



Inquiry into Human Trafficking

Supplementary Submission to the Joint Committee on Law Enforcement

27 January 2017

"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 provide additional evidence to the re-initiated 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. The Centre provides ongoing casework and legal representation to men, women and children who have experienced human trafficking, slavery and slavery-like conditions in Australia.

This submission draws upon our research, publications and experience advising or representing people who have been at risk of, or subject to human trafficking.

Acknowledgements

This submission draws on the significant research contributions of Elizabeth Sheridan, Indika Chandrasekera and Alisha Mathew.

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Anti-Slavery Australia and the Law Council of Australia, *Report on Establishing a National Compensation Scheme for Victims of Commonwealth Crime*, November 2016.

EXECUTIVE SUMMARY

In response to the re-initiated Joint Committee on Law Enforcement inquiry into Human Trafficking, Anti-Slavery Australia maintains the previous submission to the Committee, dated 3 March 2016. This supplementary submission provides additional evidence, and further addresses measures to strengthen Australia's response to human trafficking in the following areas:

- (1) Establishment of a national compensation scheme,**
- (2) Protection of survivors of trafficking, slavery and slavery-like conditions by providing a better framework of visa protection**
- (3) Labour exploitation and human trafficking**
- (4) Strengthening of Australia's response to human trafficking in supply chains**

It should be noted that throughout this submission, all acts relating to human trafficking, slavery and slavery-like conditions are referred to as "human trafficking and slavery".

1. ESTABLISHMENT OF A NATIONAL COMPENSATION SCHEME

In the previous submission to the Committee, dated 3 March 2016, Anti-Slavery Australia recommended that the establishment of a national compensation scheme for victims of human trafficking, slavery and slavery-like conditions would provide a much needed and realistic pathway for survivors to access financial compensation. The recommendation is grounded in the observation that civil actions are unrealistic options in practically all cases of trafficking and slavery. 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. Anti-Slavery Australia has previously submitted that this would ensure that Australia fulfils Principle 2 of the *National Australian Action Plan to Combat Human Trafficking and Slavery 2015-19*¹ by establishing a consistent and effective pathway to compensation.

Anti-Slavery Australia welcomes the opportunity to provide additional evidence to the re-initiated committee, drawn from Anti-Slavery Australia's further research in this area in 2016. This research is in addition to the report 'Establishing a National Compensation Scheme', published jointly with the Law Council of Australia and attached to this submission.

1.1. Alternative Models

1.1.1. Targeted federal reparation schemes

In the first submission to the Committee, Anti-Slavery Australia referred to 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.²

¹ "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."

² 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. .

Two examples of existing Commonwealth schemes are the *Australian Victims of Overseas Terrorism Payments Scheme* (AVTOP) and the *Defence Abuse Reparation Scheme* (DARS) (now ceased).

Neither DARS, nor AVTOP payments require an admission of liability, which makes it easier for victims to access payments. The payments are determined in adherence to set guidelines and do not necessarily have to adhere to legal burdens of proof,³ allowing for payments to be made more promptly.

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.⁴ DARS reparation payments are classified as an exempt lump sum for the purposes of income testing.⁵ A national compensation scheme for trafficked people could ensure that recipients are not prevented from accessing social security benefits through the addition of a similar exception.

Payments made under the AVTOP are capped at \$75,000,⁶ while DARS payments were capped at \$50,000.⁷ The highest amount payable through State and Territory victims' compensation schemes is \$100,000.⁸ These amounts could provide guidance as to an appropriate upper limit for payments under a national compensation scheme for trafficked people. Anti-Slavery Australia considers that an appropriate cap on the amount payable under a national compensation scheme for trafficked people would be in the range of \$100,000. An amount in this range would reflect the seriousness of slavery and human trafficking, and the serious harm suffered by trafficked people.

³ 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.].

⁴ Explanatory Memorandum, *Social Security Amendment (Supporting Australian Victims of Terrorism Overseas) Bill 2012* (Cth), 1.

⁵ Australian Government Defence Abuse Response Taskforce, 'Financial Impact of Receiving a Reparation Payment' (Fact sheet, 2013) www.defenceabusetaaskforce.gov.au/Outcomes/Documents/Financial%20of%20receiving%20a%20reparation%20payment.pdf.

⁶ Social Security Act 1991 (Cth) s 1061PAD-E

⁷ Australian Government, 'Defence Abuse Reparation Scheme Guidelines', 12. The most serious category of abuse (Category 4) carries a maximum payment of \$45,000. An additional \$5,000 may be awarded where there has been mismanagement of the issue by Defence.

⁸ Victims of Crime Assistance Act 2009 (QLD) s 38(1); Criminal Injuries Compensation Act 2003 (WA) s 31(1).

1.1.2. Harmonisation through the Council of Australian Governments

The attached report, 'Establishing a National Compensation Scheme', published jointly with the Law Council of Australia and attached to this submission, outlines comparisons between the state and territory victims' compensation schemes, revealing significant differences in the operation of each of the schemes. These discrepancies affect who is eligible for compensation, as well as the amount of compensation to which each victim is entitled. As a consequence of these discrepancies, a person who incurs an injury as a result of an act of violence in Tasmania, for example, may find that they are ineligible for compensation had they incurred the same injury in New South Wales. Further, the amount of compensation varies significantly between the states, with a victim able to receive a maximum of \$100,000 in South Australia, compared to a maximum of \$35,000 in New South Wales. The lack of standardisation between the victims' compensation schemes in different states leads to unequal and unjust outcomes, as it renders a victim's eligibility for compensation and the amount of compensation received dependent on where the victim happens to be in Australia when the act of violence occurred.

For over eight years, Anti-Slavery Australia's consistent recommendation has been that Australia establishes a national victims' compensation scheme for survivors of human trafficking, slavery or slavery-like conditions. However, in the absence of such a scheme, there may be an appropriate alternative approach; states and territories could be encouraged to develop a consistent approach across jurisdictions to ensure that all survivors of federal crimes are treated fairly and equally, regardless of the jurisdiction where the harm took place. Anti-Slavery Australia suggests that the Committee encourages the Commonwealth Attorney-General's Department to lead a process of harmonisation through the Council of Australian Governments (COAG) inter-governmental forum to ensure equal treatment in all the Australian states and territories.

Recommendations:

- Establish a national compensation scheme to compensate victims of human trafficking, slavery and slavery-like practices. This would ensure equal and just outcomes for survivors who apply for compensation of an injury that had occurred in Australia.
- If government is reluctant to establish a national compensation scheme, then in the alternative:
 - Anti-Slavery Australia requests that the Committee recommends that the Commonwealth Attorney-General's Department prioritises the harmonisation of compensation schemes through the Council of Australian Governments (COAG) inter-governmental forum to ensure that survivors are treated equally regardless of where they were exploited in Australia.

2. IMPROVE VISA PROTECTION FOR VICTIMS OF TRAFFICKING, SLAVERY AND SLAVERY-LIKE CONDITIONS

Anti-Slavery Australia has first-hand experience working with survivors of human trafficking and slavery, and can report that survivors experience great hardship and uncertainty about their future if they do not receive sufficient visa support and protection. Anti-Slavery Australia maintains the previous submission to the Committee, dated 3 March 2016, and makes the following additional recommendations.

