

**Criminal Code Amendment (Trafficking in Persons) Bill 2004  
17 February 2005**

**Submitted by World Vision Australia<sup>1</sup>**

(drawn from submission made to Attorney General's Department, 28 October 2004,  
that was endorsed by Australian Women Lawyers,  
Baptist World Aid Australia,  
CCF Australia,  
Child Wise,  
Christian Blind Mission International,  
Dr. Sallie Yea, RMIT University,  
Plan Australia,  
Save the Children  
UNICEF Australia)

**Submission to:**

Secretary, Senate Legal and Constitutional Legislation Committee  
By email [LegCon.Sen@aph.gov.au](mailto:LegCon.Sen@aph.gov.au)

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<sup>1</sup> Based on the original submission made by World Vision Australia on the Criminal Code Amendment (Trafficking in Persons) Bill 2004 to the Attorney General's Department, 28 October 2004, written by Georgina Costello, barrister and Kayte Fairfax, World Vision Australia Policy Officer on Child Trafficking, in collaboration with Child Wise and CCF Australia.

## Introduction

World Vision Australia welcomes the opportunity to make a submission to the Senate Legal and Constitutional Legislation Committee on the important new draft legislation to combat trafficking. We acknowledge the steps taken by the Australian Federal Government and the Australian Federal Police over the past year to address trafficking in persons, and urge the Government to continue to reform areas of law and policy which could be further improved for the benefit of trafficking victims<sup>2</sup> and Australian society.

World Vision Australia has welcomed the consultation process on the draft legislation as a critical opportunity for government to engage with NGOs and their expertise. Some NGOs, like World Vision Australia, bring experience and knowledge from their direct work with trafficking victims at 'the frontline', either in Australia or in source countries in Asia. In October 2004, World Vision made a series of recommendations in its joint submission on the Criminal Code Amendment (Trafficking in Persons) Bill 2004 to the Attorney General's Department, endorsed by seven major child and development focused organisations (attached). World Vision has refined these amendments further in discussions with Minister of Justice and Customs Chris Ellison, legal staff from the Attorney General's Department, and Shadow Attorney General, Nicola Roxon MP. This submission presents these refined amendments.

We urge the government to continue to develop an ongoing dialogue with NGOs and others across the sector, in the development, implementation and review stages of all components of the Action Plan to Eradicate Trafficking in Persons.

### **I) inclusion of additional offences, including child-specific offences**

World Vision Australia is concerned that law and policy in Australia relating to all trafficking victims, and particularly to trafficked children, should be adequate, appropriate and based on internationally agreed human rights standards. We support the rights of children who are trafficked as well as the rights of the children and siblings (aged under 18 years) of trafficking victims – having a sibling or parent who is trafficked can diminish a child's rights and increase a child's vulnerability to trafficking. Furthermore, loss of a parent to trafficking increases a child's vulnerability to extreme poverty, and potentially to being trafficked themselves.

While the incidence of child trafficking into Australia has been very low, some cases have been noted during the 1990s. For example, in 1994 an African boy was brought back to Australia to be sexually abused, a 13 year old Thai girl was found in a Sydney

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<sup>2</sup> The term victim is used here in a legal sense to distinguish a trafficked person from a trafficker; it is not intended to exclude notions of survival, hope, pro-action, resilience and personal agency that many victim-survivors exhibit, both during and after the trafficking process, especially when comprehensively resourced and supported in their recovery.

brothel in 1996, and one case in the 1990s involved teenage boys being brought from the Philippines into Australia.<sup>3</sup>

Children have been trafficked into Australia (and some may be undetected<sup>4</sup>), and no doubt will again given the extent of child trafficking internationally, especially in the Asia region. World Vision submits that the nature and seriousness of trafficking-related crime against children demands that it be addressed *pre-emptively* where possible – to ‘get the law and policy right’ now, to comprehensively protect any child trafficked into or within Australia, through pre-emptive, not reactive, law that predicts and mitigates problems.

Therefore, while WV commends the inclusion of child trafficking as a separate offence in the proposed Bill, we are concerned that other trafficking related offences, particularly that of sexual servitude, are not adequately covered by the legislation.

