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## Inquiry into Human Trafficking

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### Submission to the Joint Committee on Law Enforcement

*"Australia is committed to a future where no one is subjected to human trafficking or slavery, and the human rights of all people are valued equally."*

National Action Plan to Combat Human Trafficking and Slavery 2015 -19

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*Anti-Slavery Australia welcomes the opportunity to respond to the Joint Committee on Law Enforcement Inquiry into Human Trafficking. Established in 2003, Anti-Slavery Australia is a leading research, policy and legal centre at the University of Technology Sydney with the mission of abolishing human trafficking, slavery and slavery-like practices in Australia. A more detailed outline of Anti-Slavery Australia research, policy programs and development, outreach and education, and the operation of the legal practice are set out in Chapter 8 of this submission.*

### **Acknowledgements**

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## **EXECUTIVE SUMMARY**

In response to the Joint Committee on Law Enforcement, Anti-Slavery Australia focuses on three specific terms of reference:

- the role and effectiveness of Commonwealth law enforcement agencies in responding to human trafficking;
- practical measures and policies that would address human trafficking; and
- the effectiveness of relevant Commonwealth legislation and policies.

In addressing these terms of reference, Anti-Slavery Australia makes seven recommendations to further strengthen Commonwealth law enforcement responses to human trafficking, slavery and slavery-like practices by the:

- (1) Appointment of an Anti-Slavery and Trafficking Commissioner**
- (2) Establishment of a national compensation scheme**
- (3) Strengthening of visa protection for victims of trafficking, slavery and slavery-like practices**
- (4) Development of new civil remedies and better protections for those facing forced marriage**
- (5) Adoption of the Productivity Commission's migrant worker recommendations in the Inquiry Report into The Workplace Relations Framework and associated recommendations to better protect the Australian community from exploitation**
- (6) Ratification of certain international treaties**
- (7) Strengthen Australia's response to exploitation in supply chains**

## 1. RECOMMENDATION ONE: THE CASE FOR AN ANTI-SLAVERY AND TRAFFICKING COMMISSIONER

One of the key challenges for the successful implementation of Australia's strategy to combat human trafficking, slavery and slavery-like practices is the multiplicity of stakeholders, ranging from Commonwealth government agencies, state and territory government agencies, universities, civil society organisations, faith-based communities, business, industry and unions.

It is vital that the Australian Government continues to lead through established mechanisms and in doing so, establish and maintain effective Commonwealth law enforcement responses to these human rights abuses. The existing framework would be strengthened by the appointment of an independent Anti-Slavery and Trafficking Commissioner (Commissioner) with responsibility to monitor and review the effectiveness of Commonwealth law enforcement responses as well as identify any areas for improvement. There is growing support domestically for the establishment of a commissioner-type role in Australia.

### 1.1. *Benefits of having a Commissioner in Australia*

The Australian Government has shown a long-standing commitment to ending human trafficking, slavery and slavery-like practices. Currently, five government ministers bring leadership and portfolio expertise to the prevention of human trafficking and slavery,<sup>1</sup> while the Interdepartmental Committee on Human Trafficking and Slavery (**IDC**), chaired by the Attorney-General's Department, was established with responsibility for "*monitoring the implementation of the strategy, reporting to the Australian government on its effectiveness, and ensuring that emerging issues are addressed on a whole-of-government basis*".<sup>2</sup>

In addressing strategies to end human trafficking and slavery, former Sex Discrimination Commissioner, Elizabeth Broderick has observed that the Australian response to human

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<sup>1</sup> The Hon Michael Keenan MP, the Hon Julie Bishop MP, the Hon Peter Dutton MP, Senator the Hon Michaelia Cash, and the Hon Christian Porter MP: see Interdepartmental Committee on Human Trafficking and Slavery, Parliament of Australia, *Trafficking in Persons: The Australian Government Response 1 July 2014 – 30 June 2015* (2015) iv.

<sup>2</sup> *Ibid* 6.

trafficking and slavery is distinctive for the authentic collaboration between multiple agencies. In particular Dr Broderick reflected on the establishment of the National Roundtable on Human Trafficking and Slavery in 2008, remarking that ‘the convening of the National Roundtable on Human Trafficking and Slavery, which continues to be an important consultative mechanism between government and others has been key. This approach to ending trafficking which is built on collaboration, strong engagement and the sharing of power by government should be a model replicated elsewhere’.<sup>3</sup>

In shaping the Australian response, the Attorney-General’s Department has been the lead agency in the development of Australia’s whole of government approach and a specialist section in the Department has had responsibility for much of the implementation of the government response. This section has developed ground-breaking initiatives including guiding the passage of important legislation and policy reform and the development of the Australian Government National Action Plan to Combat Human Trafficking and Slavery 2015-2019.

Anti-Slavery Australia submits that an independent body, such as a Commissioner, to monitor and review the effectiveness of anti-trafficking strategies would enhance and strengthen the Australian response. The benefit of the quality of independence is illustrated by observance of international models of similar commissioner-type roles. For example, the first independent Finnish National Rapporteur has noted that *“the added value of a Rapporteur lies in providing an objective analysis of how human trafficking is being addressed. The Rapporteur can expose bottlenecks and make recommendations for resolving them.”*<sup>4</sup>

The establishment of a Commissioner dedicated to the monitoring and review of Commonwealth law enforcement responses to human trafficking, slavery and slavery-like practices would also help to increase the efficiencies in these responses. For example, a Commissioner could identify any duplication of efforts across Commonwealth law enforcement agencies, identify gaps in the effectiveness of the Commonwealth

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<sup>3</sup> Former Sex Discrimination Commissioner Elizabeth Broderick, (Keynote address at the Anti-Slavery Australia Freedom Awards, 5 November 2015).

<sup>4</sup> Interview with Johanna Suurpää, first Finnish National Rapporteur on Trafficking in Human Beings, Dutch National Rapporteur on Trafficking in Human Beings (2010), *Human Trafficking – ten years of independent monitoring*. The Hague: BNRM, 20.

response, including law enforcement responses and make recommendations to ensure that the Australian response is best practice. An effective Commonwealth response involves a wide variety of government agencies: the Australian Crime Commission, the Australian Federal Police, the Australian Institute of Criminology, the Commonwealth Director of Public Prosecutions, the Departments of Employment, Foreign Affairs and Trade, Immigration and Border Protection, Prime Minister and Cabinet, Social Services and also the Fair Work Ombudsman. Additionally, Anti-Slavery Australia notes the establishment of specific taskforces and working groups to address emerging challenges. Such bodies include the interagency Taskforce Cadena<sup>5</sup> and the establishment of the Ministerial Working Group by the Minister for Employment Michaelia Cash.<sup>6</sup> It is Anti-Slavery Australia's view that relevant government agencies would benefit from the advice and guidance which a Commissioner could offer on the exercise of their functions, particularly in areas such as identification and support of vulnerable people, liaison with civil society organisations, the development of communication strategies and the adoption of a more human rights-based approach to trafficking in line with the National Action Plan to Combat Human Trafficking and Slavery 2015-19.

Internationally, the appointment of a Commissioner would demonstrate Australia's leadership and commitment to combating human trafficking, slavery and slavery-like practices.

## **1.2. Role and model for a Commissioner**

The role of a Commissioner should be set out in Commonwealth legislation, which would define the functions and powers of the Commissioner.

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<sup>5</sup> The Hon Michael Keenan MP, 'Strengthening Government support and protections in the fight against human trafficking and slavery' (Joint media release, 22 June 2015).

<sup>6</sup> Senator the Hon Michaelia Cash, 'Ministerial Working Group to help protect vulnerable foreign workers' (Media Release, 15 October 2015).



The core functions of the Commissioner would include:

- a) monitoring the implementation of the *National Action Plan to Combat Human Trafficking and Slavery 2015-2019* and ensuring compliance with human rights obligations;<sup>7</sup>
- b) an appointment to the membership of the IDC, the Operational Working Group, the National Roundtable on Human Trafficking and other working groups set up under these bodies;
- c) reporting annually to the Australian Parliament on the exercise of the Commissioner's functions, which are made publicly available;
- d) providing recommendations, advice and guidance to government agencies on the exercise of their relevant functions;
- e) assessing the effectiveness of relevant Commonwealth legislation and policies as well as the impact of any proposed relevant Commonwealth legislation and policies;
- f) possessing statutory powers to collect and request data and information on human trafficking, slavery and slavery-like practices; and
- g) consulting and engaging with government agencies, non-governmental bodies, business and industry, unions and other persons.

To ensure that the role of the Commissioner is effective, it is also important that the role be well resourced. The Commissioner should suitably qualified staff to assist in the performance of the Commissioner role. For example, the UK Anti-Slavery Commissioner has appointed an advisory panel of experts, to enable the UK Anti-Slavery Commissioner to seek specialised expertise from a knowledgeable consultative group.<sup>8</sup>

It is also crucial that the role of the Commissioner be independent. The independence of the Commissioner should therefore be recognised in its establishing legislation.

