

Inquiry into Establishing a Modern Slavery Act in Australia

**Submission to
the Foreign Affairs and Aid Sub-Committee
of the Joint Standing Committee on
Foreign Affairs, Defence and Trade**

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Executive Summary

This Submission draws on the wealth of knowledge and experience of the Contributors around the issue of modern slavery in regard to both Australia and the United Kingdom, but also globally.

The Submission considers the issue from the perspective of the victims of modern slavery, which informs the following recommendations, in regard to the possible establishment of Modern Slavery Act in Australia.

It draws the Inquiry's attention to the legal context in which the *Modern Slavery Act 2015* was enacted in the United Kingdom, including its human rights obligations undertaken as a member of both the Council of Europe and the European Union; as well as the UK Government's felt need, to pass further legislation in the area of labour market enforcement as a result of its engagement with the issue of modern slavery.

With this in mind, we consider that the protection and assistance currently afforded to victims of trafficking should be extended to all those – including foreign nationals – who may be victims of modern slavery.

The following are our Recommendations:

- 1) That Australia establish a Modern Slavery Act;
- 2) That Australia be guided by the victim-centred and human rights approach of Europe in developing such legislation, while ensuring that special measures are in place for children, migrant workers, foreign nationals, and those with special needs;
- 3) That Australia extend any and all protection afforded to victims of trafficking to victims of modern slavery, in line with its international human rights obligations, including foreign nationals, in a non-discriminatory manner;
- 4) That, like the UK and other European countries, Australia move to abolish the connection between visa support and participation in criminal investigations for foreign victims of modern slavery;
- 5) That the Government consider best practice in establishing a federal compensation scheme for victims of modern slavery which include 'back pay' and facilitating reintegration into society;
- 6) That the Government publish guidelines on its humanitarian and compassionate factors in regard to visa permits for foreign victims of modern slavery;
- 7) That an effective reporting infrastructure, including a central repository, be developed, to ensure supply chains are both transparent and free of modern slavery;
- 8) That Australia coordinate across labour market and modern slavery enforcement, ensuring the mainstreaming of decent work as a buttress to modern slavery legislation; and
- 9) That evidence-based research, including *Multiple Systems Estimation* in determining the prevalence of modern slavery and impact of current anti-trafficking practices, drive policy and resource allocation in moving forward.

Contributors

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Dr Heli Askola is a Senior Lecturer in the Faculty of Law at Monash University. Her research focuses on trafficking in human beings, exploitation of migrants, immigration and freedom of movement, citizenship and violence against women in a comparative context. She is the author of *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union* (Hart Publishing, 2007) and *The Demographic Transformations of Citizenship* (Cambridge University Press, 2016) and a number of other publications exploring, among other things, legal responses to trafficking in human beings and labour exploitation in the course of migration. Her current research involves inter-disciplinary and comparative research into the intersection of immigration law and various forms of violence against women, such as forced marriage. She has provided expertise for various international bodies such as the International Organization for Migration, the European Parliament and the European Commission, especially on migration law, international human rights law and trafficking in human beings, comparative criminal law and Justice and Home Affairs in the European Union.

Kevin Bales, CMG, FRSA is Professor of Contemporary Slavery at the University of Nottingham, Lead Author of the Global Slavery Index, and co-founder of the NGO, Free the Slaves. His book *Disposable People: New Slavery in the Global Economy* is published in ten languages. Desmond Tutu called it 'a well-researched, scholarly and deeply disturbing expose of modern slavery.' The Association of British Universities named his work one of '100 World-Changing Discoveries.' The film based on *Disposable People*, which he co-wrote, won him the Peabody and two Emmy Awards.

In 2007 Prof. Bales published *Ending Slavery: How We Free Today's Slaves*, a roadmap for the global eradication of slavery which won the Grawemeyer Award. In 2009, with Ron Soodalter, he published *The Slave Next Door: Modern Slavery in the United States*. His most recent book is the 2016 *Blood and Earth: Modern Slavery, Ecocide, and the Secret to Saving the World*. In 2016 his research institute was awarded the Queens Anniversary Prize, and he was made a Companion of the Most Distinguished Order of Saint Michael and Saint George (CMG) in the 2017 New Year's Honour's List 'for services to the global anti-slavery movement'.

Bales is the leading authority on modern slavery and has advised the US, British, Irish, Norwegian, and Nepali governments.

¹ See [Case of the Workers of Fazenda Brasil Verde vs Brazil](#), Inter-American Court of Human Rights, Judgement (Preliminary Objections, Merits, Reparations and Costs), 20 October 2016, paras. 269-272. Currently available in either Spanish or Portuguese.

Andrew Crane is Professor of Business and Society and Director of the [Centre for Business, Organisations and Society](#) in the School of Management at the University of Bath, UK.

He is a leading author, researcher, educator and commentator on corporate responsibility. His [books](#) include an award-winning textbook [Business Ethics](#), [The Oxford Handbook of Corporate Social Responsibility](#), and [Social Partnerships and Responsible Business](#).

