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Committee Secretary  
Senate Legal and Constitutional Affairs Committee  
PO Box 6100  
Parliament House  
Canberra, ACT, 2600

**Submission from the Synod of Victoria and Tasmania, Uniting Church in Australia to Senate Legal and Constitutional Affairs Committee on *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012***

The Synod of Victoria and Tasmania, Uniting Church in Australia, welcomes this opportunity to make submission to the Senate Legal and Constitutional Affairs Committee on the *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012*. The Synod supports the passage of the legislation.

**The Position of the Synod on Human Trafficking and Forced Labour**

The Synod supports action to prevent and deter human trafficking and to provide support to survivors of human trafficking. In 2010 the meeting of the Synod representatives passed the following resolution:

10.7.10.2.5 The Synod resolved:

- (a) In keeping with an understanding of the gift of dignity that God has given to all people, to oppose all forms of human trafficking;
- (b) To support a three-pronged approach in combating human trafficking of:
  - (i) Preventing trafficking;
  - (ii) Prosecuting the traffickers; and
  - (iii) Protecting the victims of trafficking.
- (c) To call on the Australian Government to:
  - (i) Fulfil its obligations under the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime, including ensuring that the survivors of human trafficking in Australia have ready access to adequate crimes compensation;
  - (ii) Support an effective review mechanism to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime that:
    - Allows input from UN agencies, civil society groups and the survivors of trafficking themselves without needing permission from the government under review;

- Includes country visits, where relevant state facilities are reviewed and stakeholders consulted;
  - Is carried out by international, independent experts;
  - Makes recommendations to improve implementation of the Protocol;
  - Allows the findings of the review to be made public;
  - Puts in place effective follow up mechanisms; and
  - Is fully funded through the UN regular budget.
- (iii) Fulfil its commitment to work with the Government of India on combating human trafficking by encouraging the Indian Government to:
- Ratify the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organised Crime, noting that India has taken the commendable step of signing the Protocol, but is yet to ratify;
  - Amend the Immoral Traffic Prevention Act so that the legislation makes all human trafficking an offence, and not just trafficking for the purposes of sexual servitude, and does not treat the victims of trafficking as criminals;
  - Introduce a visa category to provide protection to the victims of trafficking; and
  - Ratify International Labour Organization Convention No. 182 on the Elimination of the Worst Forms of Child Labour.
- (d) To write to the Prime Minister, the Attorney General, the Minister for Home Affairs, the Minister for Foreign Affairs, the Leader of the Opposition, the Shadow Attorney General and the Shadow Minister for Foreign Affairs to inform them of this resolution.

The 2011 meeting of the representatives of the Synod passed the following resolution:

11.6.18.2.3 The Synod resolved:

- (a) To support and encourage industries and businesses to take all reasonable steps to make sure the products they supply into the Australian market are free from the involvement of slavery, forced labour and human trafficking in their production;
- (b) To call on the Federal Government
  - (i) to follow the lead of the US Department of Labor and develop a list of goods imported into Australia where there is evidence that slavery, human trafficking or forced labour are likely to have been used in the production of the goods;
  - (ii) to ensure that Government procurement processes take effective steps to exclude products made with slavery, human trafficking or forced labour in their production;
  - (iii) to require industries and businesses to take reasonable steps to ensure slavery, forced labour and human trafficking have not been used in making products supplied to the Australian market; and
  - (iv) At a minimum, to require companies importing goods identified through the research outlined in clause (i) of this resolution to report publicly what they are doing to ensure they are not importing goods produced with slavery, human trafficking and forced labour; and
- (c) To write to the Prime Minister, the Minister for Trade, the Minister for Foreign Affairs, the Minister for Home Affairs, the Leader of the Opposition, the Shadow Minister

for Trade, the Shadow Minister for Foreign Affairs, the Shadow Minister for Home Affairs, and the Leader of the Greens to inform them of this resolution.

The Synod also has opposed exploited child labour, including forced child labour, with the meeting of its representatives passing the following resolution in 2006:

06.4.4.3 The Synod resolved:

- (a) To oppose all forms of exploitive child labour and any form of labour for children that interferes in their spiritual, moral, social, mental or physical development, health or education (noting that the international definition of a child is anyone below the age of 18);
- (b) To support all Governments around the world ratifying and implementing the International Labour Organisation Convention No.182: Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour;
- (c) To call on the Australian Government to ratify the International Labour Organisation Convention No.182: Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour without further delay; and
- (d) To write to the Prime Minister of Australia and the Commonwealth Minister for Employment and Workplace Relations to inform them of this resolution.

**Comments on the *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012.***

The Synod welcomes the inclusion of the definitions of 'coercion' and 'threat' in Section 270.1 of the Bill. The Synod also welcome the expansion of the clauses within Section 270.3 to include reducing a person to slavery.

The Synod welcomes the inclusion of the definition and offences of servitude, forced labour, deceptive recruiting for labour or services, forced marriage, aggravated slavery-like offences, organ trafficking, debt bondage and harbouring a victim of trafficking in the Criminal Code. However, the Synod questions if 'harbouring' should be the term used, rather than simply 'receiving and concealing' a victim in relation to assisting a third person in committing an offence. 'Harbouring' has connotations of doing something positive for the victim.

The Synod welcomes the expansion of Section 270.4 and 270.5 to cover all forms of labour servitude and not just sexual servitude. The Synod also welcomes the expansion of the offence of deceptive recruiting beyond sexual services to other forms of servitude or forced labour.

The Synod welcomes Section 270.9 extending the jurisdictional reach of slavery-like offences to all Australian residents and companies, regardless of where the offence is committed (Section 15.2 (extended geographical jurisdiction – category B)).

The Synod welcomes the inclusion of Section 270.11 which ensures that a victim's consent or acquiescence is not a defence to conduct constituting an offence Division 270.

The Synod welcomes the inclusion of a definition of exploitation through Section 271.1A.

In Sections 271.2(1)(b) and (c), 271.2(1A) (b) and (c) and 271.5(1)(b) and (c) the Synod welcomes the expansion from "force or threats" to "coercion, threat or deception".

While the legislation increases the availability of reparations for victims of the offences covered through the amendment to Paragraph 21B(1)(d) of the *Crimes Act 1914*, the Synod is concerned that the Australian Government falls short of its international obligations in providing compensation for victims of human trafficking. In 2005 Australia ratified the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* supplementing the *United Nations Convention against Transnational Organised Crime*.

Article 6.6 of the Protocol 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 damaged suffered.*

However, Australia has failed to provide direct avenues for survivors to pursue compensation. The obligation to provide compensation to victims of serious crimes and human rights abuses is contained in a number of human rights treaties that Australia has voluntarily signed up to. It is contained in the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* supplementing the *United Nations Convention against Transnational Organised Crime*. It is also enshrined in the *International Covenant on Civil and Political Rights*, which requires that an 'effective remedy' be available to victims whose rights have been violated. These obligations are also aligned with the *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* which provides for victims of crime to have access to the "mechanisms of justice and to prompt redress".