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<sup>7</sup> This is currently the responsibility of the Commonwealth Attorney-General Commonwealth. See National Roundtable on Human Trafficking and Slavery, *Guidelines for NGOs: Working with Trafficked People* (3rd ed, 1 July 2015) 47.

<sup>8</sup> Independent Anti-Slavery Commissioner, *Independent Anti-Slavery Commissioner: strategic plan 2015 - 2017*, (UK, 16 October 2015) 1.

### **1.3. Support for the appointment of a Commissioner**

Following her visit to Australia in November 2011, Joy Ngozi Ezeilo, the former UN Special Rapporteur on trafficking in persons, especially women and children, made the following two recommendations in her report to the General Assembly about her Mission to Australia.

First, that at a national level, Australia should appoint a national coordinator or *rappporteur* to oversee and monitor the national response to multi-agency work on trafficking.<sup>9</sup> Secondly, to consider appointing an ambassador for human trafficking to further strengthen the country's international profile on this issue and to complement the work of the Ambassador for People Smuggling Issues.<sup>10</sup>

More recently in 2012, various submissions to the Joint Standing Committee on Foreign Affairs, Defence and Trade in relation to their 'Inquiry into Slavery, Slavery-like conditions and People Trafficking' called for the establishment of an anti-trafficking and slavery ambassador.<sup>11</sup> Certain NGO bodies have continued to advocate for the appointment of an ambassador for trafficking.<sup>12</sup>

### **1.4. International examples of commissioner-type roles**

Many other countries have appointed an ambassador, rapporteur or commissioner to monitor their approach to combating human trafficking, slavery and slavery-like practices. Notable examples include the Netherlands,<sup>13</sup> Finland,<sup>14</sup> the United States of America<sup>15</sup> and the United Kingdom.

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<sup>9</sup> Joy Ngozi Ezeilo, Special Rapporteur, *Report of the Special Rapporteur on trafficking in persons, especially women and children*, UN Doc A/HRC/20/18 (18 May 2012).

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

<sup>11</sup> These included submissions made by World Vision Australia, Slavery Links Australia, Dr. Anne Gallagher AO and the National Tertiary Education Union (available at: [http://www.aph.gov.au/Parliamentary\\_Business/Committees/House\\_of\\_representatives\\_Committees?url=ifadt/slavery\\_people\\_trafficking/subs.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_representatives_Committees?url=ifadt/slavery_people_trafficking/subs.htm)).

<sup>12</sup> For example, World Vision (available at: <http://campaign.worldvision.com.au/news-events/australians-ambassador-trafficking/>).

<sup>13</sup> The Netherlands established the institution of the National Rapporteur on Trafficking in Human Beings in 2000, whose mandate was expanded in 2012 to also cover sexual violence against children.

The United Kingdom’s appointment of the UK Anti-Slavery Commissioner under the *Modern Slavery Act 2015* (UK) is the most recent example. The general functions of the UK Anti-Slavery Commissioner are to encourage good practice in the prevention, detection, investigation and prosecution of slavery and human trafficking offences, and the identification of victims of those offences.<sup>16</sup>

During its evidence-gathering, the UK Modern Slavery Bill Evidence Review Panel (the Panel) found overwhelming support for the introduction of an Anti-Slavery Commissioner.<sup>17</sup> For example, the Panel spoke to a number of survivors of slavery, many of whom believed a new Anti-Slavery Commissioner could have a substantial impact in improving support for survivors.<sup>18</sup> The Panel also found that there was insufficient empirical data and a consequential lack of understanding of the core issues related to modern slavery, and were of the view that an Anti-Slavery Commissioner would ensure such data deficiencies were addressed, “*enabling those who deal with modern slavery to not only understand and respond effectively to present phenomena, but to recognize and proactively work to combat developing phenomena*”.<sup>19</sup>

The functions of the UK Anti-Slavery Commissioner include making annual reports on the exercise of the Commissioner’s functions, which are laid before the relevant parliamentary bodies,<sup>20</sup> and making recommendations to any public authority about the exercise of its functions.<sup>21</sup> The UK Anti-Slavery Commissioner may also request a specified public authority to co-operate in any way necessary for the purposes of the Commissioner’s functions.<sup>22</sup> Since his appointment as the UK Anti-Slavery

<sup>14</sup> Finland appointed a National Rapporteur on Trafficking in Human Beings in 2008 under the Finnish *Act on the Ombudsman for Minorities and National Discrimination Tribunal* (660/2001; amendments up to 1109/2008 included), a role which is assumed by the Ombudsman for Minorities operating under the Finnish Ministry of the Interior.

<sup>15</sup> The United States of America established the Department of State’s Office to Monitor and Combat Trafficking in Persons under the US *Trafficking Victims Protection Act 2000*. The Office is headed by Ambassador-at-Large to Monitor and Combat Trafficking, who assists the US Secretary of State in relation to the Interagency Task Force to Monitor and Combat Trafficking established by the United States’ President.

<sup>16</sup> *Modern Slavery Act 2015* (UK) ch 30 s 41(1).

<sup>17</sup> Baroness Butler-Sloss, Frank Field MP and Sir John Randall MP, *Report of the Modern Slavery Bill Evidence Review: Establishing Britain as a world leader in the fight against Modern Slavery*, (UK, 16 December 2013) 29.

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

<sup>19</sup> *Ibid.*

<sup>20</sup> *Modern Slavery Act 2015* (UK) ch 30 ss 42(8), (10), (11),(12).

<sup>21</sup> *Modern Slavery Act 2015* (UK) ch 30 s 41(3)(b).

<sup>22</sup> *Modern Slavery Act 2015* (UK) ch 30 s 43(1).

Commissioner, Kevin Hyland OBE has issued his strategic plan for 2015-2017, which sets out how he intends to work with different statutory agencies that have a duty to co-operate and how he will be working with non-governmental bodies.<sup>23</sup>

Anti-Slavery Australia submits that Commonwealth law enforcement responses would benefit from the appointment of a Commissioner who has a role and functions similar to that of the UK Anti-Slavery Commissioner.

**Recommendations:**

- To maintain existing Government structures such as the National Roundtable on Human Trafficking and Slavery and expand membership of the Roundtable.
- To appoint an Anti-Slavery and Trafficking Commissioner to monitor and review the effectiveness of Commonwealth responses, including law enforcement responses to human trafficking, slavery and slavery-like practices and the implementation of the National Action Plan to Combat Human Trafficking and Slavery 2015 – 2019.

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<sup>23</sup> Independent Anti-Slavery Commissioner, *Independent Anti-Slavery Commissioner: strategic plan 2015 - 2017*, (UK, 16 October 2015).

## 2. RECOMMENDATION TWO - ESTABLISHMENT OF A NATIONAL COMPENSATION SCHEME

An effective legislative and policy response to human trafficking requires that victims of human trafficking, slavery and slavery-like practices have access to effective remedies. As civil actions are unrealistic options in practically all cases, Anti-Slavery Australia submits that the establishment of a national compensation scheme for enslaved and trafficked people is necessary to ensure that victims of serious human rights abuses, such as human trafficking and slavery, have a real opportunity of a remedy. This would ensure that Australia fulfils Principle 2 of the *National Australian Action Plan to Combat Human Trafficking and Slavery 2015-19*<sup>24</sup> by establishing a consistent and effective pathway to compensation.

### 2.1. *Australia's international obligations*

Australia has obligations under international agreements to ensure the availability of victims' compensation for enslaved and trafficked people, as follow:

- a) Article 25(2) of the *United Nations Convention Against Transnational Organized Crime*<sup>25</sup> states, "Each State Party shall establish appropriate procedures to provide access to compensation and restitution for victims of offences covered by this Convention."
- b) Article 6(6) of Annex II of the *United Nations Trafficking Protocol*<sup>26</sup> states, "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."

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<sup>24</sup> "Principle 2: Australia provides holistic and victim-centred support to trafficked people, regardless of gender, age, disability, race, ethnicity, immigration status, sex, sexuality or the purpose for which they were exploited, and affords them access to an effective remedy."

<sup>25</sup> Ratified by Australia on the 27<sup>th</sup> May 2004 - *United Nations Convention against Transnational Organized Crime*, GA Res 55/23, UN GAOR, 55<sup>th</sup> sess, 62<sup>nd</sup> plen mtg, Agenda item 105, Supp No 49, UN Doc A/RES/55/25 (entered into force 8 January 2001) art 25(2).

<sup>26</sup> Ratified by Australia on the 14<sup>th</sup> September 2005 - *United Nations Convention against Transnational Organized Crime*, GA Res 55/23, UN GAOR, 55<sup>th</sup> sess, 62<sup>nd</sup> plen mtg, Agenda item 105, Supp No 49, UN Doc A/RES/55/25 (entered into force 8 January 2001) annex II ('*Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*') art 6(6).

- c) Article 12 of the *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*<sup>27</sup> states, “When compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to: Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes; The family, in particular dependents of persons who have died or become physically or mentally incapacitated as a result of such victimization.”
- d) Part II Article 2(3)(a) of the *International Covenant on Civil and Political Rights*<sup>28</sup> states, “Each State Party to the present Covenant undertakes: To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.”