His recent work has focused on understanding the business of modern slavery and helping public, private and civil organisations develop evidence- based solutions to the problem. He published the first article on modern slavery in the world’s leading management theory journal, the *Academy of Management Review*, and has published a study for the Joseph Rowntree Foundation (with Allain, LeBaron and Behbahani) on [Forced Labour’s Business Models and Supply Chains](#). He contributed to the consultation preceding the passing of the UK Modern Slavery Act in 2015 and has written on modern slavery in The Guardian, OpenDemocracy.org, and various blogs.

He has published in some of the world’s leading academic journals and is the co-editor of the journal, [Business & Society](#). He is a frequent contributor to the media, including the *Financial Times*, *New York Times*, *Globe and Mail*, *Wall Street Journal*, and *The Guardian*. You can follow him on [@ethicscrane](#).

Marie Segrave is Associate Professor at Monash University and an ARC DECRA Fellow undertaking research on unlawful migrant labour, exploitation and regulation, she is based in the School of Social Sciences and works on issues related to irregular migration, regulation, exploitation and abuse with [The Border Crossing Observatory](#) and the [Gender and Family Violence](#) program.

Her DECRA research is spread across NSW and Victoria in regional and urban areas. To date this research has included 40 interviews with stakeholders and 30 interviews with unlawful migrant workers. This research is seeking to examine the experiences of unlawful migrant workers: specifically, those who entered Australia lawfully but without work rights and those who have overstayed their visa, regardless of whether they originally had work rights. Of 30 unlawful workers, 26 did not have work rights when they entered Australia.

This research will offer a rich account of the motivations and experiences of unlawful migrant workers, and the impact of migration and labour regulation on these workers. Importantly some of this work has focused specifically on the horticulture industry in regional Victoria, where the issue of the Modern Slavery Act has been raised by participants who are growers and contractors.

Introduction

The following Submission draws the attention of the Inquiry to the lessons learnt from the UK experience with its *Modern Slavery Act 2015* – as a number of the Contributors to this Submission played an active role in advising the British Government and giving both oral and written evidence to the Parliament of Westminster committees during the drafting process.

In developing its considerations, the Contributors have emphasised a victim centred and human rights approach to considerations of what a Modern Slavery Act in Australia might include. They recognise that the British experience is distinct from that of Australia, in large part, because of the overarching human rights obligations which flow from *1950 European Convention on Human Rights* as interpreted by the European Court of Human Rights; the *2005 European Convention on Action against Trafficking in Human Beings* and its reporting requirements to GRETA: the Council of Europe’s Group of Experts on Action against Trafficking in Human Beings; and finally in regard to the European Union and its *2011 EU Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims*.

These added legal requirements each carry with them a number of obligations in regard to human trafficking. They become relevant to our Submission and we recommend that Australia look to the British and European experience for instances of best practice. We do so, as we believe that Australia should extend any and all protection afforded to victims of trafficking to all victims of ‘modern slavery’, including foreign nationals in a non-discriminatory manner, in line not only with its international human rights obligations but also with best practice.

By ‘modern slavery’ we understand this as an umbrella term which addresses the majority of practices set out in Divisions 270 and 271 of the Commonwealth *Criminal Code Act 1995*, as amended by *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013*; that is to say, offences in regard to: slavery, servitude, forced labour, organ trafficking, and trafficking in persons. It might be emphasised here, that we believe that the issue of forced marriage should be dealt with, in part, elsewhere than in modern slavery legislation.

Our Submission is comprehensive, addressing each of the Terms of Reference, and demonstrates an in-depth understanding of the issues at hand and the manner in which Australia might respond to these issues in crafting its own Modern Slavery Act.

Before going on to consider the Terms of Reference put forward by the Foreign Affairs and Aid Sub-Committee of the Joint Standing Committee on Foreign Affairs, Defence and Trade as part of its Inquiry into the establishment of a Modern Slavery Act in Australia, this Submission wishes to emphasise that its authors are in favour of establishing such an Act, modelled on the *UK Modern Slavery Act 2015*, taking into consideration the specificities in regard to the regional and Australian context.

The Contributors have engaged with the various issues from differing perspectives and academic disciplines and expect that their input will form part of the debates which will be created around your Inquiry and the move towards the establishment of a Modern Slavery Act in Australia.

In a number of instances, Contributors have indicated their willingness to further assist the Inquiry: including Professor Allain in regard to nature of modern slavery, and its development within the British and European context; Professor Bales in regard to developing legislation around supply chains, having previously been involved in the same process both in the State of California and in the United Kingdom; and Professor Segrave in regard to the unique nature of forced and child marriage in the Australian context, and in more generally that of the exploitation of migrant workers.

Considerations in Line with the Terms of Reference

1. 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;

In terms of understanding the nature and extent of modern slavery, we are fortunate to be living in an historical moment when we know more about the extent and prevalence of slavery and human trafficking than at any time in history. Except for a few rare examples, such as the 1860 United States Census that recorded every slave living in the republic, the locating and counting of those in slavery has been uncommon and haphazard. But by bringing together the power of research specialists like the Gallup World Poll, supported by the Walk Free Foundation, along with a group of global social science research experts, we are now able to make *reliable* measures of global slavery for the first time. The current global estimate of 48 million people enslaved is statistically the best ever achieved, and later this year a new joint ILO–Walk Free Foundation estimate will be incrementally better. Are these estimates perfect? No, modern slavery is a crime and criminals hide their activities, but test after test, peer-review after peer-review, has testified to the stability and reliability of these estimates.

