



Submission No 51

**Inquiry into Slavery, Slavery-like conditions and People  
Trafficking**

**Organisation:** Law Council of Australia – supplementary  
submission

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# Inquiry into Slavery, Slavery- like conditions and People Trafficking – Supplementary Submission

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**Joint Standing Committee on Foreign Affairs,  
Defence and Trade**

**14 December 2012**

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## Introduction

1. On 2 October 2012 the Law Council of Australia made a written submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade (the Committee) in response to its inquiry into slavery, slavery-like conditions and people trafficking.
2. The Law Council's submission focused on Australia's efforts to address slavery, slavery-like conditions and people trafficking, with a particular emphasis on the extent of the problem in Australia; legislative measures that have been developed to address these practices; and the protections, remedies and assistance that are currently available for victims.
3. On 20 November 2012, representatives of the Law Council, Ms Fiona McCleod SC and Ms Rosemary Budavari, appeared at a public hearing conducted by the Committee.
4. At the hearing, the Law Council representatives agreed to take questions on notice relating to:
  - Whether the Commonwealth would have the constitutional power to legislate to make the use of prostitutes in Australia and abroad unlawful;
  - Whether the Law Council is aware of evidence of migration agents who have interests in brothels;
  - Whether making migration agents declare registrable interests to the Department of Immigration and Citizenship (DIAC) would have any effect on people trafficking; and
  - Whether immigration lawyers involved with the Law Council suggest that there is an issue in terms of students coming to Australia and being exploited.
5. Following the hearing, the Committee also asked the Law Council to respond to questions relating to:
  - Whether Australia can gather better data on slavery or trafficking;
  - Whether victims compensation schemes across States and Territories should be standardised rather than creating a Federal scheme;
  - Why very few cases of people trafficking are prosecuted;
  - How a court would order that a pecuniary penalty be paid to an individual for breach of a civil penalty provision under the *Fair Work Act 2009* (Cth);
  - How voluntary victim impact statements would assist in sentencing;
  - What a national framework for victim support would provide and how it would differ from a National Charter for Victims' Rights in Australia; and
  - Whether there is any link between labour exploitation and organised criminal activity?
6. This supplementary submission contains the Law Council's response to these questions.

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## Responses to questions on notice

### Constitutional power to make use of prostitutes unlawful

7. During the Committee's hearing on 20 November 2012, the Hon. Phillip Ruddock MP asked the following question:
- Would the Commonwealth have the constitutional power to use some of these treaties to legislate to make use of prostitutes in Australia and abroad unlawful?
8. Mr Ruddock's question appeared to relate to a suggestion that was put forward in submissions by Andrea Tokaji from Christian Faith and Freedom, and the Australian Christian Lobby (ACL) surrounding the need for the purchase of prostitution services to be criminalised. Both Ms Tokaji and the ACL suggested that there had been a decrease in trafficking following the introduction of Sweden's prostitution laws, which criminalised the purchase of prostitution services.<sup>1</sup>
9. Mr Ruddock first raised this question with Ms Tokaji when she gave evidence before the Committee on 20 November 2012.<sup>2</sup> The question was subsequently raised with the Law Council, the ACL and World Vision when these organisations appeared before the Committee.
10. The Law Council notes that the ACL submission refers to a number of articles to support its argument for criminalising the purchase of prostitution services. For example, pages 4 and 5 of the ACL submission refer to a study by Cho, Dreher and Neumayer, titled 'Does Legalized Prostitution Increase Human Trafficking?'<sup>3</sup> The Law Council notes that one of the findings of this study was that 'countries with legalized prostitution experience a larger reported incidence of trafficking inflows.'<sup>4</sup> However, the Law Council also notes that these study findings were qualified by the authors, who stated that these results need to be subjected to further scrutiny.<sup>5</sup>
11. The Law Council draws the Committee's attention to one of the final paragraphs in that study which notes that the qualitative evidence used in the study is tentative and that there:

*is no 'smoking gun' proving that the scale effect dominates the substitution effect and that the legalization of prostitution **definitely** increases inward trafficking flows. The problem here lies in the clandestine nature of both the prostitution and trafficking markets, making it difficult, perhaps impossible, to find hard evidence establishing this relationship.*<sup>6</sup> (emphasis added)

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<sup>1</sup> For more information, see Danna, D. 'Client-Only Criminalization in the City of Stockholm: Local Research on the Application of the 'Swedish Model' of Prostitution Policy,' *Sexuality, Research and Social Policy*, March 2012, Vol. 9 (1), pp.80-93, DOI: 10.1007/s13178-011-0072-z.

