

UN Convention against Transnational Organized Crime, November 2000, and Protocols on Trafficking in Persons and Smuggling of Migrants

Introduction

- 5.1 The proposed treaty actions considered in this Chapter are the ratification of the UN Convention against Transnational Organized Crime (hereafter referred to as the TOC Convention) and two supplementary Protocols, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (referred to here as the TiP Protocol), and the Protocol against the Smuggling of Migrants by Land, Sea and Air (People Smuggling Protocol). All proposed treaty actions were done at New York on 15 November 2000.
- 5.2 Because some elements of the Convention and Protocols are interrelated yet others are unique, the Committee will approach general issues under the TOC Convention, which may or may not apply to all three proposed treaty actions, and then look at separate issues particular to the two protocols in their turn. General issues across all three proposed treaty actions will then be considered.

United Nations Convention Against Transnational Organized Crime (New York, 15 November 2000)

Introduction and background

- 5.3 Australia signed the TOC Convention on 13 December 2000. The Convention entered into force generally on 29 September 2003, following ratification by 40 States. The first Conference of the Parties to the Convention is scheduled for 28 June to 9 July 2004.
- 5.4 According to the National Interest Analysis (NIA), the TOC Convention provides a global approach to preventing and combating transnational organised crime. The purpose of the Convention is
- to criminalise offences committed by organised criminal groups, to combat money laundering, and to facilitate international cooperation in the fight against transnational organised crime.¹
- 5.5 The Committee heard that significant new opportunities for organised crime have been created by the globalisation of economic systems and developments in transportation and communications technologies, and that in this environment, ‘transnational organised crime threatens the security and prosperity of all countries, including Australia’.²
- 5.6 The Committee understands that Australia already has extensive domestic policy and legislation designed to combat transnational organised crime, but that ratification of the TOC Convention will increase the effectiveness of domestic measures by providing a standardised approach to criminalisation and a mechanism for cooperation with a range of other countries in the prevention, detection and prosecution of transnational crime.³
- 5.7 Negotiations for the TOC Convention started at the end of 1999, and arose from a resolution of the UN General Assembly (UNGA) recognising that transnational crime was an increasing issue and
- that it would be useful for the UN to look at an agreement which would facilitate cooperation in the fight against this crime.⁴

1 National Interest Analysis (NIA), para. 5.

2 Ms Joanne Blackburn, *Transcript of Evidence*, 13 February 2004, p. 12.

3 Ms Joanne Blackburn, *Transcript of Evidence*, 13 February 2004, p. 12, and NIA, para. 6.

4 Ms Kerin Leonard, *Transcript of Evidence*, 13 February 2004, p. 13.

Obligations under the TOC Convention

5.8 According to Ms Blackburn, from the Attorney-General's Department, the main obligations in the TOC Convention are

- to criminalise offences committed by organised crime groups, including corruption and corporate or company offences
- to deal with money laundering and enable the proceeds of crime to be attached
- to protect witnesses testifying against criminal groups
- to speed up and widen the reaches of extradition
- to tighten cooperation to seek out and prosecute suspects
- to boost prevention of organised crime at the national and international levels.⁵

5.9 The Committee understands from the NIA that States Parties to the TOC Convention are required to criminalise four types of conduct, to be known as Convention offences:

- participation in an organised criminal group and organising, directing, aiding, abetting, facilitating or counselling the commission of a serious crime involving an organized criminal group
- laundering of proceeds of crime
- corruption in the public sector
- obstruction of justice.⁶

Impact of ratification

Implementation

5.10 According to Ms Blackburn, the Attorney-General's Department is of the view that Australia's obligations under the Convention would be met by existing Commonwealth, state and territory legislation and new regulations under the Mutual Assistance in Criminal Matters Act and the Extradition Act.⁷ The Committee heard that most of the Convention's obligations already covered in domestic legislation relate to offences and cooperation elements.⁸

5 Ms Joanne Blackburn, *Transcript of Evidence*, 13 February 2004, p. 12.

6 NIA, para. 12.

7 Ms Joanne Blackburn, *Transcript of Evidence*, 13 February 2004, p. 12.

8 Ms Kerin Leonard, *Transcript of Evidence*, 13 February 2004, p. 18.

- 5.11 The Committee understands that new regulations would be required to the Extradition Act to implement requirements under Article 16 of the Convention, that is, States Parties to the TOC Convention would be made extradition countries under Australian legislation. The Committee was advised that, similarly, mutual assistance regulations would be made to apply the Convention between the States Parties under Australia's Mutual Assistance in Criminal Matters Act.⁹
- 5.12 The Committee also understands that there are provisions in the TOC Convention that will allow existing bilateral agreements to continue to operate between countries; where there is an existing bilateral treaty, the Convention will run 'in parallel' with the bilateral treaty obligations.¹⁰

