

Question on Notice – Public Hearing
**Foreign Affairs and Aid Sub-Committee, Joint Standing Committee on Foreign Affairs,
Defence and Trade**

Inquiry into establishing a Modern Slavery Act in Australia

DFAT has held discussions with Child Protection experts, the Australian Council for International Development (ACFID), key child rights organisations operating in international development, the Re-Think Orphanages group, academics, tourism industry representatives, legal experts and other Australian government departments to inform this response.

Senator Reynolds asked the following question at the hearing on 19 October 2017:

Senator REYNOLDS: Can I ask you to take on notice to give us a little more detail about what we could do to take an international lead for both sending and receiving countries in terms of advice?

The answer to the Honourable Senator’s questions above is as follows:

Australia has strong policy and legislation on child protection, a recognised role in global efforts to counter slavery and human trafficking through the National Action Plan to Combat Human Trafficking and Slavery 2015-19 and we are a party to the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption.

While responsibility for limiting the growth of institutions and ensuring adequate standards of care lies with national governments, Australia’s credentials alongside our long-term partnerships with reputable NGO and volunteer organisations, provide a solid foundation to promote responsible volunteering and increase awareness of the risks of ‘orphanage voluntourism’.

To increase awareness and advice in sending and receiving countries, Australia can:

- Raise awareness of the issue and advocate for stronger national legislation, standards and practices that support the protection of children, including through our role in the Bali Process, ASEAN, APEC and other regional fora.
- Initiate a public awareness campaign to inform the Australian public of the risks of orphanage voluntourism and promote smart volunteering.
- Engage with the travel industry on awareness and advice to discourage orphanage tourism.
- Work with the Australian Charities and Not-for-profits Commission (ACNC) and Overseas Aid Gift Deduction Scheme (OAGDS) to raise awareness and examine ways to strengthen child-safeguarding standards.
- Further strengthen the SmartTraveller website to provide definitive advice to travellers not to engage in orphanage voluntourism.
- Provide examples through media channels (including SmartTraveller, traditional media and social media) on alternative ways to support vulnerable children and families.

- Ensure information on this issue is included on the new Australian Volunteers website (being developed as part of the new phase of Australian Volunteers program, to be launched in February 2018).
- Increase awareness and advice to educational institutions regarding the risks of orphanage voluntourism to vulnerable children.

Senator Reynolds asked the following question at the hearing on 19 October 2017:

Senator REYNOLDS: The second part of that, again on notice, is whether the department has done some more thinking on what happens—we know that there are at least eight million children, but most of them are not visible, so there could well be two or three times as many kids in unregistered facilities. What we do? The next question is going to be that you can't just stop supporting them, because the evidence shows that the operators just walk away with the money and leave the kids. There are agencies who now have very good guidelines to train people on how they go into those facilities and support them and reunite the children with their families. But it's a long process and there are a lot of kids. It would be great if you have more thinking on that that you could come back to the committee on.

The answer to the Honourable Senator's questions above is as follows:

DFAT is not advocating a blanket ban on orphanages or other forms of residential care. A range of factors drive the demand for orphanages and other forms of residential care for vulnerable children including poverty, migration, support for children living with disabilities and weak social welfare systems. DFAT's policies recognise that residential care is best provided as an option of last resort, aimed at promoting longer-term reintegration into family or community.

Australian aid can support these reintegration efforts. To increase advice and knowledge on re-integration efforts, DFAT will support a learning event to capture good practice and share knowledge. This learning event brings fifty-seven of our accredited partners together and will build on knowledge gained through the Australian aid funded Australian NGO Cooperation Program (ANCP). For example, in Myanmar, through ANCP, ChildFund Australia is working with Child Focus Network to strengthen local child protection systems through the local Department of Social Welfare. In Cambodia, also through support from the ANCP, Save the Children is strengthening community systems for child protection to increase knowledge and application of positive parenting techniques; providing social work support to children and families; and strengthening child protection mechanisms. Through the Australian Volunteer program (placing long-term skilled volunteers), Australia is supporting the strengthening of systems and policies on child protection in Timor Leste.

The Australian Government also provides \$21 million a year in core funding to UNICEF. UNICEF's core priorities include child protection and issues related to child trafficking. UNICEF works with development partners, governments and non-governmental organisations on all aspects of anti-trafficking responses (prevention, protection and prosecution).

Senator Reynolds asked the following questions at the hearing on 19 October 2017:

The other thing is in terms of legislation. There are clearly crimes here along the trafficking supply chain. You have people here who are paying for that trafficking to occur but are unaware of it. This is one of the things with international agencies and individuals that we are grappling with now. **Where is the crime and who legislates and investigates and prosecutes that crime?** Clearly we and the US have recognised that it is trafficking, but it's also slavery—not in every facility, but in many of them. Maybe you can answer it now or take it on notice given the time. Could you come back with an aspect on prosecution, because to solve this in the long term sending and receiving countries need to have a very clear and consistent understanding and ability to legislate for that ... If you could take that on notice, and if you have some more thinking on that that we could reflect in our report, for Australia and then as a template that we can take in that mosaic globally, because we are now further advanced on this than any other country.

