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20 July 2018

Submission to Senate Standing Committees on Legal and Constitutional Affairs: Modern Slavery Bill 2018

We welcome the opportunity to contribute to the Senate Standing Committees on Legal and Constitutional Affairs regarding the Modern Slavery Bill 2018.

We are academics who have researched and published widely in the area of human trafficking, exploitation, irregular labour and migration with over 20 years of experience in this area. We have collectively led and contributed to two international research centres: the Border Crossing Observatory which produces high quality independent research on irregular migration and borders, and the Monash Migration and Inclusion Centre, which provides a research platform for understandings of the impact of migration and population growth in Australia with a specific focus social inclusion.

This submission brings together our extensive published and ongoing research in the area of human trafficking and slavery, unlawful migrant labour exploitation, and the migration-trafficking-victimisation nexus in Australia and internationally.

We would be available to discuss this submission further with the Committee.

Sincerely,
Associate Professor Marie Segrave, Monash University.
Dr Sanja Milivojevic, La Trobe University.
Professor Sharon Pickering, Monash University.
Dr Bodean Hedwards, Monash University.

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> "Modern slavery in supply chains also distorts global markets, undercuts responsible businesses, and poses significant legal and reputational risks for companies…This Bill will address modern slavery risks in supply chains of our goods and services by establishing a flexible, risk-based reporting framework. This will transform the way the Australian business community responds to modern slavery…**2018 is a landmark year in terms of tackling modern slavery in Australia**." (Minister Hawke, Hansard)

We will address specific issues pertaining to the legislation, but note at the outset that this legislation in its current form will be limited in relation to broadly addressing modern slavery. We note that there is no specific offence of modern slavery, and that this legislation will be limited in its ability to address issues pertaining to trafficking and slavery-like practices that do and do not fall within the remit of the existing Commonwealth legislation (s270 and s271) because of the legislative focus being exclusively linked to corporate supply chain practices.

That said, we believe the legislation has the potential to have some positive impact, and this submission focuses on achievable improvements within the context of this Bill. We remain concerned that many of the recommendations from the previous Inquiry have not been taken up (as indicated where relevant below) and we have prioritized 4 recommendations in this submission.

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Recommendation One: Include provisions for an Independent Commissioner

We note that in the Recommendations arising from the Joint Standing Committee on Foreign Affairs, Defence and Trade [JSCFADT] 2017 Inquiry into establishing a Modern Slavery Act in Australia, provisions for an Independent Anti-Slavery Commissioner were included (2.72).

While it has been announced that the Modern Slavery Business Engagement Unit will be established in the Department of Home Affairs to "ensure business is appropriately supported to address modern slavery risks in their supply chains", this entity is insufficient to oversee implementation of the Act, to pursue compliance with a particular focus on how effectiveness and impact is measured, to review practices under the new legislation and to ensure that where slavery and trafficking-like practices are identified that both business and potential victims are supported and assisted in a way that is independent. There remains a lack of leadership in the implementation of the *National Action Plan to Combat Human Trafficking and Slavery 2015-19,* and a failure of accountability within government and Departments for demonstrating that the commitments in place to address human trafficking and slavery are having any demonstrable impact on these exploitative practices. Australia has the opportunity to lead the world with an Independent Commissioner who can act to ensure that service provision, training, communication, awareness raising and data collection across Australia is robust, rigorous and research-led. The Independent Commissioner would lead the implementation and operation of supply chain reporting, and be well placed to review the implementation of the Act, in particular to identify gaps and shortcoming and to develop measures to redress these.

Recommendation Two: Exclude forced marriage

We strongly urge the removal of Forced Marriage from the reporting requirement. There is extensive published research (see for example, Vidal 2018, Segrave, Milivojevic & Pickering 2018) that points to the failures of Australia's existing response to forced marriage. What is clear is that forced marriage is a practice that is familial and interpersonal, and corporate entities cannot be held to account for the actions of their employees in the private sphere. Further, the continued location of forced marriage within the trafficking and slavery suite of offences in Australia reflects a failure to recognise the gendered nature of this practice and the refusal to acknowledge that this practice ought to be included in the definition of family violence, as recommended by the Victorian Royal Commission into Family Violence in 2016.

The existing policing and welfare provisions in place to support victims of trafficking and slavery are not designed to support young women who are seeking to avoid a forced marriage, and the impact of the increasing awareness within the community that support can be accessed is resulting in the Australian Federal Police diverting its scarce resources predominantly to this issue. The consequence of this is significant, not least because the role of the AFP generally is not to divert and mediate family matters to ensure a criminal offence does not occur. Further, the consequence of the current location of this practice within s270 and s271 of the Criminal Code, is the failure to enable a wider engagement with the gender and family violence sector who are far better placed to support young women in this context.

