Submission

to the

Joint Standing Committee on Foreign Affairs, Defence and Trade (JSCFADT)

Inquiry into

Establishing a Modern Slavery Act in Australia

from

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Incorporated in Victoria
as a community Association

May 2017

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Slavery Links Australia Inc (Slavery Links) thanks the Committee for this opportunity to respond to the Terms of Reference. We request an opportunity to give evidence in person.

Slavery Links is an incorporated association whose work refers to slavery as defined in the Supplementary Convention, 1956 and in Division 270 of the Criminal Code (Cth).

SUMMARY

The purpose of the Criminal Code is to define the offences established by the 1995 legislation and subsequent amendments to it. The adoption of a Modern Slavery Act-type of legislation in Australia will add the framework which is necessary to describe the policy objectives of the existing Criminal Code and to set up arrangements whereby these objectives will be monitored and implemented in practice.

In summary, we submit:

1. Retain Division 270 of the Criminal Code

The Commonwealth should retain the definition of slavery as provided in Division 270 of the Criminal Code Act, 1995 and retain the crimes defined therein.

2. Locate the crime of Debt Bondage in Division 270 of the Code

The Committee ought to recommend that the crime of debt bondage be re-located from Division 271 to Division 270, to locate it with other crimes relating to slavery.

3. Parliamentary Scrutiny for slavery

The Committee ought to recommend that slavery be made eligible for Parliamentary Scrutiny via an amendment to Section 3 of the Human Rights (Parliamentary Scrutiny) Act, No 186 of 2011, to add to the list of treaties: (h) The Supplementary Convention, 1956

4. Nomenclature and policies re slavery

The Committee ought to recommend that Departments develop policies and nomenclature which are reflective of 'Slavery, Slavery-like conditions and People Trafficking', consistent with evidence provided by the Attorney General's Department to the Standing Committee in May 2013 regarding slavery.

5. As to the UK Modern Slavery Act:

A Modern Slavery Act would be a welcome means of drawing attention to antislavery measures required in Australia. This Submission has identified five specific aspects of the UK Modern Slavery Act 2015 as potentially useful to be implemented in Australia:

- Anti-slavery Commissioner
- Gang masters
- Data Collection
- Transparency in supply chains
- Corporate culture and corporate social responsibility.

SECTION 1 REFERS TO REFERENCE 6:
WHETHER A MODERN SLAVERY ACT SHOULD BE INTRODUCED IN AUSTRALIA

01 Some aspects of the UK *Modern Slavery Act*, 2015 (the MSA) could usefully be applied in Australia. Having such an Act would bring a welcome focus on antislavery measures to be taken.

02 Section 4 of this Submission identifies five aspects of the MSA that could usefully be introduced in Australia, viz:

- Anti-slavery Commissioner
- Gang masters
- Data Collection
- Transparency in supply chains
- Corporate culture and corporate social responsibility..

03 However three aspects of the work of the 2013 Joint Standing Committee, Foreign Affairs Defence and Trade are yet to be completed. Slavery Links refers to these in Section 3 of this submission, viz.:

- Parliamentary Scrutiny for the Supplementary Convention, 1956 (Section 3.1)
- Clarify the offence of debt bondage in the 'hierarchy of forcing' (Section 3.2)
- Follow up on assurances provided by the Attorney General's Department regarding use of the term 'slavery' (Section 3.3)

04 Some underlying concepts of the MSA do not relate to Australia's situation and caution is required in six respects at least. These aspects, to be avoided, are identified in Section 2 following.

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SECTION 2 REFERS TO REFERENCE 1 AND REFERENCE 5: WHAT IS 'EFFECTIVE' DEPENDS ON <u>WHAT PROBLEM WE ARE TRYING TO SOLVE</u>

05 What is slavery? The principal publication and reference work produced by Slavery Links, entitled 'Australians and Modern Slavery',[1] begins with a reference to the Supplementary Convention, 1956, where slavery and servitude are defined. This beginning is followed by a recitation of the *indicia* of slavery. The *indicia* were formulated by the war crimes tribunal in the former Yugoslavia.[2]

06 The *indicia* of slavery were enunciated by Gleeson CJ in the leading judgment in Tang's Case, *R v Wei Tang* (2008) 237 CLR 1, Para 28:

07 > '*In the case of* Prosecutor v Kunarac*, before the International Criminal Tribunal for the Former Yugoslavia, where the charges were of "enslavement", both the Trial Chamber and the Appeals Chamber adopted a view of the offence that was not limited to chattel slavery. The Trial Chamber, after an extensive review of relevant authorities and materials, concluded that enslavement as a crime against humanity in customary international law consisted of the exercise of any or all of the powers attaching to the right of ownership over a person; the actus reus of the violation being the exercise of any or all of such powers and the mens rea consisting in the intentional exercise of such powers. The Trial Chamber identified, as factors to be taken into account, <u>control of movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour</u>*.' (Citations removed. Underlining of *indicia* added)

08 In contrast to the International Criminal Tribunal for the Former Yugoslavia, the European Court of Human Rights appears to have favoured a narrow concept of chattel-type slavery. This Submission reiterates the concern of the High Court of Australia regarding the European Court's position (see the discussion of *Siliadin v France*,2005 in Paras 38-48). This aspect of European jurisprudence and some other underlying concepts of the UK Modern Slavery Act, MSA, do not relate to Australia's situation, our Criminal Code or our jurisprudence.

