

28 April 2017

Committee Secretary  
Joint Standing Committee on Foreign Affairs, Defence and Trade  
PO Box 6021  
Parliament House  
Canberra ACT 2600

Dear Committee Secretary,

RE: UNSW LAW SOCIETY SUBMISSION REGARDING THE INQUIRY INTO MODERN  
SLAVERY

The University of New South Wales Law Society welcomes the opportunity to provide a submission to the Joint Standing Committee's inquiry into whether Australia should have legislation similar to the UK in preventing modern slavery and human trafficking.

The UNSW Law Society is the representative body for all students in the UNSW Faculty of Law. Nationally, we are one of the most respected student-run law organisations, attracting sponsorship from prominent national and international firms. Our primary objective is to develop UNSW Law students academically, professionally and personally.

Our enclosed submission reflects the opinions of the students of the UNSW Law Society. We thank you for considering our submission and should you require any further information, please do not hesitate to contact us.

Yours faithfully,



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Policy Submissions Director



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## I. PREAMBLE

The practice of treating fellow human beings as chattel is an entrenched one, spanning the earliest examples of recorded history to present day exploitation, transcending cultural and geographical barriers in a way very few other trades have managed. There are several reasons for which slavery is practised, including prestige, labour, economic gain, sexual exploitation and subjugation. In our contemporary context, however, the balance has shifted towards largely pecuniary ends as slavery adapts to the fluctuating conditions and diversified markets of the modern globalised economy. In spite of the western world's large strides in legislating against slavery in the 19<sup>th</sup> and 20<sup>th</sup> centuries, it is now apparent that the slave trade has become more resilient, and it is therefore necessary for states to adopt responses that reflect the transnational nature of slavery in a world previously defined on principles of territorial sovereignty.

## II. DEVELOPMENT OF MODERN SLAVERY

### *A Legislative Antecedents*

The sun was already setting on mass commercial slavery by the time the Parliament of the United Kingdom passed the *Slavery Abolition Act 1833*, with the *Slave Trade Act 1807* having galvanised British and European resistance to the international slave trade - although the Act itself did not prevent the ownership of slaves within Commonwealth territories. Amendment XIII to the United States Constitution in 1864 also affirmed the illegality of slavery on the other side of the transatlantic. A litany of legal instruments then ensued, with the *General Act of Brussels 1890*<sup>1</sup> encapsulating the culmination of these pan-European efforts to end slavery. This consensus would be extended towards international scope with the League of Nations *Slavery Convention 1926*,<sup>2</sup> to later be reaffirmed by its successor organisation, the United Nations.<sup>3</sup>

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<sup>1</sup> *Convention Relative to the Slave Trade and Importation into Africa of Firearms, Ammunition, and Spiritous Liquors*, signed 2 July 1890, 27 Stat 886 Treaty Series 383 (entered into force August 31 1891).

<sup>2</sup> *The Convention to Suppress the Slave Trade and Slavery*, opened for signature 25 September 1926, [1927] LNTS 1414 (entered into force 9 March 1927).

<sup>3</sup> *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, opened for signature 7 September 1956, 266 UNTS 3 (entered into force 30 April 1957).

## B Contemporary Environment for Slavery

In the post-WWII era, the preponderance of international instruments concerning slavery effectively led to a global recognition of slavery as being unacceptable, alongside other attitudes such as not tolerating piracy. This has led to slavery becoming a product of corruption and lack of enforcement as opposed to an accepted custom, with exceptions such as Mauritania, the last country to ban slavery.<sup>4</sup> Several key characteristics of this new slave trade can be identified:

- Three categories of origin; labour imposed by the state, labour imposed by private agents for sexual exploitation and labour imposed by private agents for labour exploitation<sup>5</sup>  
Three categories of origin; labour imposed by the state, labour imposed by private agents for sexual exploitation and labour imposed by private agents for labour exploitation<sup>6</sup>
- Slavery not being the foundation for industry in the developed world, instead being limited to the developing world
- Scale and scope of operations being far larger and linking to more countries.
- High returns for little investment (in comparison to the old transatlantic slave trade).<sup>7</sup>  
This has effectively made unilateral measures to stop slavery all but impossible as the underground nature of trafficking networks and recruitment schemes hinder domestic law from making any material impact as decentralised operations move in and out of jurisdictions.

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<sup>4</sup> NPR, 'Slavery Lives on in Mauritania', *World Conference Against Racism*, 28 August 2001 (Ivan Watson) <<http://www.npr.org/programs/specials/racism/010828.mauritania.html>> accessed 8 April 2017.

<sup>5</sup> International Labour Office, *Profits and Poverty: The Economics of Forced Labour* (International Labour Organization, 2014) 5.

<sup>6</sup> International Labour Office, *Profits and Poverty: The Economics of Forced Labour* (International Labour Organization, 2014) 5.

<sup>7</sup> Richard Re, 'A Persisting Evil' (2002) 23(4) *Harvard International Review*.