<sup>2</sup> See transcript of proceedings before the Parliamentary Joint Committee on Foreign Affairs, Defence and Trade, 20 November 2012, p .7, available at [http://parlinfo.aph.gov.au/parlInfo/download/committees/commjnt/a1b1921a-6c25-4395-8ca3-7623f6602319/toc\\_pdf/Parliamentary%20Joint%20Committee%20on%20Foreign%20Affairs.%20Defence%20and%20Trade\\_2012\\_11\\_20\\_1551.pdf;fileType=application%2Fpdf#search=%22committees/commjnt/a1b1921a-6c25-4395-8ca3-7623f6602319/0000%22](http://parlinfo.aph.gov.au/parlInfo/download/committees/commjnt/a1b1921a-6c25-4395-8ca3-7623f6602319/toc_pdf/Parliamentary%20Joint%20Committee%20on%20Foreign%20Affairs.%20Defence%20and%20Trade_2012_11_20_1551.pdf;fileType=application%2Fpdf#search=%22committees/commjnt/a1b1921a-6c25-4395-8ca3-7623f6602319/0000%22) (JSCFADT Transcript, 20 November 2012)

<sup>3</sup> Cho, S., Dreher, A & Neumayer, E., 'Does Legalized Prostitution Increase Human Trafficking?', *World Development*, 2013, Vol. 41, pp.67-82, <http://dx.doi.org/10.1016/j.worlddev.2012.05.023>.

<sup>4</sup> *Ibid.*, p.76.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

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12. The Law Council notes that the Australian Institute of Criminology (AIC) also highlighted the need for caution when considering the conclusions reached by Cho, Dreher and Neumayer due to concerns about the reliability of the data used in that study.<sup>7</sup>
13. The submission by the ACL also quotes a 2005 report funded by the European Parliament to support its argument that trafficking in Sweden has decreased since the introduction of laws which criminalise the purchase of prostitution services. The Law Council draws the Committee's attention to the fact that the results obtained in the study funded by the European Parliament in relation to Sweden are qualified, with this report noting that,

*Official data suggest a significant decrease in the phenomenon, however, there are no definite results, above all because prostitution may have transferred to invisible places (such as private apartments) and for this reason it is less (or no longer) investigated.<sup>8</sup>*

14. In the time available for a response, the Law Council has examined the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons<sup>9</sup> Supplementing the United Nations Convention against Transnational Organized Crime and the International Labour Organisation Convention No. 29 on Forced or Compulsory Labour<sup>10</sup> and is of the view that these instruments do not contain any provisions that would support an obligation on the part of Australia to make the use of prostitutes unlawful. It would therefore appear that the Commonwealth would not be able to use the external affairs power in section 51(xxix) of the Constitution to support such legislation in relation to these Conventions.

## **Involvement of migration agents in brothels**

15. Mr Ruddock also asked the Law Council whether it is able to give the Committee evidence of migration agents who have interests in brothels. This question arose from the Law Council's submission, which noted that one of its Committees, the Immigration Lawyers' Association of Australasia (now known as the Migration Law Committee), had expressed concern about recent reports in the media of the involvement of migration agents in sex trafficking networks and the exploitation of their clients in the sex industry.<sup>11</sup>

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<sup>7</sup> See transcript of proceedings before the Parliamentary Joint Committee on Foreign Affairs, Defence and Trade, 21 November 2012, available at <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees/commjnt/fc342003-774a-4aad-820c-aeee40ea89dd/0000%22>, p.19. (JSCFADT Transcript, 21 November 2012)

<sup>8</sup> Di Nicola, A., Orfano, I., Cauduro, A., & Conci, N. (with financial support from the European Parliament), *Study on National Legislation on Prostitution and the Trafficking in Women and Children*, August 2005, p.58. Available from [http://ec.europa.eu/anti-trafficking/download.action;jsessionid=pNvJQGhNLI7GThx3WRhjh1wTzGx20lq1XPdvyr1ZwX76M92Tvq1R!-486222055?nodeId=d5da8862-fcfa-432c-baf8-ac16b231653a&fileName=Study+on+National+Legislation+and+Prostitution\\_en.pdf&fileType=pdf](http://ec.europa.eu/anti-trafficking/download.action;jsessionid=pNvJQGhNLI7GThx3WRhjh1wTzGx20lq1XPdvyr1ZwX76M92Tvq1R!-486222055?nodeId=d5da8862-fcfa-432c-baf8-ac16b231653a&fileName=Study+on+National+Legislation+and+Prostitution_en.pdf&fileType=pdf)