If there is a lack as to what we know, it is in the measure of the prevalence of slavery in advanced, developed, States – whether in North America, Europe, or Australia – simply put, random sample surveys of slavery are not effective in these countries. Fortunately, an advanced technique, borrowed from the statistical analysis of mass atrocities, has now shown that accurate estimates can be achieved in all States. This technique, *Multiple Systems Estimation*, utilised to consider the issue of modern slavery was first tested in the United Kingdom, and the Home Office and Government immediately re-orientated its policies and resource allocations on the basis of the new and reliable estimate that there are some 13,000 people enslaved persons in the United Kingdom. This technique is perfectly applicable to Australia, and we urge its immediate deployment so that the Government can base future responses to this issue on solid data. Allocating resources requires such reliable data.

It is also worth bringing to the attention of the Inquiry the importance of specificity of meaning in relation to the various types of exploitation that are included under the broad heading of ‘modern slavery’ as discussed in the Introduction, as these will have a fundamental effect on the manner in which the Government responds to the various types of exploitation.

For example the issue of forced marriage in Australia should be considered and responded to separately. In Australia, the response to forced marriage, for the Australian Federal Police, is primarily a pre-crime response: that is, a potential victim is seeking an intervention so she (most often) is not forced to travel internationally for the purpose of a marriage she does not consent to and/or under Australian law she cannot consent to. This requires a careful shift in thinking about how Australia conceives of and supports law enforcement work in this area; and the appropriateness of the existing victim support schemes. As such, we remain available to speak to the Inquiry as to the unique nature of forced and child marriage in the Australian context and how this might be best addressed.

2. The prevalence of modern slavery in the domestic and global supply chains of companies, businesses and organisations operating in Australia;

There is a high likelihood of modern slavery practices being used in the domestic and global supply chains of companies, businesses and organisations operating in Australia. For example, in a recent survey of Ethical Trading Initiative member companies in the United Kingdom (i.e. companies well advanced in social auditing of their supply chains to rigorous labour standards), more than 70% believed that there was at least some likelihood of modern slavery in their supply chains, and over 30% thought it very likely². Most companies report a particularly high likelihood in their tier two and three suppliers. The suppliers of retail companies and others operating in the United Kingdom are likely to be materially similar to those operating in Australia, suggesting a similar level of likelihood.

While there is no legal definition of ‘modern slavery’ in Australia and its use and contours remains amorphous, Segrave’s research focused on unlawful migrant labour, demonstrates the two following points with regards to supply chains and employment conditions in Australia:³

1) In the Horticulture Industry, many growers who supply supermarkets argue that current conditions *enable* large corporations to squeeze competition and profit from growers across Australia, without any regulation, transparency, or ethical operation, and that the demands of this creates conditions whereby growers may, in certain situations, access a ready workforce which is willing to be paid at a below-award rate. We cannot only address the conditions that give rise to exploitation by focusing on employment practices: we must consider how industries are regulated and the power wielded by some corporations; and

2) It is clear that in many industries, not just the horticultural industry, the lack of transparency is a significant hurdle. The cash economy is significant in Australia (recently reported as resulting in \$15 billion lost revenue annually⁴) and the limitations of forensic accounting analysis, is a significant challenge.

In the horticulture industry, for example, it has been reported that workers will share a tax file number to give to employers, and that the total payment of all workers is undertaken via one cash transaction from a grower to a contractor to then distribute. These situations are not just limited to migrant workers (i.e. Australian workers are a part of this industry and receive cash payment): however, for migrant workers there are significant risks of not being paid (which happens frequently) and being underpaid, with deportation used as a threat to ensure workers remain quiet. Thus, issues related to modern slavery are not linked only to the transparency of practices, but to the complexity of regulation and enforcement, and these are significant problems across Australia.⁵

² Lake et als., *Corporate approaches to addressing modern slavery in supply chains: A snapshot of current practice*. Ashbridge: Ethical Trading Initiative, 2015.

³ See Nicola Piper, Marie Segrave and Rebecca Napier-Moore, “Forced labour, trafficking and slavery”, Special Issue of *Anti-Trafficking Review*, 2015; wherein the international definition adopted to the broad identification of modern slavery is relatively obtuse.

⁴ Nassim Khadem, “Federal budget to tackle illegal cash economy costing up to \$15b in lost revenue”, *The Sydney Morning Herald*, 5 April 2017; available at: <http://www.smh.com.au/business/the-economy/federal-budget-to-tackle-illegal-cash-economy-costing-up-to-15b-in-lost-revenue-20170404-gvdfkr.html>.

⁵ See Marie Segrave, Sanja Milivojević, and Sharon Pickering (in press) *Sex Trafficking and Modern Slavery: The absence of evidence*, Oxford: Routledge, 2017; Sanja Milivojević, Marie Segrave, and Sharon Pickering, “The limits of migration-related human rights: connecting exploitation and immobility” in Weber (eds) *Routledge International Handbook of Criminology and Human Rights*, Oxford: Routledge, 2016; Marie Segrave and Sanja Milivojević, “Human trafficking: Examining global responses” in *The Routledge International Handbook of the*

3. Identifying international best practice employed by governments, companies, businesses and organisations to prevent modern slavery in domestic and global supply chains, with a view to strengthening Australian legislation;

On the questions of global supply chains, it is simply and demonstrably the case that slavery crime permeates a large number of the products and commodities that flow into Australia. One challenge of this fact is that, unlike slavery in the historical past, the total amount of slave input to any of these products or commodities is extremely small. So we are faced with a problem that is economically negligible but morally profound. A key way to address this challenge is to enable business to act in their own best interests and rid their supply chains of modern slavery.

