt owed or

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<sup>12</sup> Article 25(2) of the United Nations Convention Against Transnational Organized Crime Convention requires that “each State Party shall establish appropriate procedures to provide access to compensation and restitution for victims of offences covered by this Convention” Article 6(6) of the *United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons, especially Women and Children, supplementing the UNODC* requires that “each state shall ensure its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered”.

<sup>13</sup> Frances Simmons, ‘Pathways to justice: Compensation for trafficked people’ (Presentation delivered at Anti-Slavery Project Seminar: The Criminal Justice Response to Trafficking and Reparations, University of Technology, Sydney, 18 February 2011), available online at [www.antislavery.org.au](http://www.antislavery.org.au).

<sup>14</sup> Article 5(2).

<sup>15</sup> *Criminal Code Act 1995* (Cth), s 271.2(1).

<sup>16</sup> *Criminal Code Act 1995* (Cth), ss 271.2(2), 271.2(2B).

<sup>17</sup> *Criminal Code Act 1995* (Cth), s 271(1B).

<sup>18</sup> *Criminal Code Act 1995* (Cth), s 271.2 (2A).

claimed to be owed.<sup>19</sup> There are separate offences of trafficking in children<sup>20</sup> and domestic trafficking within Australia.<sup>21</sup> Unlike the offences prohibiting the trafficking of adults, establishing the use of force, threats or deception is never necessary to prove a child has been trafficked.<sup>22</sup>

15. In our view the trafficking offences in the *Criminal Code* do not fully capture the conduct that is prohibited by the definition of trafficking in the *Trafficking Protocol*. First, the definition of exploitation does not cover “practices similar to slavery” or servitude”. Second, the abusive and coercive means that traffickers employ to exploit their victims is not adequately captured because the *Criminal Code* fails to define “abuse of a position of power and vulnerability”. Finally, Division 271 does not target the maintenance of a person in a situation of exploitation.

1. *Ensure the Criminal Code targets all types of exploitation prohibited by International law.*

16. Article 3(a) of the *Trafficking Protocol* explains that the term “exploitation” includes, 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”.

17. The terms “sexual exploitation” and “exploitation of prostitution of others” are not defined in the *Trafficking Protocol* or by other international laws but most of the types of exploitation (namely, forced labour or services, slavery or practices similar to slavery and servitude) are defined and prohibited by international instruments that pre-date the *Trafficking Protocol*.<sup>23</sup>

18. The *Trafficking Protocol* does not explicitly require that states introduce laws prohibiting exploitation but states do have obligations under other international instruments to criminalise forced labour, slavery, servitude and practices similar to slavery.<sup>24</sup> An effective legislative response to trafficking requires national anti-trafficking laws to precisely define what constitutes exploitation.<sup>25</sup>

19. The United Nations Office on Drugs and Crime (“UNODC”) advises that effective anti-trafficking laws should “address all the forms of exploitation with reference to international human rights standards including fundamental principles and rights at work such as the abolition of forced labour and child labour”.<sup>26</sup>

20. The definition of exploitation in the *Criminal Code* provides:

*exploitation*, of one person (the *victim*) by another person (the *exploiter*), occurs if:

(a) the exploiter's conduct causes the victim to enter into slavery, forced labour or sexual servitude; or

<sup>19</sup> *Criminal Code Act 1995* (Cth), s 271.2(2B).

<sup>20</sup> *Criminal Code Act 1995* (Cth), s 271.4.

<sup>21</sup> *Criminal Code Act 1995* (Cth), s 271.5

<sup>22</sup> Article 3(b) also provides that the recruitment, transportation, harbouring or receipt of children by any means for the purpose of exploitation will constitute trafficking, regardless of whether consent is present.

<sup>23</sup> Namely, the 1926 Slavery Convention, the 1956 Supplementary Convention, the ILO Conventions on Forced Labour and the *International Covenant on Civil and Political Rights*.

<sup>24</sup> UNODC, *Model Law Against Trafficking in Persons* (2009), pp 35-36.

<sup>25</sup> UNODC, *Model Law Against Trafficking in Persons* (2009), pp 35-36.

<sup>26</sup> UNODC, *International Framework for Action to Implement the Trafficking Protocol* (2009), p 18.