The Human Trafficking Visa Framework provides the opportunity for non-citizens without a valid visa who are survivors of human trafficking or slavery offences to remain in Australia. The 1 July 2015 amendments to the *Migration Regulations 1994* restructured the Trafficking Visa Framework. That framework now comprises two visas: the temporary *Bridging F Visa* and permanent *Referred Stay (Permanent) visa*. After assessment and referral by the Australian Federal Police, survivors may be granted a Bridging F Visa, which allows them to remain in Australia during an initial assessment period and in some cases where a further investigation is undertaken, for the duration of the survivor's participation in the criminal justice process. Survivors have access to the government funded Support for Trafficked People program while they hold a visa in the trafficking visa framework. In very rare cases, if the trafficked person has contributed to the investigation and/or prosecution of a matter, and meet further visa criteria, they may become eligible for the offer of a Referred Stay (Permanent) visa.

In the 2014-15 financial year, 26 Bridging F visas and Criminal Justice Stay visas were granted, alongside 8 Referred Stay visas granted to victims of trafficking and slavery and their families in Australia,⁹ while in the 2015-16 financial year 31 Bridging F Visas and 5 Referred Stay visas were granted. In total there were 80 clients on the Support for Trafficked People Program (Support Program), administered by the Australian Red Cross, in 2015-16.¹⁰

The following supplementary recommendations concerning the Human Trafficking Visa Framework are based on the experiences of survivors of human trafficking to whom Anti-Slavery Australia has provided legal and migration advice in 2016.

⁹ The Interdepartmental Committee on Human Trafficking and Slavery, The Australian Government, *Trafficking in Persons: The Australian Government Response 1 July 2015 – 30 June 2016*, [2016] 41.

¹⁰ *Ibid.* 35.

2.1. Assessment of 'danger' in Migration Regulation 2.07AK

In Anti-Slavery Australia's previous submission to the Committee, we recommended that the Department of Immigration and Border Protection develop policy guidance on the operation of the trafficking visa framework following the 1 July 2015 amendments to the *Migration Regulations 1994*. In November 2016, the Department of Immigration and Border Protection amended the Procedures Advice Manual (PAM) to address the legislative amendments.¹¹ The updated (PAM) provides guidance to departmental decision makers on the interpretation of the regulatory requirement that the victim of trafficking 'would be in danger' if they returned to their home country. While the 'danger' criteria has been part of the visa criteria for the permanent visa for some time, in our view, the new policy interpretation of danger adds to the uncertainty experienced by survivors.

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:

“[T]he Minister is satisfied that the person would be in danger if he or she returned to his or her home country.”¹²

In forming an opinion, the delegate is instructed to consider the level of protection available in the victim's home country on the advice of the Department of Foreign Affairs and Trade, as well as advice from overseas posts.¹³ The delegate is also directed to consider whether the victim could reasonably mitigate their exposure to danger by relocating to another area of their country. It is the opinion of Anti-Slavery Australia that these additional requirements are unfairly burdensome on victims of trafficking and fail to take into account an individual survivor's circumstances including the impact of trafficking on their well-being and future life.

The overall eligibility criteria for the grant of the visas are already narrowly framed and Anti-Slavery Australia recommends that the provision dealing with 'danger' be removed from the Migration Regulations. However, if the criterion is to remain, we recommend that

¹¹ Department of Immigration and Border Protection, *PAM3: Act-Character and Security- Human Trafficking and Visa Framework- Requirements of a valid Referred Stay visa application*, 19 November 2016. .

¹² *Migration Regulations 1994* (Cth) reg 2.07AK(3)(f).

¹³ n10.

the Department interpret 'danger' broadly and take into account factors such as the family circumstances of the survivor, the length of time the survivor has assisted Australian law enforcement processes and circumstances of a compassionate or compelling nature.

2.2. Provision for family reunification within the Human Trafficking Visa Framework

In order to obtain an extended Bridging F Visa and a Referred Stay (Permanent) Visa the applicant is required to participate and cooperate in an investigation relating to a possible human trafficking and slavery offence. Due to the clandestine nature of trafficking and slavery offences, criminal investigations are often prolonged over the course of years, and may not result in the conviction of alleged offenders for trafficking offences. During these complex and lengthy investigations, victim-witnesses are left in a continuing state of uncertainty and stress and may be separated from their family for many years.

Anti-Slavery Australia recommends that the Government facilitates the temporary reunification of families who are separated for extended periods of time due to the lengthy nature of police investigations into human trafficking offences. In particular, the dependent children of victim-witnesses should be allowed temporary entry into Australia, in situations where their parent, or parents, has assisted the police for a period of time, 6-12 months or more.

While awaiting an offer for a Referred Stay visa, victims of trafficking and slavery offences on a Bridging F Visa may be granted a further bridging visa by the Department of Immigration and Border Protection for the purpose of travel outside of Australia in compassionate and compelling circumstances. Such an application also requires the support of the Australian Federal Police.

It has been the experience of Anti-Slavery Australia that a victim of human trafficking may visit their home country, facilitated by the AFP and DIBP for the compelling and compassionate purpose of seeing their young children. Unfortunately, the fact that a survivor temporarily visited their home country may subsequently be raised by the DIBP as evidence that the victim does not face danger in their home country, when an invitation for a Referred Stay visa is considered. It is important that all of the circumstances of such a visit are reasonably assessed by the Department, such as the extent of protective measures put in place by the survivor. However, this places survivors of human trafficking in the terrible position of having to choose between their safety, and reunification with their children.

The following case study provides an example of the circumstances which may give rise to this situation. The names of all parties have been changed to preserve confidentiality.

Case Study

Mary was a citizen of a South East Asian country, earning a small amount of money to support her two children who lived with her mother. She was trafficked into Australia in September 2011. She entered Australia believing that she would be working in the sex industry, and earning money to provide a better life for her family.

Upon her arrival in Australia, Mary was told that she owed her employer much more than she had previously agreed to and that extra money would be taken out of her pay for food and accommodation. She remained in this situation due to threats that she would be turned in to Australian authorities and her family would be hurt in her home country if she attempted to escape. She was held in conditions of sexual servitude.

After her escape, Mary contributed to a police investigation conducted by the AFP. Ultimately, the offender was charged with Migration Act offences, unrelated to Mary, and was found not guilty of trafficking offences.

In March 2013, Mary received an offer of permanent stay in Australia, what at the time was known as a Witness Protection (Trafficking) visa (now the Referred Stay visa). Mary accepted this offer, however, in November 2015 the DIBP sent a request inviting further comment on adverse information that they received from the AFP. This information referred to three trips to her home country that Mary undertook between 2011 and 2013 in order to visit her young children. The Department also noted that “no specific threats were made” to Mary during her trips home. Submissions were made to the DIBP regarding Mary’s circumstances, and they were ultimately convinced that she satisfied the danger criteria. She was granted a Referred Stay visa in 2016.

Mary left her home country when her children were 6 years old. Unfortunately, her children, now 11 years old are reluctant to join her in Australia, as they have largely grown up without her. Mary now faces the prospect of not returning to her home country or seeing her children, and potentially losing her Australian residency.

2.2.1. *Legal frameworks and family reunification*

There are various international instruments, to which Australia is a party that highlight the importance of the family and support the protection of family ties, particularly in the circumstances involving children and humanitarian visa applicants.

- Article 16 of the Universal Declaration of Human Rights (1948) and Article 23 of the International Covenant on Civil and Political Rights each state that “the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”¹⁴
- Article 10 of the International Covenant on Economic, Social and Cultural Rights states that “the widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.”¹⁵
- Articles 9 and 16 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), deal with the rights of women regarding equality, marriage and family.¹⁶
- The Convention on the Rights of the Child makes numerous references to family. Articles 9 and 10 discuss the rights of the child with regard to separation from family, Articles 20 and 21 deals with deprivation of family environment and adoption, and Article 23 discusses the rights of child refugees.¹⁷

Victims of trafficking and refugees often share experiences about the destruction of family units. For a variety of reasons individuals are separated from their loved ones. Once they have achieved a sense of relative safety and stability, family reunion is frequently a top priority.¹⁸ For example, a 2013 study revealed that for Sudanese

¹⁴ *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 3 (entered into force 23 March 1976).

