

CHAPTER 2

ISSUES RAISED IN RESPECT OF THE BILL

2.1 The overwhelming majority of submissions to the inquiry supported the Government's proposal to ratify the Protocol and to criminalise human trafficking. However, submissions also raised two broad sets of concerns with respect to the Bill: that it failed to implement the requirements of the Protocol and that it contained a number of discrepancies with respect to domestic criminal law. This chapter of the report examines these two issues.

Implementation of the Protocol

2.2 The stated rationale for the Bill is to criminalise comprehensively every aspect of trafficking in persons and thereby fulfil Australia's obligations under the Protocol. Passage of the Bill, combined with measures already in place, is intended to allow Australian ratification of the Protocol in the near future.¹

The requirements of the Protocol

2.3 Article 5(1) of the Protocol will require Australia as a State Party to:

... adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally.

2.4 The conduct to be criminalised is described in Article 3 as 'trafficking in persons'. It comprises:

... 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.²

2.5 It was put to the Committee that three elements must therefore be made out in order for the proscribed activity - 'trafficking in persons' - to occur.³ These are:

- An **action** consisting of recruitment, transportation, transfer, harbouring or receipt of persons.

1 *Explanatory Memorandum*, p. 1. See also Second Reading Speech, Senator the Hon Chris Ellison, Minister for Justice and Customs, *Senate Hansard*, 8 December 2004, p.2

2 Article 3(a) of the Protocol.

3 HREOC, *Submission 9A*, p. 5; HREOC, *Committee Hansard*, 23 February 2005, p. 3.

- That action is undertaken by **means** of 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.
- That action is undertaken for the **purpose** of 'exploitation'. Article 3(a) of the Protocol provides that:

'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.

2.6 There must be no requirement to establish the existence of any of the above-mentioned means where a child is involved.⁴ Article 3(c) of the Protocol expressly provides that:

the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the [above-mentioned] means.

2.7 The Protocol also states that the consent of a victim of 'trafficking in persons' to the intended exploitation must be irrelevant where any of the means listed in Article 3(a) have been used.⁵

Concerns that the Bill is inconsistent with the Protocol

2.8 Submitters argued that the Bill, as currently drafted, fails to comply with or satisfy the above-mentioned requirements of the Protocol and, as such, Australia's obligations under that Protocol.⁶ A consequence, it is argued, is that the Bill fails to appropriately capture and criminalise all aspects of trafficking in persons. Amendments to the Bill have therefore been suggested. These arguments are considered below.

The consent of victims made an issue?

2.9 Concerns have been raised that the proposed offences of trafficking by force or threat require the prosecution to prove - and therefore the defence to disprove - that the force or threats of the accused resulted in consent on the part of the victim.⁷ That is, that the victim's consent will in effect be made an issue before the court. This, it is

4 Article 3(c) of the Protocol. A 'child' is defined in Article 3(d) for the purposes of the Protocol to mean any person under eighteen years of age.

5 Article 3(b) of the Protocol.

6 See, for example, HREOC, *Submission 9*, p.2 and World Vision, *Submission 12*, pp.3-4.

7 That is, an element of the proposed trafficking offences in proposed sections 271.2 and 271.5 is that the defendant's use of force or threats must result in the defendant obtaining the victim's consent to their entry or receipt into, or transport within, Australia.

argued, is at odds with the above-mentioned requirement of the Protocol that the consent of the victim shall be irrelevant in such cases.⁸ The Coalition Against Trafficking in Women Australia (CATWA), for example, criticises this approach as placing the onus on the victims of trafficking to prove that they have been forced into trafficking instead of targeting the action of the traffickers.⁹ Witnesses argued that the element of the victim's consent should therefore be removed from the offences.¹⁰

Response of the Attorney-General's Department

2.10 The Attorney-General's Department maintained that the Bill is consistent with the Protocol's requirement that the consent of the victim to the 'intended exploitation' should be irrelevant. It explained that:

The victim's consent to the trafficking activity does not provide an excuse or defence for the trafficker. The key issue for the prosecution to establish is the use of force or threats by the offender to obtain the victim's consent to the activity. Subsection 271.2(1) creates an offence where the victim's consent 'to the entry into Australia' is obtained by force or threats. The offence will be made out where the victim consented to participate in forced labour on arrival in Australia, provided the victim's consent to come to Australia was obtained through the use of force or threats.¹¹

The Committee's view

2.11 The Committee shares the concern of witnesses that the offences as currently framed put the consent of victims in issue before a criminal court. In its view, this is inconsistent with the requirements of the Protocol. Moreover, it appears unnecessary. See in this regard the other recommendations of the Committee listed below. The Committee therefore recommends that the references to consent of victims be omitted.

Recommendation 1

2.12 The Committee recommends that proposed subsections 271.2(1) and 271.5(1) of the Bill be amended to remove any reference to the consent of victims.

Failure to specify an exploitative purpose?

2.13 Concerns were raised over the apparent failure to include the element of exploitative purpose in the proposed trafficking offences.¹² This, it is suggested, is

8 See, for example, HREOC, *Submission 9*, pp. 4-5; World Vision, *Submission 12*, pp. 3-4; Project Respect, *Submission 6*, Attachment, pp.8, 10.

9 CATWA, *Submission 13*, p. 1

10 See, for example, HREOC, *Submission 9*, p. 5.

11 *Submission 17A*, pp. 6-7.

12 See proposed subsections 271.2(1) and 271.5(1). The elements of the trafficking offence in proposed subsection 271.2(1), for example, are: (i) the defendant organises or facilitates the entry, proposed entry or receipt of another person into Australia; (ii) the defendant uses force

inconsistent in that other proposed offences in the Bill implicitly or expressly include such a requirement.¹³ Moreover, it means that the application of the proposed trafficking offences extend well beyond people trafficking and into people smuggling – an activity already prohibited by other Commonwealth legislation.¹⁴ This blurring of people trafficking with people smuggling is seen as undesirable.¹⁵ As the Human Rights and Equal Opportunity Commission (HREOC) argued, an exploitative purpose:

... is an essential component of the definition of trafficking in the trafficking protocol. Its omission means that these offences have an uncertain scope extending to circumstances outside the internationally accepted definition of 'trafficking'. That lack of certainty may undermine public confidence in the new offence regime and thus actually harm the government's efforts to raise awareness of the problems associated with trafficking.¹⁶

Response of the Attorney-General's Department

2.14 In view of the above, the Committee asked the Attorney-General's Department why the new trafficking offences did not require that the conduct be for the purpose of exploitation whereas other offences - such as the proposed trafficking in children offences - do. The Department's response was as follows:

The elements of these offences are different. The general trafficking offences in section 271.2 require either the use of force or threats, or the use of deception about certain matters, including that the victim will be exploited. These offences are available whether the victim is a child or an adult. The trafficking in children offence in section 271.4 does not require the prosecution to prove that the offender threatened the child, used force against the child, or deceived the child. In addition, whether the child 'consented' to the conduct is irrelevant to the offence. It is only necessary to prove that the offender intended or was reckless as to the fact that the child would be used to provide sexual services or otherwise exploited.¹⁷

or threats; and (iii) that use of force or threats results in the defendant obtaining the other person's consent to that entry, proposed entry or receipt. The provision does not require that the entry, proposed entry or the receipt of another person into Australia be for one or more of the forms of 'exploitation' listed in Article 3(a) of the Protocol.