Dispute resolution procedures and their interpretation

- 5.13 Article 11 of the TOC Convention refers to prosecution, adjudication and sanctions. The Committee notes that if one State Party considered that another Party was not complying with its obligations under the Convention, for example it was not committed to prosecuting alleged criminals, that issue could be raised under the dispute resolution procedures of the Convention, providing a reservation had not been lodged to exclude a Party from those provisions. The Committee was advised however that this course of action would be highly unlikely, and that in general, 'the situation with disputes with other countries is that you want to avoid arbitration if you can.'¹¹
- 5.14 Mr Zanker, from the Attorney-General's Department, noted that this kind of concern should not arise, 'given the penalties that are in the Migration Act and the attitude that has been taken towards people smuggling'.¹² If concerns of this type should arise however, Mr Zanker stated that they would be more likely to be raised through diplomatic channels. He also noted that Australia is party to many agreements which do not involve the compulsory resolution of disputes. In those agreements, the settling of disputes is by negotiation only.¹³

9 Ms Kerin Leonard, *Transcript of Evidence*, 13 February 2004, p. 18.

10 Ms Joanne Blackburn, *Transcript of Evidence*, 13 February 2004, p. 18.

11 Mr Mark Zanker, *Transcript of Evidence*, 13 February 2004, p. 22.

12 Mr Mark Zanker, *Transcript of Evidence*, 13 February 2004, p. 22.

13 Mr Mark Zanker, *Transcript of Evidence*, 13 February 2004, p. 22.

- 5.15 In advice provided to the Committee, the Attorney-General's Department states that in the event that Australia becomes a party to the Convention and another State Party felt that it had not complied with its obligation under 11(2)

it is extremely unlikely that this concern would become the subject of a formal dispute under the Convention. If anything ... the matter [would be raised] ... through diplomatic channels.¹⁴

- 5.16 Amongst other information provided to the Committee on this issue, the Department notes that there is no provision for dispute resolution between states and individuals as the Convention is an agreement between states.

However, if an individual felt that Australia was in breach of its obligations under paragraph 2 of Article 11 the issue could be raised with the Government in the same way as any other issue of public concern.¹⁵

Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the UN Convention against Transnational Organized Crime

- 5.17 Australia signed the TiP Protocol on 11 December 2002, and the Committee understands that it entered into force generally on 25 December 2003, following ratification or accession by 40 countries. The Protocol would enter into force for Australia 30 days after its instrument of ratification is deposited.¹⁶

- 5.18 The Committee heard that, during the negotiations for the TOC Convention, focus was also given to the issue of trafficking in persons. The Committee is aware that the Asia-Pacific region has become a hub for this type of activity, particularly for the purposes of sexual servitude.¹⁷

- 5.19 The Committee understands that the purpose of the TiP Protocol is to
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14 Attorney-General's Department, *Submission*.

15 Attorney-General's Department, *Submission*.

16 NIA, para. 3.

17 Ms Joanne Blackburn, *Transcript of Evidence*, 13 February 2004, p. 12.

prevent and combat trafficking in persons, especially women and children, through a comprehensive international approach, including measures to prevent trafficking, punish traffickers, and protect the victims of trafficking.¹⁸

- 5.20 The Committee agrees with Ms Blackburn who stated that people trafficking is a repugnant form of transnational organised crime involving the deception and degradation of thousands of victims around the world.¹⁹ The NIA states that it is impossible to identify the number of trafficked persons in Australia, but the Committee agrees that although the number is thought to be small, trafficking in persons is a serious crime and must be addressed by all countries.²⁰
- 5.21 The NIA states that the Australian Government recently announced a \$20 million package of measures to combat trafficking and provide support for victims, and that one component of the package was ratification of the TiP Protocol.²¹

Reservation lodged upon signature

- 5.22 The Committee understands that, on signature of the Protocol, Australia deposited the following declaration:

The Government of Australia hereby declares that nothing in the Protocol shall be seen to be imposing obligations on Australia to admit or retain within its borders persons in respect of whom Australia would not otherwise have an obligation to admit or retain within its borders.

- 5.23 The Committee was advised that this declaration will remain effective following ratification of the Protocol and indicates Australia's understanding that the treaty does not compromise the government's stance on unauthorised arrivals.²² The Committee understands that making a declaration on signature and ratification is a common practice which countries use to clarify the way in which obligations will be interpreted. Ms Blackburn advised that 'it does not operate as a reservation against the operation of the terms of a derogation from the terms of the treaty; it is purely declaratory'.²³

18 Ms Joanne Blackburn, *Transcript of Evidence*, 13 February 2004, p. 13, and NIA, para. 6.

19 Ms Joanne Blackburn, *Transcript of Evidence*, 13 February 2004, p. 12, and NIA, para. 8.

20 NIA, para. 10.

21 NIA, para. 9.

22 Ms Joanne Blackburn, *Transcript of Evidence*, 13 February 2004, p. 13.

23 Ms Joanne Blackburn, *Transcript of Evidence*, 13 February 2004, p. 23.

- 5.24 The Committee notes that, as at 27 February, four other states had made declarations to the TiP Protocol, and seven other states had made reservations. Most reservations relate to the mechanisms for dispute settlement (discussed at 5.13 – 5.16). The Committee understands that ‘no other state has made an interpretative declaration similar to Australia’s declaration’.²⁴

Obligations under the TiP Protocol

- 5.25 The NIA states that the TiP Protocol includes a number of mandatory obligations relating to the criminalisation of conduct, the protection of victims of trafficking, the prevention of trafficking and international cooperation.²⁵

Compliance with Article 5 and new legislation required

- 5.26 The Committee was advised that the Attorney-General’s Department is of the view that Australian laws comply with obligations under the Protocol, except for Article 5, which refers to the criminalisation of offences under the Protocol.²⁶ The Committee understands that legislation would need to be introduced to ensure that trafficking in persons was comprehensively criminalised²⁷ and that a review of legislation was being conducted at the time of the public hearing on 13 February.