¹⁵ *International Covenant on Economic, Social and Political Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

¹⁶ *Convention on the Elimination of All Forms of Discrimination against Women* opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

¹⁷ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, (entered into force 2 September 1990).

¹⁸ Brooke Wilmsen, 'Family separation: The policies, procedures, and consequences for refugee background families' [2011] 30(1) *Refugee Survey Quarterly* 44, 46.

refugees in Australia, “war and forced migration has altered the shape and structure of Sudanese families” although “group and family cohesion is considered to be of paramount importance.”¹⁹ Meanwhile, parent migration has been shown to have significant social, psychological and emotional impacts on children who are often left behind with extended family or other carers.²⁰ As Robertson et al explain:

“The refugee family experience of transnationalism is generated out of forced separation. It is characterized by the ongoing negotiation of precarious economic and social contexts, in combination with limited control over resettlement outcomes. This presents particular challenges for maintaining family connections.... [Yet] people do not abandon them altogether.”²¹

2.2.2. Mental health and family separation

For the individuals seeking humanitarian protection, and the victims of trafficking offences who face an uncertain future in Australia, family separation has a profound impact on psychological and emotional health. The extreme vulnerability of these groups is both a contributing factor to their isolation from the community, and a compelling argument for family reunification. In particular, victims of trafficking, slavery, sexual servitude, forced marriage and extreme labour exploitation are vulnerable to mental health issues such as Post Traumatic Stress Disorder, anxiety, depression and suicide attempts as a consequence of extremely traumatic experiences.²²

For onshore Protection Visa applicants, family configurations are often complicated, as Wilmsen notes, by a combination of “tradition and custom, but also of circumstances surrounding [their] refugee experiences.”²³ Refugees and other migrants who are faced with lengthy periods of uncertainty over their immigration status and a lack of family

¹⁹ Michael Savic, Anna Chur-Hansen, Mohammad Afzal Mahmood, and Vivien Moore, ‘Separation from family and its impact on the mental health of Sudanese refugees in Australia: a qualitative study’ [2013] 37(4) *Australian and New Zealand Journal of Public Health* 383, 383.

²⁰ Marta Moskal and Naomi Tyrrell, ‘Family migration, decision-making, step-migration and separation: Children’s experiences in European migrant worker families’ (2016) 14(4) *Children’s Geographies* 453, 454.

²¹ Zoe Robertson, Raelene Wilding and Sandra Gifford, ‘Mediating the family imaginary: young people negotiating absence in transnational refugee families’ (2016) 16(2) *Global Networks* 219, 220.

²² Dr Ligia Kiss, Nicola S Pocock, Varaporn Naisanguansri, Soksreymom Suos, Brett Dickson, Doan Thuy, Jobst Koehley, Kittiphan Sirisup, Nisakorn Pongrunsee, Van Anh Nguyen, Rosilyne Borland, Poonam Dhavan and Cathy Zimmerman, ‘Health of men, women and children in post-trafficking services in Cambodia, Thailand and Vietnam: an observational cross-sectional study’ (2015) 3(3) *The Lancet* 154, 154.

²³ Brooke Wilmsen, ‘Family separation and the impacts on refugee settlement in Australia’ (2013) 48(2) *Australian Journal of Social Issues* 241, 242.

reunion or support suffer mental harm, which exacerbates existing barriers to successful resettlement, including:²⁴

- Pre and Post-migration experiences and trauma
- A lack of social networks in the receiving country
- A lack of economic opportunities
- Difficulties accessing education
- Language barriers
- Experiences with xenophobia or prejudice
- A lack of permanent accommodation

However, the above referenced 2013 study of family separation amongst Sudanese refugees in Australia reported constant worry about the wellbeing and safety of family members in their home country, as well as feelings of grief and survivor's guilt. This is thought to have had a tangible impact on the mental health of resettling Sudanese refugees in Australia.²⁵

In providing legal advice to survivors of human trafficking, Anti-Slavery Australia has first-hand knowledge of the trauma cause by family separation. We therefore recommend that provision be made for temporary family reunification within the Human Trafficking Visa Framework. In this way, the Government may continue to strengthen the protection of victims of human trafficking, slavery and slavery-like offences.

2.3. Amendments to the partner visa framework

While the family violence provisions in the *Migration Regulations 1994*²⁶ 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

²⁴ See Wilmsen, above n 39, 245 for an outline of the biomedical versus the social inclusion approach to refugee settlement.

²⁵ Savic et al, above n 36, 385.

²⁶ *Migration Regulations 1994* (Cth) pt 1 div 1.5.

indicate that there cannot be a 'genuine relationship' as the victim did not consent to the marriage.

Forced marriage continues to emerge as a significant and concerning social issue.²⁷ While the actual dimension of the practice is unclear, there have been a number of critical developments since 2013. One such initiative is the website, My Blue Sky, created and operated by Anti-Slavery Australia, funded by the Australian Government. My Blue Sky is a national portal providing secure access to any person facing forced marriage in Australia. My Blue Sky has received over 20 requests and referrals for assistance and legal advice concerning Australians who feared, or were subject to forced marriage during 2016. Additionally My Blue Sky has received referrals from temporary partner visa holders who have reported that they have experienced violence, preceded by a forced marriage. These developments continue to highlight the need for coordinated, accessible education targeted towards at-risk communities. However, this education needs to be supported by a migration framework which protects vulnerable visa holders and residents.

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'.

Recommendations:

- That the Migration Regulations be amended to repeal the "would be in danger" clause currently contained within Migration Regulation 2.07AK.
- Provide for temporary family reunification for victims of human trafficking who have assisted police for 6 to 12 months or more while holding the Bridging F Visa.
- Amend the family violence provisions in the *Migration Regulations 1994* (Cth) to include circumstances where a marriage was forced such that there is no 'genuine relationship'.

²⁷ Simmons, F & Jennifer Burn, 'Without Consent: Forced Marriage in Australia', [2013] MULR 970.

3. LABOUR EXPLOITATION AND HUMAN TRAFFICKING

Migrant workers, face higher risks of exploitation including increased vulnerability to human trafficking, slavery and slavery-like practices.²⁸ The recent high-profile cases of labour exploitation in 7-Eleven and in the agriculture industry have highlighted the prevalence of the exploitation of migrant workers in Australia,²⁹ and also the need for stronger framework of legislation and policies to protect against this human rights abuse.

In Anti-Slavery Australia's previous submission to the Inquiry, a number of recommendations were made regarding measures to enhance the protection of vulnerable migrant workers from labour exploitation and human trafficking. Anti-Slavery Australia makes the following further recommendations based on subsequent experiences and evidence gathered in 2016, including the developing role of Taskforce Cadena, and the emerging focus on the intersection of business and human rights. 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.

3.1. Fair Work Ombudsman and the Department of Immigration and Border Protection

Anti-Slavery Australia makes this supplementary recommendation as an addition to our previous submission regarding the role of the Office of the Fair Work Ombudsman in combatting the exploitation of migrant workers. Human trafficking, slavery and slavery-like offences do not fall within the operation remit of the Fair Work Ombudsman.³⁰ However, the FWO is nonetheless in a unique position to prevent these forms of exploitation due to the level of access to workplaces, and the relationships and referral pathways that the Fair Work Ombudsman has developed with other government departments and law enforcement.³¹ Anti-Slavery Australia commends the continuing commitment of the Fair Work Ombudsman to combatting human trafficking, slavery and slavery-like offences, and we make the following recommendation in order to continue to strengthen the policies in place to prevent the exploitation of vulnerable workers.