In order to be compliant with the international obligations Australia has accepted it should either create a compensation scheme at the Federal level for survivors of trafficking, or ensure survivors of human trafficking can receive compensation under the current state systems.

In contrast to Australia, the United States established the *Victims of Trafficking and Violence Protection Act 2000*, which provides avenues for survivors of trafficking and terrorism to pursue compensatory remedies.

A detailed policy paper which was provided to the previous Attorney General in March 2011 on the issue of compensation for survivors of human trafficking is attached as an Appendix to this submission.

However, the Synod does not support delaying the passage of the *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012* over the issue of compensation for survivors of human trafficking. It would see this matter dealt with in a separate Bill.

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## **APPENDIX: ACCESS TO COMPENSATION FOR SURVIVORS OF TRAFFICKING IN AUSTRALIA**

### **Australia's international obligations towards survivors of human trafficking**

In 2004 Australia ratified the *United Nations Convention against Transnational Organised Crime*<sup>1</sup>, and the accompanying *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* ("the Palermo Protocol")<sup>2</sup> in 2005.<sup>3</sup> However, Australia has failed to provide avenues for survivors to pursue compensation, meaning Australia is not fully compliant with its obligations under the Protocol.

The Protocol stipulates that the states whom it binds must ensure "that victims of trafficking in persons [have] the possibility of obtaining compensation for damage suffered" through the domestic legal system.<sup>4</sup> The obligation to provide compensation is also enshrined in the *International Covenant on Civil and Political Rights*, which requires that an 'effective remedy' be available to victims whose rights have been violated.<sup>5</sup> These obligations are also aligned with the *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* which provides for victims of crime to have access to the "mechanisms of justice and to prompt redress".<sup>6</sup> These international instruments clearly highlight that as victims of human rights violations trafficked persons have an international legal right to access satisfactory remedial options.<sup>7</sup> More specifically, nations who have ratified the Protocol have an obligation to ensure survivors of trafficking are aware of, and have access to, fair and adequate compensation.

Previously, the rights of survivors of human trafficking have been overlooked in favour of prosecuting offenders. Survivors of human trafficking, who have been subject to abuse, often have limited English skills and no friends or family in Australia, and therefore should be regarded as particularly vulnerable.

### **State and Territory legislation which criminalises offences relating to human trafficking**

At the State and Territory level there is no legislation specifically criminalising human trafficking.<sup>8</sup> However, there are relevant state offences which criminalise conduct closely related to trafficking in persons, including sexual servitude and deceptive recruiting for sexual services. The overlap between state and federal offences for sexual servitude and deceptive recruiting

<sup>1</sup> *United Nations Convention against Transnational Organised Crime*, opened for signature 15 November 2000, [2004] ATS 12, (entered in to force 29 September 2003).

<sup>2</sup> *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, opened for signature 15 November 2000, [2005] ATS 27, (entered in to force 25 December 2003).

<sup>3</sup> (4.6) The Anti-People Trafficking Interdepartmental Committee, Parliament of Australia, *Trafficking in Persons: The Australian Government Response* (2004 – 2009), 1.

<sup>4</sup> *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, opened for signature 15 November 2000, [2005] ATS 27, art 6.6 (entered in to force 25 December 2003).

<sup>5</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, [1980] ATS 23, art 2.3 (entered in to force 23 March 1976)

<sup>6</sup> *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, 29 November 1985

<sup>7</sup> (4.1 (ii)) Office of the High Commissioner for Human Rights, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, E/2002/68/Add.1

<sup>8</sup> (5.7) Dr Andreas Schloenhardt, 'Australia, State and Territory Offences relating to Trafficking in Persons' (Human Trafficking Working Group, The University of Queensland TC Beirne School of Law, 2009), 2.

highlight the interplay between the States and Territories' jurisdiction to legislate in regards to general criminal law matters. This can be juxtaposed to the Commonwealth's ability to use the external affairs power (*Constitution* s 51 (xxix)) to enact legislation as required by the need to be compliant with its international obligations.<sup>9</sup> Because the Commonwealth provisions relating to sexual servitude and deceptive recruiting for sexual services only apply to offences which occur to some extent externally to Australia, the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General ("MCCOC") recommended that these offences also be criminalised by State and Territory governments.<sup>10</sup> New South Wales,<sup>11</sup> South Australia,<sup>12</sup> Victoria,<sup>13</sup> Western Australia,<sup>14</sup> the Northern Territory<sup>15</sup> and the Australian Capital Territory<sup>16</sup> all followed the recommendations made by the MCCOC Report,<sup>17</sup> and implemented offences which prohibited sexual servitude and deceptive recruiting for sexual services. The intent of the MCCOC report was to ensure the states criminalised actions of those who, whilst in Australia, recruit/employ persons in Australia to work as sex workers whilst in a position of servitude.<sup>18</sup>

### **Deficiencies in current legislation**

At present Australia does not have a Federal Crimes compensation scheme to compensate victims of Federal offences.<sup>19</sup> This means that survivors of human trafficking cannot access compensation by virtue of their status as victims of a Commonwealth offence. They must instead frame their claims as victims of lesser state criminal offences which state compensation schemes recognise. Thus there is no clearly defined legal avenue through which survivors of trafficking can seek compensation. This means Australia is currently not compliant with its obligations under Article 6.6 of the Palermo Protocol which requires state parties to ensure their domestic legal system contains pathways for survivors of trafficking to obtain compensation.<sup>20</sup> Despite the potential scope for state compensation schemes to compensate victims of trafficking under the banner of general state criminal offences, such a pathway does not acknowledge the extent or nature of the crime for which the survivor is being awarded compensation. The only other option for survivors of human trafficking is to obtain compensation for unpaid wages and workers compensation under existing work place relations law.<sup>21</sup> In order to be compliant with the obligations under the Palermo Protocol Australia should either create a compensation scheme for federal victims of crime, or ensure survivors of human

<sup>9</sup> *Australian Constitution* s 51 (xxix)

<sup>10</sup> 5.8 ) Discussion Paper, Chapter 9: Offences Against Humanity, Slavery, (Model Criminal Code Officers Committee, 1998), 12.

<sup>11</sup> *Crimes Amendment (Sexual Servitude) Act 2001*(NSW).

<sup>12</sup> *Criminal Law Consolidation (Sexual Servitude) Amendment Act 2000* (SA).

<sup>13</sup> *Justice Legislation (Sexual Offences and Bail) Act 2004* (Vic).

<sup>14</sup> *Criminal Code* (WA).

<sup>15</sup> *Criminal Code Amendment Act 2002* (NT)

<sup>16</sup> *Crimes Amendment Act 2000* (ACT)

<sup>17</sup> Discussion Paper, Chapter 9: Offences Against Humanity, Slavery, (Model Criminal Code Officers Committee, 1998).

