



Submission No 79

Inquiry into Slavery, Slavery-like conditions and People Trafficking

Organisation: Anti-Slavery Australia – Supplementary submission



Inquiry into Slavery, Slavery-like Conditions and People Trafficking

Joint Standing Committee on Foreign Affairs, Defence and Trade

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The Right to an Effective Remedy: The case for a national compensation scheme for enslaved and trafficked people

Anti-Slavery Australia remains deeply concerned about access to effective remedies for victims of slavery, slavery-like practices and human trafficking identified in Australia. In our first submission to the Committee in October 2012, we set out the case for a national compensation scheme observing that in the last decade, Australia has responded effectively to slavery and human trafficking by focusing on prevention, identification, investigation and prosecution of offenders within a human rights framework.¹ In this supplementary submission we elaborate on the need for a national compensation scheme for victims of Commonwealth crimes and observe recent developments in Australia and internationally.

The development of an effective scheme to ensure the accessibility and availability of reparations to identified victims, in particular, payments of compensation has not yet been the focus of significant attention.

The existing Australian compensation framework is inadequate for victims of slavery, slavery-like practices and people trafficking as well as for other Federal crimes against the person. Prior to 1990 the main complainant or ‘victim’ of Federal offences was the Commonwealth rather than natural persons.² However, Federal legislation has more recently evolved toward codifying some of Australia’s international human rights obligations, resulting in an increased number of ‘natural person’ victims.³

Currently in Australia, statutory compensations schemes are provided by each of the States and Territories. Our concern about the operation of these schemes is that they are not designed to reflect the Commonwealth jurisdiction, and, therefore in respect of recognition of victims of Commonwealth crimes, they lack consistency and fail to provide appropriate avenues of compensation for slavery and trafficking victims. This view is heightened since the coming into effect of the *Crimes Legislation Amendment (Slavery, Slavery-like conditions and People Trafficking) Act 2013* which introduced new offences of servitude, forced labour and forced marriage and expanded the definition of

¹ Submission 34, Anti-Slavery Australia, Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry into Slavery, Slavery-like Conditions and People Trafficking 2012* Pamela Stewart, ‘Tortious Remedies for Deliberate Wrongdoing to Victims of Human Trafficking’ (2011) 34 *University of New South Wales Law Journal* 898, 904; see also Frances Simmons and Jennifer Burn ‘Evaluating Australia’s Response to all Forms of Trafficking: Towards Rights-centred Reform’ (2010) 84(1) *Australian Law Journal* 712; *Trafficking in Persons: The Australian Government Response July 2010-June 2011*, Report of the Anti-People Trafficking Interdepartmental Committee (2011).

² Sam Garkawe and Michael O’Connell, ‘The Need for a Federal, Australia-Wide Approach to Issues Concerning Crime Victims’ (2007) 18(3) *Current Issues in Criminal Justice* 489, 490.

³ Submission 34, Anti-Slavery Australia, Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry into Slavery, Slavery-like Conditions and People Trafficking 2012* at 14.

‘coercion’. Practically there are numerous additional hurdles in accessing State/Territory schemes for Commonwealth offences.

Slavery and human trafficking are Commonwealth offences and, (with the exception of sexual servitude offences), there are no State or Territory offences which correspond precisely to the criminal acts envisaged in the Commonwealth legislation. Additionally, the breadth of the elements of the offences as set out in the relevant Divisions of the *Criminal Code Act 1995* (Cth) are not reflected in the State/Territory schemes, especially where there is an absence of physical violence.

Further, in attempting to apply State/Territory schemes to Commonwealth offences there are additional practical problems.

- a. In situations where there may be a claim under a State/Territory scheme, it is usually the case that only certain elements of the crime, such as the sexual assault element are compensable under those schemes, or
- b. They risk failure because the various schemes either not contain an appropriate category under which a person can apply or do not reflect the breadth of criminality as set out in the Commonwealth offences.

Our analysis of the need for a national scheme as articulated in our submission of 9 October 2012 to the Inquiry has been compounded by the recent passing of the *Victims Rights and Support Bill 2013* through the NSW Parliament⁴. Under this new legislation, the maximum ‘recognition payment’ available for victims of sexual assault offences is capped at \$10,000 as set out in Section 12 of the *Victims Rights and Support Regulation 2013*. The transitional provisions of the new Bill provide that the previous compensation scheme under the *Victims Support and Rehabilitation Act 1996* (the VSRA) was closed on the day that the new Bill was introduced into Parliament, being 7 May 2013. Effectively, this means that all undecided claims as at 7 May must be dealt with under the new scheme.⁵ Further, while the offences committed against victims of slavery and slavery-like offences are possibly included in the below definition of a ‘Category B recognition payment’⁶ there are likely to be instances where violence was not involved and therefore a NSW victim may fall outside the ambit of the new Scheme.