- 13 HREOC, *Submission 9*, page 5. The deception offences in proposed sections 270.7(1) and 271.2(2) require that a person must be deceived about matters which would fall with the definition of 'exploitation' in Article 3(a) of the Protocol'. Similarly, the new trafficking in children offences in proposed section 271.4 require, among other things, proof of recklessness or an intention on the part of the defendant that the child 'will be used to provide sexual services or be otherwise exploited'.
- 14 See Division 73 of the *Criminal Code* and Division 12 of the *Migration Act 1958* (Cth).
- 15 HREOC, *Submission 9*, pp. 4-6. World Vision, *Submission 12*, p. 12 of Attachment.
- 16 Mr Lenehan, *Committee Hansard*, 23 February 2005, p. 2.
- 17 *Submission 17A*, p. 6.

The Committee's view

2.15 After careful consideration, the Committee considers that the concerns raised by witnesses, including HREOC and World Vision, carry some weight. The Committee was unable to be persuaded that the proposed trafficking offences, as currently drafted, merely meet the requirements of the Protocol. The Committee remains unaware of any cogent justification for these offences' application to circumstances outside the internationally accepted definition of 'trafficking'. It is also concerned at the potential for such widely cast criminal offences to have unintended consequences. The Committee therefore recommends that the relevant offences be amended to require that the conduct to be proscribed be undertaken for the purpose of exploitation. As mentioned below, the Committee also considers that 'exploitation' should be defined in the same terms as it appears in the Protocol.

Recommendation 2

2.16 The Committee recommends that proposed subsections 271.2(1) and 271.5(1) be amended to include in the trafficking offences an element of a purpose of exploitation.

Not all means of trafficking covered?

Means other than force, threats or deception not covered?

2.17 The proposed offences of trafficking in persons will criminalise organising or facilitating the entry, proposed entry or receipt of another person into Australia, or transportation within Australia, by means of force, threat or deception about certain matters.¹⁸ The Bill also extends the scope of the existing section 270.7 of the Criminal Code which criminalises deceptive recruiting for sexual services.

2.18 Submitters acknowledge that the above will go some way to satisfying the obligations of the Protocol. However, they noted that, while force, threat or deception may be significant techniques used by traffickers, they are not the only techniques or 'means' of trafficking that are used and therefore to be prohibited under Article 3 of the Protocol.¹⁹ As Project Respect stated:

[any] legislation which seeks to embrace the UN Trafficking Protocol, and address all forms of trafficking in persons, needs to address the myriad of ways in which traffickers recruit, transport, harbour and receive persons.²⁰

18 See proposed sections 271.2 and 271.5 in the Bill.

19 The means of trafficking prohibited under the Protocol are listed in paragraph 2.5 above.

20 *Submission 6, Attachment, p. 10.*

2.19 In contrast, it was noted that the Bill did not expressly address the following means of trafficking which are listed in Article 3(a) of the Protocol:

- other forms of coercion;
- the abuse of power or of a position of vulnerability; and
- the giving or receiving of payments or benefits to achieve the consent of a person having control over another person.²¹

All forms of deceptive recruitment covered?

2.20 As mentioned above, the Bill amends subsection 270.7(1) of the Criminal Code to widen the offence of deceptive recruitment for sexual services. The Explanatory Memorandum explains that:

... section 270.7 does not address the situation where a person knows he or she will be working in the sex industry but is deceived about the exploitative conditions of that employment. ... The amended offence [therefore] includes deception about the conditions under which sexual services are to be provided.²²

2.21 Subsection 270.7(1) will therefore be amended to apply expressly to deception about:

- the fact that the arrangement will involve the provision of sexual services;
- the extent to which the person will be free to leave the place or area where the person provides sexual services;
- the extent to which the person will be free to cease providing sexual services;
- the extent to which the person will be free to leave his or her place of residence; and
- the fact that the engagement will involve exploitation, debt bondage or the confiscation of the person's travel or identity documents.

21 HREOC, *Submission 9*, p. 4; CATWA, *Submission 13*, p.1

22 *Explanatory Memorandum*, p.4.

2.22 However, it was put to the Committee that the amended offence fails to cover all the required forms of deception.²³ That is, none of the matters listed in the above paragraph cover deception about:

- the nature of sexual services a person will be required to provide; and
- the quantum of any debt or purported debt owed or which will be owed by the person in connection with the engagement.

2.23 Submissions referred to the Parliamentary Joint Committee on the Australian Crime Commission (PJCACC) recent recommendation that it is essential that such deception be clearly criminalised.²⁴ Deception is a significant technique used by traffickers. Evidence presented to the PJCACC confirmed that the majority of deception that occurs in trafficking of sex workers relates to the size of the debt that trafficked workers must repay, the number of clients they must see and the range of sexual services they must provide.²⁵

2.24 Similar concerns were raised in respect of proposed deceptive trafficking offences in subsections 271.2(2) and 271.5(2).²⁶ That is, that they also failed to cover deception about the nature of sexual services to be provided and the quantum of any debt or purported debt.