### III. NATURE OF MODERN SLAVERY

The most striking aspect of all forms of modern slavery is its tendency to be hidden from the public eye, or indeed, of most governing authorities. States, enterprises and individuals all rely on slavery to extract economic gain, to the sum of an estimated annual US\$150 billion from 21 million forced labourers in 2012.<sup>8</sup> However, no form of transparency or comprehensiveness in the tracking of modern slavery exists, leaving only estimates to inform governments of the extent of slavery. Nevertheless, what can be readily identified are the types of slavery involved, of which the United States Department of State broadly divides into seven distinct categories.<sup>9</sup>

#### *A Types of Modern Slavery*

##### *1 Sex Trafficking*

Where commercial sex acts occur through coercion or fraud, this constitutes an act of sex trafficking. The ILO estimates the proportion of sex slaves worldwide to be 22% of those in modern slavery (4.5 million people) as of 2012, and the practice is strongly associated with trans-border movements.<sup>10</sup>

##### *2 Child Sex Trafficking*

Where individuals below the age of 18 are recruited or transported for the purposes of commercial sex acts, it is classed as human trafficking regardless of if threats or coercion was employed. In Australia, all jurisdictions prohibit the usage of under-18s in prostitution, and it is a party to UN instruments

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<sup>8</sup> International Labour Office, above n 5, 45.

<sup>9</sup> Office of the Under Secretary for Civilian Security, Democracy, and Human Rights, 'Trafficking in Persons Report' (Report, U.S Department of State, June 2016) 30-31.

<sup>10</sup> International Labour Office, above n 5, 7-8.

expressly banning the practice.<sup>11</sup> Sex trafficking of women and children is specifically covered under a Protocol to the Palermo Convention.<sup>12</sup>

### 3 *Forced Labour*

Where coercive means or deception is employed to compel someone to work. Developed countries host hidden forced labourers in a variety of industries other than prostitution.<sup>13</sup> The UK's *Modern Slavery Act 2015* includes provisions for the reporting of such hidden labour by large organisations,<sup>14</sup> however, less than 20% of published reports from firms addressed key performance indicators on reducing exposure to slave labour in supply chains.<sup>15</sup> In some cases, states have become involved in slavery for profit as well, with North Korea exporting indentured labour to neighbouring countries.<sup>16</sup>

### 4 *Forced Child Labour*

Although children can find legitimate forms of work, it is often the case that they are found in slavery-like situations of slavery. Provisions to prevent forced labour operate alongside prohibitions of child labour in many jurisdictions.

### 5 *Bonded Labour*

Obligations where individuals are forced to work in order to fulfil debts, either their own or that of their ancestors are still commonplace today. Bonded labour is particularly prevalent in developing areas of the world such as South Asia.<sup>17</sup> It persists in regions like India despite heavy and sustained attempts to criminalise it, as enforcement is often lacking due to societal acceptance.<sup>18</sup>

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<sup>11</sup> *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, opened for signature 25 May 2000, 2171 UNTS 227 (entered into force 18 January 2002).

<sup>12</sup> *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, opened for signature 12 December 2000, 2237 UNTS 319 (entered into force 25 December 2003).

<sup>13</sup> Jacqueline Joudo Larsen and Lauren Renshaw, 'People Trafficking in Australia' (Research Paper No 441, Australian Institute of Criminology, June 2012) 1.

<sup>14</sup> *Modern Slavery Act 2015* (UK) c 30, s 54.

<sup>15</sup> Steve Gibbons, 'Reporting on Modern Slavery: The Current State of Disclosure' (Report, Ergon Associates, May 2016) 4.

<sup>16</sup> Choe Sang-Hun, 'North Korea Exports Forced Labourers for Profit, Rights Groups Say', *The New York Times* (New York), 20 February 2015, 8.

<sup>17</sup> Siddharth Kara, *Bonded Labor: Tackling the System of Slavery in South Asia* (Columbia University Press, 2012) 1.

<sup>18</sup> *Ibid* 185.

### 6 *Domestic Servitude*

Domestic servitude entails work in a private residence, making it difficult for authorities to gain access to private residences. Workers will often face harassment, violence and abuse behind closed doors; in places such as East Africa, children are abducted for domestic work.<sup>19</sup>

### 7 *Child Soldiers*

This involves the unlawful recruitment or use of children through coercive or fraudulent measures for combatant roles or military labour. This occurs not only with non-state actors, but also state bodies as well, in the case of Afghanistan's law enforcement and security services, and Iraq's popular mobilisation forces.<sup>20</sup>

It is abundantly clear that the externalities of a globalised, and hence more interconnected world are a double-edged sword. While allowing great advances in trade, communication and innovation, it has also enabled trafficking of humans to become a profitable and widely practised enterprise even in an age where stern prohibitions of such practices ostensibly exist. The diversity of slavery types able to be readily identified today also suggests that broad, multilateral action cannot succeed on its own; rather, domestic policies and enforcement must be coupled with a global recognition of the abhorrent nature of slavery. A policy such as the United Kingdom's *Modern Slavery Act 2015* is but one example of constructive action towards achieving this framework to eradicate human trafficking and coerced labour.

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<sup>19</sup> United Nations Office on Drugs and Crime, 'Human Trafficking: An Overview' (Report, UN. GIFT, 2008) 10.