The answer to the Honourable Senator's question is as follows:

The Australian Government is committed to holding Australians accountable for child exploitation committed overseas, including in relation to sham orphanages.

In relation to the allocation of legislative, investigative and prosecutorial responsibility:

- certain conduct is criminalised, codified and legislated by the Australian Parliament through the Commonwealth *Criminal Code Act 1995 (Criminal Code)*
- the Australian Federal Police (AFP) investigates crimes under the *Criminal Code*, and
- the Commonwealth Director of Public Prosecutions (CDPP) prosecutes crimes under the *Criminal Code*, in accordance with the [Prosecution Policy of the Commonwealth](#)¹.

While there is no specific ban on orphanage 'voluntourism', there is a range of conduct potentially related to voluntourism that is criminalised.

The crimes of 'slavery and slavery-like conditions' and 'child sex offences outside Australia' are contained in the Criminal Code at division 270 and division 272 respectively. These offences capture the exploitation of children in overseas orphanages by Australians who engage in voluntourism in sham orphanages.

- For example, if an Australian exploits a child overseas, including in a sham orphanage, depending on the facts and circumstances, the criminal offences that may apply to this conduct include: slavery, servitude, forced labour, or forced marriage; and/or a range of child sex offences outside Australia (penetration of a minor outside Australia, intended sexual exploitation of a minor outside Australia, grooming of a minor outside Australia, etc).

¹ The Prosecution Policy provides that a two-stage test must be satisfied before a prosecution is commenced: there must be sufficient evidence to prosecute the case; and it must be evident from the facts of the case, and all the surrounding circumstances, that the prosecution would be in the public interest.

- The offences have extended geographical jurisdiction and can capture conduct that occurs wholly or partly outside Australia where the offender is an Australian citizen, resident, or body corporate incorporated in Australia.

Voluntourism in sham orphanages would not generally trigger a human trafficking offence:

- While human trafficking is criminalised in division 271, these offences relate to the movement of victims into or from Australia – they do not capture the scenario of voluntourism where a person travels from Australia to an orphanage overseas.

A table summarising offences potentially relevant to orphanage voluntourism is attached (pp.5-6).

In relation to human trafficking in the region, Australia's flagship anti-trafficking program, the Australia-Asia Program to Combat Trafficking in Persons (AAPTIP) supports improvements to the criminal justice response to human trafficking at both national and regional levels in ASEAN. DFAT is currently designing the fourth iteration of this counter-trafficking investment. The new investment will focus more closely on supporting criminal justice agencies in the region to meet their obligations to protect the rights of victims of human trafficking crime, including children.

In addition, Australia can raise awareness of the issue and advocate for stronger national legislation, standards and practices that support the protection of children, including through our role in the Bali Process, ASEAN, APEC and other regional fora.

Annex: Potential Criminal Code Offences related to orphanage ‘voluntourism’

Slavery and slavery-like conditions

Section	Offence	Maximum Penalty
270.3(1) <i>Slavery</i>	A person intentionally reduces another person to slavery, possesses or exercises rights of ownership over a slave, engages in slave trading, enters into a commercial transaction involving a slave, or exercises control or direction over, or provides finance for, slave trading or a commercial transaction involving a slave	25 years
270.3(2) <i>Slavery</i>	A person recklessly enters into a commercial transaction involving a slave, or exercises control or direction over, or provides finance for, slave trading or a commercial transaction involving a slave	17 years
270.5(1) <i>Servitude</i>	A person causes another person to enter into or remain in servitude. ²	15 years, or 20 years for an aggravated offence
270.5(2) <i>Servitude</i>	A person conducts a business involving the servitude of another person or persons	15 years, or 20 years for an aggravated offence
270.6A(1) <i>Forced Labour</i>	A person causes another person to enter into or remain in forced labour	9 years, or 12 years for an aggravated offence
270.6A(2) <i>Forced Labour</i>	A person conducts a business involving the forced labour of another person or persons	9 years, or 12 years for an aggravated offence
270.7 <i>Forced Labour</i>	A person intentionally induces another person to enter into an engagement to provide labour or services, where the other person is deceived about: the extent to which the person will be free to leave, or to cease providing labour or services; the quantum or existence of a debt owed or claimed to be owed; the fact the engagement will involve exploitation or the confiscation of travel or identity documents; or, if the engagement is to involve the provision of sexual	7 years, or 9 years for an aggravated offence

² Under section 270.4, servitude is defined as: the condition of a person... who provides labour or services, if, because of the use of coercion, threat or deception, a reasonable person in the position of the victim would consider himself or herself to be free:

- to cease providing the labour or services, or
- to leave the place or area where the victim provides the labour or services, and
- the victim is significantly deprived of personal freedom in respect of aspects of his or her life other than the provision of the labour or services.

