

Report on

# ESTABLISHING A NATIONAL COMPENSATION SCHEME

*for Victims of Commonwealth Crime*

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## PURPOSE OF THE REPORT

Over a number of years, commencing in 2008 with a call from now President-Elect of the Law Council of Australia (**LCA**), Fiona McLeod SC, both the LCA and Anti-Slavery Australia (**ASA**) have advocated for improvements in legislation and policy for survivors of human trafficking, slavery and slavery-like offences. The purpose of this Report is to set out the proposal to establish a national compensation scheme for survivors of human trafficking, slavery and slavery-like practices.

The Report draws on research, advocacy and experiences of the LCA and ASA in relation to trafficked people, including people who have experienced slavery, and slavery-like practices, such as forced marriage. The LCA and ASA consider it essential to establish a national response to compensation for people who have experienced human trafficking, slavery, and slavery-like practices. Importantly, there is no current form of redress at a national level for these Federal offences, and as such offences have no State or Territory equivalent, State and Territory schemes offer inadequate redress.

This Report is structured to:

- set out a brief overview of the existing schemes in Australia; and
- outline key issues in establishing a national compensation scheme.

For ease of reference, this Report will use the terms 'trafficked people' and 'human trafficking' to encompass the range of human trafficking, slavery and slavery-like practices and offences in the *Criminal Code Act 1995* (Cth), including servitude, forced labour, deceptive recruiting for labour services, forced marriage and debt bondage.

This Report will also use the term 'survivor' to refer to people who have been subject to human trafficking, rather than 'victim'. This is consistent with a rights-based model. However, when discussing policy and legislation, the term 'victim' has been used to reflect the terminology used in the legal apparatus.

## ACKNOWLEDGEMENTS

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# BACKGROUND

## THE INADEQUACY OF THE CURRENT FRAMEWORK

Currently in Australia, statutory victims' compensation schemes are provided by each of the eight States and Territories, and trafficked people may, in limited circumstances, have access to these schemes. However, these schemes are not designed to provide a remedy to victims of Federal offences against the person. The LCA and ASA therefore consider that these schemes are an inadequate form of redress for trafficked people.

State and Territory schemes differ in respect of categories of harm, time limits and levels of award. Under the existing schemes, the amount of compensation available to trafficked people in Australia varies, such that a victim could receive less than \$10,000<sup>1</sup> as a recognition payment in certain jurisdictions, but up to \$100,000 in other jurisdictions, including payments additional to the general recognition payment,<sup>2</sup> depending on the State or Territory in which the offence(s) takes place and the type of offence(s).

Trafficked people who have been moved between State and Territory can only apply for compensation relating to the harm that they suffered whilst in a specific State or Territory. The consequence is that victims of crime in multiple States or Territories will be required to make multiple applications for statutory compensation.<sup>3</sup> State or Territory schemes fail to recognise the offences of forced labour, forced marriage and debt bondage,<sup>4</sup> leaving victims of these crimes without access to statutory victims' compensation schemes.

Inconsistencies between the State and Territory compensation frameworks, and the lack of a coordinated Federal approach to compensation, is an impediment to trafficked people obtaining fair, effective and timely access to justice, and departs from international best practice.

## INTERNATIONAL LAW

Australia has obligations under various international instruments to ensure the availability of compensation for survivors of trafficking and other human rights abuses. These include:

- the *United Nations Convention Against Transnational Organized Crime*, which requires State parties to 'establish appropriate procedures to provide access to compensation and reparation for victims';<sup>5</sup>
- the *United Nations Convention against torture and other cruel, inhuman or degrading treatment or punishment*, which requires State parties to ensure victims of torture are able 'to obtain redress and [have] an enforceable right to fair and adequate compensation';<sup>6</sup>
- the *United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*, which requires States to ensure that victims of trafficking have the 'possibility of obtaining compensation for damage suffered';<sup>7</sup>
- the United Nations (UN) *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (the Declaration)*, which urges Member States to ensure that 'when compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation.'<sup>8</sup> The Declaration extends obligations of compensation toward family members of persons who have died or become incapacitated due to victimisation. It further encourages States to pursue the 'establishment, strengthening and expansion of national funds for compensation';<sup>9</sup>

1 *Victims Rights and Support Regulation 2013* (NSW) reg 12(c). See also the newly introduced *Victims of Crime (Financial Assistance) Regulations 2016* (ACT), which provides that victims of certain offences may receive as little as \$1,000 for a general recognition payment.

2 *Victims of Crime Assistance Act 2009* (QLD) s 38(1); *Criminal Injuries Compensation Act 2003* (WA) s 31(1).

3 Frances Simmons, 'Making Possibilities Realities: Compensation for Trafficked People' [2012] 34 *Sydney Law Review* 511, 529.

4 *Ibid* 533.

5 *United Nations Convention against Transnational Organized Crime*, opened for signature 15 December 2000, 2225 UNTS 209 (entered into force 29 September 2003) art 25(2).

6 *Convention against torture and other cruel, inhuman or degrading treatment or punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) art 14(1).

