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Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Dear Ms Julie Dennett,

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

1. Australian Lawyers for Human Rights (“ALHR”) thanks the Senate Legal and Constitutional Affairs Committee for the opportunity to comment on the Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012 (“**the Bill**” or “**this Bill**”).
2. ALHR was established in 1993. ALHR is a network of Australian law students and lawyers active in practising and promoting awareness of international human rights. ALHR has a national membership of over 2,000 people, with active National, State and Territory committees. Through training, information, submissions and networking, ALHR promotes the practice of human rights law in Australia. ALHR has extensive experience and expertise in the principles and practice of international law, and human rights law in Australia.
3. In summary, ALHR welcomes the Bill and generally supports the legislature’s efforts to revise and redraft certain existing trafficking offences and to finally recognise trafficking offences such as forced labour, forced marriage and harbouring a victim under domestic Australian law.

4. That said, ALHR does raise some concerns about certain shortcomings in the Bill, as compared with the obligations of States set out in various international instruments. To this end, ALHR makes some specific recommendations to redefine some terms under the Bill - such as the definitions for coercion and consent. ALHR also recommends changes for particular matters such as the matter of reparations. ALHR finally recommends that education programs for relevant communities and accessible support mechanisms are necessary to effectively implement the arrangements envisioned by this Bill.

5. Background

The Bill seeks to give effect to the *United Nations Convention against Transnational Organized Crime* (“**TOC**”), with specific reference to the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, supplementing the *United Nations Convention against Transnational Organized Crime* (“**Trafficking Protocol**”). Australia is a signatory to the Convention and these Protocols.

International law now provides that States must implement domestic legislation to make trafficking and related acts illegal.¹ States must identify trafficking offences, which involves identifying victims and offenders, and accordingly prosecute such offences.²

However, the very nature of trafficking makes it difficult to find accurate information, as trafficking is a covert operation handled by sophisticated organized criminal groups, and victims rarely come forward. From the limited information available, prosecutions are rare and it is inferred that the identification of trafficking offences by States is likewise a rarity. Indeed, a recent report from the United Nations Office of Drugs and Crime found low numbers of prosecutions³, and the U.S Government’s Trafficking in Persons Report in 2010 found only 6,017 prosecutions for trafficking offences worldwide, with fewer convictions and fewer victim identifications than in 2009.⁴ The Report also used information provided by NGOs and other community groups to find that the prosecution rate for sex trafficking is much higher than for other forms of trafficking, for example, forced labour.⁵

Regrettably, the existence of the Trafficking Protocol has not effected any decline in the occurrence of domestic or international trafficking.⁶ It follows that such offences have not been adequately prosecuted by States, or empowered bodies of the United Nations; that there are persons guilty of trafficking offences who have not been charged and/or convicted; and that the unlawful exploitation of victims continues despite the existence of laws to the contrary.

There is certainly a great deal of progress that needs to be made to fulfill the ideals set out in the international instruments but the proposed amendments go some way in addressing trafficking, slavery and slavery-like conditions in Australia.

¹ *Commentary to the United Nations Recommended Principles and Guidelines on Human Rights and Human Trafficking (Commentary to the Trafficking Principles and Guidelines)*, pp 185-192.

² *Commentary to the Trafficking Principles and Guidelines*, pp 185-192.

³ United Nations Office on Drugs and Crime, “Global Report of Trafficking in Persons,” (2009) available at: http://www.unodc.org/documents/Global_Report_on_TIP.pdf (viewed 15 July 2012).

⁴ U.S Department of State *Trafficking in Persons Report*, (2010), (U.S. TIP Report 2011).

⁵ See US TIP Report 2011.

⁶ See US Tip Report 2011.

The Australian Perspective

Australia ratified the TOC in 2004 and its supplementary Trafficking Protocol in 2005. Most recently, the federal legislature introduced the *Criminal Code Amendment (Trafficking in Persons Offences) Act 2005* (Cth) to comply with Australia's international obligations. Unlike the *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999* (Cth) which confined the meaning of "trafficking" in Australian domestic law to sexual servitude and slavery, the 2005 Act progressively broadened the meaning of "trafficking" to include forced labour and other forms of trafficking. Yet there were still many ways in which the legislation could have been improved.