Section	Offence	Maximum Penalty
	services, that fact, or the nature of sexual services to be provided	
270.7B(1) <i>Forced Marriage</i>	A person causes another person to enter into a forced marriage	4 years, or 7 years for an aggravated offence
270.7B(2) <i>Forced Marriage</i>	Be a party to a forced marriage, where you are not a victim of the forced marriage	4 years, or 7 years for an aggravated offence

Child sex offences outside Australia³

Section	Offence	Maximum Penalty
272.8(1) <i>Sexual intercourse with a child</i>	A person engages in sexual intercourse with a child under 16 years old and the sexual intercourse occurs outside Australia	20 years, or 25 years for an aggravated offence or persistent abuse
272.8(2) <i>Causing sexual intercourse with a child</i>	A person engages in conduct with a child under 16 years old and that conduct causes the child to engage in sexual intercourse in the presence of the person and the sexual intercourse occurs outside Australia	20 years, or 25 years for an aggravated offence or persistent abuse
272.9(1) <i>Sexual activity with a child</i>	A person engages in sexual activity (other than sexual intercourse) with a child under 16 years old and the sexual activity occurs outside Australia	15 years, or 25 years for an aggravated offence or persistent abuse
272.9(2) <i>Causing sexual activity with a child</i>	A person engages in conduct with a child under 16 years old and that conduct causes the child to engage in sexual activity in the presence of the person and the sexual activity occurs outside Australia	15 years, or 25 years for an aggravated offence or persistent abuse
272.12(1) <i>Sexual intercourse with a young person (offender in a position of trust or authority)</i>	A person engages in sexual intercourse with a young person who is 16 or 17 years old and the person is in a position of trust or authority in relation to the young person and the sexual intercourse occurs outside Australia	10 years
272.12(2) <i>Causing sexual intercourse with a young person</i>	A person engages in conduct with a young person who is 16 or 17 years old and the person is in a position of trust or authority in relation to the young person and that conduct causes the young person to engage in sexual intercourse in the presence of the person and the sexual intercourse occurs outside Australia	10 years

³ These offences also apply to a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory, or any other body corporate that carries on its activities principally in Australia. For example, if an overseas sham orphanage is run by an Australian individual or body corporate and there is child sex exploitation, then division 272 of the *Criminal Code* would capture their conduct overseas. However, where the orphanage does not have a strong Australian nexus (for example it is an overseas-run organisation that receives financial support from an Australian person) then the orphanage would not fall within the ambit of division 272.

Section	Offence	Maximum Penalty
<i>(offender in a position of trust or authority)</i>		
272.13(1) <i>Sexual activity with a young person (offender in a position of trust or authority)</i>	A person engages in sexual activity (other than sexual intercourse) with a young person who is 16 or 17 years old and the person is in a position of trust or authority in relation to the young person and the sexual activity occurs outside Australia	7 years
272.13(2) <i>Causing sexual activity with a young person (offender in a position of trust or authority)</i>	A person engages in conduct with a young person who is 16 or 17 years old and the person is in a position of trust or authority in relation to the young person and that conduct causes the young person to engage in sexual activity (other than sexual intercourse) in the presence of the person and the sexual activity occurs outside Australia	7 years
272.14(1) <i>Procuring a child for sexual activity</i>	A person engages in conduct with a child under 16 years old with the intention of procuring the child to engage in sexual activity outside Australia	15 years
272.15(1) <i>Grooming a child for sexual activity</i>	A person grooms a child under 16 years old with the intention of making it easier to procure the child to engage in sexual activity outside Australia	12 years
272.18(1) <i>Benefiting from a child sex offence</i>	A person engages in conduct with the intention of benefiting from a child sex offence under division 272 and the person's conduct could result in the person benefiting from the offence	20 years
272.19 <i>Encouraging a child sex offence</i>	A person engages in conduct with the intention of encouraging a child sex offence under division 272 and the person's conduct could result in the encouragement of an offence	20 years
272.20 <i>Preparing or planning a child sex offence</i>	A person does an act with the intention of preparing or planning an offence against subdivision 272.8 (sexual intercourse with a child), 272.9 (sexual activity with a child), 272.10 (aggravated offence where child has a mental impairment or is under	5-10 years (depending on the subdivision)

Section	Offence	Maximum Penalty
	the care, supervision or authority of the offender), 272.11 (persistent sexual abuse), 272.12 (sexual intercourse with a young person where the offender is in a position of trust or authority), 272.13 (sexual activity with a young person where the offender is in a position of trust or authority), or 272.18 (benefitting from a child sex offence)	