7 *United Nations Convention against Transnational Organized Crime*, GA Res 55/25, UN GAOR, 55th sess, 62nd mtg, Agenda item 105, Supp No 49, UN Doc A/RES/55/25 (entered into force 8 January 2001), Annex II art 6(6).

8 *United Nations Declaration on the Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res 40/34, UN GAOR, 3rd Comm, 40th sess, 96th plen mtg, agenda item 98, Supp No 53, UN Doc A/RES/40/34 (entered into force 29 November 1985) art 12.

9 *Ibid*, art 13.

- the *International Covenant on Civil and Political Rights* outlines that where the violation of an individual's rights occurs, the victim has a human right to an 'effective remedy';<sup>10</sup> and
- the *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*, which requires that States take all measures to suppress all forms of trafficking in women.<sup>11</sup> In its concluding observations regarding Australia in 2010, the CEDAW Committee specifically requested Australia to 'include in its next report information on civil proceedings for provision of access to compensation for victims, the number of cases and the amount of compensation awarded'.<sup>12</sup> The Australian Government's follow-up report to the CEDAW Committee noted that the amendments to the Commonwealth Criminal Code would 'improve the ability of all individuals, including women, to access reparations where they are the victims of a Commonwealth offence such as people trafficking and slavery'.<sup>13</sup>

Other international instruments provide guidance on key standards agreed upon in international law on the right to an effective remedy for trafficked people:

- the *UN Recommended Principles and Guidelines on Human Rights and Human Trafficking*;<sup>14</sup>
- the *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*;<sup>15</sup>
- the *UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*;<sup>16</sup>
- the *Convention for the Protection of Human Rights and Fundamental Freedoms*;<sup>17</sup>
- the *American Convention on Human Rights*;<sup>18</sup>
- the International Labour Organization *Protocol of 2014 to the Forced Labour Convention, 1930*;<sup>19</sup>
- the *Council of Europe Convention on Action against Trafficking in Human Beings and its Explanatory Report*;<sup>20</sup>
- the *Convention relating to the Status of Refugees*;<sup>21</sup>
- the UN Human Rights Council Resolution concerning *Trafficking in persons, especially women and children: access to effective remedies for trafficked persons and their right to an effective remedy for human rights violations*;<sup>22</sup>

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10 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 2.

11 *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) art 6.

12 Committee on the Elimination of Discrimination Against Women, *Concluding observations of the Committee on the Elimination of Discrimination against Women*, 46th sess, 935th and 936th mtg, UN Doc CEDAW/C/AUS/CO/7 (12 – 30 July 2010) [31].

13 Committee on the Elimination of Discrimination Against Women, *Concluding observations on the combined sixth and seventh periodic reports of Australia- Addendum: Information provided by Australia on the follow-up to the concluding observations of the Committee*, 46th sess, 935th and 936th mtg, UN Doc CEDAW/C/AUS/CO/7 (12 – 30 July 2010) [110].

14 *Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council – Addendum – Recommended Principles and Guidelines on Human Rights and Human Trafficking*, UN ESCOR, 2002 substantive session, Agenda Item 14(g), UN Doc E/2002/68/Add.1 (20 May 2002).

15 *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res 61/147, UN GAOR, 3rd Comm, 60th sess, 64th plen mtg, Agenda Item 71 (a), UN Doc A/RES/60/147 (21 March 2006).

16 *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, opened for signature 18 December 1990, 2220 UNTS 3 (entered into force 1 July 2003).

17 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

18 *American Convention on Human Rights: "Pact of San José, Costa Rica"*, opened for signature 22 November 1969, 1144 UNTS 144 (entered into force 18 July 1978).

19 *Protocol of 2014 to the Forced Labour Convention, 1930*, opened for signature 11 June 2014, ILM (not yet in force).

20 *Council of Europe Convention on Action against Trafficking in Human Beings and its Explanatory Report*, opened for signature 16 May 2005, CETS No 197 (entered into force 1 February 2008).

21 *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 138 (entered into force 22 April 1954).

22 United Nations Human Rights Council ("HRC"), *Trafficking in persons, especially women and children: access to effective remedies for trafficked persons and their right to an effective remedy for human rights violations*, HRC Res 20/1, UN HRCOR, 20th sess, Agenda Item 3, UN Doc A/HRC/RES/20/1 (18 July 2012).

- *Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA*;<sup>23</sup>
- the UN Refugee Agency *Guidelines on International Protection: The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked*;<sup>24</sup>
- the *UNICEF Guidelines on the Protection of Child Victims of Trafficking*;<sup>25</sup> and
- the International Labour Organization *Forced Labour (Supplementary Measures) Recommendation, 2014 (No. 203)*.<sup>26</sup>

It is also significant to note the recommendations of Joy Ngozi Ezeilo, the former UN Special Rapporteur on trafficking in persons, especially women and children, following her visit to Australia in November 2011. In the report, the UN Special Rapporteur noted that Australia has international law obligations to provide survivors of human trafficking with access to effective remedies, and that the establishment of a comprehensive national framework for victim's compensation would be in accordance with such obligations.<sup>27</sup> The UN Special Rapporteur therefore recommended that the Australian Government '[e]stablish, at the federal level, a comprehensive compensation scheme for survivors of trafficking'.<sup>28</sup>

The Agreed Conclusions from the 60th session of the UN Commission on the Status of Women also recognises the need to address the specific needs and issues of women subjected to trafficking and forced marriages.