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[1] Howell, Roscoe (2011) Australians and Modern Slavery, (Slavery Links Australia Inc, Brighton, Victoria), With a Foreword by The Hon Catherine Branson QC, former President of the Australian Human Rights Commission. The *indicia* are listed on page 1. Refer also to the introduction on line at: http://library.slaverylinks.org/wp-content/uploads/sites/2/2013/07/AAMS-Extract.pdf

[2] The war in Croatia ran from 1991-1995. The war in Bosnia and Herzegovina ran from 1992-1995. The trial of Prosecutor v Kunarac was held in 2001 and the Appeal Chamber re Kunarac sat in 2002

09 In the submission of Slavery Links, caution is required regarding the MSA in six respects at least:

10 ***2.1 The MSA was intended to deal with human trafficking to Britain, largely from Central and Southern Europe (see Attachment 1, page 16). This is different from the problems facing Australia.***

11 Australian antislavery initiatives need to address the ancient slave-making systems which persist in the Indo-Asia-Pacific region. These systems were comprehended by the Supplementary Convention, 1956[3] and Division 270 of Australia's *Criminal Code Act*, 1995 (the Code). In a global economy, Australia is exposed to those ancient slave-making systems through trade, labour migration and exchanges of people and culture.

12 We repeat: Australian laws need to address the particular risks to which Australia is exposed. This particularity was considered in Tang's Case, *R v Wei Tang* (2008) 237 CLR 1, at Para 119, when Kirby J (dissenting) made a comment which is relevant to antislavery policy and the potential role of an Australian Slavery Commissioner. Kirby J noted:

13 > '*the Attorney-General of the Commonwealth acknowledged that: "After examining the legislation of the United States, Canada, South Africa, New Zealand and the United Kingdom, we have not identified any provisions that implement the Convention in terms similar to those found in Australia's Criminal Code*."'

14 Of course not. The United States, Canada, South Africa and the United Kingdom are not located in the Indo-Asia-Pacific and not exposed in the same direct way as Australia to the ancient slave making systems that exist in this region. New Zealand is somewhat exposed.

15 In a continuation of Para 119, Kirby J remarked:

> "*The closest analogy to the Australian provisions was said to be s 98(1) of the Crimes Act 1961 (NZ)*." (Citation omitted)

16 In the submission of Slavery Links, this simply affirms that Australia and New Zealand deal with problems as we find them in our region. Other economies such as the United States and Europe, who trade with Asia, may yet need to comprehend this.

17 In the submission of Slavery Links, it is essential for Australia to retain the Supplementary Convention, 1956, as a point of reference for Division 270 of the Criminal Code; and to continue its implementation with respect to the slave-making systems found in our region.

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[3] Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery. Go to:
http://www.ohchr.org/EN/ProfessionalInterest/Pages/SupplementaryConventionAbolitionOfSlavery.aspx

In Article 1 the Supplementary Convention defines four slave-making systems of servitude: child trading, debt bondage, forced marriage and serfdom. The Supplementary Convention also refers to systems of forced labour which, as the Preamble to the 1926 Slavery Convention observed, can develop into slavery.

18 ***2.2 The MSA is Eurocentric***

19 Section 1(2) of the MSA states:

> '*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*.' [underline added]

20 By referring to the 'Human Rights Convention', we take it that the MSA is referring to the European Convention on Human Rights (ECHR).[4] Australia is not a party to ECHR.

21 Moreover the ECHR does not refer to the Supplementary Convention, 1956, where slavery and servitude (as understood in the Criminal Code) are defined. This is a serious flaw.

22 ***2.3 The MSA does not define the terms 'slavery' and 'servitude'***

23 Instead, the MSA refers to 'slavery' as in Article 4 of the Human Rights Convention. Article 4 of the ECHR is entitled 'Prohibition of slavery and forced labour'. It provides:

> 1. No one shall be held in slavery or servitude.
> 2. No one shall be required to perform forced or compulsory labour.

24 These words in the ECHR do not define slavery. They do not refer directly to 'powers of ownership' or to the definition of slavery as a status or condition as in the Supplementary Convention, 1956.

25 In the submission of Slavery Links, any application of the ECHR in Australia would need to be interpreted or understood with reference to the Supplementary Convention, 1956. This point is elaborated below, with regard to the European case of *Siliadin v France* (2005) (Para 38-48).

26 ***2.4 It is not clear why Great Britain adopted a Eurocentric approach in the MSA (or why Australia would want to follow that lead)***

27 As a colonial power in South Asia and South East Asia, the British encountered the ancient slave-making systems of the Indo-Asia-Pacific at first hand. The British worked hard to bring about the two most recent slavery conventions. Miers[5] tells the story with respect to the League of Nations and the Slavery Convention, 1926. Greenidge[6] tells the story with respect to the United Nations and the Supplementary Convention, 1956.

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[4] The European Convention on Human Rights (strictly the Convention for the Protection of Human Rights and Fundamental Freedoms) was opened for signature on 4 November 1950 in Rome. It was ratified and entered into force on 3 September 1953. This Submission refers to it as The European Convention on Human Rights, or ECHR.

[5] Miers, Suzanne (2003) Slavery in the Twentieth Century: The Evolution of a Global Problem (Altamira Press: Walnut Creek California)

[6] Greenidge, C. W. W. (1958) Slavery (London: George Allen and Unwin)

28 Unlike Great Britain, Australia has not departed from its reliance on the definition of slavery as provided in the Supplementary Convention, 1956 and its parent, the Slavery Convention, 1926. In the submission of Slavery Links, Australia should retain this aspect of our legal heritage and jurisprudence.