<sup>9</sup> *Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against Transnational Organized Crime* adopted by United Nations General Assembly resolution 55/25 of 15 November 2000, entry into force 29 September 2003. Australia ratified this Protocol on 14 September 2005. Available at <http://www2.ohchr.org/english/law/protocoltraffic.htm>

<sup>10</sup> See International Labour Organisation *Convention No 29 on Forced or Compulsory Labour*, 1930, ratified by Australia on 2 January 1932, available at <http://www.ilo.org/ilolex/cgi-lex/ratific.pl?C029> (ILO Convention)

<sup>11</sup> Immigration Lawyers' Association of Australasia Focus Group, Submission to Department of Immigration and Citizenship on Migration Agents Code of Conduct, 14 September 2012, available from [http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file\\_uid=205AECC2-1999-B243-6E1D-](http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=205AECC2-1999-B243-6E1D-)

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16. In the time available for providing a response, the Law Council has not been able to obtain any further information in relation to this question.

## Declaration of registrable interests by migration agents

17. Senator Mark Furner asked the Law Council whether making migration agents declare registrable interests to the Department of Immigration and Citizenship (DIAC) would have any effect on people trafficking.
18. This question related to the Law Council's submission which noted that the Migration Law Committee had suggested that the Code of Conduct of migration agents<sup>12</sup> should be amended to require migration agents to declare 'registrable interests' to DIAC. This would require any migration agent who had an interest in a legitimate business, such as an agricultural enterprise or legal brothel, to declare that interest to DIAC. As such industries have been identified among those where slavery and trafficking activities occur,<sup>13</sup> this measure may assist DIAC to identify victims of these activities and any involvement of migration agents in such activities.

## Exploitation of students

19. The Chair of the Committee, the Hon Melissa Parke MP, also requested further information from the Law Council regarding whether immigration lawyers involved with the Law Council suggest that there is an issue in terms of students coming to Australia and being exploited.
20. In the time available for a response, the Law Council has been unable to obtain any information from immigration lawyers relevant to this issue. However, the Law Council notes the comments made by DIAC in evidence it gave to the Committee on 21 November 2012, where, in response to a question regarding the exploitation of international students in the labour market, a DIAC officer stated that students represent the majority of visa holders who are referred for investigation regarding trafficking. However, he also noted that the numbers of students referred are small, so that it does not appear to be a major issue.<sup>14</sup>
21. The Law Council also notes that the Australian Crime Commission has stated that, in many cases, trafficking victims believe that they are coming to Australia to work or study legitimately,<sup>15</sup> and that international students have been identified as one of the groups perceived to be at risk of exploitation.<sup>16</sup>

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[0982EDD859F3&siteName=lca](http://www.melbourneweeklyphillip.com.au/news/local/news/general/sex-in-the-city/2648291.aspx). See also Sally Neighbour and Peter Cronau, Four Corners, in B. Donnelly, *Sex in the City*, 17 October 2011, Melbourne Weekly Port Phillip, available from

<http://www.melbourneweeklyphillip.com.au/news/local/news/general/sex-in-the-city/2648291.aspx>

<sup>12</sup> The Migration Agents Code of Conduct is prescribed under s 314, *Migration Act 1958* (Cth) and Regulation 8 and Schedule 2 of the *Migration Agents Regulations 1998* (Cth).

<sup>13</sup> Attorney-General's Department, *Discussion Paper: The Criminal Justice Response to Slavery and People Trafficking; Reparation; and Vulnerable Witness Protections*, 2010, available at

<http://www.ag.gov.au/Consultationsreformsandreviews/Pages/TheCriminalJusticeresponsetoslaveryandpeopletraffickingreparationsandvulnerablewitnessprotections.aspx>

<sup>14</sup> Op.cit, JSCFADT Transcript, 21 November 2012, p 23.