The 2011 Trafficking in Persons report ("the TIP report"), completed by the United States of America State Department, gives a global view on trafficking around the world by comparing trafficking legislation across different countries. The 2011 TIP report on Australia⁷ found that, although Australia had tried to combat trafficking through its domestic legislation, there were problems with aspects of the legislation, in particular concerning people who are not moved from one place to another. The legislation also does not provide for lower levels of coercion or threats. There were also concerns about the fact that most of the prosecutions were related to sex slavery and not other forms of forced labour. This seems to be a universal concern with all trafficking instruments, internationally, regionally and domestically.

The first case in Australia to deal with slavery and the new domestic legislation enacted after the Protocol was the case of *The Queen v Tang*,⁸ in which the defendant was ultimately found guilty of slavery offences under s 270.3(1)(a) of the *Criminal Code Act 1995* (Cth). The decision relevantly highlights the interaction between international law and slavery in Australia.

The Bill goes some way in addressing these issues but not far enough. Perhaps a more abstract criticism of the Bill is that it tends to focus on trafficking in terms of "criminal prosecution" and "border patrol" rather than in terms of the "human rights" of both the victims and of those accused.

Overall, there are quite a few improvements that Australia needs to make to bring its laws into line with the purpose and intention of the international instruments and to effectively deal with trafficking and slavery in the region. However, as stated above, ALHR commends the current efforts to do so.

6. Establish new offences in the Criminal Code of forced labour, forced marriage, organ trafficking, and harbouring a victim

ALHR welcomes the inclusion of forced labour, forced marriage, organ trafficking and harbouring a victim. All these offences are relevant and important offences relating to trafficking and slavery and now make it easier for law-enforcement bodies to identify victims and prosecute these offences.

The new offence of harbouring a victim is especially welcomed as it is an important part of the Trafficking Protocol and addresses the issue found in the US TIP Report which

⁷ US Department of State, *Trafficking in Persons Report* - Australia, June 2011, available at <http://www.state.gov/g/tip/rls/tiprpt/2011/164231.htm> (viewed 23 July 2012).

⁸ *The Queen V Tang* (2008) 237 CLR 1.

highlighted difficulties in prosecuting the enslavement of victims who are not moved from one place to another.

With respect to “forced marriage”, ALHR considers that the phrase “forced marriage” might be replaced with the phrase “marriage migration” as used in the Trafficking Protocol, as “marriage migration” covers many more possible offences than simply forced marriage.

7. Seek to ensure that the slavery offence applies to conduct which renders a person a slave, as well as conduct involving a person who is already a slave

ALHR supports this amendment. ALHR considers that the criminalisation of conduct which renders a person a slave gives due weight to the absolute right to freedom from slavery and forced labour contained in Article 8 of the *International Covenant on Civil and Political Rights*, as well as the provisions of the TOC and the Trafficking Protocol.⁹ ALHR otherwise further commends the *preventative* value afforded by the provision in that persons guilty of the crime may be charged accordingly before a victim must suffer any harm.

ALHR otherwise reserves its comments regarding the consequential amendments under the *Telecommunications (Interception and Access) Act 1979* (Cth) (as foreshadowed in the Explanatory Memoranda to this Bill) until such amendments are proposed.

8. Extend the application of the existing offences of deceptive recruiting and sexual servitude so they apply to non-sexual servitude and all forms of deceptive recruiting

ALHR supports the spirit of this amendment but considers that some further amendments might be appropriate. The Bill creates liability from the “means” of the offence, as required by the Trafficking Protocol. However, ALHR agrees with the submission of the Castan Centre for Human Rights Law in regard to this Bill in that there is no explicit reference to “trafficking” in the Bill,¹⁰ which weakens the amendment considerably.

Article 3 of the Trafficking Protocol defines human trafficking. It states that “trafficking in persons”:

- a) Shall mean the 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 the 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, for the purpose of exploitation. 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;

⁹ See also: the *Convention on the Rights of Persons with Disabilities*, Article 27, the *International Covenant on Economic, Social and Cultural Rights*, Article 7 and the *Convention on the Rights of the Child*, Articles 19 and 32.

