

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
AUSTRALIAN FEDERAL POLICE

Please find our responses included below in the relevant sections. In response to the submission from the CDPP, we note that there is a lack of evidence on which to base or defend the amendments proposed by the Bill. The cases referenced involved a lack of evidence to prove sexual servitude, and evidence of harsh employment conditions.

We note there has been no cases provided by the CDPP or AFP providing evidence or rationale to support amendments relating to removal of consent; telecommunications interceptions; forced marriage; criminalising businesses; slavery-like offences; or increasing the penalties for debt bondage. This supports that these amendments are not targeted or evidence-based.

Senator Humphries asked the following question at the hearing of 29 August 2012:

Perhaps the AFP could also present some cases where you can describe to us the factual situations but tell us where the law broke down, where the state of the law was insufficient to secure a conviction when one ought to have been secured.

Senator HUMPHRIES: We still have the question in front of us about the extent we need to beef-up the law in order to capture people who are doing the wrong thing now but who are escaping the arm of justice, because of the way the law is drafted. To help us answer that question, I would like you, perhaps Ms Hinchcliffe, to take on notice the task of putting in front of us some cases that the DPP has handled. *Perhaps the AFP could also present some cases where you can describe to us the factual situations but tell us where the law broke down, where the state of the law was insufficient to secure a conviction when one ought to have been secured.*

If there were a case of a witness who suddenly went cold or disappeared or went back to China or somewhere, that does not help me very much. I want to know of cases that have been considered, or have actually been commenced, which have failed because of a flaw in the state of the law. I am looking here at the evidence of people like the Scarlet Alliance who say that there are already laws to deal with slavery and slavery-like offences. The prosecution brought under those provisions may claim that there is not any evidence that there is a deficiency in the law at the moment. I want you to prove them wrong. That is what I am asking you to do.

Ms Hinchcliffe: I am happy to take that on notice. Often there is a mixture of the issues I have just described in terms of the evidence that is available and the complexity of the offences as they are.

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

Organ trafficking

The AFP investigated its first organ trafficking case in 2010. No charges were laid as CDPP advised the AFP there was insufficient evidence to support a prosecution for a Commonwealth people trafficking offence.

This matter involved an alleged attempted removal of an organ. The victim allegedly travelled from the Philippines to Australia for the purposes of donating a kidney to a NSW woman. The AFP understood that the victim had consented to the removal and had been promised money and a visa in exchange. There was strong evidence of recruitment, travel and preparatory tissue matching. The

victim came forward to police just prior to the operation occurring, having changed her mind about the removal. The organ was not ultimately removed.

Currently, where a person is brought to Australia for the purpose of organ removal and they consent to the removal, this will only constitute a trafficking offence if it is an offence to remove the organ in the jurisdiction where the procedure takes place. As removal of an organ is not currently, by itself, an offence in NSW, this requirement could not be made out.

The amending Bill will expand the circumstances in which trafficking a person who consents to the removal of an organ will constitute a Commonwealth trafficking offence. This behaviour will be criminalised if it is illegal to enter into an agreement for the removal in the relevant State or Territory where the removal would be carried out. These legislative amendments would assist the prosecution of a case based on similar facts where it is not an offence in the State to remove the organ but it is an offence in that State to enter into an agreement to remove an organ.

Servitude and forced labour

The current legislative framework does not criminalise forced labour unless it is connected to the offence of trafficking and servitude offences are currently limited to sexual servitude. Exploitation of victims in industries outside of the sex industry can be difficult to prosecute where the exploiter is not involved in the trafficking of the victim.

The introduction of a stand-alone forced labour offence and servitude offences which reach beyond the sex industry will ensure that this type of exploitation is captured when it is disassociated from the trafficking.

In 2009, the AFP became aware of a man who had subjected a victim to serious exploitative conditions in a restaurant. He was charged with a trafficking offence involving forced labour in 2010.

The victim (an Indian national) had worked for approximately 12 hours per day, 7 days a week for minimal pay. He had lived in a storeroom at the rear of the restaurant and bathed in the kitchen. He was subjected to continued physical and mental abuse, and threats directed to himself and against his family. He had limited freedom and limited access to his passport. His exploitation was compounded by his lack of education and basic understanding of English.

