



Submission to

The House of Representatives

Standing Committee on Social Policy and Legal Affairs

Inquiry into the regulatory and legislative aspects of  
international and domestic surrogacy arrangements

by

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## Slavery Links' Submission regarding international and domestic surrogacy arrangements

Slavery Links welcomes the Inquiry, by the House of Representatives Standing Committee on Social Policy and Legal Affairs, into the regulatory and legislative aspects of international and domestic surrogacy arrangements.

### **1. Purpose of this Submission regarding commercial surrogacy**

This Submission refers to commercial arrangements,<sup>1</sup> made by Australians in the Indo-Asia-Pacific region, where the intention of the parties is that the birth mother will not raise the child.<sup>2</sup>

Accordingly the Submission refers to Australia's obligations under the United Nations Supplementary Convention, 1956 (see Attachment 1). Article 1 (d) of the Convention defines child trading as:

#### Article 1 (d)

Any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.

In summary, the Submission has been written from the point of view of a child who, if subject to commercial surrogacy, would be born as an infant whose fate is to be traded. Under the Convention, child trading is a form of servitude.

While the Submission has regard to principles espoused by the Family Law Council,<sup>3</sup> it argues that the fundamental freedom of the child is a paramount principle which needs to be affirmed. Some precepts that were considered by the Council, such as the diversity rights of parents, should take a lower place when compared with the gravity of the Subordinate and Overriding Principles considered in Point 7 and Point 8 below.

The Submission also argues that an understanding of the Convention encourages the situation of a birth mother to be construed in the context of development justice, where that sort of support is an alternative to a policing response (see Point 16).

### **2. Request to give evidence in person**

Slavery Links requests an opportunity to give evidence in person. Why?

- The Supplementary Convention, 1956 is not well known and, apparently, there has been no discussion to date regarding the obligations which arise in relation to child trading.
- Secondly, the Convention draws links with development justice and overseas aid, which may not be self-evident, given this lack of awareness.

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<sup>1</sup> This Submission does not refer to altruistic arrangements made by Australians in Australia, nor does it refer to the assisted conception and carrying of a child whom the parties intend to parent

<sup>2</sup> This form of words was taken from page 98 of the Family Law Council (2013) Report on Parentage and the Family Law Act. Go to: <http://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/family-lawcouncil-report-on-parentage-and-the-family-law-act-december2013.pdf>

<sup>3</sup> Family Law Council (2013) Op. Cit.

- Thirdly, it may be helpful for the Committee to discuss aspects of implementation regarding Australian law and practice and also regarding the process of Parliamentary Scrutiny.

The Supplementary Convention, 1956 provides an essential definition of child trading, as a form of servitude. It also provides a framework for considering the aspect of justice and the application of overseas development aid relevant to the needs of parties in the Indo-Asia-Pacific region.

### **3. How does the Supplementary Convention, 1956 relate to the Inquiry's Terms of Reference?**

The Supplementary Convention provides a framework for construing the laws of other countries as well as Australian jurisdictions (Reference 1, 5 and 8). How so? The Convention refers to freedom from slavery, a fundamental freedom which has *jus cogens* status. Freedom from slavery applies whether or not the country has ratified the Convention.<sup>4</sup> Under Article 9, 'No reservations may be made to this Convention'.

The Convention also offers a framework for action regarding human rights, which can be taken to include welfare aspects for all parties (Reference 2). In the Indo-Asia-Pacific, welfare aspects would include development justice, and also development aid, as ways of responding.

Finally, the Convention provides guidance for policy (Reference 4). Because child trading is a form of servitude, the Convention encourages – even obliges – the Commonwealth to respond appropriately.

### **4. Australian law defines servitude but ignores child trading**

Child trading is one of the forms of servitude that were defined in the Supplementary Convention, 1956. The terms 'forced labour', 'servitude' and 'slavery' appear in the Convention, and forms of 'servitude' cannot be understood without reference to the Convention.<sup>5</sup>

These terms are relevant in Australian law. They were applied in defining the hierarchy of slavery offences in Division 270 of the *Criminal Code Act, 1995* (Cth). They were also used to define a fundamental freedom in Section 11 of the *Victorian Charter of Human Rights and Responsibilities Act, 2006*.

The *Criminal Code Act, 1995* (the Code) refers to debt bondage and forced marriage, which were defined as forms of servitude in the Supplementary Convention. For some reason, the Code has not yet referred to child trading and serfdom (peonage), which were also defined as forms of servitude in the Convention. This Submission does not refer to peonage. It refers to child trading, a form of servitude which is defined in international law but is yet to be recognised by Australian law.

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<sup>4</sup> According to the United Nations Register, as at 30-10-2014 08:08:14 EDT the Supplementary Convention had: 35 Signatories and 123 Parties. Go to:

[https://treaties.un.org/pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg\\_no=XVIII~4&chapter=18&Temp=mtdsg3&lang=en](https://treaties.un.org/pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XVIII~4&chapter=18&Temp=mtdsg3&lang=en)

<sup>5</sup> Howell, Roscoe (2014) Australian Perspectives on Forced Labour, Servitude and Slavery, Occasional Paper No 1, Occasional Papers in Slavery (Slavery Links Australia Inc, Melbourne)

## 5. Impetus for the Inquiry and key aspects of the background

This Submission is about commercial surrogacy and exposure to servitude when a child is traded.

