

INQUIRY INTO ESTABLISHING A MODERN SLAVERY ACT IN AUSTRALIA

**SUBMISSION TO THE JOINT STANDING
COMMITTEE ON FOREIGN AFFAIRS
DEFENCE AND TRADE**

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EXECUTIVE SUMMARY

Anti-Slavery Australia welcomes the opportunity to respond to the Joint Standing Committee on Foreign Affairs, Defence and Trade Inquiry (**‘the Committee’**) into establishing a Modern Slavery Act in Australia.

Established in 2003, Anti-Slavery Australia is a leading research, policy and legal centre at the University of Technology Sydney with the mission of abolishing human trafficking, slavery and slavery-like practices in Australia. Anti-Slavery Australia provides legal advice and representation to men, women and children who have experienced these forms of exploitation in Australia. This submission draws upon Anti-Slavery Australia’s research and past publications as well as our advocacy and legal casework experience with survivors of human trafficking and slavery in Australia.

The UK Modern Slavery Act (2015)

The UK Modern Slavery Act introduced a number of measures to combat human trafficking and slavery including: the introduction of slavery and trafficking prevention orders,¹ independent child trafficking advocates,² transparency in supply chains provisions,³ and the appointment of an independent Anti-Slavery Commissioner.⁴ Not all provisions of the UK Modern Slavery Act are relevant to the Australian context, such as the slavery and human trafficking prevention orders⁵ or the criminal defence of slavery or trafficking.⁶ Anti-Slavery Australia recommends the enactment of legislation which introduces key elements of the UK Modern Slavery Act including a mandatory reporting framework to ensure transparency in supply chains, the creation of an office of the Anti-Slavery Ombudsman to parallel the role of the Anti-Slavery Commissioner in the UK, and sector-specific licensing for the labour hire sector. The introduction of these measures will strengthen Australia’s position as a world-leader in the identification and prevention of human trafficking and slavery.

The Australian response to human trafficking and slavery

Human trafficking and slavery occur throughout Australia, and in the countries to which Australia is connected by the supply of goods and services. Anti-Slavery Australia commends the Australian government’s ongoing commitment to the elimination of human trafficking and slavery. However, there is more to be done to ensure that the human rights of survivors of human trafficking and slavery are comprehensively protected in Australia. It is essential that immigration outcomes, support services and financial assistance for survivors of human trafficking and slavery are not connected to cooperation with the criminal justice system. In order to protect the human rights of survivors, it is also important that family reunification for survivors in Australia and their overseas family members is prioritised. To support these measures, it is vital that the Australian government strengthen existing mechanisms to identify victims and survivors of human trafficking and slavery.

¹ Modern Slavery Act 2015 (UK) c 30 part 2.

² Ibid, s 48.

³ Ibid, s 54.

⁴ Ibid, s 40.

⁵ Ibid, s14 .

⁶ Ibid, s 45.

Transparency in supply chains reporting

Human trafficking and slavery in the supply chains of goods and services produced and consumed in Australia is a serious violation of Australia's criminal law and human rights obligations. The Australian government should enact a legislative framework which requires organisations over a certain size to make public reports on the nature of their supply chains and the measures they have taken to ensure that there is no human trafficking or slavery in the production of their goods or services. This framework should incorporate elements of the 'Transparency in Supply Chains' provision under section 54 of the UK Modern Slavery Act. However, we recommend that an Australian version of this provision be strengthened to provide a stronger framework for transparency.

Anti-Slavery Australia recommends that at a minimum, under an Australian transparency in supply chains framework, prescribed organisations would be required to identify areas of their supply chains with a high risk of human trafficking and slavery, disclose instances of human trafficking and slavery in their supply chains, provide information about the measures taken to respond to any instance of human trafficking or slavery in their supply chains, and describe prevention and mitigation procedures.

An Australian 'Transparency in Supply Chains' provision should contain a robust framework of sanctions and penalties to guarantee compliance with reporting obligations to assist in the prevention of human trafficking and slavery in the supply chains of organisations that operate within Australia.

Anti-Slavery Ombudsman

Anti-Slavery Australia recommends that the Australian government create an independent Anti-Slavery Ombudsman to provide high-level oversight and monitoring of the Australian response to human trafficking and slavery.

Forced marriage

Anti-Slavery Australia advocates for the introduction of a national civil protection framework to address gaps in victim support and protection where any person, regardless of their age, is at risk of or in a forced marriage.

Anti-Slavery Australia recommends that the Australian government engage in a consultative process with relevant communities and other key stakeholders, to create an effective civil framework to prevent forced marriage in Australia.⁷ The implementation of a framework of civil remedies for people facing forced marriage, along with the development of education and awareness raising campaigns, will ensure that prevention and protection remain the focus of Australia's response to forced marriage.

The Australian government should also prompt States and Territories to consider amending intervention/violence order legislation to make these orders more accessible to adults who are facing forced marriage, and to strengthen powers of State-based child protection authorities to intervene on behalf of children at risk of forced marriage.

⁷ *Family Law Act 1996 (UK) s 63C (2)-(3); Forced Marriage etc (Protection and Jurisdiction) (Scotland) Act 2011 s 12. Note that the definition of third person differs between the UK and Scottish Acts.*

Forced labour

In order to effectively address and prevent forced labour and extreme labour exploitation in Australia, the Australian government should ratify the International Labour Organisation's *Forced Labour Protocol*, and introduce a sector-specific licensing scheme for the labour-hire industry.

Redress for victims of human trafficking and slavery

Victims and survivors of human trafficking and slavery have a right to redress and remedies for the harms they have suffered. To ensure that survivors of human trafficking and slavery have access to remedies, Anti-Slavery Australia recommends that the Australian government introduce a comprehensive national compensation scheme for victims of human trafficking and slavery. This would address the current disparities between State and Territory victims of crime support schemes, and ensure that individuals who are recognised as victims of human trafficking and slavery have access to compensation.

A statutory cause of action should also be created that would allow survivors of human trafficking and slavery to initiate civil suits against any party who has engaged in human trafficking or slavery. A statutory cause of action should specify that survivors need not prove damage in order to be successful in their claim. This would overcome the many obstacles that often prevent survivors of human trafficking and slavery from initiating civil claims.

KEY RECOMMENDATIONS

Anti-Slavery Australia makes the following key recommendations:

1. The UK Modern Slavery Act (2015) includes a range of criminal, civil and protective mechanisms designed to address modern slavery within the UK migration and regulatory context. For over a decade Australia has seen the evolution of a distinctive Australian response to human trafficking and slavery. Through a series of legislative amendments Australia developed a robust criminal law framework, implemented national policy, established consultative bodies to address all forms of human trafficking and slavery, and developed a National Action Plan to Combat Human Trafficking and Slavery 2015–19. While many parts of the UK Act are not appropriate in the Australian response, the UK provisions which establish a transparency in supply chains mechanism and an independent Anti-Slavery Commissioner are innovative and beneficial reforms that should be considered and expanded within the Australian context.
2. New legislation should be introduced in Australia to implement the Australian Government Action Plan to Combat Human Trafficking and Slavery and address emerging gaps in the Australian response. Australia is now poised to take the next steps in framing an effective response to human trafficking and slavery. Protection of survivors and the establishment of a national compensation scheme are urgent areas for reform. As a matter of priority, Australia should establish a national compensation scheme for victims of human trafficking and slavery, improve identification of trafficked and enslaved people, create an office to provide oversight and coordination of Australian responses to human trafficking and slavery, and ratify key international instruments.

GAPS IN THE AUSTRALIAN RESPONSE TO HUMAN TRAFFICKING AND SLAVERY

3. Anti-Slavery Australia recommends that the Commonwealth government continue to support the Australian Institute of Criminology in the development of an enhanced monitoring program on human trafficking and slavery, in order to **better understand the prevalence of human trafficking, slavery and slavery-like conditions in Australia.**

Initial Identification and Referral to Comprehensive Support

4. **Improve the Australian Government funded Support for Trafficked People Program** to further assist and protect survivors of human trafficking, slavery and slavery-like practices by adopting the following recommendations:
 - a. If a victim or survivor is identified by the Australian Federal Police as a ‘suspected victim of human trafficking and slavery’ the person may be referred to the Support

for Trafficked People Program. The Australian Federal Police is the only agency authorised to refer a person to the Support for Trafficked People Program. Recognising that survivors of human trafficking and slavery may be fearful of meeting with law enforcement officials early in the identification process, the existing referral process that requires a referral by the Australian Federal Police is unduly narrow, with the result that some victims may be fearful of engaging with law enforcement and the consequence that they remain unidentified and ineligible for support. Anti-Slavery Australia recommends broadening the pool of agencies permitted to make referrals to the Support for Trafficked People Program. Appropriate agencies could include the Department of Immigration and Border Protection, and certain other agencies including key civil society organisations.

- b. If the Australian Federal Police do refer a suspected victim to the Support for Trafficked People Program, after an initial period of support, further support is contingent on the survivor's participation in criminal justice processes. Anti-Slavery Australia recommends that the criteria for the provision of further support should focus on the status of a survivor of human trafficking or slavery and that decisions about eligibility and further support should be determined on a case-by-case basis taking into account the individual needs of each survivor.

5. **Improve the permanent Referred Stay Visa** to better support and protect victims of human trafficking and slavery by:

- a. Broadening the visa criteria to facilitate the grant of a visa pathway for survivors of human trafficking and slavery who are unable to contribute to criminal investigations due to compassionate and/or compelling circumstances.
- b. Removing the visa criteria that an applicant must prove that they “would be in danger” if returned to their home country.

6. **Create provisions to facilitate the reunification of survivors with their families** in cases where the survivor is participating in a criminal investigation or prosecution, or awaiting the determination of a permanent trafficking visa, where proceedings have extended beyond six months. Survivors with dependent children should be prioritised for family reunion in Australia.

7. **Ensure that training on the indicators of all forms of human trafficking and slavery and referral pathways is delivered to frontline officers** of Commonwealth government agencies consistently throughout Australia on an ongoing basis and that the Commonwealth liaises with the states and territories to extend training in all jurisdictions.
8. Develop effective and timely monitoring of all Australian visa schemes to assess whether particular visas or schemes are linked to exploitation through human trafficking and slavery.

FORCED MARRIAGE PROTECTIONS IN AUSTRALIA

9. Establish **a civil law statutory scheme to provide protection to any person fearing forced marriage, regardless of the age of the affected person.** The Australian Government should also:
 - a. Advocate for states and territories to consider amending existing legislation regarding intervention/violence orders to recognise forced marriage as an act of personal or family violence and to account for the complexities of the type of violent behaviours experienced by victims of forced marriage.
 - b. Advocate for states and territories to amend child protection legislation to give clear grounds for child protection agencies to intervene on behalf of children at risk of forced marriage.
10. Engage with stakeholders to **fund and develop ongoing education and awareness** raising campaigns, targeting vulnerable communities to prevent forced marriage.

FORCED LABOUR AND LABOUR EXPLOITATION

11. Anti-Slavery Australia recommends that the Australian government **ratify the Forced Labour Protocol** and the **Domestic Workers Convention**, demonstrating its commitment to effectively address and prevent forced labour and labour exploitation in Australia.
12. **Introduce a sector specific licensing regime for the labour-hire industry** to address the exploitation of migrant workers through labour-hire companies.

REDRESS FOR SURVIVORS OF HUMAN TRAFFICKING AND SLAVERY

13. The Australian Government should **introduce a comprehensive, national compensation scheme** to address disparities between State and Territory victim's support schemes, and to ensure that all survivors of human trafficking and slavery in Australia have access to remedy. A national scheme should recognise the serious psychological trauma suffered by survivors of human trafficking and slavery and provide resources to assist applicants who

may be traumatised and re-victimised during this process. Payments under this scheme should not be tied to a victims' cooperation with criminal investigations and prosecutions.

14. Visa protection should be extended to **permit victims of human trafficking and slavery to remain in Australia while applications for compensation are finalised**. This should apply to all suspected victims of human trafficking and slavery regardless of their contribution to police investigations and prosecutions.
15. To overcome the obstacles that may prevent survivors of human trafficking and slavery from initiating civil suits, **a civil law statutory action should be created that would allow victims to initiate an action against any party who has engaged in any form of human trafficking and slavery** (as defined by the Criminal Code). Legislation should specify that survivors need not prove damage in order to be successful in their claim.

AN AUSTRALIAN ANTI-SLAVERY AND TRAFFICKING OMBUDSMAN

16. **Establish an office of the Australian Independent Anti-Slavery and Trafficking Ombudsman** to provide high-level oversight and monitoring of the Australian response to human trafficking and slavery, as well as compliance with applicable laws and regulations. The ombudsman will promote systemic change by following up on findings and recommendations that it and other bodies make, and by ensuring that there is an open dialogue between its office, government agencies and other third party stakeholders, including business and civil society.
17. The ombudsman should have the power to take referrals related to specific cases, investigate and make recommendations about action related to individual cases.

HUMAN TRAFFICKING AND SLAVERY IN SUPPLY CHAINS

18. **Prevent slavery and human trafficking at any point in the production of goods and services** by enacting a legislative framework which requires organisations to make public reports on the nature of their supply chains and the measures they have taken to ensure that there is no human trafficking or slavery in the production of their goods or services. This should include at a minimum:
 - a. **Threshold:** Anti-Slavery Australia recommends that Australian Transparency in Supply Chains legislation be developed which introduces reporting obligations for prescribed organisations, including public bodies. This legislation should include transitional provisions to progressively introduce reporting requirements for medium sized enterprises. In determining an appropriate threshold for reporting, factors for

consideration should include annual turnover and number of employees. Reporting requirements should be extended to each entity that is owned or controlled by the parent company that satisfies the statutory threshold.

- b. **Reporting requirements:** Organisations should be required to report on the steps that they have taken during each financial year to ensure that human trafficking and slavery are not taking place in their supply chains. Organisations should also be required to disclose:
 - i. The organisation's structure, its business and its supply chains;
 - ii. Its policies in relation to slavery and human trafficking;
 - iii. Its due diligence processes in relation to slavery and human trafficking in its business and supply chains;
 - iv. The parts of its business and supply chains where there is a risk of human trafficking and slavery taking place, and the steps it has taken to assess and manage that risk;
 - v. Disclose any instances of human trafficking and slavery that have been identified in its supply chain and the steps it has taken in response;
 - vi. Its effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains, measured against such performance indicators as it considers appropriate; and
 - vii. The training about slavery and human trafficking available to its staff.
- c. **A central repository:** All reports should be published on a central repository to be administered by a government agency such as ASIC or an Anti-Slavery Ombudsman.
- d. **A complaints and grievance pathway:** The framework should provide for a grievance pathway whereby good faith complainants can notify a relevant body, such as an Anti-Slavery Ombudsman, that an organisation has not complied with its reporting obligations.

TERMS OF REFERENCE

This submission addresses the following Terms of Reference for the Inquiry into establishing a Modern Slavery Act in Australia (**'the Inquiry'**):

- The nature and extent of modern slavery (including slavery, forced labour and wage exploitation, involuntary servitude, debt bondage, human trafficking, forced marriage and other slavery-like exploitation) both in Australia and globally;
- The prevalence of modern slavery in the domestic and global supply chains of companies, businesses and organisations operating in Australia;
- Identifying international best practice employed by governments, companies, businesses and organisations to prevent modern slavery in domestic and global supply chains, with a view to strengthening Australian legislation;
- The implications for Australia's visa regime, and conformity with the Palermo Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children regarding federal compensation for victims of modern slavery;
- Provisions in the United Kingdom's legislation which have proven effective in addressing modern slavery, and whether similar or improved measures should be introduced in Australia;
- Whether a Modern Slavery Act should be introduced in Australia; and
- Any other related matters.

PART A – THE AUSTRALIAN RESPONSE TO SLAVERY AND HUMAN TRAFFICKING

1 PREVALENCE OF HUMAN TRAFFICKING AND SLAVERY

Human trafficking and slavery takes many forms. While contemporary forms of slavery may appear to be different from historical forms of slavery, these abhorrent practices continue to be driven by economic greed and linked to other human rights breaches including gender discrimination, racism and restrictions on freedom of movement. Individuals and communities are made vulnerable to human trafficking and slavery by environmental, economic, social and contextual factors, such as poverty, inequality, discrimination and gender-based violence.⁸ 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.⁹

Human trafficking and slavery are illegal and clandestine, making comprehensive data on the numbers of people living in slavery or slavery-like conditions difficult to estimate. Estimates of the number of adults in slavery and slavery-like conditions vary widely; in 2012 the International Labour Organisation estimated that globally, 21 million people lived in slavery-like conditions,¹⁰ the Walkfree Global Slavery Index estimated that as many as 45.8 million people are living as slaves.¹¹

Human trafficking and slavery also occur throughout Australia,¹² and in countries to which Australia is connected by the supply of goods and services.

The internationally accepted definition of human trafficking is found in the *United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children*. This definition of human trafficking comprises three elements:

1. an **action**, such as recruitment, transportation, transfer, harbouring or receipt of persons;
2. a **means**, such as threats, 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 payment to achieve the consent of a person having control over another person; and
3. for the **purpose**, of exploitation. Exploitation includes forced labour, sexual exploitation, slavery or practices similar to slavery, servitude or the removal of organs.¹³

⁸ Anne T. Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, 2010) 415.

⁹ Ibid.

¹⁰ *Statistics on forced labour, modern slavery and human trafficking*, International Labour Organisation <<http://www.ilo.org/global/topics/forced-labour/statistics/lang--en/index.htm>>.

¹¹ *Global Findings*, Global Slavery Index <<http://www.globalslaveryindex.org/findings/>>.

¹² 'Trafficking In Persons: The Australian Government Response 1 July 2015 – 30 June 2016' (Eighth Report Of The Interdepartmental Committee On Human Trafficking And Slavery, Commonwealth of Australia, 2016) 3.

¹³ *United Nations Convention against Transnational Organized Crime*, GA Res 55/23, UN GAOR, 55th sess, 62nd plen mtg, Agenda item 105, Supp No 49, UN Doc A/RES/55/25 (entered into force 8 January 2001) annex II ('*Protocol to Prevent, Suppress and*

Slavery is defined by the *Convention to Suppress the Slave Trade and Slavery* 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.”¹⁴

This definition was expanded and extended in the *Supplementary Convention to the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery*.¹⁵ This instrument extends its application to practices similar to slavery,¹⁶ specifically debt bondage, serfdom, servile forms of marriage, and exploitation of children.¹⁷

Human trafficking and slavery are criminalised in Australia through legislative amendments to the Criminal Code. The slavery offences are contained in Division 270 of the Criminal Code and apply to all persons, regardless of whether the conduct occurs within or outside of Australia. Division 271 criminalises activities involving trafficking in persons. Additionally, State or Territory offences may be used in conjunction with Commonwealth offences to secure convictions. Such state-based offences may include, for example, sexual assault and deprivation of liberty offences.¹⁸

Since 2003, Anti-Slavery Australia has provided legal advice to over 280 men, women and children who have experienced human trafficking and slavery in Australia.¹⁹

Anti-Slavery Australia Active Client Breakdown (MatterTypes)

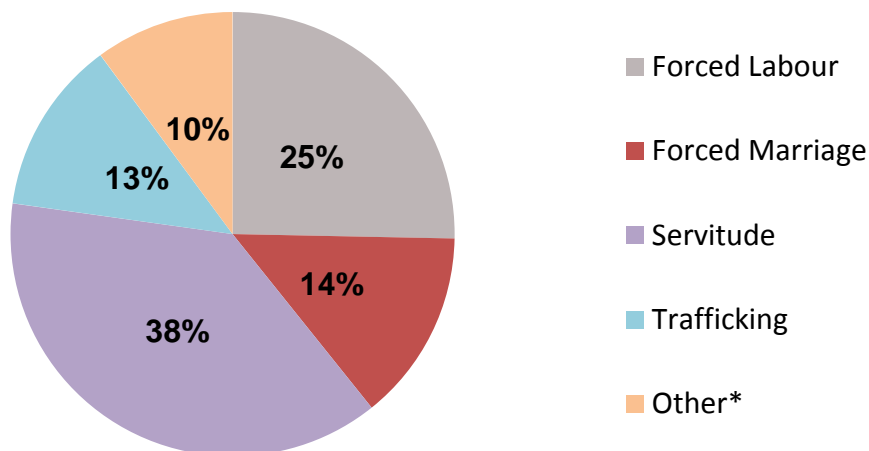


Figure 1: Forms of human trafficking and slavery experienced by current Anti-Slavery Australia clients.²⁰ *Other clients include family members of survivors.

Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime) art 3 (a).

¹⁴ *Convention to Suppress the Slave Trade and Slavery*, opened for signature 25 September 1926, 60 LNTS 253 (entered into force 9 March 1927) art 1.

¹⁵ *Supplementary Convention to the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery*, opened for signature 1 April 1957, 226 UNTS 3 (Entered into force 30 April 1957)

¹⁶ Anne T. Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, 2010) 181.

¹⁷ *Supplementary Convention to the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery*, opened for signature 1 April 1957, 226 UNTS 3 (Entered into force 30 April 1957) art 1.

¹⁸ 'Trafficking In Persons: The Australian Government Response 1 July 2015 – 30 June 2016' above n 12, 19.

¹⁹ As of the date of this submission.

Human trafficking and slavery in Australia are often hidden, or hidden in plain sight. Traffickers target people made vulnerable by social, cultural or political circumstances such as recent migrants, young people and refugees. Slavery and slavery-like practices occur in industries such as the sex industry, agriculture, hospitality, construction, and in private homes and in intimate or family relationships.²¹

While there are groups and occupations that are disproportionately affected, human trafficking and slavery can affect anyone, and is not limited to any particular industry. In 2015, of the new referrals to the Australian Federal Police ('AFP') for human trafficking and slavery matters, approximately 79 per cent related to forms of human trafficking and slavery other than sexual exploitation. Of this 79 per cent, 44 per cent related to forced marriage, 21 per cent related to labour exploitation and 12 per cent related to other forms of human trafficking and slavery.²² There are also examples of Australian citizens being trafficked overseas, as in the case of *United States v Damion St. Patrick Baston*, wherein two Australian women were trafficked to the United States.²³

Anti-Slavery Australia Active Client Breakdown (Top Ten Countries of Origin)

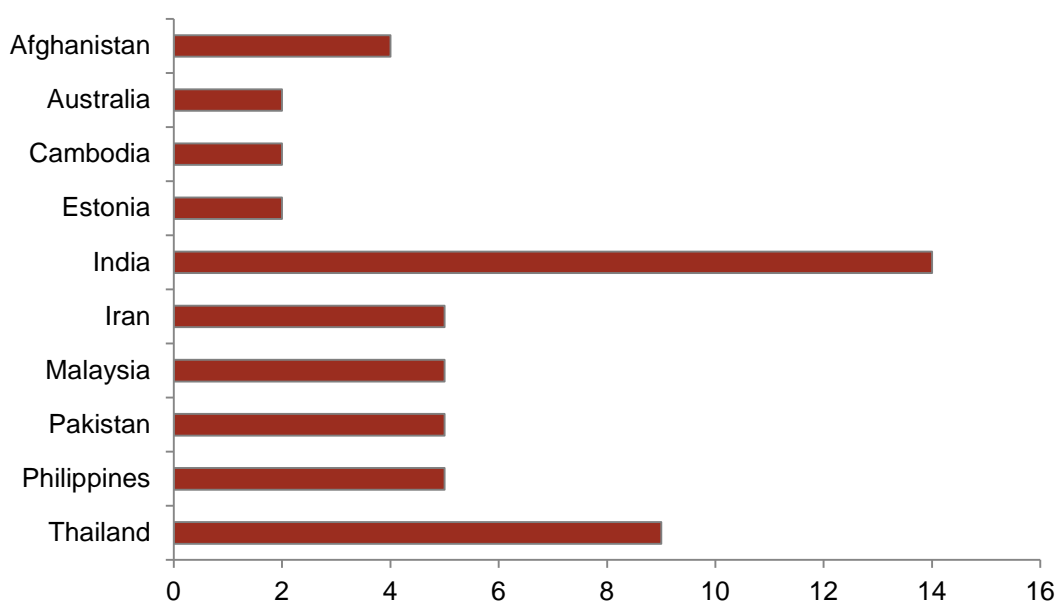


Figure 2: Top ten countries of origin for current Anti-Slavery Australia clients

Survivors of human trafficking and slavery often face lasting physical and psychological trauma. Survivors may also face economic and social impacts including lost wages, lost

²⁰ In this graph, where clients are the victims of human trafficking and another slavery-like practice, we list the slavery-like practice as the matter type.

*Servitude became an offence following the introduction of the *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013* (Cth).

**"Other" matters include all non-human trafficking, slavery and slavery-like conditions client matters. These include family members of existing clients, humanitarian visa applications, and partner visa applications.

²¹ 'Trafficking In Persons: The Australian Government Response 1 July 2015 – 30 June 2016' above n 12, 4.

²² Australian Government, Submission No 18 to Parliamentary Joint Committee on Law Enforcement, *Inquiry into Human Trafficking*, 16 January 2016, 6.

²³ *United States v Damion St. Patrick Baston* 818 F 3d 651 (11th Cir, 2016).

earning capacity, social, cultural and linguistic isolation, as well as social stigma and rejection from their community.

1. Anti-Slavery Australia recommends that the Commonwealth government continue to support the Australian Institute of Criminology in the development of an enhanced monitoring program on human trafficking and slavery, in order to **better understand the prevalence of human trafficking, slavery and slavery like conditions in Australia.**

RECOMMENDATIONS

Anti-Slavery Australia recommends that the Commonwealth government continue to support the Australian Institute of Criminology in the development of an enhanced monitoring program on human trafficking and slavery, in order to **better understand the prevalence of human trafficking, slavery and slavery like conditions in Australia.**

2 COMBATTING HUMAN TRAFFICKING AND SLAVERY WITHIN A HUMAN RIGHTS FRAMEWORK

Australia has international obligations to address human rights abuses including human trafficking and slavery, which are found in a number of international agreements. These include:

- *The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organised Crime;*
- *The International Covenant on Civil and Political Rights;*
- *The International Covenant on Economic, Social and Cultural Rights;*
- *The Convention on the Elimination of All forms of Discrimination against Women;*
- *The Convention on the Rights of the Child;*
- *The Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery;* and
- relevant ILO forced labour conventions.²⁴

It is essential that the human rights and safety of survivors be at the centre of any legislation, policies or programmes developed to combat human trafficking and slavery. Anti-Slavery Australia recommends that the Committee utilise a human rights framework in assessing the need for a Modern Slavery Act in Australia.

