31 July 2012

Senate Legal and Constitutional Affairs Committee
Via online submission

Dear Committee Secretary,

Re: Inquiry into the Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012

Thank you for the opportunity to make a submission to the above inquiry. I am a law student intern at the Migrant and Refugee Rights Project of the Australian Human Rights Centre, at UNSW Law School.

This submission addresses two key aspects of Australia's current legislation that are inconsistent with its obligations under the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons especially Women and Children, supplementing the UN Convention Against Transnational Organized Crime (2000) ('the Trafficking Protocol'). The Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012 remedies one of these inconsistencies, but one remains unaddressed.

AUSTRALIA'S INTERNATIONAL OBLIGATIONS

Australia has obligations in relation to trafficking in persons under the Trafficking Protocol. The Protocol commits State Parties to criminalise trafficking in persons,[1] take measures to protect and assist the victims of trafficking,[2] consider taking measures to permit victims to remain in their 'territory, temporarily or permanently, in appropriate cases,'[3] and establish comprehensive policies, programs and other measures to prevent trafficking and protect its victims (especially victims who are women or children).[4]

A BROADENED DEFINITION OF 'EXPLOITATION'

Article 5 of the Protocol requires States Parties to criminalise trafficking in persons. This provision has been described as a "central and mandatory obligation of all State

[1] Art 3 & 5.
[2] Art 6.
[3] Art 7.
[4] Art 9.

Parties."[5] Under the Trafficking Protocol exploitation "shall include, 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 the removal of organs removal of organs."[6] The *travaux preparatoires* indicate that this definition was left deliberately broad to ensure that other forms of exploitation would not be excluded by implication.[7]

Although states are not required to reproduce the definition of trafficking verbatim in their domestic legislation, offences should be defined in a manner consistent with the meaning of the Protocol and the intention of the Protocol drafters.[8]

The current level of criminalisation in Australia falls short of this standard as it limits 'exploitation' to situations of slavery, forced labour, sexual servitude or improper organ removal. Under the Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012 the definition of exploitation is expanded to include situations where the exploiter's conduct causes the victim to enter into slavery or a similar condition including, "but are not limited to,"[9] servitude and forced labour.[10] This broadening of the definition of exploitation aligns Australian legislation with the international definition of trafficking and satisfies Australia's obligation of criminalisation under the Trafficking Protocol.

> ***Recommendation 1:***
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> ***The broadened definition of exploitation under the Criminal Code to include all slavery-like practices should be adopted.***

NON-CRIMINALISATION OF VICTIMS

The bill falls short of its stated purpose to "better support and protect victims" in several key respects.[11] One of these is the failure to protect victims from criminal prosecution for offences related to the individual's status as a victim of trafficking.

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[5] United Nations Office on Drugs and Crime, *Legislative Guide for the Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime* (2002), [http://www.unodc.org/pdf/crime/legislative_guides/03%20Legislative%20guide_Trafficking%20in%20Persons%20Protocol.pdf] at 27 July 2012, ('the Legislative Guide'), at Part 2 para 36.
[6] Art 3(a).
[7] *Travaux Preparatoires for the Organized Crime Convention and Protocols*, [http://www.unodc.org/unodc/en/treaties/CTOC/travaux-preparatoires.html] at 16 May 2012, at 343, note 22 and at 344, note 30.
[8] Ibid.
[9] Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012 (Cth), s 271.1A.
[10] Ibid.
[11] Nicola Roxon, "Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012 Second Reading Speech", House of Representatives (30 May 2012), Parliamentary Debates, 6225

The present legislative framework makes no provision for the non-criminalisation of victims of trafficking where their offending relates directly to their status as a victim. For example there is no legislative safeguard against the prosecution of a victim of sex-trafficking for a soliciting offence. In addition to being inconsistent with the bill's purpose to protect vulnerable individuals, this omission is potentially inconsistent with Australia's international obligations. The UN Office of the High Commissioner for Human Rights' *Recommended Trafficking Principles and Guidelines on Human Rights and Trafficking* specifically address this issue, and recommend that state parties to the Trafficking Protocol provide that:

> "[T]rafficked 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."[12]

The importance of the non-criminalisation of victims of trafficking in relation to status-related offences has been repeatedly affirmed at an international level.[13]

> ***Recommendation 2:***
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> ***The Bill should be amended to provide for the non-criminalisation of victims of trafficking for offences directly related to their status as victims of trafficking.***

Thank you for your time in considering my submission.

Yours sincerely,

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[12] UN Office of the High Commissioner for Human Rights, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, 20 May 2002, [http://www.ohchr.org/Documents/Publications/Traffickingen.pdf] at 27 July 2012, Principle 7 at p. 1. Guideline 4.5 is concerned with prosecution of status-related offences with reference to the need for an adequate legal framework requiring States to consider ensuring "legislation prevents trafficked persons from being prosecuted, detained or punished for the illegality of their entry or residence or for the activities they are involved in as a direct consequence of their situation as trafficked persons."

[13] See for example: UN General Assembly, "Trafficking in Women and Girls," Jan. 30, 2009, at para 12; UN Human Rights Council, "Trafficking in Persons, Especially Women and Chidren," June 17, 2009, at para 3; UN General Assembly, "Trafficking in Women and Girls: Report of the Secretary-General," Aug. 4, 2008 at para 63; UN General Assembly, "Further Actions and Initiatives to Implement the Beijing Declaration and Platform for Action," Nov. 16, 2000 (Beijing +5 Outcome Document), at para 70(c). See further: Gallager (2010) Chapter 5 'Obligations of Protection and Support.'