



Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012

Senate Legal and Constitutional Affairs Committee

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Introduction

Anti-Slavery Australia thanks the Committee for the opportunity to make a submission regarding the *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012 (The Bill)*.

Anti-Slavery Australia recommends the passage of the Bill to the Committee.

Background

Anti-Slavery Australia is a research and legal centre at the University of Technology, Sydney dedicated to the abolition of slavery, human trafficking and extreme labour exploitation (forced labour). Anti-Slavery Australia engages in teaching, policy development, law reform and professional practice on behalf of victims of trafficking¹. The director of Anti-Slavery Australia was appointed to the inaugural National Roundtable on People Trafficking in 2008 and continues in that role.

Since 2003 Anti-Slavery Australia has provided access to a comprehensive, high quality legal service for men, women and children who have experienced slavery, trafficking and extreme labour exploitation in Australia. During 2010-12, Anti-Slavery Australia provided legal representation to more than 70 clients, resulting in 39 grants of permanent residency for people who had been trafficked to Australia. Anti-Slavery Australia also lodged 13 applications for victims compensation and partnered with a legal firm, both working pro bono, to lodge a further 12 applications². Increasingly, Anti-Slavery Australia is assisting those threatened by, or trapped in, forced marriage³.

As Australia's only specialist legal centre dedicated to advancing the human rights of trafficked people, Anti-Slavery Australia is informed by the direct experiences of trafficked people in Australia, by research, and through collaboration with government agencies and a range of NGO's.⁴ Anti-Slavery Australia convenes the Sydney Trafficking Response Network to

¹ More information about Anti-Slavery Australia is available at www.antislavery.org.au

² *Trafficking in Persons: The Australian Government Response July 2010-June 2011*, Report of the Anti-People Trafficking Interdepartmental Committee, (2011), p. 46.

³ ABC Radio National, *Forced Marriage*, Interview with Rachael Kohn, The Spirit of Things, Sunday 29 July 2012. <http://www.abc.net.au/radionational/programs/spiritofthings/forced-marriage/4148388>

⁴ See further, Frances Simmons and Jennifer Burn, 'Evaluating Australia's Response to all Forms of Trafficking: Towards Rights-centred Reform' (2010) 84(10) *Australian Law Journal* 712.

facilitate the exchange of information, to develop best practice responses, and to promote discussion of emerging issues and responses.

Anti-Slavery Australia is guided by the principles set out in 2002 by the then UN High Commissioner for Human Rights, former President of Ireland, Mary Robinson, that the human rights of trafficked persons should be at the centre of all efforts to prevent trafficking⁵. While criminalisation of trafficking and related offences is part of an effective deterrence and prevention strategy, it may be that for some victims of trafficking, participation in a criminal trial may be one part of an appropriate and effective remedy. To this end, legislation should be 'clear, enforceable and comprehensive to ensure effective protection of the victim'⁶.

International law context

Australia is a party to major international treaties and conventions and has a responsibility to address slavery, slavery-like practices, human trafficking and forced labour. Trafficking is defined in Article 3 of the *United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing the Convention on Transnational Crime* (The Trafficking Protocol).⁷

Trafficking in persons, as defined in the Trafficking Protocol, is:

....the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

5 United Nations, OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, (E/2002/68/Add.1).

6 Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo. Submission to the UN Human Rights Council 6 June 2012 (A/HRC/20/18)

http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A.HRC.20.18_En.pdf at 5

7 *United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000 .

The Trafficking Protocol obliges State parties to criminalise trafficking, and to investigate and prosecute traffickers.

Definitions of slavery and slavery-like practices are found in the *International Convention to Suppress the Slave Trade and Slavery* 1926 ('the 1926 Slavery Convention'),⁸ and the *Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery* 1956 ('the 1956 Supplementary Convention')⁹. International labour treaties specifically define and prohibit forced labour. The *Forced Labour Convention* 1930 (ILO No.29)¹⁰ and the *Abolition of Forced Labour Convention* 1957 (ILO No. 105)¹¹ prohibit forced labour.¹²

While forced marriage is not specifically defined in international law, significant international instruments make it clear that marriage should be entered into with the full and free consent of each of the parties to the marriage¹³.