<sup>18</sup> *Ibid.*, 19.

<sup>19</sup> 6.1 Jennifer Burn and Frances Simmons 'Submission to the National Consultation on Human Rights' (Submission to the National Consultation on Human Rights, Anti-Slavery Project, University of Technology, Sydney, 2009), 19.

<sup>20</sup> *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, opened for signature 15 November 2000, [2005] ATS 27, art 6.6 (entered in to force 25 December 2003).

<sup>21</sup> Jennifer Burn and Frances Simmons 'Submission to the National Consultation on Human Rights' (Submission to the National Consultation on Human Rights, Anti-Slavery Project, University of Technology, Sydney, 2009), 19.



trafficking can receive compensation under the current state systems<sup>22</sup>. This could be done in a similar fashion to the MCCOC report, in order to try and ascertain some uniformity in the different state compensation schemes, ensuring they each provide compensation for victims of human trafficking.

### **Existing State crimes compensation schemes**

Currently there are two State mechanisms by which victims of crime are able to seek compensation:

1. State-funded crimes compensation schemes
2. Compensation under the *Sentencing Act*<sup>23</sup>

A federal scheme through which victims of workplace violations can seek compensation is the *Fair Work Act* (2009).

#### 1. State funded crimes compensation schemes

The key rationales behind state funded crimes compensation schemes is that they remain easily accessible, provide victims with a timely response to their claim, and are financially viable for states to operate<sup>24</sup>.

In order to be eligible for state funded crimes compensation in the Australian Capital Territory ("ACT"), New South Wales ("NSW"), Northern Territory ("NT"), Queensland ("QL"), South Australia ("SA"), Tasmania ("Tas"), Victoria ("Vic") or Western Australia ("WA") the applicant must be a victim of a violent crime (ACT, NSW, NT and Vic) or have suffered as a result of the commission of an offence (Qld, Tas, SA or WA).<sup>25</sup> A victim is only eligible to apply for compensation in a particular state if the crime was committed in that state.

Aside from qualifying as a victim, in order to apply for compensation an applicant must have reported the matter to police in all states, and after doing so they must co-operate with the police investigation and potential prosecution. Similarly, the victim must also have suffered from a physical/psychological injury (ACT, Qld, Tas, WA), a compensable injury listed in the table of injuries (NSW, NT) or a physical/psychological injury, pregnancy or incurred expenses which are likely to have arisen as a result of a crime/recovering from a crime (Vic).

The burden of proof for establishing entitlement to an award of compensation is on the balance of probability, whether or not a conviction has occurred in ACT, NSW, Tas and VIC. In Qld a conviction is necessary if an application has been made to a court. However in the absence of a court order, ex gratia payments can be made at the government's discretion. In SA a conviction is not necessary, however the offence must be proved beyond reasonable doubt, and the injury must have occurred on the balance of probabilities. In WA a conviction is not necessary, but in the absence of a conviction an award is made at the discretion of the assessor. Evidently, there are significant discrepancies in the burden of proof which must be satisfied, making compensation less accessible in some states rather than others.

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<sup>22</sup> (6.1) Ibid., 20.

<sup>23</sup> *Sentencing Act 1991* (Vic)

<sup>24</sup> Department of Justice, Parliament of Victoria, *Reviewing Victims of Crime Compensation: Sentencing Orders and State-funded Awards* (2009), 4-5

<sup>25</sup> 2.1 Commissioner for Victims' Rights, Parliament of South Australia, *Victims Compensation in Australia* (2009), 2.

The limitation period in which a victim can apply for compensation is 12 months in the ACT. In NSW, NT and Vic it is two years, whilst in Qld, SA, Tas and WA it is three years. In the context of survivors of human trafficking the limitation of time imposed for bringing a claim may pose significant obstacles in obtaining compensation. A further threat to a survivor's ability to obtain compensation is whether or not they contributed to their victimisation. In NT, Qld, Tas and WA the survivor's contribution to the offence, or their behaviour at the time of its commission is relevant to an award of compensation, and can result in a reduction of the amount that is awarded. In Qld a claim can be refused on this basis. In the ACT a victim cannot claim if they were committing a serious crime when injured, and how the victim conducted themselves when the crime was committed is taken into account. The claim can be reduced or refused. In NSW whether the victim has made a contribution to the act of violence is taken into account, so too is whether the victim failed to mitigate the extent of his/her injury; and the claim may be reduced or refused on this basis. In SA whether the victim has contributed to his injury or failed to mitigate the extent of his injury is taken into account, and if a victim is committing an indictable offence when injured they are not entitled to compensation, unless a failure to award it would be deemed unjust. In Victoria the Tribunal will consider the victim's character (including past criminal behaviour and the number or nature of findings of guilt) or attitude at any time during or after the commission of an offence. This is considered when assessing how much to award the victim, or if an award is to be made at all.<sup>26</sup> Apart from the lack of uniformity in what occurs if a victim contributes to their own victimisation across the states, whether an applicant's actions/behaviour is relevant to their status as a victim is a highly contentious issue.<sup>27</sup>

In the ACT, NSW, Qld and Vic a victim can only claim economic loss that is incurred or likely to be incurred as a result of the injury. Whereas in NT, SA, Tas and WA awards can be made for non-economic loss, or pain and suffering. Again this discrepancy potentially makes pursuing a compensation claim in one state more favourable than another.

The maximum amount payable under the relevant schemes also differs from state to state. In the ACT, NSW and SA the maximum award is \$50,000. In the NT the maximum award is \$40,000, whereas in Tas it is \$30,000. In Victoria the maximum that can be awarded to a primary victim is \$60,000. In Qld and WA the maximum award is \$75,000.

Accessibility is highly contingent on whether the victim can get legal assistance to lodge a claim under a state funded compensation scheme, and if so, whether they can have the cost of such legal help reimbursed in the case of a successful claim. Most states suggest that a solicitor is not needed. However this is questionable in the cases of survivors of human trafficking.<sup>28</sup> In the ACT it is suggested a solicitor is not required, but if engaged cannot charge more than \$650, which cannot be recovered during proceedings. In the NSW a solicitor is also said not to be needed, however if engaged the Tribunal may pay the fee at their discretion. In NT solicitors are not required as the compensation scheme is administered by the Crime Victim Support Unit. In Qld legal costs do not feature in court ordered compensation but may be recovered in *ex gratia* payments. In Tas solicitors fees can be deducted from the compensation award at the Minister's discretion. In Vic a solicitor is said not to be needed, however if one is engaged and

<sup>26</sup> *Victims of Crime assistance Act 1996* (Vic), s 54.

<sup>27</sup> Interview with Belinda Lo (Fitzroy Legal Service, 124 Johnston Street Fitzroy 3065, 16 February 2010).

