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Senate Legal and Constitutional Committee
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Submission to Inquiry into the *Migration Amendment (Complementary Protection) Bill 2009*

The Anti-Slavery Project welcomes the opportunity to comment on the provisions of the *Migration Amendment (Complementary Protection) Bill 2009 (the Bill)* and supports the introduction of a complementary protection scheme.

People who have experienced human trafficking and slavery also frequently experience substantial discrimination, amounting to a gross violation of their human rights. A gross violation of human rights may include the risk of harm, re-trafficking, retaliation from agents and traffickers, lack of effective state protection, severe social ostracism, shaming, stigmatisation and discrimination. Australia is a party to the *United Nations Convention against Transnational Organized Crime* and its *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children*. Australia ratified the *Protocol* in September 2005. These international instruments impose a range of obligations on Australia, including to protect trafficked people from revictimization and to consider an offer of residence to a trafficked person where there are compassionate and humanitarian factors that may give rise to a protection need. Within the context of complementary protection, we urge the Committee to consider the special status of people who have experienced the human rights violations of human trafficking and slavery.

The Anti-Slavery Project is a research and legal centre in the Faculty of Law at the University of Technology, Sydney, dedicated to eliminating all forms of trafficking and slavery through research, direct service and advocacy programs. We provide legal advice and representation to people who have experienced trafficking and/or slavery (**Trafficked or Enslaved People**) and advocate for changes to laws and policies to better protect the human rights of those who have experienced trafficking and slavery.

Our experience is that many people are surprised to learn that fundamental human rights abuses such as trafficking, slavery, sexual servitude, debt bondage and forced labour can and do occur in 21

st century Australia. Although slavery, sexual servitude, and debt bondage trafficking are already prohibited by the *Commonwealth Criminal Code Act 1995 (Criminal Code)*, criminal sanctions alone are not sufficient to prevent these practices or protect those vulnerable to them. The 2009 report of the United Nations Special Rapporteur on trafficking in persons identified rights as relevant to Trafficked or Enslaved People:

Trafficking is a grave violation of human rights, in particular the right to liberty, human dignity, and the right not to be held in slavery or involuntary servitude. Moreover, as experience from around the world shows, trafficking is often related to a range of other fundamental human rights. The rights violated include, but are not limited to: the right to freedom from discrimination, right to life and security of person, right to human dignity, freedom from torture, inhuman or degrading treatment, right to recognition as a person before the law, [and the] right to freedom from arbitrary detention...ⁱ

1. Summary

This submission draws on our experience in meeting the legal needs of Trafficked and Enslaved People in Australia by showing how they may benefit from a complementary protection framework. The submission defines trafficking and slavery, refers to Australia's international obligations as a State Party to the *United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children*, outlines existing avenues of protection in Australia, identifies gaps in the existing legal framework, considers potential harms faced by Trafficked or Enslaved People if returned to their home country and indicates how in some cases, this harm and danger may amount to torture, cruel, inhuman or degrading treatment. Finally, we briefly consider the underlying goals of the Bill and apply these to Trafficked or Enslaved People, namely: the need to minimise the use of ministerial intervention; and the need to meet Australia's international *non-refoulement* obligations. This Bill goes a long way towards addressing the needs of those who have suffered gross violations of their human rights and dignity, and meeting Australia's international obligations.

2. Slavery and human trafficking

Slavery is an offence in the *Commonwealth Criminal Code* and is defined as "the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised,

including where such a condition results from a debt or contract made by the person". Human trafficking is the movement of people through deception, coercion or force, for the purpose of exploitation such as forced or coerced labour, servitude, slavery or sexual exploitation.

Trafficking is defined in the *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children*. Australia ratified the *Protocol* in September 2005. Trafficking is:

....the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.ⁱⁱ

Article 7 obliges each State Party to consider measures to permit victims of trafficking to remain in its territory in appropriate cases. In giving consideration to the implementation of this Article State parties should give "appropriate consideration to humanitarian and compassionate factors". Additionally, Article 9 addresses the obligation on State Parties to "protect victims of trafficking in persons, especially women and children, from revictimization".