Furthermore, the 2011 Universal Periodic Review of Australia included a recommendation from the Philippines for the Australian Government to '[c]onsider using the [Office of the High Commissioner for Human Rights (**OHCHR**)]'s *Recommended Principles and Guidelines on Human Rights and Human Trafficking* as a guide in its anti-trafficking measures'.<sup>29</sup> The OHCHR guidelines provide that '[c]onsideration should be given to the establishment of a compensation fund for victims of trafficking and the use of confiscated assets to finance such a fund'.<sup>30</sup> Similarly, the 2015 Universal Periodic Review of Australia included a recommendation from Lithuania for the Australian Government to '[i]mprove coordination on trafficking, the monitoring of the implementation of anti-trafficking legislation, ensure the rights of victims are protected, including the right to redress and economic and social support'.<sup>31</sup>

In addition, the Australian Government's *National Action Plan to Combat Human Trafficking and Slavery 2015-2019* clearly identifies the need to provide Australia's trafficked people with access to compensation. Prosecution and Compliance Goal Four includes the following as action items:

- provide trafficked people with information on the availability of compensation and reparation;<sup>32</sup> and
- provide trafficked people with the opportunity to access victims of crime financial assistance schemes irrespective of their nationality and whether an offender has been convicted, including, '[c]ontinu[ing] to monitor the possible need for a federal victims of crime financial assistance scheme'.<sup>33</sup>

23 *Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA* [2011] OJ L 101/1.

24 Office of the United Nations High Commissioner for Refugees, *Guidelines on International Protection: The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked*, UN Doc HCR/GIP/06/07 (7 April 2006).

25 United Nations Children's Emergency Fund, *UNICEF Guidelines on the Protection of Child Victims of Trafficking* (UNICEF, version 2.1, September 2006).

26 *Forced Labour (Supplementary Measures) Recommendation, 2014 (No. 203)*, opened for signature 11 June 2014, ILM.

27 Joy Ngozi Ezeilo, Special Rapporteur, *Report of the Special Rapporteur on trafficking in persons, especially women and children*, UN Doc A/HRC/20/18 (18 May 2012) [64].

28 *Ibid.*, [82(g)].

29 United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Australia*, 17th sess, Agenda item 6, UN Doc A/HRC/17/10 (24 March 2011) [86.85].

30 *Above n 14*, 6[4].

31 United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Australia*, 31st sess, Agenda item 6, UN Doc A/HRC/31/14 (13 January 2016) [136.230].

32 Commonwealth of Australia, *National Action Plan to Combat Human Trafficking and Slavery 2015 -19* (2014), Goal 4, Item 72.1.

33 *Ibid.*, Item 43.2.

# ISSUE 1:

## PROPOSED MODELS FOR A NATIONAL COMPENSATION SCHEME

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### 1.1 FEDERAL OFFENCES RELATING TO THE PERSON

Historically, crimes against the person have fallen within State and Territory jurisdiction. Recently, the Commonwealth has legislated for offences in the area of crimes against the person.<sup>34</sup> It has become clear that it is timely to establish a national victims' compensation scheme, to fairly and equitably compensate victims of Federal offences, rather than requiring victims of these offences to rely on inconsistent State and Territory schemes.

### 1.2 A TARGETED FEDERAL SCHEME TO PROVIDE REDRESS FOR VICTIMS OF FEDERAL OFFENCES

ASA observes that there are two models for national victims' compensation schemes: the *Australian Victims of Overseas Terrorism Payments Scheme (AVTOP)* and the *Defence Abuse Reparation Scheme (DARS)*. The LCA and ASA consider that both of these national schemes set out mechanisms for effective pathways to compensation and remedies to victims, without the need for an admission of liability by the Commonwealth. Payments under these schemes are not categorised as compensation, despite the fact that the schemes effectively fulfil the purpose of compensating people for harm or injury. Categorising payments in this way makes it easier for survivors to access the payment, since there is no need to prove liability (which is required for statutory compensation). For example, the DARS does not require a legal burden of proof to be met before a payment is made.<sup>35</sup> A payment under the DARS is an acknowledgment of the fact that abuse, in itself, is wrong. Similarly, a national scheme for trafficked people could make payments on the basis that human trafficking is inherently wrong, thereby carrying a lower burden of proof than the usual criminal or civil standard. This characterisation also allows victims to receive payment even if they do not know the identity of their trafficker or associated persons.

ASA further notes that these schemes are designed so that money received will not necessarily reduce the ability of a recipient to access social security benefits. Under the AVTOP, payments do not count as part of a person's liquid assets for social security purposes.<sup>36</sup> A Reparation Payment under the DARS is an 'exempt lump sum' for the purposes of income testing, so it does not affect the receiver's entitlement to social security benefits.<sup>37</sup> A proposed national compensation scheme for trafficked people could contain similar exemptions, to ensure that recipients of payments are not prevented from accessing social security benefits. The AVTOP is capped at \$75,000.<sup>38</sup> The DARS is capped at \$50,000.<sup>39</sup> These amounts could provide guidance for a reasonable cap on the proposed national compensation scheme. The highest amount payable through existing State and Territory victims' compensation schemes is \$100,000, which is the maximum amount offered in Queensland and Western Australia.<sup>40</sup> The LCA and ASA consider that an appropriate cap on the compensation award would be in the range of this figure.