<sup>28</sup> *Ibid.*



the victim is consequently successful VoCAT does have discretion to cover the solicitor's fees, whereas compensation awarded in WA does not take in to account solicitor's fees.

Another aspect of the process for claiming compensation which may render it inaccessible to human trafficking survivors is the length of time it may take to process a claim. Although information on the expected length of time taken to process a claim is not available for every state, there is no set period in which any of the state tribunals have to make a final determination about a victim's claim. In the NT and WA most claims are settled within six months, whereas in SA most claims are settled in three months, and in Tas applicant should allow at least four months for a determination to be made.

## 2. Offender-funded reparation schemes: *The Sentencing Act (Vic)*

A victim can also obtain reparation from the offender via an order made under a State *Sentencing Act*<sup>29</sup>. Such a mechanism has the same drawbacks as exist for obtaining reparations at the Commonwealth level. In addition each state has its own *Sentencing Act*, with the Act is only designed to provide compensation for victims of State, and not Federal offences. Thus a survivor of trafficking can only apply for reparation under the relevant Sentencing Act if they can frame the crime committed against them in terms of the State offences of sexual servitude<sup>30</sup>, deceptive recruiting for sexual servitude<sup>31</sup> or the more general criminal offences of rape or sexual assault. Once an offender is convicted a victim may apply within a prescribed limitation period to recover damages for pain and suffering and other expenses incurred, from the perpetrator.<sup>32</sup>

## *Fair Work Act and Migration Legislation Amendment (Worker Protection)* – Cth legislation which provides an avenue to obtain compensation

The *Fair Work Act 2009 (Cth)* ("the Act") could be utilised by survivors of labour trafficking to gain compensation for an employers' breach of their responsibilities under the *Fair Work Act*. Under the Act a court may order pecuniary penalties be paid by an offending employer to the Commonwealth, a particular organisation or person<sup>33</sup>. Breaches of the Act which may warrant the awarding of a pecuniary penalty order include: failure to employ employees for maximum weekly working hours of 38 hours per week, failure to pay overtime, failure to pay employees by cash cheque or electronic funds transfer, failure to pay employees in accordance with the relevant award. Furthermore, the Act gives the court the flexibility to award a penalty granted to someone other than the applicant at their request. This allows inspectors to bring proceedings on behalf of employees, and subsequently request that the court pay any penalty awarded to the affected employee rather than the Commonwealth.

Similarly, there is also new legislation designed specifically to protect foreigners on temporary work visas; who are particularly susceptible to exploitation by labour traffickers.<sup>34</sup> The *Migration*

<sup>29</sup> *Sentencing Act 1991 (Vic)*. Although this paper only has scope to explore the accessibility of compensation under the Victorian Sentencing Act most of the other states also have equivalent legislation.

<sup>30</sup> *The Crimes Act 1958 (Vic)*, s 60AB.

<sup>31</sup> *The Crimes Act 1958 (Vic)*, s 60AD.

<sup>32</sup> *Sentencing Act 1991 (Vic)*, s 85C.

<sup>33</sup> Explanatory memorandum, *Fair Work Bill 2008 (Cth)*.

<sup>34</sup> *Fryer v Yoga Tandoori House Pty Limited* [2008] FMCA 288, and *Inspector Robert John Hartle v Aprint (Aust) Pty Ltd & Anor* [2007] FMCA 1547.

*Legislation Amendment (Worker Protection) Act*<sup>35</sup> has inserted a revised set of sponsorship obligations which sponsors of temporary foreign workers must adhere to. These include the payment of a minimum wage and the cost of departing from Australia if employment is terminated.<sup>36</sup> If a sponsor fails to satisfy a sponsorship obligation they have contravened a civil penalty provision, and as a result the Minister may apply to have a pecuniary penalty order made against the offending employer.<sup>37</sup> If an employer fails to honour a penalty ordered against them then the person to whom the money is owed is able to recover the amount as a debt due in an eligible court.<sup>38</sup>

Consequently, there are potentially two avenues through which survivors of labour trafficking can seek compensation if they frame their grievances under the banner of non-compliance with workplace or visa regulation. One of the unique advantages of the *Fair Work Act*<sup>39</sup> is that it enables inspectors to bring proceedings on behalf of a victim and request that any penalty award made is made out to the victim rather than the Commonwealth<sup>40</sup>. Removing the burden of running proceedings for breaches of the Act from the shoulders of a survivor of human trafficking would certainly mean compensation through the Act is significantly more accessible to survivors.

Whether victims of sex trafficking could recover unpaid wages via this legislative framework does not appear to have been considered. It is unlikely that victims of sex trafficking could recoup compensation for unpaid wages under the *Migration Legislation (Worker Protection) Act*<sup>41</sup>, because this legislation places responsibilities on employers who sponsor foreign workers under the temporary worker regime, and generally sex trafficking victims enter Australia on tourist or student visas which they may fraudulently hold or overstay.<sup>42</sup> However, it could be argued that trafficked women could recoup compensation underpayment of wages, failure to pay overtime and failure to ensure their working hours are not in excess of 38 hours per week; because they too are trafficked into working conditions which fail to observe these minimum standards.<sup>43</sup> In the case of *Aprint* (which will be discussed further below) and *Wei Tang*<sup>44</sup> foreign employees in the printing and sex industries respectively were brought to Australia under startlingly comparable circumstances. Both had full knowledge of the work they would be engaged in but were deceived as to the nature of their working conditions, and their freedom of movement.<sup>45</sup> In both cases victims were significantly underpaid and working in excess of 38 hours per week.

<sup>35</sup> *Migration Legislation Amendment (Worker Protection) Act 2008* (Cth).

<sup>36</sup> *Migration Legislation Amendment (Worker Protection) Act 2008* (Cth), s 140H.

<sup>37</sup> *Migration Legislation Amendment (Worker Protection) Bill 2008* (Cth), s 140Q.

<sup>38</sup> Explanatory Memorandum, *Migration Legislation Amendment (Worker Protection) Bill 2008* (Cth).

<sup>39</sup> *Fair Work Act 2009* (Cth).

<sup>40</sup> Explanatory Memorandum, *Fair Work Bill 2008* (Cth).

<sup>41</sup> *Ibid.*

<sup>42</sup> Ann-Mari Jordens 'Human Trafficking in Australia' (2008)

<<http://www.acmro.catholic.org.au/policies/documents/Traffictalk.doc>> at 22 February 2010.

<sup>43</sup> 1(i).6 Miriam Cullen and Bernadette McSherry "Without Sex: Slavery, trafficking in persons and the exploitation of labour in Australia" (2009) 34(1) *Alternative Law Journal*, 1.

<sup>44</sup> *R v Wei Tang* [2007] VSCA 144.

<sup>45</sup> 1(i).6 Miriam Cullen and Bernadette McSherry "Without Sex: Slavery, trafficking in persons and the exploitation of labour in Australia" (2009) 34(1) *Alternative Law Journal*, 1.