3. **Protections in Migration Law**

Under existing law there are three pathways to protection for Trafficked or Enslaved People

- a. Protection under the *Convention Relating to the Status of Refugees* 1951 (**Refugees Convention**) through grant of a Protection Visa;
- b. Grant of a visa through the exercise of Ministerial discretion under sections 351 or 417 of the Migration Act; and
- c. Grant of a permanent visa through recent amendments to the trafficking visa framework in migration law giving greater certainty to trafficked people who have made a contribution to law enforcement and who have a fear of danger on return to the country of origin.

A. **Protection Visa**

Trafficked or Enslaved People (whose experiences of exploitation may have occurred in Australia or overseas) may satisfy the definition of a ‘refugee’ set out in the *Refugees Convention* and the associated *Refugees Protocol*ⁱⁱⁱ and implemented into Australian law under section 36(2) of the *Migration Act 1958* (Cth). In most cases, the claims are based upon the ‘particular social group’ ground of the Convention definition. In the case of *VXAJ v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 198 FLR 455, a fine line was drawn between “Thai women who were victims of trafficking” who were not considered to be a ‘particular social group’ and “Thai women who were victims of trafficking and had cooperated with police” who were found to constitute a ‘particular social group’. These careful distinctions between what does and does not amount to a ‘particular social group’ are complex determinations depending on substantial evidentiary support and interpretation of the Refugees Convention. While the applicant in *VXAJ* ultimately succeeded, this case demonstrates the difficulties which victims of trafficking face in trying to bring their claims within the refugee definition which was written over fifty years ago when there was little understanding of sexual and gender-based abuse.

B. Ministerial Discretion

Trafficked or Enslaved People may fall through gaps in the current Migration Act and Regulations and be forced to return to their country of origin where they face the risk of harm, re-trafficking, retaliation from agents and traffickers, and severe social ostracism, shaming, stigmatisation and discrimination. If the trafficked person is eligible to ask the Minister for Immigration for the benefit of his or her personal discretion under sections 351 and 417 of the Migration Act, the Minister may take into account factors relating to trafficking, slavery and potential harm if returned to the home country.

C. Trafficking Visa Framework- protection for some Trafficked or Enslaved People

Australia’s responses to trafficking are in accord with our obligations as a Party to the *United Nations Convention against Transnational Organized Crime* and the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*. The *Protocol* addresses criminal law responses, police investigations and prosecutions and the protection and support of trafficked people.

Since 2004, and most recently in July 2009, there have been significant reforms in Australian

migration law protecting Trafficked or Enslaved People. If a trafficked person makes a contribution to law enforcement and meets visa criteria about danger on return to their home country, she or he may be eligible for the grant of a Witness Protection (Trafficking) (Permanent) Visa. Eligibility for the permanent visa is dependent upon:

- the applicant having “*made a contribution to, and cooperated closely with, the prosecution of a person who was alleged to have trafficked a person or who was alleged to have forced a person into exploitative conditions (whether or not the person was convicted)*”; or
- the applicant having “*made a contribution to, and cooperated closely with, an investigation in relation to which the Director of Public Prosecutions has decided not to prosecute a person who was alleged to have trafficked a person or who was alleged to have forced a person into exploitative conditions*”; and
- the Minister being “*satisfied that the [applicant] would be in danger if he or she returned to his or her home country*”.^{iv}

In our experience there are still a small number of Trafficked or Enslaved People who are ineligible for protection through the Trafficking Visa Framework. Victims may be ineligible for a visa where the police decide that there is no likelihood of investigation for a range of factors. Thus, even where a victim may be willing to assist police investigations, it may not be possible to do so and they are then denied a Witness Protection (Trafficking) (Permanent) Visa. On the other hand, where there is an investigation or prosecution, a victim may not be willing, out of fear or traumatisation, to testify against the person who trafficked them into Australia. In this circumstance, a trafficked person may also be denied a permanent visa. An effective system of complementary protection would address these issues.

