

Submission by Civil Liberties Australia to the Australian Parliament's Joint Standing Committee on Foreign Affairs, Defence and Trade

## **Inquiry into establishing a Modern Slavery Act in Australia (comparable to the UK's *Modern Slavery Act 2015*)**

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We have responded to each of the questions as set by the inquiry, although there is inevitably some overlap and we express our concern that the framing of the inquiry presumes that the UK legislation is comprehensive and effective which we suggest it is not.

**(a) Whether a Modern Slavery Act should be introduced in Australia; and (f) Provisions in the United Kingdom's legislation which have proven effective in addressing modern slavery, and whether similar or improved measures should be introduced in Australia.**

Our submission is that Australia should introduce a Modern Slavery Act but that Australia can do more and better than copy the United Kingdom's *Modern Slavery Act 2015 (MSA 2015)*.

In particular, Australia can and should improve its responses to human trafficking in four main ways, by:

- (i) Providing formal protection, locally, nationally and transnationally, for victims of human trafficking who commit crime as a result of coercion or in the context of their situation as a trafficked person (with consequent improved investigations, nationally and transnationally);
- (ii) Enabling access (particularly for women in prison) to appellate procedures for those victims who have been convicted for crimes committed as a result

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- of coercion or in the context of their situation as a victim of human trafficking; and
- (iii) Mandating formal reporting requirements on corporate bribery, corruption and slavery in supply chains.
  - (iv) Providing a suitable visa regime which supports transnational victims and encourages protected testimony against traffickers.

### **Human trafficking - criminal law (national and transnational)**

Non-prosecution and non-punishment are not merely moral questions.<sup>2</sup> For example, a UNODC report on transnational organised crime in East Asia and the Pacific identified human trafficking as a major issue and found that human trafficking is on the rise in a quarter of countries around the world.<sup>3</sup>

Key issues and implications for responses included improving victim identification systems to enable the provision of protection and support and investing in a victim-centred approach with appropriate training for law enforcement to include the vital importance of ensuring the protection of victims. Here, the criminalization of those, particularly women, who commit crime as a result of abuse, coercion or exploitation, engages Australia's international commitments pursuant to the UN Trafficking Protocol<sup>4</sup> which is designed to identify and define a victim and has an optional framework for protection.

Human trafficking is defined in three ways:

- movement of persons - 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 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,

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<sup>2</sup> See Schloenhart and Jolly, *Trafficking Persons in Australia: Myths and Realities* (LexisNexis Butterworths, 2013). See also Anne Gallagher and Paul Holmes, 'Developing an Effective Criminal Justice Response to Human Trafficking: Lessons from the front line' (2008) 18 *International Criminal Justice Review*.

<sup>3</sup> United Nations Office on Drugs and Crime, *Transnational Organized Crime in East Asia and the Pacific: A Threat Assessment* (Vienna, 2013)  
<[http://www.unodc.org/documents/southeastasiaandpacific//Publications/2013/TOCTA\\_EAP\\_web.pdf](http://www.unodc.org/documents/southeastasiaandpacific//Publications/2013/TOCTA_EAP_web.pdf)>

<sup>4</sup> United Nations Office of the High Commissioner for Human Rights, *Protocol to prevent, Suppress and Punish Trafficking in Persons Especially Women and Children*, (Geneva, 2000). The Protocol was adopted by resolution A/RES/55/25 of 15 November 2000 at the fifty-fifth session of the General Assembly of the United Nations.

- for the purpose of exploitation which includes, 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 removal of organs .

Many nations have committed to tackling human trafficking but there are a range of responses. Article 2 of the UN protocol provides the statement of purpose to:

- (a) To prevent and combat trafficking in persons, paying particular attention to women and children;
- (b) To protect and assist the victims of such trafficking, with full respect for their human rights; and
- (c) To promote cooperation among States Parties in order to meet those objectives.

In the EU this has been developed in Article 26 of The EU Trafficking Directive which has a non-punishment provision which provides that:

each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so.

This does not require non-prosecution or non-punishment but allows for the provision of systems to recognize the possibility of not imposing any penalty where people act under compulsion. UN Trafficking Principles and Guidelines, at Principle 7 states:

Trafficked Persons shall not be detained, charged or prosecuted for their illegal entry into or residence in countries of transit or destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.

In addition there are a series of other communications coming out from the UN as to the importance of non-punishment especially in relation to women and girls . This is reinforced by the International Labour Office (ILO) Protocol of June 2014 (updating the existing ILO Convention 29 on Forced Labour). Article 4(2) of the ILO Protocol requires states to:

take the necessary measures to ensure that competent authorities are entitled not to prosecute or impose penalties on victims of forced or compulsory labour for their involvement in unlawful activities which they have been compelled to commit as a direct consequence of being subjected to forced or compulsory labour.