Feedback from the CSOs supports the conclusion reached by ASA and the LCA that a targeted Federal compensation scheme is the best method of providing an effective remedy for trafficked people.

The LCA and ASA suggest that the Attorney-General's Department may be the appropriate agency to administer and monitor the scheme. This department already has specialist legal knowledge, which would be well suited to the effective administration of the scheme.

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34 Law Council of Australia, Submission to the Attorney-General's Department, *Consultation on the Criminal Justice Response to Slavery and People Trafficking: Reparation and Vulnerable Witness Protections*, 3 March 2011, [117].

35 Anti-Slavery Australia, Supplementary submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade in relation to the *Inquiry into Slavery, Slavery-like Conditions and People Trafficking* (31 May 2013).

36 *Social Security Act 1991* (Cth) s 14A(1)(db).

37 Australian Government Defence Abuse Response Taskforce, 'Financial Impact of Receiving a Reparation Payment' (Fact sheet, 2013) [www.defenceabusetaskforce.gov.au/Outcomes/Documents/Financial%20impact%20of%20receiving%20a%20reparation%20payment.pdf](http://www.defenceabusetaskforce.gov.au/Outcomes/Documents/Financial%20impact%20of%20receiving%20a%20reparation%20payment.pdf).

38 *Social Security Act 1991* (Cth) s 1061PAD-E.

39 Australian Government, 'Defence Abuse Reparation Scheme Guidelines', 12. The most serious category of abuse (Category 4) carries a maximum payment of \$45,000. An additional \$5,000 may be awarded where there has been mismanagement of the issue by Defence.

40 *Victims of Crime Assistance Act 2009* (QLD) s 38(1); *Criminal Injuries Compensation Act 2003* (WA) s 31(1).

### 1.3 AMENDING COMMONWEALTH LEGISLATION CONCERNING REPARATION ORDERS

Under section 21B of the *Crimes Act 1914* (Cth) (**the Crimes Act**), there exists a mechanism for the court to issue reparation orders. These are court orders which may be imposed on a convicted offender of a Federal offence to make direct reparations, by way of monetary payment or otherwise, to the victim of the offence.<sup>41</sup>

The difficulty with this mechanism is that it requires a successful prosecution of a trafficking offence, leading to a conviction. In the area of human trafficking, there have been a low number of cases which have proceeded to prosecution, and since the introduction of Divisions 270 and 271 of the Criminal Code, only 18 of these cases have resulted in a criminal conviction.<sup>42</sup> The LCA and ASA are unaware of any case where an application for reparation orders under section 21B of the Crimes Act has been sought in the context of proceedings relating to human trafficking. This demonstrates that reparation orders are an unlikely remedy for trafficked people under the current framework.

The procedures relating to reparation applications and adjudication of applications also lacks clarity, particularly with respect to the manner in which applications should be made.

Furthermore, there is no guarantee that any orders will be made – reparation orders are discretionary and dependent on the financial capacity of the offender to make reparations.<sup>43</sup>

By way of comparison, in the United Kingdom (**UK**), reparation orders complement the national compensation scheme. A trafficked person can receive a reparation order under the *Modern Slavery Act 2015* (UK),<sup>44</sup> or compensation under the *Criminal Injuries Compensation Scheme (CICS)*. A person cannot receive both a reparation order and a compensation order for the same offence. The UK approach recognises that although reparation orders are not suitable as the only remedy for survivors of trafficking, they remain a useful avenue in situations where the defendant has been identified, convicted, and has sufficient assets to be able to pay for the harm caused. Further discussion of the UK model can be found at Section 1.5 below.

While the reparation provision in the Crimes Act<sup>45</sup> will not apply to many cases of human trafficking in Australia, the LCA and ASA consider that this mechanism should be retained with the introduction of a national victims' compensation scheme to ensure that trafficked people are not restricted in their ability to access assistance. The Commonwealth Director of Public Prosecutions and the Attorney-General's Department should consider developing guidelines to clarify the reparations application process including streamlining adjudication procedures.

### 1.4 INTERACTION WITH EXISTING STATE AND TERRITORY SCHEMES

It is not intended that a national compensation scheme replace the existing State or Territory statutory victims of crime compensation schemes. The LCA and ASA consider that trafficked people should have the option of pursuing a compensation claim through one or more of these compensation avenues, where appropriate. Currently, State and Territory victims' compensation schemes are limited to State and Territory offences and / or acts of violence, such as sexual assault. This therefore precludes eligibility for compensation where an offence or act of violence cannot be proved. For example:

- in New South Wales, the victim must have been subject to an act of violence including having suffered an injury as a result; and victims will not be eligible if the act of violence occurred while the victim was engaged in behaviour constituting an offence; and
- in South Australia, while it is not necessary for an offence to be admitted or proved beyond reasonable doubt in court proceedings, if this has not occurred, a victim is only eligible if the commission of the offence is admitted in statutory proceedings or can be reasonably inferred from admissions made in such proceedings.<sup>46</sup>

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41 *Crimes Act 1914* (Cth) s 21B.