4. Torture, cruel, inhuman or degrading treatment

Trafficked or Enslaved People may face a long and difficult road to psychological and physical recovery which does not end when they are identified and their exploitation stopped. If Trafficked or Enslaved People are returned to their country of origin, they may risk the possibility of being re-trafficked or of being subjected to violent revenge attacks from traffickers.

Aside from these serious physical threats, trafficked people often face stigma and shaming on return to their home country. This is particularly the case of in instances of trafficking for sexual exploitation. Stigma can lead to grave levels of social ostracism and discrimination. For instance, in

India the ostracism suffered by rape victims (which includes many women who have been trafficked for sexual exploitation) is so severe that some estimate that, in Delhi, as little as one in sixty-eight cases are reported.^v In Vietnam and Cambodia, the stigma against those with HIV/AIDS is seen as being directly intertwined with sex work which results in the marginalisation of those involved, or who have previously been involved, in the sex industry.^{vi} There is even anecdotal evidence to suggest that in some cases Trafficked or Enslaved People are abandoned by their families who refuse to care for them.^{vii} Such stigma constitutes severe discrimination against people who have been trafficked, for example exclusion from social relationships, refusal of service in the hospitality industry, minimised prospects of marriage, refusal of treatment in hospitals, and limited employment opportunities.

The Anti-Slavery Project asserts that such severe levels of ostracism and discrimination, as well as the physical threats of re-trafficking or retaliation by traffickers, constitute torture, cruel, inhuman or degrading treatment within the definitions proposed by the Bill to be inserted into subsection 5(1) of the *Migration Act* as follows:

- Section 2: “cruel or inhuman treatment or punishment means an act or omission by which:
 - (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
 - (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person:
 - ...
 - (v) for any reason based on discrimination that is inconsistent with the Articles of the Covenant; or
 - (c) pain or suffering, whether physical or mental, is intentionally inflicted on a person for any other reason so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature.”
- Section 3: “degrading treatment or punishment means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable”.
- Section 8: “torture means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:
 - ...
 - (e) for any reason based on discrimination that is inconsistent with the Articles of

the Covenant.”

The ‘Covenant’ referred to in sections 2 and 8 is the *International Covenant on Civil and Political Rights (ICCPR)*. Article 8 of the ICCPR prohibits slavery, servitude and forced or compulsory labour. Thus the physical and mental risks faced by Trafficked or Enslaved People who return to their country of origin, which is aimed at them because of their exploitation, is “discrimination that is inconsistent with the Articles” of the ICCPR. At the very least, the treatment of returned victims of trafficking to countries such as, but not limited to, India, Vietnam and Cambodia, may amount to degrading treatment under section 3 of the Bill, or cruel or inhuman treatment under section 2(a) or 2(c). In support of this line of thinking, Chief Federal Magistrate Pascoe, in *VXAJ*, cited with approval (at 460-61) the UNHCR Guidelines of Gender-Related Persecution which state (at [18]) that:

The forcible or deceptive recruitment of women or minors for the purposes of forced prostitution or sexual exploitation... can be considered a form of torture and cruel, inhuman or degrading treatment... In addition, trafficked women and minors may face serious repercussions after their escape and/or upon return, such as reprisals or retaliation from trafficking rings or individuals, real possibilities of being re-trafficked, severe community or family ostracism, or severe discrimination.