- In preparing this Submission, Slavery Links has noted the background and context of comments from the Family Law Council<sup>6</sup> and the Family Court.<sup>7</sup>
- In October 2014 Slavery Links wrote to Attorney General Brandis to encourage further consideration of these matters, and with reference to the Supplementary Convention, 1956. (A copy of that letter is at Attachment 2.) Slavery Links awaits a reply to indicate that the Attorney has engaged with the Convention or taken steps to implement remaining aspects.
- Slavery Links also welcomes the initiative of the House of Representatives in holding two roundtables on the subject in 2014-2015.<sup>8</sup>

## 6. Reported need for greater clarity and coherence

This Submission is mindful of the roundtables' overall conclusion. Paragraph 1.12 states:

The roundtables revealed the diversity of views, the lack of regulatory clarity and a number of welfare and ethical issues relating to both domestic and international surrogacy practices.

Stripped of cautious language, the roundtable indicated that the field lacks a coherent understanding of cause and of effect and also of the possibility of agreement about who is responsible to act in the interplay of interests between parent and child. Slavery Links invites the Inquiry's attention to the Supplementary Convention, 1956, as a framework which defines the problems and encourages greater coherence of understanding and response.

## 7. Subordinate principles to assist in the consideration of commercial surrogacy

Care is needed in applying findings of the Family Law Council (2013) to the issue of commercial surrogacy in the Indo-Asia-Pacific region. The Council was not commissioned to report on the situation of birth mothers who may become engaged in commercial arrangements, nor to report on their relationships with children whom they delivered, nor the welfare of a child born into servitude.

The Council reported according to its Terms of Reference 'in relation to who [sic] is considered to be a parent of a child under the Family Law Act 1975 (Cth)'.<sup>9</sup> The Council's Brief, its Terms of Reference, referred to parentage and so its response referred to parentage, with greater emphasis than might have been the case if the Terms of Reference had been more focussed on the needs of a child who is subject to commercial surrogacy.

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<sup>6</sup> Family Law Council (2013) Op. Cit.

<sup>7</sup> On 9 October, 2014, Hon Diana Bryant AO, Chief Justice of the Family Court of Australia, made a statement regarding Australians who have sought Parenting Orders from the Family Court in relation to overseas commercial surrogacy. Further that on occasion a surrogate child has been in effect abandoned, transferred for money, sold or otherwise mistreated

<sup>8</sup> Parliament of the Commonwealth of Australia (2015) Roundtable on surrogacy, The House of Representatives Standing Committee on Social Policy and Legal Affairs, March 2015. Canberra

<sup>9</sup> Family Law Council (2013) Op. Cit., page iii

For example, the Council indicated that one key aspect of the problem to be solved was having 'no capacity for the family courts to recognise or accord parental status to intended parents where children are born as a result of a commercial surrogacy arrangement'.<sup>10</sup> The Council described a 'pressing need for a comprehensive review and revision of Part VII'<sup>11</sup> of the *Family Law Act, 1975* in order to clarify the situation so that the Family Court could deal more effectively with parents.

In the context of commercial surrogacy, and from the point of view of a child, there are more 'pressing' needs to be considered than the smooth operation of a Court in Australia (see Point 8).

In Slavery Links' Submission, the child ought to be at the centre of consideration, as indicated by Article 1 (d) of the Supplementary Convention. In contrast, the Family Law Council articulated two Principles, which were proposed by the Council as being relevant to parentage in Australia:<sup>12</sup>

Principle 1 of the Family Law Council

The courts must consider the best interests of the particular child

Principle 2 of the Family Law Council

The law should ensure that children are not disadvantaged by the status of their carers or the way in which their family is formed

The first Principle is, unambiguously, to do with the child. The second Principle encourages diversity of parentage but, in its impetus, it appears to refer to the interests of the carer or parent, not the child. This seems to be contrary to Australia's international obligations. As the Council noted:

'Australia's international human rights obligations require that in all actions concerning children, the best interests of the child shall be a primary consideration, and that children have a right to a [sic] nationality.'<sup>13</sup>

In child trading, the parent or guardian is a beneficiary of the exploitation of a child. When considering commercial surrogacy, caution is needed to avoid privileging the parent (at the expense of the child) by giving equal weight to parentage, compared with the status of the child to be traded.

Further, all children have a right to nationality. However, when citizenship is considered for a child conceived by a commercial surrogate mother who comes from another country, there is no reason to assume that an Australian carer is to be preferred over a birth parent (see Point 9).

## **8. An over-riding principle to assist consideration of commercial surrogacy**

Each of the above Principles appears to be relevant in context of a Council report whose focus is on Australia, where most people live relatively affluent and settled lives under the rule of law.

Other needs become 'pressing' when we have regard to circumstances in the Indo-Asia-Pacific. This Submission calls for an additional, overriding Principle, which takes account of child trading:

Overriding Principle

That no child should be traded nor born into servitude by virtue of child trading.