- (b) the exploiter's conduct causes an organ of the victim to be removed and:
    - (i) the removal is contrary to the law of the State or Territory where it is carried out; or
    - (ii) neither the victim nor the victim's legal guardian consented to the removal and it does not meet a medical or therapeutic need of the victim.
21. Unlike the definition of exploitation in the *Trafficking Protocol*, the definition of exploitation in the *Criminal Code* does not explicitly cover “practices similar to slavery” such as “servile marriage”.<sup>27</sup> Sexual servitude is included but the broader concept of servitude is not. In our view the definition of exploitation in the dictionary of the *Criminal Code* should be amended to include servitude and the types of “practices similar to slavery” that are prohibited by the *1956 Supplementary Convention*.<sup>28</sup>
22. Debt bondage is not defined in the definition of exploitation but it is a discrete offence under s 271.8 of the *Criminal Code*. We recommend covering debt bondage in the definition of exploitation by the insertion of the phrase “practices to similar to slavery”.
2. *Ensure the Criminal Code provides statutory guidance on the definition of coercion and the abuse of a position of power and vulnerability.*
23. Traffickers often control their victims through subtle methods of coercion. Traffickers may employ psychological coercion to maintain control in circumstances where the victim is isolated, vulnerable to threats, fearful of deportation or economic destitution, and dependent upon their trafficker for food and housing.<sup>29</sup>
24. Under the *Trafficking Protocol* the consent of a person is nullified “by means of the threat or use of force or other forms of coercion, abduction, fraud, deception, the abuse of power or a position of vulnerability or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person”.<sup>30</sup>
25. The trafficking offences in the *Criminal Code* do not fully adopt the language of the *Trafficking Protocol*, referring instead to the use of *force or threats or deception*<sup>31</sup>. The description of the circumstances in which the consent of the trafficked person will be annulled does not explicitly include trafficking which occurs by means of:
- a. “other forms of coercion”;
  - b. “the abuse of power or of a position of vulnerability”; or
  - c. “the giving or receiving of payments or benefits to achieve the consent of a person having control over another person”.<sup>32</sup>

<sup>27</sup> Debt bondage is not defined in the definition of exploitation but it is a discrete offence under *Criminal Code*, s 271.8. Trafficking for debt bondage is addressed by s 271.2(2) and (2A).

<sup>28</sup> See UNODC, *Model Law Against Trafficking in Persons* (2009), p 35.

<sup>29</sup> UNODC *Model Law Against Trafficking in Persons* (2009), 22.

<sup>30</sup> Article 3a. Article 3(b) also provides that the recruitment, transportation, harbouring or receipt of children by any means for the purpose of exploitation will constitute trafficking, regardless of whether consent is present.

<sup>31</sup> *Criminal Code Act 1995* (Cth) s 271.1

<sup>32</sup> This can be contrasted to the offence of debt bondage (s 271.8(2) which makes it clear that in determining whether one person caused another person to enter into a condition of debt bondage a court or jury can take into account the differential power relationship between the alleged perpetrator and the alleged victim including their economic relationship, the alleged victim's ability to speak, write



26. The *Criminal Code* defines “threat” broadly to capture any threat of detrimental action that cannot be reasonably justified.<sup>33</sup>
27. Under international law the concept of an abuse of position of power or vulnerability encompasses nonviolent methods of coercion that leave a person with no reasonable alternative but to submit to the exploitation.<sup>34</sup>
28. The UNODC *Model Law Against Trafficking in Persons* recommends that laws criminalising trafficking should specifically define “abuse of a position of vulnerability” as “in practice this causes many difficulties”.<sup>35</sup> The phrase “abuse of a position of vulnerability” refers to any situation in which the person involved believes he or she has no real or acceptable alternative but to submit; or taking advantage of the vulnerable position a person is placed in by virtue of a range of a factors including (but not limited to)
- a. having entered a country illegally or without proper documentation, or
  - b. reduced capacity to form judgments by virtue of being a child, illness, infirmity or a mental or physical disability, pregnancy or
  - c. promises or giving of sums of money or other advantages to those having authority over a person, or
  - d. being in a precarious position from the standpoint of social survival.<sup>36</sup>
29. Comparative jurisprudence on the meaning of “coercion” provide guidance on how the law may describe the subtle forms of control exercised by traffickers.<sup>37</sup> In the United States, for example, recent reforms to the statutory definition of trafficking have affirmed the approach taken by superior courts in the United States, namely that the concept of coercion encompasses
- any harm, whether physical or non-physical, including psychological, financial, or reputational harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labour or services in order to avoid incurring that harm.<sup>38</sup>
30. The new definition of coercion is designed to facilitate the prosecution of trafficking cases where the traffickers rely on psychological coercion by “more fully captur[ing] the imbalance of power between trafficker and victim” and to clarify that the ban on sex

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and understand English or the language in which the deception or inducement occurred and the extent of the alleged victim’s social and physical dependence on the accused.

<sup>33</sup> *Criminal Code Act 1995* (Cth), s 271.1 defines threat as (a) a threat of force; or (b) a threat to cause a person’s removal from Australia; or (c) a threat of any other detrimental action; unless there are reasonable grounds for the threat of that action.

<sup>34</sup> The “travaux préparatoires” state that the phrase “abuse of a position of vulnerability is understood to refer to any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved”: UNGA, “Interpretative notes for the official records (travaux préparatoires) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto” (UN Doc A/55/383/Add1, 3) Nov 2000, Interpretative Note, 63.