<sup>20</sup> *Children and Armed Conflict – Report of the Secretary-General*, 70<sup>th</sup> sess., Agenda Item 68, UN Doc A/70/836–S/2016/360 (20 April 2016).

## IV. IMPLICATIONS OF A MODERN SLAVERY ACT ON AUSTRALIA'S VISA REGIME

### *A Overview*

A Federal MSA in Australia would interact with the Australian Government's visa regime as a result of the trafficking and enslavement of visa-holders in Australia. As a snapshot, the *National Action Plan to Combat Trafficking and Slavery 2015-2019* described human trafficking and slavery as a "serious crime" for which the Australian Government holds "primary accountability and responsibility" to address<sup>21</sup>. Although the Department of the Attorney-General notes on its website that "there is little reliable data about the extent and nature of human trafficking",<sup>22</sup> in 2012 the Australian Institute of Criminology still reported 305 investigations into potential instances of trafficking-related offences by the AFP's Transnational Sexual Exploitation and Trafficking Teams. Statistically, 70% of all victim support cases concerned individuals from South East Asia, having largely entered Australia on Student Visas (subclass 500).<sup>23</sup> There is general acknowledgement in the *National Action Plan* that human trafficking and slavery of foreign workers and visa-holders is of greater prevalence than what the current statistics show.<sup>24</sup>

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<sup>21</sup> Attorney General's Department, *National Action Plan to Combat Human Trafficking and Slavery 2015-2019* (at 26 November 2014) 12.

<sup>22</sup> Attorney General's Department, *Human Trafficking* <<https://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Pages/default.aspx>>.

<sup>23</sup> Jacqueline Joudo Larsen, Lauren Renshaw, 'People Trafficking in Australia' [2012] 441 *Trends & Issues in Crime and Criminal Justice* 3.

<sup>24</sup> Attorney General's Department, above n 1, 13.



*B Two Key Implications of a MSA with Regard to Responsible Government in Australia*

A contrary argument would suggest that Australia already has existing slavery laws in place that criminalise its undertaking. While this is true, a MSA would allow government agencies to interact with one united legislative source rather than the five that currently exist.<sup>25</sup> As well as being a more effective legislative framework that encourages interaction and cooperation between agencies, a simplification of the existing scattered framework improves the accessibility of legal protection for victims available under the law. This is of immense importance given the nature of human trafficking in Australia, where victims have been subjected by coercive means to limited freedoms, liberties, and prior interaction with Australian law.

Secondly, the introduction of a MSA would provide an opportunity for the Australian Government to pursue responsible reform of its visa regime. Part of the issue in ascertaining the nature and extent of human trafficking in Australia is the abuse of Student Visa (subclass 500) classifications in the human trafficking trade. This visa is favourable over alternatives such as the Working and Holiday Visa (subclass 462) because of its five-year duration as opposed to twelve months, as well as providing greater ambiguity for employers breaching 20-hour working week conditions.<sup>26</sup> Additionally, the scope of originating countries whose citizens are eligible for subclass 462 visas overlooks the main sources of human trafficking into Australia, meaning victims are essentially further implicated and pushed into incorrectly applying for subclass 500 visas. Another alternative to the subclass 500 visa is the Employer Nomination Scheme (subclass 186) visa, which has also shown glaring issues due to employer-employee imbalances in various public issues at large corporations such as 7-Eleven.<sup>27</sup>

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<sup>25</sup> Ibid 13-15.

<sup>26</sup> Jacqueline Joudo Larsen, Lauren Renshaw, 'People Trafficking in Australia' [2012] 441 *Trends & Issues in Crime and Criminal Justice*, 3.

<sup>27</sup> Adele Ferguson, Sarah Danckert and Klaus Toft, '7-Eleven: A Sweatshop on Every Corner', *The Sydney Morning Herald* (online), 29 August 2015 < <http://www.smh.com.au/business/workplace-relations/7eleven-a-sweatshop-on-every-corner-20150827-gj8vzn.html>>.

The ongoing prevalence of human trafficking enabled by visa classification issues remains one of the main oversights in the UKMSA, and attracted heavy criticism.<sup>28</sup> In endeavouring to learn from international examples, the addition of uniformed anti-modern slavery legislation could easily encourage a streamlining of Australia's visa regime to reduce exploitation of visa-holders, as well as increase the accuracy and reporting of immigration flows in Australia.

The need for reform would align with current government actions regarding the abolition and replacement of 457 visas. The limiting scope of subclass 462 visas and workplace imbalances in the subclass 500 visa negatively affects the capabilities of the Australian legal system to protect freedoms afforded to vulnerable trafficked and enslaved foreign workers in Australia under Commonwealth law. While there is merit in the notion that limiting accessibility to visas prevents the system's abuse, there is a point at which a limited scope leads to legal fictions and absurdities that undermine the purpose of visa classification in the first instance. Resolving classification issues in the Australian visa regime alongside an MSA would greatly improve the capabilities of law enforcement responses in eradicating modern slavery.

