

Inquiry into the Modern Slavery Bill 2018

Submission to the Senate Legal and Constitutional
Affairs Legislation Committee

19 July 2018

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

¹ www.lawyersalliance.com.au.

Introduction

1. The Australian Lawyers Alliance (ALA) welcomes the opportunity to provide input to the Senate Legal and Constitutional Legislation's Committee review of the *Modern Slavery Bill 2018* ('the Bill').
2. In developing this submission the ALA has carefully considered the recommendations of the Joint Standing Committee on Foreign Affairs, Defence and Trade ('the Joint Committee') in the report *Hidden in Plain Sight, An inquiry into establishing a Modern Slavery Act in Australia*, which was tabled in December 2017. The ALA made a submission to that Committee's inquiry, a copy of which is attached to this submission.
3. The ALA is broadly supportive of the general objective of the Bill to require large corporations based or operating in Australia and non-corporate Commonwealth entities to report annually on the risks of modern slavery in their operations and supply chains, and the actions they have undertaken to address those risks. However, the ALA is concerned that the Bill fails to implement some of the most important recommendations of the Joint Committee, and that as a result the Bill as it currently reads will not be effective in addressing some of the abusive labour practices that were considered by the Committee, and which were apparent in the supply chains of some of Australia's biggest retail brands.

The need for an independent Anti-Slavery Commissioner

4. The ALA is concerned that there is no provision within the Bill to establish an independent Anti-Slavery Commission, as recommended by the Joint Committee.
5. The Joint Committee recommended that the Government establish an independent Anti-Slavery Commissioner under the Modern Slavery Act with the following powers and functions:
 - (a) overseeing the implementation of the *National Action Plan to Combat Human Trafficking and Slavery 2015-19* and any future plans to combat modern slavery;
 - (b) monitoring and investigating compliance of government agencies with the *National Action Plan to Combat Human Trafficking and Slavery 2015-19* and existing modern slavery legislation;

- (c) ensuring victims of modern slavery, including children, have access to appropriate support services;
- (d) providing education, guidance and awareness training for government agencies and entities about modern slavery issues;
- (e) engaging with government and entities on the implementation and operation of the proposed supply chain reporting requirement and central repository;
- (f) collecting and analysing data on modern slavery in Australia;
- (g) undertaking legislated reviews of the proposed Modern Slavery Act at least every three years;
- (h) improving coordination between criminal justice agencies in identifying and prosecuting modern slavery cases;
- (i) providing advice on how to improve the proposed Modern Slavery Act, as well as responses to modern slavery, on an ongoing basis;
- (j) providing independent oversight of the response to combatting modern slavery across all sectors, and identifying gaps and solutions;
- (k) working with various agencies, law enforcement bodies, prosecutors and others to increase the identification and reporting of modern slavery crimes, and to bolster the prosecution rates for modern slavery offences;
- (l) raising community awareness of modern slavery; and
- (m) any other related matters.²

6. The Committee noted the positive role that the UK Anti-Slavery Commissioner plays in raising awareness of modern slavery issues and improving compliance with the UK *Modern Slavery Act 2015* ('the UK MSA'). The Committee further noted that an Anti-Slavery Commissioner in

² Joint Standing Committee on Foreign Affairs, Defence and Trade (2017), *Hidden in Plain Sight, An inquiry into establishing a Modern Slavery Act in Australia*, 2017, Commonwealth of Australia, 2017, Recommendation 6, paragraph 4.59.

Australia could have the additional role of requesting and collecting data on modern slavery in Australia.³

7. The Committee was clearly of the view that an independent Anti-Slavery Commissioner could play a vital role in strengthening Australia's response to combatting modern slavery. In particular, the Committee envisaged that the Commissioner would undertake a legislated review of the Modern Slavery Act every three years after its commencement, to assess the effectiveness of the Act, the level of public awareness of modern slavery and the effectiveness of the operation of the proposed supply chain reporting requirements.⁴ Such an independent evaluation of the Act is critical for the long-term effectiveness of the legislation in terms of achieving its aim of strengthening Australia's response to modern slavery and making businesses more transparent about the risks of modern slavery in their supply chains and more accountable in terms of how these risks are being addressed.

The total revenue threshold for mandatory supply chain reporting

8. Under s5(1) of the Bill, a reporting entity is one which has a consolidated revenue of at least \$100 million for the reporting period and is an Australian entity, or carries on business in Australia. Under s13(1) of the Bill, a reporting entity must provide the Minister with a modern slavery statement that describes the risks of modern slavery practices in its operations and supply chains and the actions the reporting entity has taken to assess and address those risks.
9. The ALA considers that the total revenue threshold for mandatory supply chain reporting should be \$50 million, as recommended by the Joint Committee.⁵
10. The Committee was of the opinion that a threshold amount of \$50 million would be the most appropriate to capture large entities operating in Australia and that such a threshold would align with the threshold that exists under the UK MSA (£36 million).⁶

³ Ibid, paragraphs 4.42 and 4.51.