²⁴ These include the *Forced Labour Convention, 1930* (No. 29) and the *Worst Forms of Child Labour Convention, 1999* (No. 182).

3 THE HUMAN TRAFFICKING VISA FRAMEWORK IN AUSTRALIA

Anti-Slavery Australia has direct experience working with survivors of human trafficking, slavery and slavery-like practices and observes that uncertainty about visa status and worry about personal protection and the safety of family members have a major impact on the protection, well-being and recovery of trafficked and enslaved women and men. The Human Trafficking Visa Framework (**'Trafficking Visa Framework'**) was created in 2004 through an amendment to the *Migration Regulations 1994* (Cth), to provide visa support to non-citizens who were identified as victims of human trafficking and did not have a valid visa. Amendments to the Trafficking Visa Framework in July 2015 resulted in changes to visa names to remove stigma that had been associated with titles (for example, the Criminal Justice Visa and the Witness Protection (Trafficking) (Permanent) visa), the broadening of the definition of human trafficking, and simplification of the visa program.

3.1 Initial Bridging Visa F ('BVF')

If a non-citizen is suspected of being a victim of human trafficking by Federal, State or Territory police, the person must not be detained by the Department of Immigration and Border Protection. Rather, in these circumstances a BVF can be issued to any person identified by the police as a possible victim of human trafficking or slavery. This visa is not dependent on the victim's willingness to assist the police, can be granted for a period of up to 45 days, and is available to any immediate family members of the suspected victim if they are in Australia.

The initial BVF can be extended for a further 45 days, bringing the total number to 90 days. Generally, the extended BVF will be granted to minors and victims of forced marriage, if without the visa they would become unlawful non-citizens.

3.2 Extended BVF and Assistance Notice BVF

If a victim of human trafficking agrees to participate in a criminal justice process, for example through contributing to a police investigation or criminal prosecution, they may be issued with an Assistance Notice BVF. Eligibility for this visa is dependent on the Attorney-General, or a designated officer, issuing an assistance notice. This notice outlines that the non-citizen, suspected victim is required to be in Australia to assist in the administration of criminal justice in relation to human trafficking, slavery or slavery-like practices and that satisfactory arrangements have been made to meet the costs of keeping the non-citizen in Australia. On receipt of the Assistance Notice, the Department of Immigration and Border Protection can issue a BVF allowing the victim of trafficking and slavery to stay lawfully in Australia for the purpose of assisting in the criminal justice process.²⁵

BVF visas may also be available to certain non-citizens who are outside Australia and who would require a BVF to enter Australia. In rare cases, a non-citizen BVF holder in Australia may have a compassionate and compelling need to leave Australia. In these cases arrangements may be made for a BVF to be issued to allow them to return to Australia.

²⁵ Australian Government, *Australian Government Strategy to Combat Human Trafficking and Slavery: Whole of Government Performance Management Reporting 1 January to 30 June 2015*, (2015) 6
<<https://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Documents/australian-government-strategy-to-combat-human-trafficking-slavery-1january2015-to-30june2015.pdf>>.

3.3 Referred Stay (Permanent) Visa

A Referred Stay (Permanent) visa provides a permanent visa to trafficked victims who have been identified by the Attorney-General or the Attorney's delegate as having made a contribution to and cooperated closely with, an investigation related to human trafficking slavery or slavery-like practices and who would be in danger if they returned to their home country. The criteria to satisfy this visa include requirements that:

- the Attorney-General, after assessing information provided by the AFP, must decide to issue a certificate that states the applicant made a contribution to and cooperated closely with an investigation; and
- the Minister must be satisfied that the applicant would be in danger if they were to return to their home country.²⁶

In the 2014-15 financial year, 26 BVFs or Criminal Justice Stay visas and 8 Referred Stay visas were granted to victims of trafficking and slavery and their families in Australia,²⁷ while in the 2015-16 financial year 31 BVFs and 5 Referred Stay visas were granted.²⁸

4 THE SUPPORT FOR TRAFFICKED PEOPLE PROGRAM

The Australian Government's Support for Trafficking People Program ('**Support Program**'), with case management services provided by the Australian Red Cross, provides support and assistance to suspected victims of human trafficking and slavery in Australia. Identification of victims and referrals to the support program are made by the AFP. Importantly, the AFP may refer any identified victim of human trafficking and slavery in Australia to the Support Program, if they are an Australian citizen or hold a valid visa. In practice, referred victims without a valid visa will be granted a BVF to enable them to remain in Australia and access the Support Program.²⁹

The Support Program assists survivors of human trafficking and slavery through case management support, accommodation, medical treatment, counselling, referrals to Anti-Slavery Australia for legal and migration advice, skills development including English language skills and social support.³⁰

All referrals from the AFP have access to the Support Program through the Assessment and Intensive Support Stream that provides support to survivors for a period up to 45 days. If a survivor is able to assist in a police investigation, they may be eligible to access the Justice Support Stream, which provides support for the duration of a police investigation and/or prosecution of a human trafficking or slavery matter.³¹

²⁶ *Migration Regulations 1994* (Cth) reg 2.07AK(3).

²⁷ More than one BVF may be granted to an individual; 'Trafficking In Persons: The Australian Government Response 1 July 2015 – 30 June 2016' above n 12, 41.

²⁸ *Ibid.*

²⁹ 'Trafficking In Persons: The Australian Government Response 1 July 2015 – 30 June 2016' above n 12, 35.

³⁰ *Ibid.* 32.

³¹ *Ibid.* 33.

4.1 Profile of survivors on the Support Program

In the 2015-16 financial year, 38 new clients entered the Support Program, with 31 female, and 7 male clients. Of these new referrals, the two highest categories were victims of forced marriage and labour exploitation. In total, there were 80 clients on the Support Program in the 2015-2016 financial year. Of Anti-Slavery Australia's 80 active clients, 33 are currently on the Support Program, with 34 of our current clients having been formerly on or exited from the Support Program. Our current active clients on the Support Program come from a diverse range of countries, and have faced a variety of exploitative practices as shown in figure 1.

PART B – GAPS IN THE AUSTRALIAN RESPONSE TO HUMAN TRAFFICKING AND SLAVERY

5 STRENGTHENING THE TRAFFICKING VISA FRAMEWORK

While the Australian government, through its *National Action Plan to Combat Trafficking and Slavery 2015-19* ('**National Action Plan**') and the *Trafficking Visa Framework*, has demonstrated a strong commitment to protect the human rights of trafficking and slavery survivors, there are a number of barriers that prevent survivors from accessing the Trafficking Visa Framework, and these represent significant gaps in the effective operation of the visa program.

In 2016, Anti-Slavery Australia released a policy paper recommending amendments to the Trafficking Visa Framework to better reflect the human rights intention behind its creation.³² Taking into account the experiences of Anti-Slavery Australia clients who are survivors of human trafficking and slavery, this policy paper identifies key concerns about the operation of the Trafficking Visa Framework, including the narrow eligibility criteria for the grant of permanent visas to victims of human trafficking and slavery, and accessibility for victims of human trafficking and slavery who are unable to assist with criminal investigations/prosecutions.

In addition to these concerns, Anti-Slavery Australia identified family reunification as a human rights issue facing identified survivors of trafficking and slavery in Australia, which is inherently linked to their immigration status under the Trafficking Visa Framework. This is discussed further in Part 5 of this submission.

5.1 Requirement of cooperation with criminal investigations

As noted above, identified and suspected victims of human trafficking and slavery in Australia are eligible to be granted a BVF under the Trafficking Visa Framework. The grant of subsequent BVFs and the offer of a permanent Referred Stay visa are reliant on the applicant's contribution and close cooperation with an investigation into a human trafficking or slavery offence. However, there are a number of barriers that prevent victims of human trafficking and slavery from interacting with or providing assistance to law enforcement, thus preventing access to the support afforded by the Trafficking Visa Framework.

A 2013 paper, from the Australian Institute of Criminology, outlines the following barriers to involvement in criminal justice proceedings, for survivors of trafficking and slavery:³³

- Fear of authorities
- Fear of identification by perpetrators, and subsequent reprisals
- Stigma and denial associated with being a 'victim' of trafficking or slavery

³² Anti-Slavery Australia, *Visas for Trafficked People: The Australian Response*, Policy Position Paper No. 3 (2016) available online at: <<http://www.antislavery.org.au/images/pdf/Publications/2016%20-%20Visas%20for%20Trafficked%20People%20The%20Australian%20Response.pdf>>.

³³ Hannah Andreovski, Jacqueline Joudo Larsen and Samantha Lyneham, 'Barriers to trafficked persons' involvement in criminal justice proceedings: An Indonesian case study' (2013) 451 *Trends and Issues in crime and criminal justice*, 2-4, <http://www.aic.gov.au/media_library/publications/tandi_pdf/tandi451.pdf>.

- Criminalisation or re-victimisation of victims of trafficking, who may also be prosecuted or detained
- Lack of trust in criminal justice officials

Anti-Slavery Australia's work with survivors of trafficking and slavery reveals that victims of these crimes often suffer from extreme psychological distress as a consequence of the severe exploitative conditions that they have endured. This trauma can be exacerbated by re-victimisation during the criminal investigation process, for example by providing detailed statements and evidence to the police. For this reason, many survivors of trafficking and slavery are unable to continue to assist police in lengthy investigations of offences, even if they are initially able to do so.

Additionally some victims of human trafficking and slavery are ineligible for immigration support through the Trafficking Visa Framework as they experienced human trafficking and slavery in Australia before relevant offences were introduced into the Criminal Code. Other victims have made a contribution to a criminal justice process but for various reasons, the police have decided to cease investigations. For example, this may occur where a trafficker has left the jurisdiction or cannot be identified.

Anti-Slavery Australia recommends that the Australian government address gaps in its response to trafficking and slavery in Australia, in order to more effectively protect the human rights of survivors. We recommend that amendments to Trafficking Visa Framework are necessary to protect the human rights of migrants who have suffered from conditions of human trafficking and slavery in Australia and ensure that they are able to access immigration support even where they are unable to contribute to police investigations.

5.2 Family reunification

Survivors of human trafficking and slavery in Australia are frequently separated from their immediate families and experience a sense of loss and displacement through long-term family separation. Anti-Slavery Australia notes that lengthy delays in the time taken to offer a permanent visa and the time taken to process Referred Stay visa applications place a particular burden on victims and their families who have suffered psychologically and physically traumatic experiences of extreme exploitation.

These delays coupled with unduly burdensome visa criteria attached to Referred Stay visas often result in the separation of family members for years, as applicants await an outcome.

Discussing the importance of family in his end of mission statement following an official visit to Australia in November 2016, United Nations Special Rapporteur on the human rights of migrants, François Crépeau, emphasised that:

"The right to live with one's family is a fundamental right for all, Australians and non-citizens alike. It is in the best interest of the child to live with both their parents and separation for long periods of time has a huge impact on the development of children left behind. Barriers to family reunion should thus be lifted at all levels, and family unity should be systematically fostered and actively

facilitated. Families should never be separated for immigration purposes for long periods of time. In particular, families of vulnerable migrants should never be separated at all.³⁴

This assertion of the human right to family reunion reflects Australia's obligations under a number of international instruments to respect the rights and basic principles that attach to the family unit and to support the protection of family ties, particularly where children are involved:

- Article 16 of the *Universal Declaration of Human Rights* (1948) and article 23 of the *International Covenant on Civil and Political Rights* each state that 'the family is the natural and fundamental group unit of society and is entitled to protection by society and the state'³⁵
- The *International Covenant on Economic, Social and Cultural Rights* states that 'the widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children'³⁶
- The Final Act and article 12 of the *Geneva Convention and Protocol Relating to the Status of Refugees* respectively outline the principle of unity of the family³⁷ and rights attaching to marriage³⁸ with reference to refugees
- Articles 9 and 16 of the *Convention on the Elimination of All Forms of Discrimination Against Women* deal with the rights of women regarding equality, marriage and family³⁹
- The *Convention on the Rights of the Child* which makes numerous references to family:⁴⁰
 - Articles 9 and 10 discuss the rights of the child with regard to separation from family
 - Articles 20 and 21 deal with deprivation of family environment and adoption
 - Article 23 discusses the rights of child refugees

Due to the complicated, hidden nature of human trafficking and slavery cases, criminal investigations are often prolonged over the course of years, and may not result in the conviction of alleged offenders for trafficking offences. In Australia, while awaiting an offer

³⁴ François Crépeau, *End mission Statement by the UN Special Rapporteur on the human rights of migrants on his official visit to Australia (1-18 November 2016)*, (17 November 2016) <<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=20885&LangID=E>>.

³⁵ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A810 (10 December 1948) art 16(3); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 23(1).

³⁶ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 10(1).

³⁷ *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954).

³⁸ *Ibid.* art 12(2).

³⁹ *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) arts 9 and 16.

⁴⁰ *Convention on the Rights of a Child*, opened for signature 20 November 1987, 1577 UNTS 3 (entered into force 2 September 1990).

for a Referred Stay visa, survivors of trafficking and slavery on temporary bridging visas may be granted further BVFs for the purpose of travel outside of Australia in compassionate and compelling circumstances. Such an application requires the support of the AFP. However, identified victims of trafficking and slavery face potential repercussions if they visit family members, such as dependent children, in their country of origin. Travel movements may be used by the Department of Immigration and Border Protection to refute claims of danger that are a key component of the Referred Stay visa criteria. Therefore, there is a chance that parents applying for a Referred Stay visa will have the credibility of their claims scrutinised and their applications refused where they attempt to visit dependent children who reside offshore.

Further, the presence of dependent children offshore is not in and of itself considered a compelling reason for applicants to visit their country of origin, creating an extra challenge for parents on a BVF who hope to see their family members and dependent children while they await an immigration outcome. The following case study outlines the experience of one of our clients. Names and identifying information have been altered to preserve confidentiality.

Case Study: Family Reunification

Alice was a national of a South East Asian country. She was a single mother earning a small amount of money to support her two children, and her elderly mother. Alice was trafficked to Australia under the mistaken belief that she would be working as a maid, earning money to provide better futures for her children.

In Australia, Alice was held in conditions of domestic servitude. She was told that she owed a large debt to her employer and that extra money would be deducted from her pay for food and accommodation. She was threatened that she would be turned into Australian authorities if she attempted to escape, and that she would be sent to prison. Threats were also made that her family would be harmed in her home country. She was sexually assaulted by her employer.

Alice eventually escaped, and contributed to a criminal investigation conducted by the AFP. Her former employer was ultimately charged with offences under the Migration Act, which were unrelated to Mary's case, and he was ultimately found not guilty of trafficking offences.

In early 2013, Alice received an offer for a Referred Stay visa (then known as a Witness Protection (Trafficking) visa). Alice accepted this offer, but in late 2015 was asked to comment on adverse information received from the AFP. This information referred to three trips that Alice made to her home country between 2011 and 2013, to visit her two young children. In a letter to Alice, the Department of Immigration and Border Protection noted that "no specific threats were made" to Alice during her trips to her home country. Submissions were made to the Department, describing the precautions that Alice had undertaken to avoid detection by her traffickers while she was overseas. The Department ultimately accepted these submissions and Alice was granted a Referred Stay visa in 2016.

Alice left her home country when her children were both just 6 years old. Unfortunately, her children, now 12, are reluctant to join her in Australia. They have grown up without her, and have established lives for themselves in their home country. Alice now faces the prospect of not returning to her home country or seeing her children until she has gained Australian citizenship.

5.3 Impact of family separation for survivors of human trafficking and slavery

While there have been few studies on the impact of family separation for survivors of human trafficking and slavery in Australia, research conducted on the refugee and asylum-seeker experience provides valuable insight into short and long term consequences of family separation. For example, refugees and migrants who may be faced with lengthy periods of uncertainty over their immigration status and who lack family reunion or support, may suffer mental harm, which exacerbates existing barriers to successful resettlement. These barriers include issues associated with pre and post-migration experiences and trauma, a lack of social networks in receiving countries, a lack of economic opportunities, difficulties accessing education, language barriers, experiences with xenophobia or prejudice and a lack of permanent accommodation.⁴¹

Further, survivors of human trafficking and slavery have been found to be vulnerable to mental health issues such as Post Traumatic Stress Disorder, anxiety, depression and suicide attempts, due to the extreme exploitation that they have experienced.⁴² For survivors who face an uncertain future in Australia, family separation can have a profound further impact on existing psychological and emotional health concerns. The extreme vulnerability of this group is both a contributing factor to their isolation from the community, and a compelling argument for family reunification.

Migrants also face long lasting repercussions from extended periods of separation from family members even once permanent visas have been obtained. Our casework experience has demonstrated that marriage or relationship breakdowns are common among survivors who have been separated from their partners, and years spent away from dependent children can result in an unwillingness for dependents to relocate to Australia and be reunited with parents, one that avenue becomes available to them. Moreover, once a migrant has obtained a permanent visa grant, applications for family reunification are often hampered by issues regarding the definition of family and required documentary evidence.⁴³

Anti-Slavery Australia has experienced, through our legal case-work and advocacy, the trauma caused by family separation that severely impacts the emotional, psychological and social well-being of survivors of human trafficking. We recommend that provisions be created within the Trafficking Visa Framework to facilitate the temporary reunification of families. Such provisions would also be suitable for individuals separated from their families during the lengthy application process for onshore Protection visas. Through this, the Australian government can ensure that the human rights of migrants who are victims of human trafficking and slavery are protected through the Trafficking Visa Framework.

⁴¹ Ibid. 245.

⁴² Dr Ligia Kiss, Nicola S Pocock, Varaporn Naisanguansri, Soksreymom Suos, Brett Dickson, Doan Thuy, Jobst Koehley, Kittiphan Sirisup, Nisakorn Pongrungees, Van Anh Nguyen, Rosilyne Borland, Poonam Dhavan and Cathy Zimmerman, 'Health of men, women and children in post-trafficking services in Cambodia, Thailand and Vietnam: an observational cross-sectional study' (2015) 3(3) *The Lancet* 154, 154.

⁴³ Farida Fozdar and Lisa Hartley, Metropolitan Migrant Resource Centre, *Refugees in Western Australia: Settlement and Integration*, [2013] 22.

RECOMMENDATIONS

1. **Improve the permanent Referred Stay Visa** to better support and protect victims of human trafficking and slavery by:
 - a. Broadening the visa criteria to facilitate the grant of a visa a pathway for survivors of human trafficking and slavery who are unable to contribute to criminal investigations due to compassionate and/or compelling circumstances.
 - b. Removing the visa criteria that an applicant must prove that they “would be in danger” if returned to their home country.
2. **Facilitate the reunification of survivors with their families** in cases where the survivor is participating in a criminal investigation or prosecution or awaiting the determination of a permanent trafficking visa, where proceedings have extended beyond six months. Survivors with dependent children should be prioritised for family reunion in Australia.

6 STRENGTHENING THE SUPPORT PROGRAM

The requirement that referrals must be made through the AFP to access the Support Program raises issues regarding the identification of suspected victims of human trafficking and slavery who may be reluctant to engage with police. These victims may come to the attention of service providers and non-government organisations (**NGOs**), but may not be able to access the Support Program due to a fear and distrust of authorities and associated fears over immigration status.

Further, victims of human trafficking and slavery, who are able to access the program, may be unable to cooperate further with police investigations, and therefore have few options in terms of support following the initial 45-day reflection period. The fact that continued support is contingent on cooperation with police fails to recognise the extreme trauma and other barriers, referred to above, that prevent victims from participating in police investigations.

It is critical that survivors who are unable to communicate with law enforcement are afforded equal support and protection as those who may be able to assist with police investigations. This is in accordance with the recommendations made by United Nations Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo, who stated that in Australia:

“The linking of ongoing support services to contribution to criminal processes should be removed, as it imposes an additional burden on victims of trafficking and does not represent an adequate acknowledgement of their status as victims.”⁴⁴

One way to address this may be to remove the requirement that survivors cooperate with police investigations, and instead introduce the option of providing victims with support and permanent residency on a case-by-case basis.⁴⁵ This would recognise the complex and varied circumstances that victims of human trafficking and slavery in Australia face, and ensure that all victims have access to support, reflecting the seriousness of the human rights abuses that they have suffered.

RECOMMENDATIONS

Improve the Australian Government funded Support for Trafficked People Program to further assist and protect survivors of human trafficking, slavery and slavery like practices by:

- a. Broadening the pool of agencies permitted to make referrals to the Support for Trafficked People Program. Appropriate agencies could include the Department of Immigration and Border protection, and certain other agencies including key civil society organisations; and
- b. Amending the criteria for the provision of further support to focus on the status of a survivor of human trafficking or slavery. Decisions about eligibility and further support should be determined on a case-by-case basis taking into account the individual needs of each survivor.

⁴⁴ Joy Ngozi Ezeilo, *Report of the Special Rapporteur on trafficking in persons especially women and children*, UN Doc A/HRC/20/18/Add.1 (18 May 2012) 14 [53]

<http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A.HRC.20.18.Add.1_En.PDF>.

⁴⁵ Similar schemes found in Finland, Iceland and Italy are discussed in *Annette Brunovskis*, ‘Balancing Protection and Prosecution in anti-trafficking policies’ (Nordic Council Of Ministers, 2012) 53.

7 IMPROVING IDENTIFICATION OF HUMAN TRAFFICKING AND SLAVERY

The identification of victims of human trafficking and slavery has been recognised by the Special Rapporteur on trafficking in persons, especially women and children, Maria Grazia Giammarinaro as the greatest obstacle to preventing further exploitation and ensuring the rights of victims.⁴⁶

It is therefore essential that the Australian government implement measures to facilitate the identification and prevention of human trafficking and slavery in Australia. This may include the strengthening of existing monitoring practices for various visa schemes, and the provision of comprehensive training for frontline officers and case workers throughout Australia.

7.1 Effective monitoring of visa schemes

Human trafficking and slavery in Australia occurs across a number of industries, including the sex industry agriculture, hospitality, construction, and in private homes. Migrants who are vulnerable to exploitation in these industries may enter Australia through various visa schemes. Due to the conditions of some of these visa schemes, including restrictions on stay, work and study in Australia, as well as other contributing isolating factors, migrant workers in Australia remain particularly vulnerable to human trafficking and slavery conditions, often from the individuals and businesses that sponsor them.

With regard to the experiences of our clients, Anti-Slavery Australia has identified the following visa frameworks that create conditions of vulnerability for migrants in Australia:

1. Temporary work visas: Temporary Work (Skilled) Visa (subclass 457)⁴⁷, Working Holiday Visa (subclass 417), Work and Holiday Visa (subclass 462) and others
2. Student Visas: Student Visa (subclass 500), Higher Education Visa (subclass 573)
3. Partner or Family Visas: Partner Visa (subclass 309 and 100), Partner Visa (subclass 820 and 801), Prospective Marriage Visa (Subclass 300)
4. Asylum seeker/Illegal Maritime Arrivals: Predominately bridging visas

There are a number of common elements in human trafficking and slavery matters that are important to recognise when examining these visa frameworks. These elements illustrate the difficulty in the detecting and identifying victims.

⁴⁶ Maria Grazia Giammarinaro, Special Rapporteur, *Trafficking in persons, especially women and children*, UN GAOR, 70th sess, Provisional Agenda Item 73(b), UN Doc A/70/260 (3 August 2015) [27].

⁴⁷ It should be noted that while the Federal government has announced that the 457 visa scheme will be brought to an end, and replaced by "two new temporary skills visas". An assessment of the 457 visa scheme has been included in these submissions to highlight the risk factors and indicators of human trafficking and slavery, which may also be present under the new schemes.

Common elements of human trafficking and slavery

Condition of ownership	Withholding of documents
Control of freedom of movement	Little or no payment for work
Withdrawal of discretion over life decisions	Threats to family members in home country
Taking of identity documents and important documents	Isolation
Sexual assault and other forms of violence	Verbal abuse, humiliation
Deception about nature and conditions of work	Psychological coercion is often coupled with threatened or actual physical violence and sexual assault
Debt-bondage (i.e. person's pledge of their labour or services as security for the repayment for an inflated debt)	Social /linguistic isolation
Threats of deportation	Creation of fear of exposure, distrust of law enforcement, authority

Figure 3: Key elements that are common to all forms of human trafficking and slavery.

Alongside these common elements, each method of entry into Australia creates additional vulnerabilities that must be addressed in Australia's response to human trafficking and slavery.

Anti-Slavery advocates for a preventative approach to combatting human trafficking and slavery, which may be achieved through the implementation of effective monitoring practices. The effective and consistent monitoring of visa programs must involve the recognition of these indicators of human trafficking and slavery, and incorporate effective referral mechanisms.

7.1.1 Temporary work visas

The exploitation of temporary visa holders in industries throughout Australia has been described as a "national disgrace".⁴⁸ The following section outlines the forms of temporary work visas currently available, and outlines key vulnerabilities that accompany the conditions of these visas.

The temporary work visa framework is comprised of a number of visas including the Temporary Work (Skilled) Visa (subclass 457) ("**457 visa**"). The Federal government has recently announced that the 457 visa will be replaced by Temporary Skill Shortage visa in March 2018.⁴⁹ The current 457 visa requires applicants to enter into a Labour Agreement, or be party to a Standard Business Sponsorship. Holders of a 457 visa are able to stay and work in Australia for up to 4 years, subject to the dates specified in the applicable Labour Agreement.⁵⁰ In 2016-17, as of 30 September 2016, there were 95,758 holders of the 457

⁴⁸ The Senate Education and Employment References Committee, *A National Disgrace: The Exploitation of Temporary Work Visa Holders* (Commonwealth of Australia, 17 March 2016) 1.

⁴⁹ Malcolm Turnbull MP and Peter Dutton MP, 'Press Conference with the Minister for Immigration and Border Protection, The Hon. Peter Dutton MP' (Transcript, 18 April 2017) <<https://malcolmturbull.com.au/media/press-conference-with-the-minister-for-immigration-and-border-protection-th>>.