The facts were considered to be insufficient to amount to a slavery offence and no separate forced labour or servitude offence was available. In order to charge the defendant for the exploitation it was necessary to obtain evidence he had facilitated the trafficking of the victim.

The AFP was able to obtain evidence that the Defendant had engaged in conduct facilitating the entry of the victim into Australia and he was charged with the offence of Trafficking in persons contrary to subsection 271.2(1B) of the Criminal Code. Had it not been possible to demonstrate a sufficient connection between the defendant and the trafficking of the victim, no charges addressing the entirety of the defendant's exploitation of the victim could have been laid. The AFP could have pursued the exploiter under a forced labour or servitude offence if the amendments proposed by the Bill had been in force at that time.

The AFP is also aware of a case where a young man was held captive by a couple in the Blue Mountains for several months in 2010. Media reports allege that he was forced to perform all the cleaning duties in the home, locked in the cubby house and starved by the couple causing him to

lose almost half his body weight. This matter was not investigated by the AFP, however we understand this man was an Australian citizen and had not been trafficked. Consequently the couple were not able to be charged with an offence under the current Commonwealth legislative framework as no offence of servitude (outside of the sex industry) currently exists. Exploitation by way of forced labour currently requires that the exploiter also trafficked the victim. The offenders were charged with a combination of state offences which attempted to capture the behaviours separately.

In the case involving the Indian national, the perpetrator was successfully charged with trafficking involving forced labour, giving no evidence of insufficient laws to address the facts of this case. The case could have alternately been brought under existing laws. These laws would have covered a situation involving exploitation without an element of trafficking. The offenders in the Blue Mountains case *were* charged with a combination of state offences which attempted to capture the behaviours separately.

For both these cases there are a number of existing laws that could have provided better remedies for the victims. For example, in the second case, if the victim was a ward of the couple, they could be found guilty of s44 of the *Crimes Act 1900* NSW, failure of person to provide the necessities of life. If he was under 16, they could have been charged with failure of person's parental responsibilities under s43A. In both cases, if the victim was detained without his consent the perpetrators could have been charged with kidnapping under s86. If they demanded the Indian national's passport with the intent to steal they could be charged under s99. In both cases, charges could have been brought under wounding or grievous bodily harm under s35, or assault occasioning actual bodily harm under s59.

Further, if the victims were employed there may have been a breach of provisions under Part 9 the *Industrial Relations Act 1996* NSW, covering unfair contracts, or Part 10 payment and remuneration. There may have been breaches of the *Occupational Health and Safety Act 2000* NSW. Charges also could have been laid under the federal *Fair Work Act 2009* (Cth), which covers private businesses. The *Fair Work Act* contains 10 National Employment standards that apply to all federal employees. These standards guarantee the rights of all employees to certain employment conditions including leave, public holidays, termination notice and maximum weekly hours of work. In addition, the general protections scheme in Parts 3-1 of the Act enhances the range of options available to exploited workers and job applicants.

In recent years, the Australian Government has introduced key workplace relations and migration reforms such as the *Fair Work Act* and subclass 457 visa changes to address labour exploitation. The *Migration Legislation Amendment (Worker Protection) Act 2008* introduced a greater level of protection for migrant workers who hold subclass 457 visas. These amendments have improved protections for vulnerable workers and migrants.

Importantly, a number of relevant elements in these cases also constitute torts, including false imprisonment, assault and battery. These could have been brought as a civil claim, and meant that the victims could have accessed compensation. Bringing actions under these laws could have resulted in better outcomes for the victims, which are not available under Australia's anti-trafficking legislation.

The Australian Government's Trafficking in Persons response 2010-11 states that 'All jurisdictions have a range of offence provisions to cover related crimes such as assault, sexual

assault, forced prostitution, kidnapping and deprivation of liberty. State offences may be used in conjunction with Commonwealth offences.’(p15)

We would argue that in the first case, the victim’s exploitation was compounded not by a lack of education and basic English, as suggested by the AFP, but by his lack of access to industrial rights mechanisms, illustrating need for migrant workers to have equitable access to Fair Work Australia and translated information about visa conditions, working rights and access to justice.