⁴ Ibid, Recommendation 7, paragraph 4.62.

⁵ Ibid, Recommendation 11, paragraph 5.49.

⁶ Ibid, paragraph 5.48.

11. The ALA considers that a threshold amount of \$50 million would provide greater opportunity to influence the supply chains of a much larger group of entities operating in Australia, and make the legislation far more effective in influencing the abusive employment practices of off-shore suppliers. The ALA submits that companies with the a total annual revenue of \$50 million have sufficient capacity to comply with the mandatory supply chain reporting requirement and have significant collective market influence to improve the practices of their global supply chains.

The need for sanctions for companies that fail to report

12. The ALA submits that the legislative provision mandating that companies of a specified revenue threshold must provide the Minister with a modern slavery statement will be effective only if there are strong sanctions and penalties for non-compliance and non-reporting. The absence of any compliance or accountability measures or sanctions for companies that do not adhere to their reporting obligations undermines the aims of the legislation to improve corporate practice in addressing the risks of modern slavery in their supply chains.

13. The Joint Committee recognised that there should be accountability measures for entities above the revenue threshold that fail to report.⁷ The Committee recommended:

‘... that the Australian Government, in mandating supply chain reporting, introduce penalties and compliance measures for entities that fail to report under the

proposed Modern Slavery Act, applying to the second year of reporting onwards.

This should include publishing a list of entities above the threshold that fail to report after the second year of reporting onwards, published alongside the central

repository of statements.’⁸

14. The ALA recommends that the Bill be amended to include penalties and compliance measures for entities that fail to report under s13, in accordance with Recommendation 19 from the Joint Committee. The ALA submits that reference in the Bill to a mandatory reporting

⁷ Ibid, paragraph 5.167.

⁸ Ibid, Recommendation 19, paragraph 5.171.

requirement for entities above the revenue threshold is meaningless in the absence of any consequences for companies that do not comply with the requirement.

Conclusion

15. The ALA strongly supports a Modern Slavery Act for Australia. However, the *Modern Slavery Bill 2018* is deficient in several respects and will fail to achieve the aims of the legislation of obliging companies to be transparent about the risks of modern slavery in their supply chains and the measures they are employing to address those risks. The ALA submits that without stronger oversight and compliance measures, the legislation will not be effective in combatting modern slavery or forced labour practices.

Inquiry into establishing a Modern Slavery Act in Australia

Submission to Joint Standing Committee on
Foreign Affairs, Defence and Trade

3 May 2017



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Who we are

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We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence. While maintaining our plaintiff common law focus, our advocacy has since expanded to criminal and administrative law, in line with our dedication to justice, freedom and rights.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

¹ www.lawyersalliance.com.au.

Introduction

1. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the issues raised by the terms of reference of the Joint Standing Committee on Foreign Affairs, Defence and Trade's inquiry into establishing a Modern Slavery Act. This submission comments on Terms of Reference 4, 5 and 6.
2. Australia is a signatory or party to all of the main international instruments concerning slavery, the most recent of which being the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organised Crime* (2000) (Palermo Protocol).
3. Under that Protocol, Australia is obliged to ensure that victims of trafficking receive assistance and protection, including with their physical, psychological and social recovery and information regarding their legal rights.² Australia should also consider adopting measures that permit victims to remain in Australian territory temporarily or permanently, having consideration to humanitarian and compassionate factors.³
4. While it is common for victims of slavery to be from countries other than Australia, this is not a requirement. Further, a number of non-residents in Australia who experience modern slavery have arrived in Australia without being subjected to trafficking.
5. In line with the terms of reference, in this submission the term 'modern slavery' is used to refer to slavery, forced labour and wage exploitation, involuntary servitude, debt bondage, human trafficking, forced marriage and other slavery-like forms of exploitation. A number of international instruments that seek to regulate this area focus on trafficking. These instruments, however, tend to incorporate modern slavery that has not stemmed from trafficking across international borders. Accordingly, this submission considers reforms across the spectrum of modern slavery and trafficking using the terms 'slavery and trafficking' to refer to crimes on this spectrum.

² Article 6.

³ Article 7.

4. 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

6. As a party to the Palermo Protocol, Australia has made a number of important commitments in relation to modern slavery and trafficking. The definition of trafficking in persons under that Protocol includes 'recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purposes of exploitation'.⁴
7. Measures should be undertaken to 'provide for the physical, psychological and social recovery of victims of trafficking... including in appropriate cases... the provision of (a) Appropriate housing; (b) Counselling and information, in particular as regards to [victims'] legal rights, in a language that the victims... can understand; (c) Medical, psychological and material assistance; and (d) Employment, educational and training opportunities', pursuant to the Protocol.⁵ The special needs of victims should be considered and their physical safety provided for. The legal system should contain 'the possibility of obtaining compensation for damage suffered'.⁶
8. In terms of legal proceedings, the Protocol requires the protection of the privacy and identity of victims as appropriate, and the provision of information and assistance to enable victims' views to be presented and considered as appropriate.⁷

⁴ Article 3(a).