42 Australian Government, *Trafficking in Persons: The Australian Government Response* (1 July 2014-30 June 2015), 28.

43 Law Council of Australia, above n 34, [107]-[109].

44 *Modern Slavery Act 2015* (UK) s 8.

45 *Crimes Act 1914* (Cth) s 21B.

46 A comparison of State and Territory schemes, carried out by Jones Day for the purposes of this Report, can be provided upon request.

The proposed national compensation scheme would be limited to Federal offences under the Commonwealth Criminal Code, such as forced labour or forced marriage. Although the victim may have access to several remedies, there would be no duplication of compensation claims for the same offence under State, Territory and Federal jurisdictions. However, the earlier payment of compensation should be taken account in the consideration of an amount under a national scheme, as discussed further below.

The LCA and ASA acknowledge the important role that the States and Territories currently play in offering remedies and support to survivors of trafficking, and applaud their efforts in combating this difficult issue. However, as some of the responses noted, human trafficking and slavery are unique offences, falling within the responsibility of the Commonwealth Government. A national scheme would promote consistency and fairness, instead of offering different remedies to survivors based on the arbitrary criterion of which State or Territory the Federal offence was committed in. Further, as noted above, the proposed scheme is designed to neither duplicate nor replace existing victims' compensation schemes, but rather to complement these schemes.

## 1.5 INTERNATIONAL COMPARISON

In the UK, the CICS compensates victims of violent crime.<sup>47</sup> In order to qualify, a person must have suffered a personal injury while in England, Scotland or Wales.<sup>48</sup> An application must be made within two years of the crime occurring.<sup>49</sup> Human trafficking offences are covered by the CICS. The decision to award compensation under the CICS is based on the balance of probabilities, which is the civil standard of proof. This is lower than the criminal 'beyond reasonable doubt' standard, so a person may be entitled to receive compensation even where there is not enough evidence to secure a conviction against the perpetrator. This lower standard of proof is used as it can be notoriously difficult to obtain convictions, particularly in the area of human trafficking. The CICS sets out detailed guidelines over the types of injuries that can be claimed (including psychological harm and loss of earnings) and those factors that will reduce the amount of compensation payable (including the conduct of the victim, or failure to cooperate). The CICS is broad, comprehensive and somewhat rigid because it covers all kinds of criminal injuries.

In Australia, a scheme that specifically addresses human trafficking may allow more appropriate treatment of trafficked people, who may, for example, be traumatised and unwilling to engage with police. The LCA and ASA consider that victims should not be penalised for their failure to engage with the authorities.

## ISSUE 2: FUNDING A NATIONAL SCHEME

### 2.1 QUANTUM OF PAYMENT

Between 2004 and 2015, the Australian Federal Police (**AFP**) received 619 referrals for human trafficking and slavery-related offences, including 118 new referrals in 2014-15 alone. The LCA and ASA note that human trafficking is covert by nature, making it difficult to identify. Although these numbers can be used to give a rough indication of the scale of a national compensation scheme, it is likely that the actual number of trafficked people is higher than the number of referrals to the AFP.

As stated above, the LCA and ASA consider that an appropriate cap on the compensation award would preferably be in line with the \$100,000 maximum offered in Queensland and the Western Australia.<sup>50</sup> The DARS and the AVTOP scheme also provide useful indicators of potential payment amounts, with \$50,000 and \$75,000 maximum amounts respectively.

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47 Ministry of Justice, *Criminal Injuries Compensation Scheme 2012* [4]. The scheme is laid before the UK Parliament pursuant to s 11(1) of the Criminal Injuries Compensation Act 1995 (UK).

48 Ibid [8].

49 Ibid [87].

50 *Victims of Crime Assistance Act 2009* (QLD) s 38(1); *Criminal Injuries Compensation Act 2003* (WA) s 31(1).

## 2.2 USING PROCEEDS OF CRIME

All Australian jurisdictions, at Federal, State and Territory levels have laws enabling the confiscation of proceeds of crime. Confiscated assets are already expressly used for victims' support and assistance in most jurisdictions. For example, between 2013 and 2014, the total money recovered under the *Proceeds of Crime Act 2002* (Cth) (**POC Act**) was \$4,860,009.<sup>51</sup> Approximately \$1,000,000 was recovered over the same period in New South Wales.<sup>52</sup>

Confiscated proceeds of crime are used at a Federal level to provide for funding projects aimed at crime prevention and law enforcement. However, the current Commonwealth scheme does not allow for a direct payment to be made to an individual victim. Furthermore, feedback from CSOs on the question of funding has raised concerns that using the proceeds of crime to fund a large-scale national scheme would drain money away from other projects.