<sup>15</sup> Australian Crime Commission, Submission to Joint Standing Committee on Foreign Affairs, Defence and Trade Inquiry into *Slavery, Slavery-like Conditions and People Trafficking*, p.5, available from

[http://www.aph.gov.au/Parliamentary\\_Business/Committees/House\\_of\\_Representatives\\_Committees?url=jfad/t/slavery\\_people\\_trafficking/subs.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jfad/t/slavery_people_trafficking/subs.htm)

<sup>16</sup> Ibid.

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## Additional questions on notice

### How can Australia gather better data on slavery or trafficking?

22. The difficulty in obtaining detailed and reliable statistics on trafficking is a problem throughout the world – it is not limited to Australia. Indeed, the United Nations Office on Drugs and Crime (UNODC) has noted the difficulties that exist in relation to obtaining reliable data on these issues, observing:

*Due to its clandestine nature, accurate statistics on the magnitude of the human trafficking problem at any level are elusive and unreliable. Figures that are available range from the actual number of victims rescued or repatriated to estimates of the total number of trafficked victims in existence. The lack of reliable statistics can be attributed to a number of factors... [One of these problems] is the tendency to, often unknowingly, mix data related to human trafficking, migrant-smuggling and irregular migration, which convolutes the true human trafficking picture. In addition, data is often collected only on cases of trans-border human trafficking and not on internal human trafficking.*<sup>17</sup>

23. Another way that more accurate and detailed data may be collected is through 'institutional strategies to systematically deal with trafficking data.'<sup>18</sup> Data collection and analysis would be improved if Government and Non-Government Organisations (NGOs) which are involved in addressing human trafficking collected data in the same way and liaised with each other regarding data collection. While much of the global data is based on estimates, there appears to be a general consensus that trafficking is a significant problem affecting most countries, including Australia.
24. There are a number of ways that Australia could improve its data collection with respect to slavery and trafficking.
25. One strategy involves increasing awareness of these crimes and therefore increasing reports to Government agencies; these reports can then be included in data collected by such agencies. It has been suggested that:

*superior data will only emerge when the gravity of trafficking is fully recognized and acknowledged by all authorities concerned. Unless governments and law enforcement agencies are prepared to combat trafficking more vigorously and, at the same time, to provide adequate protection to the victims of trafficking, the majority of trafficking cases will continue to go uncounted, the victims uncared for, and the traffickers unpunished.*<sup>19</sup>

26. The AIC has also noted that the lack of awareness of what constitutes slavery and trafficking presents a challenge for data collection.
27. The International Organization for Migration (IOM) suggests that agencies who work to combat trafficking should be encouraged to collect data systematically.<sup>20</sup> The reports of the Government's Anti-People Trafficking Interdepartmental Committee are

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<sup>17</sup> United Nations Office on Drugs and Crime, *Trafficking in Persons – Global Patterns*, April 2006, pp.43-44. Available from [http://www.unodc.org/pdf/traffickinginpersons\\_report\\_2006-04.pdf](http://www.unodc.org/pdf/traffickinginpersons_report_2006-04.pdf)

<sup>18</sup> Frank Laczko, Chief of the Research and Publications Division of the International Organization for Migration, *Human Trafficking: The Need for Better Data*, 1 November 2002, available from <http://www.migrationinformation.org/Feature/print.cfm?ID=66>

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.



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a useful source of data from Government agencies.<sup>21</sup> This source could be supplemented by data from NGOs which are involved in combating trafficking at the grass-roots level.

28. The AIC noted the importance of ensuring that official statistics are monitored and supplemented with qualitative information sourced from NGOs in this area.<sup>22</sup> The AIC has also noted the criticism of the use of estimates in data relating to trafficking.<sup>23</sup> It suggested the use of indicators of trafficking such as those developed by the International Labour Organisation.<sup>24</sup>
29. It would be beneficial to develop a set of common guidelines in relation to the collection of data and statistics on the issues of slavery and people trafficking. As noted by the Organization for Security and Co-operation in Europe, such guidelines should outline the type of data that should be collected as well as the methods that should be used to collect it. The establishment of a similar set of guidelines in Australia would help to ensure that any data that is collected in Australia is collected in a uniform manner.<sup>25</sup> The Guidelines for the Collection of Data on Trafficking in Human Beings, Including Comparable Indicators,<sup>26</sup> developed by the IOM may be a useful model to consider in this regard.
30. Finally, the Law Council understands that the AIC is currently looking into the development of a 'national minimum dataset'<sup>27</sup> to improve awareness of people trafficking. The Law Council suggests that the Committee requests further details about this project from the AIC.