<sup>10</sup> Family Law Council (2013) Op. Cit., page 99

<sup>11</sup> Family Law Council (2013) Op. Cit., page 32

<sup>12</sup> Family Law Council (2013) Op. Cit., page 33

<sup>13</sup> Family Law Council (2013) Op. Cit., page 102

Why? This Submission has regard to the Indo-Asia-Pacific region (where conditions are not necessarily affluent, nor law abiding, nor settled for many people). In this region, there really is a 'pressing need', to ensure that:

- Australians do not encourage ancient systems of slave-making or servitude to persist in the region
- Australians do not expose these countries to slave-making through commercial transactions in the region
- Australians actively discourage slave-making by encouraging the fundamental freedom from slavery, upholding international law and through international development aid

### **9. Did the Family Law Council identify other principles relevant to commercial surrogacy?**

Yes. This Submission draws attention to one example, where the Council derived a guiding principle, of trust and continuity from:

'customary adoptions which take place between relatives and close friends where bonds of trust have already been established. A key characteristic of this practice is the principle that children 'are never lost to the family of origin', as they have usually been placed with relatives somewhere in the family network'.<sup>14</sup>

Slavery Links commends this principle of trust and respect which locates a child in an enduring relationship with the birth family. The principle is similar to that espoused by NGOs such as Save the Children and international bodies such as UNICEF, who point out that children orphaned by disaster still have families of cousins, uncles, aunts and others with whom relationships can be encouraged.

The commercial surrogacy discourse to date seems to carry an unstated assumption, namely that a child conceived from elsewhere in the Indo-Asia-Pacific region would be better off with an Australian parent. In contrast, the guiding principle of trust and continuity, derived from 'customary adoptions', would suggest otherwise. At the very least, the assumption should be stated clearly, scrutinised and subject to challenge in light of the principle of trust and respect in enduring family relations.

### **10. Which international Conventions have been parts of the discourse to date?**

The Supplementary Convention 1956 is not well known, was not referred to by the Family Law Council (2013), and apparently has not been part of the public discourse to date.

Five Conventions have taken centre stage at the roundtables and in the Family Law Council (2013) report, namely:

- The Hague Convention in Inter-Country Adoption<sup>15</sup>
- The Hague Convention on Child Abduction<sup>16</sup>

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<sup>14</sup> Family Law Council (2013) Op. Cit., page 4

<sup>15</sup> The Hague Convention on the Protection of Children and Cooperation with Respect to Inter-Country Adoption, 1993. Go to: <https://assets.hcch.net/docs/77e12f23-d3dc-4851-8f0b-050f71a16947.pdf>

<sup>16</sup> Hague Convention on the Civil Aspects of International Child Abduction 1980. Go to: <https://assets.hcch.net/docs/e86d9f72-dc8d-46f3-b3bf-e102911c8532.pdf>

- The Hague Convention on Parental Responsibility and Protection of Children<sup>17</sup>
- The Worst Forms of Child Labour Convention, 1999 (No. 182)<sup>18</sup>
- The Convention on the Rights of the Child and the Optional Protocol on the sale of children, child prostitution and child pornography<sup>19</sup>

Failure to consider the Supplementary Convention, 1956, has introduced a gap in awareness of non-sexualised child trading and has avoided consideration of commercial surrogacy as an expression of child trading (which is a form of servitude).

### **11. Does the Optional Protocol on the sale of children cover the aspect of child trading?**

Only partially. The Optional Protocol misses the aspect of servitude which appears in the Supplementary Convention, 1956. Moreover, as the Preface to the International Protocol indicates, its impetus refers to sex rather than to non-sexual exploitation in the general economy.

What does the Optional protocol do in this context; and how can it be construed? In the Family Law Council (2013) report, Professor John Tobin and Elliot Luke submitted that:<sup>20</sup>

‘There is a strong argument to suggest that an international commercial surrogacy arrangement amounts to the sale of a child in contravention of article 35 of the CRC [Convention on the Rights of the Child] and article 2 of the Option Protocol [on the Sale of Children]. If this argument were [sic] accepted, Australia would be under an international obligation to prohibit such arrangements within its own jurisdiction and to cooperate with other jurisdictions to prohibit such arrangements.’

The Council continued: ‘Tobin and Luke add (with respect to the definition of the sale of a child) that: The identity of the person transferring the child is irrelevant thus the fact that the persons involved in a surrogacy relationship may have a biological or birth connection to the child is irrelevant.’

### **12. The Supplementary Convention is more closely aligned than the Optional Protocol**

With respect to Tobin’s and Luke’s opinion regarding parentage, the Supplementary Convention, 1956, is more closely aligned (than the Optional Protocol) to the situation of a child who is subject to commercial surrogacy. The Supplementary Convention refers specifically to the roles of parents or guardians with respect to child trading (as a form of servitude), as indicated in Point 1 above.

<sup>17</sup> The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children. Go to: <https://assets.hcch.net/docs/f16ebd3d-f398-4891-bf47-110866e171d4.pdf>

<sup>18</sup> International Labour Organization, Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour Entry into force: 19 Nov 2000. Go to: [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_INSTRUMENT\\_ID:312327](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312327)

<sup>19</sup> Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000, entered into force on 18 January 2002. Go to: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPSCCRC.aspx>

<sup>20</sup> Family Law Council (2013) Op. Cit. The quote is on page 88 and further discussion is on page 100

- A birth mother, who is contracted to relinquish a child, is nevertheless undoubtedly a parent
- A putative adopter seeks to be a parent, and in the meantime acts in effect as a guardian
- The commercial intermediary is, in the terms of Article 1 (d) of the Supplementary Convention, 'another person'

Defining commercial surrogacy as child trading, (a form of servitude and a slavery-like practice where ownership is in effect exercised), gives proper weight to commodification of the child.