⁵ Article 6.3.

⁶ Article 6.4-6.6.

⁷ Article 6.1-6.2.

United Nations Model Law against Trafficking in Persons (2009)

9. The obligations under the Palermo Protocol have been further elucidated by the UN Office on Drugs and Crime in the *UN Model Law against Trafficking in Persons* (2009) (the Model Law). This document draws on current international law available at the time of drafting and represents a comprehensive approach to eliminating trafficking and providing reparations to victims. It applies to all trafficking, 'whether national or transnational and whether or not connected with organized crime'.⁸ The Model Law is in many ways stronger than the UK legislation, explored below, and provides a useful benchmark by which to assess Australia's current legal framework and how it might be improved.

Offences

10. While the focus is on trafficking, the definition of the offence of trafficking in persons is sufficiently broad to incorporate all forms of modern slavery. The offence of trafficking under the Model Law is defined as including recruiting, transporting, transferring, harbouring or receiving another person 'by means of the threat or use of force or other forms of coercion', including fraud, deception, 'abuse of power or of a position of vulnerability, or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person', for the purposes of exploitation.⁹ 'Exploitation' is defined as including prostitution or other sexual exploitation, forced or coerced labour or services, slavery, servitude and the removal of organs.¹⁰
11. 'Aggravated circumstances' include situations of particular vulnerability, where the offence involves more than one victim, where the crime was committed as a part of the activity of an organised criminal group, where the offender is a spouse of the victim or where the offender is in a position of responsibility or trust in relation to the victim.¹¹
12. Making use of forced labour and services, or profiting from such services or labour in the knowledge that the labour/services are forced, are offences under the Model

⁸ Article 4.

⁹ Article 8.

¹⁰ Article 8.2.

¹¹ Article 9.

Law,¹² as is acting as an accomplice in,¹³ organising or directing¹⁴ or attempting to engage in trafficking.¹⁵ There is no territorial limit to these offences, suggesting that they would best be implemented by introducing supply chain obligations (that is, obligations on organisations to eliminate slavery and trafficking in their supply chains). The UK has a useful model in this regard, explored below.

13. 'Forced labour' is defined as 'all work or service that is exacted from any person under the threat of any penalty and for which the person concerned has not offered him- or herself voluntarily'.¹⁶ Additional protections are envisaged for children.¹⁷
14. Withholding, producing or altering travel or identity documents in the course of trafficking, is also an offence.¹⁸

Vulnerability of victims

15. The Model Law focuses on the vulnerability of the victim, specifying that the law should be applied in a non-discriminatory manner,¹⁹ and defining the types of vulnerability that regulators should pay particular attention to. These include age, pregnancy, disease, disability, illness and irregular migration status.²⁰
16. This definition could apply to exploitation of individuals on student visas or working holiday visas in Australia, as revealed in the media and other sources.²¹

Protection for victims

17. The Model Law includes protection for victims, stipulating that they will not be held liable for offences committed by them where their involvement in the offence is a

¹² Article 11.

¹³ Article 12.

¹⁴ Article 13.

¹⁵ Article 14.

¹⁶ Article 5.1(i).

¹⁷ Article 8.3.

¹⁸ Article 16.

¹⁹ Article 3.2.

²⁰ Article 5.1(a).

²¹ Ann Arnold, 'Taken to the cleaners: International students underpaid, exploited', *ABC Background Briefing*, 3 June 2016, <http://www.abc.net.au/radionational/programs/backgroundbriefing/international-students-exploited/7472384>; FWO, *Inquiry into the wages and conditions of people working under the 417 Working Holiday Visa Program*, (October 2016), available at <https://www.fairwork.gov.au/about-us/access-accountability-and-reporting/inquiry-reports>.

direct consequence of their situation as a trafficked person. This provision does not apply to particularly serious crimes.²²

18. The privacy of victims of slavery and trafficking is protected: it is an offence to unlawfully disclose the identity of victims and/or witnesses.²³ Commercial transport carriers can also be guilty of an offence if they fail to disclose a suspicion that a victim of trafficking has been a passenger.²⁴
19. Protection of victims and witnesses is considered by the Model Law. A national coordinating body is to be established and information made available for victims in an appropriate language regarding the protection, assistance and support that is available to them.²⁵ Assistance to be provided includes safe and appropriate accommodation, healthcare and treatment, confidential counselling and psychological care and information regarding free or low-cost legal assistance to assist in navigating any criminal investigation or in accessing compensation. The dependants of the victim are to be catered for, and it is stipulated that victims shall not be held in detention as a result of their status as victims, or their immigration status.²⁶
20. Protection also extends to ensuring the safety of victims of, or witnesses to, trafficking and their families, including protection from intimidation and retaliation and access to witness protection programs.²⁷ Protection is extended to the court process, including allowing court proceedings in camera and other measures to protect victims' privacy.²⁸ Special protection is to be afforded to children, and where there is doubt, there is a presumption that the victim is a child.²⁹

Compensation

21. The right to initiate civil action is specifically referred to in the Model Law.³⁰ Additionally, where an offender is convicted of an offence, provision is made for court-ordered compensation to be paid by the offender, which should take priority

²² Article 10.