### *C Establishing a compassionate circumstances visa*

Currently, the right of a trafficked person to stay in Australia is dependent on whether he or she cooperates with police investigations relating to human trafficking and/or slavery offences. Initially, when the Australian Federal Police (AFP) believes that a person has been trafficked, he or she may be granted the right to stay in Australia for 45 days through the Bridging F Visa.<sup>29</sup> This is regardless of whether the trafficked person is actively assisting with the investigation. However, extensions to 45 day period will be dependent on whether the AFP deems that the trafficked person is assisting and cooperating with the investigation. This extension, enabled by the Bridging F Visa, allows the trafficked person to stay for the duration of the criminal justice process.<sup>30</sup>

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<sup>28</sup> Institute of Chartered Accountants in England and Wales, *Modern Slavery* (20 April 2017) <<http://www.icaew.com/en/technical/legal-and-regulatory/information-law-and-guidance/modern-slavery-act>>.

<sup>30</sup> *Migration Regulations 1994* (Cth) reg 2.20B.

A right to stay permanently and work in Australia then arises if the Minister for Immigration (or delegate) deems that the trafficked person has assisted with the investigation or prosecution and that it is also dangerous for that person to return to his or her home country. This is allowed through the grant of a Referred Stay visa.<sup>31</sup>

The requirement that trafficked persons must decide whether to assist the police or not places victims under great anxiety and fear for their safety. Often, perpetrators of trafficking and slavery threaten violence on the victims to deter them from cooperating with the police.<sup>32</sup> Furthermore, even if trafficked person desires to assist the police, it may be difficult for them to do so. Traffickers control the victim's movements and access to information, such that they may not know the names of the traffickers, their location and other such information. Thus, trafficked persons must live in a constant state of anxiety with the knowledge that they may be returned to their home country if at any time, the AFP deems that they are unhelpful to the investigation, which may place them in significant danger.<sup>33</sup>

We submit that a visa based on compassionate and compelling circumstances be established for victims of trafficking. We submit that standards for the grant of this visa may include an assessment of the risk of harm and the gravity of the harm if the victims were returned to their home country. In this, regard may be had to factors such as their risk of being trafficked again, the extent of knowledge that the traffickers have about the victim and his/her movements, as well as socio-cultural factors, such as discrimination against trafficked persons.

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<sup>31</sup> Ibid reg 2.07AK.

<sup>32</sup> Anti Slavery Australia, Submission No 9 to Joint Committee on Law Enforcement, *Inquiry into Human Trafficking*, 11 October 2016, 25.

<sup>33</sup> Ibid 17.

## V. INADEQUACIES IN THE CURRENT COMPENSATION SCHEME

### *A Conforming with the Palermo Protocol*

Article 6 of the *Palermo Protocol* requires states to ensure “domestic legal systems offer victims of trafficking in persons the possibility of obtaining compensation for damages suffered”. This is in addition to providing general support for victims’ recovery in Article 3,<sup>34</sup> which is essentially covered by the \$150 million *Support for Trafficked People Program* funded by the Department of Social Services,<sup>35</sup> even though the *National Action Plan* allocates compensation schemes under the Attorney-General Portfolio<sup>36</sup>. The Commonwealth Government is the only Parliament in Australia that has not passed a compensation structure for victims of human trafficking.<sup>37</sup> Nevertheless, State and Territory jurisdictions have differing levels of access to compensation, where ‘retribution’ damages are awarded to trafficked persons for similar events can differ up to \$90,000.<sup>38</sup> Additionally, these schemes concern victims of human trafficking rather than modern slavery, of which the latter has a much larger scope. Due to its inconsistency and lack of scope, current Federal and State compensation falls short of a desirable level of conformity with the *Palermo Protocol*.

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<sup>34</sup> *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, opened for signature 12 December 2000, 2237 UNTS 319 (entered into force 25 December 2003).

<sup>35</sup> Department of Social Services, *Support for Trafficked People Program* (11 November 2016) <<https://www.dss.gov.au/women/programs-services/reducing-violence/anti-people-trafficking-strategy/support-for-trafficked-people-program>>.

<sup>36</sup> Attorney General’s Department, *National Action Plan to Combat Human Trafficking and Slavery 2015-2019* (at 26 November 2014).

<sup>37</sup> Jennifer Burn, Fiona McLeod SC, Nicola Knackstredt, ‘Report on Establishing a National Compensation Scheme’ [2016] *Law Council of Australia*, 4.

<sup>38</sup> *Ibid.*

*B How a MSA would improve conformity with the Palermo Protocol*

Paramount amongst arguments against broadening Federal compensation structures for victims of slavery the notion that adding legislation would further exacerbate administrative issues, and its cost to the taxpayer. A Federal MSA in Australia would address these issues. Firstly, Anti-Slavery Australia suggests Federal coordination, with the support of the States and Territories, would reduce inconsistencies and encourage more compliant compensation structures for victims of human trafficking *and* slavery.<sup>39</sup> As noted numerous times, a MSA would allow for the streamlining of existing legal sources in order to have the stated effect. Further evidence of the need for administrative reform and restructure is found in the misallocation of the ‘Support for Trafficked People Program’ in the Social Services Department Portfolio rather than the Attorney General’s. A MSA would hypothetically reduce jurisdictional inconsistencies, and subsequently lay the foundations for expanding compensation structures for victims of human trafficking and slavery. In effect, a MSA would improve Australian compliance with Article 6 of the *Palermo Protocol*.