### **13. Need to affirm the eligibility of the Supplementary Convention, 1956 for Parliamentary Scrutiny**

Australia was a leader of world opinion, when ratifying the Slavery Convention, 1926 and its successor, the Supplementary Convention, 1956. Although there is a reference to slavery in the ICCPR, the International Covenant on Civil and Political Rights, slavery can only be understood with reference to the Convention where it is defined: namely, the Supplementary Convention, 1956. Yet the Supplementary Convention is not on the list of matters to be considered by the Parliamentary Joint Committee on Human Rights. Evidently, slavery was overlooked when the list was framed.

Some Parliamentarians have expressed concern to Slavery Links, that the process of Parliamentary Scrutiny may be a burden on the taxpayer, an overhead cost. In the experience of Slavery Links, the opposite is true. The Scrutiny process educates Parliamentarians and public servants alike and encourages them to think through issues that might otherwise not be considered.

This Submission has shown that, in practice, the Supplementary Convention, 1956 was not considered even though it is an essential reference for commercial surrogacy. That situation needs to change. Why? In Slavery Links' Submission, if the Supplementary Convention had been eligible for Parliamentary Scrutiny:

- Then Article 1(d) would have been considered as a reference point for commercial surrogacy.<sup>21</sup> The aspect of child trading (as servitude) would not have been ignored
- Moreover, the Criminal Code would almost certainly have considered the aspects of debt bondage and forced marriage at an earlier date than the reforms which eventuated

This experience shows that the process of Parliamentary Scrutiny is a benefit, not a burden.

In July 2015, a coalition of ten anti-slavery groups asked 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:

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

A draft Explanatory Memorandum and Notes for a Second Reading Speech are in Appendix 3.

Slavery Links encourages the current Inquiry to support this initiative for Parliamentary Scrutiny because:

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<sup>21</sup> Roscoe Howell (2015) 'Adding slavery to the list of treaties to be considered by the Parliamentary Joint Committee on Human Rights', Briefing Papers on Slavery (© Slavery Links Australia Inc., Melbourne). Go to: <http://library.slaverylinks.org/wp-content/uploads/sites/2/2015/08/Adding-Slavery-to-Treaties.pdf>



- This action would bring the machinery of Parliamentary governance into line with the Criminal Code Act 1995 and Australian jurisprudence, especially Tang's Case.<sup>22, 23</sup>
- It would be non-controversial in the sense of completing the work of the Joint Standing Committee Foreign Affairs Defence and Trade (JSCFADT) in the Forty Third Parliament.
- It would consolidate Australia's antislavery achievement of progressive implementation of the Supplementary Convention.

#### **14. Anniversary of the antislavery Conventions in September, 2016**

The recommended action has a further benefit. It would position Australia to celebrate the ninetieth anniversary of Australia's antislavery engagement beginning with the Slavery Convention, 1926; and continuing with the sixtieth anniversary of the Supplementary Convention, 1956. The Coalition parties provided leadership in 1926 and 1956; and they and other parties have continued the work through the work of the Australian Law Reform Commission, from 1982 to 1990,<sup>24</sup> and development of the Criminal Code since 1990.

All Australians, of all political persuasions, are eligible to celebrate these anniversaries.

#### **15. Punitive measures may be appropriate. Loving concern is no excuse for slave-making**

Slave-making is a serious offence.

The Supplementary Convention leaves no doubt that an offence has been committed by any person who is a party to the delivery of a child with a view to exploitation of that child's qualities or capacities. Exploitation in the guise of loving concern is no exception. Loving concern is not accepted as an excuse for family violence or other crimes; nor would it be an excuse for slave-making.

There are likely to be disparities in power relationships that play out in commercial surrogacy in the Indo-Asia-Pacific region. A relatively powerless birth mother in another country may be dealing with a relatively powerful (Australian) party who pays, as well as a relatively powerful intermediary.

This Submission has not considered what penalties or other discouragements would apply to such offences when two parties are relatively powerful and one is disempowered. Slavery Links requests the Committee to consider these aspects.

#### **16. Utilising overseas development aid to support women, in preference to punitive measures**

The Supplementary Convention also offers a human rights frame, which would encourage greater support for surrogate mothers and their children. Framing surrogacy through the Supplementary Convention would tend to promote changes in mothers' living conditions, in particular support to address the forces that may compel a woman to enter a commercial surrogacy arrangement.