## **2.2. The deficiency of current state/territory compensation schemes**

Current state/territory compensation schemes are inadequate to be applied to victims of slavery, human trafficking or offences relating to slavery-like practices (such as forced labour) due to several factors:

- a) In Australia, there are currently eight different statutory/territory victims’ compensation schemes and each have different considerations of categories of harm, relevant time limits, and levels of award applicable. This disparity can be seen clearly in the maximum amount of monetary compensation available in different states varying between \$10,000<sup>29</sup> and \$75,000.<sup>30</sup>
- b) Successful claims for victims compensation under a state or territory based scheme require that the compensable act must correspond to a criminal offence under the relevant state or territory’s criminal legislation. Slavery, human trafficking or offences

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<sup>27</sup> *United Nations Declaration on the Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res 40/34, UN GAOR, 40<sup>th</sup> sess, 96<sup>th</sup> plen mtg, agenda item 98, Supp No 53, UN Doc A/RES/40/34 (entered into force 29 November 1985) art 12.

<sup>28</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) pt II art 2(3)(a).

<sup>29</sup> See Category B Recognition Payment: *Victims Rights and Support Regulation 2013* (NSW) reg 12(c).

<sup>30</sup> See *Victims of Crime Assistance Act 2009* (Qld) s 38(1); *Criminal Injuries Compensation Act* (WA) s 31(1).

relating to slavery-like practices are Commonwealth offences (with the exception of sexual servitude<sup>31</sup>) and there are often no state or territory offences which correspond precisely to the criminal acts defined under Commonwealth legislation. It may be the case that only certain elements of trafficking offences may be compensable under state/territory schemes, such as sexual assault in cases of trafficking for sexual exploitation.

- c) State and territory compensation schemes are not consistent with the Commonwealth offences of forced labour, forced marriage and debt bondage as set out in Divisions 270 and 271 of the Commonwealth Criminal Code Act.<sup>32</sup> This means that many trafficked people are unable to access an effective remedy through the relevant state or territory statutory victims' compensation scheme.

### **2.3. Commonwealth reparation orders lack practical effect**

Section 21B of the *Crimes Act 1914* (Cth) allows for a federal court to issue reparation orders against convicted offenders of federal offences in order to compel the offender to make reparations (monetary or otherwise) to the victim of the offence. Anti-Slavery Australia submits that the current statutory provision and the associated procedures underpinning Commonwealth reparation orders cannot provide an effective remedy to all people who have experienced human trafficking and slavery in Australia.

Few cases relating to slavery, human trafficking, or slavery like practices have proceeded to prosecution, and during the last ten years, there have been only 17 criminal convictions.<sup>33</sup> Anti-Slavery Australia is not aware of any instance in which reparation orders have been made for the benefit of trafficked people, and considers these orders to have little practical effect, especially where an offender's assets may already have been forfeited to the Commonwealth through the operation of legislation providing for

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<sup>31</sup> See *Crimes Act 1900* (ACT) s 79; *Crimes Act 1900* (NSW) s 80D; *Crimes Act 1958* (Vic) s 60AB; *Criminal Code Act 1913* (WA) ss 331B, 331C; *Criminal Code Act* (NT) Div 6A; *Criminal Law Consolidation Act 1935* (SA) s 66.

<sup>32</sup> Frances Simmons, 'Making Possibilities Realities: Compensation for Trafficked People' [2012] 34 *Sydney Law Review* 511, 529.

<sup>33</sup> Interdepartmental Committee on Human Trafficking and Slavery, Parliament of Australia, *Trafficking in Persons: The Australian Government Response 1 July 2014 – 30 June 2015* (2015) 28.

forfeiture of assets.<sup>34</sup> Furthermore these orders are discretionary and dependent on the financial capacity of the offender to make reparations.<sup>35</sup>

While the reparation provision in the Crimes Act 1914 (Cth) will not apply to many victims, Anti-Slavery Australia recommends that guidelines be developed by the CDPD and the Attorney-General's Department to clarify the reparations application process including streamlining adjudication procedures.

Anti-Slavery Australia further recommends that policy consideration be given to the paying of reparations out of any forfeited assets where, but for the forfeiture, damages may have been available.

#### **2.4. *Alternative models – targeted federal reparation schemes***

There are two existing schemes that provide reparations to people who are victims of federal offences. These schemes may inform the development of an appropriate statutory compensation scheme in Australia for the benefit of victims of human trafficking, slavery and slavery-like practices. The schemes provide an effective remedy to particular classes of victims by way of a monetary payment, but these payments are not categorised as a form of compensation nor do they constitute an admission of liability by the Commonwealth.<sup>36</sup>

Two examples of existing Commonwealth schemes are the *Australian Victims of Overseas Terrorism Payments Scheme* and the *Defence Abuse Reparation Scheme*.

These schemes are designed so that money received will not result in any negative impact upon a recipient's social security benefits, whether that is Medicare or any other benefit.<sup>37</sup> The payments are determined in adherence to set guidelines and do not

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<sup>34</sup> See for example the *Proceeds of Crime Act 2002* (Cth) pt 2-3.

<sup>35</sup> Law Council of Australia, Submission to the Attorney-General's Department, *Consultation on the Criminal Justice Response to Slavery and People Trafficking: Reparation and Vulnerable Witness Protections*, 3 March 2011, [107]-[109].

<sup>36</sup> Anti-Slavery Australia, Supplementary submission to Joint Standing Committee on Foreign Affairs, Defence and Trade, Inquiry into Slavery, Slavery-like conditions and People Trafficking, 31 May 2013. .

<sup>37</sup> Explanatory Memorandum, *Social Security Amendment (Supporting Australian Victims of Terrorism Overseas) Bill 2012* (Cth), 1.



necessarily have to adhere to legal burdens of proof,<sup>38</sup> allowing for payments to be made more promptly.

**Recommendations:**

- To establish a national compensation scheme to compensate victims of human trafficking, slavery and slavery-like practices.
- To develop guidelines concerning the process of applying for a Commonwealth reparation order and the assessment and impact of statutory asset forfeiture provisions.

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<sup>38</sup> The burden of proof required by the *Defence Abuse Reparation Scheme* is a question as to whether the victim has 'plausibly suffered abuse whilst employed in the Defence': see Australian Government, *The Defence Abuse Reparation Scheme Guidelines* (2013), [1.5.1.].

### **3. RECOMMENDATION THREE - STRENGTHENING OF VISA PROTECTION FOR VICTIMS OF TRAFFICKING, SLAVERY AND SLAVERY-LIKE PRACTICES**

It is the long experience of Anti-Slavery Australia that some victims of human trafficking, slavery and slavery-like practices may not receive the visa support and protection that they need and as a result, experience great hardship and uncertainty about their future. Anti-Slavery Australia strongly recommends that victims of trafficking, slavery and slavery-like practices be supported by an appropriate visa that reflects their experiences of trafficking and slavery and takes into account individual circumstances.

Currently, the Australian trafficking visa framework and support program for survivors of human trafficking revolves around the contribution of a survivor of human trafficking and slavery to a police investigation. Anti-Slavery Australia continues to recommend that the visa support for victims of trafficking, slavery and slavery-like practices be de-linked from criminal investigations to provide true safety to survivors of egregious human rights abuses and to provide recognition of their status as victims of grave crimes. In that way, survivors can live in certainty about their status and in the safety of Australia.

#### **3.1. *Trafficking visa framework 2004 - 2015***

In January of 2004 the Australian government established a visa program system for those who were victims of trafficking, slavery, and slavery-like practices.<sup>39</sup> The trafficking visas were intended to provide lawful stay to a victim of crime, initially for 30 days, and for a longer period if the victim engaged with a police investigation or commonwealth prosecution. The framework recognised that victims of trafficking were often reluctant to give evidence in a trial where, as a consequence, they could face reprisals if they returned to their home country.<sup>40</sup> In describing the new framework, the Member of Parliament for Wentworth, Mr Malcolm Turnbull, now Prime Minister, explained that a permanent Witness Protection (Trafficking) (Permanent) Visa would come into effect 'following the conclusion of a criminal justice process where the victim has significantly

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<sup>39</sup> *Migration Regulations 1994* (Cth) sch 8, as amended by *Migration Amendment Regulations 2003 (No. 10)* (Cth) sch 1.

<sup>40</sup> Jennifer Burn and Frances Simmons, 'Rewarding witnesses, ignoring victims: an evaluation of the new trafficking visa framework', (2005) 24 *Immigration Review* 6, 6.

contributed to the prosecution or investigation of people trafficking matters and who may be in danger if they return to their home country'.<sup>41</sup>

The 2004 framework was comprised of four different visas: the Bridging Visa F (Class WF), Criminal Justice Stay Visa, the Witness Protection (Trafficking) (Temporary) Visa (Class UM), and the Witness Protection (Trafficking) (Permanent) Visa (Class DH). These four visas were reduced to three after amendments to the Migration Regulations with effect from 1 July 2009.<sup>42</sup> The amendments were intended to simplify the visa framework and provide greater certainty and security to victims and their families, to permit family reunion and improve the government funded support for trafficked people program.