Secondly, a major criticism of the UKMSA was its lack of penalties for noncompliance.<sup>40</sup> While a MSA should never be seen as a profit device, there is evidence of widespread non-compliance by companies in the UK<sup>41</sup>. As little as 14% of Californian businesses comply with the *Transparency in Supply Chains Act of 2010*<sup>42</sup>, which acts as the platform for the UKMSA. An effective MSA in Australia would learn from these shortfalls and introduce penalties to deter non-compliance. A MSA greatly boosts the scope of enforcement measures by holding companies accountable to their supply chains. Fines for non-compliance ought to be considered in further deterring the continuation of slavery practices in Australia.

<sup>39</sup> Jennifer Burn, Fiona McLeod SC, Nicola Knackstredt, ‘Report on Establishing a National Compensation Scheme’ [2016] *Law Council of Australia*, 4.

<sup>40</sup> Leah Messinger, ‘California Law Aimed at Slowing Human Trafficking and Forced Labor Should do More, Report Says’, *The Guardian* (online), 23 January 2016 <<https://www.theguardian.com/sustainable-business/2016/jan/22/california-anti-slavery-law-development-international-sun-maid-asia-human-trafficking>>.

<sup>41</sup> Arnold Porter, Kaye Scholer, *Scarce Compliance with Section 54 of Modern Slavery Act* (March 27 2017) <<http://www.internationallawoffice.com/Newsletters/White-Collar-Crime/United-Kingdom/Arnold-Porter-Kaye-Scholer-LLP/Scarce-compliance-with-Section-54-of-Modern-Slavery-Act>>.

<sup>42</sup> The California Transparency in Supply Chains Act of 2010, Cal. Civ. Code § 1714.43.

Additionally, compliance with the *Palermo Protocol* does not require Federal compensation structures to be provided in the first-instance; retribution payable to victims imposed upon offenders by courts also qualifies as an option for compensation. Federal compensation structures should be supplementary to retribution payments imposed by courts in order to prevent unnecessary economic pressure and improve compliance with the *Palermo Protocol*.

A MSA is necessary to ensure Australia's State and Federal Governments are compliant with the *Palermo Protocol*. On its own, it is unlikely that a technicality of international compliance is a convincing policy platform. As such, the MSA's broader reach to notions of societal improvement, economic reform through equality of access, and its potential for administrative streamlining and maximising returns for government expenditure are its true benefit to victims as well as taxpayers. While the MSA would certainly bring compliance with the *Palermo Protocol*, it would be glaringly short-sighted to merely view it as a device of conformity as opposed to a genuine device of political, economic and social change for victims of human trafficking and slavery, and by extension Australian society.

### *C The need for a No fault compensation scheme*

Currently, there are limited avenues for victims of trafficking to access compensation. The primary hindrance to effective compensation for trafficked persons is the lack of a corresponding Commonwealth compensatory remedy for the Commonwealth trafficking offences of slavery,<sup>43</sup> sexual servitude,<sup>44</sup> trafficking in persons<sup>45</sup> and people smuggling offences.<sup>46</sup> Therefore, under the current law, even if the Commonwealth trafficking offences are proved, the only remedies available to trafficked persons are through Commonwealth laws that are unrelated to trafficking and slavery offences and various state legislations.

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<sup>43</sup> *Criminal Code Act 1995* (Cth) div 270.3.

<sup>44</sup> *Ibid* div 270.6, 270.7.

<sup>45</sup> *Criminal Code Amendment (Trafficking in Persons Offences) Act 2005* (Cth) div 271.

<sup>46</sup> *Criminal Code Act 1995* (Cth) div 73.

These include compensation awarded through the *Commonwealth Fair Work Act 2009* (Cth)<sup>47</sup> and state legislations, such as *Victims Rights and Support Bill 2013* (NSW).

The current compensatory scheme is insufficient for a three reasons. First, the lack of a national compensatory scheme does not accord with the international best practice as per the *Palermo Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children* which states that 'each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.'<sup>48</sup> Currently, there are no compensatory scheme that is designed specifically take into account the particular nature of trafficking offences.

Second, current legislation which may be able to compensate victims of trafficking are fault-based. Therefore, if the particular offence under the legislation is not proved through its particular tests, victims may be without remedy. For example, in New South Wales, the victim will not be eligible to receive compensation where the victim is deemed to have engaged in behaviour constituting an offence.<sup>49</sup>

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<sup>47</sup> *Commonwealth Fair Work Act 2009* (Cth) s 392.

<sup>48</sup> United Nations Convention against Transnational Organized Crime, GA Res 55/23, UN GAOR, 55th sess., 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 Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime') art 6(6).

<sup>49</sup> *Victims Rights and Support Bill 2013* (NSW) s 25(3).

Third, there are wide discrepancies between state legislations in the amounts of compensation awarded. For example, in New South Wales under the Victims Rights and Support Bill 2013 (NSW), the amount awarded is \$10,000,<sup>50</sup> while in Queensland the amount awarded is \$75,000.<sup>51</sup> Thus, while the same Commonwealth offence of trafficking and slavery may be proved, victims will receive different levels of compensation due to the location that they are in.