²⁸ Productivity Commission 2015, *Workplace Relations Framework*, (Final Report, Commonwealth of Australia, 2015) 939.

²⁹ The Senate Education and Employment References Committee, 'A National Disgrace: The Exploitation of Temporary Work Visa Holders' (Commonwealth of Australia, 17 March 2016) 2.4-2.6.

³⁰ *Trafficking In Persons: The Australian Government Response 1 July 2015 – 30 June 2016* (Eighth Report Of The Interdepartmental Committee On Human Trafficking And Slavery, Commonwealth of Australia, 2016) 44.

³¹ *Ibid.*

The Memorandum of Understanding between the Fair Work Ombudsman and Department of Immigration and Border Protection,³² and the Ministerial Direction No. 58 determine the responsibilities of the Fair Work Ombudsman in relation to visa holders.³³ The Department of Immigration and Border Protection should share any information with the Fair Work Ombudsman when they suspect the sponsor of a 457 Visa has underpaid a migrant.

Anti-Slavery Australia submits that the Fair Work Ombudsman should not share any identifying information with the Department of Immigration and Border Protection about a migrant who has breached their employment-related visa conditions.³⁴ Ministerial Direction 58 states that Fair Work and Fair Work Building Industry Inspectors are to focus on monitoring Temporary Work (Skilled) - Standard Business Sponsorship Visa (Subclass 457) sponsor compliance. While undertaking their responsibilities, the focus of FWO investigations should be to protect vulnerable workers rather than to inadvertently trigger actions that could result in further harm to the non-citizen. This is especially important in joint operations, such as those conducted through Taskforce Cadena. In recent Taskforce Cadena operations migrant workers have been detained, placed into detention centers and subsequently deported.³⁵ It is essential that effective identification measures be in place to ensure that potential victims of human trafficking are identified during this process.

3.2. Licensing for Labour Hire Businesses

Anti-Slavery Australia recommends that the Australian Government implement a sector specific licensing scheme for the labour hire industry.

The Labour Hire industry is defined by the existence of “triangular” employment relationships. This typically includes a labour hire agency, which supplies the labour of a

³² Fair Work Ombudsman and the Department of Immigration and Border Protection, *Memorandum of Understanding* (at 2 July 2013).

³³ Minister for Immigration and Border Protection (Cth), *Direction [No 58]- Migration Act 1958- Direction under section 499- Exercise of powers by fair work inspectors*, 1 August 2013.

³⁴ *Ibid* [29.5].

³⁵ Minister for Immigration and Border Protection, *Taskforce Cadena detain thirty four individuals* (press release, 24 August 2016); David Hurley, ‘Farm raided in Koo Wee Rup, more than 50 illegal workers taken into detention’, *Herald Sun* (online) 2 December 2016 <<http://www.heraldsun.com.au/news/victoria/farm-raided-in-pakenham-more-than-50-illegal-workers-taken-into-detention/news-story/74899b1f89f0d1f4be99c1f614288165>>.

labour hire worker to a third party (the host employer) in exchange for a fee.³⁶ The labour hire employment arrangement involves no direct contractual relationship between the labour hire worker and the host employer.³⁷

The role of the labour hire industry in the exploitation of vulnerable migrant workers has been recognised in the reports of several State and Commonwealth government inquiries. The Senate report 'A National Disgrace: The Exploitation of Temporary Work Visa Holders' details the extensive exploitation of migrant workers by labour hire companies. The report recommends that a licensing regime be established for labour hire contractors, that all licensed labour hire contractors be published on a public register, and that labour hire companies that subcontract to other labour hire companies, including overseas businesses, be obliged to ensure that those subcontractors hold a license.³⁸

3.2.1. United Kingdom Gangmasters and Labour Abuse Authority

The United Kingdom Gangmasters and Labour Abuse Authority is located within the Home Office and oversees the licensing of labour hire contractors (called 'gangmasters' in the United Kingdom). The Gangmasters and Labour Abuse Authority are also responsible for monitoring licensees, as well as carrying out inspections.³⁹ The licensing of labour hire contractors was introduced in the United Kingdom in 2004 following a series of cases involving the severe exploitation of migrant workers.⁴⁰ The most striking of which was the so called 'Morecambe Bay' disaster, in which at least 21 Chinese labour hire workers in the shellfish industry were exploited in conditions that cost them their lives.⁴¹

The Gangmasters and Labour Abuse Authority also maintain a register of licensees.⁴² In addition to the online register, the Authority website also allows host employers to sign up

³⁶ Richard Johnstone et al, *Beyond Employment: The Legal Regulation of Work Relationships* (The Federation Press, Annandale, 2012), 60.

³⁷ Department of Economic Development, Jobs, Transport & Resources, 'Victorian Inquiry into the Labour Hire Industry and Insecure Work' (State of Victoria, 27 October 2016) 2.1.1.

³⁸ The Senate Education and Employment References Committee, 'A National Disgrace: The Exploitation of Temporary Work Visa Holders' (Commonwealth of Australia, 17 March 2016) 9.309.

³⁹ *Gangmasters (Licensing) Act 2004* (UK) s 1.

⁴⁰ Department of Economic Development, Jobs, Transport & Resources, 'Victorian Inquiry into the Labour Hire Industry and Insecure Work' (State of Victoria, 27 October 2016) 9.202-9.204.

⁴¹ 'The tragedy of Morecambe Bay', *The Economist* (Online) 12 February 2004 <<http://www.economist.com/node/2424172>>.

⁴² *Gangmasters (Licensing) Act 2004* (UK) s 11.

for the 'Active check' service, which allows host employers to ensure they are using licensed providers and provides live updates on any changes to, or revocation of, issued licences.⁴³ The 'Active check' also creates an online record of the host employers 'check', which provides proof that the host employer has fulfilled their obligations regarding due diligence.⁴⁴

The Triennial Review of the Gangmasters and Labour Abuse Authority (then called the Gangmasters Licensing Authority) concluded that the department was effectively targeting serious transgressors and increasing its focus on high-risk industries.⁴⁵ At the time of that review the Gangmasters and Labour Abuse Authority was attempting to reduce the burden on compliant businesses, by adopting a risk-based approach to inspections.⁴⁶

Anti-Slavery Australia recommends that the Government introduce a sector specific licensing regime modelled on the Gangmasters and Labour Abuse Authority.

3.3. Protecting Temporary Migrant Workers in Australia

Anti-Slavery Australia submits that a legislative and policy framework is required, which will ensure more rigorous monitoring of employment conditions of temporary migrant workers, to prevent serious labour exploitation, as well as human trafficking, slavery and slavery-like offences.

Anti-Slavery Australia commends the Government's recent programmes to address the serious issue of labour exploitation in Australia, in particular the establishment of the Labour Exploitation Working Group.⁴⁷ Anti-Slavery Australia makes the following recommendations as to legislative, policy and regulatory initiatives which could continue to strengthen the protections for vulnerable migrant workers.

⁴³ *Labour User Guidance for Basic Public Register Checks and Formal 'Active Check'*, Gangmasters Licensing Authority <<http://www.gla.gov.uk/media/2218/active-check-guidance.pdf>> 1

⁴⁴ Ibid.

⁴⁵ 'Report of the Triennial Review of the Gangmasters Licensing Authority' (Department for Environment, Food and Rural Affairs, April 2014) 4.

⁴⁶ Ibid.

⁴⁷ 'Trafficking In Persons: The Australian Government Response 1 July 2015 – 30 June 2016' (Eighth Report Of The Interdepartmental Committee On Human Trafficking And Slavery, Commonwealth of Australia, 2016) iv.