The obligation for states, against this background, not to prosecute or punish victims of human trafficking for crimes they were compelled to commit logically ought to move victims who commit crime from the position of suspect to witness.<sup>5</sup>

Globally, however, implementation of protection is somewhat haphazard. For women, this is exacerbated by a lack of understanding of the gender issues which makes it more likely that a woman who commits crime is doing so within the meaning of the Protocol, either by an unknown trafficker or by a family member.

State legal frameworks flow from commitments through the UN Trafficking Protocol but implementation is not harmonized. There is increasing legislative effort to prosecute traffickers but limited protection for victims who commit crime. Figures for recovery of victims by informal mechanisms through NGOs and border and police forces are woefully low.

In the UK, the *Modern Slavery Act 2015* creates a human trafficking defence to criminal activity but in limited circumstances as the defences in section 45 are subject to narrower application for adults and limited to certain offences set out in schedule 4.

Australia should make the protection far more comprehensive, across all case types. There needs to be protected confession provisions for those who waive privilege in order to invoke human trafficking referral mechanisms, criteria for non-prosecution and, where the public interest in prosecution may remain, guidelines for reduced punishment.

It should be recognised that cases may depend on the victim's credibility in the same way as it might where that person is giving uncorroborated evidence in any other case as a witness, therefore emphasising the quality and reliability of the evidence. Any sentencing procedure should have regard to particular vulnerability, including a recognition that some victims will survive by moving up the chain of command. Guidance should include judicial training to understand that men, women and children can all be trafficking victims. In the context of killing, in international law child soldiers are not prosecuted and 'following orders' can be recognised in sentencing, so there is no circumstance in which it is inappropriate to consider duress or coercion or even deception in the context of non-prosecution or non-punishment.

The MSA 2015 has useful measures for prevention orders and maritime enforcement which should be adopted in Australia. It also creates the important role of a Commissioner

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<sup>5</sup> Felicity Gerry and Lyndon Harris, 'Women in Prison: Is the Justice System Fit for Purpose?' (Policy Paper, Lexis Nexis Halsbury's Law Exchange, 2014 <<http://www.halsburyslawexchange.co.uk/category/policy-papers/>>. Both on the curriculum for Oxford Criminology.

who can oversee implementation and enforcement which is a vital mechanism for oversight and evaluation.<sup>6</sup>

However, the MSA 2015 does not properly protect women who are subject to domestic coercion, and it creates no improvement in the formal investigatory framework. The prosecuting authority has reasonable (CPS) guidelines but they are not up to date and not mandatory. There has been some use of the common law power of abuse of process to quash convictions on credible evidence on appeal but largely due to the influence of the EU Trafficking Directive.<sup>7</sup>

Credible evidence should be obtained by comprehensive pre-charge investigations, nationally and transnationally.<sup>8</sup> Worryingly, in both the UK and Australia the mechanisms to investigate transnationally and post-conviction are not comprehensive in the context of human trafficking.

Through this Inquiry, Australia has an opportunity to create a statutory code of practice for law enforcement and to improve mutual legal assistance mechanisms. All of this demonstrates the opportunity for Australia to create more comprehensive mandatory structures.

The focus should be on moving victims from suspect to witness.<sup>9</sup>

Australia has legislation to prosecute traffickers but no corresponding legislative protection for victims of human trafficking. These victims can show up at borders, in

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<sup>6</sup> In Indonesia there is mandatory protection for victims of human trafficking who commit crime but it was not applied to Mary Jane Veloso who was convicted of drug trafficking and sentenced to death against a background that suggests she acted within the definition of human trafficking as set out in the UN Protocol. She is currently on a temporary reprieve whilst her recruiters are tried.

<sup>7</sup> *R v VSJ* 2017 EWCA Crim 36: The Court of Appeal of England and Wales considered conjoined appeals and applications by several appellants who appealed out of time on the basis that they should never have been prosecuted for drug trafficking because they were victims of human trafficking. The Modern Slavery Act did not apply as it was not in force at the time of the alleged offending. Some appeals were allowed and some were not. The willingness of the Appeal court to entertain post-conviction appeals is good. The approach was essentially to consider whether, had the full facts been known, there would have been a decision not to prosecute on the basis that it would not have been in the public interest to charge a human trafficking victim who committed the crime. Those appeals that were successful saw convictions quashed effectively as a form of abuse of process where the available evidence was credible.