At the moment Australia is reviewing the adequacy of Australia’s existing offences of slavery, sexual servitude, deceptive recruiting for sexual services and extraterritorial people smuggling aggravated by exploitation.²⁸

- 5.27 The Committee was advised that at the time of the public hearing, no proposals for the details of the change had been submitted for ministerial approval, but that if and when proposals were made and accepted by the government, category A status had been approved for any required legislation.²⁹ The Committee also understands that the

24 Attorney-General’s Department, *Submission*.

25 NIA, para. 13.

26 Ms Joanne Blackburn, *Transcript of Evidence*, 13 February 2004, p. 13.

27 Ms Joanne Blackburn, *Transcript of Evidence*, 13 February 2004, p. 13.

28 Ms Margaret Joseph, *Transcript of Evidence*, 13 February 2004, p. 23.

29 Ms Joanne Blackburn, *Transcript of Evidence*, 13 February 2004, p. 23.

government would propose to ratify the TiP Protocol after any required legislative amendments are in place.³⁰

Implementation of the TiP Protocol

5.28 Aside from the new legislation foreshadowed to ensure compliance with Article 5 of the TiP Protocol, the Committee understands that a number of obligations can be implemented administratively or under existing Commonwealth legislation. The NIA states that

Australia already has strong laws criminalising sexual servitude, slavery, deceptive recruiting and people smuggling under the *Criminal Code*. These offences are all covered by the *Proceeds of Crime Act 2002* as serious offences for which convicted persons can be required to forfeit all their property.³¹

5.29 The Committee understands that, together with new legislation, the package of measures to combat trafficking in persons announced on 13 October 2003 will ensure that Australia exceeds the remaining obligations under the Protocol.³²

Australian involvement in regional forums and promotion on awareness of trafficking issues

5.30 The Committee was very pleased to receive additional information from the Attorney-General's Department regarding Australia's involvement in awareness raising as well as direct support for regional initiatives to combat trafficking in persons.³³ This information has been sourced from Australia's international development agency, AusAID, and demonstrates Australia's commitment to improvement of both awareness of trafficking issues domestically and among countries particularly in the Asia-Pacific region. The Committee recognises the importance of these activities in the prevention of trafficking, the prosecution of traffickers and the protection of victims of trafficking.

5.31 As part of the package of measures announced by the government on 13 October 2003, a four stage strategy to improve domestic

30 Ms Joanne Blackburn, *Transcript of Evidence*, 13 February 2004, p. 13.

31 NIA, para. 13.

32 NIA, para. 13.

33 Attorney-General's Department, *Submission*.

community awareness of trafficking issues will be implemented over four years. The Committee understands that the target audience includes owners, managers and receptionists of sex industry services, victims of trafficking, other sex workers, clients of the industry, brothel regulators, the media, community health, welfare and ethnic organisations, and law enforcement agencies. The strategy is designed to

- increase awareness of the issue of trafficking in persons
- provide factual information about the issue
- encourage target audiences, particularly victims, to report the crime
- encourage the media to report more broadly on the matters associated with people trafficking, and with increased understanding of the complexity of the issue.³⁴

5.32 The Committee was also pleased to learn of the extent of Australia's involvement with regional countries, including cooperative activities between law enforcement agencies in several countries and training in gender awareness and awareness of specific issues such as child sex tourism. Regional projects supported by AusAID include programs operated by the UN Development Program and the International Organization for Migration, covering such issues as capacity building in regional countries. Capacity building includes, for example, the establishment of procedures for handling trafficking victims, through the drafting of Memoranda of Understandings (MOUs) between neighbouring countries to facilitate coordination of efforts to assist victims of trafficking. Assistance may involve arranging victims' return and reintegration to their own countries and cultures.

5.33 Other practical assistance Australia offers to countries in the region includes briefing ASEAN regional policy makers on activities, and providing financial assistance to representatives of Asian governments to attend conferences and workshops.

5.34 The Committee considers that several of these issues have relevance for the broader aims of the TOC Convention and the People Smuggling Protocol and therefore explores them further in paragraphs 5.66 – 5.77.

34 Attorney-General's Department, *Submission*.

Consultation

5.35 Information on consultations undertaken in respect of all three proposed treaty actions considered in this Chapter is included in an annex to each of the NIAs, and will be covered in the later section on general issues. The Committee has given special emphasis however to consultation issues in regard to the TiP Protocol because of the greater legislative ramifications to ensure Australia's compliance.