2.25 Submitters also highlighted an apparent inconsistency between the Bill's deceptive trafficking offences and its deceptive recruiting offences in respect of the extent of deception.²⁷ Proposed subsection 271.2(2) makes it an offence to organise or facilitate the entry etc into Australia where there is deception about the fact that the entry etc will involve the provision of sexual services, exploitation, debt bondage or the confiscation of travel or identity documents. Proposed subsection 271.5(2) creates a similar offence in respect of domestic trafficking. However, neither provision includes deception about the matters listed in proposed section 270.7. That is, the extent to which the person will be free to:

23 HREOC, *Submission 9*, pp. 2-3; Western Australian Police Service, *Submission 11*, p. 2; Project Respect, *Submission 6*, Attachment, p.4. See also Catholic Woman's League argued Inc. *Submission 14*, p.3. The Catholic Woman's League argued that the definition of 'sexual servitude' should be amended to protect women who consent to work in the sex industry, but who are deceived about the conditions of work. See also Parliamentary Joint Committee on the Australian Crime Commission, *Australian Crime Commission's response to trafficking in women for sexual servitude*, June 2004, pp. 52-53.

24 See, for example, HREOC, *Submission 9*, p.3 and Ms Fairfax, World Vision, *Committee Hansard* at p. 25. Parliamentary Joint Committee on the Australian Crime Commission, *Australian Crime Commission's response to trafficking in women for sexual servitude*, June 2004, pp. 52-53.

25 Parliamentary Joint Committee on the Australian Crime Commission, *Australian Crime Commission's response to trafficking in women for sexual servitude*, June 2004, pp. 51-53.

26 HREOC, *Submission 9*, p. 3.

27 HREOC, *Submission 9*, p. 3; Project Respect, *Submission 6*, Attachment, p. 7.

- leave the place or area where the person provides sexual services;
- cease providing sexual services; or
- leave his or her place of residence.

Response of the Attorney-General's Department

2.26 The Department argued at the hearing that the three alternative means of trafficking listed in the Bill – force, threats and deception – would cover the field in respect of what is required by the Protocol.²⁸ That is, force or threat would cover trafficking by means of 'other forms of coercion', 'abuse of power or of a position of vulnerability' or 'the giving or receiving of payments or benefits to achieve the consent of a person having control over another person'.²⁹ The Department did note, however, that it would depend in each case on the exact issues presented to the court.

2.27 The Committee put to the Department the specific concerns of witnesses that the Bill did not address all forms of deceptive recruitment. The Department's response was as follows:

The new trafficking in persons offences in section 271 cover deception as to the fact that the entry, receipt or arrangements for the victim's stay in Australia will involve the provision of sexual services, exploitation, debt bondage or the confiscation of the person's travel or identity documents The amended offence [ie, section 270.7] will apply where the perpetrator deceives a victim about the way they will be required to perform their job. ... This will ensure perpetrators are not able to impose work conditions on the victim that are unacceptable to that person. Nor will perpetrators be able to force a victim to do one type of work when they agreed to do work of a completely different nature ... The new debt bondage offences are [also] available in any circumstance where contracts for personal services are exploitative and deception as to the quantum of a debt or purported debt would be a relevant consideration in determining whether such circumstances existed.³⁰

2.28 In its response to questions from the Committee, the Attorney-General's Department agreed that the new offences in proposed section 271 were inconsistent with the amended deceptive recruiting offence in section 270 and should be amended to ensure deception as to each of the elements listed in para. 2.23 above is covered.

It is agreed that the new offences in proposed section 271 do not directly align with the amended deceptive recruiting offence in section 270 and that

28 *Committee Hansard*, 23 February 2005, p. 44. See also *Submission 17*, p.7

29 Proposed section 271.1 will provide that 'threat' includes a threat of force, removal from Australia, or 'a threat of any other detrimental action', unless there are reasonable grounds for that threat.

30 *Submission 17A*, pp. 1-2. The Attorney-General's Department also noted that these amendments were the Government's response to the recommendations of the PJCACC mentioned in paragraph 2.23 above.

an amendment to ensure deception as to each of these elements is covered in both sections may be appropriate.³¹

The Committee's view

2.29 On balance, the Committee is not persuaded that the concerns raised by witnesses are appropriately addressed by the Bill. The legislation which seeks to implement the Protocol should clearly and unambiguously address all means by which traffickers recruit, transport, harbour and receive their victims. As was stated by the Minister, 'Australia has a moral obligation to ensure that it has every possible measure in place to fight the trade in human beings.'³²

Recommendation 3

2.30 The Committee recommends that proposed sections 271.2 and 271.5 be amended to remove any doubt that they apply to each of the means of trafficking listed in the definition of 'trafficking in persons' contained in Article 3(a) of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Torture, United Nations, 2000*.

Recommendation 4

2.31 The Committee recommends that proposed subsection 270.7(1) be amended to include an express reference to deception about the nature of sexual services a person will be required to provide and to deception about the quantum of any debt or purported debt owed or which will be owed by the person.

Recommendation 5

2.32 The Committee recommends that proposed sections 271.2(2) and 271.5(2) be amended to include an express reference to deception about:

- the nature of sexual services a person will be required to provide;
- the quantum of any debt or purported debt owed or which will be owed by the person;
- the extent to which the person will be free to leave the place or area where the person provides sexual services;
- the extent to which the person will be free to cease providing sexual services; and
- the extent to which the person will be free to leave his or her place of residence.

31 *Submission 17A*, p. 1.

32 Second Reading Speech, Senator the Hon Chris Ellison, Minister for Justice and Customs, *Senate Hansard*, 8 December 2004, p. 2.

Not all forms of exploitation covered?

2.33 Another concern raised in submissions was the apparent failure of the Bill to cover adequately all the forms of exploitation contemplated by the Protocol.³³ The Protocol defines exploitation to mean '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' (emphasis added). As acknowledged by World Vision, this inclusive definition reflects the fact that:

Trafficking is a dynamic global crime and anti-trafficking laws need to be flexible and broad enough to capture changing illicit markets and practices.³⁴

2.34 In contrast, the Bill only defines 'exploitation' in terms of 'slavery', 'forced labour' or 'sexual servitude'.³⁵ The Bill and the Criminal Code then set out what shall constitute 'slavery', 'forced labour' or 'sexual servitude':

- 'Slavery' is defined essentially as the condition of exercising the power of ownership over another person.³⁶
- 'Forced labour' is the condition of a person who provides labour or services (other than 'sexual services') and who, because of the use of force or threats, is not free to cease providing labour or services or to leave the place at which the labour or services are provided.³⁷
- 'Sexual servitude' is defined as being limited to the provision by a person of 'sexual services'.³⁸
- 'Sexual services', for the purposes of the above, is defined in turn to mean the commercial use or display of the body for the sexual gratification of others.³⁹

Failure to cover non-commercial sexual exploitation, especially of children

2.35 This approach, it is claimed, does not adequately capture non-commercial sexual exploitation (that is, forms of sexual exploitation which are not paid for) as is

33 See, for example, World Vision, *Submission 12*, pp. 8-9 and 13- 15 of the Attachment.

34 *Ibid.*, p. 8.

