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28<sup>th</sup> April 2017

Joint Standing Committee on Foreign Affairs, Defence and Trade  
PO Box 6021  
Parliament House  
Canberra ACT 2600  
[jscfadt@aph.gov.au](mailto:jscfadt@aph.gov.au)

RE: The inquiry into establishing a Modern Slavery Act in Australia.

Thank you for the opportunity to submit to the Joint Standing Committee on Foreign Affairs, Defence and Trade's inquiry into establishing a Modern Slavery Act in Australia.

Scarlet Alliance, the Australian Sex Workers Association, is the peak national sex worker organisation in Australia. Formed in 1989, the organisation represents a membership of individual sex workers and sex worker organisations. Scarlet Alliance and our member organisations and projects have the highest level of contact with sex workers in Australia of any agency, government or non-government. Through our project work and the work of our membership we have consistently maintained high levels of access to sex industry workplaces in the major cities and many regional areas of Australia. Scarlet Alliance and many of our member sex worker organisations and projects within Australia have CALD (culturally and linguistically diverse) projects employing bi-lingual project workers resulting in extremely high levels of engagement with CALD and migrant sex workers throughout Australia, across a range of work place types.

The Scarlet Alliance Migration Project that was first funded in 2009 is staffed and managed entirely by migrant sex workers. The Migration Project aims to fill the evidence gap in trafficking issues and represent the actual experiences of migrant sex workers in Australia. The project works to support evidence-based policy development, capacity development of sex worker peer educators in delivering services to migrant sex workers, and the production of translated information for distribution to sex workers of Thai, Chinese and Korean language backgrounds, especially around issues of legal and migration rights and responsibilities.

Our submission is informed by these experiences and those of the Scarlet Alliance Migration Project Steering Committee, enabling the direct input of migrant sex workers, who have been most impacted by anti-trafficking interventions.

This submission is endorsed by our member organisations throughout Australia, SWOP NSW, SWOP NT, Respect Inc QLD, SIN SA, RhED VIC and Debby Doesn't Do It for Free.

We look forward to providing further information as part of the hearing process. In the meantime, if you require further information please contact our Chief Executive Officer, Jules Kim on 0411 985 135.

Regards,

A handwritten signature in black ink, appearing to read 'Jules Kim', with a small dot above the 'i'.

Jules Kim  
Chief Executive Officer

A handwritten signature in black ink, appearing to read 'Ryan Cole', with a stylized 'R' and 'C'.

Ryan Cole  
President

## **Inquiry into Establishing a Modern Slavery Act in Australia**

### ***Migrant sex workers need rights-based preventative approaches rather than increased criminal justice approaches.***

Scarlet Alliance submits that a sex worker driven evidence-based approach to sex work, migration and trafficking should be pursued over criminal justice approaches. The most effective approaches aim to address the circumstances that create trafficking and prioritise the needs, agency and self-determination of victims over criminal prosecutions and increased surveillance. They address labour exploitation through a focus on prevention, industrial rights, civil remedies, statutory compensation, and equitable access to visas, migration channels and support.

Scarlet Alliance opposes the implementation of the *Modern Slavery Act 2015* (the Act) as it does not fill any legislative gaps in Australia's anti-trafficking strategy. Moreover, *the Act* fails to incorporate the recommendations made in the *Modern Slavery Review* (the Review) and previous Australian reviews into trafficking and exploitation.

### ***Migrants need access to safer migration channels***

Migrant sex workers need increased access to safe migration pathways. However, instead of creating safer migration channels for migrant sex workers, the Australian anti-trafficking response has made it more difficult by increasing border security and implementing stricter visa conditions. Making migration more difficult for migrant sex workers increases vulnerabilities to trafficking. Immigration restrictions impede regular migration for many seeking a better life or working conditions. *The Palermo Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention Against Transnational Organised Crime* (the Protocol) highlights the need to discourage the demand that fosters exploitation that leads to trafficking<sup>1</sup>. Increasing immigration scrutiny and reducing legitimate migration pathways in effect, feeds this demand.<sup>2</sup> Increasing access to legal channels migrant sex workers can independently enter Australia with reduces that potential avenue for exploitation.

Migrant workers often need to use the services of agents to apply for expensive and complicated visas. However, research indicates that the use of brokers and agents to travel significantly increases migrant sex workers' vulnerability to trafficking.<sup>3</sup> When provided with accessible and safe migration pathways,

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<sup>1</sup> United Nations Human Rights Office of the High Commission (OHCHR). (2000). *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*. Retrieved from <http://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolTraffickingInPersons.aspx>, Part III article 9 section 5.

<sup>2</sup> Hathaway, D. S. (2012). *Human Trafficking and Slavery: Towards a New Framework for Prevention and Responsibility*. Portland State University, Pg 7.

<sup>3</sup> Renshaw, L. (2016). Migrating for work and study: The role of the migration broker in facilitating workplace exploitation, human trafficking and slavery. *Trends & Issues in Crime & Criminal Justice*(527).

migrant sex workers are able to access visas without the need to use a broker or a third party, thereby, reducing migrant workers' vulnerability to trafficking.<sup>4</sup>

The *Modern Slavery Act 2015* (the Act) does not address the gaps in Australia's current anti-trafficking legislation that fails to provide migrants with increased access to legal and safe migration avenues. On the contrary, in the UK, the *Modern Slavery Act 2015* was introduced alongside amendments to the *Immigration Act 2014* (UK) that made immigration policy stricter, such as increasing penalties against migrants who breached their visa conditions.<sup>5</sup> For example, migrants in breach of their visa can have their vehicles, bank accounts and licences seized.<sup>6</sup> As a result, the increased penalties against migrant workers have worked to create disincentives for victims of exploitation and trafficking to report in fear that reporting abuse will result in penalties, deportation or discrimination.<sup>7</sup>

### ***Victims of trafficking and exploitation need access to a Federal compensation scheme***

State and territory compensation schemes are not designed to cope with federal offences, as a result the very few victims of trafficking who have successfully secured compensation, have been granted significantly varied amounts ranging from \$7,500 to \$50,000, depending on the state or territory's policies and requirements.<sup>8</sup> Previous inquiries have identified the need for a national compensation scheme. The report into the Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012 report recommended:

“Evidence to this inquiry demonstrates that the establishment of a federal compensation scheme for victims and, in particular, victims of slavery and people trafficking offences is a matter which should be further investigated.”<sup>9</sup>

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Joint Standing Committee on Foreign Affairs Defence and Trade Human Rights Sub-Committee. (2013). *Trading lives : modern day human trafficking*. Canberra: Parliament of the Commonwealth of Australia, Pg 22.

<sup>4</sup> Global Alliance Against Traffic in Women (GAATW). (2010). *Beyond Borders: Exploring the link between trafficking and migration* Retrieved from Thailand: [http://www.gaatw.org/publications/WP\\_on\\_Migration.pdf](http://www.gaatw.org/publications/WP_on_Migration.pdf).

Taran, P. A., Chammartin, G. M. F., & International Labour Office: International Migration Branch. (2002). *Getting at the Roots: Stopping Exploitation of Migrant Workers by Organized Crime*: International Labour Office, Pg 11.