Is it more appropriate to standardise State and Territory victims' compensation schemes rather than create a Federal scheme?

31. As outlined in its submission to the Committee, the Law Council considers a Commonwealth victims' compensation scheme to be the preferred model for providing compensation to victims of people trafficking.<sup>28</sup>
32. A Commonwealth scheme is preferable to standardising State and Territory schemes as victims of slavery and trafficking offences are victims of Commonwealth crimes. Although victims of Commonwealth crimes have traditionally been Commonwealth agencies, the number of Commonwealth offences involving individual victims is increasing. In these circumstances, it is appropriate that there be a Commonwealth scheme.
33. The harmonisation of State and Territory laws presents many challenges. Such challenges have been noted by the Law Council in the context of criminal laws

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<sup>21</sup> See <http://www.ag.gov.au/Peopletrafficking/Pages/Australias-response-to-people-trafficking.aspx>

<sup>22</sup> J. Joudo-Larsen & L. Renshaw, *People Trafficking in Australia*, Trends and Issues in Crime and Criminal Justice, No. 441, June 2012, p.6. Available from <http://www.aic.gov.au/documents/A/2/1/%7BA219EED2-D27C-4BBF-B99A-4687070C3F7B%7Dtandi441.pdf>

<sup>23</sup> Op.cit., JSCFADT Transcript, 21 November 2012, pp 11- 14

<sup>24</sup> See [http://www.ilo.org/sapfi/Informationresources/Factsheetsandbrochures/WCMS\\_105023/lang-en/index.htm](http://www.ilo.org/sapfi/Informationresources/Factsheetsandbrochures/WCMS_105023/lang-en/index.htm)

<sup>25</sup> See <http://ec.europa.eu/anti-trafficking/download.action?nodeld=859b93f5-c71f-4557-8b99-5b5312c088f2&fileName=Joining+Efforts+to+Protect+the+Rights.pdf&fileType=pdf>, p.105.

<sup>26</sup> See International Organization for Migration, *Guidelines for the Collection of Data on Trafficking in Human Beings, Including Comparable Indicators*, 2009. Available from [http://publications.iom.int/bookstore/free/guidelines\\_collection\\_data\\_IOMVienna.pdf](http://publications.iom.int/bookstore/free/guidelines_collection_data_IOMVienna.pdf)

<sup>27</sup> Op.cit., *People Trafficking in Australia*, Trends and Issues in Crime and Criminal Justice, No. 441, p.6.

<sup>28</sup> Law Council of Australia, Submission to Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry into Slavery, Slavery-like conditions and People Trafficking*, 2 October 2012, p.26 (Law Council Submission)

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generally.<sup>29</sup> Due to the nature of these challenges, the Law Council considers that it is preferable to establish a Commonwealth scheme.

34. The Law Council notes that one of the recommendations of the Senate Legal and Constitutional Affairs Committee following its inquiry into the *Crimes Legislation Amendment (Slavery, Slavery-like conditions and People Trafficking) Bill 2012* was that the Australian Government should investigate the establishment of a Commonwealth scheme for victims of people trafficking and slavery.<sup>30</sup> The UN Special Rapporteur on Trafficking, Ms Joy Ngozi Ezeilo, has also recommended that the Australian Government establish a Commonwealth victims' compensation scheme,<sup>31</sup> as have a number of other organisations including the Australian Human Rights Commission.<sup>32</sup>

#### Why are very few cases of people trafficking prosecuted?

35. The Law Council notes the evidence provided to the Committee by the Senior Assistant Director of the Legal, Policy and Law Reform Branch of the Commonwealth Director of Public Prosecutions (CDPP), Ms Jaala Hinchcliffe, on 21 November 2012.
36. In her evidence to the Committee, Ms Hinchcliffe outlined a number of reasons why very few cases of people trafficking are prosecuted.
37. One reason for the small number of prosecutions is the technical nature of the offences under Divisions 270 and 271 of the *Criminal Code Act 1995* (Cth). This makes it difficult to prove all the elements of the particular offences under these Divisions. It is noted that the *Crimes Legislation Amendment (Slavery, Slavery-like conditions and People Trafficking) Bill 2012* addresses some of these difficulties.
38. Other issues that may inhibit the successful prosecution of people trafficking offences concern the willingness and availability of the victims to provide evidence.<sup>33</sup> As noted by the Law Council previously, the crime of people trafficking involves the perpetrator exercising coercion and control over vulnerable victims. This coercion and control:

*may be subtle, involving direct or implied threats or making the victim feel responsible for their own behaviour. Sexual exploitation victims may be given a small amount of money for what they do; others may be involved in petty crime such as stealing from shops, street begging or working in illegal industries, for example drug trafficking. This can lead to feelings of guilt and revulsion, which makes it even more difficult to tell anyone what has happened.*<sup>34</sup>

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<sup>29</sup> See <http://www.lawcouncil.asn.au/programs/criminal-law-human-rights/criminal-law/model-criminal-code.cfm>

<sup>30</sup> See Report of Senate Legal and Constitutional Affairs Legislation Committee on its *Inquiry into the Crimes Legislation Amendment (Slavery, Slavery-like conditions and People Trafficking) Bill 2012*, Recommendation 2, September 2012. Available from [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Committees?url=legcon\\_ctte/slavery\\_and\\_people\\_trafficking/report/index.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=legcon_ctte/slavery_and_people_trafficking/report/index.htm)

<sup>31</sup> See *Report of the Special Rapporteur on trafficking in persons, especially women and children*, Mission to Australia, 18 May 2012, A/HRC/20/18/Add.1, p.21. Available from [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A.HRC.20.18.Add.1\\_En.PDF](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A.HRC.20.18.Add.1_En.PDF)

<sup>32</sup> Australian Human Rights Commission, *A Human Rights Approach to Trafficking in Persons*, 14 November 2011. Available from [http://www.humanrights.gov.au/legal/submissions/2011/20111114\\_trafficking.html](http://www.humanrights.gov.au/legal/submissions/2011/20111114_trafficking.html)

<sup>33</sup> Op.cit., JSCFADT Transcript, 21 November 2012, p.7.

<sup>34</sup> See United Nations Office on Drugs and Crime, *Anti-human trafficking manual for criminal justice practitioners*, Module 3, 2009, p.4. Available from [http://www.unodc.org/documents/human-trafficking/TIP\\_module3\\_Ebook.pdf](http://www.unodc.org/documents/human-trafficking/TIP_module3_Ebook.pdf), cited in Law Council of Australia, Submission to Senate Legal and Constitutional Affairs Committee, *Inquiry into Crimes Legislation Amendment (Slavery, Slavery-like Conditions*

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39. Victims also report threats to family members in other countries. Victims are often apprehensive about acting in any way which may upset the offender or jeopardise the safety of themselves or others.
40. The lack of sufficient protection for witnesses in these matters may also affect the number of prosecutions. The Law Council notes that, in her appearance before the Committee, Ms Hinchcliffe outlined a number of measures that could be implemented to better protect victims who are called to give evidence in people trafficking prosecutions. These include: providing victims with the opportunity to have their identity protected; providing evidence by video-link, and, in cases where a retrial is ordered, allowing the evidence given by victims at the first trial to be 'able to be tendered and played so that the victims are not required to give evidence again.'<sup>35</sup> Such suggestions are consistent with the Law Council's submission to the Committee.
41. The possibility of charges against victims themselves may also affect their willingness to assist with trafficking prosecutions. As noted above, victims may be involved in minor crimes as a result of being trafficked. If these matters are not proceeded with, victims may be more willing to assist in trafficking prosecutions.<sup>36</sup> The Law Council notes that this recommendation has previously been made by the Australian Human Rights Commission, and that such a recommendation would reflect an optional provision in the *UNODC Model Law Against Trafficking in Persons*.<sup>37</sup>

How would a court order that a pecuniary penalty be paid to an individual for breach of a civil penalty provision under the Fair Work Act?