5.36 The Committee was advised that ratification has widespread support amongst community groups working on trafficking issues³⁵ and that a range of Commonwealth and State stakeholders are involved in enforcement action and will be consulted as to how the legislation may be formed and enforced.³⁶

There is also quite a large range of non-government organisations who deal with trafficking victims and a large range of non-government organisations involved in the sex industry in those states where prostitution is legal. Consultation ... covered all of these stakeholders, and I would expect that, subject to government agreeing to a consultation process, that is the range of people we would be looking to consult with.³⁷

5.37 The Committee was pleased to receive three submissions on the TiP Protocol from interested organisations. Each is supportive of Australia's ratification of the Protocol. The Committee notes the view that the Protocol 'will assist in eliminating the global problem of the trafficking in people'³⁸, and that

through ratification, the Australian Government will signal to the region our commitment to defeating the lucrative and illegal trade, and our intolerance to those who commit gross human rights violations and exploit vulnerable people for financial gain.³⁹

5.38 The Committee notes the concerns raised by the Australian Catholic Migrant and Refugee Office, and the Uniting Church in Australia, particularly with regard to the treatment of the victims of trafficking. The Committee considers however, that the commitment that would

35 Ms Joanne Blackburn, *Transcript of Evidence*, 13 February 2004, p. 13, and NIA, para. 9.

36 Ms Joanne Blackburn, *Transcript of Evidence*, 13 February 2004, p. 24.

37 Ms Joanne Blackburn, *Transcript of Evidence*, 13 February 2004, p. 24.

38 The Uniting Church in Australia, *Submission*.

39 NSW Young Lawyers Human Rights Committee, *Submission*.

be demonstrated through ratification of the TOC Convention and both Protocols will be the most beneficial outcome for victims of trafficking in the longer term.

- 5.39 The concerns raised by both organisations about the domestic implementation of federal and state policies with regard to, for example, the provision of specific services to victims, or specific initiatives to raise awareness within the sex industry, are noteworthy but are outside the Committee's remit to consider proposed treaty actions. The Committee trusts that there are domestic forums where these issues can be given proper consideration and positive outcomes can be achieved.

Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the UN Convention against Transnational Organized Crime

- 5.40 As stated in paragraph 5.1, the People Smuggling Protocol was adopted by the UN General Assembly on 15 November 2000. Australia signed the Protocol on 21 December 2000 and it entered into force on 28 January 2004.⁴⁰
- 5.41 The Committee was advised that the People Smuggling Protocol forms a key element of the global approach to prevent and combat the smuggling of migrants, to promote cooperation among state parties and to protect people who have been smuggled.⁴¹
- 5.42 The Committee notes that existing domestic legislation designed to combat people smuggling is considered to be sufficient to meet obligations under the Protocol, and that ratification would 'highlight Australia's domestic efforts to combat transnational organised crime in the international arena'.⁴²

We already have several regulations under the Mutual Assistance in Criminal Matters Act and the Extradition Act which essentially make the offences that are in the convention

40 Ms Joanne Blackburn, *Transcript of Evidence*, 13 February 2004, p. 12.

41 Ms Joanne Blackburn, *Transcript of Evidence*, 13 February 2004, p. 12, and NIA, para. 6.

42 NIA, para. 7.

extradition offences and offences for which mutual assistance can be granted.⁴³

Obligations under the People Smuggling Protocol

5.43 According to the NIA, the People Smuggling Protocol requires States Parties to criminalise certain forms of conduct that is transnational in nature when committed internationally and in order to obtain a financial or material benefit:

- the smuggling of migrants
- when committed for the purpose of smuggling migrants:
 - ⇒ producing a fraudulent travel or identity document
 - ⇒ procuring, providing or possessing such a document
- enabling a person who is not a national or a permanent resident to remain in the State concerned without complying with the necessary requirements for legally remaining in the State.⁴⁴

Implementation

5.44 The Committee understands that Australia will be able to meet all requirements under the Protocol, including those listed in the above paragraph, through existing domestic legislation, particularly the *Migration Act 1958*, the *Criminal Code* and the *Proceeds of Crime Act 2002*.⁴⁵

5.45 There are no foreseeable costs to Australia that will be imposed by ratification of the Protocol, apart from participation in the Conference of the Parties.⁴⁶ This is discussed in the general issues section later in this Chapter, at paragraphs 5.83 and 5.84.

Awareness raising activities

5.46 Article 15 of the People Smuggling Protocol requires that measures be taken to provide or strengthen information programs to increase public awareness that people smuggling is a crime, and cooperate in the field of public information for the purposes of preventing potential migrants from falling victim to organised crime groups.

43 Ms Joanne Blackburn, *Transcript of Evidence*, 13 February 2004, p. 17.

44 NIA, para. 12.

45 NIA, para. 28.

46 NIA, para. 29.

- 5.47 Mr Zanker advised that significant leaflet campaigns had been conducted by the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) throughout the Middle East, Indonesia and other source and transit countries.⁴⁷ More detailed information about DIMIA's programs with was provided to the Committee by the Attorney-General's Department.
- 5.48 The Committee notes that the Overseas Information Campaign conducted by DIMIA includes videos, radio news clips, posters and information kits translated into 12 languages.⁴⁸ The Committee recognises that compliance officers assigned by DIMIA to 20 locations extend Australia's information sharing network, and work with local police and immigration officials to identify and report on the activities of people smugglers and counter foreign nationals who may try to enter Australia illegally.⁴⁹ The Committee also acknowledges Australia's active participation in international programs, as well as consultations and conferences, to combat people smuggling. These programs will be discussed more broadly later in this Chapter.
- 5.49 The Committee agrees that the wide range of measures would adequately fulfil Australia's obligations under the People Smuggling Protocol.