<sup>5</sup> Focus on Labor Exploitation (FLEX). (2016). *FLEX Briefing: Immigration Bill Part One*. Retrieved from UK <http://www.labourexploitation.org/sites/default/files/publications/FLEXImmBillBriefFINAL.pdf>

<sup>6</sup> *Immigration Act 2016* (UK) Part 2 Access to Services

<sup>7</sup> Focus on Labor Exploitation (FLEX). (2016). *FLEX Briefing: Immigration Bill Part One*. Retrieved from UK <http://www.labourexploitation.org/sites/default/files/publications/FLEXImmBillBriefFINAL.pdf>

<sup>8</sup> Joint Standing Committee on Foreign Affairs Defence and Trade Human Rights Sub-Committee. (2013). *Trading lives : modern day human trafficking*. Canberra: Parliament of the Commonwealth of Australia, Pg 72-73.

<sup>9</sup> Legal and Constitutional Affairs Legislation Committee. (2012). *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012 (Provisions) Report* Canberra: Parliament of Australia Retrieved from

[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Completed\\_inquiries/2010-13](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13). Retrieved on 12 April 2017, Pg 34.

This recommendation is also cited by the *Trading Lives: Modern Day Human Trafficking* report.<sup>10</sup> In addition Article 6 of *The Protocol* states:

*'Each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered'.<sup>11</sup>*

Scarlet Alliance welcomed the changes to *The Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013* making it easier for victims to access reparations, however the amendments did not go far enough. The Amendments meant that reparations can be accessed where (damage) is caused by *reason of* the offence (formerly as a *direct result of*). However, compensation must still be provided by the 'trafficker', and there is no Federal Government compensation scheme prescribed. Similarly the UK Modern Slavery Act only addresses reparations available from a "person convicted of an offence" to the victim of the offence. *The Act* does not address Australia's failure to provide victims with compensation – victims are not guaranteed compensation and there are no provisions protecting victims from instances when defendants cannot pay reparations. Federal reparation scheme also does not guarantee victims with compensation. In reality, defendants often have few assets in Australia, and victims are rarely compensated for their lost wages.<sup>12</sup>

Establishing a national compensation scheme that victims can access, irrespective of a trafficking conviction, will ensure that victims are provided with an effective remedy to their exploitative working conditions and provide significant, tangible positive impact to people's lives.

***Anti-trafficking approaches need to delink victim protection from criminal proceedings.***

At its sixty sixth session, the Commission on Human Rights heard from the *United Nations Special*

*Rapporteur on Trafficking in Persons, especially Women and Children* of the important need for States to provide support for victims unconditionally.<sup>13</sup> Making support conditional upon the victim's participation in a criminal investigation creates disincentives for victims of trafficking who are unable or unwilling to participate in a criminal proceeding to report exploitation and trafficking.

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<sup>10</sup> Joint Standing Committee on Foreign Affairs Defence and Trade Human Rights Sub-Committee. (2013). *Trading lives: modern day human trafficking*. Canberra: Parliament of the Commonwealth of Australia, Pg 78.

<sup>11</sup> United Nations Human Rights Office of the High Commission (OHCHR). (2000). *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*. Retrieved from <http://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolTraffickingInPersons.aspx>, Article 6.

<sup>12</sup> Anti-Slavery Australia. (2015). Compensation for Victims of Trafficking? . Retrieved from <http://www.antislavery.org.au/images/stories/Factsheets/13%20-%20Compensation%20for%20victims%20of%20trafficking.pdf>, Pg 1.

<sup>13</sup> Ezeilo, J. N. (2011 ). Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms. *Trafficking in persons, especially women and children, Note by the Secretary General* (sixty-sixth session).

Victim protections stated in *the Act*, such as legal aid and reparations, are granted to victims on the basis that they:

- 1) they are referred to the authorities; and
- 2) they have been determined on 'reasonable grounds' to be a victim of trafficking.

As a result, *the Act* does not fill Australia's legislative gap in providing victims of trafficking and exploitation with unconditional support, irrespective of their contribution to a criminal investigation. Often when given the space and safety to make a decision, victims of trafficking will decide to pursue a criminal investigation. Forcing victims to quickly decide whether they will contribute to a criminal proceeding and making support conditional upon their decision is not conducive to solid prosecution cases and impacts on the victims' feelings of safety and security.

***Anti-trafficking approaches must not contravene human rights.***

Evidence from sex worker organisations, evidence based research and government statistics consistently support that trafficking and exploitation is not the experience for the vast majority of migrant sex workers in Australia.<sup>14</sup>

The *Trading Lives* report states:

*'The research overall suggests that exposure to vulnerabilities is not the norm in the sex industry but that what you can find is that there are a very small number of sex workers who are potentially connected with a niche'.<sup>15</sup>*

Criminal justice based anti-trafficking approaches have jeopardised sex workers' support and safety structures, workplaces and undermined efforts to address labour exploitation. Contrary to protecting the human rights of migrant sex workers, anti-trafficking approaches that focus on police surveillance and prosecutions have increased stigma and marginalised migrant sex workers. For example, criminalising the support and safety structures of sex workers sends the message that associates of sex workers are by default exploitative.<sup>16</sup> Consequently, sex workers and our support and safety structures are forced to operate covertly and sex workers are often forced to work alone<sup>17</sup>, decreasing our access to support structures, increasing isolation and undermining sex workers right to freedom of association.

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<sup>14</sup> Australian Government. (2016). *Trafficking in persons: the Australian Government response* Canberra: the Parliament of the Commonwealth of Australia: Commonwealth of Australia, Pg 4.

<sup>15</sup> Joint Standing Committee on Foreign Affairs Defence and Trade Human Rights Sub-Committee. (2013). *Trading lives: modern day human trafficking*. Canberra: Parliament of the Commonwealth of Australia, Pg 22.

<sup>16</sup> Global Network for Sex Worker Projects (NSWP). (2017). *The Decriminalisation of Third Parties*. Retrieved from UK: <http://www.nswp.org/resource/policy-brief-the-decriminalisation-third-parties>.

<sup>17</sup> *Ibid*, Pg 6.

International human rights organisations increasingly report the greatest threat to health, safety and human rights of migrant sex workers is government anti-trafficking policy.<sup>18</sup>

*The Slavery and Trafficking Prevention Orders (STPOs) and the Slavery and Trafficking Risk Orders (STROs)* introduced in *the Act* contravene a range of basic human rights and undermines Australia's fundamental principles of justice, in the guise of combating trafficking. For example, the STPOs are applied to defendants who have been found 'not guilty' by reason of insanity or as a result of a disability.<sup>19</sup> In effect, the STPOs undermine a defendant's human right to a fair and public hearing. On the other hand, the STROs can be applied to a defendant without a victim or a crime being committed, contravening the defendant's 'right to be presumed innocent until proven guilty'.<sup>20</sup> Additionally, the foreign travel restrictions contravene the right to freedom of movement and the right to not be subjected to arbitrary interference with their privacy, family, home or correspondence.<sup>21</sup>

### ***Australia is behind in ratifying international rights conventions.***

Ratifying the UN's *1990 International Convention on the Protection of Rights of All Migrant Workers and Members of Their Families* will formalise Australia's commitment to improving the rights of migrant workers. It will send a clear message to employers that Australia is committed to maintaining the human rights of all workers, including migrant workers.