## 2.3 CONSTITUTIONAL ISSUES IN LEGISLATING FOR A NATIONAL COMPENSATION SCHEME

In establishing any fund at a Commonwealth level through legislation, it is necessary to consider the constitutionality of such a proposal. In accordance with *Pape v Commissioner of Taxation*,<sup>53</sup> *Williams v Commonwealth*<sup>54</sup> and *Williams v Commonwealth*,<sup>55</sup> the Commonwealth can make payments to individuals if:

- there is Commonwealth legislation that authorises the making of those payments; and
- there is an appropriate Constitutional head of power supporting the legislation.

Any legislation must be drafted so that:

- the payments being authorised by the legislation bear some relationship to the Constitutional head of power supporting the legislation;
- the manner in which survivors' claims are processed is set out in detail (e.g. whether an agency is to be established to administer claims or whether that is to be undertaken by the courts, and the terms on which payments should be made); and
- the parliament has a method of reviewing the payments being authorised.

Allens Linklaters have proposed that the appropriate heads of power which underpin the POC Act and those of Commonwealth offences may also be used to support legislation for a national compensation scheme. These heads of power are:

- the external affairs power;<sup>56</sup>
- the express incidental power;<sup>57</sup>
- the implied incidental power;<sup>58</sup> and
- the executive power.<sup>59</sup>

The High Court's expansive approach to the external affairs power may provide appropriate support with respect to establishing a fund for the crimes of human trafficking.

The first approach is to rely upon the types of crimes that the fund is intending to compensate. Human trafficking could be characterised as matters 'external to Australia'. The concept of a 'matter external to Australia' has been construed broadly by the High Court of Australia (see, for example: *Polyukhovich v The Commonwealth*<sup>60</sup> and *Victoria v Commonwealth*).<sup>61</sup>

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51 Commonwealth Director of Public Prosecutions, *Annual Report 2013/14* (2014) 64.

52 Office of the Director of Public Prosecutions (NSW), *Annual Report 2013-2014* (2014) 32.

53 (2009) 238 CLR 1.

54 (2012) 248 CLR 156.

55 (2014) 252 CLR 416.

56 *Australian Constitution* s 51(v).

57 *Australian Constitution* s 51(xxxix).

58 *Australian Constitution* ss 51-52.

59 *Australian Constitution* s 61; Parliament of Australia, *History of Criminal Law*, [accessed on 13 July 2016], available at: [http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/Browse\\_by\\_Topic/Crimlaw/Historycriminalaw](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Browse_by_Topic/Crimlaw/Historycriminalaw).

60 (1991) 172 CLR 501.

61 (1996) 187 CLR 416.

The second approach would be to rely upon a law that seeks to implement Australia's obligations under a relevant instrument. For such a law to fall within the external affairs power, the critical question is whether that legislation is reasonably capable of being considered appropriate and adapted to give effect to Australia's obligations under a particular instrument. The *International Convention to Suppress the Slave Trade and Slavery* (1926) (**Slavery Convention**) may be of assistance with respect to the creation of a compensation fund.

The Slavery Convention was considered by the High Court of Australia in *R v Tang*.<sup>62</sup> The High Court considered that the criminalisation of 'slavery' in the Criminal Code was supported by the external affairs power of the Constitution – the provision in the Criminal Code was reasonably capable of being considered appropriate and adapted to give effect to Australia's obligations under the Slavery Convention.

## 2.4 ALTERNATIVES MEANS OF FUNDING A NATIONAL COMPENSATION SCHEME

In light of any concerns in respect of drawing resources away from projects that rely on the POC Act, direct government funding may be preferable. A scheme similar to the AVTOP would involve setting up a fund from which appropriate payments could be made. Like the AVTOP, the national scheme for survivors of trafficking could be set up as an amendment to the *Social Security Act 1991* (Cth).

# ISSUE 3: CRITERIA FOR DETERMINING ELIGIBLE APPLICANTS UNDER A PROPOSED SCHEME

## 3.1 DETERMINING ELIGIBLE APPLICANTS

Any person who has experienced human trafficking or slavery in Australia should be eligible to make a claim for compensation under a national compensation scheme. This includes people who are not on the Support for Trafficked People Program. A trafficked person would need to show, to the appropriate standard of proof – such as 'reasonable likelihood' – that they have been a victim of one of the Federal human trafficking offences, such as forced labour, forced marriage or servitude. The scheme must be easy to navigate and transparent, so that applicants are not deterred from making a claim by an overly complex process.

## 3.2 CALCULATING THE AMOUNT TO BE AWARDED

As noted above, the amount of compensation available to trafficked people in Australia currently varies, such that a victim could receive less than \$10,000<sup>63</sup> as a recognition payment in certain jurisdictions, but up to \$100,000,<sup>64</sup> including payments additional to the general recognition payment and depending in which State or Territory the offence(s) had taken place and the type of offence(s). Furthermore, such compensation is only claimable in relation to offences recognised by each State or Territory that are not the Federal offences, but are often offences committed incidentally to the Federal offence (e.g. sexual assault may occur incidentally to the Federal offence of sex trafficking).

In calculating the amount to be awarded to a victim of Federal crime under the proposed national compensation scheme, it may be helpful to assess whether existing legislative frameworks would be suitable models for a national scheme. For example, the national scheme could follow the model in New South Wales, where the NSW Commissioner of Victims' Rights is statutorily required to have regard to certain factors, such as whether the act of violence was reported to a police officer within a reasonable time, when assessing the amount to be awarded to a victim.<sup>65</sup>

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62 (2008) 237 CLR 1.