Enforcement of People Smuggling legislation and related prosecutions

- 5.50 The Committee was advised that people smuggling offences are covered by the *Migration Act 1958* and the *Criminal Code Act 1995*. Information provided by the Attorney-General's Department on charges and convictions under relevant legislation was thorough and of great benefit to the Committee in its deliberations with regard to this Protocol.⁵⁰
- 5.51 The Committee notes that in there have been 572 convictions for people smuggling offences in the last 10 years. Persons convicted of offences under sections 232A or 233 of the Migration Act have generally received a term of imprisonment, ranging from 4 months to 12 years. In some cases, terms of imprisonment have been combined

47 Mr Mark Zanker, *Transcript of Evidence*, 13 February 2004, p. 26.

48 Attorney-General's Department, *Submission*.

49 Attorney-General's Department, *Submission*.

50 Attorney-General's Department, *Submission*.

with fines and / or conditions not to enter Australian territorial waters for a set period of time following release from prison. According to the Attorney-General's Department, there are currently 24 federal prisoners in gaol for people smuggling offences.⁵¹

Submission from NSW Young Lawyers

- 5.52 Comments made by Ms Renee Saibi, Chair of the Human Rights Committee of NSW Young Lawyers, include observations that this Protocol is the 'only international instrument that attempts to comprehensively deal with the issue' of people smuggling, and that the incorporation of the Protocol into Australian law 'completes one very important task – it seeks to reconcile key human rights norms with the criminalisation of the practice'.⁵²
- 5.53 The Committee accepts the views of the Human Rights Committee of NSW Young Lawyers that the cumulative effect of the articles of this Protocol will be to provide a framework for Australia's international initiatives, and that Australia should adopt the instrument.

General Points on TOC Convention and Protocols

- 5.54 Having considered specialised elements of the Convention and Protocols, the Committee can make some observations about issues which are common to all three, as well as draw some conclusions about the ways in which the national interest would be affected by various courses of action. Further, the Committee considers the impact that ratification of the treaties may have on existing and future treaty obligations, and on Australia's involvement in the region.

Terminology in TOC Convention and Protocols

- 5.55 The Committee is aware that the TOC Convention contains some generalised terms which are also applicable to the two Protocols. While the Committee asked questions specifically on the TOC Convention, issues of terminology in multilateral agreements are relevant to each of the proposed treaty actions in this Chapter.

51 Information in this paragraph is taken from the Attorney-General's Department's Submission, received 27 February 2004.

52 NSW Young Lawyers, *Submission*.

- 5.56 The Committee was concerned about some of the general definitional terms used in the Convention and Protocols and how they may be defined and applied by Parties to them. Three examples were raised with representatives of the Attorney-General's Department and clarification was received and is outlined in the following paragraphs.
- 5.57 Article 2(a) of the TOC Convention refers to an organised criminal group as one that exists 'for a period of time'. Ms Joseph, from the Attorney-General's Department, stated
- the existing offences in Australia which are relevant to the obligations under the TOC Convention are of general application, so we do not have this notion of an organised criminal group incorporated into Australia's law. However, we do have very broad corporate responsibility and criminal liability provisions in the Commonwealth Criminal Code.⁵³
- 5.58 Article 16.14 states that a State should not be obligated to act if it has 'substantial grounds' to refuse extradition. The Committee sought clarification on how such grounds would be determined under the TOC Convention and how they would be notified. Ms Leonard, from the Attorney-General's Department, said that some of the grounds would include those outlined in the Convention itself, that is, the punishing of a person on the basis of their sex, race, religion, nationality, ethnic origin or political opinion, but also 'where the death penalty was to be enforced in the other country would be a substantial ground for refusal of extradition'.⁵⁴ Ms Blackburn stated that several of those issues were included in the Commonwealth Extradition Act as mandatory grounds on which extradition must be refused.⁵⁵
- 5.59 As a final example, Article 18 of the TOC Convention refers to Article 18(21)(b) which states that a State Party may refuse a request for mutual assistance if it is considered that execution of the request is likely to 'prejudice its sovereignty'. The Committee sought clarification on how this would be determined and what reasons may need to be provided.
- 5.60 Ms Blackburn, stated that this ground (for refusal) currently exists under domestic mutual assistance legislation but that there is
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53 Ms Margaret Joseph, *Transcript of Evidence*, 13 February 2004, p. 15.

54 Ms Kerin Leonard, *Transcript of Evidence*, 13 February 2004, p. 15.

55 Ms Joanne Blackburn, *Transcript of Evidence*, 13 February 2004, p. 15.

currently no obligation to provide specific reasons.⁵⁶ The Committee understands that this is an area that would require amendments to the mutual assistance legislation, such that reasons would need to be given should a request for mutual assistance be refused by Australia as a party to the Convention.⁵⁷

- 5.61 Of significant concern to the Committee is how Australia's obligations under international treaties are practically and effectively implemented with consistency between Parties to an agreement. The Committee was gratified to see the link between generalised aspirational terms included in multilateral agreements such as the TOC Convention and its Protocols and existing domestic legislation which will give effect to those terms. While it remains concerned that a uniform approach to such generalised statements such as 'sovereignty' will mean that there is potentially a variation in their application, it accepts the Department's view that 'every country must have the right to determine whether they consider that request impacts on their sovereignty'.⁵⁸

