

The Senate

Legal and Constitutional
Legislation Committee

Criminal Code Amendment (Trafficking
in Persons Offences) Bill 2004 [2005]

March 2005

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RECOMMENDATIONS

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.

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.

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.

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 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.

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.

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.

Recommendation 11

3.20 The Committee recommends that the provisions of the Bill be subject to further and wider consultation, including with State and Territory governments.

Recommendation 12

3.21 The Committee recommends that in the process of consulting State and Territory governments, the Bill also be referred to the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General for comment.

Recommendation 13

3.40 The Committee recommends that the Bill be amended to ensure that Part IAD of the Crimes Act 1914 applies to offences against the proposed Division 271 of the Criminal Code inserted by the Bill.

Recommendation 14

3.63 Subject to the preceding recommendations, the Committee recommends that the Bill proceed.

ABBREVIATIONS

the Action Plan	Action Plan to Eradicate Trafficking in Persons
AFAO	Australian Federation of AIDS Organisations
AFP	Australian Federal Police
the Bill	Criminal Code Amendment (Trafficking in Persons Offences) Bill 2004
the Castan Centre	Castan Centre for Human Rights Law
CATWA	Coalition Against Trafficking in Women Australia
Crimes Act	Crimes Act 1914
the Criminal Code	Criminal Code Act 1995
DIMIA	Department of Immigration and Multicultural and Indigenous Affairs
HREOC	Human Rights and Equal Opportunity Commission
the Law Council	Law Council of Australia
MCCOC	Model Criminal Code Officers Committee
the Protocol	<i>Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Torture</i> , United Nations, 2000.
PJCACC	Parliamentary Joint Committee on the Australian Crime Commission
SCOT	Standing Committee on Treaties
SSPAN	Sexual Service Providers Advocacy Network
UNICEF	United Nations International Children's Emergency Fund
UN	United Nations

CHAPTER 1

INTRODUCTION

Background

1.1 On 9 February 2005, the Senate referred the provisions of the Criminal Code Amendment (Trafficking in Persons Offences) Bill 2004 [2005] to the Senate Legal and Constitutional Legislation Committee for inquiry and report by 7 March 2005. On 7 March 2005, the Senate agreed to extend the reporting date for this inquiry to 10 March 2005.

Overview of the Bill

1.2 The Bill is part of the Government's response to issues arising out of trafficking in persons, and aims to fulfil Australia's legislative obligations under the *United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (the Protocol). The Protocol supplements the *United Nations Convention against Transnational Organised Crime*. The Protocol's purpose is to prevent and combat trafficking in persons and facilitate international cooperation against such trafficking. It aims to maintain a balance between law enforcement and victim protection. The Trafficking Protocol came into force on 25 December 2003. At present, the Protocol has 117 signatories and 76 parties. The Explanatory Memorandum explains that passage of the Bill, combined with other measures already in place, will permit Australian ratification of the Protocol.¹

1.3 As explained below, the Bill inserts new Division 271 into the *Criminal Code Act 1995*, creating new trafficking and debt bondage offences.²

Trafficking persons into Australia

(i) *Offence of trafficking persons into or within Australia*

1.4 Proposed subsection 271.2(1) creates an offence of trafficking persons into Australia where the entry into Australia is accomplished by the use of threats or force which causes the victim to consent to the entry. Absolute liability applies to one element of the offence—that the use of threats or force results in the victim consenting to being brought to Australia.³

1 *Explanatory Memorandum*, p. 1.

2 The overview of the Bill is drawn from the Bills Digest prepared by the Parliamentary Library in respect of the Bill. See *Bills Digest* No. 96, 2004-05.

3 This aspect of the offence is discussed in detail at paragraphs 2.74 to 2.76 of this report.

1.5 Proposed subsection 271.2(2) creates an offence where a person's entry into Australia occurs as the result of deception about the fact that their stay will involve the provision of sexual services, exploitation, debt bondage or the confiscation of their travel or identity documents. The maximum penalty for either offence is 12 years imprisonment.

1.6 Proposed section 271.5 creates a similar offence of trafficking concerning the organisation or facilitation of the transportation of persons from one place in Australia to another place in Australia.

(ii) Aggravated offence of trafficking of persons into Australia

1.7 Proposed subsection 271.3 creates an aggravated offence, with a maximum penalty of 20 years imprisonment if a person commits the proposed section 271.2 offence and:

- the offender intends that the victim will be exploited after entering Australia
- the offender subjects the victim to cruel, inhuman or degrading treatment, or
- the offender recklessly subjects the victim to a danger of death or serious harm.

(iii) Offences of trafficking children into or within Australia

1.8 Proposed section 271.4 creates an offence of trafficking where the victim is under 18 years of age and the offender organises the victim's entry into Australia and intends or is reckless about whether the victim will be used to provide sexual services or otherwise exploited after entering Australia. The maximum penalty for this offence is 20 years imprisonment.

1.9 Proposed section 271.7 creates a similar offence of trafficking concerning the organisation or facilitation of the transportation of children from one place in Australia to another place in Australia.