¹⁰ Submission of the Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012, Professor Susan Kneebone and Aderajew Teshome on behalf of the Castan Centre for Human Rights Law, 31 July 2012, Submission 10.

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

(c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in subparagraph (a) of this article;

(d) “Child” shall mean any person under eighteen years of age.

A definition of trafficking such as this should be included in the Bill to fully give effect to Australia’s obligations under this Protocol and other applicable international instruments.

9. Increase the penalties applicable to the existing debt bondage offences, to ensure they are in line with the serious nature of the offences

ALHR supports the increased penalties to the existing debt bondage offences contain in section 271.8 of the Criminal Code from 12 months to 4 years as this better reflects serious nature of such an offence and supports victims’ rights.¹¹

10. Broaden the definition of exploitation under the Criminal Code to include all slavery-like practices

ALHR supports this amendment but also endorses the submission from Women’s Legal Centre (ACT & Region) which highlights the importance of effectively prosecuting slavery or servitude when it occurs in an intimate relationship and that the bill needs specific reference to include intimate relationships with the slavery and servitude offences.¹²

11. Amend the existing definitions to ensure the broadest range of exploitative conduct is criminalised by the offences, including psychological oppression and the abuse of power or taking advantage of a person's vulnerability

ALHR commends this amendment as it is one aspect of the Bill which actually acknowledges the importance of human rights issues of trafficking, rather than merely addressing issues of crime and boarder control.¹³

ALHR also supports this amendment as it further encapsulates the complex nature of trafficking and slavery. However, ALHR recommends that the Criminal Code make it explicit that consent for a victim of trafficking is not relevant when coercion, force or

¹¹ See United Nations, Report of the Special Rapporteur on Contemporary Forms of Slavery, Including its Causes and Consequences, Gulnara Shahinan (2010). http://www2.ohchr.org/english/issues/slavery/rapporteur/docs/A.HRC.15.20_EN.pdf.

¹² Women’s Legal Centre (ACT & Region), Submission to *Inquiry into the Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012*, available at http://aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=legcon_ctte/slavery_and_people_trafficking/submissions.htm (viewed 31 July 2012).

¹³ Anne Gallagher, Trafficking, smuggling and human rights: tricks and treaties 12 FRM 25.

deception has been used, as discussed in point 7. ALHR views that this will bring Australia into line with its international obligations.

12. ALHR recommends further availability of reparations to victims such as the establishment of a federal compensation scheme

ALHR strongly supports the increased availability of reparations to victims, in particular, allowing a victim to be awarded reparations for loss suffered as a result of criminal conduct, even if the loss was not a direct result of that conduct. The crimes of human trafficking, organ trafficking, forced labour, slavery, servitude and other offences associated with this bill are damaging to victims but also to the fabric of society.

The UN Special Rapporteur on trafficking in persons, especially, in women and children conducted a country visit to Australia at the end of 2011. In her final report, she made several recommendations to the Australian Government which ALHR endorses. In particular with relation to reparations, while the proposed amendment is supported, further work could be done. For example, in the Special Rapporteur's final recommendation, it was suggested that Australia should 'strengthen criminal justice capacity to identify and confiscate assets and proceeds of trafficking-related crimes, and develop mechanisms and procedures to enable assets and proceeds to be used for continuing support to victims of trafficking.'¹⁴ This is important because currently a reparations order is discretionary and also it is provided by the offender, who often may not have funds.

ALHR commends the Special Rapporteur's recommendation that the reparations clause explicitly include reference to non-economic loss such as pain and suffering.¹⁵

ALHR also supports a federal compensation scheme as this would give full effect to the obligations under the Trafficking Protocol as, currently, victims would have to seek compensation under the various state and territory schemes which all differ.

13. ALHR recommends that non-criminalisation of victims be included

Immunity from prosecution is important in supporting the rights of victims as established in the UN Trafficking Protocol and also the UNODC *Model Law against Trafficking in Persons*.¹⁶ ALHR recommends that a new clause be inserted that ensures trafficking victims cannot be prosecuted for offences directly related to their status as a trafficking victim.