One major change in the 2009 amendments was that the Witness Protection (Trafficking) (Temporary) Visa was repealed. While the temporary visa was valid for a period of three years, the visa holder could, after two years, be offered the opportunity of meeting the criteria for a permanent Witness Protection (Trafficking) (Permanent) Visa. This offer was generally made at the conclusion of the police investigation or prosecution. For the long duration of a police investigation, possible criminal trial and provision of evidence in a criminal trial the victim/witness lived in uncertainty about their future and a protracted period of separation from their family.

### **3.2. The 2015 amendments to the trafficking visa framework**

The *Migration Regulations 1994* were further amended on 1 July 2015 to significantly change the trafficking visa framework and the titles of the visas. The amendments were made with the aim of avoiding “*stigmatization*” and facilitating “*better-targeted support and access to benefits*”<sup>43</sup> for victims of trafficking, slavery, and slavery-like practices. Changing the names of visas in the trafficking visa framework was an important and long-requested change. The change of visa titles from Criminal Justice Stay Visa and

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<sup>41</sup> Malcolm Turnbull, Commonwealth, *Parliamentary debates*, House of Representatives, 14 March 2005, 12 (Malcolm Turnbull).

<sup>42</sup> Jennifer Burn and Frances Simmons, ‘Prioritising protection – a new visa framework for trafficked people’ (2009) 41 *Immigration Review* 3.

<sup>43</sup> Explanatory Statement, Migration Legislation Amendment (2015 Measures No. 2) Regulation 2015 (Cth) 1.

Witness Protection Visa to a restructured Bridging F Visa and Referred Stay Visa, respectively, removes any preconceptions and misconceptions attached to the words and phrases previously used. However, while changing the names of visas is an important amendment, there is still work to do to ensure that the visa framework is appropriate.

Currently, the trafficking visa scheme contains two different visas:

- a) The Bridging F (Class WF) Visa – From 1 July 2015, the Bridging F Visa was expanded to ensure that, “*victims of trafficking, slavery, and slavery-like practices who are assisting in the administration of criminal justice in Australia... [were moved] out of the criminal justice stay visa framework and onto the visa catering specifically for trafficked persons (the Bridging F Visa)*”.<sup>44</sup> The restructuring of the Criminal Justice Stay Visa addressed concerns articulated by advocacy organisations<sup>45</sup> that the title of the visa stigmatised those who were granted the visa. Feedback from visa holders was that potential employers feared that the term ‘criminal justice visa’ suggested that the potential employee was a criminal or involved in some form of criminal conduct. Further, the visa was for any person required to stay in Australia for purposes of the ‘administration of justice’ and is potentially granted to both defendants and witnesses.
  
- b) The Referred Stay (Permanent) (Class DH) Visa is the new permanent visa for victims of human trafficking, slavery and slavery-like practices, previously named the ‘Witness Protection (Trafficking) (Permanent) Visa’. The renaming of the Criminal Justice Stay Visa was intended to address concerns of stigmatization linked to the visa name,<sup>46</sup> and reflected long-term advocacy.<sup>47</sup> In a very welcome change to the visa criteria, the Migration Regulations were amended to provide a better and more efficient pathway to permanent residence. For the grant of a permanent visa, there is no longer a visa criteria requirement for there to be a

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<sup>44</sup> Department of Immigration and Border Protection, *PAM3: Act – Character and Security – People Trafficking*, [83].

<sup>45</sup> Such as Anti-Slavery Australia, The Australian Red Cross, Australian Catholics Religious Against Trafficking in Humans, Scarlet Alliance, Project Respect and the Salvation Army.

<sup>46</sup> Explanatory Statement, Migration Legislation Amendment (2015 Measures No. 2) Regulation 2015 (Cth) 10.

<sup>47</sup> Anti-Slavery Australia, Submission No 34 to Joint Committee on Foreign Affairs, Defence and Trade, *Inquiry into Slavery, Slavery-Like Conditions and People Trafficking*, 9 October 2012.

prosecution of a person who is alleged to have trafficked a person (or a decision by the CDPP not to prosecute). Rather, a victim may be granted an Attorney-General's certificate to the effect that the "*applicant made a contribution to, and cooperated closely with, an investigation in relation to another person who was alleged to have engaged in human trafficking, slavery or slavery-like practices*",<sup>48</sup> and the Minister is satisfied that the applicant would be in danger if they were returned to their home country.<sup>49</sup> This important amendment potentially allows those victims of trafficking who have made a contribution to and cooperated with an investigation the opportunity to apply for a permanent visa, regardless of whether or not the investigation has led to a prosecution.

### **3.3. Evaluating the current trafficking visa framework**

An evaluation of the current visa framework raises a number of difficulties. While the amendments to the Migration Regulations were made almost 8 months ago, there is a lack of clarity about the operation of the visa criteria and a lack of policy guidance from the Department of Immigration and Border Protection about departmental interpretation of the visa criteria.

In order to obtain an extended Bridging F Visa and a Referred Stay Visa the applicant is still required to participate and cooperate in an investigation relating to a possible human trafficking and slavery offence. The investigations required for such matters are often complex and lengthy, and victim-witnesses are left in a continuing state of uncertainty and stress.

#### **Assessment of 'danger' in Migration Regulation 2.07AK**

In addition to the visa criteria dealing with the extent of the contribution of the victim to law enforcement, the Minister for Immigration (or delegate) is required to form an opinion that:

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<sup>48</sup> *Migration Regulations 1994* (Cth) reg 2.07AK.

<sup>49</sup> *Migration Regulations 1994* (Cth) reg 2.07AK.

“[T]he Minister is satisfied that the person would be in danger if he or she returned to his or her home country.”<sup>50</sup>

Anti-Slavery Australia submits that the requirement to demonstrate ‘danger’ be removed from the visa criteria. The eligibility criteria for the grant of the visas are already narrowly framed. The additional hurdle of meeting the ‘danger’ criteria seems unnecessary and has resulted in considerable uncertainty in the assessment of cases by delegates in the Department of Immigration and Border Protection. In any case, multiple factors may be relevant in assessing danger including the extent of police protection in the home country, issues relating to discrimination on gender or racial grounds, the risk of re-trafficking, and retribution. Clearly the test of danger anticipated in the *Migration Regulations* is a different test to the requirement to provide evidence of persecution in relation to a Protection visa.

### **3.4. Compassionate circumstances**

As previously recommended in the Anti-Slavery Australia submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade ‘Inquiry into Slavery, Slavery-like Conditions and People Trafficking’<sup>51</sup>, Anti-Slavery Australia continues to recommend the granting of permanent visas in compassionate circumstances, where trafficked people are unable to participate in a criminal investigation.

Anti-Slavery Australia observes that there is a significant gap in the trafficking visa framework that could be remedied by the implementation of a mechanism to grant a permanent visa in compassionate circumstances. There are a small number of victims of trafficking and slavery who are unable to participate in criminal investigations, and do not qualify for any other visa.

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<sup>50</sup> *Migration Regulations 1994* (Cth) reg 2.07AK(3)(f).

<sup>51</sup> Anti-Slavery Australia, Submission No 34 to Joint Committee on Foreign Affairs, Defence and Trade, *Inquiry into Slavery, Slavery-Like Conditions and People Trafficking*, 9 October 2012, 34.

## Examples of cases where a visa in the trafficking framework may not be available

Identified gaps include a lack of visa supports for people who:

- experienced human trafficking, forced labour and forced marriage prior to amendments to the Commonwealth Criminal Code in 2005 and 2013 introducing relevant criminal offences;
- are unable to participate in the criminal justice process due to physical and mental difficulties, or fear for their own lives or the lives of their families;
- are unable to participate in the criminal justice system and where there are compassionate and compelling circumstances;
- have made a contribution but are no longer able or required to assist due to situations outside of their control, including a lack of corroborating evidence, or the trafficker has left the jurisdiction or cannot be identified;
- are minors, trafficked to Australia and who are unable to participate in the criminal justice process.

### 3.5. Support programs for trafficked people

As a state party to the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (Trafficking Protocol), Australia is internationally obliged to ensure that victims of trafficking are appropriately protected and assisted.<sup>52</sup> In accordance with Article 6.3 of the Trafficking Protocol,<sup>53</sup> the Australian Government's Support for Trafficked People Program (Support Program), which is run by the Australia

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<sup>52</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 15 December 2000, 2237 UNTS 319, Annex II (entered into force 31 May 2004) Part II.

<sup>53</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 15 December 2000, 2237 UNTS 319, Annex II (entered into force 31 May 2004) art 6.3 states:

*Each State Party shall consider implementing measure to provide for the physical, psychological and social recovery of victims of trafficking in persons, including, in appropriate cases, in cooperation with non-governmental organisations, other relevant organisations and other elements of civil society, and, in particular, the provisions of:*

- (a) Appropriate housing;*
- (b) Counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand;*
- (c) Medical, psychological and material assistance; and*
- (d) Employment, educational and training opportunities.*

Red Cross, provides support for victims of human trafficking, including accommodation assistance, counselling and mental health support, medical treatment, income support, access to legal services, and social support.<sup>54</sup> Suspected victims of trafficking are able to enter the Support Program once they are identified as such by the Australian Federal Police and are then referred to the Australian Red Cross. This is available to suspected victims regardless of the type of visa that they hold.