Debt bondage

1.10 Proposed section 271.8 creates an offence of debt bondage where a person intentionally causes another person to enter into debt bondage. The maximum penalty is imprisonment for 12 months.

1.11 'Debt bondage' is defined in the Bill as occurring when a person pledges his or her services or the services of another person as security for a debt if the reasonable value of those services is not applied to repay the debt or if the length and nature of the services is not defined.

1.12 Admissible evidence in a debt bondage prosecution can include the economic relationship between the parties, the terms of any agreement between them, and the personal circumstances of the alleged victim (including their ability to speak English and the extent of their social and physical dependence on the alleged offender).

1.13 Proposed section 271.9 creates an offence of aggravated debt bondage. It will occur if the offender commits an offence of debt bondage and the victim is under 18 years of age. The maximum penalty is imprisonment for 2 years. In order for a person to be convicted of this aggravated offence, the prosecution must prove that the defendant intentionally committed or was reckless about committing the offence against a person under the age of 18.

Deceptive recruiting for sexual services

1.14 Item 7 of the Bill replaces the existing offence of deceptive recruiting for sexual services in subsection 270.7(1) of the Criminal Code with a reworded offence. The new offence will cover a wider range of circumstances in which deceptive recruiting can occur. For instance, not only will deceptive recruiting occur when the victim is deceived about the fact that they will be required to provide sexual services but the offence will also occur if the person is deceived about other matters, such as the extent to which they will be free to leave the place where they provide sexual services, the extent to which they will be free to cease providing sexual services or the extent to which they will be able to leave their place of residence.

Jurisdictional requirements

1.15 Proposed section 271.10 provides that extended geographical jurisdiction (category B) applies to the offences of people trafficking into Australia and debt bondage. This means that the offences apply to conduct by Australian citizens or bodies corporate anywhere in the world, subject to a foreign law defence.

1.16 The extended geographical jurisdiction is also applied to existing sexual servitude and deceptive recruiting offences by the Bill.

Jurisdictional requirements for the domestic trafficking offences

1.17 For constitutional reasons, these offences must be tied to specific heads of Commonwealth power. Proposed section 271.11 therefore provides that the domestic trafficking offences will be activated if: any of the conduct occurs outside Australia; the conduct involves transportation across State borders for reward; the conduct occurs within a territory; is engaged in by a constitutional corporation; some of the conduct makes use of a postal, telegraphic or telephonic service; or the victim is an alien.

Amendment of the Telecommunications (Interception) Act 1979

1.18 The Bill also amends the *Telecommunications (Interception) Act 1979* so that telecommunications interception warrants will be available for the investigation of the new people trafficking offences and for all the people smuggling offences in Division 73 of the Criminal Code.

Conduct of the inquiry

1.19 As mentioned above, the Bill was referred to the Committee on 9 February 2005. Details of the inquiry, the Bill and associated documents were immediately placed on the Committee's website. The Committee wrote to over 100 organisations and individuals to invite submissions by 17 February 2005. The Committee also advertised the inquiry in The Australian newspaper on 16 February 2005.

1.20 The Committee received 18 submissions, and these are listed at Appendix 1. Submissions were placed on the Committee's website for ease of access by the public.

1.21 The Committee held a public hearing in Sydney on 23 February 2005. A list of witnesses who appeared at the hearing is at Appendix 2 and copies of the Hansard transcript are available through the Internet at <http://aph.gov.au/hansard>.

Acknowledgement

1.22 The Committee thanks those organisations and individuals who made submissions and gave evidence at the public hearing.

Note on references

1.23 References in this report are to individual submissions as received by the Committee, not to a bound volume. References to the Committee Hansard are to the proof Hansard: page numbers may vary between the proof and the official Hansard transcript.

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 woman 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 gift; 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 be 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

CHAPTER 3

OTHER ISSUES

3.1 A number of other issues arose during the course of the inquiry. This section of the report discusses:

- consultation in the development of the Bill;
- access to justice for victims of trafficking;
- victim support; and
- alternative legislative approaches.

Consultation

3.2 As part of its inquiry, the Committee examined the consultation process undertaken in the development of the Bill. This section of the report will look at:

- consultation with interested stakeholder groups; and
- consultation with states and territories.

Consultation with interested stakeholder groups

3.3 The Committee is concerned to note evidence that key stakeholder groups were not contacted by the Attorney-General's Department in the development of the legislation. HREOC, a key body in monitoring and developing policy relating to Australia's obligations under international human rights conventions and treaties, advised that it had not been asked by the Attorney-General's Department to comment on either the exposure draft of the Bill, or the Bill itself.¹

3.4 Other stakeholder groups giving evidence to the Committee also advised that they had not been consulted, and had only become aware by hearsay that an exposure draft of the Bill was available. Representatives of World Vision and of Scarlet Alliance told the Committee that they were alerted to the existence of the exposure draft through attendance at a conference on trafficking.² Both World Vision and Scarlet Alliance subsequently made submissions, but neither was contacted by the Department with feedback.³

3.5 Scarlet Alliance expressed concern that the views of contract sex workers and others affected by the legislation were not being heard.⁴ The Australian Federation of

1 *Submission 9A*, p. 1.

