

**Submission to the
National Action Plan to Combat Modern Slavery 2020-24 Public Consultation Paper**

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Thank you for the opportunity to respond to the *National Action Plan to Combat Modern Slavery 2020-2024: Public Consultation Paper*. We have had the opportunity to contribute towards, and consider, the joint submission focusing on the inclusion of orphanage trafficking in the National Action Plan to Combat Modern Slavery 2020-2024 made by Rethink Orphanages Australia and the ACFID Child Rights Community of Practice. We agree with that submission and take this opportunity to provide further specificity with regard to the recommendation to amend the *Criminal Code 1995 (Cth)* with respect to orphanage trafficking.

Currently orphanage trafficking is not a prosecutable offense under Australian law. This is due to the definition of trafficking in Division 271 of the *Criminal Code 1995 (Cth)*, which creates a requirement for trafficking to include a proposed or actual crossing of an Australian border in order to be a prosecutable offence. As a result of this definition, trafficking offences involving Australian citizens, residents or entities that wholly take place in foreign jurisdictions, cannot be prosecuted under Australian law, despite the application of extended geographical jurisdiction to Division 271 of the *Criminal Code 1995*.

Goal One listed in the National Action Plan to Combat Modern Slavery 2020-24 Public Consultation Paper constitutes a commitment to ‘maintain and promote compliance with international standards on modern slavery’. Goal Four states that Australia will ‘maintain a robust and comprehensive legislative framework to combat modern slavery’. We submit that to realise Goals One and Four, Australia should consider amendments to the *Criminal Code 1995 (Cth)* to address an important issue relating to the ability of Australian officials to prosecute trafficking offences undertaken by Australian citizens, residents or entities in foreign jurisdictions despite extraterritoriality provisions. In this submission, we identify two options for amendment to ensure that orphanage trafficking, and trafficking generally, is prosecutable when committed by Australian citizens, residents or entities in foreign jurisdictions, and recommend inclusion of this reform in the National Action Plan 2020-24.

Progressing amendments to the *Criminal Code 1995 (Cth)*, would also assist in meeting the commitment made during the 74th Session of the UNGA in the Resolution on the Rights of the Child adopted by the General Assembly on the 18th of December 2019. Under Article 35 (t) States committed to:

Taking appropriate measures to protect children who are victims of trafficking and are deprived of parental care, as well as enacting and enforcing legislation to prevent and combat the trafficking and exploitation of children in care facilities, and supporting children who are victims of human trafficking in returning to their families and in receiving appropriate mental health and psychological assistance that is victim-centred and trauma-informed and taking appropriate measures to prevent and address the harms related to

*volunteering programmes in orphanages, including in the context of tourism, which can lead to trafficking and exploitation;*¹

This would continue to enhance Australia's global leadership on this issue and be consistent with the objective of Goal Eleven: Enhance our leadership and partnerships to promote regional and international cooperation on combatting modern slavery.

We propose two alternative amendments for consideration:

1. **Broaden the current definition of the trafficking offence in Division 270** of the Criminal Code by removing the prerequisite to cross or intend to cross an Australian border for an act of trafficking to constitute an offence under Australian law. Such an approach would allow for orphanage trafficking offenses committed by Australian citizens, residents or entities in other jurisdictions to be prosecuted, as well as other acts of trafficking which do not involve a nexus with Australian borders.
2. **Create a new offence of orphanage trafficking** through the inclusion of orphanage trafficking as an additional form of trafficking into Division 271 of the Criminal Code 1995 (Cth). This could be achieved via the insertion of a subdivision. Below is an excerpt proposing wording for a subdivision taken from an article written by the authors and published by *Griffith Journal of Law and Human Dignity*² (attached):

Subdivision BC 271.8 *Offence of orphanage trafficking in children*

A person commits an offence of orphanage trafficking in children if:

(a) the first-mentioned person organises or facilitates the transportation of another person to an orphanage or institutional facility; and

(b) the other person is under the age of 18; and

(c) in organising or facilitating that transportation, the first-mentioned person:

(i) intends that the other person will be exploited, either by the first-mentioned person or another, during or following the transportation to that other place; or

(ii) is reckless as to whether the other person will be exploited, either by the first-mentioned person or another, during or following the transportation to that other place.

¹ UN General Assembly, Report of the Third Committee, A/74/395

² van Doore, KE & Nhep, R, 2019, 'Orphanage Trafficking, Modern Slavery, and the Australian Response', *Griffith Journal of Law and Human Dignity*, Vol. 7, no. 2, Dec 2019.

Penalty: Imprisonment for 25 years.

It is suggested that that the offences be given an extra-territorial application, modelled on section 273.2 of the Criminal Code (Extended geographical jurisdiction - Category C) which reads:

273.2 Who can be prosecuted for an offence committed outside Australia

A person must not be charged with an offence against this Division that the person allegedly committed outside Australia unless, at the time of the offence, the person was:

- (a) an Australian citizen; or*
- (b) a resident of Australia; or*
- (c) a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory; or*
- (d) any other body corporate that carries on its activities principally in Australia.*

This would apply to both Australian citizens and residents, but also include any incorporated bodies (such as charities or not for profit organisations) and any organisations that may be registered or incorporated overseas but have their principal place of activity in Australia in accordance with section 273.2(d).

Thank you for taking the time to consider our comments and recommendations. We are available for further comment or response to questions should you require more information, and are contactable as per below.

Yours sincerely,

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