Fourth, some legislation, such as under s 21B of the *Crimes Act 1914* (Cth), rely upon the convicted person to compensate the victim with their own financial means. However, the convicted person often does not have financial assets in Australia. Furthermore, they are capable of fleeing the Australian jurisdiction to evade compensation. Consequently, victims may be left without any remedy.

We submit that a Commonwealth compensatory scheme for the Commonwealth trafficking offences should be implemented that is not fault-based. When assessing the amount of compensation, we submit that it may be relevant to have regard to the particular circumstances and damage suffered by the victim, and awarded an appropriate amount that would restore the victim as best is possible to psychological and physical wellbeing.

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<sup>50</sup> Ibid s 12(c).

<sup>51</sup> *Victims of Crime Assistance Act 2009* (QLD) s 38(1); *Criminal Injuries Compensation Act (WA)* s 31(1).



## VI. FORCED MARRIAGE

*The United Nations<sup>52</sup> position on forced marriage is clear – State parties have a duty to bring about the complete abolition of forced marriages, whereby a woman is promised or given in marriage on a payment of money, transferred to another, or inherited by another without her permission<sup>53</sup>.*

*Following the 2012 report to the UN General Assembly on Servile Marriages, Special Rapporteur Gulnara Shahinan opined, “women and girls should not be forced to marry. Women and girls should not be forced to spend their lifetime in slavery. Nothing can justify that<sup>54</sup>.”*

Forced marriages are best understood as a form of gender-based violence; women are disproportionately affected<sup>55</sup>. The *UN Committee on the Elimination of Discrimination Against Women* recognises gender discrimination and violence as both a consequence and cause of forced marriages<sup>56</sup>. Victims may suffer psychological and sexual assault, psychological abuse, false imprisonment and estrangement from family and friends. In most cases, women and girls have been coerced, threatened or deceived into marriage without freely and fully consenting.

Child marriage is a form of forced marriage that exacerbates female oppression. In 2016, UNICEF revealed that incidents of child marriage were increasing in more discrete countries including Brazil, Indonesia and Thailand. Moreover, rates of child marriage tend to increase during periods of humanitarian crises. As such, women and girls in Northern and Eastern Africa are under increasing threat of forced and underage marriage. Nevertheless, India has the highest number of child brides in

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<sup>52</sup> Here-in UN.

<sup>53</sup> Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, signed 7 September 1956, 226 UNTS 3 (entered into force 30 April 1957) article 1(c).

<sup>54</sup> UN News Centre, 'Ahead of international day marking slavery's abolition, UN officials warn of 'new' forms of bondage,' (Media Release, 30 November 2012), <<http://www.un.org/apps/news/printnewsAr.asp?nid=43648>>.

<sup>55</sup> *NHCR Handbook for the Protection of Women and Girls* (2008) 201.

<sup>56</sup> Frances Simmons and Jennifer Burn, 'Without Consent: Forced Marriage n Australia' (2013) 36 *Melbourne University Law Revue* 970, 973.

the world, a figure derived in part by the large and young population. In 2016, UNICEF estimated that 18% of Indian girls were married by the age of 15 and 47% by the age of 18. Even then, rates of child marriage fluctuate within the country. Northern states including Bihar and Rajasthan are notorious for child marriages - in Bihar 69% of girls are married by 18 years. Poor families marry off their daughters to avoid economic burden and reduce dowry payments. However, ingrained patriarchy and cultural practices have long sought to restrict a woman's autonomy and sexuality in India.

Reliable data on the prevalence of forced marriage does not exist. This is because many victims of forced marriages *prefer* to live a life of servitude, fearing retaliation from their husband or community, fear deportation and carry feelings of guilt or shame. Moreover, many forced marriages transpire in regions where women are already oppressed, and may not realise they have rights. In 2016, UNICEF estimated that over 11.25 million girls were forced into marriage before their 18<sup>th</sup> birthdays<sup>57</sup>.

#### *A Australian Legislation*

Increasingly, there is 'overwhelming evidence' that forced marriage is becoming commonplace in Australia<sup>58</sup>. In *Madley v Madley* [2011] FMCAfam 1007, the Federal Magistrates Court placed a 16-year-old applicant on the airport watch list, to prevent her parents from forcing her to marry an unknown person in Lebanon.

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<sup>57</sup> Statistic Brain, *Arranged / Forced Marriage Statistics* (16 August 2016) Statistic Brain < <http://www.statisticbrain.com/arranged-marriage-statistics/> >.

<sup>58</sup> Frances Simmons and Jennifer Burn, 'Without Consent: Forced Marriage in Australia' (2013) 36 *Melbourne University Law Review* 970, 973.

Division 270.7A of the *Criminal Code Act 1995* (Cth) criminalises forced marriage, while Division 270.1A likens servitude offences and forced marriage offences to ‘slavery-like offences.’ This approach was similarly adopted in *R v Tang* [2008] HCA 39, where the High Court found it “unnecessary... and unhelpful to seek to draw boundaries between slavery and cognate concepts such as servitude, peonage, forced labour, or debt bondage<sup>59</sup>.”