35 Item 11 of the Bill inserts into the *Criminal Code* a definition of 'exploitation' which provides that 'exploitation' shall be taken to occur where an exploiter's conduct causes a victim to enter into slavery, forced labour or sexual servitude. This definition also refers to organ removal which is not relevant to the discussion on this point.

36 Section 270.1 of the *Criminal Code*.

37 See Items 12 and 13 of the Bill and subsection 73.2(3) of the *Criminal Code*.

38 See Dictionary and section 270.4 of the *Criminal Code*.

39 See Item 15 of the Bill.

required by the Protocol.⁴⁰ That is, non-commercial exploitation is not caught by the definition of 'sexual servitude', which is limited to sexual exploitation for a commercial purpose. Moreover, non-commercial sexual exploitation may not always fit neatly within the specific definitions of 'slavery' or 'forced labour' in the Criminal Code. Exploitation can, for example, occur without exploiters exercising 'ownership' over victims. Similarly, the definition of 'forced labour' is also likely to pose problems for law enforcement agencies and prosecutors. It is somewhat contradictory to argue that non-commercial exploitation, especially sexual exploitation, constitutes a form of labour. Another complication is the definition of 'forced labour' expressly excludes 'sexual services'. As HREOC stated:

One might anticipate that defence lawyers would argue that services or labour of a sexual nature are governed by a specific and exclusive definition (inserted by item 15 of the Bill) and should not be held to be within the wider definition of 'forced labour'.⁴¹

2.36 This apparent gap was seen to be a particular problem in the case of child victims who may be trafficked for non-commercial sexual exploitation or so-called personal use.⁴²

2.37 Representatives of the Attorney-General's Department argued at the hearing that non-commercial sexual exploitation could be addressed appropriately under the proposed offences of trafficking by force, threats or deception or by the proposed offence of trafficking in children.⁴³ Proposed section 271.4 provides for an offence of trafficking in children where a person organises or facilitates entry etc of a child and intends or is reckless to the fact that the child will be used to provide 'sexual services' or 'will be otherwise exploited'. The suggestion being that 'otherwise exploited' would encompass non-commercial sexual exploitation.

2.38 Other witnesses took issue with this response on a number of grounds:

- The Bill's definition of 'exploitation' is limited to 'slavery', 'forced labour' or 'sexual servitude'. As noted above, it is argued that reliance on these concepts, as defined, to prosecute non-commercial sexual exploitation will be problematic.

40 World Vision, *Submission 12*, pp. 8-9 and 13-15 of the Attachment. HREOC noted that, in its view, the term 'other forms of sexual exploitation' in the Protocol's definition of exploitation is not limited to a commercial context. Mr Lenehan, HREOC, *Committee Hansard*, 23 February 2005, pp.2-3. The problems posed by attempting to fit 'exploitation' as defined by the Protocol into the concepts of 'slavery', 'forced labour' or 'sexual servitude', as defined, are also discussed at paragraphs 2.40-2.43 below.

41 HREOC, *Submission 9A*, p.4.

42 See World Vision, *Submission 12*, pp 2-5. World Vision cited cases in which children have been brought to Australia to be sexually abused. Examples of non-commercial sexual exploitation of children include trafficking for the purpose of making pornography for personal use or for private sex abuse, including sexual exploitation by friends and associates.

43 *Committee Hansard*, 23 February 2005, p. 49.

- The term 'otherwise exploited' in new section 271.4 is curtailed by the limited definition of 'exploitation' in the Bill.⁴⁴
- Reliance on the offences of trafficking by force, threats or deception would not reflect the Minister's stated view that trafficking offences involving children warrant relatively higher penalties.⁴⁵ The former offences attract a maximum penalty of 12 years imprisonment in contrast to 20 years for the proposed offence of trafficking in children.
- The proposed trafficking offences require proof beyond a reasonable doubt that the consent of the victim (including a child victim) was obtained by force, threat or deception. In contrast, the Protocol expressly states that these means of exploitation are irrelevant in cases involving children and, moreover, the consent of the victim shall not be made an issue.⁴⁶

2.39 The different approach taken by the Protocol in respect of children (that is, no need to prove coercion, consent etc) was also put forward by World Vision as a justification to create additional, child specific offences to deal with child trafficking, including child debt bondage, child servitude and child slavery. In doing so, World Vision stressed the very different nature of trafficking in children and the consequences for its victims:

... children are particularly susceptible to trauma and injury from child trafficking and related crime, with psychosocial and physical consequences that can last a lifetime. International experience has shown that children are much more vulnerable to traffickers than adults due to their reduced capacity to assess risk, to articulate and voice their worries (know their rights and be able to negotiate them) and to look after themselves (both basic needs and to protect themselves from abuse).⁴⁷

Non sexual exploitation - forced adoptions and marriages

2.40 World Vision expressed concern that the proposed deceptive recruiting offence is unjustifiably narrow as it applies only to sexual exploitation. In commenting on the exposure draft of the Bill, World Vision had argued that the offence should criminalise deceptive recruitment for any form of exploitation which may include, but is not limited to, sexual exploitation. The Attorney-General's

44 HREOC noted that the Bill's Explanatory Memorandum also indicates that 'exploited' as used in this context is to be defined by reference to the Bill's definition of 'exploitation'. It states that the definition of 'exploitation' in the Bill applies to the trafficking in children offence. *Submission 9A*, p.3.

45 See Second Reading Speech, Senator the Hon Chris Ellison, Minister for Justice and Customs,, *Senate Hansard*, 8 December 2004, p. 4, as noted by HREOC in *Submission 9A*, p.5.

46 See discussion at para's 2.6-2.7 and 2.9-2.11 above.

47 *Submission, 12*, p.3 and pp. 12-13 of Attachment. See also CATWA, *Submission 13*, pp. 2, 3-4.

Department's response at that time was also that the proposed trafficking offences could be used to prosecute deceptive recruiting for non-sexual purposes.⁴⁸

2.41 World Vision cited trafficking by forced adoptions or servile marriages as two specific examples of forms of exploitation that were not adequately covered by the Bill.⁴⁹ It urged the Committee to consider recommending the amendment of the definition of 'exploitation' in the Bill to include a reference to 'forced adoption and marriage'.