Commentators have previously noted the similarities between these two cases in a bid to raise concerns that instances of labour trafficking are consequently not being prosecuted under Division 271 of the federal *Criminal Code*.<sup>46</sup> However, in light of these similarities it seems appropriate to argue that survivors of trafficking should also be entitled to seek compensation, or have an inspector seek compensation on their behalf, for their employers' contravention of *the Fair Work Act*.<sup>47</sup> Depending on the duration of the exploitation a survivor of trafficking may receive compensation which more adequately reflects their experience via this avenue than through the relevant state crimes compensation schemes or the *Sentencing Act*.<sup>48</sup> It may be particularly relevant where a survivor of trafficking is aware that they will be working in the industry they are in fact trafficked in to, but deceived as to the nature of their working conditions.<sup>49</sup> The downside to compensation via this route is that the applicant cannot recoup compensation for pain and suffering incurred as a consequence of being trafficked.

It is questionable whether survivors of sex trafficking could in reality seek compensation under *the Fair Work Act*<sup>50</sup> when they are generally residing in Australia on fraudulent or illegal visas, rather than legal 457 visas. Even if an argument could be made for sex workers on illegal visas to access compensation under *the Fair Work Act* the threats used by traffickers on their victims often revolve around their illegal status and potential deportation, making them fearful of Australian authorities and pursuing compensation via this avenue unlikely.<sup>51</sup>

### **Existing Australian cases where survivors of human trafficking have successfully claimed compensation**

It is widely suggested that there has been only one existing Australian case where a survivor of human trafficking has claimed compensation<sup>52</sup>. Despite this, there are cases in Australia which have not been treated as human trafficking cases, although they should have been dealt with in this manner.<sup>53</sup> It is arguable that there are three existing Australian cases where survivors of human trafficking have successfully claimed compensation to date.

#### Jetsadophorn 'Ning' Chaladone

Ning was trafficked from Thailand to Australia in 1995 when she was a thirteen year old girl. Her father consented to her departure from Thailand to Australia under the pretext that she would be working as a nanny in Sydney. Unable to speak English, and with no contacts in Australia, Ning was forced to work as a prostitute in a brothel in order to pay the alleged \$35,000 debt she owed her traffickers for transporting her to Australia.<sup>54</sup> They informed her that this debt would be cleared after she had had sex with six hundred and fifty clients. She was

<sup>46</sup> *Criminal Code* (Cth).

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

<sup>48</sup> *Sentencing Act 1991* (Vic).

<sup>49</sup> See *Inspector Robert John Hartle v Aprint (Aust) Pty Ltd & Anor* [2007] FMCA 1547, and *R v Wei Tang* [2007] VSCA 144.

<sup>50</sup> *Fair Work Act 2009* (Cth).

<sup>51</sup> Interview with Belinda Lo (Fitzroy Legal Service, 124 Johnston Street Fitzroy 3065, 16 February 2010).

<sup>52</sup> Jennifer Burn and Frances Simmons 'Submission to the National Consultation on Human Rights' (Submission to the National Consultation on Human Rights, Anti-Slavery Project, University of Technology, Sydney, 2009).

<sup>53</sup> Dr Andreas Schloenhardt, 'Labour Trafficking in Australia' (Human Trafficking Working Group, The University of Queensland TC Beirne School of Law, 2010), 1.

<sup>54</sup> Dr Andreas Schloenhardt, 'Case Report: Jetsadophorn 'Ning' Chaladone' (Human Trafficking Working Group, The University of Queensland TC Beirne School of Law, 2008).

found ten days after she had been trafficked to the Surry Hills brothel during a raid by immigration officials, after a tip off from one of Ning's clients. By that time Ning had already been raped by as many as one hundred men. The brothel owners responsible for trafficking Ning to Australia were never prosecuted, and after her discovery she was promptly removed back to Thailand. Only after a member of the Australian Federal Police and a filmmaker sought to track Ning down in Thailand did she finally return to Australia in 2007, in a bid to seek compensation under Victim Support and Rehabilitation Act, before the NSW Victims Compensation Tribunal. The NSW Tribunal found that Ning had "suffered from chronic post-traumatic stress disorder and moderate to severe depressive disorder" as a result of the trafficking ordeal.<sup>55</sup> She was awarded an undisclosed amount of compensation, although awards are capped at \$50,000. Ning used the money to educate her son, renovate her home and start a business in her home town in Thailand.

#### Fryer v Yoga Tandoori House Pty Limited

Mr Yogalingham Rasalingam, owner of Yoga Tandoori house, was the first person to be charged with the trafficking offences under Division 271 of the *Criminal Code*.<sup>56</sup> Mr Rasalingam recruited the son of his servant, Mr Rajendran, to come and work at his chain of four Indian restaurants in Australia. Mr Rajendran was brought to Australia speaking very little English and with no contacts or money of his own, and thus there was a considerable power imbalance between the two men. Mr Rajendran and Mr Rasalingam made an agreement that Mr Rajendran would work 365 days for the first year of his employment without payment, because Mr Rasalingam had paid for his ticket to Australia. The agreement also stated that Mr Rasalingam would provide money to the victim's family each time he returned to India. Mr Rasalingam told Mr Rajendran to organise his travel arrangements at a particular travel agent in India who did not request him to sign any documents and instead falsified a visa application and work contract to deceive the Australian authorities. When Mr Rajendran arrived in Australia his passport, return airline ticket and other documents were confiscated from him and he was forced to sleep on the floor of a tin shed. Mr Rasalingam threatened Mr Rajendran with the prospect of deportation if he complained to the authorities about his living and working arrangements. As per the contract he worked seven days a week, from 9:00am to at least 1:00am and was not paid for his work. There are no records to suggest any money was given to his family in India.

Mr Rajendran was able to recover \$11, 560.31 in compensation for unpaid wages after the commencement of an investigation by a workplace inspector under the *Workplace Relations Act 1996*.

#### Inspector RJ Hortle v Aprint (Yu Tu Chuan)

In 2005, on behalf of Aprint, Mr Tu Chuan returned to China to recruit additional employees to work as printers for his business<sup>57</sup>. Aprint sought employees through a central employment agency operated by the Government of the Peoples Republic of China. The agency assisted the employees in applying for a subclass 457 visa, which they were subsequently granted. The terms of their employment, as attached to their 457 visa application were that: the employment was for four years, the employees would work for 5 days a week for 10 hours per day and in the first year of their employment. Aprint would deduct monthly instalments from the employees

<sup>55</sup> Natalie Craig, "Sex Slave Victim Wins Abuse Claim", The Age (Melbourne), May 29, 2007.

<sup>56</sup> *Fryer v Yoga Tandoori House Pty Limited* [2008] FMCA 288.