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Recommendation Three: Developing a robust Review Process

We support the provision for the three-year review. We believe this provides a guaranteed opportunity to build a robust evidence base around the impact of the legislation, and to further enhance and finesse the legislation in order to work towards reducing the prevalence of slavery and slavery-like practices in supply chains.

We note, however, that in the Explanatory Memorandum to the Bill, it is stated that a benefit of the targeted regulation through a modern slavery reporting requirement is that it "will prompt flow on change down supply chains" (p44). This is not known. It is an assumption. The measure of effectiveness of company and corporate efforts *and* the review of the legislation must look beyond process measures (that is, whether companies are reporting consistently etcetera) to consider whether the intended and desired impact has come to fruition. We strongly recommend an independent review at this critical three-year stage, to ensure there is a robustness and rigour to the data collection and analysis.

We also note that as part of the evaluation process, it is indicated that "the Australian Government proposes to establish an expert reference group to help evaluate the effectiveness of the reporting requirement and ensure it is properly implemented" and that this will be led by Home Affairs with other members including key government agencies and business and civil society stakeholders (p55).

We strongly urge a review of the way in which these bodies are created. We have strong concerns regarding other existing mechanisms, such as the National Roundtable on Human Trafficking and Slavery, specifically in relation to the absence of researchers who have a detailed and highly regarded track record and expertise in relation to human trafficking, slavery and migrant labour exploitation. We note that the Roundtable primarily involves civil society members and others who are funded by the government to deliver on aspects of their counter-trafficking strategy. This is not a reflection of independence. We urge very careful consideration of who will sit on this panel, and to invite potential panelists to apply rather than relying on existing networks to fill the number of places required.

Recommendation Four:

a. Analysis of the impact on existing criminal justice and welfare mechanisms

We note, as researchers who have dedicated over a decade of our careers to monitoring the implementation of the Australian response to human trafficking and slavery, that there is silence in relation to the ways in which this law will impact the existing provisions in relation to responding to human trafficking and slavery-like offences. There is no recognition of the potential impact, also, on the Fair Work Ombudsman. There needs to be some indication of how these existing mechanisms will be better budgeted and resourced to enable them to address the issues and to support *both* businesses and exploited workers, that come to the fore as companies increasingly review and uncover practice that they were previously unaware of.

b. Clarity regarding the support of exploited workers and businesses

Our final concern is that there are no clear provisions for how to support businesses who uncover slavery-like practices in their supply chains. It is unclear whether these businesses will potentially face prosecution or fines, particularly if there is evidence that there was some knowledge of these practices and/or a failure to ensure that employment practices have been adhered to over time.

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Further, there is no clarity regarding how workers will be treated if they are identified as potentially exploited. In Segrave's recent research on unlawful migrant labour in Australia, what was evident was that migration status is the leverage through which labour and other exploitation often occurs and that workers having limited capacity (and often limited desire) to take action. We strongly recommend, as per Segrave's recommendations in her 2017 report, that

> "If Australia is committed to ending exploitation, migration status must not be the primary focus. This can be achieved in two ways:
> a. *Protection in law for undocumented workers*: amend or remove s235 of the Migration Act This would indicate a firm intolerance to exploitation. Section 235 of the Migration Act must be removed or amended to confirm that undocumented workers have the same minimum employment rights as citizens, as currently the interaction between this offence and protections under the Fair Work Act remains unclear (see Berg 2016). The prospect that this offence may deprive workers of enforceable labour rights leaves a large sector of the workforce vulnerable to exploitation and thus effectively protects unscrupulous employers. If this section is not repealed, it could be amended to articulate that undocumented workers' common law and statutory employment law rights remain enforceable despite having worked contrary to visa conditions. This would put beyond doubt that the Fair Work Act applies regardless of migrant workers' visa/migration status, and position exploitation at the forefront of the national response. Further, this amendment would carry significant symbolic weight in relation to Australia's stance on modern slavery and migrant labour exploitation. It would indicate an intolerance to exploitation in the first instance, regardless of migration status.
> b. *Formal, legal separation between FWO and DIBP*. In 2017, the FWO and DIBP established a new protocol that articulates the working relationship between FWO and DIBP, whereby "for temporary visa holders who don't have work entitlements attached to their visa, DIBP will consider the case on its merits" (FWO 2017: online). This fundamentally fails to understand the position of workers working contrary to their visa, or who have overstayed their visa. It provides no certainty (and therefore no incentive) to workers to come forward, and enables exploitative employers to operate with impunity. Even a remote prospect of visa cancellation and removal is sufficient to deter these workers from seeking assistance or lodging a complaint. A formal firewall should be established and enshrined in legislation or via regulatory amendments, to ensure that reported workplace-related exploitation can be addressed without migration status undermining the recognition of workers' vulnerability and victimisation."

References

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