29 Australia does have a robust definition of slavery and servitude. Division 270 of Australia's Criminal Code relies on a definition of slavery as found in the Slavery Convention, 1926 and as extended in the Supplementary Convention, 1956. In his leading judgment in Tang's Case, Gleeson CJ noted that slavery (and our comprehension of it) has evolved. Specifically, in Para 29, he noted:

30 '*It is unnecessary, and unhelpful, for the resolution of the issues in the present case, to seek to draw boundaries between slavery and cognate concepts such as servitude, peonage, forced labour, or debt bondage. The 1956 Supplementary Convention in Art 1 recognised that some of the institutions and practices it covered might also be covered by the definition of slavery in Art 1 of the 1926 Slavery Convention. To repeat what was said earlier, the various concepts are not all mutually exclusive. Those who engage in the traffic in human beings are unlikely to be so obliging as to arrange their practices to conform to some convenient taxonomy*.'[7]

31 In the submission of Slavery Links, the *indicia* of slavery are essential building blocks in comprehending slavery (Para 07). The outward form does not signify. We make this point again below, with respect to the Bellagio-Harvard Guidelines on the Legal Parameters of Slavery and Jean Allain's work on ownership; and in contradiction of the narrow approach to slavery adopted by the European Court in *Siliadin v France* (2005) (Para 38-48).

32 *2.5 Section 3 of the MSA develops a construct of 'exploitation' that is not suited to the Australian case*

33 The construct of 'exploitation in the MSA is not consistent with the Bellagio-Harvard Guidelines on slavery.[8] The difference is significant in two respects. The Bellagio Guidelines derive from Jean Allain's work on 'ownership'.[9] Guideline 5 (Making a Determination as to whether Slavery Exists) provides:

34 '*In evaluating the particular circumstances to determine whether slavery exists, reference should be made to the substance and not simply to the form of the relationship in question. The substance of the relationship should be determined by investigating whether in fact there has been an exercise of one or more of the powers attaching to the right of ownership. This will include a determination as to whether control tantamount to possession is present*.'

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[7] *R v Wei Tang* (2008) 237 CLR 1, Para 29

[8] Research Network on the Legal Parameters of Slavery (2102) Bellagio-Harvard Guidelines on the Legal Parameters of Slavery. Go to: http://www.law.qub.ac.uk/schools/SchoolofLaw/Research/researchfilestore/Filetoupload,286201,en.pdf

[9] The work was continued in Allain, J & Hickey, R (2012), 'Property and the Definition of Slavery' International and Comparative Law Quarterly, vol 61, no. 4, pp. 915-938. DOI: 10.1017/S0020589312000450

35 So, a person who is trafficked or debt bonded or a child soldier may or may not be enslaved, depending on whether there has been an exercise of one or more of the powers attaching to the right of ownership. The outward form or label does not signify whether slavery is present. Yet Section 3 of the MSA attempts to define 'exploitation' according to outward forms – compulsory labour, sexual exploitation, removal of organs etc, securing services etc by force, threats or deception, securing services etc from children and vulnerable persons.

36 The difference with respect to the MSA construct of 'exploitation' is also significant because the High Court took account of Allain's work, as indicated in Gleeson CJ's citations 37 and 51 in Tang's Case. The MSA construct of 'exploitation', if interposed into Australian thinking and jurisprudence, could distract from 'slavery' as it was defined by the Supplementary Convention, 1956, construed by the Bellagio process and understood by the High Court of Australia.

37 In the submission of Slavery Links, to adopt the language of Section 1 and or Section 3 of the MSA would be to bowdlerise[10] a strict conception of slavery as expressed in the slavery Conventions and Division 270 of the Criminal Code. That bowdlerising would not be helpful.

38 ***2.6 The case of* Siliadin v France *(2005)***

39 Sixthly, we come to the case of *Siliadin v France* and the choice of a narrow conception of slavery (chattel slavery) or a conception which allows for any of the powers of ownership to be exercised, as favoured by the High Court of Australia in Tang's Case. The European conception is narrow and not appropriate in context of the Indo-Asia-Pacific. The logic of MSA's 'Euro-centric' argument runs like this:

40 • Section 1 (2) of the MSA refers to Article 4 of the European Convention on Human Rights (Prohibition of slavery and forced labour).

41 • Paragraph 1 of the European Court's Guide on Article 4 asserts that freedom from slavery is a fundamental value.

42 • However the European Court's conception of slavery is a narrow conception of 'classic' or chattel-style slavery. It's Guide refers to a case, *Siliadin v France*, with which the High Court of Australia did not agree. The European Court's Guide states:

43 > '*Article 4 of the Convention, together with Articles 2 and 3 of the Convention, enshrines one of the fundamental values of democratic societies (Siliadin v. France, § 112; Stummer v. Austria [GC], § 116)*.'[11] [underline added]

[10] In 1818 Dr T. Bowdler published an expurgated version of Shakespeare. To 'bowdlerise' is to remove pithy language, to omit or alter words or passages that may be considered indelicate. Refer to the Shorter Oxford Dictionary: Little, William, Fowler, H.W. and Coulson, J. (1969) The Shorter Oxford English Dictionary on Historical Principles, (London: Oxford at the Clarendon Press), Third Edition, page 210

[11] European Court of Human Rights (2014) Guide on Article 4 of the European Convention on Human Rights: Prohibition of slavery and forced labour, 2nd edition, pp 5/18, Para 1, where the case was cited as: Siliadin v. France, no. 73316/01, ECHR 2005-VII. Go to: www.echr.coe.int/Documents/Guide_Art_4_ENG.pdf

44 The High Court of Australia regarded Siliadin[12] as too narrow and preferred the broader approach to *indicia* of the condition of slavery as expressed in Kunarac.[13] Gleeson CJ in the leading judgment in Tang's Case, *R v Wei Tang* (2008) 237 CLR 1, at Paras 30-31, characterised the European Court's treatment as 'brief' and 'dismissive'. He remarked:

45 '*In Siliadin v France, the European Court of Human Rights dealt with a complaint by a domestic worker that the French criminal law did not afford her sufficient and effective protection against "servitude" or at least "forced or compulsory" labour. Reference was made to legislative materials which used the term "modern slavery" to apply to some females, working in private households, who started out as migrant domestic workers, au pairs or "mail-order brides". The Court referred briefly and dismissively to the possibility that the applicant was a slave within the meaning of Art 1 of the 1926 Slavery Convention, saying:*