42. Section 546(1) of the *Fair Work Act 2009* (Cth) (Fair Work Act) provides that the Federal Court, the Federal Magistrates Court or an eligible State or Territory court may order a person to pay a pecuniary penalty that the court considers appropriate, if the court is satisfied that the person has contravened a civil remedy provision. Sub-section 539(1) of the Fair Work Act outlines the provisions of that Act that constitute civil remedy provisions. Sub-section 539(3) states that the *Fair Work Regulations 2009* (the regulations) may also provide that a provision set out in the regulations is a civil remedy provision.
43. Section 546(3) provides that the court may order that the pecuniary penalty, or part of the penalty, be paid to the Commonwealth; or a particular organisation; or a particular person. The pecuniary penalty may be recovered as a debt due to the person to whom the penalty is payable.<sup>38</sup>
44. As noted by the Law Council in its submission to the Committee, whilst it may be possible for a court to order that a pecuniary penalty be paid to an individual for breach of a civil penalty provision under the Fair Work Act, the Law Council is unaware of any case to date in which a pecuniary penalty order has been sought under the provisions of the Fair Work Act.<sup>39</sup>

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and People Trafficking) Bill 2012, 1 August 2012, p.25, available from [http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file\\_uuid=E9DDA961-1999-B243-6E3B-068A4B73E426&siteName=lca](http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=E9DDA961-1999-B243-6E3B-068A4B73E426&siteName=lca)

<sup>35</sup> Op.cit, JSCFADT Transcript, 21 November 2012, p.7.

<sup>36</sup> See [http://www.hreoc.gov.au/legal/submissions/2012/20120120\\_trafficking.html#Heading75](http://www.hreoc.gov.au/legal/submissions/2012/20120120_trafficking.html#Heading75)

<sup>37</sup> See UNODC *Model Law against Trafficking in Persons*, Article 10, available from

[http://www.unodc.org/documents/human-trafficking/UNODC\\_Model\\_Law\\_on\\_Trafficking\\_in\\_Persons.pdf](http://www.unodc.org/documents/human-trafficking/UNODC_Model_Law_on_Trafficking_in_Persons.pdf)

<sup>38</sup> S. 546(4), *Fair Work Act 2009* (Cth)

<sup>39</sup> Op.cit., Law Council Submission, p.27.

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What would a national framework for victim support provide? Would that differ from a National Charter for Victims' Rights in Australia?

45. The Law Council considers that a National Charter for Victims' Rights in Australia (National Charter) could provide a starting point for the development of a national framework for victim support. For example, charters or statements of victims' rights at the State and Territory level have led to the development of specific victims' services within the justice system, such as guides for the preparation of victim impact statements, court liaison services and the provision of easy to access information regarding the court process.
46. The Law Council considers that a National Charter should be more than a symbolic statement of rights. It must be accompanied by the types of services required to ensure victims understand the nature of their rights and receive appropriate assistance – in other words, a national framework. Such support services include specialist court assistance, legal advice, counselling, health care and rehabilitation services.

How would victim impact statements assist in sentencing when they are voluntary?

47. As noted by the Law Council in its submission to the Committee, despite the fact that victim impact statements are not mandatory, the use of victim impact statements can have a therapeutic effect for victims and can provide the court with a more in-depth understanding of the consequences of the offence on the victim.
48. In some instances, victim impact statements can also enhance the deterrent effect of the sentencing process on the offender.<sup>40</sup> Indeed, it has been noted that '[l]istening to a victim impact statement may aid judges in more fairly and better understanding the effects of particular crimes against specific types of victims that perhaps the judge cannot really appreciate.'<sup>41</sup>
49. Victim impact statements have also been recognised as a source of relevant material when sentencing.<sup>42</sup>

Is there a link between labour exploitation and organised criminal activity?

50. Labour exploitation can take a number of forms including forced labour, bonded labour, and involuntary domestic servitude.<sup>43</sup>

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<sup>40</sup>Op.cit., Law Council Submission, pp.33-34. See also Law Council of Australia, Submission to Australian Law Reform Commission, *Discussion Paper No.70: Sentencing of Federal Offenders*, 17 March 2006, p.17. Available from [http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file\\_uid=8A08B075-1E4F-17FA-D233-75CBF6B6BAD0&siteName=lca](http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=8A08B075-1E4F-17FA-D233-75CBF6B6BAD0&siteName=lca).

<sup>41</sup> S. Garkawe, *The Effect of Victim Impact Statements on Sentencing Decisions*, Paper delivered at conference on Sentencing – Principles, Perspectives and Possibilities, 10-12 February 2006, p.13. Available from <http://njca.anu.edu.au/Professional%20Development/programs%20by%20year/2006/Sentencing%20Conference/Sen%20conf%20papers%202006/Garkawe.pdf>

<sup>42</sup> For example see *Siganto v The Queen* (1998) 194 CLR 656 where Gleeson CJ, Gummow, Hayne and Callinan JJ at [29] referred to: "the undoubted proposition that a sentencing judge is entitled to have regard to the harm done to the victim by the commission of the crime. That is the rule at common law." See also *The Queen v De Simoni* (1981) 147 CLR 383 at 389 where it was observed that a sentencer is entitled to consider all the conduct of the offender, including that which would aggravate the offence (such as harm done to the victim) but cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence: *The Queen v De Simoni* (1981) 147 CLR 383 at 389.