Currently, Australia is falling short of meeting its obligations under the UN Convention, such as ensuring the rights of all migrant workers without distinction of sex or race and all migrant workers enjoy no less favourable treatment than that applying to local workers.<sup>22</sup> Additionally, Article 14 provides that no migrant worker will be subject to arbitrary interference or attacks upon their privacy, and Article 16 provides that the State will effectively protect migrant workers against threats and intimidation (including by public officials). The International Labour Organisation's *Migration for Employment*

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<sup>18</sup> Jefferys, E. (2009). Anti-trafficking Measures and Migrant Sex Workers in Australia. *Intersections: Gender and Sexuality in Asia and the Pacific*(19), Section 2;  
Pearson, E. (2007). Australia. In Global Alliance Against Traffic in Women (GAATW) (Ed.), *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights Around the World*. Thailand GAATW, Pg 52  
Busza, J., Castle, S., & Diarra, A. (2004). Trafficking and health. *BMJ : British Medical Journal*, 328(7452), 1369-1371, Pg 1370.

<sup>19</sup> *Modern Slavery Act 2015* (UK) Section 14.

<sup>20</sup> United Nations General Assembly. (1948). The Universal Declaration of Human Rights. Retrieved from <http://www.un.org/en/universal-declaration-human-rights/>, Article 11.

<sup>21</sup> *Ibid*, Article 12-13.

<sup>22</sup> United Nations Human Rights Office of the High Commission (OHCHR). (December 1990). International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families *Adopted by General Assembly resolution 45/158*. Retrieved from <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CMW.aspx>, Article 25.

*Convention (revised) 1949* also mandates equal treatment and indicates a need for migrants to have access to accurate information regarding their rights.<sup>23</sup>

Ratifying the *International Convention on the Protection of the Rights of All Migrants Workers and their Families* would send a clear message that migrant workers are entitled to equal protection of their human rights. It would demonstrate that it is unacceptable for employers to subject migrant workers to poorer conditions than local workers, thus reducing the power imbalance between employer and migrant worker that exacerbates potential for trafficking and exploitation.

### ***The Police are inappropriate regulators of the sex industry***

One of the major drivers for decriminalisation in NSW was the findings of the Wood Royal Commission showing 'a clear nexus between police corruption (in the NSW Police Force) and the operation of brothels.'<sup>24</sup> Research demonstrates that in criminalised jurisdictions sex workers' ability to seek information, support and health care is 'severely limited by the risk of prosecution'<sup>25</sup> and 'illegal sex workers were more likely to report being harassed (42% compared with 13% of legal sex workers)' by police, and that this harassment included verbal abuse, racial insults, stalking, phone calls and requests for sexual favours.<sup>26</sup>

In addition, over-policing and compliance checking in the guise of investigating trafficking in the sex industry deters migrant sex workers from seeking supportive, legal and health assistance for fear that detection by the authorities will result in deportation, increased policing of our workplaces, increased immigration scrutiny and prosecution. The Scarlet Alliance Migration Project, staffed and managed by migrant sex workers and with input from the wider migrant sex worker community, has reported that contact with Department of Immigration and Border Protection officers has often resulted increased policing of their workplace, heightening tensions between migrant sex workers and the authorities and further deters migrant sex workers from seeking assistance.

Scarlet Alliance is deeply concerned that the increased discretionary powers afforded to the courts and authorities, disregard for due process, and vague and over-reaching offences in *the Act*, if introduced to Australia, will disproportionately target migrant sex workers who have habitually being targeted by anti-trafficking measures. Over-policing, compliance checking and sex industry raids in the guise of anti-trafficking have been counterproductive in effectively preventing trafficking as it threatens to

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<sup>23</sup> International Labour Organisation. (1949). *Migration for Employment Convention (Revised), 1949 (No. 97) Convention concerning Migration for Employment (Revised 1949) (Entry into force: 22 Jan 1952)* (Vol. (Online) C097), Article 2 & 6.

<sup>24</sup> New South Walse Government. (1997). *Royal Commission into the NSW Police Service: Final Report- Corruption (Vol. 1)* Retrieved from <https://www.pic.nsw.gov.au/Report.aspx?ReportId=100>, Pg 13.

<sup>25</sup> Harcourt, C., Egger, S., & Donovan, B. (2005). Sex work and the law. *Sexual health*, 2(3), 121-128, Pg 123.

<sup>26</sup> Woodward, C., & Fischer, J. (2005). Regulating the world's oldest profession: Queensland's experience with a regulated sex industry. *Research for Sex Work*, 8, 16-18, Pg 17.

‘destabilise sex worker communities and drive sex workers underground, increasing vulnerability and risk for all sex workers, disrupting HIV and STI prevention efforts, impeding access to services, and severing relations with service providers.’<sup>27</sup>

The recent *NSW Government Response to the Legislative Assembly Inquiry into the Regulation of Brothels* warned against the reintroduction of police in the sex industry as it ‘risks creating similar outcomes to re-criminalising sex work’.<sup>28</sup> The over-policing and compliance checking of the sex industry continually targets and harms migrant sex workers, not traffickers, and does not help migrant sex workers experiencing trafficking or labour exploitation. Police raids and compliance checking often result in migrant sex workers being deported or charged, rather than assisting in accessing services, reclaiming their wages or increasing their workplace occupational health and safety.

### **Public awareness campaigns need to be evidence-based**

In one recent news article, the police were quoted declaring that the sex industry in NSW is ‘not regulated in any way, shape or form’ and ‘sex slavery, corruption, blackmail and even child abuse can be rife’.<sup>29</sup> The media’s misrepresentation of trafficking related to the sex industry in the guise of public awareness is counterproductive and does nothing to support or help migrant sex workers experiencing exploitation or trafficking. Misleading the public about trafficking in the sex industry reduces the capacity of the public to accurately identify and report trafficking related crime. The former *UN Special Rapporteur on Trafficking in Persons* warns against ‘employing sensationalist scare tactics’.<sup>30</sup> Sensationalist reporting on trafficking related to the sex industry increases stigma and discrimination against all sex workers and does nothing to help migrant sex workers in the event of exploitation.

### **Investment in preventative approaches: current approach inadequate**

In 2014 the *UN Special Rapporteur on Trafficking in Persons, especially Women and Children* stated that anti-trafficking approaches need to encompass ‘the full range of measures aimed at preventing future acts of trafficking from occurring’.<sup>31</sup> Currently, Australia’s anti-trafficking approach is inadequate in its application of preventative measures to tackle trafficking at its source. Trafficking can be prevented by existing infrastructure in Australia; however, a prevention approach needs significantly improved

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<sup>27</sup> Steen, R., Jana, S., Reza-Paul, S., & Richter, M. (2015). Trafficking, sex work, and HIV: efforts to resolve conflicts. *The Lancet*, 385(9963), 94-96, Pg 1.

<sup>28</sup> Select Committee on the Regulation of Brothels. (2015). *Inquiry into the Regulation of Brothels*. Retrieved from NSW: <https://www.parliament.nsw.gov.au/committees/DBAssets/InquiryReport/GovernmentResponse/5198/Government%20Response%20-%20Inquiry%20into%20the%20Regulation%20of%20Brothels.pdf>, Pg 3.

<sup>29</sup> Ceglie, A. D. (2017, 11 March). Push for sex work licence to cut human trafficking. *The Daily Telegraph*. Retrieved from <http://www.dailytelegraph.com.au/news/nsw/push-for-sex-work-licence-to-cut-human-trafficking/news-story/600798c8d10d63fde8c09aa51a3db273>.