<sup>8</sup> *Rantsev v Cyprus and Russia* Application No 25965/04 (Strasbourg 7 January 2010); *Case of M. and Others v Italy and Bulgaria* Application No 40020/03 (31<sup>st</sup> July 2012)

<sup>9</sup> Felicity Gerry, 'Let's talk about Slaves...Human Trafficking: Exposing hidden victims and criminal profit and how lawyers can help end a global epidemic' (2015) 3 *Griffith Journal of Law and Human Dignity*; Felicity Gerry et al., 'Is the Law an Ass When It Comes to Mules? How Indonesia Can Lead a New Global Approach to Treating Drug Traffickers as Human Trafficked Victims' (2016) 1-23 *Asian Journal of International Law*; Gerry F, 'No Face Veils in Court' (2016) 25 *Nottingham Law Journal*. See also Denise Brennan, 'Methodological challenges in research with trafficked persons: Tales from the field' (2005) 43 *International Migration*.

criminal investigations (national or transnational) and in business supply chains, and they can be victims who are being moved to, and from, and within Australia.

Australia's criminal legislation and corporate structures are currently inadequate. The figures for recovery of victims by informal mechanisms through NGOs and Australian border and police forces are woefully low: such a poor result on internationally comparable performance measures must drive the need for more and better formal structures in Australia and within Australia's area of influence.

There is some understanding of human trafficking in Australia<sup>10</sup> and a national Action Plan to Combat Human Trafficking and Slavery is running from 2015–19. However, there is little focus on human trafficking in crime, on coercive control in a domestic context or on the obvious area of transnational organised crime.

Current laws do not protect victims of human trafficking from prosecution if they commit crimes as a result of coercion or as a consequence of their situation as a trafficked person, and sentencing frameworks do not accommodate the vulnerability of coerced women sufficiently. This has a knock on effect to the incarceration of vulnerable women which is a significant problem for the penal system. These issues have also been highlighted by child sexual abuse in the context of cross-border child trafficking and coercive surrogacy.

Australia is behind other countries in victim protection in both the criminal and corporate spheres. For example, Malaysia's 2007 Anti-Trafficking in Persons Act prohibits all forms of human trafficking and the Malaysian government has made some efforts to protect victims, including providing trafficking victims with immunity from immigration offences, and raising public awareness. In the criminal sphere, the dangers for victims in transnational organised crime have been highlighted by submissions to the Inquiry into Australia's advocacy on the death penalty abroad.<sup>11</sup> Research by the Australian Institute of Criminology has also shown extensive human trafficking out of Indonesia.<sup>12</sup>

Indonesia has had protection for victims since 2007 (long before the UK's *MSA 2015*) although implementation and enforcement are poor.<sup>13</sup>

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<sup>10</sup> Catherine Flynn, Margaret Alston and Robyn Mason, 'Trafficking in women for sexual exploitation: Building Australian Knowledge' (2014) 57 *International Social Work*; See also Anna Dorevitch and Michelle Foster Obstacles on the Road to Protection: Assessing the treatment of sex-trafficking victims under Australia's Migration and Refugee Law (2008) 9 *Melbourne Journal of International Law*.

<sup>11</sup> Felicity Gerry and Narelle Sherwill, *Human Trafficking, Drug Trafficking and the Death Penalty* (2016) 6 *Indonesia Law Review*.

<sup>12</sup> AIC Experiences of trafficked persons: An Indonesian sample

< <http://www.aic.gov.au/publications/current%20series/tandi/441-460/tandi449.html>

<sup>13</sup> Gerry and Sherwill, above n 3.

**Human trafficking – G20 commitments – on corporate law see also sections (b) and (c) below.**

In the corporate sphere, Australia has committed to G20 obligations to improve gender equality. Since current corporate guidance does not provide a functioning mechanism to comprehensively ensure the eradication of slavery in business, formal mechanisms would also assist in addressing Australia's G20 commitments.

**(b) The nature and extent of modern slavery (including slavery, forced labour and wage exploitation, involuntary servitude, debt bondage, human trafficking, forced marriage and other slavery-like exploitation) both in Australia and globally;**

Human trafficking is a highly lucrative industry that extends to all corners of the globe. The phrases 'human trafficking', 'slavery' and 'forced labour' are used interchangeably but essentially amount to exploitation for profit and power.<sup>14</sup>

Developed countries like Australia have become the destination for slaves plucked from source countries and people are also trafficked within their own states. Those trafficked are generally the impoverished, the un-empowered, the uneducated and the dispossessed: largely, they are women and girls, particularly in the context of sexual exploitation. The urgency with which this issue needs to be tackled nationally and transnationally has recently been fuelled by reports that profits are being used to fund terrorist activity.<sup>15</sup> It makes cooperation between nations imperative.