46 *"[The Court] notes that this definition corresponds to the 'classic' meaning of slavery as it was practised for centuries. Although the applicant was, in the instant case, clearly deprived of her personal autonomy, the evidence does not suggest that she was held in slavery in the proper sense, in other words that Mr and Mrs B exercised a genuine right of legal ownership over her, thus reducing her to the status of an 'object'."*

47 *It is understandable, in the context of that case, that the definition of "slavery" was dealt with only in passing and briefly. Nevertheless, it is to be noted that the Court did not refer to the definition's reference to condition in the alternative to status, or to powers as well as rights, or to the words "any or all"*.' (Citations deleted)

48 So, the European Court had regard to a strict definition of status rather than to the condition of a slave; they had regard to a strict definition of rights but did not take account of powers that could be exercised by a slave owner; they applied a test of complete ownership rather than testing for the presence of any or all of the powers of ownership.

49 **Summary Regarding Reference 1 and Reference 5**

50 The European definition of slavery does not have regard to slavery as we understand it in Australia. Why would we want to import this with a Modern Slavery Act? We would not want it, at all.

51 While the discussion following in Section 3, with regard to Reference 7, has identified five useful components of the UK Modern Slavery Act, 2015, which could be adopted in Australia, Slavery Links submits that the Committee retain Australian jurisprudence on slavery and slave-making to avoid importing (at least) the six aspects of the UK Act described above.

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[12] In Tang's Case, the High Court referred to Siliadin v. France, (2006) 43 EHRR 16 at [122]-[123]

[13] International Criminal Tribunal for the Former Yugoslavia, Case No IT-96-23-T and IT-96-23/1-T, 22 February 2001 (Trial Chamber); and Case No IT-96-23 and IT-96-23/1-A, 12 June 2002 (Appeals Chamber)

SECTION 3 REFERS TO REFERENCE 7:
RELATED MATTERS: COMPLETING THE WORK OF THE 2013 JSCFADT COMMITTEE

52 With reference to the work of the Joint Standing Committee on Foreign Affairs, Defence and Trade Inquiry in 2013 and further to its report, *Trading Lives: Modern Day Human Trafficking:*

53 ### *3.1 Parliamentary Scrutiny for the Supplementary Convention, 1956*

54 Members of the Joint Standing Committee will be aware that Bills may be subject to Parliamentary Scrutiny, whereby proposed legislation is tested against the provisions of 'core' human rights treaties to ensure that Australia meets our human rights obligations. This work is undertaken by the Parliamentary Joint Committee on Human Rights. The 'core' human rights treaties are listed in the Human Rights (Parliamentary Scrutiny) Act, 2011.

55 Members of the Joint Standing Committee may be surprised to find that the Supplementary Convention, 1956 – slavery – is not on Australia's list of 'core' human rights treaties. This means that slavery is not directly eligible for consideration during the process of Parliamentary Scrutiny, the process which encourages Parliamentarians to think about each new Bill that comes before them. Moreover, it means that slavery has not been directly eligible for some grants or some actions (such as inclusion in options created for the school curriculum by the Australian Human Rights Commission). When people are not informed about slavery, action becomes less likely.

56 Slavery Links submits that the Committee recommend that the Government to add slavery to the list of matters considered by the Parliamentary Joint Committee on Human Rights. The action requested is simple and straightforward: to amend Section 3 of the Human Rights (Parliamentary Scrutiny) Act, No 186 of 2011, by adding to the list of treaties:

57 (h) The Supplementary Convention, 1956 [ATS No. 3]

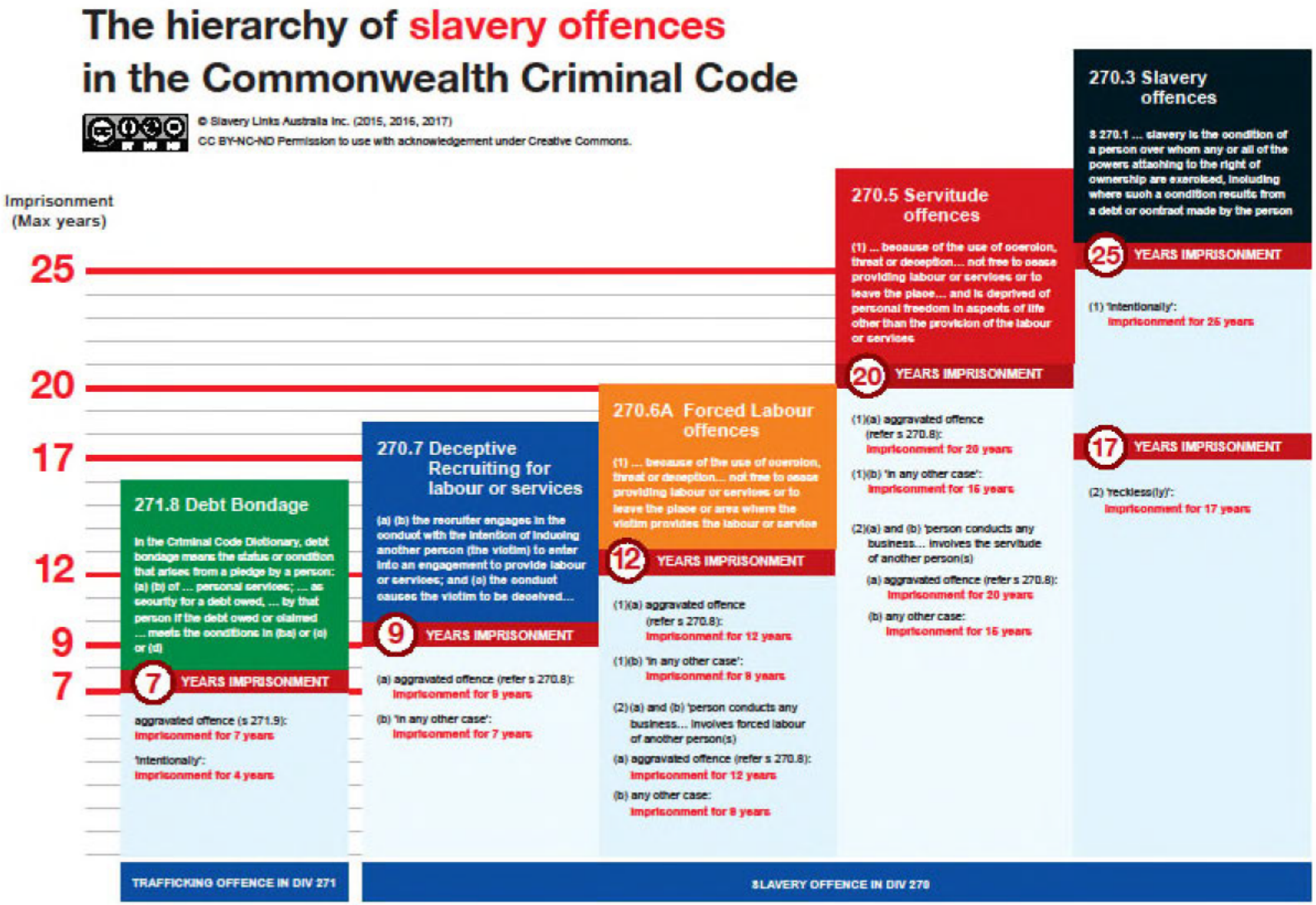
58 In the submission of Slavery Links, this would complete the work that the Joint Standing Committee initiated with its 2013 report, *Trading Lives*. Further information and a detailed case can be provided.