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<sup>22</sup> *R v Tang* (2008) 237 CLR 1

<sup>23</sup> Kolodizner, Irina (2009) *R v Tang: Developing an Australian Anti-Slavery Jurisprudence*, Sydney Law Review, Case Note Vol 31, pp 487 - 497

<sup>24</sup> ALRC Report 48, Criminal Admiralty Jurisdiction and Prize, Summary page xv 'Slavery'. Go to: <http://www.austlii.edu.au/au/other/lawreform/ALRC/1990/48.html>

Slavery Links has described these forces as the four 'engines' of slavery: poverty, powerlessness, crime/corruption and conflict. Each aspect needs to be addressed, and all of them.<sup>25</sup>

The Committee will be aware of precedents for a development aid approach for addressing problems in the region which find an expression in crime. For example, the Preface to the Optional Protocol on the Sale of Children states that the elimination of the sale of children:

'will be facilitated by adopting a holistic approach, addressing the contributing factors, including underdevelopment, poverty, economic disparities, inequitable socio-economic structure, dysfunctioning families, lack of education, urban-rural migration, gender discrimination, irresponsible adult sexual behaviour, harmful traditional practices, armed conflicts and trafficking of children'<sup>26</sup>

Slavery Links is prepared to provide further information on this aspect, and specifically the four 'engines' of slavery, if it would assist the Committee.

## 17. Concluding Summary

Australia is obliged to take account of the Supplementary Convention, 1956. Apart from that obligation, there are four notable advantages to be had by framing commercial surrogacy in terms of the Supplementary Convention rather than some other treaty:

1. The Supplementary Convention has wide support from State Parties. Further, Article 9 provides: '*No reservations may be made to this Convention.*' While some countries have not signed or ratified, it is noted that the International Court of Justice has ruled that protection from slavery is one of two examples of obligations *erga omnes* arising out of human rights law.<sup>27</sup> As Slavery Links understands it, there are no exceptions. Australia could act with confidence in encouraging other countries in the region to adopt an appropriate response.
2. Defining commercial surrogacy as child trading (a form of servitude), where ownership is in effect exercised, gives proper weight to the commodification of the child.
3. A human rights frame would encourage support to be given to surrogate mothers, in preference to a policing response. Framing surrogacy experiences through the Supplementary Convention would tend to promote change in mothers' living conditions, in particular to address the forces that may compel a woman to enter a commercial surrogacy arrangement.

These forces are the four 'engines' of slavery: poverty, powerlessness, crime/corruption and conflict. Each aspect needs to be addressed, and all of them. These forces are amenable to change using overseas development aid, providing it is directed to those 'excluded' groups who are vulnerable but who would not be reached by a mainstream program.

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<sup>25</sup> 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. Refer to the introduction on line at: <http://library.slaverylinks.org/wp-content/uploads/sites/2/2013/07/AAMS-Extract.pdf>

<sup>26</sup> Optional Protocol to the Convention on the Rights of the Child on the Sale of Children. See Note 19 above

<sup>27</sup> Kevin Bales and Peter Robbins (2001) 'No one should be held in slavery or servitude: a critical analysis of international slavery agreements and concepts of slavery' *Human Rights Review*, 1 January, 2001)

4. The Supplementary Convention recognises how enslavement actually works. It allows recognition for a person who has been enslaved, in a particular place such as their village or local workplace.

ENDS

## **Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery**

**Adopted by a Conference of Plenipotentiaries convened by Economic and Social Council resolution 608(XXI) of 30 April 1956 and done at Geneva on 7 September 1956**

**Entry into force: 30 April 1957, in accordance with article 13**

### **Preamble**

The States Parties to the present Convention ,

Considering that freedom is the birthright of every human being,

Mindful that the peoples of the United Nations reaffirmed in the Charter their faith in the dignity and worth of the human person,

Considering that the Universal Declaration of Human Rights, proclaimed by the General Assembly of the United Nations as a common standard of achievement for all peoples and all nations, states that no one shall be held in slavery or servitude and that slavery and the slave trade shall be prohibited in all their forms,

Recognizing that, since the conclusion of the Slavery Convention signed at Geneva on 25 September 1926, which was designed to secure the abolition of slavery and of the slave trade, further progress has been made towards this end,

Having regard to the Forced Labour Convention of 1930 and to subsequent action by the International Labour Organisation in regard to forced or compulsory labour,

Being aware , however, that slavery, the slave trade and institutions and practices similar to slavery have not yet been eliminated in all parts of the world,

Having decided , therefore, that the Convention of 1926, which remains operative, should now be augmented by the conclusion of a supplementary convention designed to intensify national as well as international efforts towards the abolition of slavery, the slave trade and institutions and practices similar to slavery,

Have agreed as follows:

### **Section I. - Institutions and practices similar to slavery**

#### **Article 1**

Each of the States Parties to this Convention shall take all practicable and necessary legislative and other measures to bring about progressively and as soon as possible the complete abolition or abandonment of the following institutions and practices, where they still exist and whether or not they are covered by the definition of slavery contained in article 1 of the Slavery Convention signed at Geneva on 25 September 1926:

( a ) Debt bondage, that is to say, the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined;

( b ) Serfdom, that is to say, the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status;

( c ) Any institution or practice whereby:

(i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or

(ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or

(iii) A woman on the death of her husband is liable to be inherited by another person;

( d ) Any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.

## **Article 2**

With a view to bringing to an end the institutions and practices mentioned in article 1 ( c ) of this Convention, the States Parties undertake to prescribe, where appropriate, suitable minimum ages of marriage, to encourage the use of facilities whereby the consent of both parties to a marriage may be freely expressed in the presence of a competent civil or religious authority, and to encourage the registration of marriages.