²³ Article 16.

²⁴ Article 17.

²⁵ Articles 18, 19.

²⁶ Article 20.

²⁷ Article 21.

²⁸ Articles 23, 25, 26.

²⁹ Article 22.

³⁰ Article 27.

over any fine.³¹ Compensation is also to be made available to victims by way of a statutory victims' compensation fund, which should be available regardless of the identification or conviction of any perpetrator.³² In all cases, the victim need not be in the relevant jurisdiction to be eligible for compensation, enabling them to return home and retain their rights to compensation.

Migration status

22. In terms of migration status, a 'recovery and reflection period' of at least 90 days is to be afforded to all victims. This should not be contingent on their assisting authorities in investigating perpetrators of trafficking offences.³³
23. An additional temporary or permanent resident's permit is also envisaged by the Model Law. Such a permit would not be dependent on cooperation with authorities, but if the victim does cooperate, the permit should last for the duration of any relevant legal proceedings, and for at least six months.
24. The right to apply for refugee status or permanent residence on humanitarian grounds is specifically considered, and the lack of a valid passport or other identity documents should not be a reason to refuse temporary or permanent residency.³⁴ Similarly, the Model Law requires the acceptance of the return of a victim of trafficking who had permanent residency at the time they were trafficked,³⁵ and the facilitation of the repatriation of victims who wish to return to their home country. The principle of *non-refoulement*, being the obligation not to send or return a person to a place where they might face persecution or torture, should underpin any potential return.³⁶

National implementation

25. A national coordinating body should be established to coordinate the implementation of the law and develop a national plan of action to do so.³⁷ The

³¹ Article 28.

³² Article 29.

³³ Article 30.

³⁴ Article 31.

³⁵ Article 32.

³⁶ Article 33. See also the *Convention Relating to the Status of Refugees*, (1951), and the 1967 Protocol thereto.

³⁷ Article 35.

establishment of a national rapporteur to monitor and report on implementation is also envisaged,³⁸ as is interagency cooperation.³⁹

5. 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

26. The UK’s *Modern Slavery Act 2015* implements many of the provisions of the Model Law and is much more comprehensive than Australian law in its ability to eliminate and adequately respond to slavery and trafficking. In particular, it presents useful models for supply chain reporting and additional protections for victims.
27. Supply chain reporting is an essential mechanism for ensuring that businesses do not profit from trafficking or modern slavery domestically or abroad. Since the implementation of the *Modern Slavery Act 2015* (UK), ‘commercial organisations’ operating in the UK with a turnover of at least £36 million must prepare an annual slavery and human trafficking statement.⁴⁰ The obligation will arise if it supplies goods or services in the UK, regardless of where in the world it is based.
28. The statement does not require the organisation to take any steps to eliminate slavery and trafficking. It does, however, bring the issue both to the minds of decision-makers in the organisation and to the public. In this way, shareholders, civil society or others can exert pressure on the organisation to do more to eliminate slavery and trafficking in their supply chains.
29. In terms of protecting victims, the UK law implements more of the protections envisaged by the Model Law. There is a defence, for example, for offences committed by victims where the offence has been compelled by slavery or exploitation.⁴¹

³⁸ Article 36.

³⁹ Article 37.

⁴⁰ S54; *Modern Slavery Act 2015 (Transparency in Supply Chains) Regulations 2015* (UK), reg 2.

⁴¹ S45.

30. Slavery and trafficking prevention orders and slavery and trafficking risk orders are available under the Act, which can prohibit the subject of the order from doing things the court considers to be necessary to prevent people committing slavery and trafficking offences. This can include preventing the subject of the order from leaving the country.
31. It is important that, if they were to be implemented in Australia, such orders balance the rights of victims appropriately against the rights of suspected perpetrators to be presumed innocent until proven otherwise. They present, however, a potentially powerful tool in protecting victims and preventing slavery and trafficking offences from occurring, and preventing offenders from evading justice.
32. Civil legal services are available to victims of slavery and trafficking pursuant to the *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (UK), including to assist with an application for leave to enter or remain in the UK, an employment-related claim or a claim for damages arising in connection with the trafficking or exploitation where there are reasonable grounds to believe that the individual has been a victim of trafficking.⁴²
33. Provision is also made for allowing overseas domestic workers to seek leave to remain and to be able to change employers where they have been a victim of trafficking.⁴³
34. The Act also creates an Independent Anti-Slavery Commissioner⁴⁴ and independent child trafficking advocates.⁴⁵

Current Australian framework

35. Compared with the Model Law and the UK law, the Australian modern slavery framework is inadequate, although it is improving.
36. The primary offences under Australian Law are found in Divisions 270 (slavery and slavery-like conditions) and 271 (trafficking in persons and debt bondage) of the

⁴² Schedule 1, paragraphs 32 and 32A.