59 ### *3.2 Clarify the offence of debt bondage in the 'hierarchy of forcing'*

60 The Criminal Code establishes a 'hierarchy of forcing' offences, from the most serious offence of slavery through servitude-forced labour-deceptive recruiting and debt bondage (see Chart 1 over the page).

61 Slavery Links submits that the offence of debt bondage—currently created and defined at Division 271 Subdivision C s 271.8 of the Code—be removed to Division 270. Currently, the grouping of debt bondage with trafficking in persons suggests that the former can only occur in the context of the latter, whereas the offence can occur independently of any human trafficking offence.

Chart 1. Clarify the offence of debt bondage



62 The inclusion of debt bondage as a species of slavery-like conditions (introduced under Division 270 at Subdivision C) at the lower end of the offence hierarchy i) will remove ambiguity by uncoupling debt bondage from human trafficking; and ii) will expand the categories of slavery and slavery-like offences envisaged by the drafters of the League of Nations *Slavery Convention 1926*, and will be consistent with Article 1 (a) of the United Nations *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices similar to Slavery*, which defines debt bondage as a form of servitude.[14]

63 ***3.3 Follow up on assurances provided by the Attorney General's Department regarding use of the term 'slavery'***

64 In October 2012 an officer from the Attorney General's Department gave evidence to the JSCFADT antislavery Inquiry, to the effect that the Department did not in effect use the term 'slavery'.

65 That evidence was significant. It indicated that Australia's senior law officers avoided using a term that has been part of Australian law since colonial times, and one that had been recommended for use by the Australian Law Reform Commission in 1990.[15] The same term, 'slavery', had also been applied in Division 268 and Division 270 of the *Criminal Code Act*, 1995.

66 In May 2013 the Attorney General's Department returned to JSCFADT and gave further evidence, that its language was to be changed, as follows:

67 > 'The formal phrase is in fact now 'human trafficking, slavery and slavery-like practices' to more accurately reflect the importance of forms of exploitation that do not require an element of movement. Slavery, of course, does not necessarily require movement whereas trafficking does entail movement. Today I will be talking about slavery and human trafficking. We are making that change to terminology through websites, through titles of the interdepartmental committee, and it will be reflected in the revised National Action Plan.'

68 Note two things:

69 - Firstly, there was a shift in the Department's language, away from the title of the Bill ('Slavery, Slavery-like conditions and People Trafficking') to the expression 'human trafficking, slavery and slavery-like practices'. On the one hand, the term 'slavery' was added; but in the manner of after-thought to the Department's apparent preoccupation with human trafficking.

70 - Secondly the promised revisions have not happened in all cases. Some Government Departments apparently remain invested in the aspect of trafficking over and above slavery, at least insofar as some web pages indicate.

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[14] Supplementary Convention Op. Cit. See Note 2

[15] Australian Law Reform Commission (1990) 'Criminal Admiralty Jurisdiction and Prize', ALRC Report 48, Summary page xv Slavery. Go to http://www.austlii.edu.au/au/other/lawreform/ALRC/1990/48.html

71 Action sought

72 Slavery Links submits that the Committee recommend that all Departments, under the leadership of the Attorney-General's Department in the whole of government response to slavery, do implement Division 270 of the Criminal Code, and develop policies and nomenclature which are reflective of 'Slavery, Slavery-like conditions and People Trafficking'.

SECTION 4 REFERS TO REFERENCE 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

73 ### *4.1 Possible machinery of government with respect to Slavery and slavery-like offences and a Modern Slavery Act*

74 The *Criminal Code Act 1995* (Cth) at the Schedule—The Criminal Code ['the Code'], in Volume 2 Division 270 sections 270.1—270.8 creates and defines the range of slavery, servitude, forced labour, deceptive recruiting and forced marriage offences.

75 - These sections would provide the statutory bases for the elaboration of important, ancillary provisions (e.g. Independent Anti-slavery Commissioner) that deal with the prevention and prosecution of slavery and slavery-like offences.