2 *Committee Hansard*, 23 February 2005, p. 19 (World Vision), and p. 11 (Scarlet Alliance).

3 *ibid*, p. 19 (World Vision), and p. 12 (Scarlet Alliance).

4 *ibid*, p. 11.

AIDS Organisations (AFAO) also emphasised the importance of consultation with affected groups in the community in the development of legislation. AFAO submitted that:

It is a fundamental principle in developing good public policy that communities most affected by policies and laws be intimately involved in the development and implementation of new models and approaches. It is imperative that sex worker organisations be more closely involved in further developing legislation that applies to trafficking. If the legislation is to achieve the aim of reducing rather than adding to the exploitation of persons, it is essential that sex worker groups participate extensively in formulating legislative responses.⁵

3.6 In response to Committee questioning about the consultation process, the Attorney-General's Department advised that a press release in relation to the Bill was issued by the Minister on 31 August 2004, and placed on the Department's website, along with the exposure draft. The website displayed an invitation for comment on the exposure draft. In evidence to the Committee, a representative of the Attorney-General's Department advised that the calling of the federal election (on 29 August 2004) placed the Department in caretaker mode, which 'limited the way that [the Department] could engage with stakeholders'.⁶ The election was held on 9 October 2004 and the new Ministry was sworn in soon thereafter.

3.7 The Attorney-General's Department advised of 13 submissions received on the exposure draft, from groups and individuals. In evidence to the Committee, a representative of the Department suggested that the process of scrutiny by the Senate committee process was also part of the consultation process.⁷ The representative stated:

... as part of this process of the committee inquiring into this legislation, as always policy is an iterative process and the government will consider the kind of recommendations that come out of the committee's deliberations today.⁸

Consultation with States and Territories

3.8 As well as an apparently flawed approach to consultation with stakeholder groups, the Committee is concerned with an apparent lack of adequate consultation on the Bill with States and Territories.

3.9 The Attorney-General's Department advised of a number of activities undertaken over recent years with states and territories in relation to the negotiation of the Protocol, and in the general area of trafficking in persons. These included:

5 *Submission 4*, p. 2.

6 *Committee Hansard*, 23 February 2005, p. 28.

7 *ibid.*, p. 33.

8 *ibid.*

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- July 2000 meeting of the Standing Committee of Attorneys-General (SCAG): paper outlining the status of Protocol negotiations prepared;
 - November 2000: National Anti-Crime Strategy Lead Ministers briefed on the Protocol;
 - May 2001 and November 2003: the Convention was discussed at the Commonwealth-State Standing Committee on Treaties (SCOT);
 - Australian Crime Commissioners' Forum activities, including the endorsement of the National Policing Strategy to Combat Trafficking in Women for Sexual Servitude for 2004-06 in July 2004; and
 - Australian Police Ministers' Council activities.⁹

3.10 The Committee commends this ongoing dialogue with states and territories in the area of trafficking in persons, but notes evidence that there has been no consultation with states and territories **on the Bill itself**. Representatives of the Attorney-General's Department told the Committee that states and territories were not directly consulted. Moreover, there was no need to do so as the Government had the constitutional power to proceed with the legislation and there was no need for the enactment of complementary State or Territory legislation.¹⁰

3.11 The Committee notes the long-standing recognition that there is a need for clear and complimentary federal and state laws and responses to criminal activity, including trafficking. This recognition is reflected in the establishment in the early 1990s of a Commonwealth-State body to develop model criminal laws to be adopted in by the Commonwealth and the States and Territories. This body is currently known as the Model Criminal Code Officers Committee (MCCOC).

3.12 The Castan Centre expressed concern that the MCCOC does not appear to have been consulted in relation to the new offences proposed in the Bill. This is despite the involvement of the MCCOC in previous consultations regarding debt bondage, and despite MCCOC's previous key role in changes to the Criminal Code relating to slavery and sexual servitude.¹¹ For example, the Attorney-General's Department advised that the MCCOC's 1998 report on sexual servitude and slavery was the source of the definition of 'sexual services', on which the Bill will rely.

3.13 The Castan Centre noted that the MCCOC had cautioned that new offences aimed at sex slavery should be consistent with the general principles of criminal law. The MCCOC had also noted that prostitution is subject to different and volatile legal regimes in the states and territories.¹²

9 *Submission 17*, pp. 1-2.

10 *Committee Hansard*, 23 February 2005, pp. 28-29, *Submission 17*, p. 1.

11 *Submission 15*, p. 3.

12 *ibid*, p. 4.

3.14 In this respect, the Committee notes the concerns (discussed earlier in this report) that the proposed debt bondage offences may have the effect of criminalising employment arrangements that are legitimate under various state and territory laws. Such a discrepancy may have implications for the ability of State and Territory authorities to administer and enforce prostitution laws. As such, it would appear to be a matter where consultation with States would be appropriate. Similarly, the Committee also notes advice from the Attorney-General's Department that laws in relation to non-commercial sexual exploitation such as servile marriages are the responsibility of States and Territories, and that the measures in the Bill complement State and Territory legislation.¹³ The Committee considers this is another example where consultation with the States and Territories would have been appropriate.