⁵⁰ See the criteria to be satisfied at the time of decision to grant a 457 visa: *Migration Regulations 1994* (Cth) sch 2 s 457.22.

visa in Australia.⁵¹ For the same time period, accommodation and food services represented the third largest sponsor industry in Australia, while cooking was the top occupation for which primary visas were granted.

The Working Holiday Maker visa programme (subclasses 417 and 462) operates through arrangements made between Australia and 39 partner countries. There are caps on the number of Work and Holiday (subclass 462) visas granted each year and this type of visa has additional eligibility requirements.⁵²

Our casework has revealed risk factors associated with these types of temporary visa schemes that make migrants particularly vulnerable to human trafficking, slavery and labour exploitation upon arrival in Australia. In particular, the temporary work visa framework has created an environment where employers are “in a position of dominance in relation to their employees” who are “vulnerable to exploitation and intimidation.”⁵³

The case study below demonstrates how employers, through temporary working visa schemes, may take advantage of workers’ limited knowledge of work rights and laws in Australia, resulting in circumstances where migrants have been coerced into signing quasi-legal agreements as a means to consolidate their traffickers’ power and control. The social and linguistic isolation of these people, coupled with their fear of local law enforcement, is indicative of the common and significant barriers faced by migrants seeking assistance.

Case Study: Working Holiday Visa (Subclass 417)

Two men, from a European country, were trafficked into Australia through an online work hire company. They were told that once they arrived in Australia they would be provided assistance in obtaining a 457 visa.

The men had bank accounts set up for them, into which their wages were to be paid. These accounts were under the complete control of their employers, who paid the men a small percentage of their agreed upon wages. After a few days of working in Australia the men fled their place of employment.

Following their escape, demands were made by the employers for money allegedly owed by the trafficked men. Over the course of two or three months, the men were repeatedly threatened by email and over the phone, and at one stage were forced to sign ‘contracts’ stating that they owed the employer AUD\$25,000 each.

The matter only came to the attention of law enforcement a few months after the men had escaped, when one man sought the assistance of local police on the threats that he had received.

Detective Sergeant Ken Foster said of the matter:

“They [the victims] come from different parts of the world, their views of policing are somewhat different to what we understand here, they’re frightened of that type of thing, they are also a long way from home, and threats were made against them, not only them but their families...”⁵⁴

⁵¹ Department of Immigration and Border Protection, Australian Government, *Subclass 457 Quarterly Report: quarter ending 30 September 2016*, (2016) 1.

⁵³ *Inquest into the death of Manjit Singh* (17 August 2015) Coroner’s Court NSW2027/11 per Deputy State Coroner HCB Dillon at [143].

⁵³ *Inquest into the death of Manjit Singh* (17 August 2015) Coroner’s Court NSW2027/11 per Deputy State Coroner HCB Dillon at [143].

⁵⁴ Aleisha Orr, ‘Perth people trafficking ring busted’, *WA Today* (online), 21 March 2013 <<http://www.watoday.com.au/wa-news/perth-people-trafficking-ring-busted-20130321-2gh3g.html>>.

Ultimately, there were no convictions for trafficking or debt bondage offences in this matter.

It is essential that the Australian government address the key concerns that have been identified by civil society organisations, which lead to the exploitation of migrant workers through temporary visa schemes. Anti-Slavery Australia submits that the introduction of any new temporary working visa, such as the Temporary Skill Shortage visa, must be accompanied by measures that address the deficiencies in existing schemes.

7.1.2 Student visas

The Australian Student visa programme incorporates seven types of visas, issued for the entire period that the applicant is enrolled in full-time study within Australia. There are a variety of requirements attached to these visas, such as financial, health insurance, English language proficiency and health and character requirements. In the six month period ending 30 June 2016, a total of 166,671 student visas were granted.

Student visa holders are allowed to work for 40 hours a fortnight during course session times, while secondary holders, for example immediately family, are restricted to work 40 hours per fortnight at any time. In circumstances of financial stress, student visa holders may be vulnerable to exploitation, particularly where unofficial agreements have been made between employers and employees. Visa holders may fear deportation due to a breach of working conditions and threats made by employers.

7.1.3 Partner and family visas

It is the experience of Anti-Slavery Australia that migrants who are sponsored into Australia through one of the various spouse/partner visa schemes may be left vulnerable to exploitation, often at the hands of their sponsor. Anti-Slavery Australia has published a research note that outlines the risks and indicators of human trafficking and slavery, which affect women within the home.⁵⁵

Partners also have the power to withdraw partner visa sponsorship, creating a fear of deportation that can be used to facilitate the trafficking or enslavement of sponsored parties. While family violence provisions exist to assist sponsored partners in this situation, the criteria required to satisfy these provisions may be too narrow to provide practical assistance to many migrants who are subsequently forced to return to their country of origin.

A majority of our clients who have experienced these circumstances are women who face key issues including:

- english language barriers that create reliance on sponsoring spouses;
- family violence or threats of violence from spouses or in-laws;

⁵⁵ Anti-Slavery Australia, *Hidden from view: Slavery in the home*, (2016) Research Note, available online at <<http://www.antislavery.org.au/images/pdf/Publications/2016%20-%20Hidden%20from%20View%20Slavery%20in%20the%20home.pdf>>.

- isolation from the wider Australian community; and
- linguistic or social isolation within home country, or country in which they have been abandoned, exacerbated by cultural isolation, a lack of funds or financial support.

Compounding these factors are situations where important communications regarding visa statuses, such as notices of refusal of visas, are sent to sponsoring parties whose details have been provided to the Department of Immigration and Border Protection for official correspondence. The Department of Immigration and Border Protection deems communications through these contact points to be valid, although the visa applicant may never see the documents themselves. While this issue may be overcome where the Department is informed of the applicant's change in circumstance, vulnerable women often do not have the legal and migration support they need to assist them through this process.

Linked to the sponsoring of partners and family members through this visa framework, is the emerging trend of Australian citizens or residents who are taken overseas and abandoned, or forced into a marriage. For example, husbands may sponsor their wives and children to enter Australia, only to deceive them into returning to their country of origin. Vulnerable women and children are then abandoned overseas without funds, having had their travel documents confiscated, preventing their return to Australia. This form of trafficking has severe consequences for the women and children involved, as they are often left impoverished in their country of origin with minimal financial or legal support. Individuals may also be trafficked overseas for the purpose of forced marriage, often by family members.

Due to the clandestine nature of forced marriage, it is difficult to identify its scope and practice in Australia. However, there have been a number of critical developments since 2013, when Federal law was amended to incorporate forced marriage as a specific criminal offence. MyBlueSky.org.au, created and operated by Anti-Slavery Australia and funded by the Australian Government, is a national online portal providing secure access to legal assistance for any person in Australia facing forced marriage. Through My Blue Sky, and other referrals, Anti-Slavery Australia has encountered several cases involving Australian citizens or visa holders who have been deceived into travelling overseas for the purpose of forced marriage. While the process for these individuals to return to Australia necessarily involves the assistance of the Department of Foreign Affairs and Trade, and the AFP, it is our experience that these government agencies are sometimes unable to fund the return of individuals at risk, and they have had to rely on the charity of private, third parties to fund return plane tickets.

The spouse/partner visa programme incorporates family violence provisions that aim to protect partners who suffer from forms of domestic violence. While the family violence provisions in the *Migration Regulations 1994*⁵⁶ allow the grant of a permanent visa to a person who has experienced family violence within a marriage, it is unclear how protections may be expanded to include, for example, individuals who have been sponsored into Australia, who face family violence through a forced marriage arranged by the sponsor, or other family members.

⁵⁶ *Migration Regulations 1994* (Cth) pt 1 div 1.5.

7.1.4 Asylum Seekers/Illegal Maritime Arrival bridging visas

In 2015, Anti-Slavery Australia released a research report funded by Uniting Care NSW/ACT entitled *Giving Voice to Asylum Seekers*, examining the lived experience of asylum seekers in the Australian labour market and the vulnerability of asylum seekers to exploitation in NSW and the ACT.⁵⁷ The report makes findings based on asylum seeker responses to questions about their economic, social and emotional well-being, interviews conducted with service providers, and academic research.

Giving Voice to Asylum Seekers outlines key concerns regarding the labour exploitation of asylum seekers in Australia, noting that while it is possible for asylum seekers to be granted bridging visas that do not restrict work rights, the process takes time. Further, the report notes that even with permission to work, past research suggests that only 15 per cent of asylum seekers will find employment.⁵⁸

The report highlights the experiences of asylum seekers who have faced labour exploitation, poor pay, excessive work hours and injury at work:

“Most of the women want to work, most took out loans, they have family back home to support, what they get here is basic. (With house cleaning)... what happened at the beginning was they were exploited; they were paid \$5 an hour. Usually it is \$15.”⁵⁹

Based on the findings and observations of this report, Anti-Slavery Australia made a number of recommendations, focussing on a preventative approach in addressing the factors and issues that contribute to conditions of exploitation experienced by asylum seekers, including human trafficking and slavery. In particular, recommendations were made on:

- the funding and development of training programs and a mobile phone application that focuses on pay, work conditions and workplace health and safety, as well as accessible advice and assistance for asylum seekers in Australia; and
- the funding of an employment relations consultant to work with employers and prepare asylum seekers for work, also providing a service that links asylum seekers to job placements.

7.2 Training and other measures for frontline officers

As discussed above, there are a number of key barriers which limit involvement of victims of slavery and human trafficking with criminal justice proceedings.⁶⁰ In the experience of Anti-Slavery Australia, through our legal practice case work, these barriers often also prevent victims of human trafficking and slavery from seeking the help of law enforcement or other authorities.

⁵⁷ Anti-Slavery Australia, *Giving Voice to Asylum Seekers: An evidence-based review of community asylum experiences in NSW and the ACT*, (2016).

⁵⁸ Ibid 61.

⁵⁹ Ibid 62-62.

⁶⁰ Hannah Andrevski, Jacqueline Joudo Larsen and Samantha Lyneham, 'Barriers to trafficked persons' involvement in criminal justice proceedings: An Indonesian case study' (2013) 451 *Trends and Issues in crime and criminal justice*, 2-4, <http://www.aic.gov.au/media_library/publications/tandi_pdf/tandi451.pdf>.

Anti-Slavery Australia commends the Australian government's ongoing work and commitment to the identification of survivors of slavery and human trafficking, including training for Department of Immigration and Border Protection immigration compliance and visa processing officers, consular officers overseas and prosecutors.⁶¹ Training

for officials in frontline government agencies has been a key measure in Australia's whole-of-government strategy to combat human trafficking and slavery.⁶² These existing programs can be strengthened to further increase the likelihood that victims of human trafficking and slavery will be identified.

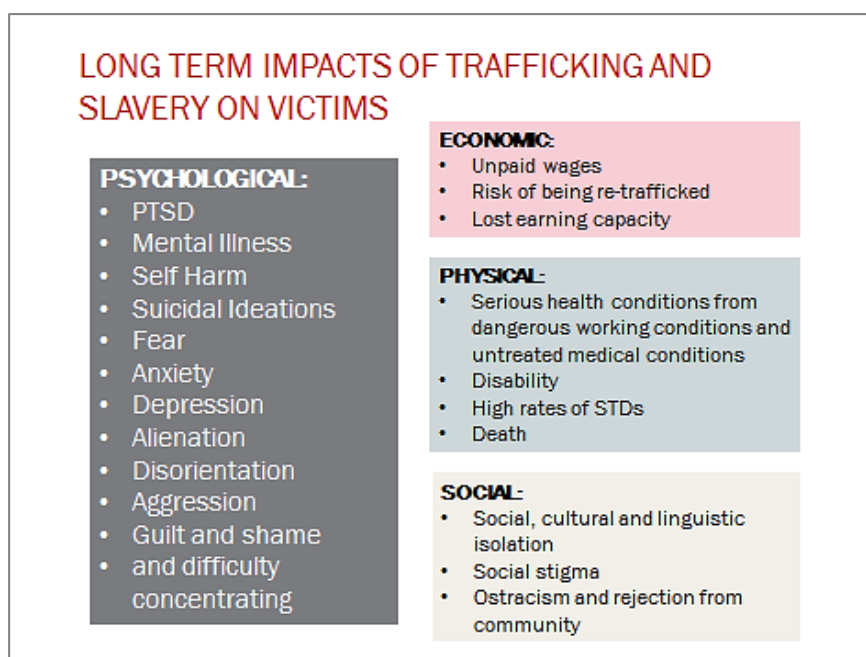


Figure 4: Training provided to the Department of Human Services Multicultural Advisory (2017).

7.2.1 Training for officers in frontline government agencies

To address changes and turnover in personnel, it is essential that comprehensive training is delivered on an ongoing basis. It is also important that training be developed and delivered, in particular, to officers of the Department of Human Services and its subsidiary agencies such as Centrelink and Medicare Australia. This training should be consistent with a human rights, victim centred approach to identifying and preventing instances of human trafficking and slavery in Australia, and may include modules on the indicators of human trafficking and slavery including forced marriage, forced labour and labour exploitation, as well as the support services available to survivors including medical assistance, financial support, accommodation, legal advice, counselling and immigration support.

Anti-Slavery has previously delivered training courses and seminars to Commonwealth agencies, such as the Department of Immigration and Border Protection, the Department of Human Services and the Attorney General's Department.

The consistent implementation of these ongoing training policies and programmes is vital to ensure that frontline workers across Federal, State and Territory agencies are adequately trained to recognise the indicators of human trafficking and slavery, and are equipped with up-to-date referral details. This will ensure that cases are identified and referred to the AFP,

⁶¹ Ibid.

⁶² 'Trafficking In Persons: The Australian Government Response 1 July 2015 – 30 June 2016' above n 12, 5.

and will assist providing accurate information to victims of human trafficking and slavery in Australia on the support and protections that are available to them.

RECOMMENDATIONS

1. **Ensure that training on the indicators of all forms of human trafficking and slavery and referral pathways is delivered to frontline officers** of Commonwealth government agencies consistently throughout Australia, and on an ongoing basis and that the Commonwealth liaises with the states and territories about training in all jurisdictions.
2. Develop proven, effective and timely monitoring of all Australian visa schemes to assess whether particular visas or schemes are linked to exploitation through human trafficking and slavery.

PART C – FORCED MARRIAGE PROTECTIONS IN AUSTRALIA

8 OVERVIEW AND PREVALENCE OF FORCED MARRIAGE IN AUSTRALIA

Forced marriage is a form of gender-based violence and is a human rights abuse.⁶³ Forced marriage is also considered to be a form of domestic or family violence and may present within a pattern of domestic violence that includes emotional or psychological abuse, physical abuse, sexual abuse, economic or financial abuse, female genital mutilation/cutting and honour-based violence.⁶⁴ In Australia, forced marriage is considered to be a slavery-like practice and is criminalised under division 270 of the Criminal Code.

In line with international best practice, Anti-Slavery Australia recognises that domestic and family violence prevention, including protection against forced marriage, requires a multi-agency response incorporating criminal, civil and child protection schemes. Anti-Slavery Australia advocates the introduction of specific civil protections for victims of forced marriage, as a form of human trafficking and slavery, to accompany the introduction of new legislation that addresses these human rights abuses in an Australian context. The development of a civil scheme will also complement existing criminal provisions.

The most effective protection for victims of forced marriage may be the enactment of protection orders similar to the Forced Marriage Protection Orders ('**FMPOs**') available in the United Kingdom. FMPOs enable those at risk of forced marriage or their advocates to make an application for a wide-ranging protective order including the surrender of passports regardless of the age of the person at risk.⁶⁵ Applications for FMPOs can be made by the person at risk of forced marriage, a relevant third party or any other person with the leave of the court.

The Australian government should also advocate for the amendment of existing intervention/violence orders and the harmonisation of child protection legislation in each State and Territory to afford greater protection for victims of forced marriage and to address the unique context of forced marriages.

To support the introduction of a civil protection regime or amendments to current legislative schemes, stakeholders should be engaged and funded to develop ongoing education and awareness raising campaigns to support preventative efforts. It is difficult to determine the prevalence of forced marriage in Australia due to under-reporting. However, known statistics indicate that forced marriage cases will continue to increase in the medium term, given that:⁶⁶

⁶³ 'Trafficking In Persons: The Australian Government Response 1 July 2015 – 30 June 2016' above n 12, 1; UNHCR Division of International Protection Services, 'UNHCR Handbook for the Protection of Women and Girls' (UNHCR Handbook, United Nations High Commission for Refugees, 6 March 2008) 194 <<http://www.unhcr.org/en-au/protection/women/47cfae612/unhcr-handbook-protection-women-girls.html>>.

⁶⁴ Frances Simmons and Jennifer Burn, 'Without Consent: Forced Marriage in Australia' [2013] 36(3) *Melbourne University Law Review* 971, 975; Domestic Violence London: A Resource for Health Professionals, *What is Domestic Violence/Forms of Domestic Violence*, (2017) National Health Service <<http://www.domesticviolencelondon.nhs.uk/1-what-is-domestic-violence-/18-forced-marriage.html>>.

⁶⁵ *Forced Marriage (Civil Protection) Act 2007 (UK)* s 20

⁶⁶ 'Trafficking In Persons: The Australian Government Response 1 July 2015 – 30 June 2016' above n 12, 24.

- since criminalisation in 2013, the AFP have received notification of more than 116 possible forced marriage cases. There have been no convictions under the Criminal Code;⁶⁷
- the AFP received 69 referrals relating to forced marriage in 2015-16, which represented 41% of all human trafficking referrals received;⁶⁸
- the Australian Red Cross has assisted 40 individuals who were wanting to leave or avoid a forced marriage through its Support Program;⁶⁹
- in 2015-16, the Australian Red Cross received 13 (out of 38) new referrals for clients suspected of being in a forced marriage situation within the Support Program;⁷⁰
- there have been approximately six cases before the Federal Courts in which a forced marriage, or threatened forced marriage, has prompted requests for orders under the *Family Law Act 1975* (Cth) or *Marriage Act 1961* (Cth) for protection or relief;⁷¹ and
- in the United Kingdom in 2015/6, the Forced Marriage Unit gave advice or support regarding a possible forced marriage in 1,428 cases. Just over a third of these cases (34%) involved victims aged from 18 to 25 years old.⁷²

8.1 The Australian criminal response to forced marriage

In 2013, the Criminal Code was amended to introduce provisions defining forced marriage as a federal offence.⁷³ Following further amendments in 2015,⁷⁴ the Criminal Code now defines forced marriage as a situation where one party enters into a marriage without freely and fully consenting because of the use of coercion, threat or deception, or because the party was incapable of understanding the nature and effect of the marriage ceremony, for example due to age or mental incapacity.⁷⁵ The legislation contains a rebuttable presumption that a person under the age of 16 is incapable of understanding the nature and effect of the marriage ceremony.⁷⁶

Criminalisation is an important component of the legal response to forced marriage. However, criminalisation of forced marriage does not address the cause of the forced marriage, nor does it provide people who are vulnerable to forced marriage with the tools required to prevent a forced marriage before it occurs, or to avoid being forced into a marriage while overseas. Civil protections may complement existing criminal law legislation to create effective prevention and protection mechanisms for victims and potential victims of forced marriage, by addressing key issues:

⁶⁷ Ibid, 20.

⁶⁸ Ibid, 1.

⁶⁹ Email from Andrea Zakarias, National Program Officer - Support for Trafficked People Program, Red Cross (2 May 2017).

⁷⁰ 'Trafficking In Persons: The Australian Government Response 1 July 2015 – 30 June 2016' above n 12, 33.

⁷¹ *Kandal v Khyatt* (2010) 43 Fam L R 344; *Department of Human Services v Brouker* (2010) 44 Fam L R 486; *Kreet v Sampir* (2011) 44 Fam L R 405; *Madley v Madley* [2011] FMCAfam 1007 (1 April 2011); 1008440 [2010] RRTA 1136 (17 December 2010); *Essey & Elia* [2013] FCCA FamCA 742; *Anthony & Kellett* [2016] FCCA 3368.

⁷² Forced Marriage Unit Statistics 2016, UK Foreign & Commonwealth Office dated 9 March 2017, 3.

⁷³ See the *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013* (Cth).

⁷⁴ See the *Crimes Legislation Amendment (Powers, Offences and Other Measures) Act 2015* (Cth) sch 4.

⁷⁵ *Criminal Code Act 1995* (Cth) s 270.7A(1).

⁷⁶ Ibid s 270.7A(4).

- criminal charges are reactive and must be proven beyond reasonable doubt, whereas civil remedies, such as protection orders, could be made where circumstances satisfy the civil standard of proof, the balance of probability; and
- people facing forced marriage may be reluctant to give evidence to the police. This may be due to trauma they have experienced or they may not wish to provide evidence against family members.⁷⁷

8.2 Existing civil remedies

8.2.1 Family Court proceedings

At present, the only effective, preventative measures available for those at risk of forced marriages provide protections to children in the form of parenting orders and injunctions under the *Family Law Act 1975* (Cth). In this jurisdiction, courts have the power to make certain orders which protect children from forced marriage, such as parenting orders and injunctions preventing removal or harassment of the child,⁷⁸ and orders for delivery of travel documents to the court.⁷⁹ However, the power to make orders made under the *Family Law Act 1975* expires when a child turns 18, marries or enters into a de facto relationship and injunctions can only be sought in the context of parent/child or marital relationships.⁸⁰

For adults, the only family law provisions which may provide relief are in the form of applications to nullify marriages under the *Marriage Act 1961* (Cth)⁸¹ on the grounds of lack of consent by one or more of the parties, or where one or more of the parties are not of marriageable age. However, this relief is only available after a forced marriage has taken place and the *Family Law Act 1975* (Cth) contains no preventative protections for adults.⁸²

8.2.2 Intervention/violence orders

State and Territory laws provide courts with powers to make orders that restrain a person from engaging in specific acts. Such orders include Apprehended Violence Orders (NSW), Intervention Orders (Vic and SA), Violence Restraining Orders (WA), Protection Orders (Qld), Domestic Violence Orders (ACT and NT) and Family Violence Orders (Tas).⁸³

The current legislative provisions concerning intervention/violence orders at State and Territory levels do not provide adequate protection to adults who are at risk of forced marriage in Australia or overseas. While there is potential for intervention/violence orders to be used in the context of forced marriage, the provisions generally target behaviours that

⁷⁷ Attorney-General's Department (Cth), 'Forced and Servile Marriage' (Discussion Paper, 2010) 16, [84]-[85].

⁷⁸ *Family Law Act 1975* (Cth), Part VII, Divisions 5 and 6.

⁷⁹ *Family Law Act 1975* (Cth), s 67ZD.

⁸⁰ See, *Family Law Act 1975* (Cth), ss 65H, 68B and 114(1).

⁸¹ See section 23(1)(d) and (e) of the *Marriage Act 1961* (Cth).

⁸² *Family Law Act 1975* (Cth) Part VI.

⁸³ LawAccess NSW, *Apprehended Violence Orders*, <

http://www.lawaccess.nsw.gov.au/Pages/representing/lawassist_avo/lawassist_avo.aspx> and See Family Court of Australia website, <<http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/family-law-matters/family-violence/family-violence-orders/family-violence-orders>>. A recent positive move to allow ADVOs registered in one jurisdiction to be registered and enforced in another jurisdiction has been made through the National Domestic Violence Order Scheme, which has seen NSW become the first State to introduce model laws to automatically recognise and enforce ADVOs across Australia, including New Zealand orders, by July 2016 through the *Crimes (Domestic and Personal Violence) Amendment (National Domestic Violence Orders Recognition) Act 2016* (NSW)).

may accompany threats of forced marriage but do not target the offence of forced marriage itself, or the specific conduct that gives rise to it.

For example in NSW, adults at risk of, or in situations of, forced marriage may seek an apprehended domestic violence order ('**ADVO**') preventing a person who has or has had a domestic relationship with the victim from assaulting, threatening, stalking, intimidating or going within a certain distance of a victim's home or workplace.⁸⁴ An ADVO can only be granted where a victim has reasonable grounds to fear and in fact fears the engagement of the perpetrator in conduct which intimidates or stalks the person or the commission of a personal violence offence by the perpetrator against the victim. Forced marriage is not included in the definition of a personal violence offence,⁸⁵ and the crimes included within the definition of a personal violence offence (such as sexual assault or kidnapping) are State crimes and do not necessarily feature in all situations of forced marriage.

The various State and Territory schemes are ill equipped to respond to the type of domestic violence commonly experienced by victims of forced marriage, which is often through more subtle means of coercion, threats or deception and may involve overseas conduct or the movement of the victim overseas.

9 STRENGTHENING FORCED MARRIAGE PROTECTIONS IN AUSTRALIA

9.1 FMPOs under the *Family Law Act 1996* (UK)

Civil protections are a practical way to protect Australian citizens or residents from being forced to marry abroad and send a clear message that there are legal tools to avoid or exit a forced marriage without having to give evidence about family members to the police. The experience in the United Kingdom demonstrates forced marriage protection orders are a practical legal tool that can assist people to avoid or exit forced marriage.

A civil protection order regime has been adopted by the United Kingdom where the *Forced Marriage (Civil Protection) Act 2007* (UK) amended the *Family Law Act 1996* (UK) ('**UK Family Law Act**')⁸⁶ to empower courts to make FMPOs to protect a person facing forced marriage or a person who has been forced into marriage.⁸⁷

The UK Family Law Act in England and Wales⁸⁸ allows for a victim of any age to apply for an FMPO and is sensitive to the unique context in which forced marriages occur, often involving complex familial relationships and related cultural issues, overseas conduct and pressure to travel to other jurisdictions to participate in the marriage ceremony.

There are a number of key advantages which FMPOs have over existing Australian provisions for violence or protection orders.

⁸⁴ The police are obliged to apply for an AVO when a domestic violence offence, a stalking/intimidation offence or an act of child abuse has been committed or is imminent or likely to be committed. See further, Australian Government Solicitor, *Domestic Violence Laws in Australia*, Report to Department of Families, Housing, Community Services and Indigenous Affairs, June 2009, 23-125 for an overview of State and territory laws relating to domestic violence.

⁸⁵ Section 4 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

⁸⁶ *Family Law Act 1996* (UK) Part 4A was introduced by the *Forced Marriage (Civil Protection) Act 2007* (UK) and came into force on 25 November 2008.