Applicability of existing legislation

- 5.62 Throughout its consideration of the proposed treaty actions, the Committee was interested to learn, should Australia become party to them, which future obligations would be suitably covered by existing legislation, where new or amended legislation may be required, and to what extent, if any, existing legislation or current or future bilateral agreements may be affected by the presence of a new multilateral agreement of this kind, particularly with regard to the range of issues it covers.
- 5.63 The Committee has reviewed several bilateral mutual assistance agreements since its establishment in 1996, and understands that under mutual assistance legislation, Australia is able to receive a mutual assistance act from any country, regardless of the presence or otherwise of a treaty relationship. The Committee also understands that because of the broad range of offences covered under the TOC Convention, it may limit the need for some mutual assistance treaties in future. It should be remembered however, that

56 Ms Joanne Blackburn, *Transcript of Evidence*, 13 February 2004, p. 16.

57 Ms Joanne Blackburn, *Transcript of Evidence*, 13 February 2004, p. 16.

58 Ms Joanne Blackburn, *Transcript of Evidence*, 13 February 2004, p. 16.

we have a system in which we can take and process a request from any country, but that arrangement does not exist with all other countries, so we have bilateral treaty relationships with countries where they must have a treaty in place in order to receive and process a mutual assistance request, for example for its own constitutional requirements.⁵⁹

Extraterritorial application

- 5.64 The Committee notes that many Australian federal offences have extraterritorial application; that is, the activities of Australian citizens overseas can be found to be criminal. The Committee understands that in the text of the TOC Convention, the definition of transnational crime provides for four conditions in which the activity is expected to be covered

where it is committed in more than one state, where it is committed in one state but part of its preparation is in another, where it is committed in one state but involves an organised criminal group that engages in criminal activities in more than one state, or it is committed in one state but has substantial effects in another state.⁶⁰

- 5.65 The Committee understands that, for example, people smuggling offences are now included in the Criminal Code and have comprehensive extraterritorial application and would therefore apply when an Australian citizen or resident is participating in that activity, whether the conduct takes place in or via Australia. As Ms Joseph explained

the fact that we already have legislation which does have this extraterritorial application does help us to meet obligations to criminalise transnational crime.⁶¹

Regional and bilateral arrangements – awareness and cooperation

- 5.66 Across all three proposed treaty actions, the Committee was especially interested in Australia's participation in bilateral and regional arrangements which would improve awareness of transnational crimes and facilitate cooperation, both between

59 Ms Joanne Blackburn, *Transcript of Evidence*, 13 February 2004, pp. 19-20.

60 Ms Joanne Blackburn, *Transcript of Evidence*, 13 February 2004, pp. 17-18.

61 Ms Margaret Joseph, *Transcript of Evidence*, 13 February 2004, p. 17.

Australia and its regional neighbours and between those neighbours themselves. Consideration has been given in earlier sections of this Chapter to some specific instances where information was received by the Committee about particular operations, strategies, and programs in which Australia is involved. The Committee considers that it is worthwhile to consider those individual examples of involvement in particular areas (for example, support for victims of trafficking in Cambodia, or publicity campaigns to discourage people traffickers in Indonesia) as indicative of a broader commitment by Australia which would be enhanced by ratification of these and similar agreements.

- 5.67 The Committee was very interested to learn of the involvement of 41 officers of the Australian Federal Police (AFP) at 24 Australian overseas posts in 23 countries, through the Law Enforcement Cooperation Program, based on the AFP's international liaison officer network. The Committee was advised that officers in the network

form the link between countries, facilitating the exchange of information as well as enhancing communication and understanding by attending international conferences and seminars, promoting the Program and building a rapport with law enforcement officers of their host country.⁶²

- 5.68 The Committee understands that the AFP also has a range of MOUs with law enforcement agencies addressing cooperation on issues including transnational organised crime. Agencies with which MOUs are in place include the Royal Thai Police, the Indonesia National Police, the Colombian Attorney-General's Department, and the Drug Enforcement Agencies of the Philippines and the United States.⁶³

- 5.69 The Committee was also pleased to receive information on DIMIA's establishment of Regional Cooperation Arrangements in Indonesia and Cambodia. According to the Attorney-General's Department submission, these

provide for intercepted Prospective Illegal Immigrants (PIIs) to be cared for by the International Organization for Migration (IOM), any potential protection needs assessed by UNHCR [UN High Commissioner for Refugees] and voluntary return is encouraged.⁶⁴

62 Attorney-General's Department, *Submission*.

63 Attorney-General's Department, *Submission*.

64 Attorney-General's Department, *Submission*.

- 5.70 The Committee recognises DIMIA's multifaceted approach to combat people smuggling and other transnational crimes, including developing and / or enhancing cooperative relationships with source, first asylum, transit, donor and destination countries, promoting a greater international awareness of issues, developing capacity building initiatives including facilitating access to technical advice and training, and participation in international forums.
- 5.71 The Committee considers that these initiatives, together with approaches outlined in earlier sections of this Chapter, will have an ongoing effect in promoting awareness of the issues involved with people smuggling and trafficking as well as broader concerns raised by the challenge of combating transnational criminal activities faced by nations in the region and around the globe.