3.15 A representative of the Attorney-General's Department advised that MCCOC had not been consulted on the Bill, giving the following reason:

The reason is primarily that the Model Criminal Code Officers Committee's main focus is the development of legislation that is designed particularly to be implemented by the states and territories, whereas we have a very clear scope to enact legislation covering the field of trafficking persons into Australia.¹⁴

3.16 The Committee notes, however, the view of the Castan Centre, that the Bill should be referred to the MCCOC:

In our view, it is imperative that the current Bill be referred to the MCCOC to be considered via its standard consultation and reporting process so as to avoid any discrepancies with general principles of criminal law and to maintain the project of crafting a consistent and model Criminal Code.¹⁵

The Committee's view

3.17 The Committee commends the work being done by government departments and agencies to address the issue of trafficking in persons. The Committee is concerned, however, that in the preparation of the Bill proposing to introduce new trafficking offences, there has been an inadequate process of consultation. An exposure draft of the Bill was produced, yet interested stakeholder groups were not contacted. The Committee notes that concerns have been raised that the proposed new offences may cut across prostitution laws in States and Territories. These concerns were not been answered during the inquiry and still exist. Yet, the Bill was not referred to MCCOC, the body which has the responsibility to develop consistent model criminal laws across Australia.

3.18 The Committee is also concerned at the suggestion by the Attorney-General's Department that the Senate committee process is apparently part of or a substitute for

13 *Submission 17A*, pp. 7-8 (as discussed earlier in this report).

14 *Committee Hansard*, 23 February 2005, p. 28.

15 *Submission 15*, p. 4.

formal community consultation processes. The Committee believes that effective consultation with stakeholder groups should occur prior to legislation being introduced into Parliament. This ensures that Bills are fully informed by the views of those who are affected by proposed legislation. The Committee believes that the Senate committee process is not a substitute for a sound consultation process. This is especially so, given that very short timeframes for committee inquiries are often imposed by the Senate, which can allow little time for full participation by stakeholder groups.

3.19 The Committee supports calls that the Bill be referred to the MCCOC in order that State and Territory Government and MCCOC have the opportunity to examine the proposed new offences and ensure that consistent model criminal code legislation is maintained.

Recommendation 11

3.20 The Committee recommends that the provisions of the Bill be subject to further and wider consultation, including with State and Territory governments.

Recommendation 12

3.21 The Committee recommends that in the process of consulting State and Territory governments, the Bill also be referred to the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General for comment.

Access to justice for victims of trafficking

3.22 World Vision suggested several measures should be adopted in the Bill to increase access to justice for trafficking victims.¹⁶ These proposed measures included:

- the use of victim impact statements in sentencing; and
- particular provisions and procedures relating to children.

Victim impact statements in sentencing

3.23 World Vision expressed support in their submission for the recommendation by the PJCACC that 'consideration also be given to adopting the use of victim impact statements in sentencing'.¹⁷ The PJCACC noted that:

State legislation (such as the *NSW Crimes (Sentencing Procedure) Amendment (Victim Impact Statements) Act 2004*) provides for the Court to accept Victim Impact Statements in certain serious matters, after conviction, and before sentencing ... Given the nature and effect of the

16 *Submission 12*, p. 6.

17 *ibid*, p. 6; see also PJCACC, *Australian Crime Commission's response to trafficking in women for sexual servitude*, June 2004, pp. 52-53.

sexual trafficking offences on the victim, there is a compelling reason to require that victim impact be considered when sentencing offenders.¹⁸

3.24 In response to the Committee's questions on notice on this issue, HREOC supported the use of victim impact statements. It noted that their use would be consistent with Australia's international obligations, such as the Convention on the Rights of the Child, and the terms of the Protocol.¹⁹

3.25 However, again in response to the Committee's questions on notice, the Attorney General's Department noted that:

Section 16A(2)(d) of the *Crimes Act 1914* (Crimes Act) provides that in determining the sentence to be imposed on a person in respect of a federal offence, the court must take into account the personal circumstances of any victim of the offence.

3.26 The Department continued:

Evidence given to the court ... may include a statement by the victim of the offence about his or her experience of the impact of the offence.²⁰

The Committee's view

3.27 The Committee's view is that consideration should be given to the greater use of victim impact statements in the sentencing of federal offenders for certain types of offences, especially sexual offences involving children. The Committee notes the growing number of federal offences that can involve child victims. The Committee also considers that federal, State and Territory sentencing regimes ought to be consistent in this regard. The need for uniformity is another reason why greater consultation with State and Territory Governments, particularly through MCCOC, ought to have occurred.