2.42 HREOC endorsed the need to amend the Bill. HREOC advised the Committee that, in its view, the Bill did not adequately address the issue of servile marriages.⁵⁰ According to HREOC, the Protocol requires trafficking in servile marriages to be subject to criminal sanctions and that, while not a widespread problem in Australia, servile marriages remain of real concern internationally.⁵¹

2.43 HREOC acknowledged that some of the Bill's offence provisions may cover this form of exploitation. The proposed trafficking offences in subsections 271.2(1) and 271.5(1) of the Bill may, for example, cover trafficking by servile marriages where it could be established that the consent of a 'wife' to enter Australia or to be transported within Australia was procured by threat or force. Proposed paragraphs 271.2(2)(b) and 271.5(2)(b) could conceivably be applied as they include deception as to 'slavery' and 'forced labour'. However, HREOC noted that the internationally accepted definition of 'servile marriage' is that it is a practice similar to slavery (that is, it is not slavery per se) and has a different content to 'forced labour' as defined in the Bill. Moreover, factors other than force, threats or deception do exist which may operate to prevent a women leaving a servile marriage or a woman in such a marriage agreeing to travel to or within Australia. HREOC therefore concluded that it was unsafe to rely on the Bill's existing provisions to address this form of exploitation.⁵² In reaching this conclusion, HREOC reiterated its view:

... the absence of a requirement for an exploitative purpose and the inclusion of a requirement that the force or threats caused the victim to consent [which] are significant and undesirable departures from the ... Protocol.⁵³

48 *Submission 12*, p. 6

49 *ibid*, p. 8.

50 Examples of a servile marriage include situations where: a woman, without the right to refuse, is given in marriage on payment of money or a gift to her parents; a husband, his family or his clan have the right to transfer the husband's wife to another person for money or a gifts; or where a woman on the death of her husband is liable to be inherited by another person.

51 *Submission 9A*, pp. 5-6.

52 *ibid*, pp. 5-7.

53 *ibid*, p. 6. See footnote 10 of that Submission.

Response of the Attorney-General's Department

2.44 In light of these concerns, the Committee asked the Attorney-General's Department's whether and how the Bill would criminalise the trafficking of adults and children for the purposes of non-commercial sexual exploitation.

2.45 The Department's response was in essence that non-commercial sexual exploitation was a matter for State and Territory Governments to address under their laws. It was not a matter that the Commonwealth Government had to address in the Bill in order to implement the Protocol.⁵⁴

2.46 However, in its response, the Department also advised that:

- The 'strong' measures contained in the Government's trafficking package applied equally to all forms of trafficking and that these would 'ensure that the Government is able to comprehensively combat trafficking in persons for all purposes'.⁵⁵
- The Bill would 'build on existing legislation to comprehensively criminalise all forms of trafficking in persons' and that 'the ability of the Australian Government to ratify the Trafficking Protocol is not linked to the enactment of complementary State or Territory legislation'.⁵⁶
- Non-commercial sexual exploitation would caught by the Bill. That is, that the trafficking in children offence in proposed section 270.4 would be available where the offender was 'reckless' as to the fact that the trafficked child would be either 'used to provide sexual services' or 'otherwise exploited' by the offender or by another person, which the Department suggested included 'a variety of conduct, including child pornography.' The Department also noted that, where a trafficked person is 'forced' into marriage, it might constitute slavery under the existing section 270.3 Criminal Code offence.⁵⁷

2.47 In response to questions about concerns over the lack of information available on which to base trafficking policy and legislation for trafficking for non-sexual purposes, the Department also advised that 'the Government will investigate currently available information and consider options for further research and information gathering'.⁵⁸

54 *Submission 17A*, pp. 5, 14-15; *Committee Hansard*, 23 February 2005, pp. 48-49.

55 *Submission 17A*, pp.7 -8. The Department did note the exception of the community awareness strategy which is specifically targeted at trafficking for sexual purposes.

56 *ibid*, pp. 8, 15

57 *ibid*, pp. 14-15.

58 *ibid*, p .8

2.48 The Department also advised that it did not consider that there was a need to create additional offences relating to children given the provision in the Bill for offences when children are trafficked domestically or internationally. These offences attract a higher penalty and do not require proof of consent or of force or threats.⁵⁹

The Committee's view

2.49 The Committee's starting point is that, in the absence of compelling reasons to the contrary, legislation seeking 'to comprehensively criminalise all forms of trafficking in persons' ought to cover unambiguously all forms of exploitation contemplated by the Protocol. After considering the available evidence, the Committee is not persuaded this will be achieved by relying on the proposed definition of 'exploitation'. Nor is it persuaded that non-commercial sexual exploitation will be caught effectively and appropriately by the proposed offences in the Bill or that this form of exploitation can be safely left to the laws of State and Territory Governments, which have yet to be consulted in respect of the specific provisions of the Bill. As mentioned elsewhere in this report, the Committee's view is that the Bill itself should be subject to further and wider consultation, including with State and Territory Governments.

2.50 The Committee also notes with some disquiet World Vision's evidence that, at a meeting with the Attorney-General's Department, World Vision was advised that concerns as to whether the Bill would cover all forms of exploitation or harm could be resolved by having the Bill's Explanatory Memorandum or the Second Reading Speech detail examples of the matters covered.⁶⁰

2.51 The Committee in its reports has repeatedly expressed its concern at the practice of relying on an Explanatory Memorandum or a Second Reading Speech in an attempt to clarify matters instead of ensuring that the proposed legislation itself provides the necessary clarity and guidance. Problems of statutory interpretation and uncertainty can and do arise as a result. This is especially true in the case of criminal laws such as the Bill. The Committee's concerns were borne out by evidence that legal advice subsequently obtained by World Vision concluded that the above-mentioned approach poses a legal risk in that those matters may not be covered by the Bill. The preferred approach was therefore to amend the Bill itself.⁶¹ The Committee shares that view.

Recommendation 6

2.52 The Committee recommends that the Bill be amended to adopt the definitions of the 'trafficking in persons' and 'exploitation' contained in the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially*

59 *Committee Hansard*, 23 February 2005, p.47.

60 Ms Fairfax, World Vision, *Committee Hansard*, 23 February 2005, (World Vision) p.27.

61 *ibid.*

Women and Children, Supplementing the United Nations Convention Against Torture, United Nations, 2000 As mentioned above, the Committee also recommends that the trafficking offences be amended to include an element of a purpose of 'exploitation'.