⁴³ S53.

⁴⁴ S40.

⁴⁵ S48.

Criminal Code Act 1995 (Cth). Slavery, servitude, forced labour and forced marriage are all prohibited by Division 270. Division 271 outlaws trafficking, including in persons generally, children specifically and organs.

37. A number of government programs and committees seek to provide support to people subjected to slavery and trafficking, although gaps remain and protections are incomplete.
38. An Interdepartmental Committee on Human Trafficking and Slavery (Interdepartmental Committee), chaired by the Attorney-General's Department, oversees Australia's strategy to combat slavery and trafficking. It comprises representatives from the Australian Criminal Intelligence Commission, the Australian Federal Police (AFP), the Australian Institute of Criminology, the Commonwealth Director of Public Prosecutions, the Department of Employment, the Department of Foreign Affairs and Trade, the DIBP, the Department of Prime Minister and Cabinet, the Department of Social Services (DSS) and the FWO.
39. In terms of access to social support, the Support for Trafficked People Program is run by the DSS. It 'provides assistance to all victims of human trafficking, slavery and slavery-like practices, including forced marriage and forced labour, who meet the eligibility criteria'.⁴⁶ Services available under the program include:
 - 'case management support
 - suitable accommodation that meets the [AFP's] security and safety requirements
 - medical treatment
 - counselling
 - referral to legal and migration advice
 - skills development training, including English-language classes and vocational guidance
 - social support'.⁴⁷

⁴⁶ Department of Social Services, *Support for Trafficked People Program*, <https://www.dss.gov.au/women/programs-services/reducing-violence/anti-people-trafficking-strategy/support-for-trafficked-people-program>.

⁴⁷ *Ibid.*



40. Changes introduced on 1 January 2016 have increased access to social security and other social supports, such as Medicare, for individuals on the relevant visas and engaged in the Support for Trafficked People Program.
41. Recent reforms to the *Crimes Act 1914* (Cth) include additional protections for children or adults who have been affected by modern slavery (being offences against division 270 or 271 of the *Criminal Code Act 1995* (Cth)). Following these reforms, children or adults can be classed as vulnerable persons when giving evidence, enjoying additional protections as a result, including protection from cross-examination, the ability to give evidence via closed circuit television or other alternative arrangements.⁴⁸
42. There is also a National Roundtable on Human Trafficking and Slavery, which brings representatives of government, civil society, academia, business and unions together to address emerging issues in trafficking in Australia and abroad.⁴⁹ This Roundtable established a Supply Chain Working Group in 2014. At the start of 2016, the Working Group made nine recommendations to eliminate modern slavery in the supply chain, which the ALA understands are still being considered by the Government.
43. The UK example on supply chains, regarding regular reporting by certain companies, should be implemented in Australia.

Australia's visa regime

Visas available to victims of slavery and trafficking

44. There are currently two visas available to victims of trafficking: the Bridging F visa (BFV) and the Referred Stay (Permanent) visa (RSPV).⁵⁰

⁴⁸ See ss15YG, 15YH, 15YI, 15YL, 15YM, 15YNB, and Part IAD generally.

⁴⁹ Interdepartmental Committee on Human Trafficking and Slavery, *Eight Report: Trafficking in Persons, the Australian Government Response 1 July 2015-30 June 2016* (2016), <https://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Documents/Report-of-the-interdepartmental-committee-on-human-trafficking-and-slavery-july-2015-to-june-2016.pdf> (Interdepartmental Committee Report), 49.

⁵⁰ Department of Social Security, *Guide to Social Security Law*, released 5 April 2017, <http://guides.dss.gov.au/guide-social-security-law/9/1/2/130>.