<sup>30</sup> Ezeilo, J. N. (2014). Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development. *Trafficking in persons, especially women and children, Thematic Report* (twenty-six Session), Section 58.

<sup>31</sup> Ibid. Pg 15.

government investment. An 'empowerment model' should be pursued that is aimed at enhancing and restoring the rights of migrant sex workers, provide support and assistance in an enabling environment and increase autonomy and self-determination. Scarlet Alliances opposes the introduction of the UK *Modern Slavery Act* as it does not fill these gaps.

The Australian government needs to implement policies that:

- provide safe and accessible migration pathways – Australia is a desirable destination for migrant workers, with its strong tradition of labour rights and high wages. Trafficking and exploitation of migrant workers can be prevented at its source by providing migrants with access to translated information and legal, safe and accessible migration avenues that do not require migrant workers to use the assistance of an agent, reducing traffickers access to migrant workers;
- protect the labour rights of migrant workers – Australia needs to meet its international obligations to ensure equal labour rights to migrant workers as local workers. Migrant workers need equal access to industrial mechanisms to claim compensation, redress exploitative working conditions and access legal aid and support without needing to contribute to a criminal proceeding or without the need for labour exploitation to fit within a trafficking framework in order to access support;
- include translated information on visa options and conditions, industrial rights, human rights, justice mechanisms and relevant laws in multiple languages to increase migrant workers awareness of their rights and responsibilities;
- support multilingual peer education and culturally appropriate service provision through multicultural projects within sex worker organisations, peer translated resources and community engagement. This would strengthen the human, civil and political rights of migrants sex workers and increase our autonomy, agency and self-determination; and
- develop and promote accurate advertising campaigns detailing support services and avenues for redress in the event of a crime.

## Submission on Establishing a Modern Slavery Act in Australia

***The nature and extent of modern slavery (including slavery, forced labour and wage exploitation, involuntary servitude, debt bondage, human trafficking, forced marriage and other slavery-like exploitation) both in Australia and globally.***

The committee will be presented with global trafficking and slavery estimates that are alarming. However, as stated by the previous director of the Australian Institute of Criminology (AIC) Toni Makkai:

*Extreme caution should be exercised in extrapolating from the under-reporting of domestic crimes to transnational crimes, as Australia enjoys the natural protection provided by being both an island and geographically remote and has extensive border protection mechanisms.<sup>32</sup>*

There is a large discrepancy between actual trafficking data produced by the Australian government and slavery and trafficking estimates produced by anti-trafficking organisations and in the media, particularly in relation to estimates regarding trafficking in the Australian sex industry. As indicated by the *Trading Lives: Modern Day Human Trafficking* (Trading Lives) report, the discrepancy between estimates and actual data is due to the fact that estimates are cited without a clear source or with unreliable methodologies.<sup>33</sup> These estimates are then circulated by the media and organisations that rely on the presence of trafficking to secure funding, thereby perpetuating the use of vague estimates to represent the nature and extent of trafficking<sup>34</sup>, including trafficking related to the Australian sex industry.

Using global estimates or anything other than facts to understand the nature and extent of slavery and exploitation in the Australian sex industry is misleading, counter-productive and will fail in identifying and providing support to victims.

Previous trafficking interventions and inquiries have almost solely focused on the sex industry. Despite enormous surveillance, heavy police investigations, substantial investment into criminal justice approaches, and the introduction of legislation that widened the types of offences that are now covered under anti-trafficking, only 13 trafficking convictions related to the sex industry have been made since their introduction.<sup>35</sup> This is consistent with research and evidence from sex worker organisations that interface daily with sex workers in their workplaces. Hence, it is unreasonable to assume that the discrepancy between estimates and actual convictions is due to widespread under-reporting.

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<sup>32</sup> Putt, J. (2007). Human Trafficking to Australia: a Research Challenge. *Trends & Issues in Crime and Criminal Justice Series*, (338), 1-6. Retrieved from [http://www.aic.gov.au/media\\_library/publications/tandi\\_pdf/tandi338.pdf](http://www.aic.gov.au/media_library/publications/tandi_pdf/tandi338.pdf), Pg 1.

<sup>33</sup> Joint Standing Committee on Foreign Affairs Defence and Trade Human Rights Sub-Committee. (2013). *Trading lives : modern day human trafficking*. Canberra: Parliament of the Commonwealth of Australia, Pg 22.

<sup>34</sup> Jahic, G., & Finckenauer, J. O. (2005). Representations and misrepresentations of human trafficking. *Trends in Organized Crime*, 8(3), 24-40.

<sup>35</sup> Interdepartmental Committee. (2016). *The Eighth Report of the Interdepartmental Committee on Human Trafficking and Slavery*. ACT: Commonwealth of Australia.

What we know about slavery related to the sex industry is that all the finalised convictions involved sex workers who had *consented* to and knew they would be working in the sex industry. Some had worked abroad or in their home country previously and none of the convictions related to the sex industry involved deception about the fact they would be sex working in Australia. However, they did involve grave labour exploitation including long working hours, inadequate breaks and time off, withheld wages, and incurring large and unfair debts. Essentially these were instances of labour violations for consenting migrant sex workers.

As highlighted in the *Trading Lives* report:

*'Recent research has indicated that labour trafficking exists in a broader context of exploitation of migrant workers... Workers perceived to be most at risk of exploitation are those on the 457 visas, migrants working in the agricultural sector or as domestic workers, international students, and those working in maritime/seafarer sector.'*<sup>36</sup>

It is worth noting that the sex industry was not included in this list. Furthermore, the *Trading Lives* report highlights that exposure to trafficking vulnerabilities is not the norm; however, the social, structural and legal circumstances connects a very small number of sex workers with an 'engineered niche' which is constructed by a reduced access to industrial rights, visas, legal rights and anti-discrimination protections.<sup>37</sup>

### ***Lack of clear markers to identify slavery, servitude and forced or compulsory labour.***

*The Act* defines slavery, servitude and forced or compulsory labour as:

*'the person holds another person in slavery or servitude and the circumstances are such that the person knows or ought to know that the other person is held in slavery or servitude' or 'the person requires another person to perform forced or compulsory labour and the circumstances are such that the person knows or ought to know that the other person is being required to perform forced or compulsory labour.'*<sup>38</sup>

In an attempt to capture a broad range of offences in the one offence, *the Act* has made the mistake of leaving the offence too undefined. The *Modern Slavery Review 2016* (the Review), the independent review of the effectiveness of *the Act*, indicated that a major challenge that became apparent in the implementation of *the Act* was a lack of clear indicators, resulting in authorities often missing the indicators for exploitation and a 'lack of consistency in how law enforcement and criminal justice agencies deal with modern slavery'.<sup>39</sup> In an effort to respond to the lack of clear indicators defined

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<sup>36</sup> Joint Standing Committee on Foreign Affairs Defence and Trade Human Rights Sub-Committee. (2013). *Trading lives : modern day human trafficking*. Canberra: Parliament of the Commonwealth of Australia, Pg 24

<sup>37</sup> Ibid, Pg 22.

<sup>38</sup> *The Modern Slavery Act 2015* (UK) Section 1.