3.3.1. *Temporary Working Visa programmes*

Visa programmes that have been linked to the exploitation of vulnerable temporary migrant workers include:

- The Working Holiday Maker (WHM) (subclasses 417 and 462) visa (the Working Holiday visa) program,
- The Temporary Work (Skilled) (subclass 457) Visa (the 457 visa) and;
- The Student (subclasses 570 to 576) Visa (the Student visa).

The vulnerability of workers within these visa programmes has been brought to the attention of the wider public following two major media exposés in 2015. Firstly, the Australian Broadcasting Corporation's programme *Four Corners* investigated and uncovered widespread exploitation of migrant workers in the meat processing and horticulture industries, many of whom held Working Holiday visas.⁴⁸ Subsequently, *Four Corners* and Fairfax Media revealed the systemic underpayment of wages and entitlements of international students working on temporary visas by 7-Eleven convenience stores franchisees throughout Australia.⁴⁹ These media reports represent two examples of a widespread problem in Australia, which has been described by the Senate Education and Employment References Committee as "a national disgrace".⁵⁰

Working Holiday Maker (WHM) (subclasses 417 and 462) visa

The Working Holiday visa programme allows young adults (aged 18 to 30) from eligible countries to work in Australia while having an extended holiday. The DIBP stipulates that work in Australia must not be the main purpose of the visa holder's visit.⁵¹ Nonetheless, Working Holiday visas allow the holder to work for the full twelve months of the visa. The only restriction being that the holder cannot work for the same employer for more than six months.⁵² Additionally, following 2005 amendments a first-time Working Holiday

⁴⁸ Australian Broadcasting Corporation, 'Slaving Away: The dirty secrets behind Australia's fresh food', *Four Corners*, 4 May 2015 (Caro Meldrum-Hanna and Ali Russell) <<http://www.abc.net.au/4corners/stories/2015/05/04/4227055.htm#transcript>>.

⁴⁹ Australian Broadcasting Corporation, '7-Eleven: The price of convenience', *Four Corners*, 31 August 2015 (Adele Ferguson and Klaus Toft) <<http://www.abc.net.au/4corners/stories/2015/08/30/4301164.htm#transcript>>.

⁵⁰ The Senate Education and Employment References Committee, 'A National Disgrace: The Exploitation of Temporary Work Visa Holders' (Commonwealth of Australia, 17 March 2016).

⁵¹ *What is the Working Holiday Maker program?*, Department of Immigration and Border Protection <<https://www.border.gov.au/Lega/Lega/Form/Immi-FAQs/what-is-the-working-holiday-maker-program>>.

⁵² *Migration Regulations 1991* (Cth) sch 2, reg 417.611 and reg 462.611.

(Subclass 417) visa holder, who performs 88 days of ‘specified work’ in regional Australia is eligible to apply for a second Working Holiday Visa. ‘Specified work’ includes work in the agriculture, mining and construction industries.⁵³ These amendments resulted in a rapid expansion in the Working Holiday Visa programme.⁵⁴ This changed the nature of the programme from a cultural exchange, to a labour market programme, in order to fill labour shortages in specific industries.⁵⁵

Working Holiday visa holders may be particularly vulnerable to exploitation. Working Holiday visa holders are young, they are generally engaged in work in which they have no previous experience and inadequate training, and increasingly come from non-English speaking backgrounds.⁵⁶ These special vulnerabilities are exacerbated as a result of the industries and types of work in which Working Holiday visa holders engage, which is generally casual, short-term, labour intensive work in industries that are highly sensitive to the cost of labour.⁵⁷ These vulnerabilities were evident in the 2015 *Four Corners* exposé on the exploitation of migrant workers in the horticulture and meat-processing industries.⁵⁸ The protections in place within the current regulatory framework are insufficient given the large number of Working Holiday visa holders, and the lack of sponsorship obligations on employers.⁵⁹ The special vulnerabilities of Working Holiday visa holders require strong workplace protections.

Temporary Work (Skilled) (subclass 457) Visa

The 457 Visa enables employers to sponsor the entry of skilled workers into Australia. It is the most commonly used programme for employers to sponsor workers from overseas to work in Australia.⁶⁰ In order to regulate Sponsors, the DIBP employs a targeted risk based model to monitor the registered active 457 Sponsors.⁶¹ The indicators which are

⁵³ Ibid, reg 417.211.

⁵⁴ Alexander Reilly, ‘Low-cost labour or cultural exchange? Reforming the Working Holiday visa programme’ (2015) 26(3) *The Economic and Labour Relations Review* 474, 481.

⁵⁵ Ibid.

⁵⁶ Ibid, 482.

⁵⁷ Ibid.

⁵⁸ Australian Broadcasting Corporation, ‘Slaving Away: The dirty secrets behind Australia’s fresh food’, *Four Corners*, 4 May 2015 (Caro Meldrum-Hanna and Ali Russell) <<http://www.abc.net.au/4corners/stories/2015/05/04/4227055.htm#transcript>>.

⁵⁹ Alexander Reilly, above n 47, 486.

⁶⁰ *Temporary Work (Skilled) (subclass 457) visa* (January 2017) Department of Immigration and Border Protection <<https://www.border.gov.au/Forms/Documents/1154.pdf>>

⁶¹ The Senate Education and Employment References Committee, ‘A National Disgrace: The Exploitation of Temporary Work Visa Holders’ (Commonwealth of Australia, 17 March 2016) 9.38

monitored include allegations from visa holders and other stakeholders, information obtained from other areas of the department, and referrals from the Office of the Fair Work Ombudsman.⁶² The Fair Work Ombudsman monitors compliance with sponsorship obligations in workplaces on behalf of the Department of Immigration and Border Protection.⁶³

The vulnerability of migrants holding the 457 Visa is evident in the case of Divye Kumar Trivedi. Mr Trivedi trafficked an Indian national to Australia to work in a restaurant (the Applicant). On 27 March 2015, the Federal Circuit Court ordered Mr Divye Trivedi to pay \$186,000 to the Applicant. This amount included back pay, entitlements and interest owed to the applicant. Mr Trivedi had previously been convicted of one count of trafficking in persons in relation to this matter contrary to subsection 271.2(1B) of the Criminal Code (see page 29).⁶⁴ This matter was described by Justice Driver as a “grotesque abuse of the of the 457 visa programme” which “raises questions about the integrity of the class 457 visa programme.”⁶⁵

Student (subclasses 570 to 576) Visa

All eligible international students holding visa subclasses 570–576 are permitted to work 40 hours per fortnight during the course of their studies.⁶⁶ Student visa holders share many of the same vulnerabilities as Working Holiday visa holders. These include youth, unfamiliarity with work rights under Australian law and limited English language skills.⁶⁷

This may be further exacerbated by the general reluctance amongst vulnerable workers to complain about their working conditions.⁶⁸ The result is that when workers feel tied to their employers they are more likely to tolerate exploitation without complain.⁶⁹ Examples include where they are working illegally, or in order to satisfy the criteria for a second Working Holiday visa or two maintain the patronage of their 457 visa sponsor.

⁶² Ibid.

⁶³ Trafficking In Persons: The Australian Government Response 1 July 2015 – 30 June 2016' (Eighth Report Of The Interdepartmental Committee On Human Trafficking And Slavery, Commonwealth of Australia, 2016) 46.

⁶⁴ Trafficking In Persons: The Australian Government Response 1 July 2014 – 30 June 2015' (Seventh Report Of The Interdepartmental Committee On Human Trafficking And Slavery, Commonwealth of Australia, 2015) 94.

⁶⁵ *Ram v D & D Indian Fine Food Pty Ltd* [2015] FCCA 389, [187].