Recommendation 7

2.53 The Committee recommends that proposed sections 271.2, 271.4, 271.5 and 271.7 be amended to remove any doubt that they apply to non-commercial sexual exploitation.

Recommendation 8

2.54 The Committee recommends that the definition of 'exploitation' in the Bill be amended to include an express reference to servile marriages.

Debt bondage not adequately covered?

2.55 Concerns were raised that the proposed definition of 'debt bondage' - and therefore the offences in the Bill that rely on that definition - will not cover all the exploitative arrangements used in trafficking. 'Debt bondage' is defined by the Bill as 'a status or condition arising from the pledge of personal services as security for debts where:

- the reasonable value of those services is not applied toward the liquidation of the debt; or
- the length and nature of those services are not defined or limited.⁶²

2.56 Submitters queried the utility of this definition.⁶³ The Australian Crime Commission, for example, noted that the definition may not capture the exploitative aspects of the contractual arrangement used in the trafficking of sex workers. The Commission advised that its intelligence activities had identified that:

... the reasonable value of the personal services rendered by a contracted prostitute is likely to be applied in liquidation of the debt, and the duration and the nature of the services is likely to be known by the contracted woman. The exploitative feature of this arrangement is in the imposition of the up front contract amount i.e. contracts are generally set at between \$30,000-60,000 or the corresponding number of sexual services, after an outlay of a disproportionately lower amount to get the contracted female into Australia.⁶⁴

62 See Item 10 of the Bill.

63 Australian Crime Commission, *Submission 8*, p. 1. Project Respect also pointed to the evidentiary difficulties that the definition posed for any prosecution: *Submission 6*, pp. 7-8 of the Attachment.

64 *Submission 8*, p. 1; see also Project Respect, *Submission 6*, page 7-8 of the Attachment.

2.57 The Commission therefore advised the Committee that 'further consideration of the drafting of this provision is required'.

2.58 The Commission, as did other submitters, also argued that the penalty for debt bondage should be greater than the penalty provided in the Bill (that is, a maximum of 12 months imprisonment).⁶⁵ HREOC referred to legislation in Canada and the United States with offences similar to the proposed debt bondage offence and which impose maximum penalties of 10 to 20 years imprisonment. In HREOC's view, this approach correctly recognised that more substantial penalties may be required in some instances of debt bondage.⁶⁶ Similar sentiments were expressed by Project Respect:

Debt bondage is as instrumental part in the trafficking process as recruitment and transport as laid out in the Trafficking Protocol. We therefore suggest that the term be lengthened to reflect the seriousness of the crime and its significance in the trafficking process.⁶⁷

Response of the Attorney-General's Department

2.59 The Attorney-General's Department's response to the concerns raised by the Australian Crime Commission was as follows:

The debt bondage offence operates where an offender causes a victim to pledge (a) his or her personal services or (b) those of another person as a security for a debt, where either (c) the reasonable value of those services is not applied to the liquidation of the debt, or (d) the length and nature of the services are not respectively limited or defined. ... Provided either (c) or (d) is satisfied, excessive up front contract amounts [ie, *the exploitative contracts of concern to the Commission*] would come within the debt bondage offence. However, where persons enter into a contractual arrangement and neither of those elements is present, in the absence of factors such as fraud or coercion, such contracts are not be regarded under the Commonwealth's legislative regime as 'criminal'. This is the case even where the terms of that contract appear unfair to one of the parties.⁶⁸

2.60 The Attorney-General's Department explained that, in its view, the exploitative contracts identified by the Commission would also constitute 'forced labour' as defined in existing section 73.2 of the Criminal Code and therefore be covered by existing and new offences.⁶⁹ That is:

- the existing slavery offence (proposed section 270.3);

65 Australian Crime Commission, *Submission* 8, page 1; CATWA, *Submission* 13, p.2.

66 *Submission* 9A, pp. 9-10.

67 *Submission* 6, p. 8 of the Attachment.

68 *Submission* 17A, p.3.

69 *ibid.*

- the existing sexual servitude offence (proposed section 270.6);
- the new deceptive recruiting offence (proposed section 270.7(1));
- the new offences of trafficking in persons (proposed sections 271.2(2), 271.3, 271.6(2) and 271.6); and
- the new trafficking in children offences (proposed sections 271.4 and 271.7).

2.61 The Department's response to concerns over the adequacy of the penalty for proposed debt bondage offence was that:

The debt bondage offences are only intended to operate as an alternative in cases where it may be difficult to prove the commission of one of the more serious offences, such as slavery, which carries a penalty of 25 years imprisonment. Many exploitative debt contract arrangements would be covered by the existing slavery offence which specifically provides for situations arising out of 'a debt or contract made by the person'. (Section 270.1 of the *Criminal Code*.) As it is only intended to cover the least serious instances of exploitative debt contracts, the penalty for the debt bondage offence is 12 months imprisonment. There is a higher penalty where the victim is under the age of 18 of 2 years imprisonment. Debt bondage and trafficking in persons activity will often occur simultaneously, and sentences may be imposed cumulatively.⁷⁰

The Committee's view

2.62 The Committee notes that the evidence of the Australian Crime Commission that exploitative contractual arrangements that impose excessive up front contract amounts and which are manifestly unfair are being used in the trafficking of sex workers. The Committee remains concerned that the definition of debt bondage - and therefore the debt bondage offence provisions - do not capture these arrangements where the reasonable value of those services is applied to the liquidation of the manifestly unfair debt and where the length and nature of the services are limited or defined. The Committee also has some reservations in seeking to prohibit these exploitative contracts under other offences in the Bill or the Criminal Code on the basis that such contracts constitute 'forced labour', 'slavery', 'sexual servitude' and the like. It also notes that the Criminal Code's definition of 'forced labour' expressly excludes the provision of sexual services for commercial purposes. The Committee's view is that 'debt bondage' should extend to this type of exploitative contract. It is noted that the Committee has also recommended that State and Territory Governments be consulted on the provisions of the Bill. These Governments are responsible for the administration and enforcement of laws governing prostitution in Australia.

70 *ibid*, p. 2.

Recommendation 9

2.63 The Committee recommends that the definition of 'debt bondage' in Item 10 of the Bill be amended to include a reference to exploitative contracts that impose excessive up front contract amounts and which are manifestly unfair.

Discrepancies with domestic criminal law principles

2.64 Submissions argued that the proposed changes in the Bill must not only comply with international law such as the requirements of the Protocol, but that they fit within the existing domestic framework of criminal law. In this regard, concerns were raised that the Bill's provisions would lead to possible discrepancies with existing criminal law principles.