⁸⁷ *Forced Marriage (Civil Protection) Act 2007* (UK) s 63A. In addition, similar provisions were adopted by Scotland in the *Forced Marriage etc (Protection and Jurisdiction) (Scotland) Act 2011*.

⁸⁸ The *Forced Marriage etc (Protection and Jurisdiction) (Scotland) Act 2011* (**Scottish Act**) authorises the making of FMPOs for victims and persons at risk of a forced marriage and largely reflects the provisions of the UK Family Law Act.

Applications for an FMPO may be made by the protected person or a relevant third party such as organisations seeking to assist victims or any other person with the leave of the court.⁸⁹ The FMPO can contain prohibitions, restrictions or requirements and such other terms as the court considers appropriate for the purposes of the order⁹⁰ and can apply to conduct within the country and in overseas jurisdictions.⁹¹ Commentary on FMPOs in England and Wales, notes that the broad powers under the forced marriage provisions could allow courts to make orders:⁹²

- seizing the respondent's passport;
- requiring the respondent to reveal the whereabouts of a protected person or victim;
- preventing the respondent having contact with the victim;
- allowing the victim to assume a new identity;
- ordering that a marriage may not take place;
- ordering that the victim may not be taken out of the country; and
- granting a personal protection order.

Importantly, FMPOs can be made even where a respondent has not been given notice of the proceedings, called an 'ex parte order' in England and Wales and an 'interim order' in Scotland.⁹³ The court must deem it "just and convenient"⁹⁴ or "equitable"⁹⁵ to make such an order and a court must have regard to all the circumstances, including any risk of significant harm to the protected person or another person if the FMPO is not made immediately.⁹⁶

Breaches of FMPOs are offences in these jurisdictions.⁹⁷ If a person who is subject to a FMPO breaches its terms, that person may be arrested⁹⁸ and the courts may convict a person for contempt of court.⁹⁹

⁸⁹ *Family Law Act 1996* (UK) ss 63C(2)-(3); *Forced Marriage etc (Protection and Jurisdiction) (Scotland) Act 2011* ss 3(1)-(2). Under section 63C(7) of the *Family Law Act 1996* (UK), 'relevant third party' means a person specified, or falling within a description of persons specified, by order of the Lord Chancellor. The Lord Chancellor made the *Family Law Act 1996 (Forced Marriage)(Relevant Third Party) Order 2009* (UK) which established that a local authority is specified as a relevant third party for the purposes of applying for an FMPO, and that 'local authority' means a county council in England; a metropolitan district council; a non-metropolitan district council for an area for which there is no county council; the council of a county or county borough in Wales; a London borough council; the Common Council of the City of London; and the Council of the Isles of Scilly, *Family Law Act 1996 (Forced Marriage)(Relevant Third Party) Order 2009* (UK), s 2.

⁹⁰ *Family Law Act 1996* (UK) s 63B(1), *Forced Marriage etc (Protection and Jurisdiction) (Scotland) Act 2011* s 2(1).

⁹¹ *Family Law Act 1996* (UK) s 63B(2), *Forced Marriage etc (Protection and Jurisdiction) (Scotland) Act 2011* s 2(2).

⁹² Mary Welstead 'Forced Marriage: Bifurcated Values in the UK' (2009) *The Denning Law Journal* Vol 21 49-65, 60-61.

⁹³ *Family Law Act 1996* (UK) s 63D, *Forced Marriage etc (Protection and Jurisdiction) (Scotland) Act 2011* s 5.

⁹⁴ *Forced Marriage etc (Protection and Jurisdiction) (Scotland) Act 2011* s5(1).

⁹⁵ *Forced Marriage etc (Protection and Jurisdiction) (Scotland) Act 2011* s5(1).

⁹⁶ *Family Law Act 1996* (UK) s63D(2), *Forced Marriage etc (Protection and Jurisdiction) (Scotland) Act 2011* s5(3).

⁹⁷ *Family Law Act 1996* (UK), s 63CA and *Forced Marriage etc (Protection and Jurisdiction) (Scotland) Act 2011*, s 9

⁹⁸ *Ibid* s 63H.

⁹⁹ *Ibid* s 63I.

Case Study: Comparison of the level of protection afforded by AVOs and FMPOs

The case of *Chief Constable & Anor v YK & Ors* [2010] EWHC 2438 illustrates the advantages of FMPOs in responding holistically to a situation where a person is at risk of a forced marriage overseas.

In that case, police applied for a FMPO to prevent a British national of Pakistani descent from being forced to marry her cousin. Orders made under this FMPO forbade family members from using violence, intimidation or harassment to solicit the marriage and obliged her parents to hand over all travel documentation. Despite these orders, the young woman went through a marriage-like ceremony prompting the court to make further orders preventing the civil registration of any purported marriage and to issue an alert to border authorities to prevent the young woman from leaving the United Kingdom.

By way of contrast, if the young woman was faced with the same situation in NSW and not a minor, only an AVO could be sought to protect the young woman from intimidation, harassment or stalking from her family to solicit the marriage. No orders could be made for her parents to hand over her travel documentation, to prevent the registration of any purported marriage or any alert to border authorities to prevent her removal from Australia.

An Australia-wide civil law response to forced marriage is important, given that in many cases, people who are facing forced marriage will not be willing to speak to the law enforcement or authorities about their experiences. Moreover, even in cases where the suspected victim does provide a police statement, the evidence may not be sufficient to support a criminal conviction, especially where other family members who may have information about what happened may be pressured not to speak to authorities.¹⁰⁰

The introduction of a civil protection regime could be achieved practically via amendments to the current *Family Law Act 1975* (Cth) to be dealt with by family law courts nationally, or be part of a standalone, national legislative framework. Further consultation with key stakeholders is necessary to determine the best model for the legislation and the availability of resources within existing courts or jurisdictions which would best meet the needs of the civil protection regime.

9.2 Broadening State and Territory intervention/violence order frameworks

Anti-Slavery Australia recommends that the Australian government consult with States and Territories to amend existing intervention/violence order frameworks to strengthen protection mechanisms for adults facing forced marriage and create consistency across jurisdictions.

For example, in NSW there are two key areas of the current AVO framework that could be amended in order to provide for the particular needs of people facing forced marriage:

¹⁰⁰ *The draft forced marriage offences have been framed with broader changes to Australia's anti-trafficking laws and convictions for people trafficking crimes have proved difficult to obtain – although the Australian Federal Police have identified over 185 suspected victims of human trafficking, to date only fifteen convictions have been obtained.* See also, Fiona David, "Prosecuting trafficking in persons: known issues, emerging response", Australian Institute of Criminology, *Trends and Issues in Criminal Justice*, no.358, June 2008. See generally 'Trafficking In Persons: The Australian Government Response 1 July 2015 – 30 June 2016' above n 12; Andreas Schloenhardt, Genevieve Beirne, and Toby Corsbie, 'Human Trafficking and Sexual Servitude in Australia' (2009) 32(1) *University of New South Wales Law Journal*, 27.

1. The expansion of the definition of personal violence offences provided in the *Crimes (Domestic and Personal Violence) Act 2007* (NSW), to capture the crime of forced marriage. Personal violence offences are currently defined as certain offences that occur under the *Crimes Act 1900* (NSW) and may not apply to all circumstances of forced marriage.¹⁰¹
2. The expansion of the powers of the court to make an order regarding the forfeiture of a passport or travel document, to ensure that a potential, adult victim is not taken overseas and forced to marry. This could draw upon the Victorian model of Family Violence Prevention Orders, which enables the court to direct a respondent to return a protected person's property.¹⁰² All State and Territories could be asked to explore expanding the power of the courts to make an order requiring the surrender of a potential victim's passport, or preventing further applications for a passport or travel document.¹⁰³

The consideration of preventative mechanisms for adult Australian citizens facing forced marriage overseas would close a significant gap in the civil protection framework for potential victims of slavery and human trafficking.

9.3 Amending State and Territory child protection legislation to strengthen protections for children at risk of forced marriage

Anti-Slavery Australia recommends the Australian government advocate for the amendment of child protection legislation in each State and Territory to give clear grounds for child protection agencies to intervene on behalf of children at specific risk of forced marriage.

The legislative grounds for intervention on behalf of a child in need of protection vary by State and Territory. None of the current provisions refer specifically to forced marriage as a type of harm which would justify intervention. In circumstances where a child is at risk of forced marriage due to conduct by his or her parents, statutory intervention would only be triggered where there has been abusive or neglectful behaviours.

The child protection regime in Western Australia provides a helpful illustration of the need to expand grounds for intervention in the case of a child at risk of forced marriage.

Applications for protection orders can only be made by the Chief Executive Officer of a prescribed authority.¹⁰⁴ The court may grant a protection order, upon application, where it finds that a child is in need of protection.¹⁰⁵ The provisions specify that a child is "in need of protection" where they have suffered or are likely to suffer physical abuse, sexual abuse, emotional abuse or neglect, and the child's parents have not protected or are unlikely to protect the child from harm or further harm.¹⁰⁶ The circumstances surrounding forced marriage do not always involve physical or emotional abuse or neglect, and so intervention in matters of forced marriage under WA child protection legislation is not always plausible.

¹⁰¹ *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s16(1) (for Apprehended Domestic Violence Orders), s19(1) (for Apprehended Personal Violence Orders).

¹⁰² *Family Violence Protection Act 2008* (Vic) s 86.

¹⁰³ The Commonwealth should consult the Attorney-General's Department about any jurisdictional issues relating to the ownership of passports that could affect the power of a state or territory court to make an order in respect of an Australian Passport.

¹⁰⁴ *Children and Young Persons (Care and Protection) 1998* (NSW) s 44.

¹⁰⁵ *Ibid* s 45.

¹⁰⁶ *Ibid* s 28(2)(c).

To address this, consideration could be given to expanding the range of circumstances that may place a child in need of protection. This would include, circumstances where a child has suffered psychological harm or the risk of psychological harm. Provisions should also explicitly identify the threat of forced marriage as a circumstance where a child is in need of protection, defining forced marriage with reference to section 270.7A of the *Criminal Code*.

9.4 Funding for education and awareness raising campaigns

Education at all levels is an essential tool in the prevention of human trafficking and slavery, including forced marriage. Education can empower survivors to seek help, providing potential victims with knowledge of Australian law, their legal options, and the support services available to survivors. Education can also assist communities and the wider public to overcome stereotypes about survivors.

The Australian government has provided funding to NGOs to provide targeted education, particularly regarding forced marriage. For example, funding has been provided to Anti-Slavery Australia to develop My Blue Sky, Australia's first comprehensive online resource dedicated to preventing and addressing forced marriage.¹⁰⁷

The Australian government has also provided funding to Australian Catholic Religious Against Trafficking in Humans ('**ACRATH**') to develop forced marriage education targeted towards schools, and the Australian Muslim Women's Centre for Human Rights' community education and training programme to increase the capacity of front line organisations in vulnerable communities.¹⁰⁸ Anti-Slavery Australia commends the Australian government's ongoing support for educational programmes to increase awareness of issues surrounding human trafficking and slavery in Australia.

However, there remains considerable scope for the Australian government to continue to fund, develop and support education and awareness raising initiatives to prevent forced marriage. Forced marriage disproportionately affects children and young people,¹⁰⁹ and the number of forced marriage referrals made to law enforcement is expected to continue to increase due to strengthened legislative protections and greater community engagement.¹¹⁰ While the Australian government has supported important initiatives in this area, there remains an ongoing need for sustained, evidence-based primary prevention education regarding forced marriage in Australia.

9.4.1 My Blue Sky

In response to the recognition that forced marriage is a slavery-like practice, Anti-Slavery Australia was funded by the Commonwealth Attorney-General's Department to develop a specialist website dedicated to forced marriage prevention, information and legal advice.

Launched in November 2015, the My Blue Sky website aims to educate and raise awareness about forced marriage. It includes information about forced marriage law in

¹⁰⁷ See Anti Slavery Australia, 'My Blue Sky' at <www.mybluesky.org.au>

¹⁰⁸ 'Trafficking In Persons: The Australian Government Response 1 July 2015 – 30 June 2016' above n 12, 10.

¹⁰⁹ Ibid, 24.

¹¹⁰ Ibid, 24.

Australia, the difference between forced and arranged marriage, safety planning, referral organisations and available support services.

My Blue Sky includes dedicated pages for young children and teenagers; educators and medical practitioners; as well as a page for those who are worried about a friend who may be forced to marry. Parts of the website are available in six languages with links to the Commonwealth Attorney-General's Department Forced Marriage Community Pack.



Figure 5: My Blue Sky Home Page <https://www.mybluesky.org.au/>

The website offers vulnerable people the opportunity to access reliable information about marriage in Australia and direct access to legal advice and support through a simple email or text message. As Australian nationals may be forced to marry in Australia or overseas, My Blue Sky offers important contact information for people who may be travelling and who are concerned they will be forced to marry once outside of Australia, as well as for those who may have already be overseas. The UK experience in responding to forced marriage shows that people facing forced marriage may only have one opportunity to reach out for help.¹¹¹

Since the launch of My Blue Sky, vulnerable young people, school teachers and counsellors and health professionals have reached out to the service for help and legal advice. Since launching on 25 November 2015, Anti-Slavery Australia has received approximately 25 requests for assistance and legal advice either by email, SMS or the locker room facility on My Blue Sky. To date, it has also attracted approximately 8000 users and 39,255 page views.

¹¹¹ Foreign and Commonwealth Office and Home Office (UK), 'The Right to Choose: Multi-agency statutory guidance for dealing with forced marriage' (Practice Guidance, 19 July 2016) 5.

RECOMMENDATIONS

1. Establish **a civil law statutory scheme to provide protection for any person fearing forced marriage, regardless of the age of the affected person.** The Australian Government should also:
 - a. Advocate for states and territories to consider amending existing legislation regarding intervention/violence orders to recognise forced marriage as an act of personal or family violence and to account for the complexities of the type of violent behaviours experienced by victims of forced marriage.
 - b. Advocate for states and territories to amend child protection legislation to give clear grounds for child protection agencies to intervene on behalf of children at risk of forced marriage.
2. Engage with stakeholders to **fund and develop ongoing education and awareness** raising campaigns, targeting vulnerable communities to prevent forced marriage.

PART D – FORCED LABOUR AND LABOUR EXPLOITATION

10 FORCED LABOUR, SERVITUDE & LABOUR EXPLOITATION IN AUSTRALIA

Recently reported cases of labour exploitation in Australia have demonstrated the vulnerability of workers to civil and criminal breaches of Australian workplace laws. In particular, the recent Four Corners investigation of *7-Eleven* franchises and reports of unscrupulous labour-hire operators in Australia's agricultural sector,¹¹² demonstrate that labour abuses occur in a variety of industries throughout Australia. Forced labour and servitude are offences under the Criminal Code which also criminalises conducting a business involved in servitude.¹¹³ While there has been recent media attention on the exploitation of workers in a number of Australian industries, to date there have been no convictions for forced labour under the Criminal Code, and only two convictions for servitude offences, both of which were prosecuted earlier this year.¹¹⁴

At a Federal level, matters involving labour exploitation may also come within the provisions of the *Fair Work Act 2009* (Cth) ('**Fair Work Act**') and/or the *Migration Act 1958* (Cth). This reflects the fact that human trafficking and slavery exist at the extreme end of a spectrum of exploitative practices that may include for example, underpayment or non-payment of wages.¹¹⁵ Civil law breaches may in some cases be indicators of more severe, criminal forms of labour exploitation, such as human trafficking and slavery or forced labour.

10.1 Identifying forced labour and labour exploitation in Australia

Survivors of forced labour and labour exploitation face a number of barriers to reporting, some of which are identified in the case of *Fair Work Ombudsman v Maroochy Sunshine Pty Ltd & Anor.*¹¹⁶ These barriers are common to many survivors of human trafficking and slavery more generally, and may include lack of personal freedom, lack of evidence or legitimate work contracts, linguistic, cultural or social isolation, distrust and fear of government/authorities, control through debt, fear of retaliation from employers, fear of deportation or incarceration and lack of understanding of Australian workplace laws.

These barriers may be exacerbated where frontline officers are unable to effectively identify indicators of labour exploitation, and are not aware of the appropriate referral processes and support services that may apply to victims of forced labour and labour exploitation.

The Australian Government's National Action Plan contains the framework to address serious forms of labour exploitation such as servitude and forced labour, and includes action items aimed at improving identification, response and prevention of human trafficking

¹¹² Caro Meldrum-Hanna, Ali Russell & Mario Christodoulo, 'Labour exploitation, slave-like conditions found on farms supplying biggest supermarkets', *Four Corners* (online), 7 May 2015 <<http://www.abc.net.au/news/2015-05-04/supermarkets-food-outlets-exploit-black-market-migrant-workers/6441496>>.

¹¹⁴ Australian Associated Press, 'Taiwanese men jailed over Qld slave house' *The Australian* (online), 8 February 2017 <<http://www.theaustralian.com.au/news/latest-news/taiwanese-men-admit-to-slavery-offences/news-story/f0cd6ae5169411645bc5a9db1b1f2883>>.

¹¹⁵ See Klara Skrivankova, 'Between Decent Work and Forced Labour: examining the continuum of exploitation' (2010) *European Commission Together Against Trafficking* <https://ec.europa.eu/anti-trafficking/publications/between-decent-work-and-forced-labour-examining-continuum-exploitation_en>.

¹¹⁶ [2017] FCCA 559.

and slavery, including forced labour, in Australia. For example, the National Action Plan includes action items for:

- increasing collaboration between domestic government agencies, such as the AFP, Department of Immigration and Border Protection, and the Fair Work Ombudsman;¹¹⁷
- monitoring the effectiveness of existing civil and criminal law frameworks under the Criminal Code and the Fair Work Act;¹¹⁸
- ensuring that referrals are made to the relevant agency where indicators of trafficking and slavery are identified;¹¹⁹ and
- training frontline officers to ensure that instances of human trafficking and slavery are effectively identified and the appropriate response is provided.¹²⁰

Anti-Slavery Australia commends the response of the Australian government to forced labour and labour exploitation in Australia. However, more can be done to ensure that this response is comprehensive in identifying and preventing instances of forced labour and labour abuse.

10.2 International Labour Organization instruments

The International Labour Organization ('ILO') *Protocol of 2014 to the Forced Labour Convention No. 29, 1930* ('**Forced Labour Protocol**'), entered into force on 9 November 2016. The Forced Labour Protocol recognises the role of the *Forced Labour Convention, 1930* (No. 29) and the *Abolition of Forced Labour Convention, 1957* (No. 105), but highlights the need to address gaps in these instruments and calls for states to take additional measures in the identification and prevention of forced labour. The Forced Labour Protocol therefore requires that states not only criminalise and prosecute forced labour, but that members should (emphasis added):

“...take **effective measures** to prevent and eliminate its use, to provide victims protection and access to appropriate and effective remedies, such as compensation, and to sanction the perpetrators of forced or compulsory labour”.¹²¹

Supplementing both the Forced Labour Protocol and the Forced Labour Convention is the *Forced Labour (Supplementary Measures) Recommendation, 2014* (No. 203) which encourages members to:¹²²

- strengthen national policies and plans of actions to address forced labour in all its forms, by ensuring that prevention, protection, access to remedy such as compensation and the sanctioning of perpetrators;
- ensure the development, coordination, implementation, monitoring and evaluation of national policies and plans of actions are assessed by competent national bodies;

¹¹⁷ Australian Government, *National Action Plan to Combat Human Trafficking and Slavery 2015-19*, 1 December 2014, 38.

¹¹⁸ Ibid, 46.

¹¹⁹ Ibid, 59.

¹²⁰ Ibid, 63.

¹²¹ *Protocol of 2014 to the Forced Labour Convention, 1930* (entered into force 9 November 2016) Art. 2.

¹²² *Forced Labour (Supplementary Measures) Recommendation, 2014* (No. 203) Arts 1(a) and (b), 2 and 14.

- collect, analyse and make available data on the nature and extent of forced labour to allow an assessment to be made on progress in the area; and
- strengthen international cooperation.

So far, 13 countries have ratified the Forced Labour Protocol, including the United Kingdom, France and Norway. Australia has yet to ratify the Forced Labour Protocol.

Anti-Slavery Australia recommends that the Australian government ratify the *Forced Labour Protocol*, as well as the *Convention Concerning Decent Work for Domestic Workers*,¹²³ in order to demonstrate its formal commitments to the identification and prevention of forced labour and other forms of severe labour exploitation.

11 FORCED LABOUR & EXPLOITATION IN THE LABOUR HIRE INDUSTRY

The labour hire industry is defined by the existence of “triangular” employment relationships. This typically includes a labour hire agency, which supplies the labour of a labour hire worker to a third party (the host employer) in exchange for a fee.¹²⁴ The labour hire employment arrangement involves no direct contractual relationship between the labour hire worker and the host employer.¹²⁵

The role of the labour hire industry in the exploitation of vulnerable migrant workers has been recognised in the reports of several State and Commonwealth government inquiries. The Senate report ‘*A National Disgrace: The Exploitation of Temporary Work Visa Holders*’ details the extensive exploitation of migrant workers by labour hire companies. The report recommends that a licensing regime be established for labour hire contractors that all licensed labour hire contractors be published on a public register, and that labour hire companies that subcontract to other labour hire companies, including overseas businesses, be obliged to ensure that those subcontractors hold a license.¹²⁶

11.1 Australian cases

Recent case reports demonstrate that forced labour and labour exploitation occur in Australia, and are facilitated through the labour-hire industry. In 2015, a Four Corners investigation evidenced severe forms of labour exploitation in the Australian agricultural industry, with products associated with this exploitation supplying large supermarket and fast-food retailers in Australia.¹²⁷ The report highlighted the role of labour hire companies in recruiting migrant workers, and revealed extreme conditions of abuse, harassment, assaults and underpayment of wages.

¹²³ *Convention Concerning Decent Work for Domestic Workers* (entered into force 5 September 2013).

¹²⁴ Richard Johnstone et al, *Beyond Employment: The Legal Regulation of Work Relationships* (The Federation Press, Annandale, 2012), 60.

¹²⁵ Department of Economic Development, Jobs, Transport & Resources, ‘Victorian Inquiry into the Labour Hire Industry and Insecure Work’ (State of Victoria, 27 October 2016) 2.1.1.

¹²⁶ The Senate Education and Employment References Committee, ‘*A National Disgrace: The Exploitation of Temporary Work Visa Holders*’ (Commonwealth of Australia, 17 March 2016) 9.309.

The recent matter of *Fair Work Ombudsman v Maroochy Sunshine Pty Ltd & Anor*¹²⁸ which resulted in the labour-hire company and its director being ordered to pay a combined penalty of \$227,300 for breaches of the Fair Work Act, Jarrett J described the “egregious” treatment of 22 workers from Vanuatu.¹²⁹ The facts of the case detailed how overseas workers were engaged through the labour-hire company, Maroochy Sunshine Pty Ltd. The company facilitated the entry into Australia, and arranged employment for them upon arrival. The Court heard how “*vulnerable foreign workers lured to work in Australia by false promises...*”¹³⁰ entered the country on the Department of Employment, Education and Workplace Relations’ Seasonal Worker Program to work in fruit and vegetables farms in Queensland. The workers were reported to have limited education, were supplied with little food, and stayed in cramped living quarters.¹³¹ The judgment outlines key indicators of exploitation in the matter, which are common across all forms of labour exploitation in Australia.¹³²

- Immediately taken to isolated, rural accommodation described as “in the middle of nowhere”
- Not provided with any pocket money
- Not provided with sufficient food
- Not able to call their families
- Had limited understanding of Australian workplace law
- Had to sleep in cramped conditions, for example 6 employees sharing a small bedroom

The case revealed the lasting and profound impact that this labour exploitation had on the employed migrant workers:

[Mr Aru] is still very upset by his experience working for Maroochy Sunshine and Mr Bani... working for Maroochy Sunshine was like “slavery times”. He had never before experienced working a full day without even a cup of tea and only being fed tomatoes; and he will never forget how he was treated by Mr Bani.¹³³

Mr Arubuti gave evidence that... he earned no money, had very little food and no control over his life. He did not know what was happening or whether he would be working each day... he was not paid and was left in debt. He has continued to have to make repayments on his loan and has about A\$900 left to repay.¹³⁴

11.2 Labour Hire Contractors

The Gangmasters and Labour Abuse Authority ('GLAA') oversees the licensing of labour hire contractors (called 'gangmasters') in the UK, and is responsible for monitoring licensees, as well as carrying out inspections.¹³⁵ The licensing of labour hire contractors was introduced in the UK in 2004 following a series of cases involving the severe exploitation of migrant workers,¹³⁶ such as the 'Morecambe Bay' disaster, in which at least 21 Chinese labour hire workers in the shellfish industry were found to be exploited in conditions that lead to their deaths.¹³⁷

The GLAA also maintain a register of licensees.¹³⁸ In addition to the online register, the GLAA website allows host employers to sign up for the 'Active check' service, which allows host employers to ensure they are using licensed providers. The website also provides live updates on any changes to, or revocation of, issued licences.¹³⁹ This 'Active check' service creates an online record of the host employers' activity, which can be used as proof that the host employer has fulfilled their due diligence obligations.¹⁴⁰

The Triennial Review of the GLAA concluded that the department was effectively targeting serious transgressors and increasing its focus on high-risk industries.¹⁴¹

11.3 Sector specific licensing regime for Australia

Anti-Slavery Australia commends the Australian government's recent steps to address the serious issue of labour exploitation in Australia, in particular the establishment of the Labour Exploitation Working Group¹⁴² and the Migrant Workers' Taskforce chaired by Professor Alan Fels. Recent reports of serious exploitation in the labour hire industry in Australia have highlighted the need for rigorous regulation. These exploitative practices fall along a spectrum of unfree labour that includes criminal exploitation such as forced labour, servitude and debt bondage conditions.

Anti-Slavery Australia recommends that the Australian government introduce a sector specific licensing regime modelled on the UK's GLAA.

RECOMMENDATIONS

1. Anti-Slavery Australia recommends that the Australian government **ratify the Forced Labour Protocol** and the **Domestic Workers Convention**, demonstrating its commitment to effectively address and prevent forced labour and labour exploitation in Australia.