The penalty for engaging in and conducting a forced marriage is 7 years imprisonment or 9 years imprisonment for aggravated offences<sup>60</sup>. These offences extend to all persons, regardless of whether the marriage occurred within or outside Australia.

Orders to annul a forced marriage can also be sought under *The Marriage Act 1961* (Cth): The consent of either of the parties is not a real consent<sup>61</sup> and/or either of the parties is not of marriageable age<sup>62</sup>.

Women who have not yet been forced into marriage, but fear the prospect of a forced marriage may also apply for an Apprehended Violence Order (AVO) or an Apprehended Domestic Violence Order (ADVO) through their local court or police.

Consideration should be given to the very definition of servitude in Australia – Division 270.4 of the *Criminal Code Act* – and whether ‘labour and services’ includes domestic work. In a momentous decision, a UK court found Safraz Ahmed guilty of servitude. Since their marriage in 2012, Ahmed had treated his wife like a domestic servant, humiliating and physically assaulting her, as well as coercing her into staying when she threatened to leave him. The UK definition of servitude is derived from Article 4 of the European Human Rights Convention: “an obligation to provide one’s services that is imposed by the use of coercion.” In Australia, servitude is understood to mean a condition where “a

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<sup>59</sup> *R v Tang* [2008] HCA 39 at [29].

<sup>60</sup> If one party is under 18 years.

<sup>61</sup> *Marriage Act 1961* (Cth) s 23.

<sup>62</sup> *Marriage Act 1961* (Cth) s 23(e).

reasonable person in the position of the victim would not consider himself or herself to be free to stop providing labour or services<sup>63</sup>.” If our understanding of ‘labour and services’ was broadened to encompass domestic work – “the production of goods and services by household members that are not sold in the market<sup>64</sup>” – Australia’s servitude laws would be more flexible.

### B *Adopting a UK-based approach*

With a large Asian, Middle-Eastern and African populace, forced marriages in the United Kingdom have increased in recent years. In 2016 alone, the Forced Marriage Unit supported and advised 1,428 individual cases, 612 of which were Pakistani nationals<sup>65</sup>. In most circumstances, at least one party is a UK citizen, while the other is attempting to gain citizenship.

In Australia, the debate around forced marriage has centred on the efficiency of criminalising the act, and whether civil remedies may be more effective. The United Kingdom has enacted civil legislation to counter forced marriage. Under the *Forced Marriage (Civil Protection) Act 2007* (UK), courts can make Forced Marriage Protection Orders (FMPOs) to protect both persons facing the prospect of forced marriage and those already married<sup>66</sup>. Moreover, FMPOs have been accompanied by investment in training, education and community outreach programs<sup>67</sup>. Between 2008-2010, the courts granted 293 FMPO orders, leading many proponents to argue that civil remedies are in itself successful<sup>68</sup>.

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<sup>63</sup> Anti-Slavery Australia, *Hidden From View: Slavery in the home* (2016) Anti-Slavery Australia UTS <<http://www.antislavery.org.au/images/pdf/Publications/2016%20-%20Hidden%20from%20View%20Slavery%20in%20the%20home.pdf>>.

<sup>64</sup> *Ibid.*

<sup>65</sup> Prasun Sonwalkar, ‘UK dealt with 79 forced marriages in India in 2016,’ *Hindustan Times* (online), 10 March 2017 <<http://www.hindustantimes.com/world-news/uk-dealt-with-79-forced-marriages-in-india-in-2016/story-nrt9cad0bVm7ApJTq1UnEK.html>>.

<sup>66</sup> *Forced Marriage (Civil Protection) Act 2007* (UK) c 20, s 63A.

<sup>67</sup> Frances Simmons and Jennifer Burn, ‘Without Consent: Forced Marriage in Australia’ (2013) 36 *Melbourne University Law Review* 970, 997.

<sup>68</sup> Home Affairs Committee (UK), *Forced Marriage*, House of Commons Paper No 880, Session

Yet, there is still pressure to enact subsidiary criminal legislation; the Home Affairs Committee of the House of Commons urged that criminalising forced marriage would ‘send out a very clear and positive message to communities within the UK and internationally<sup>69</sup>’.

### C Other considerations

Both the Australian and UK case have illustrated the significant connection between forced marriages and immigration. As such, any response to forced marriage must endeavour protect persons, regardless of their immigration status<sup>70</sup>. Provisions are in place to protect vulnerable persons. Following the *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1, victims of domestic and family violence may claim refugee status in Australia, when their home countries cannot/will not provide protection. Moreover, victims of trafficking, whether Australian citizens or foreign nationals are eligible for a ‘period of support<sup>71</sup>.’ While non-citizen victims of forced marriage may be eligible for visas under the *Crimes Legislation Amendment (Slavery, Slavery-Like Conditions and People Trafficking) Act 2013* (Cth)<sup>72</sup>.

Simmons and Burn argue that awareness of forced marriages (as a form of slavery) among immigration decision-makers and enforcers should complement any legislation.

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2010–12 (2011) 4 [4], 7 [12].

<sup>69</sup> Ibid, 7 [12].

<sup>70</sup> Frances Simmons and Jennifer Burn, ‘Without Consent: Forced Marriage n Australia’ (2013) 36 *Melbourne University Law Revue* 970, 1000.