When the former Special Rapporteur on trafficking in persons visited Australia in 2011, she expressed concern that, “all ongoing support services are dependent on a contribution to criminal justice process or investigation”<sup>55</sup> – and as participation in investigations is still the determining factor as to whether or not a victim is granted an extended Bridging F Visa or a Referred Stay Visa, the former Special Rapporteur’s concern applies to the current visa framework. The former Special Rapporteur also stated that the focus on criminal justice “imposes an additional burden on victims of trafficking and does not represent an adequate knowledge of their status as victims,”<sup>56</sup> and therefore it does not have a human rights based, or victim based, approach to protecting those who have been exploited.

### **3.6. Visa entitlements**

Early this year, the government implemented changes that allowed holders of the extended Bridging F Visa and the Referred Stay Visa to be able to have greater access to support payments and education. The Human Trafficking Visa Framework has been allocated funding of \$2.3 million over four years.<sup>57</sup> The extended Bridging F Visa now allows the visa holder access to Special Benefit income support payments and 510 hours

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<sup>54</sup> Interdepartmental Committee on Human Trafficking Slavery, Parliament of Australia, : *The Australian Government Response July 2014 – 30 June 2015* (2015) 32.

<sup>55</sup> Joy Ngozi Ezeilo, Special Rapporteur, *Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo – Addendum – Mission to Australia*, UN GAOR, 20<sup>th</sup> sess, Agenda Item 3, UN Doc A/HRC/20/18/Add.1 (18 May 2012) [53].

<sup>56</sup> *Ibid.*

<sup>57</sup> Interdepartmental Committee on Human Trafficking and Slavery, Parliament of Australia, *Trafficking in Persons – The Australian Government Response 1 July 2014-30 June 2015* (2015) 11.



of tuition through the Adult Migrant English Program (AMEP).<sup>58</sup> Survivors granted the Referred Stay Visa are now able to access Youth Allowance, Austudy and Newstart payments as the 104 week Newly Arrived Resident's Waiting Period for income support has been waived.<sup>59</sup>

### **3.7. Reflection and recovery Period and entry to the Support for Trafficked People Program**

Anti-Slavery Australia refers to its 2012 submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade in which we recommended the extension of the 45 day period of 'reflection and recovery' to an initial and automatic reflection period of 90 days, regardless of whether or not the victim of trafficking is able or willing to assist in an investigation.<sup>60</sup> Former Special Rapporteur, Joy Ngozi Ezeilo, had suggested that an automatic reflection period of 90 days would be more appropriate as a 45 day period may not be an adequate length of time for a victim of trafficking to properly reflect and make critical decisions.<sup>61</sup> The former Special Rapporteur also stated that an automatic 90 day reflection period is also more in accordance with Article 7 of the Trafficking Protocol,<sup>62</sup> and would be important in allowing proper recovery of the victim of trafficking as they are able to regain their physical and psychological stability, which in turn may also be more beneficial in criminal investigations.<sup>63</sup>

We support and agree with the former Special Rapporteur's recommendation of extending the reflection and recovery period from 45 days to 90 days.

Referral to the Support for Trafficked People Program is triggered by a written opinion from an officer of the Australian Federal Police, or of a police force of a State or Territory

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<sup>58</sup> This program provides those with access to 510 hours of free English language tuition; see also Interdepartmental Committee on Human Trafficking and Slavery, Parliament of Australia, *Trafficking in Persons – The Australian Government Response 1 July 2014-30 June 2015* (2015) 11-12.

<sup>59</sup> Interdepartmental Committee on Human Trafficking and Slavery, Parliament of Australia, *Trafficking in Persons – The Australian Government Response 1 July 2014-30 June 2015* (2015) 12.

<sup>60</sup> Anti-Slavery Australia, Submission No 34 to Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry into Slavery, Slavery-Like Conditions and People Trafficking*, 9 October 2012, 36-37.

<sup>61</sup> Joy Ngozi Ezeilo, Special Rapporteur, *Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo – Addendum – Mission to Australia*, UN GAOR, 20<sup>th</sup> sess, Agenda Item 3, UN Doc A/HRC/20/18/Add.1 (18 May 2012) [54].

<sup>62</sup> *Ibid.*

<sup>63</sup> Joy Ngozi Ezeilo, Special Rapporteur, *Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo*, UN GAOR, 17<sup>th</sup> sess, Agenda Item 3, UN Doc A/HRC/17/35 (13 April 2011) [52].

that “the applicant has been identified as a suspected victim of human trafficking, slavery or slavery-like practices”.<sup>[1]</sup>

The Anti-Slavery Australia experience is that many victims are initially reluctant to engage with law enforcement:

Victims of trafficking [slavery, and slavery-like practices], have often suffered serious harm and abuse at the hands of their traffickers, including physical and psychological harm that in many cases extends to on-going physical and psychological injury months to years after their removal from a trafficking situation. In many cases victims of trafficking have instilled in them a fear of government authorities such as immigration officials and police. They are often threatened with further harm to themselves or their families, as well as threats of deportation, if they contact the police. It is our experience that linking initial access to support through identification of a person as a ‘suspected victim of trafficking’ by the Australian Federal Police centres the Australian response as prosecution-centred rather than rights-centred.<sup>64</sup>

Anti-Slavery Australia recommends that referral pathways be broadened to authorise specialist officers in the Department of Immigration and Border Protection, and other agencies, such as the Australian Red Cross, to refer suspected victims of human trafficking, slavery or slavery-like practices to the Support for Trafficked People Program for initial support.

### **3.8. Identification of suspected victims of trafficking**

The current Special Rapporteur on trafficking in persons, especially women and children, Maria Grazia Giammarinaro, has pinpointed the identification of victims of trafficking as the greatest obstacle in ensuring the rights of victims and preventing further exploitation.<sup>65</sup> The Special Rapporteur recommends that “individual due diligence” measures should be in place so that the individual needs of victims of trafficking, particularly those who are most vulnerable (such as children), are addressed.<sup>66</sup> To be eligible for a trafficking visa and access to the Support Program, victims are currently

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<sup>[1]</sup> Migration Regulations 1994, Schedule 1, Item 1306 Bridging F (Class WF), (3)(d)(i).

<sup>64</sup> Anti-Slavery Australia, Submission No 34 to Joint Standing Committee on Foreign Affairs Defence and Trade, Inquiry into Slavery, Slavery-Like Conditions and People Trafficking, October 2012 at 9.14.

<sup>65</sup> Maria Grazia Giammarinaro, Special Rapporteur, *Trafficking in persons, especially women and children*, UN GAOR, 70<sup>th</sup> sess, Provisional Agenda Item 73(b), UN Doc A/70/260 (3 August 2015) [27].

<sup>66</sup> *Ibid* [28].

required to participate and closely cooperate with the Australian Federal Police in the investigative process. This is despite the fact that the person has already been identified as a victim of trafficking.

This approach is prosecution based, rather than rights based or victim based, and ignores the needs of those who have suffered great trauma and are physically and/or psychologically unable to assist in investigations. Although the Australian Federal Police investigate Commonwealth offences, in some cases there may be insufficient evidence to meet the criminal standard of proof and, logically, in such cases, the police investigation would not proceed. The consequence may be that a person has been trafficked, is recognised as being trafficked and yet is unable to contribute to a police investigation. The result is that there cannot be a visa granted under the trafficking visa framework. This is a major gap in the existing framework and causes considerable distress and hardship. Additionally, some victims of trafficking are extremely fearful of their traffickers and fear the possible retribution that may be inflicted upon themselves and their family if they were to contact authorities, or they have had instilled in them a fear of authorities such as immigration officials and police.

Furthermore, the amendment of the *Migration Act 1958* (Cth) by the *Migration Amendment (Charging for a Migration Outcome) Bill 2015* (Cth), has only further complicated the successful identification of victims of trafficking. The *Migration Act 1958* (Cth) now criminalises those who ask for or offer a benefit in exchange for the occurrence of a 'sponsorship-related event'.<sup>67</sup> A 'sponsorship-related event' is defined in s245AQ of the Act as a number of acts, including applying for approval as a sponsor, and any actions that can be taken in relation to a sponsored visa, such as agreeing to a sponsor, and employing a person to work in an occupation for which a visa has been granted.<sup>68</sup> We share the concern expressed by the Law Institute of Victoria in their submission regarding the *Migration Amendment (Charging for a Migration Outcome) Bill 2015* (Cth), where the amended provisions can target and penalise an already vulnerable

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<sup>67</sup> *Migration Act 1958* (Cth) ss 245AR, 245AS.