The 2014 International Labour Office report (the ILO report)<sup>16</sup> concludes that there are globally an estimated 21 million victims. They comprise a 'vast nation of men, women and children...virtually invisible, hidden behind a wall of coercion, threats and economic exploitation'.<sup>17</sup> Socio economic factors for global forced labour include lack of education

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<sup>14</sup> There are concerns that the word 'slavery' doesn't cover children exposed to hazardous work or those who are not given a fair wage but this is probably semantics since those people have little choice and in any event slavery and trafficking are now commonly understood terms used interchangeably. Human exploitation is more over-arching.

<sup>15</sup> Loveday Morris, 'Islamic State says it is buying and selling Yazidi women, and using them as concubines' *The Sydney Morning Herald* (online) 14 October 2014, <<http://www.smh.com.au/world/islamic-state-says-it-is-buying-and-selling-yazidi-women-and-using-them-as-concubines-20141014-115kp0.html#ixzz3GTDM2y8X>>.

<sup>16</sup> International Labour Organization, *Profits and Poverty: The economics of forced labour* (2014) <[http://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS\\_243391/lang-en/index.htm](http://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS_243391/lang-en/index.htm)>.

<sup>17</sup> Ibid 45.

and literacy, poverty and other wealth and income shocks, all of which need to be addressed to empower people to avoid exploitation.<sup>18</sup>

Australia is known as a destination country for human trafficking although it can also happen within the country.<sup>19</sup> Recent news reports have referred to the following cases:

- Blackmail, extortion and slavery in restaurants in Australia<sup>20</sup>
- FIFO sex workers trafficked through mining towns<sup>21</sup>
- International surrogacy as a frontline in human trafficking<sup>22</sup>
- Organ tourism – harvesting organs from living donors abroad<sup>23</sup>

Often, men, women and girls are held in debt bondage, being forced to provide profit for their traffickers to pay off a unilateral, legally unenforceable debt.<sup>24</sup> There are therefore many causes of human trafficking to and within Australia. Project Respect argues that the demand for trafficked women is fuelled by, for example, a lack of women in developed countries prepared to do prostitution, and racialised ideas that Asian women have certain qualities, for example that they are more compliant and will accept higher levels of violence.<sup>25</sup>

Exploitation can arise also in domestic servitude, treatment of employees in remote locations, the sex trade, organised gangs, drug trafficking and cultivation, and in immigration offences.

Research by the Australian NGO, The Anti-Slavery Australia, concluded that ‘slavery thrives in Australia 200 years after Abolition’. They recommended adequately resourced

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<sup>18</sup> Ibid.

<sup>19</sup> Red Cross: Human Trafficking in Australia FAQ's  
<[http://www.redcross.org.au/files/Trafficking\\_FAQs.PDF](http://www.redcross.org.au/files/Trafficking_FAQs.PDF)>

<sup>20</sup> Adele Ferguson, ‘Blackmail, extortion and slavery at a restaurant near you’ *The Canberra Times* (online) 25 March 2017 <<http://www.canberratimes.com.au/business/workplace-relations/blackmail-extortion-and-slavery-at-a-restaurant-near-you-20170324-gv5usu>>.

<sup>21</sup> AAP, ‘Sex workers trafficked through Queensland mining towns’ *Brisbane Times* (online) 10 July 2012 <<http://www.brisbanetimes.com.au/queensland/sex-workers-trafficked-through-queensland-mining-towns-20120709-21sgh.html>>.

<sup>22</sup> Louise Yaxley, ‘International surrogacy is “new frontline in human trafficking”, says judge John Pascoe; Indian case sparks renewed calls for inquiry’ *ABC News* (online) 9 October 2014 <<http://www.abc.net.au/news/2014-10-09/surrogacy-claims-strengthen-calls-for-inquiry/5800258>>.

<sup>23</sup> Simon Lauder, ‘Australian organ tourists drive sinister trade’ *ABC News* (online) 1 September 2010 <<http://www.abc.net.au/news/2010-09-01/australian-organ-tourists-drive-sinister-trade/966408>>.

<sup>24</sup> Calliste Weitenberg, ‘Human trafficking has been identified as a major transnational crime in the Asia-Pacific, and cases are occurring in Australia’ *SBS* (online) 7 June 2013 <<http://www.sbs.com.au/news/article/2013/06/07/human-trafficking-crime-21st-century>>.