Money Laundering

- 5.72 The Committee understands that this is the first Convention to look at transnational organised crime in such a comprehensive way⁶⁵, but that some of the measures it deals with complement and are compatible with measures in other international forums, such as the Organization for Economic Cooperation and Development (OECD)'s Financial Action Task Force on Money Laundering.⁶⁶

Australia's work with the Regional Ministerial Conferences

- 5.73 The Committee is aware from the NIAs on both Protocols to the TOC Convention that ratification of the Convention and its Protocols would support Australia's work as co-Chair on the Regional Ministerial Conferences on People Smuggling, Trafficking in Persons and Related Transnational Crime. The Committee heard that
- as co-Chair of these conferences with Indonesia, the Australian Government has taken an active role in promoting regional cooperation to break down the criminal networks responsible for transnational crime.⁶⁷
- 5.74 The Ministerial Conferences took place in February 2002 and April 2003. The Committee was advised that at the conclusion of both of these conferences, the co-Chairs issued communiqués on behalf of

65 Ms Kerin Leonard, *Transcript of Evidence*, 13 February 2004, p. 13.

66 NIA, para. 11.

67 Ms Joanne Blackburn, *Transcript of Evidence*, 13 February 2004, p. 13.

all the parties, encouraging all regional countries to ratify the Convention and its Protocols.⁶⁸

- 5.75 According to the Attorney-General's Department's submission, a two-day legislative workshop organised by Australia in November 2003 demonstrated the significant progress made by the Bali Process countries since the first Bali Ministerial Conference and the first legislative workshop in September 2002 in drafting, enacting or amending legislation to criminalise people smuggling and trafficking in persons. The workshop also highlighted the significant amount of information that is already available for countries to draw on when developing their legislation.
- 5.76 The Committee was interested to hear that Indonesia was a signatory but has not ratified the Convention. The Department advised that Indonesian officials had advised that Indonesia does intend to ratify the Convention, but that the Government 'is currently progressing other priority activities'.⁶⁹ Further advice on this issue from DFAT had not been received by the time this report was printed.
- 5.77 The Committee had noticed during its consideration that several countries, including several in the Pacific region, which at the time of the hearing were also yet to ratify these instruments. A list of these regional neighbours and a comment on their progress towards ratification was included in information later provided by the Attorney-General's Department.⁷⁰ The Committee is pleased to note that several countries are currently undergoing legislative reviews or similar processes to Australia, with a view to concluding ratification procedures at some point in the future.⁷¹

Consultations

- 5.78 An annex outlining consultations undertaken, particularly with Australian States and Territories is attached to each NIA.⁷² The annexes describe the processes involved since the initial briefing of the Heads of Commonwealth Operational Law Enforcement Agencies

68 Ms Joanne Blackburn, *Transcript of Evidence*, 13 February 2004, p. 14.

69 Attorney-General's Department, *Submission*.

70 Attorney-General's Department, *Submission*.

71 Attorney-General's Department, *Submission*.

72 Information in this section has been compiled from the Consultations Annexes to all three proposed treaty actions. There are some slight differences between the Annexes relating to additional specific consultations undertaken but the Committee considers that they share similarities in the important areas of scope and outcome.

(HOCOLEA) in November 1999 on the draft TOC Convention, and including consideration by the Standing Committee on Treaties (SCOT) in May 2001 and again in November 2003. The Committee is advised that no negative comments were expressed by States and Territories at this last SCOT meeting.

- 5.79 The Committee understands that the Australian Chamber of Commerce and Industry provided comments on the draft Convention in July 2000, to the effect that while the Convention's objectives were 'sound and reasonable', its enforcement should not impede legitimate commercial activity.
- 5.80 The Committee also understands that in the general area of trafficking in persons, the Minister for Justice and Customs has worked closely with his state and territory counterparts through the Australian Police Ministers' Council (APMC).
- 5.81 The Consultations Annexes to the TOC Convention and People Smuggling Protocol state that comments received on the Convention and its Protocols from the Queensland Department of Justice and Attorney-General in March 2001 were taken into account in determining the domestic action required to comply with obligations under the Convention.
- 5.82 The Committee is satisfied with the nature and range of consultations conducted prior to the tabling of these proposed treaty actions.

Costs

- 5.83 The NIA states that 'some expense' will be incurred in the activities of the Conference of the Parties, the first session of which is expected to be held in 2004. The rules governing the payment of expenses will be discussed and agreed at that time. The Committee notes that there is a provision in the TOC Convention which

encourages the making of voluntary contributions to funds to be run by the assembly to provide technical assistance. There is also a provision suggesting that one could use proceeds of crime confiscated assets funds. They are both voluntary provisions. There is no provision in the Convention for the levying of mandatory membership payments. That is not to say however, that the assembly of States Parties cannot

determine that States Parties should make contributions to its activities.⁷³

- 5.84 The Committee notes the admission of the Attorney-General's Department that that paragraph of the NIA 'has a significant lack of detail' in it and requests that further information on costs be provided by the Attorney-General's Department soon after the first Conference of Parties has decided these matters.⁷⁴

A further Protocol to the TOC Convention?