<sup>68</sup> Leah Ferris, *Migration Amendment (Charging for a Migration Outcome) Bill 2015*, No 46 of 2015-16, 12 November 2015, 9.

migrant group,<sup>69</sup> and will deter those who are victims of trafficking from coming forward and disclosing their circumstances to authorities due to the fear of having their visa cancelled by the DIBP and being deported. The likely deterrent effect that these provisions will have on the reporting of human trafficking by victims will be contrary to the operation of international and domestic laws which require Australia to identify and support victims of human trafficking or slavery.

**Recommendations:**

- To broaden referral pathways to the Support for Trafficked People Program to include representatives of authorised agencies.
- To extend initial support available to victims of trafficking and slavery from 45 to 90 days.
- For the Department of Immigration and Border Protection to develop policy about the operation of visas in the trafficking visa framework.
- To repeal the permanent resident visa criteria requiring that a victim of trafficking demonstrate that they would experience 'danger' on return to their home country.
- To establish a process for granting permanent visas to trafficked persons in compassionate circumstances.

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<sup>69</sup> Law Institute Victoria, Submission No 34 to Senate Legal and Constitutional Affairs Committee, *Migration Amendment (Charging for a Migration Outcome) Bill 2015*, October 2015, 3-4.

#### **4. RECOMMENDATION FOUR – DEVELOPMENT OF NEW CIVIL REMEDIES AND BETTER PROTECTIONS FOR THOSE FACING FORCED MARRIAGE**

Forced marriage has emerged as a major human rights issue in Australia and the practice of forced marriage was criminalised by the Australian Parliament in 2013.<sup>70</sup>

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

Launched in November 2015, the My Blue Sky website aims to educate and raise awareness about forced marriage. It includes information about forced marriage law in Australia, the difference between forced and arranged marriage, safety planning, referral organisations and available support services.

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

International research and experience shows that people facing forced marriage may only have one opportunity to reach out for help. This website offers vulnerable people the opportunity to access reliable information about marriage in Australia and direct access to legal advice and support through a simple email or text message. Australian nationals may be forced to marry in Australia or overseas. My Blue Sky offers important contact information for people who may be travelling overseas and who are concerned they will be forced to marry once outside of Australia, as well as for those who may have already been taken overseas. Since the launch of My Blue Sky, vulnerable young people, school teachers and counsellors and health professionals have reached out to the service for help and legal advice.

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<sup>70</sup> Jennifer Burn and Frances Simmons, 'Without consent: Forced Marriage in Australia', (2012) 36(3) *Melbourne University Law Review* 970.

To increase community engagement with the issue, collaborative forced marriage networks have been established in New South Wales and Victoria with plans to establish networks in other states and territories in the future. Anti-Slavery Australia co-convenes the NSW Forced Marriage Network with the Australian Red Cross, which brings together over 130 members from 60 government and community organisations. Membership includes representation from the Cultural and Linguistically Diverse (CALD) communities, migrant resource centres, government agencies at the local, state and federal level as well as from community organisations and individual advocates. The purpose of the Network is to engage the community to raise awareness about and prevent forced marriage as well as to provide coordinated support and assistance to people who may be in, or at risk of, forced marriage. Three working groups have also been established in the areas of prevention, education and training and direct service provision. There is clearly a need for greater education and awareness-raising about forced marriage in all communities. Currently the Networks are run on a pro-bono basis by members, and this limits the capacity to provide education and outreach. There is a real need for government funding for these Networks.

Anti-Slavery Australia's experience highlights significant gaps in the legal framework. In particular, we observe a protection gap in the existing family law protective jurisdiction. In addition to the criminalization of forced marriage, Anti-Slavery Australia strongly advocates for the introduction of a complementary civil framework through the *Family Law Act 1975 (Cth)* to address gaps in victim support and protection where any person, regardless of age, is at risk of or in a forced marriage.

#### **4.1. Current issues**

While Anti-Slavery Australia continues to support the criminal justice response to forced marriage, there are significant gaps in the protection framework for those facing forced marriage in Australia and overseas. The Australian experience to date illustrates cases of

Australian girls and women trafficked outside Australia for forced marriage,<sup>71</sup> and reports of others being forced into marriage with Australia.<sup>72</sup> Reports have illustrated forced marriage in asylum seeker visa applicants and the issue of promised marriage in the indigenous community is still unresolved. The Australian cases show an identifiable pattern of removal of Australian citizens by family members for the purposes of forced marriage or marriage without full and free consent in a country outside Australia.

Since the practice of forced marriage was criminalised in 2013, the Australian Federal Police have reported that a significant number of children are facing forced marriage. As child protection is a state issue, this highlights the need for clear coordination between federal and state agencies for the purpose of establishing effective referral and support services.

#### **4.2. Protective and preventative orders**

Anti-Slavery Australia refers to the protective jurisdiction of the Family Court of Australia and the Federal Circuit Court of Australia to issue protective and preventative orders for children. Such orders can include orders preventing a child from leaving the jurisdiction to marry overseas. However, Anti-Slavery Australia has identified an emerging category of vulnerable young women (and possibly young men) who are over the age of 18 and at risk of forced marriage who are not covered by protective orders because of their age. From our experience such vulnerable adults are often subject to intense coercion and family pressure to marry. Anti-Slavery Australia recommends the implementation of a civil protection order similar in operation to the UK Forced Marriage Protection Order ('FMPO'). The UK FMPO enables those at risk of forced marriage or their advocates to make an application for a wide-ranging protective order including the surrender of passports regardless of the age of the person at risk.

In relation to children, the Commonwealth and States have responsibilities in the area of legislation affecting children and child protection. There is a need for a coordinated response to ensure that children throughout Australia facing forced marriage are

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<sup>71</sup> See for example *Department of Human Services & Brouker and Anor* [2010] FamCA 742; *Kandal & Khyatt & ors* [2010] FMCAfam 508; and *Madley & Madley and Anor* [2011] FMCAfam 1007.

<sup>72</sup> See for example, *Essey & Elia* [2013] FCCA FamCA 742.

protected.<sup>73</sup> States and Territories have varying responses to child protection. In NSW for example, even a suspicion of forced marriage requires mandatory reporting to child protection authorities for children up to the age of 16, although the mandatory reporting guidelines do not compel a mandatory report about a suspicion of forced marriage if the child is between the age of 16 and 18.

#### **4.3. Amendments to the partner visa framework**

While the family violence provisions in the *Migration Regulations 1994*<sup>74</sup> allow the grant of a permanent visa to a person who has experienced family violence within a marriage, there is a requirement to prove the genuineness of the relationship before the family violence provisions can be invoked. The intrinsic nature of a forced marriage would indicate that there cannot be a 'genuine relationship' as the victim did not consent to the marriage.

Anti-Slavery Australia recommends that the family violence provisions in the *Migration Regulations 1994* (Cth) should be expanded to include circumstances where the marriage was forced such that there was no 'genuine relationship'.

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<sup>73</sup> Anti-Slavery Australia and Plan International Australia, *Just Married, Just a Child. Child marriage in the Indo-Pacific region*, (2015), 28.

<sup>74</sup> *Migration Regulations 1994* (Cth) pt 1 div 1.5.



**Recommendations:**

- Broaden the Family Court of Australia’s jurisdiction so as to allow general protective and preventative orders for people over the age of 18 in relation to forced marriage.
- Amend the Partner Visa framework so that family violence provisions can be invoked in forced marriage circumstances where there was no ‘genuine relationship’.
- Encourage better coordination between federal agencies and state-based child protection services.
- Fund collaborative Forced Marriage Networks to expand into all states and territories and to develop further education and outreach strategies for communities.

## 5. RECOMMENDATION FIVE – ADOPTION OF THE PRODUCTIVITY COMMISSION’S MIGRANT WORKER RECOMMENDATIONS IN THE INQUIRY REPORT INTO THE WORKPLACE RELATIONS FRAMEWORK

Anti-Slavery Australia recommends the adoption of the Productivity Commission’s recommendations in relation to migrant workers as outlined in the *Inquiry Report into the Workplace Relations Framework* (the Inquiry Report).<sup>75</sup> Migrant workers face higher risks of exploitation including increased vulnerability to human trafficking, slavery and slavery-like practices.<sup>76</sup>

Anti-Slavery Australia considers that the adoption of the following measures will enhance the effectiveness of existing Commonwealth legislation and policies as well as law enforcement agencies’ response to human trafficking:

- a) improving information and the accessibility of information available to migrant workers’ workplace rights and conditions available through the Department of Immigration and Border Protection and the Fair Work Ombudsman;<sup>77</sup>
- b) providing additional resources to the Fair Work Ombudsman to identify, investigate and carry out enforcement activities against employers, particularly in relation to those employees who are more vulnerable to exploitation;<sup>78</sup>
- c) increasing penalties for breaching Reg. 3.44 of the *Fair Work Regulations 2009* (Cth) by keeping false or misleading documents as required under the Regulations and the *Fair Work Act 2009* (Cth) in line with similar penalties under s. 234 of the *Migration Act 1958* (Cth);<sup>79</sup>
- d) amending the *Fair Work Act 2009* (Cth) to clarify that, in instances where migrants have breached the *Migration Act 1958* (Cth), their employment contract is valid and the *Fair Work Act 2009* (Cth) applies;<sup>80</sup>

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<sup>75</sup> Productivity Commission 2015, *Workplace Relations Framework*, Final Report, Canberra, vol 2 ch 29.