## **Section II. - The slave trade**

### **Article 3**

1. The act of conveying or attempting to convey slaves from one country to another by whatever means of transport, or of being accessory thereto, shall be a criminal offence under the laws of the States Parties to this Convention and persons convicted thereof shall be liable to very severe penalties.

2. ( a ) The States Parties shall take all effective measures to prevent ships and aircraft authorized to fly their flags from conveying slaves and to punish persons guilty of such acts or of using national flags for that purpose.

( b ) The States Parties shall take all effective measures to ensure that their ports, airfields and coasts are not used for the conveyance of slaves.

3. The States Parties to this Convention shall exchange information in order to ensure the practical co-ordination of the measures taken by them in combating the slave trade and shall inform each other of every case of the slave trade, and of every attempt to commit this criminal offence, which comes to their notice.

### **Article 4**

Any slave who takes refuge on board any vessel of a State Party to this Convention shall ipso facto be free.

## **Section III. - Slavery and institutions and practices similar to slavery**

### **Article 5**

In a country where the abolition or abandonment of slavery, or of the institutions or practices mentioned in article 1 of this Convention, is not yet complete, the act of mutilating, branding or otherwise marking a slave or a person of servile status in order to indicate his status, or as a punishment, or for any other reason, or of being accessory thereto, shall be a criminal offence under the laws of the States Parties to this Convention and persons convicted thereof shall be liable to punishment.

### **Article 6**

1. The act of enslaving another person or of inducing another person to give himself or a person dependent upon him into slavery, or of attempting these acts, or being accessory thereto, or being a party to a conspiracy to accomplish any such acts, shall be a criminal offence under the laws of the States Parties to this Convention and persons convicted thereof shall be liable to punishment.

2. Subject to the provisions of the introductory paragraph of article 1 of this Convention, the provisions of paragraph 1 of the present article shall also apply to the act of inducing another person to place himself or a person dependent upon him into the servile status resulting from any of the institutions or practices mentioned in article 1, to any attempt to perform such acts, to being accessory thereto, and to being a party to a conspiracy to accomplish any such acts.

## **Section IV. - Definitions**

### **Article 7**

For the purposes of the present Convention:

( a ) "Slavery" means, as defined in the Slavery Convention of 1926, the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, and "slave" means a person in such condition or status;

( b ) "A person of servile status" means a person in the condition or status resulting from any of the institutions or practices mentioned in article 1 of this Convention;

( c ) "Slave trade" means and includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a person acquired with a view to being sold or exchanged; and, in general, every act of trade or transport in slaves by whatever means of conveyance.

## **Section V. - Cooperation between States Parties and communication of information**

### **Article 8**

1. The States Parties to this Convention undertake to co-operate with each other and with the United Nations to give effect to the foregoing provisions.
2. The Parties undertake to communicate to the Secretary-General of the United Nations copies of any laws, regulations and administrative measures enacted or put into effect to implement the provisions of this Convention.
3. The Secretary-General shall communicate the information received under paragraph 2 of this article to the other Parties and to the Economic and Social Council as part of the documentation for any discussion which the Council might undertake with a view to making further recommendations for the abolition of slavery, the slave trade or the institutions and practices which are the subject of this Convention.

## **Section VI. - Final clauses**

### **Article 9**

No reservations may be made to this Convention.

### **Article 10**

Any dispute between States Parties to this Convention relating to its interpretation or application, which is not settled by negotiation, shall be referred to the International Court of Justice at the request of any one of the parties to the dispute, unless the parties concerned agree on another mode of settlement.

### **Article 11**

1. This Convention shall be open until 1 July 1957 for signature by any State Member of the United Nations or of a specialized agency. It shall be subject to ratification by the signatory States, and the instruments of ratification shall be deposited with the Secretary-General of the United Nations, who shall inform each signatory and acceding State.
2. After 1 July 1957 this Convention shall be open for accession by any State Member of the United Nations or of a specialized agency, or by any other State to which an invitation to accede has been addressed by the General Assembly of the United Nations. Accession shall be effected by the deposit of a formal instrument with the Secretary-General of the United Nations, who shall inform each signatory and acceding State.

### **Article 12**

1. This Convention shall apply to all non-self-governing trust, colonial and other non-metropolitan territories for the international relations of which any State Party is responsible; the Party concerned shall, subject to the provisions of paragraph 2 of this article, at the time of signature, ratification or accession declare the non-metropolitan territory or territories to which the Convention shall apply ipso facto as a result of such signature, ratification or accession.
2. In any case in which the previous consent of a non-metropolitan territory is required by the constitutional laws or practices of the Party or of the non-metropolitan territory, the Party concerned shall endeavour to secure the needed consent of the non-metropolitan territory within the period of twelve months from the date of signature of the Convention by the metropolitan State, and when such consent has been obtained the Party shall notify the Secretary-General. This Convention shall apply to the territory or territories named in such notification from the date of its receipt by the Secretary-General.

3. After the expiry of the twelve-month period mentioned in the preceding paragraph, the States Parties concerned shall inform the Secretary-General of the results of the consultations with those non-metropolitan territories for whose international relations they are responsible and whose consent to the application of this Convention may have been withheld.