45. The BFV is available to suspected victims of human trafficking. These visas allow the holder to 'an initial period of up to 90 days to recover and reflect, and to facilitate the longer term temporary stay of trafficked people assisting in criminal justice processes'. No work rights attach to this visa. This visa can be extended for victims who remain in Australia to assist with an investigation or prosecution, in which case work rights can be available.
46. The RSPV is a permanent visa, available to 'eligible victims or witnesses of trafficking who have contributed to an investigation or prosecution of a human trafficking related offence, and as a result would be in danger if they returned to their home country'.⁵¹ Visa holders have work rights. This visa replaced the Witness Protection and Trafficking visa and the Criminal Justice Stay visa (CJSV), as well as expanding access to social support by waiving the 104-week Newly Arrived Resident's Waiting Period for income support for RSPV holders, enabling trafficking victims to enrol in longer courses of study while maintaining access to income support.⁵² Very few of these visas are issued annually.⁵³
47. There does not appear to be any scope for victims of trafficking to access visas longer than 90 days if they are unable or unwilling to assist in investigations of trafficking, which could be as a result of fear for the safety of themselves or a loved one.
48. This system falls short of that envisaged by the Model Law. The Model Law acknowledges that victims may not want to cooperate with law enforcement efforts, and makes it clear that visas should not be dependent upon this. There are any number of reasons why a victim might not want to cooperate with an investigation to prosecute those who were exploiting them. While the Australian regime allows for visas for people who are willing but unable to assist for reasons such as trauma,⁵⁴ it provides less protection than that afforded under the Model Law.

⁵¹ Department of Social Security, *Guide to Social Security Law*, released 5 April 2017, <http://guides.dss.gov.au/guide-social-security-law/9/1/2/130>.

⁵² Interdepartmental Committee Report, 1-2.

⁵³ In 2015-16, there were five RSPVs and 31 BFVs issued to victims of trafficking and their family members. In 2014-15, the numbers were eight RSPVs and 17 BFVs. Nine CJSVs were issued in 2014-15, although reforms in 2015 meant that this visa is no longer used for victims of trafficking: Interdepartmental Committee Report, 41.

⁵⁴ Government response to the Interdepartmental Committee Report), response to recommendation 4.

49. There is also no specific reference to *non-refoulement* and how this obligation might augment the availability of visas. Article 14.1 of the Protocol reaffirms the *non-refoulement* commitments Australia has made under the *Convention Relating to the Status of Refugees* and the 1961 *Protocol*. Similar obligations exist in other treaties by which we have agreed to be bound, including the *Convention against Torture and Other Cruel, Inhuman Degrading Treatment or Punishment*.⁵⁵
50. Victims of trafficking may face unique threats if they are returned to their countries of origin, especially if their work that in Australia might conflict with cultural norms in their home countries. This would be particularly relevant where the individual has engaged in sex work, for example, although it could relate to any work conducted. Where there is a risk that the individual would suffer persecution, including from their family or community that the government could not protect them from, it may be appropriate to grant them a humanitarian visa. This avenue should be available in addition to other temporary or permanent visas that might be available, and irrespective of their willingness or capacity to assist in any criminal investigation.
51. While it may be possible for victims of trafficking to seek a humanitarian visa independently of the trafficking framework, under the present system this could be complex and may be unsuccessful. The Interdepartmental Committee does not identify this as an option for trafficked persons. It would be better if this obligation was explicitly reflected in the visas available to people who have been trafficked, and in the policy response to this issue.

Visa-holders at risk of slavery and trafficking

52. Any migrant whose visa could be cancelled for failing to meet work or other conditions is potentially at risk of slavery and trafficking. The visa-holder might feel that they have no option other than to continue to live in slavery-like circumstances, due to the risk of deportation if they reveal the infringement of their visa conditions. Partnership visas, work visas and student visas all carry this risk.
53. As noted by the Fair Work Ombudsman (FWO):

‘In 2014-2015, temporary visa holders accounted for 11.7% of all requests for assistance received by the FWO. Temporary visa holders comprise

⁵⁵ Article 3. Note the reference in article 3.2 to human rights conditions in the receiving/home country.

around 5% of the Australian workforce, suggesting they are significantly over represented amongst those coming to us for help, despite being generally reluctant to seek assistance from the Commonwealth regulator.’⁵⁶

54. In terms of visa-holders who are working in the legitimate economy, the media has recently focused on the risks faced by students. Reports consistently reveal that students in Australia are vulnerable to experiencing conditions that could amount to modern slavery under the Palermo Protocol.⁵⁷ Where the student is here on a student visa, they might be particularly reticent to complain about their treatment. These visas restrict work to 20 hours per week. Where students have been forced to work for more hours than that at reduced pay, they could be at risk of having their visas cancelled for breaching conditions, as a consequence of which they could be deported. Comments by the Minister for Immigration in response to the 7-Eleven exploitation scandal in 2015 confirm that this is a real risk.⁵⁸
55. Reports have also been received of individuals who have found themselves in forced labour, wage exploitation and involuntary servitude-like circumstances on working holiday visas. Under visa subclasses 417 (Working Holiday Visa) and 462 (Work and Holiday Visa), an applicant may be eligible for a second 12-month visa if they have worked for three months in a remote or regional area, employed in specific industries.⁵⁹ Some individuals on these visas have reported that fake jobs have been advertised to meet this criteria, or that the jobs that they have been offered do not meet the minimum pay and conditions required by Australian law. Others have reported sexual harassment or other mistreatment at their rural workplaces, but have felt unable to escape the situation as they would lose the opportunity for a further visa if they did.