- 5.85 The Committee was advised that the third protocol to the TOC Convention, which relates to illicit manufacturing of and trafficking in firearms has been 'less enthusiastically subscribed to at the international level' and therefore has not yet entered into force.⁷⁵ Ms Leonard advised the Committee that Australia would need legislation in place at the state and territory level to be able to ratify the firearms protocol. Consultation will be required and will be conducted by the Firearms Policy and Working Group within the Australasian Police Ministers' Council. Despite the potential for delay because of the protocol on firearms

a decision has been made that there is a significant advantage for us in proceeding with the [TOC] convention and the other two protocols.⁷⁶

- 5.86 The Committee looks forward to reviewing the third Protocol to the TOC Convention at the appropriate time.

Concluding remarks

- 5.87 The efficiency of the review process for international treaties is dependent on information being supplied in an appropriate and timely manner. The 15 or 20 sitting day period review period available to JSCOT (and with which it typically complies) often means that only one public hearing is held, reviewing treaty actions which are usually on a range of different subjects.

73 Ms Joanne Blackburn, *Transcript of Evidence*, 13 February 2004, p. 20.

74 Ms Joanne Blackburn, *Transcript of Evidence*, 13 February 2004, p. 20.

75 Ms Kerin Leonard, *Transcript of Evidence*, 13 February 2004, p. 25.

76 Ms Kerin Leonard, *Transcript of Evidence*, 13 February 2004, p. 25.

- 5.88 Given this timeframe, the Committee accepts advice from government agencies concerning the invitation of certain relevant witnesses to provide appropriate evidence. According to established practice, if answers to questions of the Committee cannot be provided at a hearing, they are taken ‘on notice’ with the department providing written answers at a later time. On one occasion during the public hearing on 13 February, the Committee was surprised at a response from the Attorney-General’s Department that it would be inappropriate to comment on an issue relating to a treaty’s operation because it fell under the aegis of another department.
- 5.89 This response has highlighted the need to remind government agencies of the benefits of assisting the Committee through the provision of appropriate witnesses and willingness to coordinate thorough responses when answers cannot be provided at a public hearing. The Committee accepts that questions relating to a proposed treaty action may fall outside the scope of a single department’s area of expertise, but considers it reasonable to expect that an agency proposing that a particular treaty action be undertaken be able to provide or coordinate responses to any germane question from the Committee, and to take appropriate measures to ensure that this occurs in all cases.
- 5.90 As examples, when the Department of Transport and Regional Services is the lead agency for a proposed treaty on maritime pollution, it coordinates the appearance of the Australian Maritime Safety Authority, whose port state control and inspection functions are often central to the treaty’s practical operation, so that questions from the Committee on all the treaty’s aspects can be answered. Similarly, the Committee appreciates the appearance at public hearings in Canberra of witnesses from the Department of Foreign Affairs and the Attorney-General’s Department who have expertise in general treaty law and practice so that questions on those issues which may fall outside a particular agency’s knowledge or experience can be answered in the most efficient way possible, or taken on notice.
- 5.91 It should be apparent from the consideration given to the submission from the Attorney-General’s Department in relation to the treaties considered in this Chapter, that the Committee values highly comprehensive information it receives. The Department is to be commended on the issues on which it has provided supplementary material, especially on the range of regional and bilateral measures on issues covered by these proposed treaty actions. The Committee is

aware that not all issues which may support an agency's case for binding treaty action to be taken can be covered within an NIA document or during a public hearing, and therefore encourages government agencies appearing as witnesses, in their own interest, to be prepared to answer questions or supply further information on the **full** range of issues which may apply to any proposed treaty action presented to the Committee for its consideration.

- 5.92 As the Committee is generally pleased with the standard of evidence received from competent witnesses who are able to respond to questions either at a public hearing or shortly thereafter, it hopes that the situation where a department which has proposed a treaty and coordinated witnesses rebuffs a relevant question will not arise again.

Recommendations

- 5.93 The Committee agrees with the view expressed by the Attorney-General's Department that Australia's ratification of the TOC Convention and the two supplementary Protocols considered in this Chapter will demonstrate Australia's commitment to combat transnational crime.
- 5.94 With regard to the TOC Convention, the Committee agrees with the view that ratification will provide a standardised approach to criminalisation and a mechanism for cooperation with a range of other countries in the prevention, detection and prosecution of transnational crime.
- 5.95 With regard to the TiP Protocol, the Committee agrees that ratification should proceed in order that a strong statement be made of Australia's commitment to addressing this repugnant, degrading crime and an example be set, in the hope that all countries proceed to address this serious issue.
- 5.96 With regard to the People Smuggling Protocol, the Committee agrees with the Attorney-General's Department's claim that ratification 'would demonstrate Australia's commitment to working with other destination, transit and source countries to combat this crime'.⁷⁷

77 Ms Joanne Blackburn, *Transcript of Evidence*, 13 February 2004, p. 12.

Recommendation 4

The Committee supports the *United Nations Convention Against Transnational Organized Crime, done at New York on 15 November 2002, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime, and the Protocol Against the Smuggling of Migrants by Land, Sea and Air (People Smuggling Protocol), supplementing the UN Convention Against Transnational Organized Crime*, and recommends that binding treaty action be taken in all three cases.

**Dr Andrew Southcott
Committee Chair**