The Australian context

Australia is a destination country for men, women and children trafficked for exploitation. It is accepted by most commentators that reliable data on the dimension of trafficking globally, and in Australia, is difficult to obtain. On an international level, the highly-regarded International Labour Organization reported recently that 20.9 million people are victims of forced labour globally¹⁴. In Australia, fewer than 400 people have been officially identified as being trafficked. We anticipate that with increasing awareness about slavery, slavery-like practices such as forced marriage and trafficking, more men, women and children will be identified. While the majority of those identified as being trafficked have been women exploited in the sex industry, an increasing number of men and women have now been identified as being trafficked into other kinds of exploitation such as forced labour in the

⁸ Opened for signature 25 September 1926, 212 UNTS 17 (entered into force 18 June 1927).

⁹ Article 7(a).

¹⁰ Opened for signature 29 July 1929, 39 UNTS 55, (entered into force 1 May 1932).

¹¹ Opened for signature 25 June 1957, 320 UNTS. 291, (entered into force 17 January 1959).

¹² *Forced Labour Convention* 1930 (ILO No.29), Article 2(1). The definition of forced labour in this convention was not changed by the *Abolition of Forced Labour Convention* 1957 (No.105).

¹³ Relevant instruments include the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights* and the *Convention on the Elimination of all Forms of Discrimination Against Women* (CEDAW) and the *Convention on the Rights of the Child*.

¹⁴ ILO 2012 *Global Estimate of Forced Labour*.

http://www.ilo.org/sapfl/informationresources/ILOPublications/WCMS_181953/lang--en/index.htm

commercial hospitality industry, agriculture and in private homes¹⁵. There has been a reported case of organ trafficking¹⁶ and a number of reported cases involving forced marriage¹⁷.

In 2003, in anticipation of ratifying the Trafficking Protocol, Australia implemented a whole of government approach to combating persons including the creation of a specialist investigative team within the Australian Federal Police, legislation to criminalise trafficking, a support program for victims of trafficking, visas¹⁸ for witnesses who contributed to a police investigation or criminal prosecution and who were in fear of danger if they returned to their country of origin¹⁹.

The current legislation and gaps in the legislative scheme

In Australia, slavery offences are set out in Division 270 of the Criminal Code. Slavery is defined as ‘... the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including where such a condition results from a debt or contract made by the person’²⁰. In 2008, the High Court handed down the decision in *The Queen v Tang*²¹, unanimously holding that the slavery provisions in the Criminal Code were appropriate and adapted to implement Australia’s international obligations²². The High Court identified four powers attaching to the right of ownership:

- the power to use a person’s labour in a substantially unrestricted manner;
- the entitlement to the fruits of a person’s labour without compensation commensurate to the value of the labour;
- the power to control and restrict a person’s movements; and

¹⁵ F Simmons & J Burn, ‘Evaluating Australia’s Response to all Forms of Trafficking: Towards Rights-centred Reform’ (2010) 84(10) *Australian Law Journal* 712; Jennifer Burn & Frances Simmons, ‘Trafficking and Slavery in Australia: An Evaluation of Victim Support Strategies’, (2006) 15 *Asian and Pacific Migration Journal* 553; Jennifer Burn, Frances Simmons & Sam Blay, ‘Combating Trafficking: Australia’s response to Modern Day Slavery’, (2005) 79 *Australian Law Journal* 543; *Trafficking in Persons: The Australian Government Response July 2010-June 2011*, Report of the Anti-People Trafficking Interdepartmental Committee, (2011), *The Australian Government Response May 2009-June 2010*, (2010), Report of the Anti-People Trafficking Interdepartmental Committee, *The Australian Government Response January 2004-April 2009* (2009).

¹⁶ Natalie O’Brien, ‘Organ trafficker’s death closes case’, SMH 25 March, 2012 <http://www.smh.com.au/national/organ-traffickers-death-closes-case-20120324-1vqvvn.html>

¹⁷ See for example, *Kreet & Sampir* [2011] FamCA 22; *Madley & Madley and Anor* [2011] FMCAfam 1007; *Kandal & Khyatt & Ors* [2010] FamCA 508, *Department of Human Services & Brouker and Anor* [2010] FamCA 742

¹⁸ Jennifer Burn and Frances Simmons, Prioritising Protection: a new visa framework for trafficked people’, (2009) *Immigration Review* 42.