<sup>35</sup> UNODC, *Model Law Against Trafficking in Persons* (2009), p 9.

<sup>36</sup> *Ibid* p 9-11.

<sup>37</sup> See eg, *United States v Bradley* 390 F 3D 145 (1st Cir 2004). This followed the introduction of a definition of coercion by the *Trafficking Victims Protection Act 2000* (US) (TPVA). The definition of coercion was clarified by the *Trafficking Victims Protection Reauthorization Act 2008* (US).

<sup>38</sup> *William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008*, Pub L No 110-457, 122 Stat 5046, s 1589(c)(2).

trafficking and forced labor will cover situations where the victim is exploited through threats of serious harm, or by a scheme, plan or pattern “intended to inculcate a belief of serious harm”.<sup>39</sup>

### 3. *Harbouring and receiving*

31. While commentary on human trafficking routinely describes trafficking as the *movement* of people by deceptive, coercive, or fraudulent means for the purpose of exploitation, international legal experts are now stressing that the international legal definition of trafficking captures “the bringing of a person into a situation of exploitation and the maintenance of that person in a situation of exploitation”.<sup>40</sup>
32. The trafficking provisions in Division 271 are narrower because they require proof of movement or entry into or out of Australia, in the case of the offence of domestic trafficking in persons, transportation from one place in Australia to another place in Australia. These gaps could be closed by broadening the operation of trafficking offences to cover harbouring and receipt.<sup>41</sup>
33. However, the maintenance of a person in a condition of exploitation could effectively be covered by ensuring that Division 270 contains stand alone offences of “servitude” (encompassing practices similar to slavery such as servile marriage) and “forced labour”, as well as the existing offences of slavery and sexual servitude.

## **B. Fully implement Australia’s obligations to prevent prohibit forced labour and practices similar to slavery**

### 1. *Slavery & practices similar to slavery*

34. The internationally accepted definition of slavery is found in the *International Convention to Suppress the Slave Trade and Slavery* 1926 (1926 Slavery Convention),<sup>42</sup> which defines slavery as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised”.<sup>43</sup> The definition of slavery does not include an element of coercion; this is because it is generally accepted that the conditions of slavery are so inherently coercive that it is impossible to consent to slavery.<sup>44</sup>

<sup>39</sup> Serious harm in this context “may refer to non-violent and psychological coercion, including but not limited to isolation, denial of sleep and punishments, or preying on mental illness, infirmity, drug use or additions (whether pre-existing or developed by the trafficker)”: Cited in Charles Doyle, “The William Wilberforce Trafficking Reauthorisation Act of 2008 (PL 110-457): Criminal Law Provisions” Congressional Research Service, January 29 2009.

<sup>40</sup> Anne Gallagher, *International Law of Human Trafficking* (2010), p 47.

<sup>41</sup> See generally David Fiona, ‘Presentation on labour trafficking and law reform’ (Presentation delivered at Anti-Slavery Project Seminar: The Criminal Justice Response to Trafficking and Reparations, University of Technology, Sydney, 18 February 2011).

<sup>42</sup> Opened for signature 25 September 1926, 212 UNTS 17 (entered into force 18 June 1927), Art 1(1).

<sup>43</sup> Opened for signature 25 September 1926, 212 UNTS 17 (entered into force 18 June 1927), Art 1(1). The language of article 1(1) of the *1926 Slavery Convention* has “proved to be abiding” and is now accepted to define slavery at international customary law. International Criminal Tribunal for the former Yugoslavia, *Prosecutor v Kunarac, Kovac and Vukovic* (IT-96-23 & IT-96-23/I-T) Judgment, 22 February 2001, [519] [hereinafter *Kunarac Trial*].

<sup>44</sup> See, for e.g., *Prosecutor v Kunarac, Kovac and Vukovic* (IT-96-23 & IT-96-23/1-A) Judgment, 12 June 2002 [hereinafter *Kunarac Appeal*] at [120] (rejecting the “the premise that lack of consent is an element of the crime since, in its view, enslavement flows from claimed rights of ownership;

35. In 1999 Australian legislators borrowed the language of the 1926 Slavery Convention to define slavery in the *Criminal Code* 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”.<sup>45</sup>
36. In 2008 the High Court considered the meaning of slavery in the landmark case of *R v Tang*.<sup>46</sup> The Court relied on a 1953 report of the UN Secretary General to identify the following 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 the person’s labour without compensation commensurate to the value of the labour; the power to control and restrict a person’s movements; and the power to commodify a person by treating the person as an object of sale and purchase.<sup>47</sup>
37. The High Court found capacity to deal with a person as an object of sale and purchase, “may be a powerful indication that a case falls on one side of the line [between harsh employment and slavery]”.<sup>48</sup> Ultimately, the High Court recognised that drawing a distinction between slavery and other exploitative practices is a question of degree.<sup>49</sup>
38. International law recognises that not all forms of egregious exploitation are encompassed by the concept of slavery. The 1926 Slavery Convention was augmented by the *Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery* 1956 (1956 Supplementary Convention),<sup>50</sup> which obliges Australia to criminalise practices similar to slavery “whether or not they are covered by the definition of slavery” contained in article 1 of the Slavery Convention. The term “practices similar to slavery” captures:
- (a) Debt bondage, that is to say, the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined;
  - (b) Serfdom, that is to say, the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status;
  - (c) Any institution or practice whereby:

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accordingly, lack of consent does not have to be proved by the Prosecutor as an element of the crime. However, consent may be relevant from an evidential point of view as going to the question whether the Prosecutor has established the element of the crime relating to the exercise by the accused of any or all of the powers attaching to the right of ownership. In this respect...circumstances which render it impossible to express consent may be sufficient to presume the absence of consent.”)

<sup>45</sup> *Criminal Code Act* 1995 (Cth) s 270.1.

<sup>46</sup> (2008) 237 CLR 1.

<sup>47</sup> *Ibid* at [27]-[35 citing United Nations, Economic and Social Council, Slavery, the Slave Trade, and other forms of Servitude (Report of the Secretary-General), UN Doc E/2357, 27 January 1953.

<sup>48</sup> *Ibid* at [50].

<sup>49</sup> *Ibid* at 18. Gleeson CJ also focussed on the question - what kinds of factors will indicate a condition of slavery? - and referred to the International Criminal Tribunal for the Former Yugoslavia’s judgment in *Kunarac* where the court identified the following indicia of slavery: control of movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour.

<sup>50</sup> Article 7(a).

- (i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or
- (ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or
- (iii) A woman on the death of her husband is liable to be inherited by another person;
- (d) Any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.<sup>51</sup>

39. Australian law defines and prohibits debt bondage but is silent on child labour, servile marriage and serfdom. A person who is a victim of practices similar to slavery is a person of servile status.<sup>52</sup>

40. The concept of servile status appears closely linked to the concept of servitude which, while it is not mentioned in the 1956 Supplementary Convention, is found in the ICCPR<sup>53</sup> and the *Universal Declaration of Human Rights*, both of which prohibit slavery and servitude. The concept of servitude is understood to encompass a broader range of exploitative conduct than slavery. Dr Anne Gallagher has observed:

While the relationship between the two concepts is not fully settled, most agree that the distinction between slavery and servitude is both distinct and qualitative: "[s]ervitude should be understood as human exploitation falling short of slavery."<sup>54</sup>

41. The concept of servitude has been understood to prohibit a "particularly serious form of denial of freedom".<sup>55</sup> In 2010 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."<sup>56</sup>

42. While international courts and commentators have sometimes sought to draw a distinction between the different types of exploitation such as slavery and servitude,<sup>57</sup> the High Court of Australia found it was "unnecessary and unhelpful" to seek to draw boundaries between slavery and cognate concepts such as servitude, peonage, forced labor, or debt bondage and that the various concepts should not be understood as

<sup>51</sup> Article 7(a).

<sup>52</sup> Article 7(b).

<sup>53</sup> Opened for signature 16 December 1966, 999 U.N.T.S 171 (entered into force 23 March 1976 except Art 41 which came into force 28 March 1979).

<sup>54</sup> Anne Gallagher, above n 40, p 182.

<sup>55</sup> *Rantsev v Cyprus and Russia* [2010] ECHR 25965/04 (7 January 2010).

<sup>56</sup> *ibid* at 281.

<sup>57</sup> 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), p 164-167; see also *Siliadin v France* (2006) 43 EHRR 16, *Rantsev* above n 55 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 Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for Signature 4 November 1950, ETS 5, (entered into force 3 September 1953).

“mutually exclusive”.<sup>58</sup> Thus, although the concepts of servitude, forced labour, servile marriage, and debt bondage may sometimes overlap, the question of whether a person is in a condition of slavery will depend on the *degree* of exploitation.

43. It is therefore appropriate for the *Criminal Code* to define and prohibit servitude and all the practices similar to slavery. This will create a hierarchy of offences in the *Criminal Code* that capture a range of exploitative conduct and fully reflect our international obligations.<sup>59</sup>

## 2. *Forced labour*

44. The hierarchy of offences in the *Criminal Code* should contain a stand-alone offence of forced labour,<sup>60</sup> which fully implements Australia’s international obligations. Article 25 of the 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 really adequate and strictly enforced”.

45. Worldwide forced labour is believed to be a larger problem than human trafficking. The ILO estimates that only 20 per cent of forced labour cases result from trafficking.<sup>61</sup> However, in Australia labour trafficking and forced labour are under-reported and the number of people who experience these types of exploitation is simply not known.<sup>62</sup>

46. The *Forced Labour Convention* 1930 (ILO No 29) and the *Abolition of Forced Labour Convention* 1957 (ILO No 105)<sup>63</sup> 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.