<sup>39</sup> Haughey, C. (2016). *The Modern Slavery Act Review* UK: Home Office (Commissioned by Home Secretary) Retrieved from <https://www.gov.uk/government/publications/modern-slavery-act-2015-review-one-year-on>, Pg 3.

within *the Act*, *the Review* recommended training for police officers to include ‘markers for trafficking and exploitation’.<sup>40</sup> However, slavery and trafficking are serious and complex crimes with severe penalties. The indicators to identify when an offence is taking place needs to be clearly defined within *the Act* without any ambiguity to ensure consistency in its application. Ultimately, a lack of clear indicators renders the *slavery, servitude and forced or compulsory labour* offence redundant as authorities are unable to effectively use this offence to identify victims or prosecute traffickers.

*The Review* clearly indicates another major challenge in the implementation of *the Act* was ‘a lack of structured approach to operation agencies to identify, investigate, prosecute and prevent slavery’.<sup>41</sup> The issues identified in *the Review* would be assisted by appropriate training and ensuring the meaningful involvement of communities that are being investigated. Often due to fundamental misunderstandings of the sex industry, resources are wasted and sex workers are needlessly surveilled and persecuted. Ensuring appropriate training by sex workers to front line workers, including police; the meaningful involvement of sex workers in the development of anti trafficking approaches and materials, and the inclusion of peer sex worker organisations in referral pathways would result in far better outcomes that are targeted, cost effective, culturally appropriate and sensitive to the needs of the community.

### ***Sex work defined as exploitation***

Section 3(3)(a)(ii) explicitly defines exploitation as sex work. The explanatory notes state that; “*Subsection (3) sets out that exploitation includes sexual exploitation by reference to conduct which would constitute..... any of the sexual offences provided for in Part 1 of the Sexual Offences Act 2003 (these include offences relating to rape, sexual assault, prostitution and child pornography).*”<sup>42</sup>

The conflation of exploitation and trafficking with sex work is a backwards step for Australia’s trafficking legislation. Moreover, the legislation conflates a variety of criminal acts with sex work. The amendments in the Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act in 2012 removed direct linkages to only the sex industry from a number of key offences, such as “servitude” and “deceptive recruiting”. This was an important step in recognising that anti-trafficking legislation has had a skewed focus on the sex industry. To adopt the UK Modern Slavery Act’s definitions of exploitation will undo this progress. Defining sex work as exploitation and legislating it as such will drive sex workers underground, inhibit sex workers’ access to basic services, consume significant (financial and labour) resources, and will be unsuccessful in improving working conditions for sex workers or identifying trafficking or exploitation.

According to *the Act* section 2(1), a person has committed the offence of human trafficking, ‘*if the person arranges or facilitates the travel of another person (“V”) with a view to V being exploited.*’ Given the definition of exploitation as sex work, this criminalises a wide range of conduct in relation to

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<sup>40</sup> Ibid, pg 5.

<sup>41</sup> Ibid.

<sup>42</sup> *Modern Slavery Act Explanatory notes (2015)* UK: Retrieved from <http://www.legislation.gov.uk/ukpga/2015/30/notes/division/5/1>. Section 33

migration and sex work. *The Act Section 2(2)* further states that, *'It is irrelevant whether V consents to the travel (whether V is an adult or a child).'*' This invalidates a sex workers ability to consent to travel and sex work. Sex work policy has been particularly fraught on this issue – anti-sex work campaigners have claimed that sex workers cannot consent to sex work, that all sex work is violence, and accused us of false consciousness and brainwashing. This has led to the criminalisation of our work, with claims that this is being done for our own good, but has led to disastrous impacts for sex workers' health and safety.

### ***Criminalising support and safety structures of sex workers.***

Scarlet Alliance is deeply concerned with *section 2(3)* of *the Act*, which criminalises anyone that arranges or arranges a person's travel by recruiting, transporting, transferring, harbouring or receiving a person. *Section 2(3)* is an incredibly broad offence that could potentially prosecute a wide range of people who are *not* perpetrators of trafficking or slavery, such as, and not limited to, travel agents, managers, drivers, landlords, friends and family and other sex workers. *Section 2(3)* could also potentially criminalise people providing health, emotional and other support for migrant sex workers. In effect, the criminalisation of people who assist migrant sex workers sends the message that anyone associated with migrant sex workers in their travel and work are by default exploitative.<sup>43</sup> Migrant sex workers' relationships with people who assist them in their travel and work are varied and complex. For example, research in Canada indicates that it is not unusual for sex workers to move through different roles in supporting and ensuring the safety of other sex workers, such as by driving another sex worker to work or managing another sex worker while sex working themselves, or after retiring.<sup>44</sup> We often utilise the assistance of other people to increase our safety, our support networks or as part of our business strategy.

Additionally, *section 2(4)(b)* criminalises anyone who arranges or facilitates travel of another person and *'know or ought to know that another person is likely to exploit V (in any part of the world) during or after travel'*. A lack of time constraints make this offence impractical to police and can include a wide range of safety and support structures of migrant sex workers, irrespective of the third person's intentions or knowledge, who are not key offenders, who are peripherally involved, or who are intending to help sex workers. Criminalising the people who support migrant sex workers does nothing to empower migrant workers or equalise the power relationship between migrant worker and employer. On the contrary, the criminalisation of the safety and support structures of sex workers force them to operate covertly, forcing migrant sex workers into more dangerous workplaces, and encouraging sex workers to work alone – by criminalising anyone who provides support or assistance, accommodation or transportation.

Decriminalisation of the safety and support structures of migrant sex workers ensures that sex workers are able to report without fear of prosecution, have access to legal avenues to challenge exploitation or

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<sup>43</sup> Network for Sex Worker Projects (NSWP). (2017). *The Decriminalisation of Third Parties*. Retrieved from UK: <http://www.nswp.org/resource/policy-brief-the-decriminalisation-third-parties>. Pg 7

<sup>44</sup> Bruckert, C., & Law, T. (2013). Beyond pimps, procurers and parasites: Mapping third parties in the incall/outcall sex industry. *Rethinking Management in the Sex Industry Research Project*, Pg7.

abuse and aid migrant sex workers in harnessing greater control and power in their employment relationships.

### ***Consent is deemed further irrelevant***

Subsection 5 under the *slavery, servitude and forced and compulsory labour* offence makes consent an irrelevant factor, ‘*whether an adult or child*’, in determining whether an offence has taken place. Additionally, *section 1(3)* states when ‘*determining whether a person is being held in slavery or servitude or required to perform forced or compulsory labour, regard may be had to all the circumstances*’. One such circumstance in *section 1(4)(b)* is ‘*to any work or services provided by the person, including work or services provided in circumstances which constitute exploitation within section 3(3) to (6)*.’ As *section 3(3)* defines explicitly sex work as exploitation, this further conflates sex work with the criminal offences of slavery, servitude, forced and compulsory labour. The effect of the above provisions is that a migrant sex worker cannot consent to sex work as sex work is seen as exploitative and therefore a sex worker’s consent is deemed irrelevant.