⁶⁶ *Migration Regulations 1991* (Cth) sch 2, regs 570.617, 571.614, 572.617, 573.617, 574.617, 575.617, 576.614.

⁶⁷ Joanna Howe, 'Examining a Temporary Migrant Worker's Ability to Make a Complaint of Sexual Harassment' (2016) 41(2) *Alternative Law Journal* 102, 103.

⁶⁸ David Weil and Amanda Pyles, 'Why Complain-Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace' (2005) 27 (1) *Comparative Labor Law and Policy Journal* 59, 91.

⁶⁹ Alexander Reilly, above n 47, 485.

3.3.2. *The Spectrum of Exploitative Labour Practices*

The exploitation of vulnerable migrant labour is representative of what has been described in recent academic scholarship as a “spectrum of unfreedom”.⁷⁰ Unfree or exploitative migrant labour describes a situation whereby a worker is unable to enter the receiving country’s labour market through a process of ‘free’ contract, but his or her labour is still commodified.⁷¹ Definitions of forced labour also recognise that exploitation can occur when a worker freely enters into an employment situation, but is then deceived about the nature and conditions of work, and may also be forced to remain in that relationship through coercion.⁷² In both of these circumstances the worker may be receiving a wage, as many forms of exploitative and forced labour are performed for some form of payment.⁷³ As such, all forms of slavery and slavery-like offences fall with a spectrum of unfree labour that involves coercion in the course of the work relationship.⁷⁴ These offences occur along a continuum of freedom/unfreedom that comprises a range of forms of commodification and exploitation.⁷⁵ The concept of a continuum of exploitation was clearly incorporated into Australian law in the 2008 High Court case *R v Tang*.⁷⁶ Chief Justice Gleeson described the elements of slavery, such as the control of movement and control of physical environment, as questions of degree.⁷⁷

Anti-Slavery Australia recommends that due to this spectrum of exploitative labour practices, the appointment of an Anti-Slavery and Trafficking Commissioner or a Director of Labour Market Enforcement would assist in the creation of policies and programs that effectively identify circumstances of labour exploitation, trafficking and slavery. This is discussed further below.

⁷⁰ See, eg, Klara Skrivankova, “Between decent work and forced labour: examining the continuum of exploitation” (JRF Programme Paper, Joseph Rowntree Foundation, 2010) 16; Judy Fudge and Kendra Strauss, ‘Migrants, unfree labour, and the legal construction of domestic servitude: migrant domestic workers in the UK’ in Cathryn Costello and Mark Freedland (eds) *Migrants at work : immigration and vulnerability in labour law* (Oxford University Press, 2014) 162-163.

⁷¹ Judy Fudge and Kendra Strauss, above n 43, 163.

⁷² Klara Skrivankova, above n 43, 5-6.

⁷³ Judy Fudge and Kendra Strauss, above n 43, 163.

⁷⁴ *Ibid.*

⁷⁵ Klara Skrivankova, above n 43, 16.

⁷⁶ (2008) 249 ALR 200.

⁷⁷ *Ibid.*, 211-212, [32].

3.3.3. Strengthening protection across the spectrum of labour exploitation

Human trafficking, slavery and slavery-like offences do not fall within the operation remit of the Fair Work Ombudsman.⁷⁸ Furthermore, in providing legal advice to survivors of human trafficking, it has been the experience of Anti-Slavery Australia that many survivors fear and misunderstand the role of the Department of Immigration and Border Protection. This may be due to either deliberate misinformation given to them by their traffickers, or survivors' experiences of government officials in their home countries. For these reasons, monitoring compliance of 457 visa sponsors regarding human trafficking, slavery and slavery-like offences requires the operation of a specialised agency. As such, Anti-Slavery Australia submits that this role could be performed by a dedicated Anti-Slavery and Trafficking Commissioner.

Chapter 1 of Anti-Slavery Australia's previous submission to the committee, dated 3 March 2016, recommends that the Australian Government appoint an independent Anti-Slavery and Trafficking Commissioner. A Commissioner could operate alongside, but independent from the Fair Work Ombudsman and the Department of Immigration and Border Protection to ensure that temporary migrant workers are not subjected to human trafficking, slavery or slavery-like practices. It is essential that legislative and regulatory framework to prevent human trafficking, slavery and slavery-like practices is reflective of the spectrum of exploitation. The creation of a dedicated independent commissioner will ensure that the special needs and vulnerabilities of survivors of the gravest forms of exploitation are provided for.

Due to the multiplicity of bodies regulating exploitative practices in Australia, there is a need for a central coordinating body. Aside from an Anti-Slavery and Trafficking Commissioner, Anti-Slavery Australia notes that one response may be the creation of a position similar to the newly established Director of Labour Market Enforcement in the United Kingdom. The Director of Labour Market Enforcement was created by the *Immigration Act 2016* (UK).⁷⁹ The role of the Director of Labour Market Enforcement will

⁷⁸ Trafficking In Persons: The Australian Government Response 1 July 2015 – 30 June 2016' (Eighth Report Of The Interdepartmental Committee On Human Trafficking And Slavery, Commonwealth of Australia, 2016) 44.

⁷⁹ *Immigration Act 2016* (UK) s 1.

be to set and lead the United Kingdom's enforcement strategy to prevent non-compliance in the labour market,⁸⁰ and administer a new system of sanctions called the labour market undertaking and enforcement order regime.⁸¹ The Director of Labour Market Enforcement will also devise a new strategy to coordinate cooperation and information sharing between the United Kingdom's labour market enforcement bodies.⁸²

Exploitation of the kind uncovered in recent media investigations constitutes a serious breach of the workers' human rights. While it did not constitute human trafficking, slavery or slavery-like practices, it does represent a kind of unfree labour that falls along the same continuum of exploitative practices as slavery and slavery-like offences. As such, Anti-Slavery Australia recommends that an Australian Director of Labour Market Enforcement would serve to monitor and prevent these exploitative practices, recognising the position of these offences on a spectrum of unfree labour. The creation of this type of office in Australia would ensure that there is no gap in protection between the Fair Work Ombudsman and that protections are cultivated for survivors of the most extreme forms of trafficking, slavery and slavery-like offences.

In order to prevent the exploitation of migrant workers it is also vital that information be made available to entrants on working visas. This information should explain their rights as workers in Australia. Education and information for migrant workers should be coordinated, targeted and accessible. Providing this information to working visa holders at points of entry to Australia could ensure that migrant workers understand that the Australian government does not tolerate exploitative labour practices. Education programs and policies can be developed through engagement with the Anti-Slavery and Trafficking Commissioner.

⁸⁰ Ibid, s 2.

⁸¹ Ibid, s 18.

⁸² Ibid, s 2 and s 8.

Recommendations:

- Ensure that information sharing between the Fair Work Ombudsman and the Department of Immigration and Border Protection does not result in the inadvertent detriment to exploited workers, and that assessment measures be in place to ensure that potential victims of human trafficking are identified during this process.
- Regulate the labour hire industry through a sector specific licensing scheme.
- Ensure adequate monitoring of the working conditions of temporary migrant workers, and their employers and sponsors, targeting human trafficking, slavery and slavery-like offences. Anti-Slavery Australia recommends that an independent Labour Exploitation or Anti-Slavery and Trafficking Commissioner could best perform this role.
- Provide targeted educational information to entrants to Australia holding working visas about Australian working conditions and rights.

4. STRENGTHEN AUSTRALIA'S RESPONSE TO EXPLOITATION IN SUPPLY CHAINS

Supply chain exploitation affects the provision of goods and services in Australia, in the region and beyond. Supply chains are the vertically integrated systems of production that link raw materials to finished products. They are the primary vehicle of the contemporary global economy. There has been an increasing and urgent focus on the integrity of supply chains and calls for Australia to establish mechanisms to efficiently identify and prevent the occurrence of exploitation within supply chains.