47. 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.<sup>64</sup>

<sup>58</sup> (2008) 237 CLR 1, at 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”.

<sup>59</sup> Frances Simmons and Jennifer Burn, ‘Evaluating Australia’s Response to all forms of Trafficking: Towards Rights-centered Reform’, (2010) 84 *The Australian Law Journal* 712 (recommending a review of Australia’s legislative response to trafficking).

<sup>60</sup> *Ibid.*

<sup>61</sup> ILO, *Global Alliance*, n 13, p 14.

<sup>62</sup> Fiona David, *Labour Trafficking*, Australian Institute of Criminology Research and Public Policy Series Paper No 108, xii.

<sup>63</sup> Opened for signature 25 June 1957, 320 UNTS 291 (entered into force 17 January 1959).

48. There is currently no specific offence of “forced labour” in the *Criminal Code*. Applying the High Court’s dictum that it is unhelpful to draw boundaries between slavery and cognate concepts such as forced labour it would appear that factual circumstances falling within the international definition of forced labour could fall within the slavery offence if the prosecution could establish the offender exercised any or all powers attaching to the right of ownership.<sup>65</sup> While the question of whether a person’s conduct will fall within the meaning of slavery will depend on the facts of the case, it is unwise to treat two distinct legal concepts as interchangeable, particularly in light of international commentary suggesting that only extreme forms of forced labour will fall within the offence of slavery.<sup>66</sup>

49. The *Criminal Code* does prohibit trafficking for forced labour.<sup>67</sup> Australia has chosen not to adopt the language of “menace and penalty”, preferring instead “the use of force or threats”. Australia’s laws define “forced labour” as:

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

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

(b) *is not free* to leave the place or area where the person provides labour or services.<sup>68</sup>

50. The term “threat” is defined as (a) a threat of force; or a threat to cause a person’s removal from Australia; or a threat of any detrimental action unless there are reasonable grounds for that action.<sup>69</sup>

51. Fiona David has suggested that the definition of forced labour in the *Criminal Code* may be narrower than the international definition in ILO No. 29.<sup>70</sup> In drafting a forced labour offence it will be helpful explicitly define the type of subtle coercive actions (or “menace”) that nullify consent. This is the approach that has been taken in the United States where forced labour is defined as follows:

#### Section 1589 – Forced Labour

a) “Whoever knowingly provides or obtains the labor or services of a person by any one of, or by any combination of, the following means—

(1) “by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person;

(2) “by means of serious harm or threats of serious harm to that person or another person;

(3) “by means of the abuse or threatened abuse of law or legal process; or

<sup>64</sup> ILO, *Human Trafficking*, n 5, pp 20-21.

<sup>65</sup> McSherry, Bernadette, ‘Trafficking in Persons: A Critical Analysis of the New Criminal Code Offences’ (2007) 18(3) *Current Issues in Criminal Justice* 385 at 5.

<sup>66</sup> See eg, ILO, *Global Alliance*, n 13, p 8 [26] (describing forced labour as a concept that includes “but is not limited to” slavery); see also Frances Simmons and Jennifer Burn, ‘Evaluating Australia’s Response to all forms of Trafficking: Towards Rights-centred Reform’, (2010) 84 *The Australian Law Journal* 712 (observing The power to buy and sell a person is not the only power attaching to the right of ownership but in *Tang* it was the exercise of this power that appeared to be critical in convincing the majority of the High Court that the women had been enslaved. In the absence of an arrangement to purchase the alleged victim of slavery, it may be more difficult to characterise a case of forced labour as falling within the definition of slavery).

<sup>67</sup> *Criminal Code Act 1995* (Cth), s271.2 (prohibiting trafficking for the purpose of exploitation)

<sup>68</sup> *Criminal Code Act 1995* (Cth), s73.2(3).

<sup>69</sup> *Criminal Code Act 1995* (Cth), s271.

<sup>70</sup> David Fiona, ‘Presentation on labour trafficking and law reform’ (Presentation delivered at Anti-Slavery Project Seminar: The Criminal Justice Response to Trafficking and Reparations, University of Technology, Sydney, 18 February 2011).