Fault elements

2.65 The Castan Centre noted that the proposed offences in the Bill do not use the usual words denoting fault elements, such as 'intention' and 'recklessness'.⁷¹ It therefore recommended that the words 'intentionally or recklessly' be included in the offence provisions.⁷² The Centre also recommended that the new trafficking in children offences in proposed section 271.4 and 271.7 be amended to include the fault element of knowledge that the person trafficked is under 18 years of age.

2.66 The Attorney-General's Department advised that section 5.6 of the Criminal Code specifies whether the fault elements of intention or recklessness will apply to the offences. Section 5.6 will operate, for example, to apply the fault element of recklessness to the new aggravated offences dealing with cruel, inhuman or degrading treatment.⁷³ That is, an offender will be guilty of these offences if the prosecution can prove the offender was aware of a substantial risk that the victim would be subjected to cruel, inhuman or degrading treatment.

2.67 The Attorney-General's Department also advised that including a fault element of 'knowledge' of age in the new trafficking in children offences could result in a person avoiding liability through deliberate disregard as to whether the person trafficked was a child. To avoid this risk, the Bill applies the fault element of recklessness. That is, an offender will be guilty of the offence if the prosecution can prove the offender was aware of a substantial risk that the victim was a child.⁷⁴

71 *Submission 15*, pp. 4-5. Section 3.1 of the *Criminal Code* provides that each offence shall consist of a physical element and a mental or fault element, such as intention or recklessness. This reflects the fact that fault must generally be proven for each physical element of an offence for a person to be guilty. *Submission 17*, p. 2.

72 *Ibid.*

73 These offences are created by proposed paragraphs 271.3(1)(b) and 271.6(1)(b).

74 *Submission 17*, p. 2.

Application of Division 11 of the Criminal Code

2.68 The Castan Centre queried how the Bill's proposed trafficking offences, which refer to 'organising' and 'facilitating', would relate to Division 11 of the Criminal Code. It was concerned that these offences may encroach on Division 11, which criminalises attempts, incitement and conspiracy to commit the offences contained in the Code. The Centre noted that the application of Division 11 to the trafficking offences would create the offences of attempting or conspiring to 'organise' or 'facilitate' entry, receipt of transportation.⁷⁵

2.69 The Attorney-General confirmed that Division 11 of the Criminal Code would apply to the trafficking offences contained in the Bill. These require the prosecution to prove beyond reasonable doubt that the offender either organised or facilitated an entry or receipt. In the event that the conduct in question only amounts, for example, to conspiring or attempting to organise or facilitate the entry or receipt of a person, the offender can be charged with the appropriate Division 11 offence, and sentenced accordingly.⁷⁶

Jurisdiction too narrow?

2.70 The Castan Centre argued that the offences in the Bill had a too narrow geographical reach. Instead, a broad, universal geographical jurisdiction was required - in line with the 'global' approach taken by the Protocol. This would be consistent with other Commonwealth offences in respect of terrorism, child sex tourism, war crimes and crimes against humanity. These have 'Category D jurisdiction' under the Criminal Code, which means that a person can be prosecuted under Australian law irrespective of whether the conduct constituting the alleged offence, or the result of that conduct, occurs in Australia.⁷⁷ The Centre was concerned that the Bill may not criminalise conduct involving the trafficking of people into Australia by foreign nationals and did not appear to apply where Australian nationals or corporations traffick people outside Australia.⁷⁸

2.71 The Attorney-General Department's response was that the Bill criminalises trafficking conduct that relates to the entry or receipt into Australia and the transportation of persons within Australia by any person, including foreign nationals. It also noted that the Bill applies Category B jurisdiction to new offences of sexual servitude and deceptive recruiting for sexual services in amended sections 270.6 and

75 *Submission 15*, pp. 6-7.

76 *Submission 17*, p. 3.

77 Section 15.4 of the Criminal Code.

78 *Submission 15*, pp. 6-7.

270.7. This means that they will have a wide geographical reach, including outside Australia.⁷⁹

2.72 The Department advised that Category D offences are generally restricted to the most serious international offences, such as genocide, crimes against humanity and war crimes in the Criminal Code, for which specific resources are available for investigations and prosecutions. It also pointed out that there are many very serious crimes under Commonwealth law to which Category D jurisdiction has not been applied.⁸⁰

Need for additional offences to deal with harm to victims

2.73 Witnesses also argued that the Bill should contain specific offences dealing with situations where, as part of trafficking, a victim suffers egregious or gross harm.⁸¹ Examples cited included trafficking victims being raped, contracting HIV / AIDs, becoming pregnant, undergoing forced abortions, or suffering psychiatric illness as a consequence of their exploitation.⁸²

2.74 In response, the Attorney-General's Department advised the Criminal Code's definition of 'serious harm' would include each of the examples of harm cited by witnesses. As such, they would also be covered by the aggravated offences provided in the Bill. These apply where an offender's conduct has subjected the victim to cruel, inhuman or degrading treatment or otherwise gave rise to a danger of death or 'serious harm' to the victim. It was also noted that the prosecution is only required to prove beyond a reasonable doubt that that conduct gave rise to a danger of serious harm, and the trafficker was reckless as to that danger.⁸³

2.75 HREOC also noted that the position of children is dealt with separately in the new trafficking in children offence in proposed section 271.4, which attracts the same penalty as the Bill's aggravated offences.⁸⁴

79 Category B jurisdiction, for example, provides that a person commits the offence if: the conduct constituting the alleged offence or a result of that conduct occur wholly or partly in Australia or on board an Australian aircraft or ship. The offence is also committed if the conduct occurs wholly outside Australia and the person is an Australian citizen, resident or body corporate incorporated in Australia. See section 15.2 of the Criminal Code.

80 *Submission 17*, p. 4.

81 World Vision, *Submission 12*, p. 9.

82 *ibid*, pp. 14-15 of the Attachment.

83 *Submission 17A*, pp. 4-5.

84 *Submission 9A*, p. 12. HREOC noted that, if there were any doubts, it would support including an express reference to 'forced abortion' in the relevant provision of the Bill. However, it pointed out that forced abortions would seem to come within the definitions of 'harm' (ie, due to the danger of psychological harm) and of 'physical harm'.