Proceedings involving children

3.28 World Vision urged the adoption of child sensitive police and court procedures in trafficking prosecutions, based on the child's best interest.²¹ World Vision observed that trafficking is an 'extremely serious form of child abuse'²² and that

18 PJCACC, *Australian Crime Commission's response to trafficking in women for sexual servitude*, June 2004, p. 52.

19 *Submission 9A*, p. [8].

20 *Submission 17A*, p. 6.

21 *Submission 12*, p. 7; see also Ms Kayte Fairfax, World Vision, *Committee Hansard*, 23 February 2005, p. 18.

22 *Submission 12*, p. 6.

the 'risk of retraumatisation during an investigation or court case is very high'.²³ Ms Kayte Fairfax from World Vision explained:

... any child that has been trafficked has a great risk of traumatisation and has already been traumatised severely, with a range of effects. Added to that, any trafficking victim—whether adult or child—has a very real fear of retribution from traffickers.²⁴

3.29 World Vision commended the United Nations International Children's Emergency Fund (UNICEF) guidelines for the protection of the rights of child victims of trafficking in south-eastern Europe. According to World Vision, these guidelines set out a number of important principles that should underpin Australian trafficking law and policy relating to children.²⁵ These emphasise, for example, that the best interests of the child shall be the overriding consideration:

In all actions concerning child victims, whether undertaken by public or private social welfare institutions, police, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be the primary consideration.²⁶

3.30 World Vision outlined a number of measures that could be taken in the conduct of criminal proceedings relating to child victims.²⁷ In particular, World Vision submitted that:

Penal procedural codes should allow for videotaping of the child's testimony and presentation of videotaped testimony in court as official evidence in all trafficking related cases (not just sex trafficking offences). Police, prosecutors, judges and magistrates should apply child-friendly practices.²⁸

3.31 More specifically, World Vision pointed to the current provisions in Part IAD ('Protection of children in proceedings for sexual offences') and Part IIIA ('Child Sex Tourism') of the *Crimes Act 1914* (Crimes Act).²⁹ It was suggested that:

... there should be specific sections in the Criminal Code that deal with the provision of evidence by children ... Under the Crimes Act, the sections are specific to the interviewing of children for sexual offences, whereas we feel

23 *Submission 12*, p. 7; see also Ms Kayte Fairfax, World Vision, *Committee Hansard*, 23 February 2005, p. 18.

24 *Committee Hansard*, 23 February 2005, p. 22.

25 *Submission 12*, Attachment A, p. 6; see also Ms Kayte Fairfax, *Committee Hansard*, 23 February 2005, p. 18.

26 For a full list of relevant principles, see World Vision, *Submission 12*, Attachment A, p. 6.

27 *Submission 12*, Attachment A, p. 11.

28 *ibid*, p. 11.

29 *Submission 12*, p. 7; see also Ms Kayte Fairfax, World Vision, *Committee Hansard*, 23 February 2005, p. 18.

that, in the case of trafficking, it is important that these sorts of provisions also exist for non-sexual offences.³⁰

3.32 World Vision explained that the possible protection provided by the above includes: the use of video evidence and closed-circuit television; disallowance of inappropriate cross-examination; a bar on a child's other sexual experiences being used against him/her, and the exclusion of certain persons from the courtroom; and a bar on the publication of the child's name or any names which would identify the child.³¹ Ms Lee-May Shaw further observed that such provision could also 'improve the quality of evidence and the ability of witnesses to provide evidence in courts'.³²

3.33 World Vision recommended that the Bill be amended to ensure that the provisions contained in Part IAD of the Crimes Act apply to evidence given in relation to offences brought under the proposed trafficking offences in the Bill.³³ World Vision also specified that these provisions should be extended to protect all child victims of trafficking, not just victims of sex trafficking.³⁴

3.34 In response to the Committee's questions on notice, the Attorney-General's Department also pointed to Part IAD of the Crimes Act, submitting that:

Australia also has existing protection for child witnesses and child complainants, in proceedings for all federal sex offences (including sexual servitude and deceptive recruiting) to ensure that children are able to testify freely and effectively as possible. Some of those protections are contained in Part IAD of the Crimes Act...³⁵

3.35 However, the Committee notes that section 15Y of the Crimes Act states that the special protections in Part IAD only apply to proceedings for certain offences. This section specifically states, for example, that Part IAD applies to proceedings for offences against Division 270 of the Criminal Code (slavery, sexual servitude and deceptive recruiting) and against Part IIIA of the Crime Acts (child sex tourism). However, there does not appear to be any provision for the protections in Part IAD to apply to proceedings for offences under the proposed new Division 271 contained in the Bill.

30 Ms Lee-May Saw, Australian Women Lawyers (appearing in conjunction with World Vision), *Committee Hansard*, 23 February 2005, pp. 21-22.

31 *Submission 12*, p. 7.

32 Australian Women Lawyers (appearing in conjunction with World Vision), *Committee Hansard*, 23 February 2005, p. 22.

33 *Submission 12*, p. 7; see also Ms Kayte Fairfax, World Vision, *Committee Hansard*, 23 February 2005, p. 18.

34 *ibid.*

35 *Submission 17A*, p. 9.