### **Article 13**

1. This Convention shall enter into force on the date on which two States have become Parties thereto.
2. It shall thereafter enter into force with respect to each State and territory on the date of deposit of the instrument of ratification or accession of that State or notification of application to that territory.

### **Article 14**

1. The application of this Convention shall be divided into successive periods of three years, of which the first shall begin on the date of entry into force of the Convention in accordance with paragraph 1 of article 13.
2. Any State Party may denounce this Convention by a notice addressed by that State to the Secretary-General not less than six months before the expiration of the current three-year period. The Secretary-General shall notify all other Parties of each such notice and the date of the receipt thereof.
3. Denunciations shall take effect at the expiration of the current three-year period.
4. In cases where, in accordance with the provisions of article 12, this Convention has become applicable to a non-metropolitan territory of a Party, that Party may at any time thereafter, with the consent of the territory concerned, give notice to the Secretary-General of the United Nations denouncing this Convention separately in respect of that territory. The denunciation shall take effect one year after the date of the receipt of such notice by the Secretary-General, who shall notify all other Parties of such notice and the date of the receipt thereof.

### **Article 15**

This Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations Secretariat. The Secretary-General shall prepare a certified copy thereof for communication to States Parties to this Convention, as well as to all other States Members of the United Nations and of the specialized agencies.

In witness whereof the undersigned, being duly authorized thereto by their respective Governments, have signed this Convention on the date appearing opposite their respective signatures.

Done at the European Office of the United Nations at Geneva, this seventh day of September one thousand nine hundred and fifty-six.



31 October 2014

3 Downing Street  
Blackburn VIC 3130  
(03) 9894-1520

Senator The Hon George Brandis SC  
Attorney General  
Parliament House  
Canberra  
ACT 2600

Dear Attorney General

**Child trading through surrogacy**

I refer to comments by Hon Diana Bryant AO, Chief Justice of the Family Court of Australia, which were reported on 9 October 2014, regarding Australians who have sought Parenting Orders from the Family Court in relation to overseas commercial surrogacy. Further that on occasion a surrogate child has been in effect abandoned, transferred for money, sold or otherwise mistreated.

As I understand it, you have been asked to hold an Inquiry into these matters. Slavery Links would welcome such an Inquiry. In considering the terms of any Inquiry, Slavery Links invites your attention to the Supplementary Convention, 1956.<sup>1</sup>

Australia is a signatory. Australia has implemented legislation regarding aspects of the Convention (debt bondage, forced labour, forced marriage) but, as yet, not child trading.

Article 1 of the Supplementary Convention obliges States Parties to take all practicable and necessary legislative and other measures to bring about progressively and as soon as possible the complete abolition or abandonment of:

*( d ) Any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.*

At some stages in a commercial surrogacy arrangement, a person who is in effect a parent or guardian acts in a way that places a (foetus or) child with a view to exploitation. In these ways, the Supplementary Convention appears to apply to commercial surrogacy.

There are five notable advantages to be had by framing commercial surrogacy in terms of the Supplementary Convention rather than the Trafficking Protocol<sup>2</sup> or some other treaty:

1. The Supplementary Convention has wide support from State Parties.<sup>3</sup> Further, Article 9 provides: '*No reservations may be made to this Convention.*' While some countries have not signed or ratified, it is noted that the International Court of Justice has ruled that protection from slavery is one of two examples of obligations *erga omnes* arising out of human rights law.<sup>4</sup> As Slavery Links understands it, there are no exceptions.



2. Defining commercial surrogacy as child trading (slavery), where ownership is in effect exercised, gives proper weight to commodification of the child.
3. A human rights frame would encourage support to be given to surrogate mothers. Framing surrogacy experiences through the Supplementary Convention would tend to promote change in mothers' living conditions, in particular to address the forces that may compel a woman to enter a commercial surrogacy arrangement. Slavery Links has described these forces as the four 'engines' of slavery: poverty, powerlessness, crime/corruption and conflict.<sup>v</sup> Each aspect needs to be addressed, and all of them.
4. The Supplementary Convention recognises how enslavement actually works. It allows recognition for a person who has been enslaved in a particular place.
5. In contrast, the Trafficking Protocol refers to Transnational *Organized Crime* and requires movement *across a border*. Birth mothers do not usually move in this way.

Please do not hesitate to contact me if Slavery Links can provide any further information. Slavery Links would be delighted to assist if you hold an Inquiry.

I am sending a copy of this letter to Hon Philip Ruddock who, in the Forty Third Parliament, was Deputy Chair of the Inquiry into best practice regarding slavery by the Joint Standing Committee, Foreign Affairs, Defence and Trade.