<sup>76</sup> *Ibid* 915.

<sup>77</sup> *Ibid* [29.1].

<sup>78</sup> *Ibid* [29.2].

<sup>79</sup> *Ibid* [29.3].

<sup>80</sup> *Ibid* [29.4].

- e) limiting information sharing between the Fair Work Ombudsman and the Department of Immigration and Border Protection. The Department of Immigration and Border Protection should share any information with the Fair Work Ombudsman when they suspect an employer has underpaid a migrant. However, the Fair Work Ombudsman should not share any identifying information with the Department of Immigration and Border Protection about a migrant who has done nothing more than breached their employment-related visa conditions.<sup>81</sup>

Anti-Slavery Australia considers that it is vital that the dissemination of information to migrant and other vulnerable workers be a coordinated whole-of-government approach that also involves input from frontline community organisations. Anti-Slavery Australia submits that education and information should be targeted, accessible and easily understood by those experiencing and at risk of human trafficking, slavery and slavery-like practices. Anti-Slavery Australia also notes that education and awareness-raising is also important for the broader community.

Anti-Slavery Australia also recommends that the Committee consider the following suggestions set out in the Inquiry Report as Anti-Slavery Australia considers that the implementation of these suggestions will enhance the role and effectiveness of Commonwealth law enforcement agencies in responding to human trafficking and the effectiveness of Commonwealth policies:

- a) giving the Fair Work Ombudsman greater powers to compel a party to provide information (for example, compelling parties to speak to inspectors on the record as this will assist in attaining enforcement outcomes);<sup>82</sup>
- b) reconsidering the Fair Work inspectors' role as Migration Inspectors as this may discourage migrants from approaching the Fair Work Ombudsman and blurs the distinction between the role of the Fair Work Ombudsman and that of the Department of Immigration and Border Protection;<sup>83</sup> and

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<sup>81</sup> Ibid [29.5].

<sup>82</sup> Ibid 928.

<sup>83</sup> Ibid 932.

c) reconsidering temporary migrants' eligibility for assistance through the Fair Entitlements Guarantee.<sup>84</sup>

**Recommendations:**

- Adopt the Productivity Commission's migrant worker recommendations in the Inquiry Report into the Workplace Relations Framework.
- Education and information should be coordinated, targeted, accessible and easily understood by those experiencing and at risk of human trafficking, slavery and slavery-like practices. However, the broader community should also be educated in order to assist in detection and referral pathways.

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<sup>84</sup> Ibid 934.

## 6. RECOMMENDATION SIX – RATIFICATION OF CERTAIN INTERNATIONAL TREATIES

Anti-Slavery Australia recommends that the Australian Government ratifies both the *Protocol of 2014 to the Forced Labour Convention* and the *Convention concerning Decent Work for Domestic Workers 2011*. Anti-Slavery Australia also recommends the adoption of the *Recommendation on Supplementary Measures for the Effective Suppression of Forced Labour 2014*.

Anti-Slavery Australia recommends the ratification and incorporation into domestic law of the *Protocol of 2014 to the Forced Labour Convention* and the *Convention concerning Decent Work for Domestic Workers 2011*. Anti-Slavery Australia also recommends the adoption of the *Recommendation on Supplementary Measures for the Effective Suppression of Forced Labour 2014*.

Anti-Slavery Australia considers that these steps will enhance the effectiveness of the existing relevant Commonwealth legislative framework and policies as well as strengthen the effectiveness of law enforcement agencies' response to human trafficking.

### 6.1. **Recommendation: Ratify Protocol of 2014 to the Forced Labour Convention 1930**

Anti-Slavery Australia recommends the ratification of the *Protocol of 2014 to the Forced Labour Convention 1930* (Protocol of 2014).

Australia has long been a signatory to the *Convention concerning Forced or Compulsory Labour 1930* (Forced Labour Convention 1930). Ratification of the *Protocol of 2014* and incorporation into domestic legislation will renew Australia's commitment to preventing and eliminating forced labour and enhance the effectiveness of law enforcement agencies' responses to forced labour.

Anti-Slavery Australia considers that the ratification of the *Protocol of 2014* will ensure a nationally consistent approach to preventing and eliminating forced labour through the following measures:

- a) education and information, particularly focusing on employers and those vulnerable to becoming victims of forced labour;<sup>85</sup>
- b) ensuring legislation applies to all workers and all sectors of the economy;<sup>86</sup>
- c) strengthening law enforcement agencies;<sup>87</sup>
- d) protecting migrant workers from abusive and fraudulent practices during recruitment and placement processes;<sup>88</sup>
- e) addressing the root causes and factors that lead to forced labour;<sup>89</sup>
- f) implementing effective measures and policies to identify, release, protect and recover victims of forced labour.<sup>90</sup>

Many of these measures are consistent with the recommendations outlined in chapter 29 (Migrant Workers) of the Productivity Commission's Inquiry Report into the Workplace Relations Framework.

The *Protocol of 2014* also calls for the adoption of measures for victims to have access to:

- a) appropriate protection, rehabilitation, assistance and support;<sup>91</sup> and
- b) remedies, including compensation.<sup>92</sup>

Anti-Slavery Australia notes that the *Protocol of 2014 to the Forced Labour Convention* complements the work already being undertaken through the:

- a) National Action Plan to Combat Human Trafficking and Slavery 2015-2019;
- b) National Roundtable on Human Trafficking and Slavery;

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<sup>85</sup> *Protocol of 2014 to the Forced Labour Convention 1930*, 103 ILC (not yet in force) art 2(a),(b).

<sup>86</sup> *Ibid* art 2(c).

<sup>87</sup> *Ibid* art 2(c).

<sup>88</sup> *Ibid* art 2(d).

<sup>89</sup> *Ibid* art 2(f).

<sup>90</sup> *Ibid* art 3.

<sup>91</sup> *Ibid* art 2.

<sup>92</sup> In Part 2, Anti-Slavery Australia recommends the establishment of a national compensation scheme for survivors of human trafficking, slavery and slavery-like practices; see *Protocol of 2014 to the Forced Labour Convention 1930*, 103 ILC (not yet in force) arts 1, 4.

- c) Australia-Asia Program to Combat Trafficking in Persons;
- d) Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime; and
- e) Support for Trafficked People Program delivered by the Australian Red Cross.

Anti-Slavery Australia considers that ratification of the *Protocol of 2014* will also support and enhance the effectiveness of the existing Commonwealth legislative framework and policies including:

- a) *Criminal Code Act 1995 (Cth) – Crimes Legislation Amendment (Slavery, Slavery-Like Conditions and People Trafficking) Act 2013 (Cth)* that established the additional offences of forced marriage and forced labour;
- b) *Fair Work Act 2009 (Cth)*; and
- c) *Migration Act 1958 (Cth)*.

## **6.2. Recommendation: Ratify Convention concerning Decent Work for Domestic Workers 2011**

Anti-Slavery Australia recommends the ratification of the *Convention concerning Decent Work for Domestic Workers 2011* (Domestic Workers Convention).

Anti-Slavery Australia welcomes the recent *Migration Legislation Amendment (2015 Measures No. 3) Regulation 2015 (Cth)* that enhance protections for diplomatic domestic workers.

However, due to the 'hidden' nature of domestic work, Anti-Slavery Australia considers that it is vital that specific protections be implemented to protect all domestic workers from trafficking, slavery and slavery-like conditions.

Anti-Slavery Australia considers that the ratification of the *Domestic Workers Convention* will enhance the effectiveness of current Commonwealth legislation and policies by affording greater protections for domestic workers based on the nature of their work, namely:

- a) decent living conditions that respect the domestic workers privacy if they reside in the household;<sup>93</sup>
- b) ensuring domestic workers are informed of their terms and conditions of employment in an appropriate, verifiable and easily understandable manner;<sup>94</sup>
- c) protections from abusive/fraudulent practices during recruitment and placement, particularly by private employment agencies;<sup>95</sup> and
- d) development and implementation of measures for labour inspection, enforcement and penalties with due regard for the special characteristics of domestic work, in accordance with national laws and regulations.<sup>96</sup>

Ratification will also ensure that protections for domestic workers are nationally consistent. For example, presently, domestic workers engaged by non-constitutional corporations in Western Australia are excluded from industrial relations protections as they are:

- a) not covered by the *Fair Work Act 2009* (Cth) as Western Australia has not referred their industrial relations powers to the Commonwealth, and
- b) expressly excluded from the coverage of the *Industrial Relations Act 1979* (WA).

### **6.3. Recommendation: Adopting the Recommendation on Supplementary Measures for the Effective Suppression of Forced Labour 2014**

Anti-Slavery Australia recommends the adoption of the *Recommendation on Supplementary Measures for the Effective Suppression of Forced Labour 2014* (Forced Labour (Supplementary Measures) Recommendation 2014).