¹³⁵ *Gangmasters (Licensing) Act 2004* (UK) s 1.

¹³⁶ Department of Economic Development, Jobs, Transport & Resources, 'Victorian Inquiry into the Labour Hire Industry and Insecure Work' (State of Victoria, 27 October 2016) 9.202-9.204.

¹³⁷ 'The tragedy of Morecambe Bay', *The Economist* (Online) 12 February 2004 <<http://www.economist.com/node/2424172>>.

¹³⁸ *Gangmasters (Licensing) Act 2004* (UK) s 11.

¹³⁹ *Labour User Guidance for Basic Public Register Checks and Formal 'Active Check'*, Gangmasters Licensing Authority <<http://www.gla.gov.uk/media/2218/active-check-guidance.pdf>> 1

¹⁴⁰ *Ibid.*

¹⁴¹ 'Report of the Triennial Review of the Gangmasters Licensing Authority' (Department for Environment, Food and Rural Affairs, April 2014) 4.

¹⁴² 'Trafficking In Persons: The Australian Government Response 1 July 2015 – 30 June 2016' above n 12, iv.

2. **Introduce a sector specific licensing regime for the labour-hire industry** to address the exploitation of migrant workers through labour-hire companies.

PART E – REDRESS FOR SURVIVORS OF HUMAN TRAFFICKING AND SLAVERY

12 THE NEED FOR A NATIONAL COMPENSATION SCHEME

Anti-Slavery Australia has long recommended the establishment of a national victims of crime compensation scheme. Anti-Slavery Australia has released a policy position paper, *Establishment of a National Compensation Scheme*¹⁴³ and has recently published the *Report on Establishing a National Compensation scheme for Victims of Commonwealth Crime*¹⁴⁴ co-authored with the Law Council of Australia, that each demonstrate the need for a national statutory compensation scheme. Civil actions are unrealistic options in practically all cases of human trafficking and slavery, and so the establishment of a national compensation scheme for trafficked and enslaved people is necessary to ensure that victims of serious human rights abuses, such as human trafficking and slavery, have a real opportunity of a remedy. The creation of such a scheme will ensure that Australia fulfils principle 2 of the National Action Plan by establishing a consistent and effective pathway to compensation.¹⁴⁵

Such a scheme would reflect recommendations made by the former United Nations Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo (“**Former Special Rapporteur**”), in her report following her mission to Australia, where the Former Special Rapporteur advocated the establishment of a comprehensive federal compensation scheme in Australia in response to the disparate outcomes available through State and Territory schemes.¹⁴⁶

In addition, Anti-Slavery Australia supports the recommendations made by the Law Council of Australia in their submissions to the Committee, that a national civil compensation scheme and national compensation fund for victims of human trafficking and slavery should be introduced.

12.1 Australia’s obligations under international law

The United Nations *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*, 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.¹⁴⁷

¹⁴³ 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>> 3.

¹⁴⁴ 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>>.

¹⁴⁵ Principle 2 requires “Australia provides holistic and victim-centred support to trafficked people, regardless of gender, age, disability, race, ethnicity, immigration status, sex, sexuality or the purpose for which they were exploited, and affords them access to an effective remedy.”

¹⁴⁶ 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].

¹⁴⁷ *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*, supplementing the United Nations Convention against Transnational Organized Crime, UN Doc A/RES/55/25, annex II, art 6 (6).

Australia also has obligations under a number of other international instruments to ensure that compensation is available for victims of human trafficking and slavery. These instruments include:

- article 25(2) of the *United Nations Convention Against Transnational Organized Crime*, which states, “Each State Party shall establish appropriate procedures to provide access to compensation and restitution for victims of offences covered by this Convention”;
- article 12 of the *United Nations Declarations of Basic Principles of Justice for Victims of Crime and Abuse of Power*, which states “When 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; The family, in particular dependents of persons who have died or become physically or mentally incapacitated as a result of such victimization”; and
- part II article 2(3)(a) of the *International Covenant on Civil and Political Rights* which states, “Each State Party to the present Covenant undertakes: 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.”

The Former Special Rapporteur reported in 2012 that the establishment of a national compensation framework for victims of human trafficking and slavery would be consistent with Australia’s obligations under international law.¹⁴⁸

12.2 Existing State and territory compensation frameworks

Currently in Australia, each State and Territory administers its own victims’ compensation, support or assistance scheme. In limited circumstances, trafficked people have access to remedies through these schemes. However, these existing State and Territory schemes are not designed to specifically address Commonwealth offenses, including crimes of human trafficking and slavery. Moreover, there are some significant differences between each jurisdiction in relation to the amount of compensation available to applicants, the eligibility requirements for applicants and the applicable limitation periods. This necessarily means that victims of human trafficking and slavery in each Australian jurisdiction face different compensation outcomes, depending on the location where the crime took place.

Anti-Slavery Australia’s previous evaluations of existing State and Territory compensation schemes have found these frameworks to be inadequate in providing remedies for victims of human trafficking and slavery. This stems from factors including:¹⁴⁹

- disparities between the numerous State and Territory-based schemes on issues such as the maximum amount of compensation available, time limitations and the requirement that separate applications be made for each jurisdiction;

¹⁴⁸ Joy Ngozi Ezeilo, Special Rapporteur, *Report of the Special Rapporteur on trafficking in persons, especially women and children*, UN Doc A/HRC/20/18 (18 May 2012) [64].

¹⁴⁹ Anti-Slavery Australia, above n 143, 3.

- difficulties faced by survivors of human trafficking and slavery in assisting law enforcement with criminal investigations; and
- visa concerns for victims of human trafficking and slavery.

The following case study outlines some common issues faced by survivors of human trafficking and slavery who attempt to access victims support services under State and Territory schemes.

Case Study: Victims Support

Mary was trafficked into Australia, where she was forced into conditions of sexual servitude. Her traffickers transported her between locations in New South Wales, Victoria and other Australian States and Territories, where she was forced to engage in sex acts against her will. Two years after escaping her traffickers, Mary was identified by the Department of Immigration as an unlawful non-citizen, and placed in immigration detention. After her story was uncovered, she was referred to the Australian Federal Police.

Mary initially assisted the police in their investigation of her traffickers. However, after a year, she was unable to continue helping the police and could not complete her police statement due to the severe psychological trauma and re-victimisation that she experienced during this process. Ultimately, the police investigation ceased and charges were not laid against Mary's traffickers.

During this time, Mary feared that she would be returned to her home country as she had been placed on a temporary bridging visa. She lived in a constant state of anxiety, and still feared retribution from her traffickers. It was only after the police investigation had ceased, and a another year of interaction with the Department of Immigration, that Mary was granted a Referred Stay (Permanent) visa, under the Australian government's Trafficking Visa Framework.

Finally, four years after the acts of violence committed against her, Mary discovered that she could apply for victim's support under the NSW Victim's Support Scheme. As the violent acts included sexual assault, Mary was able to apply outside of the usual 2 year time period.¹⁵⁰ Under the scheme, Mary was a primary victim,¹⁵¹ and was therefore eligible for payments for approved counselling services, financial assistance and a recognition payment.¹⁵²

Mary did not qualify for either financial assistance payment available under the scheme. A few years had passed since the act of violence had occurred and so Mary had no immediate needs requiring assistance.¹⁵³ She was also unable to demonstrate or quantify any other economic loss as defined under the scheme.¹⁵⁴

Mary applied for counselling services and a recognition payment. To support her application she provided an initial psychological assessment. The Tribunal was made aware that Mary failed to provide a statement to police. Mary was required to provide a subsequent written submission, statement and further psychological reports to substantiate her claims that severe psychological impacts had caused her to cease assisting police. Providing this evidence to the Tribunal was particularly difficult for Mary, who suffered from severe depression, anxiety and suicidal thoughts at this time.

¹⁵⁰ *Victims Rights and Support Act 2013* (NSW) s 40(5).

¹⁵¹ *Ibid.* s 19(1).

¹⁵² *Ibid.* s 26.

¹⁵³ *Victims Rights and Support Regulation 2013* (NSW) cl 8(1).

¹⁵⁴ *Ibid.* cl 8(2).

As a victim of violent sexual assault, Mary was eligible for a category B recognition payment under the scheme,¹⁵⁵ and was eventually awarded the maximum payment of \$10,000.¹⁵⁶ She was approved for counselling services, although the shame and stigma that she felt speaking about her experiences with strangers prevented her from attending these sessions.

Mary made another application for assistance under the Victorian scheme for the acts of sexual violence committed against her in that state. The application included an initial psychologist's report. The Victims of Crime Assistance Tribunal, requesting further information stated (emphasis theirs):

"This is relevant to the ability to obtain assistance from "other sources". The Tribunal accepts that there has been psychological injury as set out in the [Psychologist's] report...however, that is one psychological injury across all the States referred to together... In other words, if assistance is obtained for that injury from one source, how can you then specify what injury relates to Victoria?... Finally, you will note that the Victorian scheme is designed "to complement" other services. In other words, the Tribunal is a last resort option for "assistance" to victims of crime. Further the Act makes it clear that any assistance is not compensation."¹⁵⁷

Mary provided further information to the Tribunal addressing these issues, and is awaiting an outcome for her claim.

12.3 Disparities between existing State and Territory schemes

12.3.1 *Maximum amounts for payments*

There are numerous differences between each State and Territory victims support scheme. For example, the maximum amount payable under each scheme for a primary victim varies widely. The following table outlines the maximum amount of compensation that may be awarded to a primary victim of an act of violence under each State and Territory victim support or assistance scheme, including a breakdown of maximum payments where relevant.

¹⁵⁵ *Victims Rights and Support Act 2013* (NSW) ss 36(1)(c) and 35(2)(b).

¹⁵⁶ *Victims Rights and Support Regulation 2013* (NSW) cl 12(c).

¹⁵⁷ This text was quoted from correspondence received by the Victorian Victims of Crime Assistance Tribunal. Identifying information has been removed to protect client confidentiality.

State/Territory	Maximum payment including breakdown (where relevant)
ACT	\$50,000 ¹⁵⁸
	The Regulations provide only up to \$10,000 where the act of violence occurred in the course of a domestic violence offence ¹⁵⁹
NSW	\$50,000
	Recognition payments up to \$15,000, ¹⁶⁰ economic loss up to \$30,000 ¹⁶¹ and immediate assistance up to \$5,000 ¹⁶²
NT	\$40,000 ¹⁶³
QLD	\$75,000 ¹⁶⁴
	Applicants may also receive up to \$500 for legal costs incurred during the application process
SA	\$100,000 ¹⁶⁵
Tas	\$30,000 ¹⁶⁶
	Where there is more than one offence up to \$50,000 ¹⁶⁷
Vic	\$70,000
	Assistance up to \$60,000 ¹⁶⁸ plus a special financial assistance payment up to \$10,000 ¹⁶⁹
WA	\$75,000 ¹⁷⁰

Table 1: Maximum payments available to primary victims of an act of violence in each Australian State and Territory as of the date of this submission.

Jurisdictions also differ in the way that schemes address the impact of more than one act of violence. In Tasmania, for example, where there has been more than one offence committed, the maximum amount of compensation available to a primary victim increases from \$30,000 to \$50,000. In contrast, the Western Australian scheme requires that the

¹⁵⁸ *Victims of Crime (Financial Assistance) Regulation 2016* (ACT) s 5(1)(a) pursuant to *Victims of Crime (Financial Assistance) Act 2016* (ACT) s24.

¹⁵⁹ *Ibid.* s 5(2).

¹⁶⁰ *Victims Rights and Support Regulation 2013* (NSW) cl 12 pursuant to *Victims Rights and Support Act 2013* (NSW) s 36.

¹⁶¹ *Victims Rights and Support Regulation 2013* (NSW) cl 8(2) for the purpose of the *Victims Rights and Support Act 2013* (NSW) s26(1)(c).

¹⁶² *Victims Rights and Support Regulation 2013* (NSW) cl 8(1) for the purpose of the *Victims Rights and Support Act 2013* (NSW) s26(1)(b).

¹⁶³ *Victims of Crime Assistance Act* (NT) s 38(1); for a table of standard amounts awarded see *Victims of Crime Assistance Regulation* (NT) sch 3.

¹⁶⁴ *Victims of Crime Assistance Act 2009* (Qld) s 38(1).

¹⁶⁵ *Victims of Crime Act 2001* (SA) s20(3)(a)(iii).

¹⁶⁶ *Victims of Crime Assistance Regulations 2010* (Tas) reg 4(1)(a).

¹⁶⁷ *Ibid.* reg 4(1)(b).

¹⁶⁸ *Victims of Crime Assistance Act 1996* (Vic) s 8(1).

¹⁶⁹ *Ibid* s 8A.

¹⁷⁰ *Criminal Injuries Compensation Act 2003* (WA) s 31(1).

amount awarded where there has been multiple related offences must not exceed the maximum payable for the last offence.¹⁷¹

As Table 1 illustrates, the highest maximum payment in any jurisdiction is \$100,000, which may be awarded to a primary victim under the South Australian scheme. This figure was the increased during amendments to the scheme that also served to double the maximum available payments for grief and financial expenses, to reflect that “while financial compensation cannot make up for the harm victims suffer, it can assist in their recovery.”¹⁷²

Anti-Slavery Australia notes that victims of human trafficking and slavery in Australia are rarely eligible for the maximum payments outlined under each scheme. For example, in NSW, victims of human trafficking and slavery are usually only eligible for a recognition payment under the scheme, resulting in a maximum payment of \$10,000 out of a possible \$50,000. As in the case study of Mary, provided above, victims of human trafficking and slavery may not have suffered quantifiable economic loss and will likely no longer require immediate financial assistance.

Further, victims of violence such as domestic servitude or forced marriage may be identified as victims of domestic violence offences, which, under certain State and Territory schemes, will adversely impact the maximum amount of compensation available. In Victoria for example, victims of domestic violence offences are eligible for a maximum of \$10,000 in compensation payments compared to a possible \$50,000 for victims of sexual assault,¹⁷³ while in NSW, victims of crimes that do not involve actual sexual assault or grievous bodily harm are only eligible for a maximum payment of \$1,500.

These outcomes do not reflect the extreme trauma, dehumanisation and lasting social and economic impacts that follow from cases of human trafficking and slavery. It is therefore integral that a national compensation scheme be introduced that recognises the severity of crimes of human trafficking and slavery as extreme human rights abuses.

12.3.2 Time limitations

Most State and Territory-based victim assistance or support schemes contain provisions that prevent applications outside of a certain time period. For example, in NSW, an application for financial support or a recognition payment must generally be made within two years from the time of the act of violence. There are few exceptions to this time limitation. Victims of an act of violence involving domestic violence, child abuse or sexual assault may make an application for a recognition payment up to 10 years from the date of the act of violence; and where a sexual offence has been committed against the applicant when they were under the age of 18; there is no time limit to the application.¹⁷⁴

¹⁷¹ *Criminal Injuries Compensation Act 2003* (WA) s 33.

¹⁷² Deputy Premier John Rau, ‘Maximum victims of crime payouts to double’ (Media release, 7 February 2014) <http://www.premier.sa.gov.au/images/news_releases/14_02Feb/victimsofcrime.pdf>.

¹⁷³ *Victims of Crime (Financial Assistance Regulation) 2016* (Vic) s5(2).

¹⁷⁴ *Victims Rights and Support Act 2013* (NSW) s40.

In contrast, the Victorian scheme requires that the decision-maker strike out applications made outside of a two year time period unless “unless it considers that, in the particular circumstances, the application ought not to be struck out.”¹⁷⁵

Further, it should be noted that the seriousness of offences of human trafficking and slavery are not reflected in legislative provisions in cases where victims have not suffered from sexual assault or sexual violence, and may not be eligible to apply for compensation outside time limits.

12.3.3 Multiple applications for acts that occur across States and Territories

State and Territory schemes facilitate support and assistance for victims of violent crimes that have occurred within a specific criminal jurisdiction. Often, decision-makers under these schemes must consider other sources of assistance in determining the applicant’s eligibility for payments, and the amount of payments that should be awarded.¹⁷⁶

In circumstances where a victim of human trafficking or slavery has suffered from acts of violence in more than one Australian jurisdiction, they are required to file separate applications for compensation under each relevant scheme. For many victims of human trafficking and slavery, the harm suffered at the hands of traffickers can have lasting psychological impacts. As in the case study of Mary outlined above, survivors may not come to the attention of authorities until well after they have healed from any physical injuries. When assessing the harm suffered by victims, State and Territory compensation legislation usually requires that the injury suffered has occurred as a direct result of the act of violence committed against the victim. For this reason, applicants may face difficulties in proving that an individual act of violence contributed to their psychological injury, where a series of incidents may have occurred in multiple locations.

Victims of human trafficking and slavery can also face re-victimisation and further trauma where they attempt to claim support for psychological injuries under various State and Territory schemes.

12.4 Inability to assist law enforcement

It is important to note that under the various State and Territory victims of crime assistance schemes, support may be refused for a number of reasons, including a failure by the victim to report the act of violence to the police within a reasonable time or whether the victim has failed to provide reasonable assistance to an investigation of the act of violence or an arrest or prosecution of any person who committed or is alleged to have committed the relevant act of violence.¹⁷⁷

As discussed earlier in this submission, victims of human trafficking and slavery face many barriers that may prevent either their initial identification by law enforcement or their continued engagement in the investigation or prosecution process. This may impede their ability to claim support under various State or Territory victim support or assistance schemes.

¹⁷⁵ *Victims of Crime Assistance Act 1996* (Vic) s 29.

¹⁷⁶ See for example *Victims of Crime Assistance Act 1996* (Vic) s 16(a).

¹⁷⁷ See for example the *Victims Rights and Support Act 2013* (NSW) ss 44(1)(b) and (e).

For example, the NSW scheme outlines the reasons for which support may not be granted, or for which financial support or recognition payments may be reduced. The legislation requires that the Commissioner regard:

“Whether the act of violence was reported to a police officer within a reasonable time, [and]... whether the victim has failed to provide reasonable assistance to any person or body duly engaged in the investigation of the act of violence or in the arrest or prosecution of any person by whom the act of violence was committed or alleged to have been committed...”¹⁷⁸

While the NSW legislation also permits the decision maker to take into regard “any fear of retaliation” preventing the report of the act to a police officer,¹⁷⁹ it does not require the Commissioner to consider any other relevant factors that may prevent an individual from reporting crimes of human trafficking or slavery to law enforcement. Further, this legislation contains no mention of specific mitigating circumstances surrounding a survivor’s inability to provide reasonable assistance to the investigation of the act of violence.

In contrast, other jurisdictions do attempt to address mitigating circumstances that may prevent a victim of violence, such as human trafficking or slavery, from providing reasonable assistance to police and other investigators, as outlined below.

12.4.1 Victoria

The Victorian scheme contains mandatory refusal provisions, where an act of violence was not reported to police in a reasonable time, or the applicant failed to provide reasonable assistance in an investigation, unless special circumstances brought about that result.¹⁸⁰ Special circumstances are not defined in the Act, and so the term is not restrictive.

12.4.2 Australian Capital Territory

ACT legislation outlines the circumstances in which financial assistance must not be given, and includes situations where the applicant has unreasonably failed to give assistance to police in the matter.¹⁸¹ However, where such disqualifying circumstances arise, the Commissioner must provide a written notice, requesting that the applicant tell the Commissioner in writing if there is a reason why the disqualifying circumstances do not apply.¹⁸² The Commissioner must consider any reasons given by the applicant in making their final decision.

12.4.3 Northern Territory:

The NT scheme states that financial assistance must not be awarded where the violent act was not reported to police within a reasonable time, unless the assessor is satisfied that circumstances prevented this.¹⁸³ Assistance must not be awarded under NT legislation

¹⁷⁸ Ibid. ss44(1)(b) and (e).

¹⁷⁹ Ibid. s44(2)(d).

¹⁸⁰ *Victims of Crime Assistance Act 1996* (Vic) s52(a).

¹⁸¹ *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 45(1)(e).

¹⁸² Ibid. 45(2).

¹⁸³ *Victims of Crime Assistance Act* (NT) ss 43(b) and (c).

where an applicant failed, to assist police officers in an investigation or prosecution, unless there is a reasonable excuse.¹⁸⁴

While these schemes each identify that mitigating circumstances may apply, the presumption that payments should be predicated on providing assistance to law enforcement fails to recognise the unique barriers that survivors of human trafficking and slavery face in assisting law enforcement, including the extreme and lasting trauma that they suffer as victims of severe exploitation and degradation.

12.5 Visa concerns

Victims of human trafficking and slavery often face uncertainty over their immigration status. In some cases, victims may not hold a valid Australian visa, and therefore may be placed on a temporary bridging visa under the Trafficking Visa Framework. Where a victim is unable to assist law enforcement, it is unlikely that they will be able to access further bridging visas, or permanent residency, and they may be forced to return to their country of origin.

This is a common and clear barrier that prevents victims of human trafficking and slavery from applying for and receiving payments under State and Territory-based compensation schemes. It is therefore vital that survivors of human trafficking and slavery be allowed to remain in Australia until applications for compensation are finalised. This may be facilitated by the grant of a BVF that does not require suspected victims of human trafficking and slavery to cooperate with police investigations, particularly as survivors may be unable to apply for compensation until after criminal matters are finalised.

To address the disparities between jurisdictions, including gaps that may prevent survivors from accessing State and Territory-based compensation and support schemes, Anti-Slavery Australia recommends that a comprehensive national framework be introduced for victims' compensation. The establishment of a national compensation scheme would assist Australia in fulfilling its obligations under the *United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime* and other international instruments.

13 THE NEED FOR A STATUTORY REMEDY

Survivors of human trafficking and slavery do not have a clear remedy for the specific harm they have suffered. At present, survivors must frame their injury to 'fit' existing categories of civil action such as battery, assault or false imprisonment.

In her thorough analysis of common law remedies in tort law for victims of trafficking and slavery, Pam Stewart explains the range of tortious remedies available for survivors.¹⁸⁵ However, Stewart outlines the many practical difficulties faced by survivors in pursuing a claim and how these obstacles may limit the effectiveness of tort law as a remedy.

¹⁸⁴ Ibid s 43(d).

¹⁸⁵ See Stewart, Pam, "Tortious Remedies for Deliberate Wrongdoing to Victims of Human Trafficking and Slavery in Australia" [2011] UTSLRS 3; (2011) 34(3) *University of New South Wales Law Journal* 898.

These obstacles arise from the very nature of human trafficking and slavery, and from the parlous situations in which victims find themselves: isolated from the community, distressed, both physically and mentally, having no money or financial security of any kind, and very fearful of incarceration or deportation because of their immigration status, often as unlawful non-citizens.¹⁸⁶ Further, many victims of human trafficking and slavery remain unidentified or do not have access to legal advice and representation.¹⁸⁷

Other obstacles to civil suits arise out of the adversarial nature of the civil litigation process, the complexity and anonymity of trafficking syndicates, and the apparent lack of assets of many perpetrators.

Even if obstacles of these kinds are overcome, there are additional significant technical and doctrinal difficulties underpinning common law causes of action. Relevantly, the Canadian Minister of the Status of Women in the Legislative Assembly of Ontario has put forward the Anti-Human Trafficking Act, 2017 ("**Canadian Bill**")¹⁸⁸ which would establish a statutory cause of action specifically for victims of human trafficking. As stated in the explanatory material, the Canadian Bill would permit a civil action to be brought by a victim of human trafficking against any person engaged in the human trafficking, with no proof of damage required.¹⁸⁹ Sections 16 and 17 of the Canadian Bill provide for a statutory remedy in the following terms:¹⁹⁰

Section 16

- (1) A victim of human trafficking may bring an action against any person who engaged in the human trafficking.
- (2) (The action may be brought without proof of damage.

Section 17

- (1) In an action under section 16, the court may,
 - (a) award damages to the plaintiff, including general, special, aggravated and punitive damages;
 - (b) order the defendant to account to the plaintiff for any profits that have accrued to the defendant as a result of the human trafficking;
 - (c) issue an injunction on such terms and with such conditions as the court determines appropriate in the circumstances; and
 - (d) make any other order that the court considers reasonable in the circumstances.

¹⁸⁶ Gallagher, A., *Prosecuting and Adjudicating Trafficking in Persons Cases in Australia: Obstacles and Opportunities*, Address to National Judicial College of Australia, Twilight Seminar on Human trafficking, State Library of NSW, 15 June, 2009 <<http://njca.anu.edu.au/Professional%20Development/People%20Trafficking/Gallagher%20Judicial%20College%20Seminar.pdf>>.

¹⁸⁷ Stewart, Pam, "Tortious Remedies for Deliberate Wrongdoing to Victims of Human Trafficking and Slavery in Australia" [2011] UTSLRS 3; (2011) 34(3) *University of New South Wales Law Journal* 898.

¹⁸⁸ Bill 96, *Anti-Human Trafficking Act*, 2017

¹⁸⁹ Legislative Assembly of Ontario, Bill 96, Human Trafficking Act, 2017.<

http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&Intranet=&BillID=4513#Sched217>

¹⁹⁰ Legislative Assembly of Ontario, Anti-Human Trafficking Act, 2017

<http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&Intranet=&BillID=4513#Sched218> as at 27 April 2017, the Bill is in Committee.

(2) In awarding damages under clause (1) (a), the court shall have regard to all of the circumstances of the case, including,

- (a) any particular vulnerabilities of the plaintiff;
- (b) all aspects of the defendant's conduct; and
- (c) the nature of any existing relationship between the plaintiff and the defendant.

The Canadian example provides that a victim may bring an action "against any person who engaged in the human trafficking". The plaintiff is only required to prove on the balance of probabilities that the defendant engaged in trafficking. In tortious causes of action such as the action in *Wilkinson v Downton* (for deliberately caused mental harm) for example, or in the tort of negligence, the plaintiff has to prove actual damage caused by the defendant. The Canadian Bill avoids that requirement.

While in tort the plaintiff must prove individual instances of actionable conduct: assaults, batteries, false imprisonment, deliberately or negligently caused damage, the Canadian example enables the plaintiff to focus the evidence on the trafficking or slavery itself rather than on conduct that would constitute tortious conduct.