76 - The operational relationship between the Code and a Modern Slavery Act would then resemble the (far more complex) interaction between the *Income Tax Assessment Act 1936* (Cth) and the *Income Tax Assessment Act 1997* (Cth), whereby the former creates the principles continued and expanded by the latter.

77 Were the Federal Parliament to enact an equivalent to the *Modern Slavery Act 2015* (UK), then the following elements could be adapted and included:

78 ### *4.2 Anti-slavery Commissioner*[16]

79 The *Modern Slavery Act 2015* (UK) ('the UK Act') creates the statutory position of independent anti-slavery Commissioner.[17]

80 A suitably modified, statutorily described position of Commissioner would be vital to the administration of an Australian anti-slavery Act.[18] The UK Commissioner's promotion and monitoring of open reporting on supply chains by corporations (required at s 54 of the UK Act), and the 'prevention, detection, investigation and prosecution of slavery…' (s 41(1)), are two examples of relevant, adaptable responsibilities of such a Commissioner relevant to contemporary and future Australian experience.

81 Note: Much of the likely efficacy of an Australian anti-slavery statute will depend upon the exercise of the functions of the Commissioner.

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[16] United Kingdom Home Office (2014) 'UK's first independent anti-slavery commissioner announced', 13 November 2014. Go to: https://www.gov.uk/government/news/uks-first-independent-anti-slavery-commissioner-announced

[17] The UK Act creates the office and describes its powers and responsibilities at Part 4, ss 40-44.

[18] One possible modification in accordance with Australian federal principles and structures would be that the Commissioner be directly accountable to the Federal Attorney-General.

82 • The movement of information along the line of prevention-detection-investigation-prosecution will require efficient and unencumbered communication, reporting and accountability.

83 • Slavery Links invites the Committee to consider options for locating the Commissioner, for example within the human rights area or, alternatively, in the corporate regulation area (where due attention will be given to the question of supply chains and corporate culture as well as the collection of information relating to business activities).

84 ***4.3 Gang masters***

85 The activities of some unscrupulous of labour hire providers in Australia have come to the attention of the Fair Work Ombudsman, and been the subject of both State and Federal inquiries.[19] (The UK Gangmasters Licensing Authority ('GLA'), created by the *Gangmasters (Licensing) Act 2004* (UK), was transferred to the Crime and Policing Directorate of the Home Office in 2014: s 55 of the UK Act *suggests* that the independent anti-slavery Commissioner will be consulted by the GLA.)

86 In the Australian context, it would be useful for the Commissioner to consult regularly with the Fair Work Commission for the purposes of data sharing.

87 ***4.4 Data Collection***

88 The UK Act, at s 41(3) 'General functions of Commissioner' gives discretionary power to the Commissioner—in pursuit of the aims of s 41(1)—to (among other things) make reports, recommendations, and 'provide information, education or training.'[20]

89 Central to the achievement of these aims is data collection and dissemination to relevant bodies.

90 The experience of Slavery Links in developing community education[21] indicates that the Commissioner's roles of 'information, education or training' would be essential contributions in building the possibility of community engagement with antislavery measures and actions.

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[19] For example, the House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation; Victorian Inquiry into the Labour Hire Industry and Insecure Work (Final Report delivered August 2016).

[20] Section 41(1) of the UK Act relevantly provides that the Commissioner 'must provide good practice in a) the prevention, detection, investigation and prosecution of slavery and human trafficking offences; [and] b) the identification of those offences.'

[21] Roscoe Howell (2012) "Speaking out about slavery: Workshops to run in your community" © Pamphlet, (Slavery Links Australia Inc, Brighton, Victoria). Go to: http://library.slaverylinks.org/wp-content/uploads/sites/2/2013/07/Speaking-out-about-slavery-Workshops-to-run-in-your-community.pdf

4.5 Transparency in supply chains

92 Section 54 of the UK Act is one of the longest and most detailed, and (in the Australian context) would draw heavily on the resources and capacities of the office of the Commissioner.

93 The *Criminal Code 1995* (Cth) relevantly provides, at Part 2.5, Division 12, s 12.1 'General principles' at subsection (1) that '[t]his Code applies to bodies corporate *in the same way as it applies to individuals*…', and at subsection (2) that '[a] body corporate *may be found guilty of any offence*, including one punishable by imprisonment.'[22]

94 The advantage to both the operation of an Australian anti-slavery Act, and to Australian corporations by the suppression of slavery and slavery-like offences—particularly those latter that exploit foreign workers by means of hidden supply chains—are obvious. Public interest in openness in government and business suggests that the time is right for the degree of accountability and publicly available reporting required by the UK Act. The guarantee of end-products untainted by slave labour is likely to advance the cause of publicly listed companies, and increase consumer confidence.

4.6 Corporate culture and corporate social responsibility

96 This point relates closely to the point immediately above. The development and maintenance of corporate social responsibility has been highlighted in recent years, especially since the Global Financial Crisis of 2008. The following extract from a paper by the Australian Human Rights Commission underscores this:

97 > The concept of Corporate Social Responsibility (CSR) is generally understood to mean that corporations have a degree of responsibility not only for the economic consequences of their activities*, but also for the social and environmental implications.* This is sometimes referred to as a 'triple bottom line' approach that considers the economic, social and environmental aspects of corporate activity…Corporations have come to recognise that part of being a good corporate citizen *includes respecting the human rights of those who come into contact with the corporation in some way*. This might be direct contact (for example, employees or customers), or indirect contact (for example, workers of suppliers, or people living in areas affected by a corporation's activities)…Corporations are also responding to the fact that many consumers and investors expect corporations to act in a socially responsible manner. The extent to which a company implements a comprehensive CSR program can influence consumer and investor decisions.[23]

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[22] Emphasis added.

[23] Australian Human Rights Commission, 'Corporate Social Responsibility & Human Rights', at <http://humanrights.gov.au>. Emphasis added.