63 *Victims Rights and Support Regulation 2013* (NSW) reg 12(c). The newly introduced *Victims of Crime (Financial Assistance) Regulations 2016* (ACT), which provides that victims of certain offences may receive as little as \$1,000 for a general recognition payment.

64 The previous maximum of \$50,000 in South Australia was increased to \$100,000 by the *Victims of Crime (Compensation) Amendment Act 2016* (SA) s 7(7).

65 *Victims Rights and Support Act 2013* (NSW) s 44.

Another possible model to follow would be that of the Northern Territory. Although there is a similar mechanism to that of New South Wales, of claims being assessed by an established assessment body (in this case, the Director of the Crime Victims Services Unit), each claim must also be calculated in accordance with Schedule 3 of the *Victims of Crime Assistance Regulations* (NT). This Schedule establishes the specific amount of financial assistance to be awarded, with respect to the injury suffered (e.g. \$6,100 of financial assistance is the standard amount awarded to persons who have suffered significant scarring, other than on the face).

To ensure that the national scheme complements the existing compensation schemes, any previous compensation payment received by a trafficked person, for example under a State or Territory victims' of crime compensation scheme, would be taken into account when applying for compensation under another scheme. This is similar to the assessment process in the AVTOP, where financial assistance from a foreign country following a terrorist act must be taken into account in determining the amount of compensation that a person can receive from the Australian scheme.<sup>66</sup> Financial assistance from a foreign country will not necessarily reduce the amount of compensation the victim may receive. For example, if a person receives a payment from the foreign country to compensate their economic loss resulting from a terrorist act, this does not overlap with the payments under the Australian scheme, which are purely for injury arising from a terrorist act.<sup>67</sup>

The proposed scheme should provide flexibility for payment amounts to be varied, taking into account other factors of the trafficked person's experience. A balance must be struck between having clearly defined boundaries for different payment amounts, which reduces administrative costs and makes the system simpler, and on the other hand providing a remedy that is sufficiently tailored to individual circumstances. Other forms of assistance, like counselling, housing support and childcare, are all important in helping a trafficked person to rebuild and recover. However, ASA and the LCA consider that the national scheme should confine itself to payments that recognise the harm suffered by trafficked people, rather than attempting to become a comprehensive support program. The Support for Trafficked People Program already provides appropriate avenues of support and assistance.

### 3.3 APPROPRIATE STANDARD OF PROOF

It is usual for State or Territory statutory victims of crime compensation schemes to apply the civil standard of proof (i.e. on a balance of probabilities) in determining the validity of any claims lodged for assessment, rather than a criminal standard (i.e. beyond reasonable doubt).<sup>68</sup> This standard is also the one adopted by the CICS in the UK.

However, other standards should also be considered such as:

- 'Reasonable likelihood' – the current Royal Commission into Institutional Responses to Child Sexual Abuse has recommended the standard of proof to be considered in any redress schemes for survivors of institutional child sexual abuse is one of 'reasonable likelihood'. The Royal Commission considers this is appropriate as it is lower than the common law standard of proof, but higher than the standard of plausibility;<sup>69</sup> and
- 'Standard of plausibility' – the *Defence Abuse Reparation Scheme Guidelines* states that, '[a] Reparation Payment shall not be made to a person, or their authorised representative, unless in the opinion of the Reparation Payments Assessor on the basis of the information available the person may have, *plausibly*, suffered abuse and/or mismanagement' (emphasis added).<sup>70</sup>

Feedback from CSOs suggested that a lower standard of proof was desirable, given the difficulties and dangers for applicants in having to establish the offences. However, some scrutiny of claims for payments is necessary to ensure the integrity of the scheme is maintained. A standard lower than the balance of probabilities test would be appropriate to reflect the fact that a number of cases will depend on survivor testimony alone. As noted above, the Royal Commission into Institutional Responses to Child Sexual Abuse recommended the standard of 'reasonable likelihood'. This may be the most appropriate test, since seeking redress and compensation for survivors of trafficking can bear similar challenges to seeking redress for survivors of abuse.

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66 *Social Security (Australian Victims of Overseas Terrorism Payments Scheme) Principles 2013* (6 June 2013), s 7. The Principle is made pursuant to the *Social Security Act 1991* (Cth).

67 *Ibid.*

68 Law Council of Australia, above n 34, [110].

69 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015) 41.

70 Australian Government, *The Defence Abuse Reparation Scheme Guidelines* (2013) 4.5.1.

### 3.4 VISA CONSIDERATIONS

Currently, if an officer of the AFP, or of a police force of a State or Territory advises the Department of Immigration and Border Protection that a person has been identified as a suspected victim of human trafficking, slavery or slavery-like practices, that person can be granted a Bridging Visa F (**BVF**) for a short time. If the person is assisting with an investigation or prosecution, the BVF can be extended to allow them to stay in Australia lawfully for the duration of the criminal justice process. Since a national compensation scheme would carry a lower burden of proof than the criminal standard, trafficked people would be encouraged to apply for compensation before waiting for the outcome of the criminal prosecution. However, in the event that a trafficked person applies for compensation after the prosecution has taken place, and has not been granted a Referred Stay Visa, an extension of the BVF or, in the alternative, the grant of another appropriate visa, may be necessary to allow them to stay in Australia while the claim is processed.