“A category B recognition payment is a payment given in respect of an act of violence of the following kinds:

- (a) a sexual assault resulting in serious bodily injury or which involved an offensive weapon or was carried out by 2 or more persons,

⁴ *Victims Rights and Support Bill 2013* (NSW) passed 30 May 2013

⁵ *Ibid* Schedule 2, Part 2, s4(1)

⁶ *Ibid* Section 35(2)

(b) a sexual assault, indecent assault or attempted sexual assault involving violence that is one of a series of related acts.”⁷

This proposed maximum ‘recognition payment’ of \$10,000 falls well below the \$50,000 available under the previous NSW scheme and even further below the \$75,000 available to victims in Queensland⁸, and Western Australia⁹. The result is inevitably inequitable; a victim of slavery or slavery-like offences committed in a State such NSW for example, will be treated less fairly than a victim of the same Commonwealth crime that takes place within the geographical boundaries of another State or Territory.

Although Part 6 of the *Victims Rights and Support Bill 2013 NSW* makes the provision for courts to order convicted offenders to pay compensation up to a maximum of \$50,000 to their victims, obtaining successful prosecutions in human trafficking cases is difficult and even when obtained, it is rare for convicted offenders to have assets in Australia. In their earlier submission to the Committee¹⁰, the Law Council of Australia noted

...there are some additional difficulties with the provision of reparation to victims of people trafficking that the Law Council would like to draw to the Committee’s attention. Central to these is the fact that very few cases of people trafficking ever end up being prosecuted. It follows that very few cases reach the point in the judicial process where the Court could make a reparation order. According to the Australian Institute of Criminology, as at 30 June 2011, of 305 trafficking related investigations by the AFP, only 13 matters resulted in convictions; four defendants were currently facing charges before the courts; and 15 matters were finalised without resulting in a conviction.¹²⁵

Even if there is a successful prosecution in a people trafficking case, an order for reparation is discretionary and will depend on the Court’s consideration of the impact such an order will have on the offender, including their capacity to meet such an order. Furthermore, a reparation order will be of little benefit to a victim if the offender has no assets or has placed assets beyond reach.

Importantly, on 14 March 2013 the Special Rapporteur on trafficking in persons, especially women and children released *Draft basic principles on the right to an effective remedy for trafficked persons*. These draft principles are currently open for comment

⁷ *ibid*

⁸ *Victims of Crime Assistance Act 2009 (QLD)* Section 38(1)

⁹ *Criminal Injuries Compensation Act (WA)* Section 31(1)

¹⁰ Submission No. 21, Law Council of Australia to Senate Legal and Constitutional Affairs Committee, *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012*, 1 August 2012, page 22

and the Special Rapporteur will report to the Human Rights Council at its twenty-sixth session in June 2013.¹¹ Article 9(b)(i) of the Draft Principles states

All trafficked persons have a legally enforceable right to obtain compensation, irrespective of their immigration status and of whether their perpetrators have been convicted

Australia's international obligations

In our earlier submission, we set out Australia's international human rights obligations to provide reparations to victims of gross violations of human rights such as slavery and human trafficking.¹²

The *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*¹³ states that remedies include the victims right to 'equal and effective access to justice'¹⁴ as well as 'adequate, effective and prompt reparation for harm suffered'¹⁵. We would argue that access to justice for an effective remedy is impeded in Australia for victims of slavery and slavery-like practices due to the lack of a coordinated federal approach to compensation.

In 2004 Australia ratified the *United Nations Convention against Transnational Organized Crime*¹⁶ and in 2005 ratified the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Trafficking Protocol)*¹⁷, both of which require State parties to provide effective access to remedies for victims of trafficking.

Australia is also a signatory to the 1985 "*Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*"¹⁸ which states that "when

¹¹ Special Rapporteur on trafficking in persons, especially women and children, 57th session of the Commission on the Status of Women, Concept Note, The Right to Effective Remedies for Trafficked Persons, 14 March 2013, page 2, http://www.un.org/womenwatch/daw/csw/csw57/side_events/OHCHR-Concept-Note-CSW-side-event-on-Effective%20remedies.pdf (accessed online 30 May 2013)

¹² Submission 34, Anti-Slavery Australia at 14

¹³ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law : resolution / adopted by the General Assembly, 21 March 2006, A/RES/60/147, available at: <http://www.refworld.org/docid/4721cb942.html> [accessed 17 May 2013]

¹⁴ Ibid at Paragraph 11(a)

¹⁵ Ibid at Paragraph 11(b)

¹⁶ *United Nations Convention against Transnational Organised Crime*, opened for signature 15 November 2000, [2004] ATS 12, (entered in to force 29 September 2003).