<sup>57</sup> *Inspector Robert John Hartle v Aprint (Aust) Pty Ltd & Anor* [2007] FMCA 1547.

wages to cover the \$10,000 debt they owed their employer for processing fees, such as the visa application fee. During the workers' employment with Aprint, they were not accorded the correct amount of ordinary working hours (38 hours), paid at the award rate their work warranted, paid adequate overtime or paid in cash. Three of the employees were underpaid approximately \$30,000 each, and the fourth man only \$785. Within a number of weeks of the application for compensation being brought the victims were repaid the amounts owing, and the application against Aprint was halted. Civil penalties of \$9,240 were also imposed on Mr Chuan. Interestingly, despite the obvious exploitation of the four men, Mr Chuan's conduct did not give rise to a criminal investigation with intent to prosecute under the Division 271<sup>58</sup> trafficking offences. Although arguably the circumstances described here could also have resulted in a prosecution under Division 270/271 of the *Criminal Code*.

### Proposed amendments to state compensation schemes

Although offender-funded reparation obtained via the *Sentencing Act* has been outlined as an avenue for victims to claim compensation, it is the least accessible option for survivors of trafficking. This is because in order to award offender funded compensation a conviction must be achieved, forcing a survivor to prosecute in order to have access to such an award. In most instances the offender will have not have the funds to actually pay any compensation, and even if they do the survivor must seek to enforce the order by taking personal legal action if payment is not made.<sup>59</sup> When making an award the judge also must take in to account the offender's financial position and the extent of the burden an award of compensation may place on them.<sup>60</sup> By taking such considerations in to account the survivor may feel the harm they have suffered is minimised and not worthy of acknowledgment by our legal system. As a result government funded compensation for survivors of human trafficking is the more viable of the two avenues for compensation, and reform proposals should be focused on improving its accessibility to survivors of human trafficking.

To make the possibility of navigating the different state crimes compensation schemes a reality for trafficked persons they must receive legal advice about how to obtain compensation, and most likely assistance throughout the proceedings<sup>61</sup>. This would ensure they are aware of their rights, and subsequently place them in a position in which they can assert them<sup>62</sup>.

Achieving this relies on two different amendments being made to the current legislation. Firstly, the states need to recognise that in some situations a solicitor is integral to a survivor obtaining compensation. As the majority of human trafficking survivors are foreigners in the country in which they would be entitled to pursue compensation it is highly unlikely they will be aware of the rights they have, or feel as though they are entitled to learn of them. For a survivor of trafficking who has been instilled with a fear of the authorities and undergone a highly traumatising experience, proceeding with a compensation claim can be an intimidating experience. Legal representation is integral to ensure a trafficked individual has a chance of

<sup>58</sup> *Criminal Code* (Cth) s 271.

<sup>59</sup> Department of Justice, Parliament of Victoria, *Reviewing Victims of Crime Compensation: Sentencing Orders and State-funded Awards* (2009), 11.

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

<sup>61</sup> 3.1(j) Elizabeth Broderick 'Trafficking: The Need for a Human Rights Based Approach' (Speech delivered at the Inaugural Anti-Trafficking Forum, University of Technology Sydney, 24 July 2008).

<sup>62</sup> 3.5 OSCE Office for Democratic Institutions and Human Rights Report on Compensation for Trafficked and Exploited Persons in the OSCE Region (2008) <  
[http://www.osce.org/publications/odihr/2008/05/31284\\_1145\\_en.pdf](http://www.osce.org/publications/odihr/2008/05/31284_1145_en.pdf)> at 1 February 2010.



successfully navigating unfamiliar terrain. State compensation tribunals need to recognise this, rather than blindly suggesting that the compensation system is designed to be navigated without legal assistance.<sup>63</sup>

Moreover, informing survivors of their legal rights is a task to which a significant amount of time and effort should be devoted. If the language used is too verbose, or survivors are not allowed ample time to digest the information and ask questions to clarify their position, survivors may remain unaware of their legal options<sup>64</sup>. As a result the legislation governing state compensation schemes should provide for an award of costs to be made if the applicant is successful and chooses to engage the assistance of a solicitor. This would remove the financial barriers between survivors and the opportunity for legal assistance.

Similarly, the requirement throughout the states and territories that the relevant tribunal consider a person's 'character' or past criminal conduct should be waived in circumstances where the applicant is a survivor of trafficking<sup>65</sup>. People who have been trafficked in to Australia have often been deceived by their traffickers as to the illegality of their entry in to the country. Largely, they have no contacts in Australia, speak little English and thus unknowingly or forcibly breach the conditions of their visas. Traffickers have also been known to fraudulently apply for visas on their victims' behalf.<sup>66</sup> Considering the significant power imbalance between the traffickers and their victims, and the vulnerability of a trafficked person when they arrive in Australia, any consideration of the survivor's attitude/criminal conviction or character is inappropriate and unjust.<sup>67</sup> Considerations such as character and attitude should be irrelevant to a person's status as a victim anyway.

Another barrier to recovering compensation may be the time limits in which victims must apply in order to be eligible for compensation. The time limit for applications ranges from one to three years after the incident occurred between the various states. In addition to this, states also have the flexibility to consider applications made out of time, if the applicant can justify their delay. In practice in Victoria it is highly unusual for an extension of time application to be rejected if evidence as to the nature of the crime, and the effect it had on the applicant that made it impossible to apply within the time limit is provided.<sup>68</sup> Although the Tribunal's willingness to accept out of time applications with sufficient evidence to support them is comforting, the legislation should be amended to reflect this accepted practice. Rather than providing the Tribunals with discretion to review out of time applications, the legislation should waive the time limit for applying for compensation where evidence of human trafficking is presented to the

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<sup>63</sup> Interview with Belinda Lo (Fitzroy Legal Service, 124 Johnston Street Fitzroy 3065, 16 February 2010).

<sup>64</sup> OSCE Office for Democratic Institutions and Human Rights Report on Compensation for Trafficked and Exploited Persons in the OSCE Region (2008) <  
[http://www.osce.org/publications/odihr/2008/05/31284\\_1145\\_en.pdf](http://www.osce.org/publications/odihr/2008/05/31284_1145_en.pdf)> at 1 February 2010.

<sup>65</sup> Interview with Belinda Lo (Fitzroy Legal Service, 124 Johnston Street Fitzroy 3065, 16 February 2010) and (3.1) Submission to the Drugs and Crime Prevention Committee, Parliament of Victoria, Inquiry into People Trafficking for Sex Work in Victoria (Belinda Lo, Fitzroy Legal Service).

<sup>66</sup> 3.4 Marieke Van Doorninck, Petra Follmar-Otto, Aurela Bozo, Zulfikar Zamonov and Zafa Akhmedov "Compensation of trafficked persons: Law and practice in the OSCE region" (Paper presented at Human Dimension Implementation Meeting, Warsaw, 1 October 2009).