<sup>25</sup> <http://www.projectrespect.org.au/>

victim service programmes to meet the needs of victims left vulnerable to violence, exploitation and endangerment of their ability to cooperate with law enforcement.<sup>26</sup>

### **Human trafficking – gender issues**

Females are disproportionately affected by human trafficking. Women and girls make up about 55 per cent of all forced labour victims and they represent the vast majority of victims exploited for commercial sex work.<sup>27</sup> Long-term physical, mental, and emotional harm in human trafficking are the prices paid by the victims and this contributes to the disempowerment of women and girls.<sup>28</sup>

When considering the broad range of human trafficking which particularly affects females, we need to differentiate trafficking for work (whether criminal or commercial) from trafficking for other gender-based reasons (sexual exploitation or forced marriage for example). Trafficking for work may often not be simply down to poverty and lack of education, instead relative poverty together with some education is often more likely to place a female at risk. Enabling safe migration, whilst also focusing on positive education and work options (including the provision of small-scale finance) has been shown to be effective.<sup>29</sup>

The role of a safe environment – where the rights of females are protected and protection is enforced – is more often seen as important in relation to the second category of trafficking, where gender inequality, the burden of familial/societal expectation and pressure based on prevailing discriminatory social norms and harmful religious narratives, a desire to control female sexuality, poverty, lack of education and opportunity and a failure to enforce laws and policies against such practices are known to be

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<sup>26</sup> Anti-Slavery Project: Slavery thrives in Australia 200 years after Abolition <<http://www.antislavery.org.au>>.

<sup>27</sup> International Labour Organization, above n 8.

<sup>28</sup> Cathy Zimmerman et al., *The health risks and consequences of trafficking in women and adolescents: findings from a European study. Including: human rights analysis of health and trafficking and principles for promoting the health rights of trafficked women* (London School of Hygiene and Tropical Medicine, 2003) .

<sup>29</sup> UNIAP, *Targeting endemic vulnerability factors to human trafficking* (United Nations Inter-Agency Project, Bangkok Thailand, 2007); See also Mongolian Gender Equality Center, *Human trafficking in Mongolia: Risks, vulnerability and trauma* (The Asia Foundation, Ulaanbaatar, 2006).

significant risk factors.<sup>30</sup> Women who are not safe struggle to be truly economically active.<sup>31</sup>

It is notable that Australia has not signed the Istanbul Convention on Preventing and Combating Violence against Women and Domestic Violence<sup>32</sup> (the Istanbul Convention). Despite being a European instrument, it is open to all nation states. It is based on the understanding that violence against women is a form of gender-based violence that is committed against women because they are women. It is the obligation of the state to fully address it in all its forms and to take measures to prevent violence against women, protect its victims and prosecute the perpetrators. Failure to do so would make it the responsibility of the state<sup>33</sup>.

It is a reasonable conclusion that the failure to implement international and well researched instruments that are designed to protect and empower women and girls means Australia falls short of what is necessary to combat human trafficking. Tackling trafficking of women – not just signing up to international instruments, but implementing them effectively – can have a disproportionately positive effect through not just empowering women but also protecting the next generation from poverty, violence, exploitation and trafficking.

Trafficking and exploitation can be domestic, intimate or as a result of the actions of strangers. Women who are trafficked are less able to access work opportunities, although they are often generating income for others. A high degree of criminal income is generated by modern slavery,<sup>34</sup> particularly in the context of the sex trade.<sup>35</sup>

Australia's anti-human trafficking strategy was established in 2003. Since then, the Federal Government has provided more than \$150 million to support a range of domestic, regional and international anti-trafficking initiatives. However, what is important is the

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<sup>30</sup> Felicity Gerry, Julia Muraszkiwicz and Niovi Vavoula, 'The role of technology in the fight against human trafficking: reflections on privacy and data protection concerns' (2016) 32 *Computer Law and Security Review*; Marianne Hester et al., *Forced marriage: the risk factors and the effect of raising the minimum age for a sponsor, and of leave to enter the UK as a spouse or fiancé(e)* (School for Policy Studies: University of Bristol, 2008); UN Women, *Causes, protective and risk factors* (n.d.) <<http://endvawnow.org/en/articles/300-causes-protective-and-risk-factors-.html>>.

<sup>31</sup> Felicity Gerry and C. Sjölin, 'Achieving the G20 gender equality target by tackling sexual exploitation through legal uniformity, extra territoriality and corporate responsibility' (Conference paper delivered at 4<sup>th</sup> International Conference on Law, Regulation and Public Policy, Singapore, June 2015).