The LCA and ASA consider that expanding the BVF framework would be a straightforward way to grant a short-term stay for trafficked people using the national compensation scheme. Additionally, the LCA and ASA consider that a person who does not hold a BVF may still be eligible to apply for compensation, whether or not the person is in Australia. There may be circumstances where a person holds a valid visa and does not require a BVF, or circumstances where there is no prosecution or investigation underway, and therefore the BVF will not be offered. The provision of an entitlement to stay in Australia while compensation is being determined could also be addressed by an amendment to the Bridging E Visa criteria.

### 3.5 FURTHER CONSIDERATIONS

The LCA and ASA consider that the best interests of the survivor should be at the forefront of all measures taken to establish and implement an effective national compensation scheme. Elements of such a scheme should include a clear and transparent application process, and a mechanism to ensure that the expertise and knowledge of professionals assisting survivors is taken into account throughout the application and determination process. Survivors need accessible information about the process and timeframes to assist them make an informed decision. Clear guidelines should set out procedures and processes, and provide information about any limitation periods. Measures such as these may reduce the impact of detrimental effects such as anxiety, uncertainty and frustration on survivor's well-being and recovery.

The proposed scheme should not have any negative impact on the survivors' access to social services or other support payments, such as Centrelink.

### 3.6 DETERMINING LIMITATION PERIODS

Each State and Territory varies with respect to the length of limitation period for making claims for victims' compensation:

#### **New South Wales**

Generally, any application for victims' support must be made within 2 years after the date that the relevant act of violence occurred. Any application made after this time with respect to an act of violence may be considered under certain circumstances:<sup>71</sup>

- if it is found that the act of violence directly resulted in the death of the primary victim;
- if the victim was under the age of 18 at the time of the act of violence, the limitation period extends to 2 years after the day on which the child turns 18 years of age; or
- if domestic violence, child abuse or sexual assault is involved, the limitation period is 10 years after the relevant date of violence, or 10 years after the day on which a child victim turns 18 years of age.

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71 *Victims Rights and Support Act 2013 (NSW) s 40.*

## Victoria

Generally, any application for victims' assistance must be made within 2 years after the date that the relevant act of violence occurred, or within 2 years after the death of the primary victim in relation to claiming funeral expenses. Any application made out of time will be struck down unless it can be shown that the application ought not to be struck down, having regard to certain factors, including the mental state of the applicant, the age of the applicant.<sup>72</sup>

## Queensland

Generally, any application for victims' assistance must be made within 3 years after:

- the date that the relevant act of violence occurred;
- the day on which the primary victim turns 18 years of age, if they were a child on the day of the relevant act of violence; or
- the date of death of the primary victim of the act of violence, if it is an application made by a related victim.

Any applications made after this time period may be considered if the scheme manager considers it would be appropriate to do so having regard to certain factors.<sup>73</sup>

## South Australia

Generally, the initial application period by a victim is 3 years after the commission of the offence. If the application arises from the victim's death, the period is 12 months after the date of death. At first instance, the application must be made to the Crown Solicitor. The court may, for any proper reason, extend the limitation period.<sup>74</sup>

## Northern Territory

Generally, an application must be lodged with the Director of the Crime Victims Services Unit within 2 years after a violent act has occurred, or within 2 years of the injury or death to which an application relates. However, the Director may accept an application made after the expiry of the time limit if the Director considers the circumstances justify it, having regard to certain factors.<sup>75</sup>

## Western Australia

Generally, a compensation application must be made within 3 years after the date on which the relevant offence was committed, or if there is more than one offence, the date that the last offence was committed. However, any late claims may be permitted by an assessor if it is considered to be just to do so, imposing any conditions the assessor considers appropriate.<sup>76</sup>

## Tasmania

The general limitation period for an application for compensation is 3 years after the date of the relevant offence. If a primary victim, secondary victim or related victim is less than 18 years old at the time of the relevant offence, his or her application for an award must be made no later than 3 years after he or she turns 18. This period may be extended by the assessor if the assessor is satisfied that there are special circumstances justifying the extension.<sup>77</sup>

## Australian Capital Territory

An application for financial assistance must, together with the required statutory declaration and each accompanying document, be filed in the Magistrates Court within 12 months after the day in which the relevant injury or property damage was sustained. The Magistrates Court may extend the time for the filing of an application if the court considers it just to do so.<sup>78</sup>

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72 *Victims of Crime Assistance Act 1996* (Vic) s 29.

73 *Victims of Crime Assistance Act 2009* (Qld) s 54.

74 *Victims of Crime Act 2001* (SA) s 18.

75 *Victims of Crime Assistance Act* (NT) s 31.

76 *Criminal Injuries Compensation Act 2003* (WA) s 9.

77 *Victims of Crime Assistance Act 1976* (Tas) s 7.

78 *Victims of Crime (Financial Assistance) Act 1983* (ACT) s 27.