Presumption that a victim is a child

3.36 World Vision further proposed that there is a need for a presumption that a victim is a child in certain circumstances:

... where the age of a victim is uncertain and there are reasons to believe she/he is a child, the presumption should be that they are a child and pending verification of the victim's age, the victim should be treated as a child and accorded all relevant special protection measures.³⁶

3.37 The Committee received little other evidence on this particular issue. However, it notes that the proposal appears to have merit.

The Committee's view

3.38 The Committee recognises that it is important to ensure trafficking victims are able to receive appropriate access to justice. The Committee acknowledges the evidence from the Attorney-General's Department that there is potential for victim impact statements to be used in sentencing for the proposed offences under the Bill.

3.39 The Committee also recognises that special procedures are desirable to protect children who are victims of trafficking in court proceedings. The Committee is concerned that Part IAD of the Crimes Act and the protection for children provided by that Part may not apply to proceedings for offences proposed under the Bill.

Recommendation 13

3.40 The Committee recommends that the Bill be amended to ensure that Part IAD of the Crimes Act 1914 applies to offences against the proposed Division 271 of the Criminal Code inserted by the Bill.

Victim support

3.41 A number of submissions raised concerns in relation to support for victims of trafficking. It was noted that Australia's treaty obligations in relation to the Protocol relate not only to the deterrence of criminal activity but also extend to the area of victim support.³⁷ Article 6 of the Protocol requires parties to the Protocol to provide to victims of trafficking, physical, psychological, and social support, including housing, medical and employment assistance. Article 7 of the Protocol refers to measures enabling victims of trafficking to remain in country, stating that:

... each State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases.

36 *Submission 12*, Attachment A, pp. 10-11.

37 Law Council of Australia, *Submission 7*, p. 2.

3.42 The Action Plan³⁸ refers to the Protocol, and outlines Australia's response, including measures to support victims, and visa arrangements for victims. The Action Plan states that:

A management approach is used, and suspected victims who are granted a Bridging F Visa can receive intensive support for the period of the Visa's validity or until they wish to leave Australia, whichever occurs first. This support includes temporary accommodation, access to Medicare and medical services, counselling and legal services, training, and social support. Victims who are subsequently granted a Criminal Justice Stay Visa can continue to receive support.

Additionally, victims who, as a result of their contribution to an investigation or the prosecution of people-trafficking offenders, are deemed at risk of harm if they return to their home country may be eligible for a temporary or permanent Witness Protection (Trafficking) Visa.³⁹

3.43 Responsibility for the planning and administration of the victim support package lies with the Office For Women.⁴⁰ It coordinates the Support for Victims of People Trafficking Programme.⁴¹

Link between visas, and provision of assistance to police

3.44 Arrangements for the issuing of visas to trafficking victims were raised as a concern by several submitters. Of particular concern was the apparent linkage of a victim's eligibility for a visa, with the assistance of the victim in the investigation and prosecution of trafficking offences. HREOC's submission argued that restricting support programs only to those women whose evidence is useful to the prosecution is inconsistent with a human rights approach to trafficking. HREOC stated:

Restricting access to recovery and support programs to those women who undertake to assist the investigation or prosecution of trafficking offences and to those women whose evidence is considered to be of value, means that many victims of trafficking would not be eligible for any assistance despite suffering significant human rights abuses. From a human rights point of view, access to these programs should be on the basis of need.⁴²

3.45 Mr Craig Lenehan of HREOC told the Committee:

38 *Australian Government Action Plan to Eradicate Trafficking in Persons*, plan presented jointly by Attorney General, Minister for Foreign Affairs, Minister for Immigration and Multicultural and Indigenous Affairs, Minister for Justice and Customs, and Minister Assisting the Prime Minister for the Status of Women, 2004.

39 Action Plan, pp. 13-14.

40 Formerly the Office of the Status of Women.

41 See Office For Women website accessed 1 March 2005.
http://ofw.facs.gov.au/international/combating_people_trafficking/index.htm

42 *Submission 9*, p. [7].

Assessment for visas should be made on the basis of the status of a person as a victim of trafficking and on the need to ensure their safety. This is, after all, a human rights issue.⁴³

3.46 World Vision also supported removing links between visas and the provision of assistance to prosecutors. World Vision advocated for an extension of visa eligibility to the children and siblings of trafficking victims:

The Federal Government should increase eligibility for visas for trafficking victims beyond the current bridging visa F and trafficking witness protection visas. Victims of trafficking should have the right to stay in Australia because of their needs, circumstances and risk profile, rather than only for reasons of their usefulness to Australian police and prosecutors. Visas should be available to all trafficking victims in Australia, not only those who have been trafficked to Australia (i.e. should cover those seeking safety in Australia having been trafficked elsewhere), and should be available to the children and siblings of trafficking victims.⁴⁴

3.47 It was observed that the credibility of evidence given in court by a trafficking victim may be subject to attack by the defence on the basis that the evidence was fabricated in order to obtain a visa and accompanying support. HREOC argued that de-linking visa eligibility with the provision of evidence of value to the prosecution would remove the ability of a defence lawyer to undermine evidence:

... if a person's evidence is required to be of a sufficient standard to allow them to receive support, it could well be argued during criminal proceedings that the evidence was fabricated in order to achieve that standard. Whereas, if the support is provided as a matter of course because the person needs that support, it de-links it from the ability of defence lawyers to claim that the evidence is not as credible as it sounds.⁴⁵

3.48 Project Respect observed that many trafficked women are reluctant to assist police because of fears that to do so may have adverse consequences for their families. Project Respect submitted that:

... some women are choosing not to access support because they are frightened of the repercussions of being a witness in a prosecution. In one case, a woman in Melbourne decided not to contact the police because she feared for her family. She made the point that while the police may be able to keep her safe (and even this point worried her), they could not protect her family in her home country. She believed she did not have the right to imperil her family, and so elected not to contact the police. This meant she was excluded from accessing the support services offered by the federal government to trafficking victims.⁴⁶

43 *Committee Hansard*, 23 February 2005, p. 3.

44 *Submission 12*, Attachment A, p. 9.

45 Ms Moyle, HREOC, *Committee Hansard*, 23 February 2005, p. 9.

46 *Submission 6*, p. [2].

3.49 A representative of DIMIA explained to the Committee that 'the visa system is indifferent to the success of the prosecution.' He advised that:

When you look at the government's package overall, it has created more distance from that sort of accusation than there was before because previously the prosecuting agencies had to support the person. The support arrangements are now quite separate.⁴⁷

3.50 However, the representative confirmed that the visa system 'does require assistance in respect of the investigation, and possibly in respect of the prosecution'.⁴⁸ In response to questions placed on notice by the Committee, DIMIA defended the linkage between visas and assistance to police. It contended that, to grant access to residency to every person who claims to be trafficked, may increase the level of fraudulent claims. DIMIA stated:

It is not reasonable to expect that every person who claims to be trafficked should be allowed to stay in Australia and it is very difficult to test such claims if there is no judicial process. Some trafficking claims have not been substantiated and in some cases people may have been both trafficked and participated in trafficking. Allowing ready access to residence may facilitate trafficking or increase the level of fraudulent claims, diverting criminal justice resources.⁴⁹

3.51 In evidence to the Committee, Project Respect and HREOC made comparisons with other jurisdictions, observing that in the United States and Italy, provision of support to victims is not tied to a victim giving police useful information.⁵⁰ In response, DIMIA advised the Committee:

In developing the visa regime consideration was given to trafficking visa models in other countries. The model developed has a strong focus on stopping the traffickers who perpetuate this insidious trade while protecting those who assist in their investigation and prosecution.⁵¹

What happens afterwards?

3.52 Another matter raised with the Committee was the question of what happens to trafficking victims once they have assisted police, and a criminal justice process has been completed. HREOC expressed concern that a trafficking victim who has assisted police may remain at risk:

47 *Committee Hansard*, 23 February 2005, p. 38.

48 *Committee Hansard*, 23 February 2005, p. 38.

49 *Submission 16*, p. [3].

50 Project Respect, *Submission 6*, p. [2]; Ms Sally Moyle, HREOC, *Committee Hansard*, 23 February 2005, p. 24.

51 *Submission 16*, p. [5].

... the witness remains at risk after she has given evidence, but it is unclear if any kind of assistance will be available once the criminal justice stay [visa] expires.⁵²

3.53 Project Respect argued in favour of the establishment of an adequate mechanism for establishing that it is safe for trafficked women to return home:

... there is no independent process for establishing if it is safe for women to return to their home country. It is not only women who appear as witnesses who may be at risk if they return home. Women who are known to have cooperated with police (even if this did not lead to a prosecution) may be unsafe, but there is currently no clear process for establishing this.⁵³

3.54 The Law Council expressed the view that the Bill should reflect the Government's responsibilities under Article 7 of the Protocol, relating to permitting trafficking victims to remain, and not be repatriated. The Law Council noted that PJCACC had recommended that:

... all trafficked women accepted onto the victim support program or receiving the Criminal Justice Stay Visa be exempt from compulsory return to their country of origin.⁵⁴

The Committee's view

3.55 The Committee acknowledges concerns relating to the tying of victim support to assistance to police and prosecutors. It also notes concerns regarding the fate of victims once they have assisted in a criminal justice process. The Committee recognises there are difficulties involved in crafting policy to address problems relating to trafficking in persons, whilst at the same time attempting to protect the victims of trafficking.

3.56 The Committee considers that further consideration ought to be given to the arrangements for the protection and support of victims of trafficking, especially in light of the imminent ratification of the Protocol and its international obligations in area of victim support. The Committee notes that Australia is only one country among many dealing with this issue. It also notes DIMIA's advice that trafficking visa models of other countries were considered in the development of Australia's visa regime. The Committee believes there is merit in regular review of developments of other countries in their approaches to trafficking in persons.

52 *Submission 9*, p. [7].

53 *Submission 6*, p. [3].