<sup>71</sup> Frances Simmons and Jennifer Burn, ‘Without Consent: Forced Marriage n Australia’ (2013) 36 *Melbourne University Law Revue* 970, 1001.

<sup>72</sup> Ibid, 101.

## VII. THE NEED FOR A PRESCRIPTIVE PROCUREMENT POLICY

With annual procurement activities of over \$55 billion<sup>73</sup> the Australian government, like many others are considered mega-consumers or market makers within the global economy, and thus wield significant influence over their suppliers in the private sector.<sup>74</sup> While governments have long used procurement guidelines to influence social and policy outcomes, it is increasingly being used internationally with a focus on weeding out forced labour practices and human trafficking.<sup>75</sup> In 2014 the US prohibited the use of various trafficking-related practices such as the charging of recruitment fees and the confiscation of identity documents by its public contractors and further required its larger contractors to maintain an appropriate anti-trafficking compliance plan addressing their entire supply chain.<sup>76</sup> Similarly the EU requires member states to exclude companies previously convicted of offences relating to human trafficking or forced labour and addressed the inclusion of societal characteristics in the technical specifications of tenders in its 2014 directive.<sup>77</sup> The effective sanctions available such as the termination of existing contracts and disqualification of future ones for non-compliance can provide a significant incentive for contractors to adopt these new requirements.

In contrast current Australian procurement policies and procedures are considerably less prescriptive, Section 6.7 of the Commonwealth Procurement Rules only requiring the exclusion of suppliers whose practices are “dishonest, unethical or unsafe”.<sup>78</sup>

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<sup>73</sup> Department of Finance, *Statistics on Australian Government Procurement Contracts* (7 December 2016) <<https://www.finance.gov.au/procurement/statistics-on-commonwealth-purchasing-contracts/>>

<sup>74</sup> International Corporate Accountability Roundtable and The Danish Institute for Human Rights, *Essential Elements of State National Action Plans for Implementation of the UN Guiding Principles on Business and Human Rights* <[https://www.humanrights.dk/files/media/dokumenter/business/unwg\\_8\\_may\\_workshop\\_icar\\_dihr\\_procurement\\_final.pdf](https://www.humanrights.dk/files/media/dokumenter/business/unwg_8_may_workshop_icar_dihr_procurement_final.pdf)>

<sup>75</sup> World Vision, Submission No 57 to Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry into Slavery, Slavery-like conditions and People Trafficking*, 8 February 2012, 3-4.

<sup>76</sup> Executive Order 13627, *Strengthening Protections Against Trafficking in Persons in Federal Contracts*, 25 September 2012.

<sup>77</sup> *Directive 2014/24/EU of 26 February 2014 on public procurement and repealing Directive 2004/18/EC* [2014] OJ L 94 /65, art.(3).

<sup>78</sup> *Commonwealth Procurement Rules 2017 (Cth)* s 6(7).

No requirements are placed on companies to actually demonstrate that these practices are not taking place in their supply chains or that they even have appropriate mechanisms to monitor and identify them. As a result, the complex task of probing a company's supply chain to identify instances of forced labour is left to the discretion of government procurement officers. Another shortcoming inherent in current legislation is the vague terminology "unethical, dishonest, and unsafe" that is unsupported by any clear criteria or weighting. John Howe argues that this leaves considerable space for labour-related considerations to be subsumed or overlooked by government officers' narrow assessments of best value for money.<sup>79</sup>

Furthermore, Howe argues procurement personnel cannot be expected to devote significant resources to monitoring compliance with labour standards and instead should encourage self-regulatory approaches supplemented by collaboration with non-government and independent organisations.<sup>80</sup> In a field that is currently led by voluntary adoptions of industry and multi-stakeholder standards, experience sharing with private and non-government sectors may avert the repetition of mistakes and save them from having to "re-invent the wheel".<sup>81</sup> For example employee centred, participatory reporting models facilitated by an independent non-government organisations are instances of best practice that have been shown to effectively address the problematic practice of "ticking the boxes" whereby suppliers superficially or fake meeting the imposed standards in order to gain "top down" certifications without instituting real change.<sup>82</sup>

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<sup>79</sup> John Howe, "The regulatory impact of using public procurement to promote better labour standards in corporate supply chains" in Macdonald K and Marshall S (eds), *Fair Trade, Corporate Accountability and beyond* (Ashgate, 2010) 331-349.

<sup>80</sup> Ibid.

<sup>81</sup> International Learning Lab on Public Procurement and Human Rights, *First International Workshop Report* (19 November 2015) <<http://www.hrprocurementlab.org/wp-content/uploads/2016/04/Public-Procurement-Learning-Lab-Workshop-Report-Final-1.pdf>>

<sup>82</sup> John Howe, "The regulatory impact of using public procurement to promote better labour standards in corporate supply chains" in Macdonald K and Marshall S (eds), *Fair Trade, Corporate Accountability and beyond* (Ashgate, 2010) 331-349.

Consequently, a more prescriptive procurement policy that ensures a minimum standard of compliance while also encouraging further self-regulation and collaboration with stakeholder organisations is a promising avenue of legislation change that may be considered alongside UK inspired Modern Slavery Act.