A key way to accomplish this is to level the playing field in terms of reporting and policing of supply chains. A great difficulty in the past has been that any business that tried to do the *right* thing and spoke openly about what they had found in their supply chains were, put simply, crucified in the media. This meant most companies either refused to examine their supply chains closely, or kept silent about what they already knew – which meant nothing was done to remove slavery from the things we buy. The answer to this challenge was first piloted in the US State of California, with a supply chains transparency provision that required all companies over a certain size to issue an annual report as to what they were doing to remove slavery and trafficking from their supply chains. This provided the level playing field – if all companies must report then the chance of being singled out and vilified was very dramatically reduced. The United Kingdom has now adopted this provision into its *Modern Slavery Act 2015*, and the US Congress is considering a national provision as well.

We urge the insertion of such a provision into Australian law and the establishment of a central repository to house company reports. To this end, it should be noted that Professor Bales assisted in formulating both the State of California and the United Kingdom supply chain provisions, and would be happy to answer any questions about how and why these provisions came into being and what that might suggest within the Australian context.

Finally, where best practice is concerned, we would point to those provisions that support the victims of slavery and trafficking in the laws of India and Brazil. Slavery crime, in addition to its violence, is about the theft of work and productive capacity. Victims may be liberated, but their years of work count in slavery for nothing, in terms of their ability to establishing a life in freedom that has economic stability.

In Brazil, this is dealt with by immediate rulings made by a labour judge which lead to ‘back wages’ being paid to freed slaves from the funds, property, or resources of their enslavers.

In India, relatively small staggered cash payments to freed slaves make sure they have a roof over their head and food to eat, and then are able to have the resources to re-start their lives through training or investing in the tools they need to do productive and remunerated work. The underlying concept here is convert freed slaves from the status and treatment of ‘victims’ as soon as possible to the role of supported individuals on the road to autonomy, self-respect, and productive work.

We would urge the Inquiry to recommend to Government to consider best practice in establishing a federal compensation scheme for victims of modern slavery which not only addresses the past wrong, but facilitates a future path of reintegration into society.

Crimes of the Powerful, in Barak (ed), Oxford: Routledge, 2015, pp. 132-143; Marie Segrave, “Labour trafficking and illegal markets”, in *The Routledge Handbook on Crime and International Migration*, Pickering and Ham (eds), Oxford: Routledge, 2015 pp. 302-315; Marie Segrave and Rebecca Powell “Victimisation, citizenship and gender: Interrogating state responses”, in Wilson and Ross (eds), *Crime, Victims and Policy: International Contexts, Local Experiences*, Hampshire: Palgrave Macmillan, 2015, pp. 53-132; and Sharon Pickering, Marie Segrave et al. “Migration Controls” in Juss (ed) *International Handbook of Migration* London: Ashgate, 2010.

4. 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 (re: the Palermo Protocol)* regarding federal compensation for victims of modern slavery;

Australia should consider extending any and all protection afforded to victims of trafficking to foreign nationals who are victims of modern slavery.

It will be recognised that the elements of the *Palermo Protocol* related to victims of trafficking have limited legal effect. A direct result of this lack of protection provided to victims of trafficking was the establishment of *2005 European Convention on Action against Trafficking in Human Beings* which moves away from a criminal justice approach and focuses upon human rights protection of victims. We believe this should be the approach taken in establishing a Modern Slavery Act in Australia, whether a person is trafficked into Australia, or becomes a victim of slavery or forced labour.

Australia should seek to emulate the European approach when it comes to its visa regime in regard to foreign nationals who are victims of modern slavery. It is clear that Australia's *Migration Regulations 1994* was improved upon by amendments in 2015 which saw changes to the visa regime for victims of trafficking. However, these amendments did not change the fact that the visa framework and support program for victims of such practices revolves around the contribution of the victim to a criminal investigation⁶. By contrast, the *2005 European Convention* removed this 'Faustian bargain' by establishing, at Article 12(6), that 'each Party shall adopt such legislative or other measures as may be necessary to ensure that assistance to a victim is not made conditional on his or her willingness to act as a witness'.⁷

To provide the necessary support for all victims of modern slavery, it is recommended that Australia emulate the European standards and break this link between visa support for foreign victims of modern slavery and their required participation in criminal investigations. This could be achieved in regard to foreign victims of modern slavery by the introduction of a national compensation scheme wherein visas for foreign victims of modern slavery would be predicated on their being eligible for compensation.

Australia's international obligations require that the Commonwealth give appropriate consideration to humanitarian and compassionate factors when implementing measures that permit victims of trafficking to remain in its territory, temporarily or permanently.⁸ The Commonwealth should publish Guidelines setting out the manner in which it takes into consideration those humanitarian and compassionate factors in implementing permits for victims – here in regard to modern slavery – of those allowed to remain in Australia.