Children’s specific experiences as trafficking victims are often lost in statistics, discussions, policy and law on people trafficking that do not clearly focus on children’s specific experiences and needs. For example, internationally, teenage girls (under 18) are often counted as women in statistics that are not disaggregated by age.<sup>5</sup> Yet 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)<sup>6</sup>. With sexual exploitation, for example, children are at greater risk of violence, unsafe sex and contracting STIs than adults, as they have immature genitals and are less able to assert their rights.

### **World Vision recommends:**

**a) the specific experiences, needs and rights of children be reflected in child-specific, separate offences that capture the different nature of trafficking-related offences against children.**

#### ***Child sexual servitude***

i) The UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (the ‘Trafficking Protocol’) clearly states that, unlike with adults, issues of consent and the use of force or threats are not relevant when determining whether a child has been trafficked. The current *Criminal Code Amendment (Slavery and Servitude) Act 1999* however, defines *sexual servitude* (section 270.4) as involving the use of force and threats. These elements are not relevant in

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<sup>3</sup> As presented at the ‘Stop the Traffic’ Conference (2003) by B.McMenamin, National Director, Child Wise

<sup>4</sup> To date there has been little public research into the nature or extent of child trafficking in Australia, or the impact of trafficking on the children of victims of trafficking in Australia.

<sup>5</sup> IPEC (2002a), *Unbearable to the Human Heart: Child Trafficking and Action to Eliminate It*, International Programme for the Elimination of Child Labour, International Labour Office, Geneva, p 3.

<sup>6</sup> Terre des Hommes, 2004 *Kids as Commodities? Child trafficking and what to do about it*, p19

the case of children and therefore do not meet the requirements of the Trafficking Protocol.

ii) A second problem with the *Criminal Code Amendment (Slavery and Servitude) Act 1999* is that *sexual services*, similar to the current definition in the Trafficking Bill, refers only to *commercial* use or display of a person's body. It is possible to think of scenarios where children can be trafficked for non-commercial sexual exploitation, as occurred during some of the Australian child trafficking cases in the 1990s (please see scenario given in section 2, page 5 of this submission).

The offence of child sexual servitude, and any other child specific trafficking-related offences, should be approached similarly to statutory rape in that criminal provisions in relation to trafficking of children must apply even where:

- a. the child has consented to the exploitation; and/or
- b. there has been no coercion or force used against the child.

The removal of the elements of consent and coercion from the definition of trafficking makes the offence qualitatively different. Accordingly, it is insufficient to provide that the standard trafficking-related offences are aggravated offences where children are involved. Instead there should be separate offences in relation to child trafficking related offences. Overseas examples may be useful in the development of a specific offence.

- A specific offence of “sexual servitude of a minor”, promoted in the United States Department of Justice “Model State Anti-Trafficking Criminal Statute” should be considered. It is as follows:

*Whoever knowingly recruits, entices, harbors, provides, or obtains by any means, or attempts to recruit, entice, harbor, provide, or obtain by any means, another person under 18 years of age, knowing that the minor will engage in commercial sexual activity, sexually-explicit performance, or the production of pornography ... or causes or attempts to cause a minor to engage in commercial sexual activity, sexually-explicit performance, or the production of pornography, shall be punished by imprisonment as follows...*

- Article 128b of the Albanian Criminal Code has an offence of “Trafficking of children” which is also worthy of consideration:

*Trafficking of children with the purpose of material profit or any other profit shall be punished from 10-20 years imprisonment.*

*When committed in complicity with others, or repetitively or associated with maltreatment and physical or psychological threat of the (victim) injured to commit difference actions or causing serious harm to the health of the injured (trafficked victim), shall be punished not less than 15 years imprisonment, and when death is caused then it shall be punished with life imprisonment.*

- Sections of Chapter 6 of the Swedish Penal Code should also be considered:  
Section 3

*A person who induces another person to engage in a sexual act by gross abuse of his or her dependant state shall be sentenced for sexual exploitation to imprisonment for at most two years. The same shall apply to a person who engages*

*in a sexual act with another person by improperly taking advantage of the fact that the latter is helpless or in some other state of incapacitation or is suffering from a mental disturbance. If the accused has exhibited particular ruthlessness or if the crime is otherwise to be considered gross, imprisonment for at least six months and at most six years shall be imposed for gross sexual exploitation.*