Another circumstance in ‘*determining whether a person is being held in slavery or servitude or required to perform forced or compulsory labour*’, identified in *section 1 (4)(a)* includes the migrant worker’s ‘*family relationships, and any mental or physical illness which may make the person more vulnerable than other persons*’.<sup>45</sup> Implicit in *the Act* is the assumption that migrant workers can be deemed unable to exercise agency or will and can be treated as minors. A lack of clear indicators marking what family situation, mental or physical illness is relevant in making a migrant worker more vulnerable leaves the application of this provision open to interpretation by the authorities. Allowing authorities to subjectively apply provisions that disregard the consent of migrant workers allows people who are untrained to make such an assessment to use misconceptions and stereotypes to direct their decision making.

Further, it is inappropriate to use mental, physical and family relationships as signs for a lack of agency. Mental or physical illness or family relationships do not automatically make migrant workers vulnerable to slavery and exploitation. Migrant workers, like all workers, do not make decisions in a vacuum. From a wider migrant workers’ perspective, making consent irrelevant erases the migrant worker experience: their right to work to provide money for their family, prevents people from moving across borders, keeps people in poverty, and prescribes who is able to make rational decisions. Rather than providing migrant workers with mental or physical illnesses or complicated family relationships with greater protections and support, *the Act* penalises migrant workers by taking away their agency.

Making consent irrelevant enters dangerous territory as it plays into victim narratives around sex workers, particularly the view that sex workers have a ‘false consciousness’ and are unable to consent to sex work, as is often peddled by anti-sex work feminists who view all sex work as violence against women. *The Act* echoes these sentiments.

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<sup>45</sup> *Modern Slavery Act 2015* (UK) Section 1 subsection 4a.

The *Modern Slavery Act 2015 Explanatory Notes* indicate that consent has been made irrelevant to prevent consent being used as a defence for trafficking related crime.<sup>46</sup> However, all of the trafficking convictions thus far in Australia that has involved sex workers, involved consent to travel and work in the sex industry but was not a barrier in attaining convictions.

Consent is a fundamental element under the International Labour Organisation's *Convention No 29 on Forced or Compulsory Labour* which defines 'forced or compulsory labour' as 'all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily'.<sup>47</sup> Consent is clearly a key element constituting 'forced or compulsory labour'. Yet the provisions in *The Act* mean that there is no room for consent to be recognised. Additionally, consent is a fundamental element in determining whether an offence has taken place in a range of areas of law. Making consent irrelevant denies the defendant due process as consent or acquiescence to travel for work will be of no relevance when proving a trafficking offence. As a result, a criminal proceeding can take place without a victim believing they have been exploited.

***Slavery and Trafficking Prevention Orders contravene the fundamental principles of Australia's legal system.***

*Section 14(1)(b), Slavery and Trafficking Prevention Orders (STPOs)* can be applied on the basis that 'the defendant is not guilty of a slavery or human trafficking offence by reason of insanity', or *section 14(1)(c) 'a finding that the defendant is under a disability and has done the act charged against the defendant in respect of a slavery or human trafficking offence.'* This provision makes the decision of a court proceeding irrelevant in applying penalties if the defendant has a disability or mental illness, denying the defendant due process. Penalising defendants found to be not guilty by reason of insanity or because of a disability undermines Australia's long accepted premise that a person with an intellectual disability or mental illness cannot be found guilty of an offence if they lacked the capacity to understand the consequences of their actions in the time of the offence, as highlighted in section 20BA of the *Crimes Act 1914*. STPOs violate our fundamental understanding of fair trial and due process which is a fundamental precept in Australian society and understandings of justice. Penalising defendants for crimes that they have been proven to be not guilty contravenes many basic human rights, such as The Universal Declaration of Human Rights Articles 9 ban on arbitrary detention<sup>48</sup> and 10 right to public hearing.<sup>49</sup>

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<sup>46</sup> Parliament of UK. (2014). *Modern Slavery Act 2015: Explanatory Notes* Retrieved from <http://www.legislation.gov.uk/ukpga/2015/30/notes/division/2>, Pg 4.

<sup>47</sup> International Labour Organisation. (1930). *Forced Labour Convention, 1930 (No. 29) Convention concerning Forced or Compulsory Labour (Entry into force: 01 May 1932)* (Vol. (Online) C020), Article 2.1.

<sup>48</sup> United Nations General Assembly. (1948). *The Universal Declaration of Human Rights*. Retrieved from <http://www.un.org/en/universal-declaration-human-rights/>.

<sup>49</sup> Ibid.

Section 14(2) makes clear that the courts need only to be satisfied that ‘a) *there is a risk that the defendant may commit a slavery or human trafficking offence, and b) it is necessary to make the order for the purpose of protecting persons generally, or particular persons, from the physical or psychological harm which would be likely to occur if the defendant committed such an offence*’. As a result, a defendant, who has been determined ‘not guilty’ of an offence by the courts, can be subjected to a STPO without a victim or without having committed an actual crime. In essence, STPOs are a tool that can be used by the authorities to arbitrarily surveil, intimidate and control defendants perceived to be undesirable.

Additionally, STPOs require the defendant to forfeit their passport, and defendants are prohibited from foreign travel for up to 5 years.<sup>50</sup> The 5 year time period can be renewed, which, in effect, means that a recipient of a STPO can be prevented from foreign travel indefinitely.<sup>51</sup> The order requires that the defendant provide their name and address to the police<sup>52</sup> and allows the courts, at discretion, to ‘impose additional prohibitions’.<sup>53</sup> In effect, the STPOs allow authorities to surveil and control people indefinitely at their discretion. Although the *Home Office Guidance on Slavery and Trafficking Prevention Orders and Slavery and Trafficking Risk Orders under Part 2 of the Modern Slavery Act* implies the travel restrictions were intended for UK nationals to prevent recruitment and intimidation of victims overseas<sup>54</sup>, *The Act* does not protect non-nationals from being restricted from returning to their country of residence or citizenship. Restricting the defendant’s movement and confiscating their passport can prevent the defendant from returning home, restricting their access to their family, occupation and country of citizenship, and contravenes the defendants right to ‘not be subjected to arbitrary interference with his privacy, family, home or correspondence’.<sup>55</sup>

### ***Slavery and Trafficking Risk Orders contravene human rights***

Scarlet Alliance is deeply concerned with the Slavery and Trafficking Risk Orders (STROs) proposed in section 23 of *The Act*. The courts can grant STROs against anyone who is considered to present a risk that they ‘*will commit a slavery or human trafficking offence, b) and it is necessary to make the order for the purpose of protecting persons generally, or particularly persons, from the physical or psychological harm which would be likely to occur if the defendant committed such an offence.*’<sup>56</sup> A STRO can be placed on someone who has not committed a crime and regardless of a conviction, contravening the

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<sup>50</sup> *Modern Slavery Act 2015* (UK) Section 17 subsection 4a.

<sup>51</sup> *Ibid.* Section 17 subsection 4b.

<sup>52</sup> *Ibid.* Section 19.

<sup>53</sup> *Ibid.* Section 20 subsection 4.

<sup>54</sup> Home Office. (July 2015). *Guidance on Slavery and Trafficking Prevention Orders and Slavery and Trafficking Risk Orders under Part 2 of the Modern Slavery Act 2015*. : Government of UK. Retrieved from <https://www.gov.uk/government/publications/slavery-and-trafficking-prevention-and-risk-orders>, Pg 16.

<sup>55</sup> United Nations General Assembly. (1948). *The Universal Declaration of Human Rights*. Retrieved from <http://www.un.org/en/universal-declaration-human-rights/>, Article 12.