As Segrave has long argued, the failure to recognise victims of trafficking as migrant labourers results in a welfare-oriented response, focused on criminal justice outcomes, rather than recognising that many migrant workers are actively seeking opportunities to work.⁹ Where migrant workers become victims of modern slavery, the issue of 'back wages' and compensation, should be given as much emphasis as their legal status in Australia.

⁶ See Segrave, Sanja Milivojević and Sharon Pickering (in press) *Sex Trafficking and Modern Slavery: The absence of evidence*, Oxford: Routledge, 2017.

⁷ Note also like provisions in Article 11(3) of the *2011 EU Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims* which reads: 'Member States shall take the necessary measures to ensure that assistance and support for a victim are not made conditional on the victim's willingness to cooperate in the criminal investigation, prosecution or trial [...]'.
⁸ See Article 7(2), *United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, 2000.

⁹ See Segrave, Sanja Milivojević and Sharon Pickering (in press) *Sex Trafficking and Modern Slavery: The absence of evidence*, Oxford: Routledge, 2017; and Marie Segrave and Sanja Milivojević, "Auditing the Australian response to trafficking", *Current Issues in Criminal Justice*, 2010).

Australia's international legal obligations require it to provide victims of trafficking with assistance and protection, including the introduction of measures for obtaining compensation, as Article 6(6) of the *Palermo Protocol* requires Australia to 'ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered'. Such protection should be extended to apply to any foreign national who becomes a victim of modern slavery in Australia.

Currently, victims of human trafficking must seek to rely on statutory victims' compensation schemes provided by the States and Territories. These existing mechanisms do not amount to a comprehensive system of remedies, as detailed in the *Report on Establishing a National Compensation Scheme: Victims of Commonwealth Crime* (Law Council/Anti-Slavery Australia, 2016).

The state schemes were not designed to provide compensation for Commonwealth crimes under the Commonwealth Criminal Code, such as slavery, servitude or forced labour, and in the absence of a national mechanism for compensation for federal offences, many current victims fall between the gaps of the different state-level mechanisms and are not able to access compensation. It is also notable that these schemes do not equate to remuneration for unpaid 'back wages'. This differs from the role and function of the Fair Work Ombudsman who can ensure that *both* compensation and remuneration for 'back wages' is paid to complainant. There should be no distinction made between the pursuit of monies owed and compensation to those who experience exploitation in a new Modern Slavery Act in Australia, as compared to those who experience unlawful working conditions.

Australia should consider introducing a national compensation scheme for victims not only of human trafficking, but also modern slavery offenses, to ensure conformity with its international obligations. Such a scheme could be designed so as to complement the current state-based schemes for compensating victims of violent crimes. In the absence of a national scheme, states and territories could also be supported by the Commonwealth in adopting similar rules and practices across jurisdictions with the aim of guaranteeing victims of modern slavery universal, and uniform, access to compensation for federal crimes.

Under a proposed Modern Slavery Act victims of offences should be encouraged to apply for compensation through the national compensation scheme as quickly as possible. As such a scheme would not be linked to acting as a witness in a criminal matter, victims could apply for compensation without having to wait for the completion of criminal proceedings.

Such a scheme may necessitate changes to the current visa regime as there may be cases where it would be necessary to grant (or extend the duration of) the Bridging F (Class WF) Visa to enable a victim – not only of trafficking, but of all modern slavery offences where they apply to foreign nationals – to stay in Australia while the compensation claim is processed. It would be relatively simple to amend the current short-term visa framework to provide for the possibility of granting a short-term visa for victims intending to make a claim under the national compensation scheme. This would be in line with best practice as outlined in legal obligations at Article 10(2) for States party to the *2005 European Convention on Action against Trafficking in Human Beings*, that each 'Party shall ensure that, if the competent authorities have reasonable grounds to believe that a person has been victim of trafficking in human beings, that person shall not be removed from its territory until the identification process as victim [...] has been completed'.

Further, it should be emphasised that where determinations of victims of modern slavery is concerned, both the *2005 European Convention* and the *2011 EU Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims* set out elements of best practice in regard to children and the need to ensure a child's best interest in such a process (and beyond); with special reference to unaccompanied children who, while in Australia, might be considered a victim of modern slavery.

5. 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;

i) Centrality of Human Rights Approach to Modern Slavery in United Kingdom Context

It will be recognised that the legal context within which the United Kingdom developed the *Modern Slavery Act 2015* is fundamentally different to Australia.

Whereas Australia is bound by obligations flowing from the *Palermo Protocol*, which are in the main meant to deal with cooperation of law enforcement in regard to international organised crime; the United Kingdom’s *Modern Slavery Act 2015* functions within a regime of human rights protection predicated on its obligations to both the Council of Europe and the European Union.

As such, much of what is left ‘unspoken’ in the *Modern Slavery Act 2015* is the legal commitment to human rights protection of victims of modern slavery and the international oversight of such protection.

Where the United Kingdom is concerned, the *Modern Slavery Act 2015* defers to jurisprudence of the European Court of Human Rights with regard to who constitutes a person held in slavery, servitude or forced labour.¹⁰ While the European Court has gone to some length in spelling out what positive obligations a State has in regard to the protection of victims of modern slavery; word should be given to the international jurisprudence which has emerged since the High Court of Australia considerations of the normative content of slavery in its 2008 *Tang* case. Such a consideration of the international jurisprudence ensures that Australia is in conformity with its obligations under Article 8 of the United Nations International Covenant on Civil and Political Rights in regard to slavery, servitude, forced or compulsory labour; and provides an opportunity for Parliament to provide forward guidance to the courts as to the parameters of those to be considered victims under any proposed legislation.