<sup>67</sup> Submission to the Drugs and Crime Prevention Committee, Parliament of Victoria, Inquiry into People Trafficking for Sex Work in Victoria (Belinda Lo, Fitzroy Legal Service) and Interview with Belinda Lo (Fitzroy Legal Service, 124 Johnston Street Fitzroy 3065, 16 February 2010).

<sup>68</sup> Interview with Belinda Lo (Fitzroy Legal Service, 124 Johnston Street Fitzroy 3065, 16 February 2010).



Tribunal. This is crucial because the highly traumatic experiences survivors of human trafficking have endured and the ongoing fear of retaliation by their traffickers make it difficult for survivors to initially speak to the police, let alone embark on a compensation claim.<sup>69</sup> Generally survivors of trafficking will not begin this process until they feel safe and secure.<sup>70</sup> Naturally reaching a point where this is possible will take time and the legislation should reflect its acknowledgment of this by relaxing the time limit in cases which involve survivors of human trafficking.

It is the fear of reprisal by their traffickers, experienced by survivors, which also prevents them from reporting the crimes committed against them to the police.<sup>71</sup> Survivors of trafficking can also be unwilling to go to the police for fear it would require them to re-live and prove what happened to them in the past, at a time when they are trying to rehabilitate their lives.<sup>72</sup> Although police reports help corroborate a survivor's claim for compensation such a process can re-traumatise the victim and be detrimental, rather than empowering. All states require that a survivor has reported the incident to the police in order for them to be eligible to claim under the relevant scheme. Only Queensland allows a victim to have reported the incident to a counsellor if they are a victim of a sexual offence/offence committed by someone who is in a position of power. The legislation should be amended to allow other reports (e.g. psychologist, counsellor, support worker) to be submitted as evidence that the offence occurred in recognition of the reasons why survivors of trafficking may have difficulty reporting the crimes committed against them to the police.<sup>73</sup> Another possible amendment would be to allow the use of victim impact statements, rather than police reports, as evidence of the crime's commission.<sup>74</sup>

Finally, amendments should be made to the current state systems to clarify that survivors of trafficking are entitled to claim compensation as such, rather than being required to frame their claims as victims of state offences. As the federal government is reluctant to introduce federal crimes compensation scheme<sup>75</sup>, perhaps an alternative would be to provide the States and Territories with funding to allow them to expand their operations, and also compensate victims of federal offences.<sup>76</sup> Some victims of federal offences, such as survivors of terrorism, are ineligible for state funded compensation because the crime did not occur in that particular state or any state in Australia. Also, some survivors of trafficking are forced to claim compensation in a state other than where the crimes were committed against them due to fears for personal safety. Thus, if states were funded to compensate victims of federal as well as state crimes they could alter the eligibility requirements so that a survivor may apply for state-funded

<sup>69</sup> Submission to the Drugs and Crime Prevention Committee, Parliament of Victoria, Inquiry into People Trafficking for Sex Work in Victoria (Belinda Lo, Fitzroy Legal Service).

<sup>70</sup> Interview with Belinda Lo (Fitzroy Legal Service, 124 Johnston Street Fitzroy 3065, 16 February 2010).

<sup>71</sup> Submission to the Drugs and Crime Prevention Committee, Parliament of Victoria, Inquiry into People Trafficking for Sex Work in Victoria (Belinda Lo, Fitzroy Legal Service).

<sup>72</sup> OSCE Office for Democratic Institutions and Human Rights Report on Compensation for Trafficked and Exploited Persons in the OSCE Region (2008) <

[http://www.osce.org/publications/odihr/2008/05/31284\\_1145\\_en.pdf](http://www.osce.org/publications/odihr/2008/05/31284_1145_en.pdf)> at 1 February 2010.

<sup>73</sup> Submission to the Drugs and Crime Prevention Committee, Parliament of Victoria, Inquiry into People Trafficking for Sex Work in Victoria (Belinda Lo, Fitzroy Legal Service).

<sup>74</sup> OSCE Office for Democratic Institutions and Human Rights Report on Compensation for Trafficked and Exploited Persons in the OSCE Region (2008) <

[http://www.osce.org/publications/odihr/2008/05/31284\\_1145\\_en.pdf](http://www.osce.org/publications/odihr/2008/05/31284_1145_en.pdf)> at 1 February 2010.

<sup>75</sup> 6.1(i) John Broome "Commonwealth/State Boundaries in Crime and Justice" (Paper presented at the 3<sup>rd</sup> National Outlook Symposium on Crime in Australia, Canberra, 22-23 March 1999), 9.32.

<sup>76</sup> Interview with Belinda Lo (Fitzroy Legal Service, 124 Johnston Street Fitzroy 3065, 16 February 2010).

compensation in the state they are currently residing in if they are a survivor of a federal, rather than state, criminal offence. There is a need for state based victims of crime compensation tribunals to add trafficking to their list of compensable violent crimes. In recommendations to reform the UK Crimes Compensation Scheme, in order to improve its accessibility to survivors of trafficking, legislative amendments clarifying that survivors of trafficking were entitled to compensation under the scheme were seen as vital to improving their access to it<sup>77</sup>.

Perhaps the biggest challenge associated with implementing these proposals to reform state crimes compensation schemes is the difficulty involved in achieving uniformity between the various states and territories. The Standing Committee for the Attorneys General bid to urge all states and territories to implement provisions criminalising sexual servitude has been noted above. It is possible that amendments to improve the accessibility of crimes compensation schemes could also be implemented in this fashion. However, despite the recommendations of the MCCOC there are discrepancies in each of the state and territory sexual servitude provisions and Tasmania and Queensland have failed to implement the relevant legislation altogether.<sup>78</sup> Thus ensuring each state and territory enacts the reforms in a uniform manner is at best difficult, and at worst unachievable.

### **Pathways to establish a federal crimes compensation scheme**

In light of the difficulties associated with implementing uniform reforms to state and territory schemes, the establishment of a federal crimes compensation scheme emerges as a more attractive option to ensure accessibility of compensation to victims of human trafficking. A federal scheme would ensure a uniform approach is taken to all survivors of trafficking. It would also fill the void in which survivors of a variety of federal crimes find themselves in if they are unable to meet the eligibility requirements under the state schemes<sup>79</sup>. Both sides of politics have, in different capacities, recognised the need to eradicate gaps in the current legislation to enable survivors of human trafficking, white collar crime, sexual slavery and terrorism to obtain compensation in the same manner victims of state crimes do<sup>80</sup>.

Whilst most criminal matters are traditionally the responsibility of the states there are a growing number of federal crimes which personally affect victims, rather than the Commonwealth.<sup>81</sup> This is symptomatic of the shift in the traditional federal and state boundaries in the area of criminal law.<sup>82</sup> Considering the development of areas of criminal law which are of national and international interest, the Commonwealth has now acquired more responsibility in the administration of criminal issues, which were once left solely to the states. It is only the federal government who has the capacity to deal with other nation states in regards to criminal issues such as human trafficking, thus it should be the federal government who implements the

<sup>77</sup> 3.8 House of Lords, House of Commons Joint Committee on Human Rights 'Human Trafficking' Twenty-sixth Report of Session 2005-2006 Volume I.