4.1. Australia's Current Responses

The 2015-2019 National Action Plan to Combat Human Trafficking and Slavery identifies the Australian Government's "response to labour exploitation in supply chains" as a key focus area. To this end, Anti-Slavery Australia supported the Australian Government initiative to convene a Supply Chains Working Group to address exploitation in supply chains and participated in the Working Group.

The Working Group on Slavery in Supply Chains (Working Group) was convened by Justice Minister the Hon Michael Keenan MP, in response to the 2012 Parliamentary Inquiry into Modern Slavery and Trafficking.⁸³ The Working Group consisted of representatives from government, industry, civil society and academia. The first phase of the working group's response was completed in mid-2015. The second phase was completed in December 2015, and the report was put to the minister and the government has responded through the National Roundtable on Human Trafficking and Slavery. Nonetheless, the report of the working group has yet to be publicly released.

In a further development, the Australian Human Rights Commission convened a Roundtable to discuss the implementation of the Guiding Principles in Australia.⁸⁴ The recommendations of the Roundtable include the development of a National Action Plan on business and human rights, which would include ongoing commitments, timelines and allocated responsibilities.⁸⁵

⁸³ Brynn O'Brien and Martijn Boersma, *Human Rights in Supply Chains of Australian Companies:*

Opportunities for Legislative Reform (September 2016) Catalyst
<http://catalyst.org.au/documents/Human_Rights_in_the_Supply_Chains_of_Australian_Businesses_-_Opportunities_for_Legislative_Reform_FINAL.pdf>

⁸⁴ Amy Sinclair, 'Implementing the UN Guiding Principles on Business and Human Rights in Australia' (Joint Civil Society Statement, Australian Human Rights Commission, August 2016).

⁸⁵ *Ibid*, 4.

4.2. Public Procurement

The Australian Government is a significant purchaser of goods and services. The Government has demonstrated clear intent to reduce human trafficking and slavery and there is an opportunity to show leadership in this area by developing policies and processes to strengthen public procurement guidelines.

Commonwealth officers are required to act “ethically” under Federal procurement rules. An information sheet circulated to Procurement Officers by the Attorney-General’s Department states that this includes ensuring that the Australian Government does not use goods or services that have been tainted by human trafficking or slavery.⁸⁶ However, Anti-Slavery Australia observes that there is considerable room to strengthen the Australian Government’s response to human trafficking and slavery in supply chains.

In an information sheet for Commonwealth Government procurement officers produced by the Attorney-General’s Department, the department observed that the Commonwealth has an important role in leading by example in ethical procurement and to develop procurement practices to prevent human trafficking in the supply chains of goods and services used by government departments.⁸⁷ Additionally, Anti-Slavery Australia welcomes the contribution of the Department of Finance to the development of ISO 20400 and that the Government uphold this standard and take further steps to lead by example in the elimination of human rights abuses such as slavery and human trafficking from public procurement supply chains.

Anti-Slavery Australia also welcomes the forthcoming amendments to the Commonwealth Procurement Rules, which will commence on 1 March 2017. Under the amended rules, officials must make reasonable enquiries as to the tenderers practices regarding ethical employment practices.⁸⁸

⁸⁶ *Human Trafficking—Information sheet for Commonwealth Government procurement officers* (2014) Attorney-General’s Department < <https://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Documents/Human-Trafficking-Information-sheet-for-Commonwealth-Government-procurement-officers.pdf>>.

⁸⁷ *Ibid*, 12-13.

⁸⁸ Department of Finance, ‘Commonwealth Procurement Rules’ (Commonwealth Government, 29 November 2016) rule 10.18.

4.3. International models of supply chain regulation

Anti-Slavery Australia recommends that the development of a Commonwealth ‘Transparency in Supply Chains’ legislative scheme would provide the most effective way of preventing slavery and human trafficking in the supply chains of goods and services consumed in Australia, without compromising Australia’s economic interests. The following international approaches to the prevention of human trafficking and slavery in production supply chains may serve as a model for the development of such a legislative scheme in Australia. However, before enacting legislation there is much to learn from international examples of transparency in supply chain legislative schemes. Critically in the Australian context, a serious engagement with the business community is vital in drafting an effective scheme that is more than a ‘tick a box’ process.

4.3.1. United Nations Guiding Principles

In 2011 the United Nations Human Rights Council endorsed the Guiding Principles on Business and Human Rights (Guiding Principles) recognise that businesses “can have an impact on virtually the entire spectrum of human rights”.⁸⁹ The Guiding Principles provide a non-prescriptive framework for states and businesses to prevent human rights abuses and contribute to “socially sustainable globalization”.⁹⁰

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

The European Union Directive on disclosure of non-financial and diversity information by certain large companies (the Directive) was adopted in September 2014.⁹¹ Under this directive member states are required to enact legislation, which obliges businesses based in the European Union with 500 or more employees to report annually on non-financial performance relating to environmental, social matters, respect for human rights, anti-corruption, and bribery matters.⁹² This legislation, regulations and administrative provisions necessary to comply with the Directive must have entered into force by 6

⁸⁹ Human Rights Council , *Report of the Special Representative of the SecretaryGeneral on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, 70th sess, UN Doc A/HRC/17/31 (21 March 2011) annex (‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’).*

⁹⁰ *Ibid*, 1.

⁹¹ *Council Directive 2014/95/EU of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, OJ L 330/1.*

⁹² *Ibid*, art 1.

December 2016.⁹³ The reporting obligations are to apply to all relevant undertakings for the financial year beginning 1 January 2017, or commencing during the calendar year 2017.⁹⁴

The directive leaves considerable scope for flexibility in the disclosures made by companies. This flexibility is included to facilitate relevant and useful disclosure.⁹⁵ The European Commission was directed to produce non-binding guidelines on methodology for reporting non-financial information.⁹⁶ These guidelines were due for publication on 6 December 2016, however publication has been rescheduled for Spring 2017.⁹⁷ It remains to be seen whether the Directive will provide an effective framework to prevent human rights abuses in global supply chains.

4.3.3. California Transparency in Supply Chains Act 2010

The California Transparency in Supply Chains Act requires retail sellers to publicly disclose the efforts they have taken to prevent slavery and human trafficking in their supply chains.⁹⁸ Enacted in 2010, the California Transparency in Supply Chains Act applies to companies with annual gross worldwide receipts of US\$100 million conducting business in California. The California Transparency in Supply Chains Act does not require companies to undertake any activities to eradicate slavery and human trafficking from their supply chains. Instead, the aim of the Act is to educate consumers about the presence of slavery and human trafficking in the supply chains of large companies, thereby enabling consumers to make more ethical purchasing decisions.⁹⁹ It is hoped that this will create an environment which encourages businesses to ensure that their supply chains are free of slavery and human trafficking.¹⁰⁰

⁹³ Ibid, art 4(1).

⁹⁴ Ibid.

⁹⁵ Ibid art 2.

⁹⁶ Ibid.

⁹⁷ Directorate-General for Financial Stability, Financial Services and Capital Markets Union, *Non-Financial Reporting* (6 December 2016) European Commission <http://ec.europa.eu/finance/company-reporting/non-financial_reporting/index_en.htm#news>.

⁹⁸ *California Transparency in Supply Chains Act* §3, 556 Cal Civil Code §1714.43(a)(1) (West, 2010).

⁹⁹ Ibid.

¹⁰⁰ Kamala D. Harris, 'The California Transparency in Supply Chains Act A Resource Guide' (California Department of Justice, 2015) 1.