A Statutory civil remedy would fundamentally alter the nature of a victim's claim, by making the trafficking or slavery practice itself actionable, thereby providing an unambiguous and accessible remedy for victims. While it is true that there are many barriers to compensation and a statutory remedy would not overcome *all* obstacles, a statutory civil remedy for victims of human trafficking and slavery would be preferable to existing common law remedies, and would assist survivors to overcome significant doctrinal and procedural difficulties.

RECOMMENDATIONS

1. The Australian Government should **introduce a comprehensive, national compensation scheme** to address disparities between State and Territory victim's support schemes, and to ensure that all survivors of human trafficking and slavery in Australia have access to remedy. A national scheme should recognise the serious psychological trauma suffered by survivors of human trafficking and slavery and provide resources to assist applicants who may be traumatised and re-victimised during this process. Payments under this scheme should not be tied to a victims' cooperation with criminal investigations and prosecutions.
2. Visas protection should be extended to **permit victims of human trafficking and slavery to remain in Australia while applications for compensation are finalised**. This should apply to all suspected victims of human trafficking and slavery regardless of their contribution to police investigations and prosecutions.
3. To overcome the obstacles that may prevent survivors of human trafficking and slavery

from initiating civil suits, **a civil law statutory action should be created that would allow victims to initiate an action against any party who has engaged in any form of human trafficking and slavery** (as defined by the Criminal Code). Legislation should specify that survivors need not prove damage in order to be successful in their claim.

PART F – AN AUSTRALIAN ANTI-SLAVERY AND TRAFFICKING OMBUDSMAN

14 APPOINTMENT OF AN AUSTRALIAN ANTI-SLAVERY AND TRAFFICKING OMBUDSMAN

Section 40 of the UK Modern Slavery Act creates the office of the Independent Anti-Slavery Commissioner. Anti-Slavery Australia recommends that the Australian government create a comparable, independent office to provide high-level oversight and monitoring of the Australian response to human trafficking and slavery, as well as compliance with applicable laws and regulations.

We recommend that this office could be implemented in Australia as an ombudsman with jurisdiction to monitor the response to human trafficking and slavery in Australia, monitor compliance with applicable laws and regulations, make recommendations, and receive and investigate complaints from individuals and organisations with a sufficient interest.

14.1 The UK Independent Anti-Slavery Commissioner

The primary function of the UK Independent Anti-Slavery Commissioner is to encourage good practices in the prevention, detection, investigation and prosecution of human trafficking and slavery offences, and the identification of victims of those offences.¹⁹¹ This mandate extends to the entirety of the United Kingdom.¹⁹²

The role of the Independent Anti-Slavery Commissioner was created in accordance with article 29(4) of the Council of Europe *Convention on Action against Trafficking in Humans*, which provides that parties shall consider appointing national rapporteurs or other mechanisms for monitoring the implementation of legislation requirements and the anti-trafficking activities of state institutions.¹⁹³

The UK Modern Slavery Bill Evidence Review Panel (“**the Panel**”), which conducted its investigation during the final drafting stages of the UK Modern Slavery Act,¹⁹⁴ found overwhelming support for the introduction of an Independent Anti-Slavery Commissioner.¹⁹⁵ In the course of gathering evidence, the Panel spoke to a number of survivors of slavery, many of whom believed that a new Commissioner could have a substantial impact on the support available to survivors.¹⁹⁶ The Panel also found that there was insufficient empirical data and a consequential lack of understanding of the core issues related to slavery, and were of the view that an Independent Anti-Slavery Commissioner would ensure that these knowledge gaps were addressed, thereby “enabling those who deal with modern slavery to not only understand and respond effectively to present phenomena, but to recognize and proactively work to combat developing phenomena”.

¹⁹¹ Ibid, s 41 (1).

¹⁹² Ibid, s 41 (3).

¹⁹³ Convention on Action against Trafficking in Human Beings, opened for signature 16 May 2005, CETS 197 (entered into force 1 February 2008) art 29 (4).

¹⁹⁴ Modern Slavery Bill Evidence Review Panel, Home Office (UK), *Establishing Britain as a world leader in the fight against modern slavery - Report of the Modern Slavery Bill Evidence Review* (2013) v.

¹⁹⁵ Ibid, 29.

¹⁹⁶ Ibid.

The functions of the Independent Anti-Slavery Commissioner include making annual reports on the exercise of his functions, which are laid before relevant parliamentary bodies, and making recommendations to any public authority about the exercise of its functions. The Independent Anti-Slavery Commissioner may also request a specified public authority to co-operate in any way necessary for the purposes of his functions. However, the Independent Anti-Slavery Commissioner does not have the power to receive or investigate individual complaints.

Since his appointment as the Independent Anti-Slavery Commissioner, Kevin Hyland OBE has issued his Strategic Plan for 2015-2017, which sets out how he intends to work with different statutory agencies that have a duty to co-operate and non-governmental bodies. The Strategic Plan for 2015-2017 prioritises improved victim identification and enhanced levels of immediate and sustained support.¹⁹⁷ The Strategic Plan emphasises the monitoring and facilitation of consistent, best-practice response across the United Kingdom¹⁹⁸ within the whole-of-government '*HM Government 'Modern Slavery Strategy'*'.¹⁹⁹ This demonstrates the role of the Independent Anti-Slavery Commissioner in facilitating and monitoring a victim-centred response amongst frontline agencies and coordinating communication and cooperation between domestic and international agencies, and civil society.

The Independent Anti-Slavery Commissioner is appointed by, and reports annually to the United Kingdom Home Secretary on the progress being made against human trafficking and slavery. However, this has been the subject of criticism by the Council of Europe Group of Experts on Action against Trafficking in Human Beings ("**GRETA**"). In 2015, GRETA conducted an evaluation of the implementation of the *Convention on Action against Trafficking in Human Beings*,²⁰⁰ finding that the Independent Anti-Slavery Commissioner does not meet the requirements of a national rapporteur because the role is not independent, as it is not sufficiently separate from the executive functions of the UK government. GRETA also noted that the functions of the Independent Anti-Slavery Commissioner, and do not include data collection and analysis.²⁰¹

GRETA has stressed that the separation of the executive and monitoring functions would better facilitate objective evaluation of the implementation of legislation, policy and activities, the identification of lacunae and shortcomings, and the preparation of comprehensive legal and policy recommendations.²⁰²

14.2 Other International Examples

Other countries have also appointed an ambassador, rapporteur or commissioner to monitor their approach to combating human trafficking and slavery. Notable examples include the Netherlands, Finland and the United States of America.

¹⁹⁷ Independent Anti-Slavery Commissioner, UK, *Independent Anti-Slavery Commissioner Strategic Plan 2015-17* (2015) 3.

¹⁹⁸ Ibid, 3-4.

¹⁹⁹ Home Office, UK, *HM Government Modern Slavery Strategy* (November 2014) 9.

²⁰⁰ *Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the United Kingdom*, GRETA (2016) 21, 6.

²⁰¹ Ibid, 11.

²⁰² Ibid.

14.2.1 The Netherlands National Rapporteur on Trafficking in Human Beings and Sexual Violence against Children

The Netherlands was the first country to establish a National Rapporteur on Trafficking in Human Beings in 2000,²⁰³ with a mandate that was expanded in 2012 to include sexual violence against children. At an operational level, the National Rapporteur on Trafficking in Human Beings and Sexual Violence against Children (“**the Dutch National Rapporteur**”)²⁰⁴ has no executive tasks and is limited to reporting, monitoring and making recommendations on the Dutch response to human trafficking and slavery, as well as sexual violence against children.²⁰⁵ The Dutch National Rapporteur submits reports annually to the government, may provide recommendations to other stakeholders,²⁰⁶ and is responsible for collecting and publishing statistical data on human trafficking and slavery in the Netherlands.²⁰⁷

GRETA has stated that the powers and role of the Dutch National Rapporteur is in conformity with the spirit and letter of the *Convention on Action against Trafficking in Human Beings*, and meets the requirements of independence as set out in the Convention.²⁰⁸

14.2.2 The United States Ambassador-at-Large to Monitor and Combat Trafficking in Persons

The Ambassador-at-Large to Monitor and Combat Trafficking in Persons is the head of the United States Department of State Office to Monitor and Combat Trafficking in Persons. The Office to Monitor and Combat Trafficking in Persons partners with foreign governments and other international stakeholders to develop and implement strategies for confronting modern slavery, including multilateral and bilateral diplomacy, public engagement and targeted foreign assistance.²⁰⁹ The Office to Monitor and Combat Trafficking in Persons is notable for producing the annual *Trafficking in Persons Report* – a diplomatic and diagnostic tool to provide a guide for relations with international governments on human trafficking.

However, the Trafficking in Persons Report (and the Office to Monitor and Combat Trafficking in Persons more generally) have drawn criticism for a failure to align with international norms, enabling the Trafficking in Persons Report to be used to suit narrow political agendas,²¹⁰ and serve as a primary tool in United States’ foreign relations and policy.²¹¹

14.3 An Australian Anti-Slavery Ombudsman

Anti-Slavery Australia recommends the creation of the office of an Independent Anti-Slavery Ombudsman, to ensure the Australian government response to human trafficking and slavery is coordinated and to reflect international best practice.

²⁰³ *Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the Netherlands*, GRETA (2014)10, 14. 24.

²⁰⁴ *Ibid.*, 14.

²⁰⁵ *Ibid.*

²⁰⁶ *Ibid.*, 14.

²⁰⁷ *Ibid.*, 24.

²⁰⁸ *Ibid.*

²⁰⁹ *Office to Monitor and Combat Trafficking in Persons, About Us*, U.S. Department of State <<https://www.state.gov/j/tip/about/index.htm>> .

²¹⁰ Anne T. Gallagher, ‘Improving the Effectiveness of the International Law of Human Trafficking: A Vision for the Future of the US Trafficking in Persons Reports’ (2011) 12 *Human Rights Review* 381, 387.

²¹¹ *Ibid.*, 392.

Anti-Slavery Australia recommends that a role similar to the Independent Anti-Slavery Commissioner under the UK Modern Slavery Act would be best implemented in Australia through the creation of a public ombudsman with jurisdiction to investigate and monitor the response to human trafficking and slavery in Australia.

Ombudsmen operate in many jurisdictions in Australia and fulfil roles such as handling individual complaints, protection of human rights,²¹² leading proactive systemic change, and as auditors, educators and agents of community change.²¹³ These functions have the primary goal of improving public administration.²¹⁴ While the office of ombudsman has traditionally exclusively investigated and sought to resolve individual complaints,²¹⁵ this jurisdiction has been expanded to place more emphasis on systemic investigations.²¹⁶ Ombudsmen also have a recognised role in promoting and protecting human rights, both through complaints handling and administrative investigation.²¹⁷ Ombudsmen can also be given jurisdiction to investigate policy decisions.²¹⁸

Ombudsmen rely on government agencies cooperating with recommendations in good faith, as ombudsmen do not have coercive powers to compel the compliance of government agencies.²¹⁹ As such, independence and impartiality is necessary to perform the functions of the office. The independence of ombudsmen varies depending on the degree granted by the establishing statute:²²⁰ for example, the Commonwealth Ombudsman is appointed by the Governor-General,²²¹ and its funding is determined by the executive.²²² Parliament is vested with the power to remove the Commonwealth Ombudsman from office.²²³

The ombudsman model is flexible, allowing ombudsmen to adapt and respond to changes in the structure and activities of government, and identify emerging issues in public administration.²²⁴ An Anti-Slavery Ombudsman should be empowered to critically monitor and assess the response of government to the issue of human trafficking and slavery, leading and maintaining dialogue between all government agencies and stakeholders, including business and civil society.

Anti-Slavery Australia submits that an ombudsman would be better positioned than a commissioner to monitor the response to human trafficking and slavery in Australia, make recommendations, monitor compliance with applicable laws and regulations and receive and investigate complaints from individuals and organisations with a sufficient interest.

²¹² See eg *Ombudsman Act 1973* (Cth) s13(2).

²¹³ Anita Stuhmcke, 'The evolution of the classical ombudsman: a view from the antipodes' (2012) 2(1) *International Journal of Public Law and Policy* 83, 93.

²¹⁴ *Ibid*, 84.

²¹⁵ *Ibid*.

²¹⁶ Stuhmcke, above n 213, 84.

²¹⁷ John McMillan, 'The Ombudsman's Role In Human Rights Protection – An Australian Perspective' (Paper presented at the 11th Asian Ombudsman Association Conference, Bangkok, 2 November 2009) 5, 7.

²¹⁸ *Ombudsman Act 1976* (Cth) s15(1)(a)(iii).

²¹⁹ Judith Bannister, Gabrielle Appleby and Anna Oliynyk, *Government Accountability: Australian Administrative Law* (Cambridge University Press, 2015) 183.

²²⁰ *Ibid*, 182.

²²¹ *Ombudsman Act 1976* (Cth) s21.

²²² Judith Bannister, Gabrielle Appleby and Anna Oliynyk, above n 219.

²²³ *Ombudsman Act 1976* (Cth) s28.

²²⁴ John McMillan, above n 217, 8.

The institution of ombudsmen is firmly established in Australian administrative law.²²⁵ While there is no one model of an ombudsman office, the framework and concept is comparatively stable and well-recognised in Australia, especially in comparison to other oversight and review agencies, such as commissioners and inspectors-general.²²⁶ The importance of the 'brand name' of ombudsman is evidenced by proposals to restrict the usage of the term to frameworks that provide suitably accessible and independent review.²²⁷ The establishment of an 'Anti-Slavery Ombudsman' would send a clear message that the Australian government is committed to combatting human trafficking and slavery.

Ombudsmen in Australia traditionally lack determinative powers, and do not have coercive powers to compel the compliance of government agencies with recommendations.²²⁸ This serves to fill the gap identified by GRETA regarding the independence of the Independent Anti-Slavery Commissioner in the United Kingdom.²²⁹ Determinative powers would undermine the influence of an 'Anti-Slavery Ombudsman' over administrative behaviour, as it would compromise the appearance of impartiality and independence.²³⁰ Establishing an 'Anti-Slavery Ombudsman' would position the role of the office within the impartial and independent tradition of Australian ombudsmen.

Furthermore, emphasising the role of an 'Anti-Slavery Ombudsman' as a voice for individuals within the government would contribute to a victim-centred approach to human trafficking and slavery in Australia, within a human rights framework.

14.3.1 Powers and Functions of the Australian Anti-Slavery Ombudsman

An Anti-Slavery Ombudsman could promote systemic change by following up on findings and recommendations that it and other bodies make, and by ensuring that there is an open dialogue between its office, government agencies and other third party stakeholders, including business and civil society.²³¹

Alternatively, Anti-Slavery Australia recommends that the office of Anti-Slavery Ombudsman could be situated within the portfolio of the Commonwealth Ombudsman. The major areas of responsibility of the Commonwealth Ombudsman include the Immigration Ombudsman,²³² the Defence Force Ombudsman,²³³ and the Overseas Student Ombudsman.²³⁴ The role of Anti-Slavery Ombudsman could be included alongside these existing roles. This would preserve the independence of the Anti-Slavery Ombudsman, and build on the existing expertise of the office of the Commonwealth Ombudsman.

The key powers of an Anti-Slavery Ombudsman should include: critically monitoring the efforts and effectiveness of all state institutions, including national coordinators; and to

²²⁵ Robin Creyke and John McMillan, *Control of Government Action: text, cases and commentary* (Lexisnexis Butterworths, 2005) 181-182, [4.2.2]-[4.2.2].

²²⁶ Ibid, 181-182, 187, [4.2.2]-[4.2.2], [4.2.11].

²²⁷ See eg, Access To Justice Advisory Committee, 'Access to Justice: An Action Plan' (Report, Law Council of Australia, 1994) 315; *Ombudsman Act 1972* (SA) s 32.

²²⁸ Judith Bannister, Gabrielle Appleby and Anna Olijnyk, above n 219.

²²⁹ *Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the United Kingdom*, GRETA (2016) 11, [31].

²³⁰ Matthew Groves, 'Ombudsmen's Jurisdiction in Prisons (2002) 28 *Monash University Law Review* 181 202.

²³¹ John McMillan, above n 217, 9.

²³² *Migration Act 1958* (Cth) part 8C.

²³³ *Ombudsman Act 1976* (Cth) part IIA, s19B

²³⁴ Ibid, part IIC, 19Z1.

maintain a constant exchange with civil society, the research community and other relevant stakeholders.²³⁵ The Anti-Slavery Ombudsman should also be empowered to perform the following functions:

- monitor the implementation of the National Action Plan and ensuring compliance with human rights obligations;²³⁶
- receive inquiries and complaints from individuals and civil society organisations;
- be appointed to the membership of the Interdepartmental Committee on Human Trafficking and Slavery, the Operational Working Group, the National Roundtable on Human Trafficking and Slavery and other working groups set up under these bodies;
- report annually to the Australian Parliament on the exercise of the Anti-Slavery Ombudsman's functions, which should be made publicly available;
- provide recommendations, advice and guidance to government agencies on the exercise of their relevant functions;
- assess the effectiveness of relevant Federal, State and Territory legislation and policies as well as the impact of any proposed relevant Federal, State and Territory legislation and policies;
- possess statutory powers to collect and request data and information on human trafficking and slavery; and
- consult and engage with government agencies, non-governmental bodies, business and industry, unions and other persons.

14.3.2 Independence of the office of Anti-Slavery Ombudsman

One of the major shortcomings of the Independent Anti-Slavery Commissioner in the United Kingdom is that the office is not sufficiently separate from the executive functions of the UK Government, which compromises the monitoring functions of the Independent Anti-Slavery Commissioner.²³⁷ As previously, noted, GRETA has stated that the separation of the Independent Anti-Slavery Commissioner and the executive branch of government is key to the objective auditing of the implementation of legislation and policy, the identification of gaps and shortcomings and the preparation of comprehensive legal and policy recommendations.²³⁸

In order to perform these functions effectively, it is essential that the role of an Anti-Slavery Ombudsman in Australia be independent. This should be recognised in the establishing legislation. By building on the model of the Commonwealth Ombudsman, the Anti-Slavery

²³⁵ *Report Concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the United Kingdom*, GRETA (2016) 21, 11.

²³⁶ This is currently the responsibility of the Commonwealth Attorney-General Commonwealth. See National Roundtable on Human Trafficking and Slavery, *Guidelines for NGOs: Working with Trafficked People* (3rd ed, 1 July 2015) 47.

²³⁷ *Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the United Kingdom*, GRETA (2016) 11.

²³⁸ *Ibid.*

Ombudsman would be able to conduct independent investigations and audit the response of the Australian government.

The adaptation of the Independent Anti-Slavery Commissioner in the United Kingdom to the Australian model of the Commonwealth Ombudsman would ensure that the office of the Anti-Slavery Commissioner in Australia operates independently.

RECOMMENDATIONS

Establish an office of the Australian Independent Anti-Slavery and Trafficking

Ombudsman to provide high-level oversight and monitoring of the Australian response to human trafficking and slavery, as well as compliance with applicable laws and regulations.

The ombudsman will promote systemic change by following up on findings and recommendations that it and other bodies make, and by ensuring that there is an open dialogue between its office, government agencies and other third party stakeholders, including business and civil society. The ombudsman should have the power to take referrals related to specific cases, investigate, and make recommendations about actions related to individual cases.

PART G – HUMAN TRAFFICKING AND SLAVERY IN SUPPLY CHAINS

15 THE PREVALENCE OF MODERN SLAVERY IN DOMESTIC AND GLOBAL SUPPLY CHAINS

Human trafficking and slavery are egregious violations of human rights, and are criminal offences under Australian law. Importantly, the Criminal Code offences of human trafficking and slavery have extraterritorial application,²³⁹ with the result that human trafficking and slavery conducted outside of Australia by an Australian organisation are criminal offences.²⁴⁰ Supply chains are the vertically integrated systems of production that link raw materials to finished products, and supply chain exploitation affects the provision of goods and services in Australia, in the region and beyond.

Supply chains are commonly divided into ‘tiers’, to denote the degrees of separation between an organisation and a supplier. ‘Tier 1’ suppliers are the suppliers with whom an organisation contracts directly for goods or services. If Tier 1 suppliers subcontract to, or purchase goods and services from, a third party, that represents ‘Tier 2’ of the organisation’s supply chain.²⁴¹ Modern business relationships frequently involve engagement with complex international supply chains, often with multiple tiers. These supply chains can involve industries that involve a high risk of exploitation in Australia, or extend to countries overseas with high incidence of human trafficking and slavery.

The National Action Plan identifies the Australian government’s “response to labour exploitation in supply chains” as a key focus area. To this end, Anti-Slavery Australia commends the Australian government initiative to convene a Supply Chains Working Group to address exploitation in supply chains, and participated in the Supply Chains Working Group.

It is difficult to estimate the extent of practices of human trafficking and slavery in global supply chains. This is due to the clandestine nature of human trafficking and slavery, combined with the lack of transparency regarding supply chains at both the Australian and international level. Globally, the International Labour Organisation has found that forced labour is most commonly found in the agriculture, construction, domestic work and manufacturing industries.²⁴² In Australia, the AFP in 2015-2016 received an increasing number of human trafficking and slavery referrals relating to the agriculture, construction and hospitality sectors.²⁴³ The Australian Government Interdepartmental Committee on Slavery and Human Trafficking has also identified increasing incidence of forced labour in the hospitality, mining, forestry and finishing industries.

Human trafficking and slavery has been identified in the supply chains of Australian organisations, gaining attention in 2016 through reports that garments for iconic Australian

²³⁹ *Criminal Code Act 1995* (Cth) ss 270.3A (slavery), 270.9 (slavery-like offences) and 271.10 (human trafficking).

²⁴⁰ *Criminal Code Act 1995* (Cth) ss 271, 11 and 15.2(c)(iii).

²⁴¹ Andreas Wieland and Robert Handfield, ‘The Socially Responsible Supply Chain: An imperative for global corporations’ (2013) 17 (5) *Supply Chain Management Review* 22, 25.

²⁴² International Labour Office, Special Action Programme to Combat Forced Labour, ‘ILO Global Estimates of Forced Labour: Results and Methodology’ (International Labour Organisation, 2012) 2.

²⁴³ ‘Trafficking In Persons: The Australian Government Response 1 July 2015 – 30 June 2016’ above n 12, 20.

brand Rip Curl were manufactured by factory workers subjected to slavery-like conditions in North Korea.²⁴⁴ Rip Curl's Chief Financial Officer commented at the time that the a supplier had subcontracted part of the Rip Curl production order, and that Rip Curl had only realised that affected garments had been manufactured in these conditions after production was complete and the product had been shipped to retail customers.²⁴⁵ It is unlikely that instances of human trafficking and slavery in garment supply chains are limited to Rip Curl products, and this incident has been linked to a broader trend in China (as domestic labour costs have risen) to outsource textile production to North Korea.²⁴⁶

In Australia, migrant workers continue to be exploited in slavery-like conditions in the agriculture and meatpacking industries to stock major Australian supermarkets and fast-food chains with fresh produce.²⁴⁷ Anti-Slavery Australia has represented clients through our legal practice who have been criminally exploited in slavery or slavery-like conditions in Australia in the agriculture, construction and service industries.

The problem of exploitation in supply chains is compounded by a general lack of understanding amongst businesses regarding the nature and extent of their own supply chains. In a 2016 report by KPMG which surveyed senior executives of leading manufacturers across diverse industry sectors, it was found that 87% of respondents did not have a complete understanding of their supply chains beyond their Tier 1 suppliers.²⁴⁸

Further, a 2016 study by Ashridge Centre for Business and Sustainability in the United Kingdom, found that 77% of companies reported that there is a likelihood of slavery occurring in their supply chains.²⁴⁹ This study involved an in-depth analysis of corporate perspectives on human trafficking and slavery one year on from the introduction of the UK Modern Slavery Act. Amongst the participating companies were IKEA, Coca Cola, Nestle and Hewlett Packard Enterprise.²⁵⁰

16 INTERNATIONAL BEST PRACTICE

16.1 United Kingdom Transparency in Supply Chains provision

Section 54 of the UK Modern Slavery Act introduced new reporting requirements for large organisations.²⁵¹ The Transparency in Supply Chains provision is similar to legislation found in the California *Transparency in Supply Chains Act*.

The Transparency in Supply Chains provision requires organisations to publish an annual 'Slavery and Human Trafficking Statement' ("**Annual Statement**") on their website. The Annual Statement must outline the steps taken by the organisation to ensure that human trafficking and slavery are not taking place anywhere in its business or supply chain.

²⁴⁴ Nick McKenzie and Richard Baker, 'Surf clothing label Rip Curl using 'slave labour' to manufacture clothes in North Korea' *The Sydney Morning Herald* (online) 21 February 2016 <<http://www.smh.com.au/business/surf-clothing-label-rip-curl-using-slave-labour-to-manufacture-clothes-in-north-korea-20160219-gmz375.html>>.

²⁴⁵ Ibid.

²⁴⁶ 'Outsourced to North Korea; How a foreign supply chain went through China to Pyongyang', *The Wall Street Journal* (online) 23 February 2016 <<https://www.wsj.com/articles/outourced-to-north-korea-1456185838>>.

²⁴⁷ Australian Broadcasting Corporation, 'Slaving Away: The dirty secrets behind Australia's fresh food', *Four Corners*, 4 May 2015 (Caro Meldrum-Hanna and Ali Russell) <<http://www.abc.net.au/4corners/stories/2015/05/04/4227055.htm#transcript>>.

²⁴⁸ Doug Gates, Tom Mayor and Erich L. Gampienrieder, 'Global Manufacturing Outlook Competing for growth: How to be a growth leader in industrial manufacturing' (Report 133493-G, KPMG International, May 2016) 19.

²⁴⁹ Quintin Lake et al, 'Corporate Leadership on Modern Slavery' (Ashridge Centre for Business and Sustainability, 2016) 9.

²⁵⁰ Ibid, 70.

²⁵¹ *Modern Slavery Act 2015* (UK) c 30, s 54.

In effect, the Transparency in Supply Chains provision does not force organisations to take action to address issues of slavery; rather, organisations are obliged to publicly disclose any inaction. These requirements came into effect in October 2015, and cover any organisation operating in the United Kingdom with an annual global gross revenue exceeding £36 million (approximately AU\$61 million). A summary of the Transparency in Supply Chain provision is provided in the table below.