In October 2016, the Inter-American Court of Human Rights gave the most in-depth and current consideration of these concepts, having surveyed the established international jurisprudence. As regards slavery, the Inter-American Court turned to the 1926 definition (which is incorporated in substance in Section 270.1 of *Criminal Code Act 1995*). Where the 1926 definition is concerned the Court ‘considers that the two fundamental elements to define a situation as slavery are : i) the status or condition of an individual and ii) the exercise of any or all of the powers attaching to the right of ownership’.¹¹ The High Court of Australia, in its 2008 *Tang* case, was the first to recognise, as the Inter-American Court of Human Rights now does, that the ‘first element (status or condition) refers to both the *de jure* and *de facto* situation’.¹²

This determination by the High Court led eventually to the development by scholars and practitioners of the 2012 *Bellagio-Harvard Guidelines on the Legal Parameters of Slavery* which were accepted by the Inter-American Court of Human Rights as the conceptual

¹⁰ See Section 1(2) of the *Modern Slavery Act 2015* which reads: ‘In subsection (1) the references to holding a person in slavery or servitude or requiring a person to perform forced or compulsory labour are to be construed in accordance with Article 4 of the Human Rights Convention.’

¹¹ *Workers of Fazenda Brasil Verde v Brazil*, Inter-American Court of Human Rights, Judgement (Preliminary Objections, Merits, Reparations and Costs), 20 October 2016, para. 269. All quotes of this case are translated from the Spanish by Anne Trebilcock, former Legal Adviser and Director of Legal Services, International Labour Organisation.

¹² *Id.*, para. 270.

understanding of the second element of the definition: ‘the exercise of any or all of the powers attaching to the right of ownership’.

The Inter-American Court made plain that the notion of ‘possession’ in property law translates into ‘control’ where issues of slavery are concerned. And that ‘when determining the level of control required to consider an act as slavery ... it could be equated with the loss of one’s own will or a considerable reduction of personal autonomy’. The Court continued, repeating verbatim Guideline 2 of the *Bellagio-Harvard Guidelines*, that the so-called ‘powers attaching to the right of ownership’ are to understood in today as:

the control exercised over a person that significantly restricts or deprives him of his individual liberty with intent to exploit through the use, management, profit, transfer or disposal of a person. In general, this exercise will be supported and will be obtained through such means as violence, deception and/or coercion.¹³

The Inter-American Court of Human Rights’ determination and reference to the *2012 Bellagio-Harvard Guidelines on the Legal Parameters of Slavery* provides future guidance which may inform the development of a Modern Slavery Act in Australia. Professor Allain acted as an Expert Witness in these proceeding and led the move to establish the 2012 Bellagio-Harvard Guidelines; and as such, remains available to the Inquiry to address any issues it might have on this matter.

The recognition of the centrality of case-law of the European Court of Human Rights as to who constitutes a victim for the purposes of the *Modern Slavery Act 2015*, is but a single manifestation of the effect of the jurisprudence of that Court. The effect that the European Court of Human Rights has had through its interpretation of the *1950 European Convention on Human Rights*, has been greatly supplemented by the obligation which parties to the *2005 European Convention on Action against Trafficking in Human Beings* have in reporting to its supervisory body, GRETA (the Council of Europe’s Group of Experts on Action against Trafficking in Human Beings).

The centrality of human rights protection afforded to victims of trafficking within the Council of Europe should guide considerations of establishing a Modern Slavery Act in Australia. The very purpose of the *2005 European Convention* is, *inter alia*, ‘to protect the human rights of the victims of trafficking’. This guidance should permeate any proposed Commonwealth legislation and extend the type of protection and assistance afforded to victims of trafficking to victims of modern slavery be they Australians or foreign nationals.

As such, it is worth highlighting here the assistance granted to victims of trafficking with the *2005 European Convention on Action against Trafficking in Human Beings* as the type of best practice which should be afforded to victims of modern slavery in any move to establish a Modern Slavery Act in Australia. This would include assistance of victims in their ‘physical,

¹³ *Id.*, para. 271. Beyond the conceptual understanding of slavery, the Inter-American Court stated that: the ‘powers attaching to the right of ownership’ should be evaluated on the basis of the following elements:

- a) restriction or control of individual autonomy;
- b) loss or restriction of the freedom of movement of a person;
- c) obtaining a benefit from the perpetrator;
- d) absence of consent or free will of the victim, or its impossibility or irrelevance due to the threat of use of violence or other forms of coercion, fear of violence, deception or false promises;
- e) the use of physical or psychological violence;
- f) the position of vulnerability of the victim;
- g) detention or captivity;
- (i) the operation.

psychological and social recovery'. Further in regard to foreign nationals who are determined to be victims of modern slavery for the purposes of being eligible for compensation (or in the process of such a determination), that while in Australia, they be granted a 'standard of living capable of ensuring their subsistence'.¹⁴