⁵⁶ FWO, *A Report of the Fair Work Ombudsman’s Inquiry into 7-Eleven* (April 2016), <https://www.fairwork.gov.au/about-us/access-accountability-and-reporting/inquiry-reports#7-11>, [5.3.1].

⁵⁷ Anna Patty, The great student swindle, *The Sydney Morning Herald*, [undated], <http://www.smh.com.au/interactive/2016/great-student-swindle/>.

⁵⁸ Latika Bourke, “7-Eleven pay scandal: Visa reprieves to be decided case by case: Peter Dutton”, *They Sydney Morning Herald*, 28 September 2015, <http://www.smh.com.au/federal-politics/political-news/7eleven-pay-scandal-visa-reprieves-to-be-decided-case-by-case-peter-dutton-20150928-gjwcu.html>.

⁵⁹ See Department of Immigration and Border Protection, *Working Holiday visa (subclass 417)*, <https://www.border.gov.au/Trav/Visa-1/417-#tab-content-1>; *Holiday and Work visa (subclass 462)*, <https://www.border.gov.au/Trav/Visa-1/462-#tab-content-1>.

56. The ALA supports the findings of the FWO in its recently published reports on 417 visas⁶⁰ and student visas.⁶¹ It is unclear, however, to what extent the Department of Immigration and Border Protection (DIBP) is cooperating with the FWO to ensure that individuals on visas are not being exploited.
57. While the focus of the FWO has been on visa-holders working in the legitimate economy, it is noted that an unknown number of visa-holders may be being exploited in black market workplaces who do not have any Ombudsman to complain to. These people are equally deserving of protection, and should be able to avail themselves of legal protections without fear of losing their visas. We further note the importance of having information available to all visa-holders regarding their rights in circumstances of modern slavery and trafficking in languages that they will clearly understand.

Compensation

58. While compensation can be made available to people who have been subject to slavery and trafficking, the avenues are piecemeal and inadequate when compared with the framework proposed by the Model Law.
59. The Model Law envisages the availability of three forms of compensation to people who have been trafficked: common law compensation, statutory victims' compensation and compensation to be paid by the offender (known as reparations orders under Australian law).

Common law compensation

60. Claims under common law for physical or psychological injuries can be the best way to compensate people for injuries that they have incurred as a result of the negligence or crimes of others. A thorough analysis of the injuries suffered and the impact that they have had on an individual's life will inform quantum of damages

⁶⁰ FWO, *Inquiry into the wages and conditions of people working under the 417 Working Holiday Visa Program*, (October 2016), available at <https://www.fairwork.gov.au/about-us/access-accountability-and-reporting/inquiry-reports>. See also FWO, *An Inquiry into the procurement of housekeepers by four and five-star hotel groups*, (May 2016), <https://www.fairwork.gov.au/about-us/access-accountability-and-reporting/inquiry-reports#4-5 star hotel>.

⁶¹ FWO, *A Report of the Fair Work Ombudsman's Inquiry into 7-Eleven* (April 2016), <https://www.fairwork.gov.au/about-us/access-accountability-and-reporting/inquiry-reports#7-11>, Recommendations.



and enable a fair amount of compensation to be paid. This compensation can also account for lost wages, lost future earnings and other costs that arise as a result of the unlawful conduct. Common law damages are generally higher than statutory compensation schemes, in recognition of the fault element on which they depend.

61. Common law damages will not be available in all instances of slavery and trafficking. They are most likely to be available where the crime has arisen in an employment context, in a claim against an employer or recruiter. As such, other forms of compensation remain relevant and important to ensuring that victims have access to redress when fault cannot be proven or there is no defendant to sue.
62. Where common law claims are brought, it is important that the courts take a broad understanding of the employment relationship. It is now clear that criminal conduct is no bar to a compensation claim based on vicarious liability, meaning that slavery and trafficking could give rise to liability for employers for the actions of their employees.⁶² In these circumstances, a 'close connection test' is most suitable for assessing whether an employment link exists.⁶³
63. A Modern Slavery Act should make it clear that common law damages are available in circumstances of slavery and trafficking, and that claims can still be brought where the victim chooses to return to their country of origin or otherwise leave Australia, as recognised by the Palermo Protocol and Model Law.⁶⁴

⁶² *Prince Alfred College Incorporated v A, DC*, [2016] HCA 37.