Sub-section	Mandatory/Discretionary	Provision
(1)	Mandatory	A commercial organisation operating in the UK with an annual global gross revenue exceeding £36 million must prepare a slavery and human trafficking statement for each financial year of the organisation.
(4)	Mandatory	A slavery and human trafficking statement for a financial year is— (a) a statement of the steps the organisation has taken during the financial year to ensure that slavery and human trafficking is not taking place— (i) in any of its supply chains, and (ii) in any part of its own business, or (b) a statement that the organisation has taken no such steps.
(5)	Discretionary	An organisation's slavery and human trafficking statement may include information about— (a) the organisation's structure, its business and its supply chains; (b) its policies in relation to slavery and human trafficking; (c) its due diligence processes in relation to slavery and human trafficking in its business and supply chains; (d) the parts of its business and supply chains where there is a risk of slavery and human trafficking taking place, and the steps it has taken to assess and manage that risk; (e) its effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains, measured against such performance indicators as it considers appropriate; (f) the training about slavery and human trafficking available to its staff.
(6)	Mandatory	A slavery and human trafficking statement— (a) if the organisation is a body corporate other than a limited liability partnership, must be approved by the board of directors (or equivalent management body) and signed by a director (or equivalent); (b) if the organisation is a limited liability partnership, must be approved by the members and signed by a designated member; (c) if the organisation is a limited partnership registered under the Limited Partnerships Act 1907, must be signed by a general partner; (d) if the organisation is any other kind of partnership, must be signed by a partner.

(7)	Mandatory	If the organisation has a website, it must— (a) publish the slavery and human trafficking statement on that website, and (b) include a link to the slavery and human trafficking statement in a prominent place on that website's homepage.
(8)	Mandatory	If the organisation does not have a website, it must provide a copy of the slavery and human trafficking statement to anyone who makes a written request for one, and must do so before the end of the period of 30 days beginning with the day on which the request is received.

Table 2: Requirements of the UK Modern Slavery Act s54, (Transparency in Supply Chains provision).

There are three central requirements of the Transparency in Supply Chains provision: the organisation must disclose what steps (if any) have been taken to ensure that their supply chain is free of human trafficking and slavery; the Annual Statement must be approved by the organisation's board and signed by a director; and the Annual Statement must be accessible via a prominent link on the organisation's website.

Anti-Slavery Australia notes that there is no provision within the legislation for the creation of a central register, which makes it difficult to draw direct comparisons between organisations' Annual Statements, or assess compliance across all reporting organisations. At present, three organisations in the UK are in the process of developing repositories of Annual Statements, including the Business and Human Rights Resource Centre, which has created a central registry (in the form of an Excel spreadsheet publically available on their website)²⁵² listing the organisations that have published Annual Statements in compliance with the legislation.²⁵³ Nonetheless, in developing a new scheme for an Australian context, consideration must be given to the role of the Annual Statement in addressing human trafficking and slavery, and a preliminary question will be whether responsibility for a central register should be undertaken by a centralised body, or civil society.

In the United Kingdom, the requirement that the Annual Statement be approved by an organisation's board and signed by a director is an important step forward from the Californian *Transparency in Supply Chains Act*, which does not contain such a requirement. This provision is significant, as it means that the Annual Statement is likely to receive a greater degree of strategic consideration within the managing or executive team of an organisation. The Transparency in Supply Chains Provision also provide, as a discretionary item, that Annual Statements may include information on the organisation's governance structure, as it relates to combatting human trafficking and slavery.²⁵⁴ There is no such category in the Californian *Transparency in Supply Chains Act* suggested disclosures, and this inclusion in the Transparency in Supply Chains provision represents a further improvement on the Californian model.

²⁵² The central registry of statements is available at: <https://business-humanrights.org/en/uk-modern-slavery-act-registry>

²⁵³ *UK Modern Slavery Act & Registry*, Business and Human Rights Resource Centre < <https://business-humanrights.org/en/uk-modern-slavery-act-registry/?dateorder=datedesc&page=0&componenttype=all>>.

²⁵⁴ Ibid, s54 (5) (a).

The Transparency in Supply Chains provision operates on the basis of encouragement, rather than an actionable or mandatory regime. The intention is that reporting requirements will create a level playing field in which it is clear whether or not businesses are acting responsibly,²⁵⁵ allowing consumers to seek out products or brands with higher ethical standards,²⁵⁶ and benefitting compliant organisations by protecting and enhancing their brand and reputation. Enforcement is focused on non-compliance with the obligation to provide a Statement, rather than breaches of human rights in supply chains themselves: if an organisation fails to produce an Annual Statement, the Secretary of State in the United Kingdom may seek an injunction requiring the organisation to comply with the Transparency in Supply Chains provision.²⁵⁷ If the organisation fails to comply with any such injunction, the organisation will be held in contempt of court, which is punishable by an unlimited fine.²⁵⁸

Despite the promising structure of the Transparency in Supply Chains provision, in May 2016, specialist consultancy firm Ergon Associates conducted a survey of organisations' Annual Statements, which demonstrated several short-comings.²⁵⁹ Of the 230 published Annual Statements which were analysed, many were found to be lacking in detail, and broadly described general commitments rather than specific actions taken by organisations to address human trafficking and slavery in supply chains. Furthermore, one quarter of the Annual Statements were not signed by an appropriate person, contravening the requirement that they be signed by a director or equivalent.²⁶⁰

It is also noted that as of January 2017, of the approximately 12,000 to 17,000 organisations who are obliged to report under the Transparency in Supply Chains provision,²⁶¹ only 1805 have published Annual Statements.²⁶²

16.2 Australian commercial organisations currently reporting under the UK Modern Slavery Act

The table below outlines the commercial organisations founded in Australia which have made Annual Statements under the UK Modern Slavery Act. The information contained in the table is drawn solely from information provided in the Annual Statements of those organisations headquartered in Australia.

²⁵⁵ Home Office (United Kingdom), 'Slavery and human trafficking in supply chains: guidance for businesses' (Statutory guidance, 29 October 2015) 3 [1.4].

²⁵⁶ Ibid, [1.7].

²⁵⁷ *Modern Slavery Act 2015* (UK) c 30, s 54 (11).

²⁵⁸ Home Office (United Kingdom), above n 255, [2.6].

²⁵⁹ 'Reporting on Modern Slavery: The current state of disclosure- May 2016' (Ergon Associates, May 2016) 1.

²⁶⁰ Ibid, 3.

²⁶¹ Daniel Hudson and Oliver Elgie, 'Potential Confusion About Modern Slavery Act Reporting Requirements' (Legal Briefing, Herbert Smith Freehills, 11 May 2016) <<https://www.herbertsmithfreehills.com/latest-thinking/potential-confusion-about-modern-slavery-act-reporting-requirements>>; Amelia Gentleman, 'UK firms must show proof they have no links to slave labour under new rule', *The Guardian* (online) 28 October 2015 <<https://www.theguardian.com/world/2015/oct/28/uk-companies-proof-no-links-slave-labour-supply-chain>>.

²⁶² *UK Modern Slavery Act & Registry*, Business and Human Rights Resource Centre <<https://business-humanrights.org/en/uk-modern-slavery-act-registry/?dateorder=datedesc&page=0&componenttype=all>>.

Company	Sector	Mandatory			Discretionary					
		(4)(a)	(4)(b)	S54(6)	(5)(a)	(5)(b)	(5)(c)	(5)(d)	(5)(e)	(5)(f)
<u>Macquarie Bank</u>	Finance	✓	--	✓	✓	✓	✓	✓	--	✓
<u>Ashurst</u>	Services	✓	--	✓	✓	✓	✓	✓	--	✓
<u>Rio Tinto</u>	Resources	✓	--	✓	✓	✓	✓	✓	✓	✓
<u>ANZ</u>	Finance	✓	--	✓	✓	✓	✓	✓	--	✓
<u>Westpac</u>	Finance	✓	--	✓	✓	✓	✓	✓	✓	✓
<u>BHP Billiton</u>	Resources	✓	--	✓	✓	✓	✓	✓	✓	✓
<u>Telstra</u>	Technology	✓	--	✓	✓	✓	✓	✓	✓	✓
<u>Comm Bank</u>	Finance	✓	--	✓	✓	✓	✓	✓	✓	✓
<u>Qantas Group</u>	Transport	✓	--	✓	✓	✓	--	✓	--	✓
<u>Wesfarmers</u>	Retail	✓	--	✓	✓	✓	✓	✓	✓	✓
<u>CSL Behring</u>	Health	✓	--	✓	✓	✓	✓	✓	✓	✓
<u>Bunnings</u>	Retail	✓	--	✓	✓	✓	✓	✓	✓	✓
<u>South32</u>	Resources	✓	--	✓	✓	✓	✓	✓	✓	✓
<u>Lendlease</u>	Construction	✓	--	✓	✓	✓	✓	✓	✓	--
<u>Goodman Group</u>	Real Estate	✓	--	✓	✓	✓	✓	✓	✓	✓
<u>Ramsay Health Care</u>	Health	✓	--	✓	✓	✓	✓	✓	--	✓
<u>SG fleet Group</u>	Transport	✓	--	✓	✓	✓	✓	✓	--	✓

Table 3: Compliance analysis for Australian organisations reporting under UK Modern Slavery Act Transparency in Supply Chains Provisions²⁶³

The level of compliance amongst the reports referred to in the table above is generally very high, with many organisations' Annual Statements satisfying both mandatory and discretionary provisions. From this sample, there appears to be variation in the level of supply chain transparency and awareness between different sectors and the geographical regions in which organisations operate. For example, resource companies Rio Tinto²⁶⁴ and BHP²⁶⁵ provide greater detail regarding the structure of their supply chains, including the geographical location of the suppliers. These Annual Statements also identify areas of the organisations' supply chain that pose the greatest risk and outline due diligence processes.

It is difficult to adduce evidence concerning the rate of compliance amongst Australian organisations operating in the UK, as there is no comprehensive list of commercial organisations that meet the revenue threshold. However, of the Australian organisations that have currently made Annual Statements, it appears that the level of engagement is generally high, but variable. In order to ensure that Australian organisations meet their obligations and provide effectively assistance in addressing human trafficking and slavery in supply chains, it is necessary to implement a strong and flexible regulatory framework.

²⁶³ UK Modern Slavery Act & Registry, Business and Human Rights Resource Centre <<https://business-humanrights.org/en/uk-modern-slavery-act-registry>>.

²⁶⁴ Rio Tinto, 'Slavery and Human Trafficking Statement 2016' (March 2017)

<http://www.riotinto.com/documents/RT_Slavery_and_human_trafficking_statement.pdf>.

²⁶⁵ BHP Billiton, 'BHP Billiton Statement: Modern Slavery Act 2015 (UK)' <http://www.bhpbilliton.com/-/media/bhp/documents/investors/annual-reports/2016/160915_bhpbillitonstatementmodernslaveryact2015.pdf?la=en>.

16.3 California Transparency in Supply Chains Act

The California *Transparency in Supply Chains Act 2010* (“**California Act**”) requires retail sellers to publicly disclose the efforts they have taken to prevent human trafficking and slavery in their supply chains.²⁶⁶ Enacted in 2010, the California Act applies to organisations with annual gross worldwide receipts of US\$100 million who are conducting business in California. The California Act does not require organisations to undertake any activities to eradicate slavery and human trafficking from their supply chains; instead the aim of the legislation is to educate consumers about the presence of human trafficking and slavery in the supply chains of large companies in particular, thereby enabling consumers to make more ethical purchasing decisions and encouraging businesses to ensure that their supply chains are free of human trafficking and slavery.²⁶⁷

The California Act is weakened by the lack of effective sanctions for contravention of the reporting requirements, or other regulatory incentives or penalties.²⁶⁸ It is noted that there has also been a wide variability in the quality of the responses provided by organisations to date under the California Act. However, in 2015 the California Attorney General’s Office created a resource to provide compliance guidance to businesses,²⁶⁹ and issued letters to over 1700 eligible organisations, requiring them to provide notice as to whether they had complied with the reporting obligations under the California Act.²⁷⁰ It is hoped that these actions demonstrate an intention to enforce compliance with the scheme moving forward.

17 DUE DILIGENCE IN SUPPLY CHAINS

Anti-Slavery Australia recommends that the Australian government implement a legislative scheme which incorporates elements of the United Kingdom’s Transparency in Supply Chains Provision. We recommend that an Australian version of this framework be strengthened to provide a more effective framework for transparency.

Anti-Slavery Australia has found that the following international frameworks provide the most rigorous standards to prevent human trafficking and slavery in supply chains.

17.1 United Nations Guiding Principles

In 2011, the United Nations Human Rights Council endorsed the *Guiding Principles on Business and Human Rights* (“**Guiding Principles**”) which recognise that businesses “can have an impact on virtually the entire spectrum of human rights”. The Guiding Principles provide a non-prescriptive framework for states and businesses to prevent human rights abuses and contribute to “socially sustainable globalization”.

The concept of ‘human rights due diligence’ was developed in the Guiding Principles. Guiding Principle 17 defines the concept of ‘human rights due diligence’, as a process which involves:

²⁶⁶ *California Transparency in Supply Chains Act* §3, 556 Cal Civil Code §1714.43(a)(1) (West, 2010).

²⁶⁷ Kamala D. Harris, ‘The California Transparency in Supply Chains Act A Resource Guide’ (California Department of Justice, 2015) 1.

²⁶⁸ Ashley Feasley, ‘Deploying Disclosure Laws to Eliminate Forced Labour: Supply Chain Transparency Efforts of Brazil and the United States of America’ (2015) 5 *Anti-Trafficking Review* 30, 45-46.

²⁶⁹ Harris, above n 267.

²⁷⁰ Feasley, above n 269, 46.

“Assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses and communicating how impacts are addressed.”²⁷¹

While the Guiding Principles are broadly applicable to business and human rights, Guiding Principles 13 and 16 are also specifically relevant to human rights due diligence in supply chains. Guiding Principle 13 requires businesses to avoid causing adverse human rights impacts, and prevent adverse human rights impacts that are directly linked to their operations or in their supply chains.²⁷² Guiding Principle 16 encourages businesses to publicly issue a ‘statement of policy’, which is approved the most senior level of the business and informed by internal or external expertise. The statement should specify the business’ human rights expectations of personnel, partners and other parties linked through its supply chain. The statement should also reflect embedded policy and procedures throughout the business.²⁷³

The Guiding Principles provide a flexible framework for businesses and states to prevent human rights abuses. Human trafficking and slavery are often caused by, or occur alongside other human rights abuses, such as extreme poverty and violence against women. The preventative framework of the Guiding Principles is a valuable tool in the elimination of the causes and conditions of human trafficking and slavery.

17.2 European Union Directive on disclosure of non-financial and diversity information

The European Union *Directive on disclosure of non-financial and diversity information by certain large companies* (“**the Directive**”) was adopted in September 2014.²⁷⁴ Under the Directive, member states are required to enact legislation which obliges businesses based in the European Union with 500 or more employees to report annually on non-financial performance relating to environmental, social matters, respect for human rights, anti-corruption, and bribery matters.²⁷⁵ Such legislation, regulations and administrative provisions necessary to comply with the Directive must have entered into force by 6 December 2016.²⁷⁶ The reporting obligations are to apply to all relevant undertakings for the financial year beginning 1 January 2017, or commencing during the calendar year 2017.²⁷⁷

The Directive leaves considerable scope for flexibility in the disclosures made by organisations to facilitate relevant and useful disclosure.²⁷⁸ The European Commission was also directed to produce non-binding guidelines on methodology for reporting non-financial information;²⁷⁹ however publication of these guidelines has been rescheduled for mid-

²⁷¹ Human Rights Council, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie*, UN GAOR, 70th sess, Agenda Item 3, UN Doc A/HRC/17/31 (21 March 2011) annex (‘*Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*’) 16.

²⁷² *Ibid.*, 14.

²⁷³ *Ibid.*, 15.

²⁷⁴ Council Directive 2014/95/EU of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, OJ L 330/1.

²⁷⁵ *Ibid.*, art 1.

²⁷⁶ *Ibid.*, art 4(1).

²⁷⁷ *Ibid.*

²⁷⁸ *Ibid.* art 2.

²⁷⁹ *Ibid.*

2017.²⁸⁰ It remains to be seen whether the Directive will provide an effective framework to prevent human rights abuses in global supply chains.

17.3 Dodd–Frank Wall Street Reform and Consumer Protection Act

In the United States of America, the *Dodd–Frank Wall Street Reform and Consumer Protection Act* (“**Dodd-Frank Act**”) introduced reporting requirements on organisations that use certain ‘conflict minerals’.²⁸¹ Section 1502 of the Dodd-Frank Act was enacted to hinder the exploitation of and trade in conflict minerals which contribute to the financing of ongoing conflicts in the eastern Democratic Republic of Congo, which are characterized by extreme violence, particularly sexual and gender-based violence.²⁸²

Section 1502 applies to any organisation that reports to the Securities and Exchange Commission (“**SEC**”), regardless of its size²⁸³ and which manufactures products that rely on ‘conflict minerals’ for functionality or production.²⁸⁴ The organisation must report to the SEC regarding the sourcing of minerals originating in the Democratic Republic of Congo, or bordering countries. If the minerals are found to originate in that area, the organisation must submit a report on due diligence measures taken to determine whether or not the minerals directly or indirectly finance armed groups in the Democratic Republic of Congo or an adjoining country. The due diligence measures must meet internationally recognised standards such as the Organisation for Economic Co-operation and Development *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*.²⁸⁵

However, following the introduction of the requirements under the Dodd-Frank Act, the requirement that organisations report to the SEC and disclose on their website that their products “have not been found to be DRC conflict free” was found to be unconstitutional compelled speech.²⁸⁶ As such, the SEC has stated that no enforcement action will be taken in relation to the due diligence requirements until the regulatory uncertainties are resolved.²⁸⁷ Subsequently, further legislation has been proposed which if passed, will repeal the Dodd-Frank Act, including the conflict minerals due diligence requirements.²⁸⁸

17.4 Netherlands Child Labour Due Diligence Law

In February 2017, the House of Representatives in the Netherlands approved the *Child Labour Due Diligence Law*.²⁸⁹ The bill is currently before the Upper House of the Parliament of the Netherlands. If passed, this bill will require organisations conducting business in the Netherlands to investigate supply chains to determine whether any child labour exists in such supply chains.

²⁸⁰ Directorate-General for Financial Stability, Financial Services and Capital Markets Union, *Non-Financial Reporting* (6 December 2016) European Commission <http://ec.europa.eu/finance/company-reporting/non-financial_reporting/index_en.htm#news>.

²⁸¹ *Dodd–Frank Wall Street Reform and Consumer Protection Act*, Pub.L. 111–203, §1502 (2010) (Herein after *Dodd-Frank Act* § 1502).

²⁸² *Ibid*, §1502(a).

²⁸³ Pursuant to *Securities and Exchange Act* 15 USC § 78a (1934) §13.

²⁸⁴ *Dodd-Frank Act* § 1502 (2)(B).

²⁸⁵ *Conflict Minerals*, 77 Fed Reg 56274, 56281-82.

²⁸⁶ *National Association of Manufacturers et al v SEC et al*, No. 13-CF-000635 (D.D.C, 2017)

²⁸⁷ U.S. Securities and Exchange Commission, ‘Statement of Acting Chairman Piwowar on the Court of Appeals Decision on the Conflict Minerals Rule’ (Public Statement, 7 April 2017) .

²⁸⁸ Financial CHOICE Act of 2016, HR Res 5983, 114th Congress (2016) § 455.

²⁸⁹ Wet zorgplicht kinderarbeid, No. 34 506 (2016-2017) [Child Labour Due Diligence Law].

Child Labour Due Diligence Law will apply to large and medium sized businesses.²⁹⁰ both those registered in the Netherlands as well as those selling products in the Netherlands.²⁹¹ Under the provisions, organisations must publish a statement that they have undertaken due diligence regarding child labour in their operations or supply chains.²⁹² If child labour is found in the supply chain, the organisation is required to develop a plan of action and make a declaration to that effect.²⁹³ These statements must be provided to a ‘supervisory body’ within the government, to be published online.²⁹⁴ The supervisory body has jurisdiction to receive complaints by effected individuals regarding non-compliance under this law.

Failure to comply with these provisions would result in an administrative fine of up to €4100.²⁹⁵ If an organisation is fined and has not complied with their obligations under the law within 5 years, the directors of the organisation may be guilty of an offence and would be liable to be imprisoned for six months.²⁹⁶

17.5 France Corporate Duty of Vigilance in Supply Chains Law

In 2017, the National Assembly of France adopted the *Corporate Duty of Vigilance Law*. The law applies to organisations established in France which are either headquartered in France and at least 5000 employees, or headquartered outside of France with at least 10,000 employees.²⁹⁷ It has been speculated that only between 150 and 200 organisations would meet this threshold, but that such organisations generate two-thirds of the international trade of French organisations.²⁹⁸

Organisations that meet the relevant threshold must implement an effective ‘vigilance plan’. This must include measures to provide for risk identification and for the prevention of severe violations of human rights resulting directly or indirectly from the operations of the organisation and its directly controlled subsidiaries, subcontractors and suppliers with whom it has an established commercial relationship.²⁹⁹ The vigilance plan must be disclosed publically and must include:

- a map that identifies, analyses and ranks risks;
- procedures to regularly assess subsidiaries, subcontractors and suppliers with whom the organisation has an established commercial relationship, with regard to the mapped risks;

²⁹⁰ Michael Congiu et al, ‘Dutch and French Legislatures Introduce New Human Rights Due Diligence Reporting Requirements’ (Insight, Littler Mendelson, 13 March 2017) 1.

²⁹¹ Wet zorgplicht kinderarbeid, No. 34 506 (2016-2017) art 4(1).

²⁹² Ibid, art 4.

²⁹³ Ibid, art 5.

²⁹⁴ Ibid, art 4(2).

²⁹⁵ Ibid, art 7.

²⁹⁶ Ibid, art 8.

²⁹⁷ *Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre* [Law n° 2017-399 of 27 March 2017 on the duty of vigilance of parent companies and sponsoring companies] (France) Art 1.

²⁹⁸ Anna Triponel, *Can a Consensus Be Reached on the French Duty of Care Bill?* (22 March 2016) Business and Human Rights Centre <https://business-humanrights.org/en/can-a-consensus-be-reached-on-the-french-duty-of-care-bill> citing *Interview de Dominique Potier, rapporteur du projet de loi sur le Devoir de vigilance des entreprises donneuses d'ordre* [Interview with Dominique Potier, rapporteur of the draft law on the Duty of vigilance of companies giving order] (21 October 2015) Centre de ressources et d'information sur l'intelligence économique et stratégique <<https://portail-ie.fr/analysis/1267/interview-de-dominique-potier-rapporteur-du-projet-de-loi-sur-le-devoir-de-vigilance-des-entreprises-donneuses-dordre>>

²⁹⁹ *Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*, above n 299.

- appropriate actions to mitigate risks or prevent serious violations;
- an alert mechanism for potential or actual risks; and
- a mechanism to monitor and assess the effectiveness of these measures.

If an organisation does not comply with its duty of vigilance obligations, any person with a legitimate interest can file a complaint within the competent jurisdiction; and if an organisation does not meet its obligations within three months of receiving a formal notice, the competent court may direct the organisation to comply under financial penalty.³⁰⁰

In the event that harm is caused by a failure to comply with the above duties, article 2 of the legislation provides that the perpetrator will be liable to compensate claimants for the harm caused by their negligence.³⁰¹

It should also be noted that the French Parliament had originally included a provision for courts to impose a punitive fine of up to €10 million for failure to comply with the duty of vigilance³⁰² (increased to €30 million in the event that such failure led to harm);³⁰³ however, it was subsequently found by the Constitutional Council that such penalty provisions were unconstitutional, as they lacked clarity and specificity to justify the imposition of a penalty.³⁰⁴ As such, these provisions were not enacted into law.

18 AN AUSTRALIAN TRANSPARENCY IN SUPPLY CHAINS LEGISLATIVE FRAMEWORK

It is clear that businesses and organisations in Australia may be directly or indirectly engaging in, or facilitating human trafficking and slavery, both in Australia and abroad.³⁰⁵ Businesses and organisations may be unaware of the presence or extent of criminal exploitation in their supply chains. It is therefore essential that this veil of ignorance is lifted through the enactment of a strong regulatory framework that mandates extensive reporting on supply chain mapping procedures and risk disclosure.

Anti-Slavery Australia recommends that the Australian government's response to human trafficking and slavery would be significantly enhanced through the implementation of a legislative scheme which incorporates elements of the Transparency in Supply Chains provision. However, Anti-Slavery Australia recommends that an Australian version of this scheme be strengthened to provide a more effective framework for transparency.

18.1 Fiduciary duty and director liability

Directors and other officers of corporations are currently liable in Australia for breaches of fiduciary duty. This has traditionally been seen as an obstacle to socially responsible or

³⁰⁰ Ibid.

³⁰¹ Ibid, art 2.

³⁰² Ibid, art 1.

³⁰³ Ibid, art 2.

³⁰⁴ Conseil Constitutionnel, *Décision n° 2017-750 DC du 23 mars 2017* [Decision No. 2017-750 DC of 23 March 2017] (France) at [12].

³⁰⁵ See eg, Outsourced to North Korea; How a foreign supply chain went through China to Pyongyang', *The Wall Street Journal* (online) 23 February 2016 <<https://www.wsj.com/articles/outsourced-to-north-korea-1456185838>>; Australian Broadcasting Corporation, 'Slaving Away: The dirty secrets behind Australia's fresh food', *Four Corners*, 4 May 2015 (Caro Meldrum-Hanna and Ali Russell) <<http://www.abc.net.au/4corners/stories/2015/05/04/4227055.htm#transcript>>.

human rights based corporate governance.³⁰⁶ However, there is a growing body of jurisprudence and scholarship indicating that directors' duties include norms of social responsibility and norms of business and human rights.³⁰⁷

Directors and other officers of corporations are also subject to various directors' duties pursuant to Chapter 2D of the *Corporations Act 2001* (Cth). For example, directors and other officers are required exercise their powers and discharge their duties with a reasonable degree of diligence and care.³⁰⁸ To determine whether a reasonable degree of care and diligence has been exercised, the foreseeable risk of harm must be balanced against the benefits that could reasonably have been expected to accrue to the corporation from the conduct in question.³⁰⁹ The concept of harm to a corporation should be interpreted as harm to any of the interests of the corporation,³¹⁰ and can include reputational harm.