98 While the *Corporations Act 2001* (Cth) encourages the development of corporate social responsibility, it tends to do so indirectly through the provisions relating to the duties and powers / care and diligence 'general duties' applicable to directors and officers.[24]

99 An equivalent to the UK Act's s 54 'Transparency in supply chains' provision, included in, and adapted to, Australian conditions and expressed in a modern anti-slavery Act, would give shape to some of the aspirations surrounding corporate social responsibility.

SECTION 5: SUMMARY

100 The notion of a Modern Slavery Act would be welcomed as a means of drawing attention to anti-slavery policy in Australia (Section 1). This Submission has identified five specific aspects of the UK Modern Slavery Act 2015 as potentially useful to be implemented in Australia (see Section 4 above), viz:

101 • Anti-slavery Commissioner

102 • Gang masters

103 • Data Collection

104 • Transparency in supply chains

105 • Corporate culture and corporate social responsibility.

106 Six aspects of the Act have been identified as not appropriate in Australia (Section 2).

In Section 3 of this Submission, Slavery Links has encouraged the Committee to support three actions arising from the 2013 Inquiry of the JSCFADT.

107 • Parliamentary Scrutiny for the Supplementary Convention, 1956

108 • Clarify the offence of debt bondage in the 'hierarchy of forcing' offences

109 • Follow up on assurances provided by the Attorney General's Department regarding use of the term 'slavery'

110 Slavery Links Australia requests an opportunity to give evidence in person regarding this Submission.

[24] For example, *Corporations Act 2001* (Cth) ss 180-184.

ATTACHMENT 1

1. Division 270 of the *Criminal Code Act*, 1995 addresses a *slavery* problem in the Indo-Asia-Pacific

In Australia, slavery offences are created in Division 270 of the Criminal Code Act, 1995. Division 270 follows the definition of slavery in the Supplementary Convention, 1956.[25] The Convention also refers to forced labour and four forms of servitude (child trading, debt bondage, forced marriage and serfdom). These ancient forms of servitude happen in cultures and economies very different from Australia. In a global economy Australia is exposed through supply chains for merchandise and for migrant labour.

The UK Modern Slavery Act, 2015 is intended to address a different sort of problem, principally the trafficking of persons to Britain from Central and Eastern Europe. Compared with the regional context of Australia's exposure, the UK's trafficking cases derive from 'local' sources. Moreover most cases derive from cultures and economies that are not dissimilar to Britain. Attachment 1 explains this.

a. Division 270 of the *Criminal Code Act*, 1995 is designed to address a *slavery* problem

Slavery and trafficking are not the same phenomenon: they have different causes; they affect different classes of people, utilise different remedial processes and have different organisations responsible.

The test of slavery is 'ownership'. The occupation of worker or form of labour exacted does not signify.

b. Australia needs to address a *slavery* problem in the Indo-Asia-Pacific

Australia is exposed to *ancient* slave-making systems which persist in *the Indo-Asia-Pacific*.

The United Nations Supplementary Convention, 1956 and the League of Nations Slavery Convention, 1926 were applied by the High Court of Australia in Tang's Case, *R v Tang* (2008) 237 CLR 1. The High Court considered the situations of women who came to Australia as free persons and who were enslaved in Australia by an Australian in full view of Australians who did not recognise what was happening and who did nothing. Similarly the Queensland Court of Appeal in Kovacs Case, *R v Kovacs* [2007] QCA 143, considered the situation of a Filipina who came to Australia as a free person and was enslaved in Australia by an Australian in full view of an Australian community, who did nothing.[26]

In the Submission of Slavery Links, Australia's Act is conceptually sound and at the leading edge of antislavery practice. One outstanding feature is the hierarchy of

[25] Supplementary Convention, 1956 Op. Cit. See Note 2

[26] The Filipina was held in remote northern Australia. Kovacs' daughter recognised the situation and arranged for the Filipina to flee.

slavery offences which was created by the reforms of 2013.[27] (Some of these reforms were facilitated by the JSCFADT Inquiry.) The hierarchy of offences – debt bondage-deceptive recruiting-forced labour-servitude-slavery – has been illustrated in Chart 1 on page 9 above. The Chart shows the relative seriousness of offences with respect to the lengths of prison terms to be served: up to 17 years imprisonment for a slavery offence which is reckless and 25 years for a slavery offence which is intentional.

Why are these crimes regarded as so serious? In Tang's Case, the High Court of Australia considered slavery to be a crime against humanity.[28] In the Submission of Slavery Links, this means that enslaving one person has an effect on all people. Freedom from slavery has *jus cogens* status. That freedom is not negotiable (derogable). A strict approach is warranted when defining slavery and the antislavery measures to be taken.

SLAVERY LINKS RECOMMENDS THAT DIVISION 270 OF THE *CRIMINAL CODE ACT* 1995 BE THE BASIS FOR ANTISLAVERY ACTION IN AUSTRALIA, WITH SPECIFIC ELEMENTS OF THE UK MODERN SLAVERY ACT THAT ARE RELEVANT TO BE INTRODUCED AS SET OUT IN SECTION 4 OF THE SUBMISSION

2. The United Kingdom (UK) Modern Slavery Act is trying to solve a *trafficking* problem that is '*local*'.

While the UK Modern Slavery Act defines both slavery and trafficking offences, the Act appears to be framed to address the human trafficking flows which have been affecting Western and Southern Europe. According to the United Nations Office of Drugs and Crime (UNODC) these occur in context of migration generally.[29] In the case of the UK, this would be to and within the European Union.

The UK Modern Slavery Act was not framed to address slave-making systems in the Indo-Asia-Pacific. The UNODC statistics refer to the phenomenon of human trafficking, and not to slavery.