<sup>78</sup> 5.7 Dr Andreas Schloenhardt, 'Australia, State and Territory Offences relating to Trafficking in Persons' (Human Trafficking Working Group, The University of Queensland TC Beirne School of Law, 2009), 2.

<sup>79</sup> *Magistrate calls for Federal terrorism compensation scheme* (2003) ABC News <<http://www.abc.net.au/news/stories/2003/08/09/920756.htm>> at 15 February 2010.

<sup>80</sup> Jonathan Pearlman, "Rights Charter to Vindicate Victims" *Sydney Morning Herald* (Sydney) 6 February 2008.

<sup>81</sup> John Broome "Commonwealth/State Boundaries in Crime and Justice" (Paper presented at the 3<sup>rd</sup> National Outlook Symposium on Crime in Australia, Canberra, 22-23 March 1999), 2.

<sup>82</sup> *Ibid.*, 11.

legislative schemes to ensure our nation is compliant with the international obligations it chooses to commit Australia to.<sup>83</sup>

In the past the federal government has justified its failure to implement a federal crimes compensation scheme by noting that crimes compensation has traditionally been the business of the states and territories. It is stated that it would be “a major policy change to permit compensation to victims” under a federal compensation scheme.<sup>84</sup> This kind of change has been deflected since 1972 when Prime Minister Gough Whitlam was working toward the establishment of a national crimes compensation scheme.<sup>85</sup> The failure to address the need for a federal crimes compensation scheme ignores the major policy changes which have occurred in Australia’s approach to crime, particularly crimes which have an international component, or are of international concern. These policy changes are reflected by the expansion of the external affairs power<sup>86</sup> due to the increasing number and range of international treaties and conventions. This expansion has given the Commonwealth a constitutional responsibility to legislate on certain criminal matters. At present the Commonwealth has criminalised slavery, sexual servitude and people trafficking<sup>87</sup>; yet failing to provide its victims with uniform, accessible pathways to obtaining compensation. It is hoped that recent bids to create a federal crimes compensation scheme will rectify this problem and ensure Australia’s compliance with the Palermo Protocol.<sup>88</sup>

It is not only Australia’s non compliance with the Palermo Protocol<sup>89</sup> which warrants the creation of a federal crimes compensation scheme. Recent terrorist attacks have left many primary and secondary victims of crime without any avenue through which to claim compensation, because the crimes in question were not committed in Australia.<sup>90</sup> This demonstrates that the current state and territory based system does not provide a just and equitable avenue for victims of crime to obtain compensation.<sup>91</sup>

A private members bill introduced in 2009, the *Assisting the Victims of International Terrorism Bill 2009*, sought to establish a federal process for assisting victims of international terrorist acts.<sup>92</sup> The bill proposed a national scheme, based on the current state and territory schemes, to provide financial assistance to Australian victims of terrorism and Australian casualties in the

<sup>83</sup> Namely the Trafficking in Persons Protocol: *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, opened for signature 15 November 2000, [2005] ATS 27, (entered in to force 25 December 2003).

<sup>84</sup> 6.3 Attorney-General’s Office, Commonwealth of Australia, Report on the Independent Review of the Operation of the *Proceeds of Crime Act 2002* (Cth) (2006), 66.

<sup>85</sup> Ian Kirkwood, ‘Hunter Terrorism Victims back Compensation Bill’, *The Herald* (Sydney), 23 November 2009.

<sup>86</sup> *Australian Constitution* s 51 (xxix).

<sup>87</sup> *Criminal Code* (Cth) ss 270 and 271.

<sup>88</sup> 6.3 (i) pg 4: Bob Debus hosted federal criminal justice forum on 28-29 September and it is an important step towards setting the reform agenda for federal criminal law and procedure

<sup>89</sup> *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, opened for signature 15 November 2000, [2005] ATS 27, art 6.6 (entered in to force 25 December 2003).

<sup>90</sup> 6.4 *Magistrate calls for Federal terrorism compensation scheme* (2003) ABC News <<http://www.abc.net.au/news/stories/2003/08/09/920756.htm>> at 15 February 2010.

<sup>91</sup> 6.2 Iyla Therese Davies, ‘Compensation for Criminal Injuries in Australia: A Proposal for Change in Queensland’ (1991) 3 *Bond Law Review* 1, 24.

<sup>92</sup> *Assisting the Victims of International Terrorism Bill 2009* (Cth).

war on terror.<sup>93</sup> The bill was recognition of recommendations dating back to the 1980s that a federal compensation scheme be established in Australia.<sup>94</sup> An Act which incorporates provisions to provide assistance to victims of Federal crimes would be a crucial step in eliminating the gaps in the current crimes compensation schemes, and ensuring that crimes prosecuted at a federal level are also compensated uniformly at a federal level.

The United States established the *Victims of Trafficking and Violence Protection Act 2000*, which provides avenues for survivors of trafficking and terrorism to pursue compensatory remedies.<sup>95</sup> The Act could provide a legislative example from which Australia could gain ideas, as it demonstrates a global push to improve access to compensation for survivors of human trafficking.

In essence government-funded compensation provides an informal, comparatively cost effective and efficient avenue through which a survivor can obtain compensation with surety.<sup>96</sup> An award made is designed to lessen the impact of the crime by recompensing survivors for out of pocket expenses incurred as a result of the crime and in some cases pain and suffering, attempting to assist a survivor to recover from the crime.

These factors ensure that whilst government-funded compensation schemes are not perfect, they are the most viable, sustainable, and potentially accessible avenue through which survivors of human trafficking can obtain compensation in the future. Thus the implementation of a Federal Crimes Compensation scheme modelled on the current state systems adopting the reforms suggested in this paper would be the most effective way to ensure victims of human trafficking in Australia have access to crimes compensation.

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<sup>93</sup> Second Reading Speech, Assisting Victims of International Terrorism Bill 2009 (Cth).

<sup>94</sup> 7.5 Michael O'Connell "Criminal Injuries Compensation: Revisiting the Rationale for State Funded Compensation for Crime Victims" (Paper presented at the Innovation: Promising Practices for Victims and Witnesses in the Criminal Justice System – A National Conference, Canberra, 23 – 24 June 2003, 21.

<sup>95</sup> 7.1 *Victims of Trafficking and Violence Protection Act of 2000*, 22 USC (2000).

<sup>96</sup> Fineston, L., 1995 'Crimes Compensation: A national perspective' in *Legalising justice for All Women: National Conference on Sexual Assault and the Law*, Proceedings of a conference held in Melbourne, November 28 -30