5. Underlying goals of the Bill

The Honourable Laurie Ferguson MP, in the Bill’s second reading speech, makes it clear that the aim of the Bill is to provide protection for those who fall through the net of the current protection visa scheme, but who are subject to treatment which would otherwise give rise to Australia’s *non-refoulement* obligations. The second reading speech also notes that there is a need for the amendments because currently the system requires those who do not meet the refugee definition but who nonetheless have significant fears about their treatment should they return to their country of origin to go through the process of applying for a protection visa and (presumably) appealing to the relevant tribunal, because this is the only pathway to Ministerial intervention. The Honourable Laurie Ferguson MP stated that not only is this an inefficient means of visa regulation, but it also lacks transparency and procedural fairness since the Minister is not compelled to consider an application, does not have to give reasons for declining a request to intervene and the Minister’s

decision is not within the power of any administrative review body, and is not subject to judicial review, except in the rarest of circumstances.

Victims of trafficking face the problems that the Bill aims to overcome. As noted above, the current visa framework for Trafficked or Enslaved People is extremely valuable and has conferred real protections on trafficked people. However not all Trafficked or Enslaved People to whom Australia owes protection obligations are protected. As a result, they are forced to try to fit their claims into the refugee definition, which may be difficult, and ultimately they may need to rely upon Ministerial intervention.

Australia's *non-refoulement* obligations in relation to those who have a real risk of being subjected to torture, cruel, inhuman or degrading treatment if refused protection, arise due to Article 4(2) of the ICCPR which states that the duty to prohibit this form of treatment is a non-derogable duty. Article 4(2) also unambiguously prohibits any derogation from Articles 8(1) and (2) of the ICCPR which prohibit slavery and servitude. It would seem, then, that Australia also has a *non-refoulement* obligation in relation to people who are at a real risk of being re-trafficked if they are not granted protection. As demonstrated above, both anecdotal and empirical evidence has shown that for some Trafficked or Enslaved People there is a real possibility that if they return to their country of origin they will be re-trafficked. This statement has been supported by Australia's Federal Magistrates Court in *VXAJ*, where the Court noted that in Thailand, in particular, the risk of being re-trafficked was certainly a real possibility due to either the direct involvement of police and immigration authorities in trafficking, or the widespread bribing of officials who were then willing to turn a blind eye. These circumstances are not limited to Thailand.

Conclusion

The question of whether there is a 'real risk' of re-trafficking, retaliation from traffickers, severe ostracism and discrimination, or an inability to sustain oneself due to psychological or physical trauma will, of course, turn on the facts and circumstances of each individual case (and country of origin information). However, there is substantial empirical and anecdotal evidence, much of which has been accepted by Australia's own Federal Magistrates Court in *VXAJ*, to suggest that many, if not most, victims of trafficking in Australia could potentially face torture, cruel, inhuman or degrading treatment if they were forced to return to their home country. Furthermore, if there is a real risk of being re-trafficked, then this gives rise to Australia's *non-refoulement* obligations under the *Refugees*

Convention, the International Covenant on Civil and Political Rights and the Convention against Transnational Organized Crime and its Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children. It is for these reasons that the Anti-Slavery Project welcomes consideration of a complementary protection scheme that will give effect to Australia's international obligations.

This submission has been endorsed by:

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- i Joy Ngozi Ezeillo. Report of the Special Rapporteur on trafficking in persons, especially women and children. 10th session of the Human Rights Council, 2009. A/HRC/10/116 page 16.
- ii *United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, 2.
- iii Refugees Convention - Convention relating to the Status of Refugees done at Geneva on 28 July 1951; Refugees Protocol - Protocol relating to the Status of Refugees done at New York on 31 January 1967
- iv 2.07AK(3) of the *Migration Regulations* 1994
- v 'Social Stigma prevents Delhiites from reporting rape' Outlook, November 3, 2003.
- vi 'Understanding HIV and AIDS-related Stigma and Discrimination in Vietnam', International Center for Research on Women, July 2002, available at <http://www.icrw.org/docs/Stigma_Vietnam_Bulletin_0702.pdf>.
- vii North, Rosemary 'Sewing up stigma in Cambodia', International Federation of Red Cross and Red Crescent Societies, 29 November 2004, available at <<http://www.ifrc.org/docs/news/04/04112901/>>.