In the Submission of Slavery Links, the flows into Western and Southern Europe, as described by UNODC, are 'localised. The types of flow are different from the phenomenon of *slavery* encountered in the Indo-Asia-Pacific and needing to be dealt with by Australia. In Europe, as identified by UNODC:

- 18 per cent of the about 13,000 victims detected in the subregion between 2012 and 2014 whose citizenships were reported were trafficked domestically.[30]
- Near three quarters of those detected at destination were trafficked a short (22 per cent) or medium (52 per cent) distance.[31]

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[27] The Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill, 2012. Go to http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd1213a/13bd014

[28] *R v Tang* (2008) 237 CLR 1, §24, §28, §32

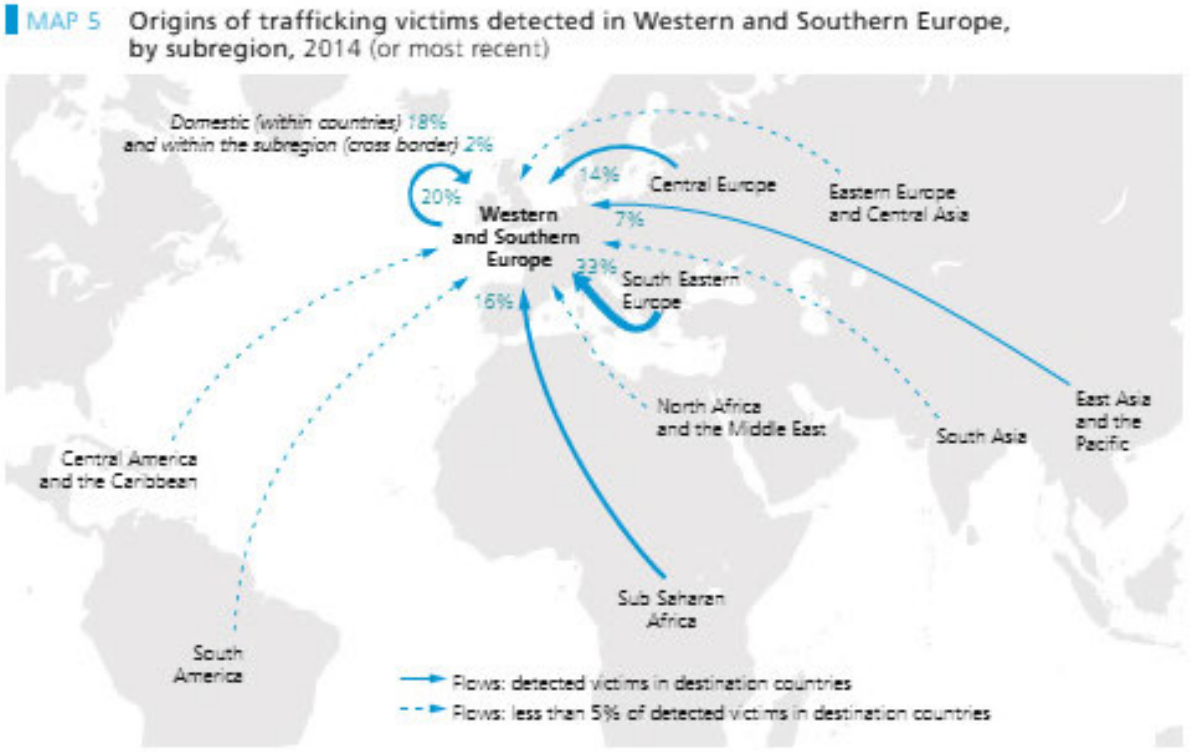
[29] UNODC Global Report on Trafficking in Persons - United Nations 2016. page 9 states that: 'Certain trafficking flows resemble migration flows, and some sizable international migration flows are also reflected in cross-border trafficking flows. Go to: https://www.unodc.org/unodc/data-and-analysis/glotip.htm

[30] UNODC Global Report on Trafficking in Persons – Op. Cit, pp 75-78

The UK Modern Slavery Act was intended to address the problem of *trafficking* which (in Australian terms) was originating from nearby sources. The flows would be considered as 'local' flows in an Australian context. In the context of the UNODC report regarding Europe, a 'medium distance' was less than 3,500 kilometres (about the distance from Perth to Sydney). A 'short distance' was defined as being to a neighbouring or nearby country – think of movement from Melbourne to Albury (see Chart 2).

This compares with Australia's setting, where the physical distance from Melbourne or Sydney to Delhi, India, is around 10,000 km – movement of such people to Australia would not amount to a 'local' flow.

Chart 2 Source: Map 5 of UNODC report, page 75



Further a relatively greater difference also pertains with respect to culture and economy. Australia is exposed to slave-making systems in countries that are culturally and economically different from us. In Europe, the flows originated from economies that are similar to the UK and not typical of the poor of the world. For example the UNODC reported that trafficked persons from Bulgaria or Romania were detected in almost every country of the Western and Southern Europe subregion. Bulgaria or Romania are a little poorer relative to Germany or the UK but not all that different culturally or in aspirations regarding their political-economies.

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[31] UNODC Global Report on Trafficking in Persons – Op. Cit, Figure 52, page 76

This similarity between origin and destination countries in Europe can be summarised in the mnemonic WEIRD, or Western Educated, Industrial, Rich (relatively) and Democratic. That mnemonic would not apply to Bangladesh, Cambodia, India, Nepal, Pakistan or the Philippines when compared with Australia.

Accordingly, in Slavery Links' submission, the UK Modern Slavery Act as a whole is not relevant to Australia. Five specific aspects of the Act that are relevant to Australia relate to:

- The Slavery Commissioner
- Regulation of Gang masters
- Collection and dissemination of data
- Statements by businesses regarding supply chains
- Development of an antislavery corporate culture

These five aspects have been discussed in Section 4 of this Submission