<sup>32</sup> Council of Europe, *Convention on Preventing and Combating Violence against Women and Domestic Violence*, CETS 210 (signed 11 May 2011, entered into force 1 August 2014).

<sup>33</sup> <http://www.coe.int/en/web/istanbul-convention/about-the-convention>

<sup>34</sup> International Labour Organization, above n 8.

<sup>35</sup> Polaris Project, *Human Trafficking: Sex Trafficking* (2017) <<https://polarisproject.org/sex-trafficking>>.

*inter-relationship* between legislation and community engagement.<sup>36</sup> Formal structures are required together with measures to equip communities to deal with the complex problems which lead to and are caused by human trafficking.<sup>37</sup>

**(c) The prevalence of modern slavery in the domestic and global supply chains of companies, businesses and organizations operating in Australia;**

**(d) International best practice employed by governments, companies, businesses and organizations to prevent modern slavery in domestic and global supply chains, with a view to strengthening Australian legislation;**

Tackling global exploitation does not stop with governments, NGOs or criminal justice. Corporate and financial entities must also be engaged, particularly to tackle trafficking for work.

There are now international 'super corporations' with economies which dwarf those of many countries.<sup>38</sup> Corporate enterprises in legitimate global markets now widely seek good practical advice in the move toward corporate responsibility. It is in the interests of global corporations for there to be uniformity in law and policy in the states in which they do business. They and their competitors are then on a level playing field so that turning a blind eye to trafficking and exploitation would then no longer be a choice to cut relative costs. In addition, the difficulties and costs of complying with numerous different regimes would be curtailed. In November 2014, the G20 countries committed to a

... goal of reducing the gap in participation rates between men and women [in the G20 countries] by 25% by 2025, taking into account national circumstances, to bring more than 100 million women into the labour force in order to significantly increase global growth and reduce poverty and inequality.<sup>39</sup>

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<sup>36</sup> World Health Organization, *Female Genital Mutilation: Programmes to Date: What works and What Doesn't* (Geneva, 1999) <[http://www.who.int/reproductivehealth/publications/fgm/wmh\\_99\\_5/en/](http://www.who.int/reproductivehealth/publications/fgm/wmh_99_5/en/)>.

<sup>37</sup> Rosy Kandathil, 'Global Sex Trafficking and the Trafficking Victims Protection Act of 2000: Legislative Responses to the Problem of Modern Slavery' (2005) 12 *Michigan Journal of Gender and Law*.

<sup>38</sup> Global Policy Forum, *Comparison of the World's 25 Largest Corporations with the GDP of Selected Countries* (2010) <<https://www.globalpolicy.org/component/content/article/150-general/50950-comparison-of-the-worlds-25-largest-corporations-with-the-gdp-of-selected-countries.html>>.

<sup>39</sup> *G20 Leaders' Communiqué, Brisbane Summit*, 15-16 November 2014 <[http://www.g20australia.org/sites/default/files/g20\\_resources/library/brisbane\\_g20\\_leaders\\_summit\\_communique.pdf](http://www.g20australia.org/sites/default/files/g20_resources/library/brisbane_g20_leaders_summit_communique.pdf)>.

This was the first of the ‘concrete actions to overcome the barriers hindering women’s full economic and social participation’ called for in the Los Cabos Declaration in 2012.<sup>40</sup>

In a keynote address at the Women-20 official launch in Ankara, 6 September 2015,<sup>41</sup> Angel Gurría, Secretary-General OECD, identified the economic case for gender equality as the world’s population ages, which requires all available talent to be mobilised as well as key research that demonstrates that improving women’s participation in the workforce increases productivity.<sup>42</sup> She also identified core barriers to gender equality as poor approaches to fathers’ having parental leave, lack of access to education for women and girls, entrenched attitudes which discourage women and girls from studying engineering or science, occupational choices affected by differentials in pay which in turn inhibit women from entering business on a self-employed basis and poor representation on boards.<sup>43</sup> So it is that boards are intricately connected with the need to bring more women into the labour force and arguably, by treating gender equality as a productivity issue, states are duty bound to do so. This is not just a corporate issue but overlaps with fighting human trafficking as criminal conduct, as well as being part of the more generalised need to empower women and girls.

In the commercial sphere, the 2014 International Labour Office report (the ILO report) *Profits and Poverty*, set out some startling figures:<sup>44</sup>

- a. Women and girls make up about 55 per cent of all forced labour victims and they represent the vast majority of victims exploited for commercial sex work.
- b. The estimated total profits made by forced labour each year worldwide was estimated in 2012 at US\$150.2 billion per year with profits highest in Asia (US\$51.8 billion).
- c. Sexual exploitation makes up two-thirds of these profits at an estimated \$105 billion a year.