- (4) “by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint, shall be punished as provided under subsection (d).
- b) “Whoever knowingly benefits, financially or by receiving anything of value, from participation in a venture which has engaged in the providing or obtaining of labor or services by any of the means described in subsection (a), knowing or in reckless disregard of the fact that the venture has engaged in the providing or obtaining of labor or services by any of such means, shall be punished as provided in subsection (d).
- c) In this section:
- (1) The term ‘abuse or threatened abuse of law or legal process’ means the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.
- (2) “The term ‘serious harm’ means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm.
- d) Whoever violates this section shall be fined under this title, imprisoned not more than 20 years, or both. If death results from a violation of this section, or if the violation includes kidnaping, an attempt to kidnap, aggravated sexual abuse, or an attempt to kill, the defendant shall be fined under this title, imprisoned for any term of years or life, or both.<sup>71</sup>
52. Introducing an offence of forced labour would narrow the gap between the offence of “debt bondage” (punishable by up to 12 months imprisonment) and the offence of “slavery” (punishable by up to 25 years imprisonment).<sup>72</sup> The offence of debt bondage would remain a summary offence and the offence of aggravated debt bondage would be an indictable offence.<sup>73</sup> In more egregious cases of exploitation the offences of forced labour, or in the most extreme cases, slavery would apply.
53. Sex work is legal in many parts of Australia.<sup>74</sup> The ILO has stated “a forced labour situation is determined by the nature of the relationship between a person and an ‘employer’”, and not by the type of work performed, or the legality or illegality of the work.<sup>75</sup> However, while the ILO’s definition of forced labour may encompass coerced commercial sex, the definition in the *Criminal Code* does not.

### 3. *Sexual servitude & deceptive recruiting for sexual services*

54. A person whose conduct causes another person to enter into or remain in sexual servitude and who intends to cause, or is reckless as to causing, that sexual servitude is guilty of an offence pursuant to s 270.6(1) of the *Criminal Code*.
55. “Sexual servitude” is defined in s 270.4 as the condition of a person who provides sexual services and who, because of force or threats: (a) is not free to cease providing sexual

<sup>71</sup> *William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008*, Pub L No 110-457, 122 Stat 5046.

<sup>72</sup> The High Court rejected the suggestion the offences of slavery and debt bondage are mutually exclusive holding that the only relevant question was whether Ms Tang’s conduct fell within the offence of slavery: *R v Tang* (2008) 237 CLR 1 at [29]; 82 ALJR 1334. To date there have been no prosecutions of debt bondage.

<sup>73</sup> *Crimes Act 1914* (Cth), s 4G.

<sup>74</sup> In Australia, sex work is either legal (WA, Vic, Qld, Tas, ACT, NT) or decriminalised (NSW).

<sup>75</sup> ILO, *Cost of Coercion*, n 5, p 6. Similarly UNODC has said national legislatures should “not conclude that coercive sexual exploitation does not amount to forced labour or services, particularly in the context of trafficking”: UNODC, *Model Law against Trafficking in Persons* (2009), p 14.

services; or (b) is not free to leave the place or area where the person provides the sexual services. “Threat” means a threat (a) of force, (b) to cause a person’s deportation; or (c) of any other detrimental action.<sup>76</sup>

56. For the purposes of “sexual servitude”, “sexual service” is defined in the *Criminal Code* as “the commercial use or display of the body of the person providing the service”.<sup>77</sup> The effect of this definition is that the offence of sexual servitude and the related trafficking offences in sections 271.2, 271.4, 271.5 and 271.7 only target commercial sexual exploitation.
57. Sexual exploitation can occur in the context of labour trafficking or as a result of forced and servile marriage. Exploited domestic workers may also experience repeated acts of sexual violence. While this type of conduct could be captured by sexual assault laws, it is appropriate that the offence of sexual servitude target the maintenance of a person in a state of non-commercial sexual exploitation.
58. The *Criminal Code* contains an offence of deceptive recruiting for sexual services, which targets deceptive recruiting for the provision of sexual services in exploitative circumstances.<sup>78</sup> We consider a similar offence could target deceptive recruitment for the provision of labour services in circumstances that result in slavery or forced labour.
4. *Improving the operation of the migration sanction offences*
59. The *Migration Amendment (Employer Sanctions) Act 2007* (Cth) has also introduced offences targeting employers who exploit unlawful non-citizens by criminalising knowingly or recklessly allowing an unlawful non-citizen to work or to allow a non-citizen to work in breach of his/her visa conditions. Each of the four offences will be deemed an aggravated offence if the worker is *exploited* and the accused either had knowledge of this fact, or was reckless to the fact. The term “exploited” is defined to mean the condition of *forced labour*, sexual servitude, or slavery, with the meaning of these terms taken from the *Criminal Code*.<sup>79</sup>
60. In our view the offence of exploitation under the *Migration Amendment (Employer Sanctions) Act 2007* could be broadened to ensure the aggravated offences target the exploitation of workers through include forced labour, sexual servitude, slavery, and practices similar to slavery (including debt bondage). The views of the Fair Work Ombudsman should be sought on whether the aggravated offence should also punish employers who exploited unlawful non-citizens in contravention of the minimum standards of the *Fair Work Act 2009* (Cth).

<sup>76</sup> *R v Sieders; R v Somsri* (2008) 72 NSWLR 417, 423, 424, 425, 426 (Campbell JA).

<sup>77</sup> *Criminal Code Act 1995* (Cth) s 270.7 (2).