Yours sincerely

**Roscoe Howell**  
Founding Director

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<sup>1</sup> Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery. A copy can be found at:

<http://library.slaverylinks.org/wp-content/uploads/sites/2/2014/06/Supplementary-Convention-on-the-abolition-of-slavery-the-slave-trade-and-institutions-and-practices-similar-to-slavery.pdf>

<sup>2</sup> The Protocol can be found at the United Nations Convention against Transnational Organized Crime and the Protocols Thereto, at: <http://www.unodc.org/unodc/treaties/CTOC/>

<sup>3</sup> According to the United Nations Register, as at 30-10-2014 08:08:14 EDT the Supplementary Convention had: 35 Signatories and 123 Parties. Go to: [https://treaties.un.org/pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg\\_no=XVIII~4&chapter=18&Temp=mtdsg3&lang=en](https://treaties.un.org/pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XVIII~4&chapter=18&Temp=mtdsg3&lang=en)

<sup>4</sup> Kevin Bales and Peter Robbins (2001) 'No one should be held in slavery or servitude: a critical analysis of international slavery agreements and concepts of slavery' *Human Rights Review*, 1 January, 2001

<sup>v</sup> Roscoe Howell (2011) *Australians and Modern Slavery* (Slavery Links, Melbourne)

# Call to recognise the treaty against slavery as one of Australia's "core" human rights obligations

## Summary

Freedom from slavery is a fundamental human right. Australia signed anti-slavery treaties in 1926 and 1956. Australian governments have implemented our treaty obligations. Yet slavery is not on the list of "core" human rights treaties. A simple Amendment is required to rectify this omission. The Amendment will enable Parliamentary scrutiny and human rights education in relation to slavery.

## The Amendment that is proposed

The proposal is to amend Section 3 of the Human Rights (Parliamentary Scrutiny) Act, No 186 of 2011, by adding to the list of treaties:

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

## Notes for an Explanatory Memorandum

The Amendment would amend Section 3 of the Human Rights (Parliamentary Scrutiny) Act, No 186 of 2011, by adding to the list of treaties:

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

In its Preamble, the Supplementary Convention, 1956, was designed to intensify national as well as international efforts towards the abolition of slavery, the slave trade and institutions and practices similar to slavery.

Article 7 of the Supplementary Convention, 1956 provided that:

( a ) "Slavery" means, as defined in the Slavery Convention of 1926, the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, and "slave" means a person in such condition or status;

This definition is consistent with the definition of slavery used in Division 270 of the Criminal Code.

The penalties provided in the Criminal Code reflect the seriousness of slavery offences. In *R v Tang* (2008) 237 CLR 1, the High Court referred to slavery as a crime against humanity.

It is appropriate for the Supplementary Convention, 1956, to be placed alongside other human rights treaties listed in Section 3 of the Human Rights (Parliamentary Scrutiny) Act, No 186 of 2011.

## Patrons-in-Chief

The Right Reverend the  
Honourable Dr Peter  
Hollingworth AC, OBE

Major General the  
Honourable Michael  
Jeffery AC, AO (Mil), CVO,  
MC (Ret)

## Patrons

Sir James Gobbo AC CVO  
KStJ QC

The Honourable John  
Fahey AC



## Notes for a Second Reading Speech

Article 4 of the Universal Declaration of Human Rights, 1948, provided that

“No one shall be held in slavery or servitude; slavery and the slave-trade shall be prohibited in all their forms”.

Article 8 of the International Covenant on Civil and Political Rights, 1966, provided that

“(1) No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.

(2) No one shall be held in servitude.”

However it is only by reference to the Supplementary Convention, 1956, that these phrases can be understood. This is clear from the decision of the High Court in *Tang* (2008) 237 CLR 1, Para 21 – 24 and 34.

The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery was Adopted by a Conference of Plenipotentiaries convened by the Economic and Social Council and done at Geneva on 7 September 1956. It was signed by Australia at Geneva on 7 September 1956 and ratified on 6 January 1958 [01/06/1958].

The Supplementary Convention, 1956, continued and augmented the Slavery Convention which Australia had signed at Geneva on 25 September 1926. The Supplementary Convention referred to situations where forced labour might develop into slavery. It defined servitude. It defined the slave-making systems of child trading, debt bondage, forced marriage and peonage.

According to its Preamble, “*freedom is the birthright of every human being*”. The Supplementary Convention was “*designed to intensify national as well as international efforts towards the abolition of slavery, the slave trade and institutions and practices similar to slavery*”.

Australian governments have contributed to these efforts for almost ninety years. Division 270 of the Criminal Code created slavery offences which implement many aspects of the Supplementary Convention, 1956. In Division 270 Australia has defined forced labour, servitude and slavery and has legislated with respect to offences of forced marriage, debt bondage and other slavery matters.

The Amendment would recognise Australia’s long term commitment in this area of human rights. Australia was a signatory of the Slavery Convention, 1926, and the Supplementary Convention, 1956. These Conventions express the foundation of Australia’s understanding of human rights.

The penalties provided in the Criminal Code reflect the seriousness of slavery offences. Indeed in *R v Tang* (2008) 237 CLR 1, the High Court referred to slavery as a crime against humanity. It is appropriate for the Supplementary Convention, 1956, to be placed alongside other human rights treaties listed in Section 3 of the Human Rights (Parliamentary Scrutiny) Act, No 186 of 2011.

### Proposed by:

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Slavery Links Australia

Kurt Gruber, Chair, No  
Slavery Australia

Andrea Nave, CEO,  
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Council of Progressive  
Rabbis; and Stephen  
Freeman, Chair, Union  
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Dan Wootton, Moderator,  
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