Beyond the provision of the *2005 European Convention* which creates the legal context in which the *Modern Slavery Act 2015* operates in the United Kingdom, reference should be made to the positive obligations of States which the European Court of Human Rights has determined as flowing from the provisions of the *1950 European Human Right Convention* Article 4 which relates to slavery, servitude, and forced labour, and through the Court's case-law, to trafficking as well. These legal obligations should inform, as best practice, the move to establish a Modern Slavery Act in Australia; they include positive obligations: in regard to putting in place an appropriate legislative and administrative framework; in regard to operational measures; and a procedural obligation to investigate.¹⁵

Finally, it will be recognised that the *Modern Slavery Act 2015* also operates in the United Kingdom environment which sees it bound by European Union Law, including the *2011 EU Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims*. This Directive mandates further victim protection, assistance and support, including the aim of their early identification as victims so as to access support, safe accommodations, and medical assistance where necessary. In considering these obligations undertaken by European Members States as best practice, in informing the possible establishment of a Modern Slavery Act, so as to cover victims of modern slavery, emphasis might also be placed on the provisions of the *2011 EU Directive* which speaks to children, or those victims who have special needs.¹⁶ As regard to the European system and its engagement with modern slavery, Prof Allain remains available to the Inquiry to address any questions it might have.

ii) Effectiveness of Specific Provisions of the Modern Slavery Act 2015

With respect to the effectiveness of the provisions in the *Modern Slavery Act 2015* in addressing modern slavery in the supply chains which could be effectively replicated in the Australian context, it should be recognised that Section 54 of the *Modern Slavery Act 2015* requires organisations with a turnover greater than GDP £36 million to produce, annually, a slavery and human trafficking statement. This statement is meant to set out what steps an organisation is taking to ensure modern slavery is not taking place in their business or supply chains. Since the statement must be publicly available, and approved and signed by a senior leader of the organisation, Section 54 has been very effective in raising awareness of, and attention to, modern slavery risks in businesses.

One challenge of Section 54 is that although it is designed to enable better transparency of company responses to modern slavery, the *Act* did not establish a central repository of such statements or a basic set of reporting structures that would enable shareholders, customers, NGOs, the media and other stakeholders to make meaningful comparisons across companies. Therefore, while a similar transparency provision is recommended for Australia, consideration should also be given to providing an effective reporting infrastructure.

It is also worth noting that using turnover as a determinant of inclusion in this process, may well limit the effectiveness of addressing the issues related to modern slavery that occur within Australia and within the Asia-Pacific region more generally. Our research has shown that often

¹⁴ See Article 12, *European Convention on Action against Trafficking in Human Beings*, 2005.

¹⁵ See European Court of Human Rights, [Guide on Article 4 of the European Convention on Human Rights: Prohibition of Slavery and Forced Labour](#), 2014, pp. 13-16.

¹⁶ See Articles 11-16, European Union, [Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims](#), Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011.

exploitation of the type which would constitute modern slavery takes place beyond second and third tier suppliers. Unless those companies above an established turnover threshold are auditing throughout their supply chains, such legislation will be ineffective in identifying the extent, and specific cases of modern slavery. Likewise, it will be recognised that in setting a turnover threshold, smaller companies where modern slavery transpires while go undetected by a Modern Slavery Act.

Although not specifically part of the *Modern Slavery Act 2015*, the United Kingdom Government has also subsequently introduced additional measures as a response to its consultation on ‘Labour market enforcement: improving enforcement’ that are expected to prove effective in combatting modern slavery in business and supply chains and that should be replicated in Australia. This is so, as it has been recognised by the United Kingdom Government that ‘there is a spectrum of abuse and it is not always clear at what point, for example, poor working practices and lack of health and safety awareness seep into instances of human trafficking, slavery or forced labour in a work environment.’¹⁷ There is therefore a critical need for coordination across labour market enforcement and modern slavery enforcement.

Within the context of the United Kingdom, effective measures have included two main additions to the armour or modern slavery protection:

- 1) Reforming the Gangmasters Licensing Authority to become the Gangmasters and Labour Abuse Authority, with stronger police-style enforcement powers to deal with labour exploitation and an expanded jurisdiction for licensing and investigation of labour providers beyond its original jurisdiction in UK food and drink processing and packaging, agriculture and shellfish gathering sectors, to all labour providers; and
- 2) The creation of the role of a Director of Labour Market Enforcement to bring together the work of existing enforcement agencies and to provide a more joined up response to issues of labour exploitation and decent work in line with International Labour Law.

For a number of years Governments in the United Kingdom have promoted an agenda of de-regulation, yet it has been recognised in light of issues of modern slavery that labour market enforcement is fundamental, and in places, it was lacking.

In line with this realisation, we recommend that the Commonwealth undertake a throughout consideration of its international labour law obligations, manifest through International Labour Organisation treaties and recommendations and seek to ensure that mainstreaming of decent work as a buttress to modern slavery legislation.

¹⁷ *Transparency in Supply Chains: A practical guide*. UK Home Office, Guidance issued under section 54(9) of the *Modern Slavery Act 2015*.

6. Whether a Modern Slavery Act should be introduced in Australia; and

It is clear there is overwhelming support for a Modern Slavery Act in Australia, in particular from key influential stakeholders. The authors of this Submission are, to varying degrees cautious but in favour of the establishment of a Modern Slavery Act in Australia.