Coercion, threat or deception

The existing offences of sexual servitude and people trafficking capture situations where the victim, because of ‘force or threats’, is not free to cease providing services, or complies with being trafficked.

The Bill will replace references to ‘force or threats’ with a broader concept of ‘coercion, threats or deception’. These changes will capture more subtle, non-physical means by which an offender could obtain a victim’s compliance.

AFP investigations have revealed that the exploitation of many victims in Australia does not involve abduction, violence or physical restraint. Rather, offenders often use subtle, non-physical means to obtain a victim’s compliance such as deception, abuse of power or of a position of vulnerability, social isolation and financial controls. Despite being used to obtain a victim’s compliance, these types of coercive conduct would not currently fall within the concept of ‘force or threats’.

The AFP is aware of matters that have been investigated as sexual servitude where the circumstances described by the victims were considered to be insufficient to amount to an actual or implied threat. Statements from the workers to police indicated that they felt that they could not “say no” to performing sexual services when they were unwell and did not wish to continue. The workers were also under the impression that they could not take a day off even if they wanted to. Prior to leaving their home country, the workers were informed they would have to pay off a debt from their earnings made through performing sexual services in Australia. When they arrived in Australia they were advised of additional debts they would need to satisfy. Depending on the facts of the case, these types of financial and psychological pressures may satisfy the new broader concept of coercion.

Amendments to the definition of coercion significantly broaden the offence. The intention behind this redefinition is clearly to broaden the ambit in order to obtain more successful prosecutions. Under this Bill, coercion can include ‘taking advantage of a person’s vulnerability’. Scarlet Alliance is concerned that this could potentially criminalise a range of people, such as clients, lawyers, NGOs, media, and third parties profiting from facilitating travel (travel agents), who all could be construed as ‘taking advantage’ of a person’s vulnerability.

This Amendment is unnecessary, and the inclusion of these elements are redundant and dangerously broad. The current definition of threat already contains threat of ‘any detrimental action’ which captures and includes physical or psychological threats contained in ‘coercion’.

While we would need the specific states where these incidents occurred to comment on specific legislation available, we can respond generally. The Commonwealth *Criminal Code* already currently has people trafficking offenses that refer to:

- The “use of force or threats” which result in the perpetrator obtaining the victim’s “compliance”; or
- Deceptive conduct – for example, where the victim is deceived about the fact that he or she will provide sexual services, or that he or she will be subject to exploitation or debt bondage, or will have his or her documents confiscated;
- Situations where there is an arrangement for the other person to provide sexual services in Australia; and
 - (c) the first person deceives the other person about any of the following:
 - the nature of the sexual services to be provided;
 - the extent to which the other person will be free to leave the place or area where the other person provides sexual services;
 - the extent to which the other person will be free to cease providing sexual services;
 - the extent to which the other person will be free to leave his or her place of residence;
 - if there is a debt owed or claimed to be owed by the other person in connection with the arrangement for the other person to provide sexual services--the quantum, or the existence, of the debt owed or claimed to be owed.

In addition, state and territory legislation on servitude often refers to a person’s ability to leave a place.

Some of the elements mentioned in the AFP commentary could have been covered under the *Fair Work Act’s* 10 National Employment standards, which guarantee the rights of all employees to certain employment conditions including leave, public holidays, termination notice and maximum weekly hours of work. In addition, the general protections scheme in Parts 3-1 of the Act enhances the range of options available to exploited workers and job applicants.

In recent years, the Australian Government has introduced key workplace relations and migration reforms such as the *Fair Work Act* and subclass 457 visa changes to address labour exploitation. The *Migration Legislation Amendment (Worker Protection) Act 2008* introduced a greater level of protection for migrant workers who hold subclass 457 visas. These amendments have improved protections for vulnerable workers and migrants.

Section 117 of the *Criminal Code* already defines ‘threat’ in relation to trafficking offences as a:

- threat of force; or
- threat to cause a person’s removal from Australia; or
- threat of any other detrimental action, unless there are reasonable grounds for the threat of that action”.

There are existing offenses for debt bondage. Current provisions in the Criminal Code already cover deceptive conduct by the employer.

The State and Territory Occupational Health and Safety Act also contains provisions prescribing duties relating to health, safety and welfare of employees.