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<sup>40</sup> International Policy Forum, *Empowering Women for Economic Growth: the Smart Choice for the G20*, (Chatham House, The Royal Institute of International Affairs, 2016) <<https://www.chathamhouse.org/sites/files/chathamhouse/events/special/2016-07-13-Chatham-House-International-Policy-Forum-Brochure.pdf>>.

<sup>41</sup> Angel Gurría, *Bringing gender equality to the core of the G20 agenda* (6 September 2015) <<https://www.oecd.org/g20/topics/employment-and-social-policy/bringing-gender-equality-to-the-core-of-the-g20-agenda.htm>>.

<sup>42</sup> UN Women, *Facts and Figures: Economic Empowerment* (2015) <<http://www.unwomen.org/en/what-we-do/economic-empowerment/facts-and-figures>>.

<sup>43</sup> Gurría, above n 40.

<sup>44</sup> International Labour Organization, above n 8.

- d. Annual profits made per victim range from \$4100 to \$37,100. This includes construction, manufacture, mining and utilities, agriculture, fishing and domestic work. Profits are highest in forced sexual exploitation.

The UK model, under the *Modern Slavery Act 2015*, builds on reporting requirements in relation to bribery and corruption and provides for businesses with a turnover of more than £36 million to provide a statement each year on action taken in respect of slavery. This might lead to better enquiries in order to avoid reputational damage but at this stage there are no requirements to audit or fully investigate suppliers.

The ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) has provided guidance on the scope of the definition of forced labour, stressing that it encompasses trafficking in persons for the purposes of labour and sexual exploitation as defined by the Trafficking Protocol.<sup>45</sup> This guidance supplements the UN Convention Against Transnational Organised Crime (2000)<sup>46</sup> criminalising trafficking in persons whether it occurs within countries or across borders, and whether or not conducted by organised crime networks.<sup>47</sup> The need for clear law and policy to empower women is supported by the ILO findings that socio-economic factors for the scale of global forced labour include lack of education and literacy, poverty and other wealth and income shocks all of which need to be addressed to empower people to avoid exploitation.<sup>48</sup>

The ILO report concludes that ‘there is an urgent need to address the socio-economic root causes of this hugely profitable illegal practice if it is to be overcome.’<sup>49</sup> It follows that tackling trafficking is a global imperative inextricably linked to global prosperity.

Australia’s legislation applies to foreign bribery but it is rarely enforced in relation to either domestic or foreign transactions. In addition, it does not include an offence of failure by a commercial organisation to prevent bribery similar to those contained in the UK Bribery Act.<sup>50</sup> Corporations in the UK have been the subject of prosecution in the context of bribery. This has been widely publicised but, more importantly, a grace period allowed organisations to implement adequate procedures thus improving corporate compliance.

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<sup>45</sup> International Labour Conference, 102<sup>nd</sup> Session, ‘Report of the Committee of Experts on the Application of Conventions and Recommendations’ (International Labour Office, Geneva, 2013) <[http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_205472.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_205472.pdf)>.

<sup>46</sup> *United Nations Convention Against Transnational Organised Crime*, 2225 UNTS 209 (signed 15 November 2000, entered into force 29 September 2003).

<sup>47</sup> Ibid.

<sup>48</sup> International Labour Organization, above n 8.

<sup>49</sup> Ibid 2.

<sup>50</sup> *Bribery Act 2010* (UK) c 23.

In the UK discussion is now around the implementation of further provisions to tackle corruption by way of a corporate offence of failure to prevent economic crime. If implemented as expected it will require companies to carry out relevant risk assessments in relation to any services provided by associated persons anywhere in the world and to put in place adequate procedures. As with the provisions of the *Modern Slavery Act (UK)*, some multinationals will already be caught by the UK Bribery Act extraterritorial provisions and here again there is scope to achieve harmonisation, not just to ensure there is greater certainty and compliance but also to mirror the procedures in relation to deferred prosecution agreements (DPA) which allow companies to confess and avoid prosecution, saving states the cost of investigation. DPAs were introduced in England and Wales after sustained pressure from the United States to deal with corporate fraud in a cheaper and more efficient way.

There is therefore an inevitable intersection between corruption, bribery and other economic crime that arises in the context of human trafficking which demonstrates that Australia needs a proactive and structured approach.