The *Forced Labour (Supplementary Measures) Recommendation 2014* outlines a suite of practical measures and policies to address forced labour, including:

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<sup>93</sup> *Convention concerning Decent Work for Domestic Workers 2011*, 100 ILC (entered into force 5 September 2013) art 6.

<sup>94</sup> *Ibid* art 7.

<sup>95</sup> *Ibid* 15.

<sup>96</sup> *Ibid* art 17.



- a) preventive measures such as awareness raising campaigns and skills training programs for at-risk population groups;<sup>97</sup>
- b) protection measures that cover both the immediate needs of survivors of forced labour as well as their long-term recovery and rehabilitation;<sup>98</sup>
- c) remedial measures that include access to compensation and legal assistance;<sup>99</sup> and
- d) enforcement measures such as developing indicators of forced or compulsory labour for use by law enforcement agencies.<sup>100</sup>

Anti-Slavery Australia particularly notes the *Forced Labour (Supplementary Measures) Recommendation 2014* requirement to implement measures to eliminate abuses and fraudulent practices by labour recruiters and employment agencies.

**Recommendations:**

- Ratify the Protocol of 2014 to the Forced Labour Convention.
- Ratify Convention concerning Decent Work for Domestic Workers 2011.
- Adopt the Recommendation on Supplementary Measures for the Effective Suppression of Forced Labour 2014.

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<sup>97</sup> *Recommendation on Supplementary Measures for the Effective Suppression of Forced Labour 2014*, 103 ILC, art 4.

<sup>98</sup> *Ibid* arts 9, 11.

<sup>99</sup> *Ibid* art 12.

<sup>100</sup> *Ibid* art 13.

## **7. RECOMMENDATION SEVEN: STRENGTHEN AUSTRALIA'S RESPONSE TO EXPLOITATION IN SUPPLY CHAINS**

Supply chain exploitation impacts on the provision of goods and services in Australia, in the region and beyond. There must be consideration given to establishing mechanisms to efficiently identify and prevent the occurrence of exploitation within supply chains. To this end, Anti-Slavery Australia supports the recent Australian Government initiative to convene a Supply Chains Working Group to address exploitation in supply chains. While there are many approaches to reducing such exploitation, Anti-Slavery Australia observes that the Australian Government is a significant purchaser of goods and services. The Australian Government has demonstrated clear intent to reduce human trafficking and slavery and there is an opportunity to show further leadership in this area by developing policies and processes to strengthen the Australian Government procurement guidelines.

**Recommendation:**

- Strengthen the Australian Government's policies and processes regarding the procurement of its goods and services.

## 8. ABOUT ANTI-SLAVERY AUSTRALIA, UNIVERSITY OF TECHNOLOGY SYDNEY

Anti-Slavery Australia at the University of Technology Sydney is a thriving specialist law, research and policy centre dedicated to advancing the rights of people who have experienced human trafficking, slavery and slavery-like practices (such as servitude, forced marriage and forced labour). Anti-Slavery Australia includes a law practice which provides legal advice and representation to women, men and children who are at risk of or who are victims of human trafficking, slavery and slavery-like practices. Clients have access to qualified lawyers and migration agents. The law practice has operated for 12 years with remarkable success.

Anti-Slavery Australia has substantial experience working with vulnerable people and communities. As a member of the National Roundtable on Human Trafficking and Slavery since 2008, Anti-Slavery Australia participated in the development and drafting of the *Guidelines for NGOs: Working with Trafficked People* in 2008 and the revised editions published in 2010 and 2015. Anti-Slavery Australia's experience and research is highly regarded due to the unique combination of practical first-hand experience with victims of trafficking and slavery through the legal service, coupled with academic rigour as part of the UTS Faculty of Law. Recent research has focused on emerging trends including asylum seeker exploitation, forced marriage, vulnerabilities of people experiencing human trafficking and slavery and best practice support frameworks. The historical context of slavery, how modern slavery is linked to entrenched cycles of poverty and discrimination, is also explored. To promote an effective response to slavery and human trafficking, Anti-Slavery Australia has made over 14 submissions to both federal and state government enquiries in the last five years.

Anti-Slavery Australia has received four grants from the Australian Commonwealth Government to date. The first of these grants was received in 2009 and funded the production of three community service announcements about slavery and human trafficking in Australia which were screened in cinemas nationwide. The second grant received in 2014, funded the creation of the first ever online training program on slavery, slavery-like practices and human trafficking. Since its launch, the course has been accessed by almost 2,000 participants, who have completed over 34,855 lessons on slavery, forced labour forced marriage and human trafficking.

## **The Freedom Awards**

Anti-Slavery Australia has an active education and outreach program responding to human trafficking, slavery, and slavery-like practices such as forced marriage and promoting ethical supply chains. In 2011, Anti-Slavery Australia convened the inaugural *Freedom Awards* at Parliament House in Canberra. This biennial event recognises the outstanding work and contributions of individuals and organisations for initiatives against slavery, slavery-like practices, including forced labour and forced marriage, and human trafficking. These awards, now in their fourth year, seek to raise awareness of all forms of slavery and human trafficking, and to promote the positive difference that individuals and organisations can make to the lives of trafficked people. The Freedom Awards celebrate good practice and promote ethical approaches to combating human trafficking. Keynote speakers at the Awards have included the Hon Brendan O'Connor MP, the Hon Tanya Plibersek MP, Dr Anne Gallagher AO and Former Sex Discrimination Commissioner Elizabeth Broderick.



Figure 1. Freedom Award recipient Dr Maree Marsh csb with Former Sex Discrimination Commissioner Elizabeth Broderick

## **Anti-Slavery Australia and Forced Marriage**

In 2015, Anti-Slavery Australia co-presented on Australia's response to forced marriage with the Attorney-General's Department and the Australian Federal Police. Sixteen workshops were delivered to thousands of government and community frontline workers in all Australian state and territory capitals. The workshops were evaluated

highly with participants demonstrating an increased and active understanding of the legislative framework and complexities of forced marriage in Australia.

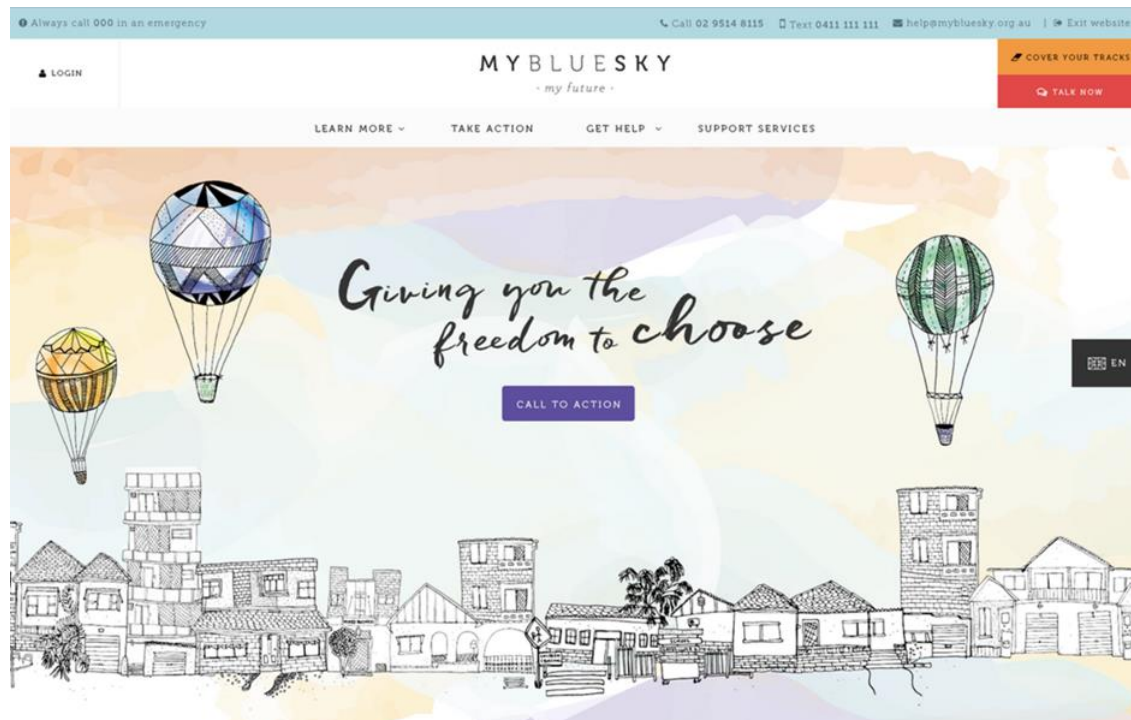


Figure 2 - Front page of the My Blue Sky website ([www.mybluesky.org.au](http://www.mybluesky.org.au))

On 25 November 2015, on the International Day for the Elimination of Violence Against Women, Anti-Slavery Australia launched My Blue Sky – Australia’s first website dedicated to providing information and legal advice aimed at forced marriage prevention.

Funded by the Commonwealth Attorney-General’s Department, the My Blue Sky website is a national portal for information, assistance education for the community and service providers. My Blue Sky includes a confidential legal advice service and referral service for any person in Australia facing the risk or reality of forced marriage.