As previously stated, human trafficking and slavery conducted overseas by an Australian corporation is a crime under the Criminal Code.³¹¹ Facilitating or causing human trafficking or slavery has significant reputational consequences for businesses.

Anti-Slavery Australia supports the introduction of mandatory reporting legislation on slavery and human trafficking in supply chains in order to provide clarity and guidance regarding the standards of conduct to be expected of commercial organisations. We submit that such additional reporting legislation would not be inconsistent with current statutory requirements for directors, and could support more responsible corporate governance practices in Australia.

18.2 Threshold and scope of application

The threshold and scope of application of the Transparency in Supply Chains provision will require changes to provide an effective framework for transparency in supply chains in Australia. There have also been a number of gaps identified in the UK Transparency in Supply Chains Provision that should be addressed to ensure that any regulatory framework in Australia is comprehensive and effective.

18.2.1 Which types of organisations will be mandated to report?

The UK Transparency in Supply Chains Provision applies to a commercial organisation that supplies goods and services.³¹² Commercial organisations are defined as a body corporate (wherever incorporated), or a partnership (wherever formed), which carries on a business, or part of a business in the United Kingdom.³¹³

This definition appears to be limited to individual entities, rather than the group or enterprise of which the entity is a part.³¹⁴ As such, wholly owned subsidiaries of corporations in the

³⁰⁶ Paul Redmond, 'Directors' Duties and Corporate Social Responsiveness' (2012) 35(1) *University of New South Wales Law Journal* 317, 325-327.

³⁰⁷ *Ibid*, 320.

³⁰⁸ *Corporations Act 2001* (Cth) s 180 (1).

³⁰⁹ *Visakis v Australian Securities Commission* (1993) 9 WAR 395, [449]-[450].

³¹⁰ *Australian Securities and Investments Commission (ASIC) v Cassimatis (No 8)* [2016] FCA 1023, [480]

³¹¹ *Criminal Code Act 1995* (Cth) ss 271.10, ss 270.3A and 15.2(c)(iii).

³¹² *Modern Slavery Act 2015* (UK) c30, s54 (2),

³¹³ *Ibid*, s54 (12)

³¹⁴ Ryan J. Turner, 'Transnational Supply chain Regulation: Extraterritorial Regulation and Corporate Law's New Frontier' (2016) 17 *Melbourne Journal of International Law* 188, 193.

United Kingdom are outside the scope of the law;³¹⁵ meaning that reporting obligations can be circumvented or limited through business structuring.³¹⁶ For example, if a wholly owned subsidiary was providing services that did not enter the United Kingdom, it would be exempt from reporting requirements.³¹⁷ While government guidance provides that it is “highly recommended” that parent companies report on the actions of their subsidiaries (particularly where the subsidiary is in a “high risk industry or location”) this nonetheless represents a significant gap in the reporting requirements of the UK Modern Slavery Act.³¹⁸

In order to provide for the complexities of corporate group structures, in an Australian context, reporting requirements on transparency in supply chains should extend to an enterprise as a whole.³¹⁹ We submit that reporting requirements should be extended to each entity that is owned or controlled by the parent company that satisfies the statutory threshold. The definition of subsidiary body could be drawn from section 46 of the *Corporations Act 2001* (Cth).

Anti-Slavery Australia also recommends that an Australian transparency in supply chain framework should apply to all large organisations of a non-commercial nature, including public bodies. This would also include universities and other organisations that engage in extensive procurement.

18.2.2 What size of organisations will be mandated to report?

The UK Modern Slavery Act sets the threshold for a commercial organisation at £36 million.³²⁰ Anti-Slavery Australia recommends an approach that does not unduly burden businesses with limited resources, but addresses the likelihood of slavery and human trafficking in supply chains. This threshold should consider both annual turnover and number of employees in Australia and worldwide.

The *Corporations Act 2001* (Cth) distinguishes between large proprietary companies (being those which satisfy two of the following three criteria (including in their controlled entities): a consolidated revenue of \$25 million or more; consolidated gross assets of \$12.5 million or more; and / or 50 or more employees)³²¹ and small proprietary companies.

This standard may be used to guide the size-related threshold over which an organisation is mandated to report under incoming transparency in supply chains provisions. Organisations of this size are likely to have international, multi-tiered supply chains, which potentially contain or contribute to human trafficking and slavery. As supplier or contracting and subcontracting chains grow and insofar as multiple tiers of such subcontracting exist, so too does the risk of human trafficking and slavery in that supply chain.³²²

However, Australian transparency in supply chains legislation should include transitional provisions to progressively introduce reporting requirements for small and medium sized

³¹⁵ Sharan Burrow et al, ‘Closing the Loopholes- How legislators can build on the UK Modern Slavery Act’ (Report, International Trade Union Confederation, 2 February 2017) 6.

³¹⁶ Ryan J. Turner, above n 314, 194.

³¹⁷ Sharan Burrow et al, above n 315.

³¹⁸ Home Office (United Kingdom), above n 54, [3.13].

³¹⁹ Ryan J. Turner, above n 314, 194.

³²⁰ *Modern Slavery Act 2015 (Transparency in Supply Chains) Regulations 2015* (UK) s2.

³²¹ *Corporations Act 2001* (Cth) s45A(3).

³²² ‘Beyond Compliance: Effective reporting under the Modern Slavery Act’ (Guidance, CORE Coalition, February 2016) 9.

enterprises (“**SMEs**”). SMEs may also have supply chains that conceal human trafficking and slavery. Risk factors that increase the risk of human trafficking and slavery in the supply chains of SMEs in particular include:

- reliance on temporary, seasonal or agency labour;
- unskilled or low-skilled workforces; and
- supply chains that extend to countries that lack government regulation of labour standards, or the presence of cheap labour.³²³

SMEs in certain high risk industries are more likely to have human trafficking or slavery in their supply chains. As noted previously in this submission, the AFP in 2015-2016 received an increasing number of slavery and human trafficking referrals relating to the agriculture, construction and hospitality industries,³²⁴ and globally it has been found that forced labour is most commonly found in the agriculture, construction, domestic work and manufacturing industries.³²⁵ As many SMEs operate in these industries, it is important that the regulatory response is commensurate with the higher risk of human trafficking and slavery in the supply chains of both large organisations and SMEs. However, SMEs generally do not have the same resources as large organisations, despite sharing many of the same risk factors in such industries.

Anti-Slavery Australia recommends that transparency in supply chain legislation be developed in Australia which introduces reporting obligations for large organisations, including public bodies. This legislation should include transitional provisions to progressively introduce reporting requirements for SMEs. We recommend that during this transitional period the Australian government engage in tripartite consultation with SMEs and civil society to develop supply chain reporting mechanisms that are appropriate for SMEs and build the expertise and capacity of SMEs to secure their supply chains against human trafficking and slavery.

18.3 Reporting requirements

As stated previously in this submission, under the UK Modern Slavery Act Transparency in Supply Chains Provision commercial organisations are required to publish an annual Annual Statement which outlines the steps taken to ensure that human trafficking and slavery are not taking place anywhere in an organisation’s supply chains or any part of its business.³²⁶ If no such steps are taken, commercial organisations are required to disclose their inaction.³²⁷

³²³ ‘Trafficking Persons Report’ (United States Department of State, July 2015) 13-14.

³²⁴ ‘Trafficking In Persons: The Australian Government Response 1 July 2015 – 30 June 2016’ above n 12, 20.

³²⁵ International Labour Office, Special Action Programme to Combat Forced Labour, ‘ILO Global Estimates of Forced Labour: Results and Methodology’ (International Labour Organisation, 2012) 2.

³²⁶ *Modern Slavery Act 2015* (UK) c 30, s 54 (4)(a).

³²⁷ *Modern Slavery Act 2015* (UK) c 30, s 54 (4)(b).

18.3.1 A 'slavery and human trafficking statement' in Australia

The UK Modern Slavery Act Transparency in Supply Chains Provision contains both mandatory and discretionary reporting sections. As stated above, the mandatory reporting requirements are minimal.³²⁸ The UK Parliamentary Joint Committee on Human Rights, in their report *Human Rights and Business 2017: Promoting responsibility and ensuring accountability*, attributed the large discrepancy in the quality of Annual Statements to the weak, non-prescriptive requirements of the legislation and insufficient government guidance.³²⁹ Most Annual Statements submitted to date reveal very little about the steps being taken to combat human trafficking and slavery.³³⁰ As reported by the UK Parliamentary Joint Committee on Human Rights, organisations are not disclosing their adverse human rights risks and steps taken to manage those risks.³³¹

Anti-Slavery Australia recommends that comparable Australian transparency in supply chain legislation should require organisations to prepare and submit an annual 'Slavery and Human Trafficking statement'. Such a statement should contain not only the mandatory reporting provisions under the current UK Provision,³³² but should go further, and be mandated to include the disclosure of information under the following categories (which correspond to the discretionary reporting sections of the UK Modern Slavery Act):³³³

- (a) the organisation's structure, its business and its supply chains;
- (b) its policies in relation to slavery and human trafficking;
- (c) its due diligence processes including identification, prevention and mitigation, in relation to slavery and human trafficking in its business and supply chains;
- (d) the parts of its business and supply chains where there is a risk of slavery and human trafficking taking place, and the steps it has taken to assess and manage that risk;
- (e) its effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains, measured against such performance indicators as it considers appropriate; and
- (f) any instances of human trafficking and slavery that have been identified in its supply chain and the step taken in response; and
- (g) the training about slavery and human trafficking available to its staff.

Under such a framework, it would not be mandatory for organisations to implement due diligence procedures. While due diligence procedures should be encouraged as best practice, it is noted that organisations may have difficulty implementing such procedures in situations where the organisation has a low degree of control over its suppliers, face high switching costs or inability provide tailored incentives to motive supplier cooperation.³³⁴ The reporting framework proposed above would ensure that elements of due diligence;

³²⁸ See section 4.2.2 of this Submission.

³²⁹ Joint Committee on Human Rights, Parliament of the United Kingdom, *Human Rights and Business 2017: Promoting responsibility and ensuring accountability* (5 April 2017) 38 [94].

³³⁰ Ibid, 38 [95].

³³¹ Ibid, 38 [94].

³³² *Modern Slavery Act 2015* (UK) c 30, s 54(4), s54(5) and s54(6).

³³³ *Modern Slavery Act 2015* (UK) s54(5).

³³⁴ Galit A. Sarfaty, 'Shining light on global supply chains' 56(2) *Harvard International Law Journal* 419, 433.

identification, prevention, reporting and mitigation are implemented without placing an unnecessarily onerous burden on organisations.

Organisations would however, be required to provide supply chain mapping and identify areas of their supply chains with a high risk of human trafficking or slavery. This would ensure that an Australian transparency in supply chains provision provides true transparency.

Anti-Slavery Australia also recommends that Australian Transparency in Supply Chains Reporting legislation should be accompanied by clear government guidance for organisations to ensure consistent and clear reporting.

18.3.2 A central repository for reports

The UK Modern Slavery Act requires that commercial organisations publish their Annual Statement in a prominent place on their website,³³⁵ or if they do not have a website, the organisation must provide a copy of the statement to anyone who makes a written request for one.³³⁶ There is no government administrated central repository for statements made under the UK Modern Slavery Act. This was identified as a shortcoming in the UK Parliamentary Joint Committee on Human Rights report *Human Rights and Business 2017: Promoting responsibility and ensuring accountability*.³³⁷

As stated previously in this submission, the first repository of Annual Statements was created by the non-government organisation Business and Human Rights Resource Centre.³³⁸ However, other similar initiatives have emerged such as the TISC Report, created by the Semantrica Ltd.

Government guidance on the Transparency in Supply Chains Provision states that the purpose of the provision is “to create a race to the top by encouraging businesses to be transparent about what they are doing, thus increasing competition to drive up standards.”³³⁹ However, the UK Joint Committee on Human Rights has noted that this purpose is undermined by the lack of certainty concerning which organisations are required to report, and the absence of a central repository of Annual Statements.³⁴⁰ Sarah Newton MP, Parliamentary Under-Secretary of State at the Home Office gave evidence to the UK Parliamentary Joint Committee on Human Rights that the government would be doing further work concerning a central list of reporting organisations and Statements, to be announced at the end of 2017.³⁴¹

There is a clear need for a central repository, which contains both a list of organisations that are required to report, and their Annual Statements. The government is best placed to administer this resource, in consultation with business and civil society. Administration by a

³³⁵ *Modern Slavery Act 2015* (UK) c 30, s 54(7).

³³⁶ *Ibid*, s54(8).

³³⁷ Joint Committee on Human Rights, above n 329, 39 [98].

³³⁸ *UK Modern Slavery Act & Registry*, Business and Human Rights Resource Centre <<https://business-humanrights.org/en/uk-modern-slavery-act-registry>>.

³³⁹ Home Office (United Kingdom), ‘Slavery and human trafficking in supply chains: guidance for businesses’ (Statutory guidance, 29 October 2015) 5 [2.5].

³⁴⁰ Joint Committee on Human Rights, above n 329, 39 [98]-[99].

³⁴¹ *Ibid*, 39 [100].

government agency would ensure that the repository is freely available and centrally located.

As such, in the Australian context, Anti-Slavery Australia recommends that the Australian Securities and Investments Commission or an Anti-Slavery Ombudsman³⁴² should have responsibility for managing the repository of slavery and human trafficking statements.

18.3.3 Complaints and grievance pathways

Anti-Slavery Australia recommends that an Australian transparency in supply chains framework provide for grievance pathways whereby a complainant can, in good faith, notify a relevant body that an organisation has not complied with its reporting obligations, as contained in other international frameworks.³⁴³

Such a provision would not only ensure appropriate complaints and grievance pathways, but would relieve the government of some of the burden of maintaining regular surveillance of 'Slavery and Human Trafficking Statements'.

18.3.4 A role of an Anti-Slavery Ombudsman

We suggest that a grievance pathway for good faith complainants could take the form of an individual complaints-driven mechanism, overseen by the Anti-Slavery Ombudsman. As discussed previously in this submission, Anti-Slavery Australia recommends the creation of an independent Anti-Slavery Ombudsman in Australia, to be modelled on the Independent Anti-Slavery Commissioner established under the UK Modern Slavery Act in the United Kingdom. An Anti-Slavery Ombudsman could be empowered to issue a notice to non-compliant organisations, and instigate civil penalties in cases of continued non-cooperation or non-compliance.

As provided in respect of the Commonwealth Ombudsman, the Anti-Slavery Ombudsman should have discretion not to investigate where complaints are "frivolous, vexatious or not made in good faith".³⁴⁴

18.3.5 Penalties for non-compliance

The UK Transparency in Supply Chains provision provides that the Secretary of State may bring civil proceedings for an injunction or, in Scotland for specific performance against a commercial organisation that does not fulfil its reporting requirements.³⁴⁵ An organisation will be in contempt of court if it fails to comply with this injunction, which may be punished with an unlimited fine.³⁴⁶ However, it is noted that in practice, such a fine is unlikely to eventuate, as if proceedings of this kind were instigated, an organisation could simply publish a statement saying that they have taken no steps to combat slavery and human trafficking, thereby satisfying its duties under section 54(4)(b). Effectively, there is no

³⁴² See the section above in this submission on the need for an Anti-Slavery Ombudsman.

³⁴³ Article 1 (II) of the French Corporate Duty of Vigilance Law provides that a person with a legitimate interest can file a complaint in the relevant jurisdiction if a company has not met its due diligence requirements within three months of receiving a formal notice to comply: *Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*, above n 297.

³⁴⁴ *Ombudsman Act 1976* (Cth) s6(1)(b)(i).

³⁴⁵ *Modern Slavery Act 2015* (UK) c 30, s 54(11).

³⁴⁶ Home Office (United Kingdom), 'Slavery and human trafficking in supply chains: guidance for businesses' (Statutory guidance, 29 October 2015) 6 [2.6].

sanction for non-compliance beyond market and reputational consequences under the UK Modern Slavery Act.³⁴⁷

There have been gaps identified in this ‘market disclosure-based’ regulatory approach. Market disclosure is a weak regulatory tool for a variety of reasons, including the fact that consumers may fail to understand the implications of the disclosures, fail to collect the full range of pertinent information, or lack the resources or expertise to fully research issues.

Furthermore, consumers’ decisions may continue shaped by economic considerations, rather than adverse human trafficking or slavery disclosures.³⁴⁸ There is also limited empirical evidence concerning the effect of ethical considerations on consumer behaviour.³⁴⁹ On the contrary, research has shown that only between 3% and 10% of consumers are willing to modify their purchasing decisions based on social or environmental criteria.³⁵⁰

As such, market-regulated disclosure legislation is not appropriate in situations where the risks associate with certain activities is not catastrophic or likely to give rise to grave consequences.³⁵¹ Without an adequate penalty or sanction to deter non-compliance with reporting obligations, there is little incentive for organisations to engage with supply chain transparency. The serious risk of criminal slavery and human trafficking being supported and hidden by complex supply chains necessitates a stronger regulatory framework.

It is also noted that the *Illegal Logging Prohibition Act 2012* (Cth) (“**the ILP Act**”) provides a model of transnational supply chain regulation that could be adapted to an Australian transparency in supply chains framework.

The ILP Act creates a range of offences to impose criminal and civil penalties on importers and domestic processors of raw timber in relation to illegally logged timber products.³⁵² The ILP Act defined illegal logged timber as timber that has been “harvested in contravention of laws in force in the place (whether or not in Australia) where the timber was harvested.”³⁵³ The ILP Act sanctions and prosecutes downstream activity, namely importation and processing, in order to strengthen overseas regulation of the timber industry.³⁵⁴

Accordingly, Anti-Slavery Australia recommends that the following breaches should incur a sanction or penalty under any incoming Australian transparency in supply chain legislation:

- continued failure to issue a statement or issuance of an incomplete statement; and
- making a misleading or fraudulent statement.

³⁴⁷ Ryan J. Turner, above n 314, 194.

³⁴⁸ Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation: Theory, Strategy and Practice* (Oxford University Press, 2011) 120.

³⁴⁹ David Vogel, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility* (Brookings Institution Press, 2005) 48.

³⁵⁰ Ibid.

³⁵¹ Robert Baldwin, Martin Cave and Martin Lodge, above n 348.

³⁵² Explanatory Memoranda, *Illegal Logging Prohibition Bill 2012* (Cth) [4.2].

³⁵³ *Illegal Logging Prohibition Act 2012* (Cth) s7.

³⁵⁴ Ryan J. Turner, above n 314, 207.

Further, Anti-Slavery Australia recommends that the Committee and the Australian government consider whether it is appropriate to impose statutory penalties and / or sanctions for ‘downstream’ breaches of human rights, including instances of human trafficking and slavery offences in international jurisdictions which are known to Australian organisations as present in their supply chains.

19 COMMONWEALTH PROCUREMENT

By broadening the scope of the Transparency in Supply Chains Provision to apply to public bodies, the Australian government has the opportunity to be a global leader in ethical and responsible business practices, and lead the private sector in identifying and responding to human trafficking and slavery in supply chains. For further recommendations regarding Commonwealth procurement please see Anti-Slavery Australia’s submission to the Parliamentary Joint Select Committee on Government Procurement Inquiry into the Commonwealth Procurement Framework.³⁵⁵

The Guiding Principles outline the state’s duty to protect human rights,³⁵⁶ the responsibility of corporations to respect human rights,³⁵⁷ and the necessity that remedies be made available for victims of human rights abuses in the business context.³⁵⁸ The Guiding Principles are also reflected in Australia’s obligations under the Organisation for Economic Co-operation and Development *Guidelines for Multinational Enterprises* (“**OECD Guidelines**”), which notes that the application of the OECD Guidelines extends to entities that may be private, state or mixed.³⁵⁹

The Australian government’s expenditure on procurement accounts for a 33.9 percent of Australia’s gross domestic product.³⁶⁰ The 2015-16 financial year saw Australian government procurement contracts valued at almost \$60 billion.³⁶¹ Of these contracts, 15.2 percent were identified as contracts with entities that were primarily or entirely based outside of Australia.³⁶² The Australian government’s procurement expenditure covers a wide range of industries, including industries that are considered high-risk for human trafficking and slavery in their supply chains. Government procurement contracts for healthcare services, building and construction, and defence and law enforcement equipment and supplies were amongst the top ten of Australian government contracted goods and services in the last financial year.³⁶³

To reflect the prominent role that government procurement plays in an Australian context, an Australian transparency in supply chains provision should be framed broadly to capture large organisations such as universities and public bodies within its operation. This would

³⁵⁵ Anti-Slavery Australia, Submission No 32 to the Parliamentary Joint Select Committee on Government Procurement, *Inquiry into the Commonwealth Procurement Framework*, 4 April 2017.

³⁵⁶ United Nations Human Rights Office of the High Commissioner, *Guiding Principles on Business and Human Rights*, ch 1 <http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf>.

³⁵⁷ Ibid. ch 2.

³⁵⁸ Ibid. ch 3.

³⁵⁹ Organisation for Economic Co-operation and Development, *Guidelines for Multinational Enterprises*, ch 1, 3 <<http://www.oecd.org/corporate/mne/1922428.pdf>>.

³⁶⁰ Organization for Economic Cooperation and Development, *Government at a glance 2015: County Fact Sheet – Australia*, (2015) 3 <<https://www.oecd.org/gov/Australia.pdf>>.

³⁶¹ Department of Finance, *Statistics on Australian Government Procurement Contracts*, (7 December 2016) <<https://www.finance.gov.au/procurement/statistics-on-commonwealth-purchasing-contracts>>.

³⁶² Ibid.

³⁶³ Ibid.

address criticisms of the scope of the UK Modern Slavery Act Transparency in Supply Chains Provision. The *Modern Slavery (Transparency in Supply Chains) Bill 2016-17* (UK), which was brought before the House of Lords before lapsing, proposed to amend the UK Modern Slavery Act so that Annual Statements would have been included in businesses' annual reports and accounts.³⁶⁴ The Bill also proposed an amendment to the *Public Contracts Regulations 2015*, which governs public procurement in the UK, so that contracting authorities would have been required to exclude economic operators where that operator did not produce an Annual Statement. Anti-Slavery Australia recommends that similar provisions be included in an Australian Transparency in Supply Chains Provision, to ensure that large organisations and public bodies are included in the scope of the framework.

The efficacy of these measures would also be enhanced through the implementation of government policies surrounding procurement practices, and training for government procurement officers.

RECOMMENDATIONS

Prevent slavery and human trafficking at any point in the production of goods and services by enacting a legislative framework which requires organisations to make public reports on the nature of their supply chains and the measures they have taken to ensure that there is no human trafficking or slavery in the production of their goods or services. This should include at a minimum:

- a. **Threshold:** Anti-Slavery Australia recommends that Australian Transparency in Supply Chains legislation be developed which introduces reporting obligations for prescribed organisations, including public bodies. This legislation should include transitional provisions to progressively introduce reporting requirements for medium sized enterprises. Threshold should be determined by reference to annual turnover or number of employees. Reporting requirements should be extended to each entity that is owned or controlled by the parent company that satisfies the statutory threshold.
- b. **Reporting requirements:** Organisations should be required to report on the steps that they have taken during each financial year to ensure that human trafficking and slavery are not taking place in their supply chains. Organisations should also be required to disclose:
 - i. The organisation's structure, its business and its supply chains;
 - ii. Its policies in relation to slavery and human trafficking;

³⁶⁴ Modern Slavery (Transparency in Supply Chains) Bill [HL] 2016-17, sch 1 (4).

- iii. Its due diligence processes in relation to slavery and human trafficking in its business and supply chains;
 - iv. The parts of its business and supply chains where there is a risk of slavery and human trafficking taking place, and the steps it has taken to assess and manage that risk;
 - v. Disclose any instances of human trafficking and slavery that have been identified in its supply chain and the steps it has taken in response;
 - vi. Its effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains, measured against such performance indicators as it considers appropriate
 - vii. The training about slavery and human trafficking available to its staff.
- c. **A central repository:** All reports should be published on a central repository to be administered by a government agency such as ASIC or an Anti-Slavery Ombudsman.
- d. **A complaints and grievance pathway:** The framework should provide for a grievance pathway whereby good faith complainants can notify a relevant body, such as an Anti-Slavery Ombudsman, that an organisation has not complied with its reporting obligations.

About Us

Established in 2003, Anti-Slavery Australia is a leading research, policy and legal centre at the University of Technology Sydney with the mission of abolishing human trafficking, slavery and slavery-like practices in Australia. Anti-Slavery Australia provides legal advice and representation to men, women and children who have experienced human trafficking, slavery and slavery like practices in Australia.

Anti-Slavery Australia assists over 85 clients at any one time, who have been trafficked, enslaved or forced to marry in Australia providing access to comprehensive legal advice, representation, referrals and assistance to vulnerable people. Areas of legal advice include advice about immigration, citizenship, human rights, employment law, family law, criminal law, and victims' compensation. Anti-Slavery Australia convenes a number of networks including the Sydney Trafficking Response Network and the NSW Forced Marriage Network, to bring together Government and community-based organisations to share their knowledge, pool resources and coordinate responses.

My Blue Sky is Australia's first website dedicated to forced marriage prevention, information and legal advice. Launched by Anti-Slavery Australia in November 2015 and funded by the Commonwealth Attorney-General's Department, the My Blue Sky website is a portal for information and legal assistance for individuals facing forced marriage and those who support them. Since its launch, the My Blue Sky website has attracted over 24,000 page views and more than 7,000 users accessing the website from 106 countries around the world. The website receives a steady stream of requests for both information and legal support from people facing forced marriage, from people worried about a friend and from service providers, journalists and researchers.

In 2014 Anti-Slavery Australia launched Australia's first ever free, specialist, online training course on slavery, forced labour, forced marriage and human trafficking. This Government funded interactive E-Learning course is aimed at frontline workers, lawyers, students and educators. To date, over 48,453 lessons have been completed through the E-learning course and feedback from users has been consistently positive, with over 90% of surveyed users saying they would recommend the course to a colleague or friend.

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