¹⁹ See *Australian Government, Trafficking in Persons. The Australian Government Response*, covering the period 2004-2011. n 15.

²⁰ The Criminal Code Amendment (Slavery and Sexual Servitude) Bill 1999 repealed imperial Acts relating to slavery, such as the *Slave Trade Act 1824*, and inserted Division 270 into the Criminal Code.

²¹ *The Queen v Tang* [2008] HCA 39 at para 30.

²² *Ibid*, at para 34

- the power to buy and sell a person²³.

In distinguishing between the crime of slavery and harsh and exploitative working conditions, the High Court said that the capacity to deal with a person as an object of sale and purchase 'may be a powerful indication that a case falls on one side of the line [between harsh employment and slavery]'²⁴. Another factor, according to the Court, could be 'the exercise of powers of control over movement which extend well beyond powers exercised even in the most exploitative of employment circumstances, and absence or extreme inadequacy of payment for services'²⁵.

In 2005 trafficking in persons offences were introduced to criminalise trafficking by means of force or use of threats²⁶ or deception²⁷, or where a person is reckless as to whether another person will be exploited²⁸. The amendment included specific offences of trafficking in children²⁹ and domestic trafficking³⁰. However, the offences do not fully implement the Trafficking Protocol. The description of the means used to traffic a person does not include trafficking which occurs by means of: other forms of coercion; the abuse of power or of a position of vulnerability; or the giving or receiving of payments or benefits to achieve the consent of a person³¹. Another shortfall is that there is no specific offence of forced labour or forced marriage.

Examples of situations not covered by the current legislation

Forced labour

A was an international student holding a valid student visa. A accepted work as a live-in domestic worker and carer in B's home. A worked 15 hours a day, was not free to leave the home and as a result had his visa cancelled. A is a kind person who did not want to leave B's invalid mother unsupervised and uncared for while B was at work. B has threatened to report

²³ *Ibid*, at para 26

²⁴ *Ibid*, at para 32

²⁵ *Ibid*.

²⁶ *Criminal Code 1995 (Cth)* s 271.2(1).

²⁷ *Ibid*, s 271.2(2) and s 271.2(2B).

²⁸ *Ibid*, s 271(1B).

²⁹ *Ibid*, s 271.4.

³⁰ *Ibid*, s 271.5.

³¹ F Simmons & J Burn, 'Evaluating Australia's Response to all Forms of Trafficking: Towards Rights-centred Reform' (2010) 84(10) *Australian Law Journal* 712 at 721.

A to Immigration for being unlawful in Australia and A fears that he will be forced to return to his country of origin and that his parents will lose their chance for a secure future.

Forced marriage

C is an 18 year old Australian who was tricked into going on a family holiday abroad. C's behaviour in Australia had caused concern for her parents. C's parents believed that if C married then she would settle down. C's parents have taken her passport and have threatened her that she cannot return to Australia until she marries. C's parents also threatened that unless C marries she will be socially isolated from her family in Australia and will not be able to see her brothers and sisters again. C's relatives abroad have assaulted her and have brought a number of men much older than her meet her and yet she is determined that she does not wish to marry. C feels that she is trapped and the only choice she has is to marry.

The Bill: Hierarchy of offences and provisions

The Bill would have the effect of creating a clear hierarchy of criminal offences signalled in part by the differing severity of penalties. An important practical effect is that slavery offences will be reserved for the gravest of crimes against humanity. As observed by the then Chief Justice in *The Queen v Tang* "It is important not to debase the currency of language, or to banalise crimes against humanity, by giving slavery a meaning that extends beyond the limits set by the text, context, and purpose of the 1926 Slavery Convention. In particular it is important to recognise that harsh and exploitative conditions of labour do not of themselves amount to slavery"³².

The current sexual servitude offence is limited in its application as it is restricted to circumstances involving the provision of commercial sexual services³³.