¹⁷ Opened for signature 15 November 2000, 2337 UNTS 319 (entered into force 25 December 2003).

¹⁸ United Nations General Assembly Resolution (A/RES/40/34) 29 November 1985.

compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation... (to victims and their families)”¹⁹ and goes on to state that “the establishment, strengthening and expansion of national funds for compensation to victims should be encouraged.”²⁰

This view of the General Assembly was reaffirmed through the 2006 *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*.²¹ Article 16 of the Guidelines states:

States should endeavour to establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligation.

Whilst the Guideline only recommends, rather than requires, States to provide national compensation funds for victims, Article 2 states:

If they have not already done so, States shall, as required under international law, ensure that their domestic law is consistent with their international legal obligations by:

...(b) Adopting appropriate and effective legislative and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice;

(c) Making available adequate, effective, prompt and appropriate remedies, including reparation, as defined below...

In Australia, there are currently eight different state and territory schemes providing financial compensation for victims of crime.²² These different schemes consider different categories of harm, time limits, and levels of award.²³ The current inconsistencies in the Australian state and territories compensation frameworks are an impediment to victims of slavery and human trafficking in obtaining the “fair, effective and prompt” access to justice, in keeping with international best practice. Accordingly, Australia is falling short of its international human rights obligations in the area of appropriate remedies.

¹⁹ Ibid 12.

²⁰ Ibid 13.

²¹ United Nations General Assembly Resolution (A/RES/60/147) 21 March 2006.

²² *Victims of Crime(Financial Assistance) Act 1983* (ACT); *Victim Support & Rehabilitation Act 1996* (NSW); *Crimes (Victims Assistance) Act 2006* (NT); *Victims of Crime Assistance Act 1996* (Vic); *Criminal Injuries Compensation Act 2003* (WA); *Victims of Crime Assistance Act 2009* (Qld); *Victims of Crime Act 2001* (SA); *Victims of Crime Assistance Act 2009* (Qld); *Victims of Crime Act 2001* (SA); *Victims of Crime Assistance Act 1976* (Tas).

²³ Jennifer Burn, *Committee Hansard*, 29 August 2012, 27.

Comments of the Special Rapporteur on Trafficking in Persons, especially women and children

We also noted in our earlier submission the comments of the Special Rapporteur in relation to payments of compensation through a federal-based scheme being her preferred option for victims of trafficking²⁴

In the Special Rapporteur’s November 2011 Mission to Australia Report it was noted that while victims of crimes are able to access compensation under state and territory schemes, remedies vary from state to state, with different eligibility requirements, different time frames, different caps on the maximum compensation and different access to compensation for pain and suffering. Furthermore, she noted that some schemes require a psychological assessment to prove damage and loss, which many victims are reluctant to undergo given their fear of re-traumatisation.²⁵

The Special Rapporteur noted that the establishment of a comprehensive federal compensation scheme was an overarching recommendation of the public consultation, one that was echoed at the National Roundtable on People Trafficking. If implemented, this recommendation would be in accordance with the obligations of Australia with respect to remedies under the Trafficking Protocol and international human rights law.²⁶

Two of the final recommendations of the Special Rapporteur’s report to Australia were:²⁷

(g) Establish, at the Federal level, a comprehensive national compensation scheme for victims of trafficking.

(h) Strengthen criminal justice capacity to identify and confiscate assets and proceeds of trafficking-related crimes, and develop mechanisms and procedures to enable assets and proceeds to be used for continuing support to victims of trafficking.

Importantly, the report made the following recommendations in relation to reparations and victims of trafficking accessing compensation.²⁸

²⁴ Submission no. 24, at 15

²⁵ Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo. Submission to the UN Human Rights Council 18 May 2012 (A/HRC/20/18).

²⁶ Ibid.

²⁷ Ibid 82.

²⁸ Ibid 70 and 71.

States should establish legislative provisions for the confiscation of assets and proceeds of trafficking offences, and for the use of such assets and proceeds to compensate trafficked persons. States should also adequately train law enforcement officials in identifying, tracing, freezing and confiscating assets connected to the crime of trafficking.