<sup>78</sup> *Criminal Code Act 1995* (Cth), s270.6. Deceptive recruiting occurs where a person, with the intention of inducing another person to enter into an engagement to provide sexual services, deceives that other person about any of the following matters: the fact that the engagement will involve the provision of sexual services; the nature of sexual services to be provided (for example, whether those services will require the person to have unprotected sex); the extent to which the person will be free to leave the place or area where the person provides sexual services; the extent to which the person will be free to cease providing sexual services; the extent to which the person will be free to leave his or her place of residence; if there is or will be a debt owed or claimed to be owed by the person in connection with the engagement — the quantum, or the existence, of the debt owed or claimed to be owed; the fact that the engagement will involve exploitation, debt bondage or the confiscation of the person’s travel or identity documents.

<sup>79</sup> *Migration Act 1958* (Cth), s 245AH.



## VI. IMPROVING ACCESS TO COMPENSATION

### A. *Pathways to compensation for trafficked people*

61. The rights of trafficked people in relation to compensation have been neglected. Criminal laws are a critical element of any effective anti-trafficking strategy. Although Australia has invested more than \$50 million in anti-trafficking measures, awards of compensation to trafficking victims are rare. Prosecutions cannot remedy the harm trafficked people have suffered or change the substandard working conditions in which marginalised workers become vulnerable to abuse.
62. We believe the issue of access to compensation for trafficked people should be proactively addressed as part of Australia's anti-trafficking strategy and legal practitioners and agencies working with trafficked people should receive training on how to ensure that trafficked people receive independent legal advice about their prospects of seeking compensation.<sup>80</sup>
63. Access to justice is critical. Unless trafficked people receive counselling and information about their legal rights in a language that they can understand they may be unable to assert their rights and the opportunities to seek compensation will be missed. Thus it is critical that each trafficked person receives independent legal advice about his or her prospects of seeking compensation, recovering unpaid wages, or pursuing civil claims. Where a conviction has been obtained, the trafficked person should receive advice about the prospect of obtaining compensation through reparations orders.
64. The Attorney-General's discussion paper asks:
- a. Does section 21B of the *Crimes Act 1914* (Cth) adequately provide for reparation orders to be made for victims of people trafficking?
  - b. What measures would to permit greater access to financial compensation by victims of trafficking?
65. There have no reparations orders made in matters where an offender has been convicted of trafficking, slavery or sexual servitude.<sup>81</sup> While this provision has traditionally been used in cases involving economic loss, not non-economic loss such as pain and suffering, there is no barrier to making a reparations order for non-economic loss.<sup>82</sup> A victim's right to commence civil proceedings is not affected by a federal reparation order<sup>83</sup>.
66. We believe the Australian Government should implement the Australian Law Reform Commission's recommendations to amend federal sentencing legislation to "clarify that a court may order a federal offender to make reparation of any loss suffered by reason of the offence, regardless of whether the loss is economic or non-economic".<sup>84</sup> Section 21B

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<sup>80</sup> See further. Frances Simmons, above n 13

<sup>81</sup> Ibid.

<sup>82</sup> See discussion in ALRC, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006), [8.41]-[8.46].

<sup>83</sup> *Crimes Act 1914* (Cth), s 15F.

<sup>84</sup> ALRC, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006), Recommendations [8.2]. We also support recommendations [8.1] and [8.3], replace the term reparation with the terms restitution and compensation and define them appropriately and ...clarify that nothing in that legislation affects the right of any person who is aggrieved by conduct punishable

should enable an application to the Court for a reparations order to be made by or on behalf of the aggrieved person.<sup>85</sup>

67. In matters where a conviction is obtained, the Commonwealth Director of Public Prosecutions should, as a matter of policy, always consider whether it is appropriate to seek a reparations order and ensure that trafficking victims received legal advice about the prospects of obtaining such an order.
68. However, convictions in trafficking matters are rare. Therefore, consideration should be given to how to improve access to justice outside the criminal justice system.<sup>86</sup> Trafficked people may be able to seek compensation under State and Territory statutory victims compensation schemes, *Fair Work Act 2009* (Cth),<sup>87</sup> discrimination & OHS law, the *Trade Practices Act* or by taking civil action against their trafficker (for e.g., tortious remedies for battery, assault or false imprisonment).
69. All eight Australian states and territories have statutory compensation schemes but the eligibility criteria, the size of the awards and the assessment process varies in different jurisdictions.<sup>88</sup> However, these schemes were not designed with the intention of compensating trafficking victims. Consequently, trafficking victims may face challenges accessing compensation under such schemes, particularly if their trafficking experience did not encompass a clear sexual assault element.<sup>89</sup>
70. We believe consideration should be given to the establishment of a federal victims compensation scheme that provides appropriate avenues to victims of federal crime to seek compensation for the harm they have suffered. Establishing a federal victims compensation scheme will involve considering how the scheme applies to all federal victims of crime including victims of child sexual exploitation.
71. In the short-term consideration should be given to how to improve access to existing legal remedies. The question of access to State and Territory compensation schemes by trafficking victims should be referred to the Standing Committee of Attorney General's.<sup>90</sup> Agencies and legal practitioners working with trafficked people should receive training about the range of potential remedies that may be available to a trafficked person depending on the type of harm they have suffered.<sup>91</sup>