The amendments to servitude provisions are drafted to address the condition of servitude, regardless of the form of the servitude³⁴. The proposed definition of servitude is the 'condition of a person (the victim) who provides labour or services, if, because of the use of coercion, threat or deception...[is not able to] (i) cease providing the labour or services; or (ii)

³² *The Queen v Tang* [2008] HCA 39 at para 32.

³³ *Criminal Code Act*, 270.4-270.8.

³⁴ *Ibid.*, 270.4, 270.5.

to leave the place or area where the victim provides the labour or services; and (b) 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 services³⁵.

The amendment to the slavery offence to address circumstances where a person reduces another person to slavery and the expansion of the provision dealing with recklessness are welcome amendments³⁶.

The Bill introduced a stand-alone offence of forced labour. The elements of this offence are clearly distinct from the slavery and servitude provisions. There has long been considerable support for a stand-alone offence of forced labour as there have been too many cases where the circumstances of the exploitation have not been sufficiently grave to establish slavery, but where the extent of the exploitation extends beyond the appropriateness of civil remedies. The introduction of this offence is a very welcome addition to the Criminal Code³⁷.

The Bill introduces an offence of deceptive recruiting for labour or services³⁸, and this too is a welcome addition to the Criminal Code.

The proposed forced marriage offence will criminalise the slavery-like practice of forced marriage³⁹. The Bill provides that 'a marriage is a forced marriage if, because of the use of the coercion, threat or deception, one party to the marriage (the victim) entered into the marriage without freely and fully consenting.⁴⁰ Importantly, coercion is defined to include any of the following: force, duress, detention, psychological oppression, abuse of power or taking advantage of a person's vulnerability⁴¹. Criminalisation of forced marriage is one part of an effective strategy to prevent forced marriage and protect those facing or in a forced marriage⁴² and should be adopted with a suite of companion measures dealing with development of community education in a range of multi-lingual formats, clear protections for those facing or leaving a forced marriage, access to legal advice, training of front-line government officers and community members. Such community initiatives are most

³⁵ Ibid., 270.4.

³⁶ *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012* (the Bill). 270.3(1)(aa) & 270.3(2)(b).

³⁷ The Bill, 270.6, 270.6A

³⁸ Ibid., 270.7.

³⁹ Ibid., 270.7A & 270.7B.

⁴⁰ Ibid., 270.7A.

⁴¹ Ibid., 270.1A.

⁴² ABC Radio National, *Forced Marriage*, Interview Jennifer Burn by Rachael Kohn, *The Spirit of Things*, Sunday 29 July 2012. <http://www.abc.net.au/radionational/programs/spiritofthings/forced-marriage/4148388>

effectively constructed in partnership with relevant partners. The Committee may wish to recommend that consideration be given to increasing the range of civil protections in the Family Law Act.

The proposed amendments to the trafficking in persons provisions will strengthen Australia's compliance with the Trafficking Protocol, with the expanded definition of coercion reflecting the spirit and language of the Protocol.

The right to an effective remedy: Reparations

The Bill broadens the current provisions dealing with Reparations. Of course Reparations are one part of an effective remedy that may be available to trafficked people. Victims of trafficking may have experienced serious harm and exploitation and as a result of such experiences suffered injury or contracted illness either through being trafficked or as a consequence of working in substandard conditions. Victims of trafficking may have incurred debt, have lost income, been deprived of education, suffered harm to their health, including psychological harm, and experienced the adverse effects of long-term trauma. They may be unwilling to assist in criminal investigations through fear of harm to themselves or to their families, and/or they may be unwilling to expose themselves to the threat of further harm. Australia is required to provide trafficked people with access to effective remedies (Trafficking Protocol & ICCPR) and yet there is no clear process that would allow victims of trafficking to claim compensation. This was an issue addressed by the UN Special Rapporteur on Trafficking in her report on Australia⁴³ and it would be helpful if the Committee recommended that Australia develops a national compensation scheme for victims of trafficking.

Conclusion

For the reasons outlined in this submission, Anti-Slavery Australia strongly recommends the passage of the Bill and would welcome an opportunity to provide any further information to the Committee.

Associate Professor Jennifer Burn, Director Anti-Slavery Australia

⁴³ Report of the Special Rapporteur on trafficking in persons, especially women and children. A/HRC/20/18/Add.1