14. ALHR recommends that victims have access to appropriate and effective migration options

Although outside the scope of this Bill, ALHR notes that victims of trafficking, slavery and other similar offences are often in Australia unlawfully. ALHR notes that the Government does provide visa options for trafficked victims in particular circumstances

¹⁴ *Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo*, UN Doc A/HRC/20/18/Add.1, para 82(h) available at <http://www.ohchr.org/EN/Issues/Trafficking/Pages/Visits.aspx> (viewed 31 July 2012)

¹⁵ *Ibid*, para 62.

¹⁶ UNODC Model Law Against Trafficking in Persons (2009), 22 available at www.unodc.org/unodc/en/frontpage/2009/July/model-law-on-trafficking-in-persons-.html

and also witness protection and criminal justice visas. However, these visas often leave the victim in a state of limbo and are dependent of the victim being identified as a victim of trafficking by the Australian Federal Police (“AFP”) and also in assisting in the prosecution process.¹⁷

ALHR recommends that all victims of trafficking be able to access permanent visa options, regardless of whether they were identified by AFP (for example they could be identified by support services, or other organisations or come forward and then be verified by the Department of Immigration and Citizenship (“DIAC”) or the AFP), and also regardless of whether they decide to participate in the criminal justice process. Further, ALHR recommends that permanent visa options be accessible for those victims of slavery, forced marriage, forced labour and other offences identified in this Bill where appropriate. This would reflect their status as a victim as identified in the Trafficking Protocol, in particular, under Articles 6 and 7 of the Protocol. ALHR also endorses the recommendations made in the submission of the Law Council of Australia on this Bill which also highlights concern that the current visa framework is insufficient to deal with trafficking.¹⁸

15. ALHR recommends that appropriate and effective education be provided

ALHR recommends that effective and appropriate education must be provided for victims, law enforcement, members of the judiciary, community organisations and other relevant service providers. In particular, with relation to education and awareness around forced marriages, appropriate cultural awareness must be integrated, as victims are from diverse backgrounds and there will be potential accessibility issues in terms of language and cultural aspects. As such, ALHR recommends that education is provided in different languages and also that support services such as accommodation are appropriate for various cultural groups. As an example, the Special Rapporteur’s final report found that victims found it difficult to access appropriate accommodation.¹⁹ Another particular target group that the Special Rapporteur found was international students²⁰ and ALHR submits that education and awareness raising is targeted at this group too.

This recommendation is extremely important not only in dealing with the effects of trafficking, slavery, forced labour and marriage but also in preventing these abhorrent crimes, given the secretive nature of these crimes and also the concern that victims are often not able to access assistance including because of cultural and language barriers. ALHR recommends the example found in the Special Rapporteur’s final report that local councils place signs in multiple languages present at brothels explaining rights of workers, as required in Yarra and Maribyrnong in Victoria.²¹ This could also be done at universities, community centres and other places at which affected groups might be found.

16. If you would like to discuss any aspect of this submission, please contact Stephen Keim,

¹⁷ *Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo*, UN Doc A/HRC/20/18/Add.1, paras 49-58 available at <http://www.ohchr.org/EN/Issues/Trafficking/Pages/Visits.aspx> (viewed 31 July 2012)

¹⁸ Submission of the Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012, Law Council of Australia, 1 August 2012, Submission 21. See paras 138-145.

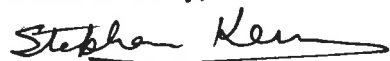
¹⁹ *Ibid*, para 55.

²⁰ *Ibid*, para 16.

²¹ *Ibid*, para 32.

President on 0433 846 518 or email: s.keim@higginschambers.com.au

Yours faithfully,

A handwritten signature in black ink that reads "Stephen Keim". The signature is fluid and cursive, with a long horizontal stroke extending from the end of the name.

Stephen Keim SC

President

Australian Lawyers for Human Rights

Contributors: Gayatri Nair, Jamie Nuich