**(e) The implications for Australia’s visa regime, and conformity with the Palermo Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children regarding federal compensation for victims of modern slavery; and**

Awareness and legislative reactions should be seen in visa arrangements. In the U.S. there are laws and regulations in the U.S. which provide for prevention, victim protection and prosecution of perpetrators of human trafficking, slavery, servitude, forced labour, forced marriage but they are by no means comprehensive.<sup>51</sup> The Trafficking Victims Protection Act 2000 and its reauthorizations (TVPA) work at the federal, and in some respects the international, level despite problems and gaps. The 2000 Act created important federal offences of human trafficking, but also allowed for restitution to victims and their resettlement in the U.S., creating the “T-visa”. There was also a focus on information gathering and co-operation in the creation of the Office to Monitor and Combat Trafficking in Persons and the Interagency Task Force to Monitor and Combat Trafficking. The 2003 Reauthorization Act broadened the focus, enabling victims to sue their traffickers and strengthening the protection of victims from deportation, Importantly in criminal terms it added human trafficking to the list of crimes that can be charged under the Racketeering Influenced Corrupt Organisations Act (RICO) enabling prosecution of those who lead a trafficking organisation, rather than just the foot soldiers. The 2005 Reauthorization looked internationally and the 2008 Act improved prevention strategies as well as improving the criminal scheme. The 2013 Reauthorization acts against child marriage and again attempts to improve the federal criminal scheme’s interaction with the state and local level.

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<sup>51</sup> See useful discussion in A. Edwards, “Traffic in Human Beings: at the Intersection of Criminal Justice, Human Rights, Asylum/Migration and Labor” (2007) *Denver Journal of Law and Policy* 36(1) 9.

A 'T-visa' introduced in 2000 is available to some victims who assist in the prosecution of their traffickers and allows the victim, spouse, children and parents to remain in the United States as long as strict criteria are satisfied. There is a low cap on the total number of visas per year (5,000) but that number is not reached; in 2015 only 508 T-visas were issued.<sup>52</sup> The low numbers of victims identified can be attributed to many different factors including the stringent criteria.<sup>53</sup> One important obstacle is a lack of access to necessary legal services.<sup>54</sup> Australia should develop a more protective system for those victims where credible evidence has been collected nationally and transnationally.

## Conclusion

It is submitted that Australia has an opportunity to create comprehensive Modern Slavery legislation far better than the UK MSA.

We suggest:

- comprehensive protection for victims of human trafficking and those affected by domestic coercion,
- a framework for appeals, and
- an effective national and transnational investigatory system.
- Suitably protective visa system

Consideration should be given to signing and implementing the Istanbul Convention or at least adopting its four fundamental themes: prevention, protection, prosecution and monitoring. Crucially, the Istanbul Convention requires governments that agree to be bound by the Convention not only to make laws but to ensure they are enforced, by:

- implementing training for professionals,
- running awareness-raising campaigns,
- taking steps to include issues such as gender equality in teaching material,
- setting up treatment programmes for perpetrators of domestic violence and for sex offenders,
- working closely with NGOs, and
- eradicating media gender stereotypes.

Work to harmonise these approaches nationally and transnationally is vital. Agreed definitions make enforcement of legislation across national boundaries possible; human trafficking is no respecter of state boundaries – this dark and dirty trade profits from the territorial limits of national laws. The good which can come out of a transnational

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<sup>52</sup> Report of the Visa Office 2015 Table XVI(A) available online at <https://travel.state.gov/content/visas/en/law-and-policy/statistics/annual-reports/report-of-the-visa-office-2015.html> (accessed 22 March 2016).

<sup>53</sup> R. Kandathil, "Global Sex Trafficking and the Trafficking Victims Protection Act of 2000: Legislative Responses to the Problem of Modern Slavery" (2005) Michigan Journal of Gender and Law 12(1) 86.

<sup>54</sup> Fight Slavery Now "Trafficking Victims Protection Act" online at <http://fightslaverynow.org/why-fight-there-are-27-million-reasons/the-law-and-trafficking/trafficking-victims-protection-act/trafficking-victims-protection-act/> accessed 22 March 2016.

harmonisation of law and policy in this context is that all nations can focus on common rules on the basis of their common interests. Improvements in one state can therefore directly influence another state which has not yet made such progress.<sup>55</sup>

Given that human trafficking disproportionately affects women, new Australian legislation will have a positive knock-on effect to female incarceration and will assist in fulfilling Australia's G20 commitments to improving gender equality in workplaces.

The Australian legislative reaction after this inquiry, it is submitted, should be comprehensive and, given the proximity to source countries, leading in approach.

ENDS

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<sup>55</sup> Based in part on research conducted and published with Catarina Sjölin, Senior Lecturer, Nottingham Trent University.

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