Professor Segrave would urge caution with regards to the shift towards the nomenclature of modern slavery, when this is not reflective of the Commonwealth legislation, as it has the potential to create significant confusion. The concept is currently poorly defined in the materials associated with the Inquiry and this reflects a concern regarding the use of a loose definition. As noted below, this creates larger concerns related to accountability and evaluation of efforts to impact on modern slavery – the gravest concern is that any effort to ‘eliminate modern slavery’ is deemed a success simply because of its intention rather than on research-based evidence. Australia has an opportunity to lead the world in being accountable in the evaluation, rather than the reporting on, efforts to counter forms of exploitation such as human trafficking and slavery within a proposed Modern Slavery Act.

7. Any other related matters.

i) Vulnerability of Migrant Workers

A key question to be asked during the Inquiry is: who is most at risk of exploitation akin to modern slavery within Australia? Given the available workplace protections for Australian workers, which are not absolute, Australian workers are *less* likely to be subjected to exploitative work conditions than migrant workers. In theory, migrant workers are entitled to the same working conditions as other workers under the *Fair Work Act 2009* (Cth). However, as the Productivity Commission has noted, ‘migrant workers are more susceptible to substandard working conditions (such as being underpaid) than Australian citizens’.¹⁸

The adoption of the recommendations made by the Productivity Commission in its Report should inform this Inquiry into establishing a Modern Slavery Act in Australia. These include increasing the amount and quality of information available to migrant workers about their entitlements; increasing the Fair Work Office’s enforcement resources (as has transpired in the United Kingdom in parallel with its enactment of the *Modern Slavery Act 2015*);¹⁹ clarifying in the *Fair Work Act* that employment contracts for workers who work in breach of the *Migration Act* are valid and the *Fair Work Act* applies; and establish information sharing as between the Fair Work Office and the Department of Immigration and Border Protection, should not transpire, for instance, in regarding foreign nationals who have simply breached their employment-related visa conditions.

As migrant workers are often times vulnerable to being exploited and thus of concern where modern slavery is concerned, it is important to increase the effectiveness of federal policies to ensure that migrant exploitation is prevented, detected and sanctioned in line with international obligations flowing from the *Palermo Protocol*, but also more generally from international human rights law, including Article 8 of the International Covenant on Civil and Political Rights.

¹⁸ Productivity Commission, *Inquiry Report into the Workplace Relations Framework 2015*, 915.

¹⁹ See above, Section 5(ii).

It should be recognised that migrant workers – who have myriad motivations to work and remain in Australia – have regulations which limit their right to work and live in Australia, creating vulnerabilities which may be exploited. These vulnerabilities are linked to a range of factors tied to legislation, including:

- 1) As non-citizens, migrant workers are always at-risk of having to leave Australia, the impact of this on a range of visa holders (from the recently abolished 457 skilled visa, to student visas) is that employers and contractors have considerable power over these workers;
- 2) As non-citizens, migrant workers have the burden of time in seeking to find alternative work if they are in an employment situation that is unsuitable, intolerable or exploitative. This is a significant disincentive to workers to seek alternative work, and to try to remain in Australia;
- 3) It has been noted that regulation surrounding a range of working visa schemes (such as the 457 visas, and the Seasonal Worker Programme) creates opportunities for exploitation and that the protections that are in place, such as the Fair Work Ombudsman, are not readily accessed by these workers;²⁰ and
- 4) Finally, the most vulnerable workers are those who are working unlawfully, particularly those who do not enter Australia with work rights attached to their visa and who have not accessed an alternative visa with work rights attached.

It should be noted, as Segrave has argued recently, that the shifts in Australia to protect vulnerable migrant workers *do not* extend to those working unlawfully; rather such a system sustains the opportunity for employers and contractors to exploit with relative impunity migrant workers.²¹

ii) Need for Evidence-based Research

Professor Segrave and others have consistently noted and called on Australia to produce research which can contribute to evidence-based policy around the impact of Australia's counter-trafficking practices.²² There remains no means of determining or measuring this impact, and thus the need for the establishment of independent evaluation of policy approaches in this area and in regard to the move towards establishing a Modern Slavery Act in Australia would be welcomed.

²⁰ See Marie Segrave's work on Tongan experiences of the Seasonal Workers Programme as part of the broader study conducted with Tazreiter, Weber and Pickering, *Fluid Security in the Asia Pacific: Transnational Lives, Human Rights and State Control*, Hampshire: Palgrave MacMillan, 2015.

²¹ See Marie Segrave, "We need to hear the stories of exploited workers, not just deport them", *The Conversation*, 1 March 2017. Online: <https://theconversation.com/we-need-to-hear-the-stories-of-exploited-unlawful-migrant-workers-not-just-deport-them-73348>.

²² See Sanja Milivojević and Marie Segrave, "Evaluating responses to human trafficking: A review of international, regional and national counter-trafficking mechanisms", in Winterdyk et al. (eds), *Human Trafficking: Exploring the International Nature, Concerns, and Complexities*, CRC Press, USA, 2012, pp. 233-263; Marie Segrave and Sanja Milivojević, "Auditing the Australian response to trafficking", *Current Issues in Criminal Justice* 2010; and Marie Segrave, *The Conversation*, *ibid*.