<sup>56</sup> *Modern Slavery Act 2015* (UK) Section 23 subsection 2

defendant's right 'to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence'.<sup>57</sup> Additionally, a lack of geographical or time constraints allows a wide range of people to be applicable for STROs, making the provision impractical, arbitrary and dangerous. A number of people are given the power in *the Act* to apply for STROs against a person, such as "an immigration officer". Imposing serious penalties on people, such as travel restrictions for a 'at least 2 years, or until further notice'<sup>58</sup> and being mandated to register with the authorities<sup>59</sup>, without due process contravenes a person subject to STROs' right to freedom of movement and not 'be subjected to arbitrary interference with his privacy, family, home or correspondence.'<sup>60</sup>

***The Modern Slavery Act fails to mandate increased training for authorities to identify and respond to slavery and exploitation.***

*The Review* identified a lack of training, clear markers and consistency to be significant barriers in identifying and supporting victims of slavery and exploitation.<sup>61</sup> Inadequate training and a need for an increased coordinated response have been identified in previous reviews in Australia; however, no sufficient investment in training has been made.<sup>62</sup> *The Act* only mandates training in Section 41 *General Functions of the Commissioner*. This section states that one of the many roles of the Anti-Slavery Commissioner includes 'providing information, education or training'.<sup>63</sup> However, Scarlet Alliance submits that training provided to authorities to identify slavery and exploitation must be driven by affected communities to train authorities on indicators for trafficking and appropriate responses. The inclusion of affected communities in anti-trafficking responses encourages communities to work together to tackle trafficking in their industries and within their communities and will ensure a greater coordinated response. Additionally including communities in training front line authorities will ensure effective, tailored approaches that are cost effective, culturally appropriate and will result in a coordinated response that does not contravene the rights of the community.

*The Act* grants discretionary powers to chief officers of police and immigration officers among others, to make STPO and STRO applications. Additionally, a range of authorities, from council workers to immigration officers, are tasked with the duty to identify slavery and exploitation. Granting a wide range of authorities with discretionary powers without providing increased training and clear indicators to

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<sup>57</sup> United Nations General Assembly. (1948). The Universal Declaration of Human Rights. Retrieved from <http://www.un.org/en/universal-declaration-human-rights/>, Article 11

<sup>58</sup> *Modern Slavery Act 2015* (UK) Section 24 subsection 4

<sup>59</sup> *Ibid.* Section 26

<sup>60</sup> United Nations General Assembly. (1948). The Universal Declaration of Human Rights. Retrieved from <http://www.un.org/en/universal-declaration-human-rights/>. Article 12

<sup>61</sup> Haughey, C. (2016). *The Modern Slavery Act Review* UK: Home Office (Commissioned by Home Secretary) Retrieved from <https://www.gov.uk/government/publications/modern-slavery-act-2015-review-one-year-on>.

<sup>62</sup> United Nations General Assembly. (2016). Universal periodic review. *Report of the Working Group on the Universal Periodic Review, Australia* (Thirty-first session). Pg 25

<sup>63</sup> *Modern Slavery Act 2015* (UK) Section 41 subsection 3d

identify slavery and exploitation will result in authorities being forced to implement *the Act* without being adequately equipped to make such assessments and encourages authorities to act on what they know, which is often skewed by the media and stereotypes, reducing the effectiveness of Australia's anti-trafficking response and violating the rights of communities.

The gaps that have been identified in past trafficking reviews in Australia and in the *Modern Slavery Review* cannot be fixed with more laws. Significant investment is needed to increase training of relevant authorities, meaningfully including at risk and affected communities to drive the training and identify the indicators for slavery and exploitation, increase the coordinated response and identify appropriate responses.

### ***A national compensation scheme needs to be implemented***

Scarlet Alliance is deeply concerned that *the Act* fails to include a national compensation scheme to victims, irrespective of a conviction. Currently in Australia, victims of trafficking are provided compensation by states and territories. However, as highlighted by the *Trading Lives* report, the state and territory schemes are not designed to accommodate Commonwealth legislation.<sup>64</sup> The compensation afforded victims of trafficking is varied and have failed to provide victims with appropriate avenues for compensation. Additionally, *the reparation for offences* provision stated under the *Crimes Act 1914* can order defendants to pay reparations to the victim.<sup>65</sup> However, there are no provisions to address circumstances in which defendants cannot pay and as a result, many victims are left without a remedy.

Similarly, *the Act* does not provide victims with any guarantee of compensation and does not fill Australia's legislative gap in victim compensation. In the UK, very few exploited workers were able to access compensation through reparation orders.<sup>66</sup>

The Palermo Protocol states:

*Each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.*<sup>67</sup>

An effective way to ensure victims of trafficking and exploitation are afforded the right to fair and prompt justice and compensation is to provide a national compensation scheme that is funded by the government and can be accessed without needing to participate in a criminal proceeding. Additionally,

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<sup>64</sup> Joint Standing Committee on Foreign Affairs Defence and Trade Human Rights Sub-Committee. (2013). *Trading lives : modern day human trafficking*. Canberra: Parliament of the Commonwealth of Australia, Pg 72.

<sup>65</sup> *Crimes Act 1914* (Aus (Com)) Div 10 Section 21B.

<sup>66</sup> Falconer, C. (8 May 2015). *The Modern Slavery Act - What's in it for migrant workers?* Retrieved from <http://www.labourexploitation.org/news/modern-slavery-act-whats-it-migrant-workers>.

<sup>67</sup> United Nations Human Rights Office of the High Commission (OHCHR). (2000). *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*. Retrieved from <http://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolTraffickingInPersons.aspx>, Article 6 section 6.

the implementation of a national compensation scheme will ensure Australia is meeting its international obligations.

### ***Protections to Victims***

Scarlet Alliance welcomes the introduction of *section 45* that prevents victims of slavery and exploitation who commit an offence with being imposed with penalties. However, the exclusions listed in *Schedule 4* includes a broad range of non-violent offences such as damaging property and assisting unlawful immigration which will exclude many victims who were forced to commit an offence. Additionally, *Schedule 4* section 33 *committing offence with intent to commit sexual offence* excludes victims who have committed a 'relevant sexual offence' under the *Sexual Offences Act 2003* (UK) which can include being a sex worker or a client of a sex worker, or providing support and assistance to a sex worker.

Scarlet Alliance also welcomes the civil legal aid provided to victims as stated in *section 47*. However, the civil legal aid is only afforded to victims where a 'competent authority' has made a 'conclusive determination that an individual is a victim of slavery, servitude or forced or compulsory labour'<sup>68</sup>. In the case of victims with visa issues or concerns, referral to the authorities is often not a logical option and requires early legal aid to assess their options and consequences and make an informed decision. Legal aid to victims needs to be anonymous and free to create incentives for migrant workers to access support.

### ***Singling out of sexual exploitation***

Scarlet Alliance is deeply concerned with the singling out of sexual exploitation in section 3 *meaning of exploitation*. The removal of sexual servitude from the headings and definitions of servitude in Australia's *Crimes Code Act 1995* was an important step in acknowledging exploitation in other industries and reducing the over sexualisation of understandings of exploitation.