Harbouring

The Bill creates a new standalone offence where the offender harbours, receives or conceals a victim and is reckless as to whether that behaviour assists another person (or furthers another person's purpose) in the commission of a trafficking, slavery or slavery like offence.

The reforms will ensure that third parties who harbour, receive or conceal trafficked persons can be prosecuted.

The kinds of third parties likely to harbour or otherwise be in receipt of trafficked persons include:

- brothel licensees/managers
- spouses and business partners
- farm proprietors/managers
- industrial proprietors/managers
- employment agents/labour contractors (including agents for sex workers)
- drivers (both business and private operators), and
- accommodation providers (both business and private operators).

The AFP is aware of a number of cases in which spouses have materially assisted in the operation of a business involving servitude who could not be charged with any offence because their conduct was facilitative rather than amounting to a primary offence.

The proposed harbouring offence is intended to capture people who intentionally harbour, receive or conceal the victim and are reckless as to whether that behaviour assists or furthers another person's commission of a trafficking offence or slavery like offence.

The AFP response clearly indicates the broad scope that the new harbouring offence would bring. Brothel licensees, managers, spouses, drivers, accommodation providers could all be convicted – and this could even include services providing health/emotional/other support for migrant sex workers. These are the people who assist sex workers to work safely. In effect, this will prohibit migrant sex workers (who may be working outside their visa conditions, or experiencing bad working conditions, but who still wish to work) to work in less visible and more isolated ways. Criminalising everyone around them – including people who may potentially hire them or anyone who assists or provides accommodation for them, will force migrant sex workers into more dangerous workplaces, and encourage sex workers to work alone. These networks act as support mechanisms – crucial for peer education and networking. The importance of peer education is acknowledged by Australia's National HIV and STI strategies.

The people criminalised under this bill are people who are *not* traffickers. They are criminalised for being peripherally involved, or caught up *unknowingly or unintentionally*, or

for assisting migrant workers. Although the AFP in their response state that the Bill covers those who ‘intentionally’ harbour, this is not the case.

Under 271.7F, a person commits an offence of harbouring if they harbour, receive or conceal another person and this assists a third person with any offence, or furthers a third person’s purpose in relation to any offence (4yrs imprisonment). There is no requirement for intention or knowledge. Absolute liability applies, meaning that there is no fault element for the physical element and mistake of fact is not available as a defence.

Although the Explanatory Memorandum states the offence is not intended to criminalise a person who unknowingly receives services from a victim (e.g. clients), or to a person whose *only intent is* to provide help to or comfort a victim, the provisions would still cover a person who intends to assist a person in other ways (by providing accommodation, security, driving services, employment) which may not be interpreted as ‘help’, but which are essential for safety of migrant sex workers. Moreover, this is only stated in the Explanatory Memorandum but not in the legislation.

These provisions will also raise issues with proving recklessness that require further police – what onus does this put on drivers, colleagues, health services, sex worker organisations, receptionists and managers to investigate sex workers before offering them services, and how will this impact on their confidentiality/privacy/fear of harassment? Migrant sex workers should be able to access services for their own occupational health and safety regardless of their visa status.

Harbouring offences already exist in the *Migration Act 1958*. Section 245AD provides offences for referring an unlawful non-citizen for work (whether for reward or otherwise, whether or not a prospective worker, and where there is recklessness as to their unlawful non-citizen status). This offence is aggravated if the prospective worker will be exploited in doing the work in relation to which he or she is referred, and the person operating the referral service knows of, or is reckless as to that circumstance. An offence against this section is punishable by imprisonment of 2-5 years.

Section 233E of the *Migration Act* also contains offences for concealing and harbouring non-citizens, where a person conceals or harbours a second person (who is a non-citizen, removee or deportee), including where they have the intention they will enter Australia in contravention of the *Migration Act*, or to prevent discovery by an officer. Penalties are up to 10 years imprisonment plus 1,000 penalty units.

Smuggling offences in the *Criminal Code* also include forced labour.

‘Receipt’ of a person is already included in every trafficking offence.

Forced labour is already covered by the *Migration Act*. The definition of ‘exploited’ under the act is ‘if the person is in a condition of forced labour, sexual servitude or slavery in Australia.’