<sup>43</sup> World Vision, *Fact Sheet – Labour Exploitation*, 2009, available from [http://www.worldvision.com.au/Libraries/DTL\\_fact\\_sheets/Factsheet\\_Labour.pdf](http://www.worldvision.com.au/Libraries/DTL_fact_sheets/Factsheet_Labour.pdf)

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51. According to the ILO *Forced Labour Convention 1930*, forced or compulsory labour is defined as any 'work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.'<sup>44</sup>
52. The United Nations Convention against Transnational Organized Crime defines an 'organised criminal group' as 'a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.'<sup>45</sup>
53. The ILO has noted that 'modern' forms of labour exploitation may be linked to 'the search for unlawful financial profits by a range of actors, some of them involved in organized crime.'<sup>46</sup>
54. In a recent paper issued by the AIC on organised crime and trafficking in persons, Fiona David concludes that a review of the international research literature suggests that there is considerable variation in the organisation of trafficking from 'solo' offenders to the involvement of sophisticated organised criminal groups. She also concludes that this is consistent with the Australian situation.
55. Ms David notes that research carried out in some countries has identified a link between the trafficking activities of an individual and their involvement in other forms of organised crime. For example, some individuals who have been found to employ illegal immigrants have also been found to be involved in other serious criminal activity such as money laundering and fraud.<sup>47</sup> Some individuals involved in trafficking activities have also been found to be involved in organised crime such as credit card fraud and drug smuggling.<sup>48</sup>
56. Whilst organised crime has been found to be linked to labour exploitation in some cases, it cannot be said that all cases of labour exploitation are carried out by organised criminal groups. Indeed, 'there are many variables that must be examined when seeking to understand the organisation of offending.'<sup>49</sup>
57. The Law Council also notes the evidence to the Committee of Ms Karen Harfield, the Executive Director of the Australian Crime Commission, that across all tiers of trafficking activities there can be individual or organised exploits.<sup>50</sup>

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<sup>44</sup> Op.cit., ILO Convention, Article 2(1).

<sup>45</sup> United Nations Convention against Transnational Organized Crime, entered into force 29 September 2003, Article 2(a), available from <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>

<sup>46</sup> International Labour Office, *A Global Alliance Against Forced Labour - Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work 2005*, p.9, available from

[http://www.ilo.org/wcmsp5/groups/public/@ed\\_norm/@declaration/documents/publication/wcms\\_081882.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_081882.pdf)

<sup>47</sup> See F. David, *Organised Crime and Trafficking in Persons*, Australian Institute of Criminology, Trends and Issues in Crime and Criminal Justice, No. 436, March 2012, p.10, available from

[http://www.aic.gov.au/documents/F/3/2/%7BF32BB053-07A7-4698-BED7-47DA99F09BBD%7Dtandi436\\_001.pdf](http://www.aic.gov.au/documents/F/3/2/%7BF32BB053-07A7-4698-BED7-47DA99F09BBD%7Dtandi436_001.pdf)

<sup>48</sup> Ibid., pp.10-11.

<sup>49</sup> Ibid.

<sup>50</sup> Op.cit., JSCFADT Transcript, 20 November 2012, p. 14.

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## Conclusion

58. The Law Council thanks the Committee for providing it with the opportunity to give evidence at its hearing into slavery, slavery-like conditions and people trafficking. The Law Council hopes that its responses to these questions on notice are of assistance to the Committee.



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## **Attachment A: Profile of the Law Council of Australia**

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The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its constituent bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's constituent bodies. The Law Council's constituent bodies are:

- Australian Capital Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the constituent bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12 month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2012 Executive are:

- Ms Catherine Gale, President
- Mr Joe Catanzariti, President-Elect
- Mr Michael Colbran QC, Treasurer
- Mr Duncan McConnel, Executive Member
- Ms Leanne Topfer, Executive Member
- Mr Stuart Westgarth, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.