The singling out of sexual exploitation conflates sex work with trafficking and over sexualises the interpretation of exploitation at the expense of investigating trafficking and exploitation in other industries. The most recent *Trafficking in Persons* report indicates that in 2015-2016 '130 of the 169 human trafficking referrals received by the AFP related to forms of exploitation not involving the sex industry'<sup>69</sup>, highlighting the growing discovery of trafficking and exploitation in industries other than the sex industry. However, the singling out of sexual exploitation would return Australia back to the over sexualisation of trafficking and exploitation which was investigated at length and at great cost and resulted in the determination that trafficking was not a widespread phenomenon in the Australian sex industry.

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<sup>68</sup> *Modern Slavery Act 2015* (UK) Section 47 subsection 7

<sup>69</sup> Interdepartmental Committee. (2016). *The Eighth Report of the Interdepartmental Committee on Human Trafficking and Slavery*. ACT: Commonwealth of Australia

Additionally, *the Act* proposes that *sexual exploitation* includes Part 1 of the *Sexual Offences Act 2003* (Sexual Offences) (UK) which criminalises sectors of the sex industry such as brothels under section 52 *Causing or inciting prostitution*<sup>70</sup> and street-based sex work under section 51A *solicitation*<sup>71</sup>. In effect, *the Act* assumes migrant sex workers working in certain sectors of the sex industry are exploited, irrespective of their experience or consent. The criminalisation of brothels and street based sex work is often less about exploitation and more about public morality. Assuming migrant sex workers in the unregulated sex industry to not have agency or consent does nothing to empower sex workers.

### **Other Related Matters**

In 2014, a UK MP attempted to introduce an amendment to the *Modern Slavery Act* that aimed to criminalise the clients of sex workers. However, it was dismissed with MP John McDonnell stating:

‘there is no evidence that criminalising clients, as in the Swedish legislation, reduces the number of either clients or sex workers... (and)... not only do such measures not work, they actually cause harm’.<sup>72</sup>

The ‘Swedish Model’ (also referred to as the Nordic Model) has reduced safe legal migration pathways and the capacity of peer outreach to reach migrant sex workers. It has increased persecution and deportation of migrant sex workers, reproducing the very circumstances that make migrant sex workers vulnerable to trafficking and exploitation.<sup>73</sup> Other countries, such as South Africa and Scotland, have also rejected the criminalisation of clients as a result of growing evidence that such approaches cause greater harm to sex workers. Evidence indicates that approaches that criminalise buyers of sex/clients are not effective in reducing trafficking or increasing sex workers access to legal, health and supportive services.<sup>74</sup>

Decriminalisation has proven to create the most enabling environment to ensure migrant sex workers are afforded workplace rights; have access to legal, health and supportive services and bilingual peer educators; and has proven to reduce organised crime and police corruption.<sup>75</sup>

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<sup>70</sup> *Sexual Offences Act 2003* (UK) Section 52.

<sup>71</sup> *Sexual Offences Act 2003* (UK) Section 51a.

<sup>72</sup> John McDonnell. (2014). Oral Answers to Questions. *House of Commons 587*(55), Column 771. Retrieved from House of Commons website:

<https://www.publications.parliament.uk/pa/cm201415/cmhansrd/cm141104/debtext/141104-0004.htm#14110460004516>.

<sup>73</sup> Amnesty International. (2016a). Amnesty International Policy on State Obligations to Respect, Protect and Fulfil the Human Rights of Sex Workers.

<sup>74</sup> Ibid.

Levy, J., & Jakobsson, P. (2014). Sweden’s abolitionist discourse and law: Effects on the dynamics of Swedish sex work and on the lives of Sweden’s sex workers. *Criminology and Criminal Justice*, 14(5), 593-607.

<sup>75</sup> Donovan, B., Harcourt, C., Egger, S., & Fairley, C. K. (2010). Improving the health of sex workers in NSW: maintaining success. *New South Wales Public Health Bulletin*, 21(4), 74-77. doi:http://dx.doi.org/10.1071/NB10013

Minister for Innovation and Better Regulation. (2016). NSW Government Response to the Legislative Assembly Inquiry into the Regulation of Brothels. Retrieved from <https://www.parliament.nsw.gov.au/committees/listofcommittees/Pages/committee-details.aspx?pk=185#tab-governmentresponses>.

## Recommendations:

- Nothing other than evidence based data should be used to understand the nature and extent of trafficking in the sex industry. The Australian trafficking convictions related to the sex industry involve labour exploitation, unpaid wages, and inflated and unfair debts – not forced sex work.
- The *slavery, servitude and forced or compulsory labour* offence needs to include clear indicators to assist authorities in consistently identify and respond to genuine cases of trafficking.
- Instead of lowering to threshold of what constitutes as slavery to capture a wider range of exploitative activities in anti-trafficking legislation, increasing migrant sex workers' access to industrial mechanisms and labour rights will ensure migrant sex workers are able to effectively negotiate and redress exploitative working conditions.
- Safety and support structures of migrant sex workers should not be criminalised. Criminalisation forces safety and support structures of migrant sex workers to operate covertly, forcing migrant sex workers into more dangerous workplaces, and encouraging sex workers to work alone.
- It is inappropriate to use mental, physical and family relationships as signs of vulnerability or a lack of agency. Migrant sex workers, like all workers, do not make decisions in a vacuum. Mental, physical or complicated family relationship should incite greater support for the migrant workers rather than removing their right to consent or practice agency.
- There needs to be room for consent to be assessed when determining whether an offence has taken place.
- If the Government is concerned with ensuring migrant workers are making empowered decisions and understand the terms and conditions of their entry, contracts and visas, a more effective approach would be to provide for the multilingual translation of travel and visa information.
- STPOs violate our fundamental understanding of fair trial and due process which is the basis of Australian society. STPOs can be used by the authorities to arbitrarily surveill, intimidate and control defendants perceived to be undesirable. STPOs should not be introduced into Australia's anti-trafficking legislation.
- STROs can be placed on someone who has not committed a crime and in spite of a conviction. STROs place severe restrictions on applicants and contravene many human rights. STROs should not be introduced into Australia's anti-trafficking legislation.
- Training provided to authorities to identify slavery and exploitation must be driven by affected communities to inform authorities on indicators for trafficking and appropriate responses. The inclusion of affected communities in anti-trafficking responses encourages communities to work together to tackle trafficking in their industries and will ensure a greater coordinated response.
- An effective way to ensure victims of trafficking and exploitation are afforded the right to fair and prompt justice and effective remedy is to provide a national compensation scheme that is funded by the Australian Government.
- Protection of victims should not exclude victims who have not committed a violent crime.

- Support for victims needs to be delinked from participation in a criminal proceeding. Support needs to be anonymous, free and without the need to report to the police.
- Scarlet Alliance opposes the singling out of sexual exploitation in section 3 *meaning of exploitation*. The removal of sexual servitude from the headings and definitions of servitude in Australia's *Crimes Code Act 1995* was an important step in acknowledging exploitation in other industries and reducing the over sexualisation of exploitation.
- Scarlet Alliance submits that a sex worker driven evidence-based approach to sex work, migration and trafficking should be pursued over criminal justice approaches. The most effective approaches aim to address the circumstances that create trafficking and prioritise the needs, agency and self-determination of victims over criminal prosecutions and increased surveillance. They address labour exploitation through a focus on prevention, industrial rights, civil remedies, statutory compensation, and equitable access to visas, migration channels and support.