⁶³ The ALA advocates for the adoption of a definition of a close connection test as being appropriate to ascertain whether an adequate link exists between an institution and an abuser in cases of child abuse, as follows: 'Close connection means that an organisation will be vicariously liable for the conduct of an associated individual where the risk of abuse by that individual was created or increased by the nature of the enterprise engaged in by the organisation. Relevant to that increased risk will be matters such as (but not confined to) disparity of authority and/or power between the organisation or the associated individual and the victim, including but not confined to vulnerability or intimacy in the relationship so created.' This definition is based on case law throughout the common law world, and would be suitably adapted to assessing whether vicarious liability exists in cases of modern slavery and trafficking: see *The Catholic Child Welfare Society & Ors (Appellants) v Various Claimants (FC)* and *The Institute of the Brothers of the Christian Schools & Ors (Respondents)* [2012] UKSC 56, [86] per Lord Phillips and Cox (*Respondent*) v *Ministry of Justice (Appellant)* [2016] UKSC 10 per Lord Reed. For an explanation of this proposed test and its origins in the context of child abuse, see ALA, *Access to justice for survivors of child abuse best practice law reform proposals*, (2017), <https://www.lawyersalliance.com.au/documents/item/791>, [26].

⁶⁴ Article 8.2.

Statutory compensation

64. The Joint Standing Committee on Foreign Affairs, Defence and Trade recommended in 2013 that a federal fund be established to compensate victims of trafficking.⁶⁵ In its response to the Interdepartmental Committee Report, the Australian Government did not fully accept the Committee's recommendation that statutory compensation be made available at the federal level.⁶⁶ It stated that victims' compensation is a matter for states and territories and that victims had accessed compensation there.⁶⁷

65. This response is inadequate. Slavery and trafficking are creatures of federal law, and thus it is appropriate for victims' compensation to be made available at a federal level. States and territory schemes vary significantly, meaning that a victim of slavery and trafficking would have vastly different entitlements depending on where they brought their claim. The nature of slavery and trafficking means that many people may have been trafficked across state borders, and thus may have to navigate multiple schemes, which would be a significant burden for someone who is already traumatised and most likely unfamiliar with the language, culture and Australian bureaucracy. Further, if the victim had returned to their home country after being freed, it is unclear whether the state and territory schemes would be available to them.

66. It would be much more appropriate to establish a federal scheme that victims of slavery and trafficking were supported in navigating, including having access to legal assistance. It would be important for this scheme to be accessible from outside of Australia if the individual wished to return home following their ordeal.

Reparation orders

67. Reparation orders may be made under s21B the *Crimes Act 1914* (Cth) by way of cash payment or otherwise, for any loss suffered or cost incurred in relation to the

⁶⁵ Recommendation 6: Joint Standing Committee on Foreign Affairs, Defence and Trade, *Trading Lives: Modern Day Human Trafficking: Inquiry of the Human Rights Sub-Committee*, (2013), available at http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jfadt/slavery_people_trafficking/report.htm.

⁶⁶ Government response to the Interdepartmental Committee Report, response to recommendation 6.

⁶⁷ It is assumed the reference to victims in the Government response to the Interdepartmental Committee Report is to victims of trafficking, although this is not clear from the document.

offence. This would apply to offences under division 270 or 271 of the *Criminal Code Act 1995* (Cth).⁶⁸

68. If a Modern Slavery Act is to be passed by the federal parliament, it would be useful to refer to reparation orders directly in the legislation.

6. Whether a Modern Slavery Act should be introduced in Australia

69. The ALA supports the introduction of a Modern Slavery Act in line with the recommendations above and below.

Recommendations

The ALA makes the following recommendations:

- A Modern Slavery Act should be introduced into Australian law, incorporating the provisions of the Model Law to the greatest extent possible. The Act should include the following:
 - Protection for victims in line with the Model Law, including immunity from prosecution for most offences committed as a result of being subjected to slavery and trafficking;
 - Visas for victims that meet Australia's *non-refoulement* obligations. Visas should not be dependent on the victim's willingness to assist in investigations and prosecutions, and permanent visas should be available to all victims who could be at risk of persecution, including ostracism by their family or local community as a result of activities engaged in during their period of slavery and trafficking;
 - Protections for all people who report that they have been subjected to slavery and trafficking and assurance that they will not lose their visas as a result of reporting crimes against them or violations by their employers;
 - Reference to common law compensation, statutory compensation and reparation orders, including provision for such compensation to remain

⁶⁸ Government response to the Interdepartmental Committee Report, response to recommendation 6.



available in circumstances where the victim has left Australia. A close connections test should be used for common law vicarious liability claims;

- Establishment of a federal victims' compensation scheme which is accessible to all victims of slavery and trafficking in Australia, both in Australia and abroad;
- Access to legal assistance for all visa and compensation applications;
- Supply chain reporting in line with the UK legislation at a minimum; and
- Slavery and trafficking prevention orders and slavery and trafficking risk orders, which should balance the rights of victims and the rights of the accused in line with the rule of law and fair trial principles.