This legislative scheme is weakened by the wide variety in the quality of the responses by companies, as well as the lack of effective sanctions for contravention of the reporting requirements. The California Transparency in Supply Chains Act is further weakened by the lack of regulatory incentives or penalties.¹⁰¹ However, in 2015 the California Attorney General's Office created a resource to provide compliance guidance to businesses.¹⁰² In 2015 the Attorney General's Office also issued letters to over 1700 eligible companies, which required them to provide the Office with notice as to whether they complied with the reporting obligations.¹⁰³ It is hoped that these actions demonstrate an intention to enforce compliance with the scheme moving forward.

4.3.4. United Kingdom Modern Slavery Act 2015

Section 54 of the Modern Slavery Act introduced new reporting requirements for large companies.¹⁰⁴ The Transparency in Supply Chains provision is similar to the California Transparency in Supply Chains Act. The provision requires companies to publish an annual 'slavery and human trafficking statement' on their website. This statement must outline the steps taken to ensure that slavery and human trafficking are not taking place anywhere in the business or supply chain. The law does not force companies to take action to address issues of slavery, but companies are obliged to publicly disclose their inaction. The requirement came into effect in October 2015, and covers any company operating in the UK with an annual global gross revenue exceeding £36 million (approximately AU\$61 million).

There are three requirements of the Transparency in Supply Chains provision: the company must disclose what steps (if any) have been taken to ensure that the supply chain is free of trafficking; the statement must be approved by the board and signed by the director; and it must be accessible via a prominent link on the company's website. There is no provision within the legislation for the creation of a central register, which creates difficulties in obtaining direct comparisons between companies' statements. Three organisations in the UK are in the process of developing repositories of modern slavery statements. Notably, the Business and Human Rights Resource has created a

¹⁰¹ Ashley Feasley, 'Deploying Disclosure Laws to Eliminate Forced Labour: Supply Chain Transparency Efforts of Brazil and the United States of America' (2015) 5 *Anti-Trafficking Review* 30, 45-46.

¹⁰² Harris, above n 42.

¹⁰³ Feasley, above n 43, 46.

¹⁰⁴ Modern Slavery Act 2015 (UK) c 30, s 54.

central registry, in the form of an Excel spread sheet of the companies that have published statements in compliance with the legislation,¹⁰⁵ which is publicly available on their website.¹⁰⁶ Nonetheless, in developing a new scheme, consideration must be given to the placement of the statement addressing slavery and a preliminary question is whether responsibility should be undertaken by civil society.

In the UK, the requirement that the statement be approved by the board and signed by the director is an important step forwards from the California Transparency in Supply Chains Act. This requirement is significant as it means that the statement may receive a greater degree of strategic consideration within the company structure. The United Kingdom Transparency in Supply Chains provision also recommends that statements include information on the organisation's governance structure, as it relates to combatting slavery and human trafficking.¹⁰⁷ There is no such category in the California Transparency in Supply Chains Act suggested disclosures. This represents a further improvement on the Californian model.

The Transparency in Supply Chains provision operates on the basis of encouragement rather than obligation. It is hoped that the reporting requirements will create a level playing field in which it is clear whether or not businesses are acting responsibly.¹⁰⁸ This is intended to bring benefits to both businesses and consumers by ensuring that businesses protect and enhance their ethical reputation and brand, and consumers are able to seek out products or brands with higher ethical standards.¹⁰⁹ If a business fails to comply with the obligation to produce a statement, the Secretary of State may seek an injunction requiring the business to comply with the Transparency in Supply Chains provision.¹¹⁰ If the business fails to comply with the injunction, the business will be held in contempt of court, which is punishable by an unlimited fine.¹¹¹

¹⁰⁵ *UK Modern Slavery Act & Registry*, Business and Human Rights Resource Centre < <https://business-humanrights.org/en/uk-modern-slavery-act-registry/?dateorder=datedesc&page=0&componenttype=all>>.

¹⁰⁶ The central registry of statements is available at: <https://business-humanrights.org/en/uk-modern-slavery-act-registry>

¹⁰⁷ *Ibid*, s54 (5) (a).

¹⁰⁸ Home Office (United Kingdom), 'Slavery and human trafficking in supply chains: guidance for businesses' (Statutory guidance, 29 October 2015) s 1.4.

¹⁰⁹ *Ibid*, s 1.7.

¹¹⁰ Modern Slavery Act 2015 (UK) c 30, s 54 (11).

¹¹¹ Home Office (United Kingdom), above n 118, s 2.6.

Despite the promising structure of the UK provision, in May 2016, specialist consultancy firm Ergon Associates conducted a survey of companies' statements which demonstrated several short-comings.¹¹² The report analysed 230 statements that had already been published. The statements were found to be lacking in detail, and broadly described general commitments rather than specific actions taken. Furthermore, one quarter of the statements were not signed by a named person, contravening the requirement that they be signed by a director or equivalent.¹¹³

Furthermore, as of January 2017 of the approximately 17,000 companies who are obliged to report under the provisions,¹¹⁴ only 1327 have published statements.¹¹⁵

4.3.5. An Australian Transparency in Supply Chains Legislative Framework

Anti-Slavery Australia recommends that the Australian Government enact a Transparency in Supply Chains Provision. An Australian Transparency in Supply Chains Provision would provide Australia with a central regulatory mechanism to help mitigate the risk of slavery and human trafficking in supply chains.

Anti-Slavery Australia submits that the Australian government's response to human trafficking would be significantly strengthened through the implementation of a legislative scheme which incorporates elements of the United Kingdom's Transparency in Supply Chains Provision. However, we recommend that an Australian version of this scheme be strengthened to provide a stronger framework for transparency.

Anti-Slavery Australia recommends that such a framework could be strengthened through the addition of a standardised format for the business statements. These standardised statements could be assessed by a relevant body such as the Anti-Slavery and Trafficking Commissioner, if established, or in its absence the Fair Work Ombudsmen or the Department of Foreign Affairs and Trade. These statements would be made available to the public at a central register. The standardisation of statements is

¹¹² 'Reporting on Modern Slavery: The current state of disclosure- May 2016' (Ergon Associates, May 2016) 1.

¹¹³ *Ibid*, 3.

¹¹⁴ Amelia Gentleman, 'UK firms must show proof they have no links to slave labour under new rule', *The Guardian* (online) 28 October 2015 <<https://www.theguardian.com/world/2015/oct/28/uk-companies-proof-no-links-slave-labour-supply-chain>>.

¹¹⁵ *UK Modern Slavery Act & Registry*, Business and Human Rights Resource Centre < <https://business-humanrights.org/en/uk-modern-slavery-act-registry/?dateorder=datedesc&page=0&componenttype=all>>.

important start creating a culture of human rights protection and awareness within business frameworks. Anti-Slavery Australia further recommends that if slavery or human trafficking is found in a supply chain, that relevant businesses be encouraged to identify and remedy the human rights abuse by taking appropriate steps to address exploitation in the supply chain. In this way, the Australian government could initiate a world-leading framework to encourage business and human rights practice, eliminate slavery and human trafficking from the supply chains of goods and services consumed in Australia.

Anti-Slavery Australia submits that such a change in business culture be developed hand in hand with the business community and that transparency in supply chain provisions incorporate the core principles of accountability, transparency and remediation.

Recommendation:

- Consult and engage with all communities, including the business community, to enact a legislative framework to ensure transparency in supply chains and to prevent slavery and human trafficking at any point in the production of goods and services.
- Strengthen the Australian Government's policies and processes regarding the procurement of its goods and services, to ensure that the Australia Government leads by example in the elimination of slavery and human trafficking in supply chains.