2.76 The Criminal Code defines 'harm', 'harm to a person's mental health', and 'serious harm' in the following terms:

harm means physical harm or harm to a person's mental health, whether temporary or permanent. However, it does not include being subjected to any force or impact that is within the limits of what is acceptable as incidental to social interaction or to life in the community.

harm to a person's mental health includes significant psychological harm, but does not include mere ordinary emotional reactions such as those of only distress, grief, fear or anger.

physical harm includes unconsciousness, pain, disfigurement, infection with a disease and any physical contact with a person that the person might reasonably object to in the circumstances (whether or not the person was aware of it at the time).

serious harm means harm (including the cumulative effect of any harm):
(a) that endangers, or is likely to endanger, a person's life; or
(b) that is or is likely to be significant and longstanding.⁸⁵

The use of absolute liability in offence provisions

2.77 Concerns were raised over the use of absolute liability in the Bill's proposed trafficking in persons offences.⁸⁶ Proposed subsections 271.2(3) and 271.5(3) provide that 'absolute liability' shall apply in respect of the element in each offence that the use of force or threats by the perpetrator resulted in the victim giving consent. According to the Explanatory Memorandum, this removes the requirement that the prosecution must prove a fault element for that element. It also means the defence of mistake of fact will be unavailable to defendants charged with the offence.⁸⁷ All the prosecution must therefore establish is that the defendant's intentional use of force or threats actually resulted in the defendant obtaining the victim's consent to the entry, receipt or transportation. It need not establish that the defendant was aware that the force or threats resulted in that consent.

2.78 Scarlet Alliance criticised this approach as 'a short sighted breach of human rights' which 'may result in unfair application of this law'.⁸⁸ The Castan Centre also argued that the proposed use of absolute liability made no sense as 'a fault element is irrelevant to whether or not a person's consent resulted from the use of force or threats'. The Centre's view was that the use of absolute liability was 'nonsensical and should be omitted'.⁸⁹

85 Dictionary of the Criminal Code.

86 See, for example, Castan Centre, *Submission 15*, p. 5.

87 *Explanatory Memorandum*, p. 7.

88 *Submission 2*, p. 5.

89 *Submission 15*, p. 5.

2.79 These concerns were put to the Attorney-General's Department. It maintained that absolute liability was necessary, especially given the need for deterrence. It advised that, if the prosecution were required to prove the defendant was aware that the force or threats would result in the victim's consent, many defendants would be able to escape liability by showing that they did not turn their minds to, or were reckless to, that issue. The Department noted that absolute liability is applied only in a limited way to particular elements in two offences where the offender has intentionally used force or threats. There will still be a requirement to prove beyond reasonable doubt that the trafficker used force or threats against the victim, and that those threats or that force resulted in the victim consenting to the entry or proposed entry to Australia.⁹⁰

Definition of deceives

2.80 The Castan Centre drew the Committee's attention to two apparent problems with the definition of 'deceives' contained in proposed section 271.1. It noted that the section did not refer to a fault element, which appeared at odds with the Criminal Code's existing definition of 'deception'. It refers to 'an intentional or reckless' deception.⁹¹ The proposed definition also does not apply to amended subsection 270.7(1) of the Criminal Code which contains a reference to 'deceives'.⁹²

2.81 The Attorney-General's Department explained that the definition of 'deceive' in the Bill relates to the new trafficking offences in proposed subsections 271.2(2) and 271.5(2) of the Bill. The Criminal Code fault elements will apply to these offences and are therefore not repeated in the definition.⁹³

2.82 However, the Department did agree that:

Division 270 of the Code should be amended to include the same definition of 'deceive' that the Bill includes in proposed Division 271.⁹⁴

Legitimate employment arrangements unintentionally criminalised?

2.83 Scarlett Alliance raised concerns that the provisions of the Bill, particularly in relation to debt bondage and domestic trafficking, could result in the explicit targeting of workers in the legal sex industry and the criminalisation of legitimate employment

90 *Submission 17*, pp. 4-5. *Committee Hansard* 23 February 2005, pp. 49-50.

91 Section 133.1 of the *Criminal Code*.

92 *Submission 15*, pp 7-8.

93 *Submission 17*, pp. 4-5

94 *ibid.*

arrangements which are not unfair or exploitative.⁹⁵ This, it suggested, was due in part to the Bill's focus on 'sexual services' in seeking to address trafficking. This was considered unnecessary in that sex work is treated as a subset of 'labour' by the Protocol. That is, forced or coerced adult sex work is covered by the Protocol in the context of slavery, forced labour or servitude. As such, it is not necessary for the Bill to refer specifically to sexual labour in order to comply with the Protocol.⁹⁶ Exploitation in Australia's legalised or decriminalised sex industry should therefore be addressed in the same manner as exploitation in other industries.⁹⁷

The Committee's view

2.84 The Committee agrees that the Bill should be amended to include in Division 270 of the Criminal Code the same definition of 'deceive' that the Bill currently includes in proposed Division 271.

2.85 After careful consideration of the conflicting positions of the Attorney-General's Department and of the above-mentioned submitters, the Committee considers that the concerns outlined above, although important, do not warrant specific recommendations to amend the Bill.

2.86 In respect of absolute liability, the Committee considers that, on balance, there would be a need for the use of absolute liability in the manner proposed. However, the Committee has recommended that any reference to consent be omitted from the relevant sections. A consequence will be the removal of any requirement for absolute liability.

2.87 The Committee has recommended that the Bill be subject to further and more extensive consultation, including with State and Territory Governments. In the course of this consultation, further consideration can be given to the implications of the debt bondage and domestic trafficking provisions to sex workers in State and Territory jurisdictions which have legalised or decriminalised prostitution.

Recommendation 10

2.88 The Committee recommends that the Bill should be amended to include in Division 270 of the Criminal Code the same definition of 'deceive' that the Bill currently includes in proposed Division 271.

95 Ms Fawkes, *Committee Hansard*, 23 February 2005, pp. 18-19. World Vision also noted that the Bill appeared to focus unduly on sexual exploitation. Ms Fairfax, *Committee Hansard* 23 February 2005, (World Vision), p. 29. Scarlet Alliance suggested, for example, that the proposed domestic trafficking in persons offence may impinge on the movement between States and Territories of those working in the legal sex industry.

96 Network of Sex Projects, *Submission 1*, p. 1.

97 Ms Fawkes, *Committee Hansard*, 23 February 2005, p. 17. World Vision also noted the legislation's significant focus on sex trafficking. Ms Fairfax, *Committee Hansard*, 23 February 2005, p. 26