54 PJCACC, *Inquiry into trafficking of women for sexual servitude*, June 2004, recommendation 8, p. 57.

Alternative legislative approaches

Decriminalising supply and criminalising demand

3.57 Some submissions argued that the most effective way to reduce demand and end trafficking is to prohibit the purchase of sexual services. CATWA advised that Sweden has taken such an approach, and recommended that Australia should take similar measures.⁵⁵

Work visas for sex work

3.58 The Sexual Service Providers Advocacy Network (SSPAN) advocated reforming the visa system to allow sex workers from other countries to apply for visas and to work within the legal sex industry in Australia. Scarlet Alliance argued that new visa categories would remove the environment enabling the exploitation of the labour of trafficked women.⁵⁶

3.59 AFAO supported such proposals, submitting that:

Enabling sex workers to work legally in Australia for short periods of time could help to remove ‘traffickers’ from the picture. For example, an alternative approach to that of increasing criminal penalties is one of encouraging women to work legally through developing an employer sponsored working visa category for sex work, which would remove the criminal elements involved in existing contract labour arrangements.⁵⁷

3.60 The AFAO emphasised the benefits of a legalised framework for sex work, arguing that a requirement of a working visa could be that a sex worker could be required to maintain contact with health promotion services.⁵⁸

3.61 Other submitters, such as CATWA, argued against proposals for a working visa category for sex workers:

Issuing work visas would not end the traffic, but simply create a two tier system in which women who held visas would be prostituted across borders with the approval of the Australia government. Traffickers would apply for working visas, as they now do for refugee visas, on behalf of the women and then carry on in their usual way i.e. debt bondage, various degrees of coercion and force. Few, if any, women will travel independently because

55 *Submission 13*, p. [4]. The Catholic Women's League put forward a similar view in its submission to the PJACC's 2004 inquiry into the trafficking of women for sexual servitude. (See *Submission 14* to this inquiry, p. 3.)

56 *Submission 2*, p. 11.

57 *Submission 4*, p. 2.

58 *ibid.*

of the expense, difficulties of language and so on. Visas for sex workers will simply legitimise trafficking.⁵⁹

The Committee's view

3.62 The Committee acknowledges the concerns raised, and the often differing views expressed. In general, the issues are of a broader nature, and beyond the scope of this inquiry. The Committee considers that the concerns raised are not sufficient to prevent the passage of the Bill.

Recommendation 14

3.63 Subject to the preceding recommendations, the Committee recommends that the Bill proceed.

Senator Marise Payne

Chair

59 *Submission 13*, p. [3].

APPENDIX 1

ORGANISATIONS AND INDIVIDUALS THAT PROVIDED THE COMMITTEE WITH SUBMISSIONS

- 1 Network of Sex Work Projects (NSWP)
- 2 Scarlet Alliance
- 2A Scarlet Alliance
- 3 Sexual Service Providers Advocacy Network (SSPAN)
- 4 Australian Federation of AIDS Organisation Inc (AFAO)
- 5 Australian Catholic Migrant and Refugee Office
- 6 Project Respect
- 6A Project Respect
- 7 Law Council of Australia
- 8 Australian Crime Commission
- 9 Human Rights and Equal Opportunity Commission (HREOC)
- 9A Human Rights and Equal Opportunity Commission (HREOC)
- 10 United Nations High Commissioner for Refugees (UNHCR)
- 11 Western Australia Police Service
- 12 World Vision Australia
- 13 Coalition Against Trafficking in Women Australia (CATWA)
- 14 Catholic Women's League Australia Inc. (CWLA)
- 15 Castan Centre for Human Rights Law
- 16 Department of Immigration and Multicultural and Indigenous Affairs
- 17 Attorney-General's Department
- 17A Attorney-General's Department

APPENDIX 2
WITNESSES WHO APPEARED
BEFORE THE COMMITTEE

Sydney, Wednesday 23 February 2005

Human Rights and Equal Opportunity Commission

Ms Sally Moyle, Director, Sex Discrimination Unit

Mr Craig Lenehan, Deputy Director, Legal Services Unit

Scarlet Alliance

Ms Janelle Fawkes, President

Ms Elena Jeffreys, Volunteer Policy Analyst

World Vision Australia

Ms Kayte Fairfax, Policy Officer (Child Trafficking)

Mr James Cox, Christian Children's Fund, Advocacy Officer

Ms Lee-May Saw, Member, Australian Women Lawyers

Project Respect

Ms Kathleen Maltzahn, Director

Attorney-General's Department

Ms Catherine Hawkins, A/g Assistant Secretary, International Crime Branch

Ms Karen Bishop, Senior Legal Officer, Criminal Law Branch

Ms Kathryn Ovington, Senior Legal Officer, International Crime Branch

Department of Immigration, Multicultural and Indigenous Affairs

Mr Vince McMahon, Executive Coordinator, Border Control & Compliance Division

Ms Sharon Watts, A/g Director, Migration Fraud & Investigation Section

Australian Federal Police

Federal Agent Grant Edwards, Coordinator Transnational Targetting

Federal Agent Bruce Hill, Manager, Border