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as a federal offence to institute civil proceedings in respect of that conduct, but the person shall not be compensated more than once for the same loss

<sup>85</sup> See, for eg, provision providing for compensation orders in s 71 of the *Victim Support and Rehabilitation Act 1996* (NSW).

<sup>86</sup> For a more detailed discussion see Frances Simmons, above n 13.

<sup>87</sup> *Fair Work Act 2009* (Cth) Part 5-2 The Fair Work Ombudsman is empowered to investigate complaints, conduct searches of work places, make orders relating to wages, and commence court proceedings against employers in breach of the civil penalty provisions of the *Fair Work Act*

<sup>88</sup> See *Victims of Crime (Financial Assistance) Act 1983* (ACT); *Victim Support & Rehabilitation Act 1996* (NSW); *Crime (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 1976* (Tas); Clearinghouse, *Stakeholder Paper 8*, January 2010.

<sup>89</sup> See further Frances Simmons, above n 13

<sup>90</sup> *Ibid.*

<sup>91</sup> Frances Simmons, above n 13.

## **B. Improving protection for vulnerable witness**

### *1. Vulnerable witnesses*

72. We welcome the focus on protection for vulnerable witness and the rights of victims of crime. The issue of protection for vulnerable witnesses in federal criminal matters is complex and concerns both trafficking victims and other individual victims of federal crimes such as child sexual exploitation and terrorism. We consider that there are clear advantages in ensuring that all trafficking victims receive the same witness protection, regardless of which State or Territory Court their trafficking matter is heard in. Care must be taken in civil proceedings and criminal proceedings to protect the identity of complainants.

73. We support the development of a Federal Charter of Victims Rights that sets out the rights of victims of crime and reflects the principles reflected in the *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*<sup>92</sup> and the *Basic Principles and Guidelines on the Rights to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian law*. This document should be made available in a range of languages.

### *2. Victim Impact Statements*

74. We support amending the *Crimes Act 1914* (Cth) to make provision for voluntary victim impact statements in trafficking matters. Some trafficked people may not wish to discuss the impact of the crime upon them and in this case statements should not be made. Victims should not be invited to express views on the appropriate sentence for offences.

75. Victim impact statements may be relied upon in court but also in subsequent applications by the victim for compensation. Trafficking victims should get independent legal advice about the legal implications of making victim impact statements and the possibility of being cross-examined about the contents of the statement.

76. The current practice is for the Australian Federal Police to assist in the preparation of victim impact statements. We believe this places undue strain on the resources of the AFP and this task could be performed by an independent third party.

77. Preparing victim impact statements can be traumatic and time consuming. Trafficked people should be able to prepare, and submit, victim impact statements in a variety of different ways depending on their individual needs and wishes. For example, victim impact statements could be prepared by a victim with the assistance of a support worker, legal representative and accredited interpreter, or by a counsellor with whom the victim has had contact.

## **VII. CONCLUSIONS AND NEXT STEPS**

78. A decade after the adoption of the *Trafficking Protocol* it is time to formally review if Australian anti-trafficking laws adequately cover all forms of human trafficking and

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<sup>92</sup> UN Doc A/Res/40/34 (1985), [4].

exploitation and consider how we improve access to compensation for trafficked people.<sup>93</sup>

79. The review should not be conducted through the narrow lens of the criminal law, but should consider the broader issues of pathways to compensation for trafficked people, legal and social protection, and the challenges of addressing a spectrum of exploitative practices.
80. We also encourage the Australian Government to consider what steps can be taken to engage the private sector in action to stop trafficking by placing pressure on supply chains that profit from exploitative labour practices including forced labour and slavery.

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<sup>93</sup> In 2005 the Parliamentary Joint Committee on the Australian Crime Commission recommended a review of the operation of the trafficking and slavery offences in the Criminal Code a review of the new the trafficking offences in the Criminal Code take place a year after the 2005 reforms and, as part of that review, consideration be given to amendments to include the provision to the court of victim impact statements: Parliamentary Joint Committee on the Australian Crime Commission, *Supplementary Report to the Inquiry into trafficking of women in sexual servitude* (2005), p 7. See Frances Simmons and Jennifer Burn, 'Evaluating Australia's Response to all forms of Trafficking: Towards Rights-centered Reform', (2010) 84 *The Australian Law Journal* 712 (recommending a review of Australia's legislative response to trafficking).