Where State-funded compensation schemes for victims of crime exist, States should abolish eligibility criteria which have the effect of preventing trafficked persons from seeking compensation, such as nationality and long-term residence requirements. Where no compensation scheme exists, States should consider establishing one that provides compensation to trafficked persons and using confiscated assets and tax deductible voluntary donations to finance such a scheme. Compensation through such a scheme should be available to all groups of trafficked persons on a non-discriminatory basis.

The Special Rapporteur reported to the General Assembly on the right to an effective remedy for trafficked people,²⁹ noting that in the course of preparing the report, she had been made aware that:

...despite the fundamental guarantee of the right to an effective remedy under international law, there remains a large gap in practice between legal provisions and their implementation in relation to trafficked persons.³⁰

Recent Federal compensation schemes

Since our earlier submission, there have been two significant developments in the Commonwealth related to payment of reparations to victims to victims. We believe a short examination of these may assist the Committee in making recommendations about the nature and process of future compensation claims by victims of slavery, slavery-like practices and human trafficking.

The *Social Security Amendment (Supporting Australian Victims of Terrorism Overseas) Act 2012* establishes the *Australian Victims of Terrorism Overseas Payments (AVTOP)*³¹ scheme which entitles Australians who are primary and secondary victims of declared

²⁹ Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo. Submission to the UN Human Rights Council 13 April 2011 (A/HRC/17/35).

³⁰ Ibid 9.

³¹ *Social Security Amendment (Supporting Australian Victims of Terrorism Overseas) Act 2012* Part 2.24AA

overseas acts of terrorism to claim up to \$75,000 in financial assistance.³² The Act specifies that the payment is not compensation:

For the purposes of any law of the Commonwealth, a payment of AVTOP is not to be treated as being a payment of compensation or damages.³³

As to the amount being set at a maximum of \$75,000 the Explanatory Memorandum to the Bill stated³⁴

Section 1061PAD provides that the payment to a primary victim is not to exceed \$75,000. This amount is comparable to Queensland and Western Australian victims of crime schemes that provide for maximum payments of up to \$75,000.

Further, the Explanatory Memorandum noted that the Bill would

...ensure that victims are not required to repay or deduct Medicare or other benefits from any payment received under the Scheme³⁵

The second scheme is the *Defence Abuse Reparation Scheme* which was announced by the Australian Government on 10 April 2013 to :

establish a mechanism by which a monetary payment may be made by the Department of Defence to persons who in the opinion of the Reparation Payments Assessor may have, plausibly, suffered abuse whilst employed in Defence.³⁶

The maximum amount claimable by an individual victim under the Scheme is \$50,000.

In the interests of payments being made promptly to victims, the nature of the Scheme is such that

- (a) a legal burden of proof is not required to be met in order that a Reparation Payment be made, and
- (b) a Reparation Payment Assessment will be made by a Reparation Payments Assessor on the basis of the information available to the Reparation Payments Assessor, in accordance with the Guidelines,

³² Ibid Section 1061PAD and Section 1061PAE

³³ Ibid Section 1061PAH

³⁴ *Social Security Amendment (Supporting Australian Victims of Terrorism Overseas) Bill 2012* Explanatory Memorandum, page 9

³⁵ Ibid at page 1

³⁶ *Defence Abuse Reparation Scheme Guidelines* at 1.5.1

in order that Applications for Reparation Payment be resolved promptly.³⁷

The purpose of making a Reparation Payment under the Scheme is to acknowledge that

- (a) abuse is wrong
- (b) abuse can have a lasting and serious impact, and
- (c) mismanagement by Defence of verbal/written reports or complaints about abuse is unacceptable.³⁸

Further, the Guidelines clearly state that the Scheme is not a compensation scheme and payments do not constitute an admission of liability by the Commonwealth:

A payment to a person under the Reparation Scheme is not paid as compensation or damages for any asserted, perceived, or possible legal liability on the part of the Commonwealth, or for any injury, disease or impairment, and does not constitute an admission of liability on the part of the Commonwealth.³⁹

Conclusion

One of the three terms of reference for this Inquiry is ‘international best practice to address all forms of slavery, slavery-like conditions and people trafficking’ and we submit that a federally funded payment scheme where victims of slavery, slavery-like practices and human trafficking offences are able to access prompt and effective compensation irrespective of their immigration status or whether the perpetrators have been convicted would represent international best practice.

Anti-Slavery Australia thanks the Committee for the opportunity to make this submission and would be pleased to provide any further comment and assistance.

³⁷ Ibid at 1.5.3

³⁸ Ibid at 1.5.2

³⁹ Ibid at 1.6.1