*Section 4*

*A person who engages in a sexual act with someone under eighteen years of age and who is that person's offspring or for whose upbringing he or she is responsible, or for whose case or supervision he or she is responsible by decision of a public authority, shall be sentenced for sexual exploitation of a minor for at most four years. This also applies to a person who, in circumstances other than those mentioned previously in this Chapter, engages in a sexual act with a child under fifteen years. If the person who committed the act exhibited particular lack of regard for the minor or if the crime by reason of the minor's young age or otherwise is regarded as gross, imprisonment for at least two and at most eight years shall be imposed for gross sexual exploitation of a minor.*

**We recommend that provision be made in the Trafficking Bill for the Slavery and Sexual Servitude Act to be amended so that both Acts complement each other.** This would also meet certain obligations under the Convention on the Rights of the Child relating to protection of the child.

**2) phrasing in relation to the terms 'for commercial use' with regard to sexual exploitation offences**

The definition of "sexual services" contained in the existing Division 270 of the Criminal Code and unchanged by the Bill, does not capture forms of sexual exploitation which are not paid for. Especially in relation to children, sexual exploitation, even if unpaid, should be prohibited. An example of non-commercial exploitation would be a person trafficking a child from overseas to use in making pornography for their personal use and/or sharing with friends - whether of an incestuous nature (the child is related to the perpetrator) or otherwise. Accordingly, **it is recommended that the definition of "sexual services" should be amended to include non-commercial use and exploitation in cases of cross-border trafficking of children into Australia for the purpose of non-commercial sexual exploitation.**

In the case of adults, sexual servitude may also occur on a non-commercial basis as in the case of trafficking into marriage. **World Vision recommends the Committee consider whether the Bill adequately covers the trafficking of adults into non-commercial sexual exploitation.**

**3) inclusion of recommendations of the 2004 Report into People Trafficking by the Parliamentary Joint Committee on the Australian Crime Commission**

a) **World Vision supports the Parliamentary Joint Committee on the Australian Crime Commission's recommendation that,**

**‘consideration be given to amending section 270(7) of the Criminal Code to broaden the offence of deception to include deception regarding the kind of services to be provided, whether of a sexual nature or not’.**

Our submission of October 28, 2004, submitted that, ‘the deceptive recruiting offence is unjustifiably narrow in its application only to sexual exploitation and that it should apply where someone is deceptively recruited for any form of exploitation which may include, but is not limited to, sexual exploitation. However, in order not to cover circumstances that are not of the quality of the international crime that trafficking contemplates, a broad offence of this kind should be qualified by including a requirement that the offence occurs where there are:

- slavery like conditions; or
- gross exploitation.

The finding of these elements should be left to the judge or jury deciding the case. We note that this offence is somewhat irrelevant in the case of children who cannot consent to their own exploitation. Further, it is submitted that the kinds of deception should include deception regarding the legality of travel documents, work rights or residence rights’.

In response to our submission in a meeting this month with Minister Chris Ellison, legal staff from the Attorney General’s Department advised us that the general trafficking offence is not restricted to sexual services and therefore that this offence could be used to cover deceptive recruiting for non-sexual purposes.

We bring this issue to the Committee for final decision.

**b) We also support the Parliamentary Joint Committee on the Australian Crime Commission’s second legislative recommendation that, ‘the consideration also be given to adopting the use of victim impact statements in sentencing’**

We recommend any measures that increase representation of the victims’ perspective in the judicial process to adopted in the Bill, as they increase victim’s access to justice. Victim impact statements are one such measure. The United Nations body responsible for promoting children’s rights, UNICEF, suggests a range of good practice measures to enhance children’s access to justice (attached). We commend these for the Committee’s consideration.

**In particular we urge the adoption of child and gender sensitive police and court procedures in trafficking prosecutions**, based on the child’s best interest. Trafficking is an extremely serious form of child abuse, where, like any abused child in Australia, trafficked children are likely to suffer a range of physical and psychological trauma, that may never fully recover from,

‘ the consequences of trafficking are always devastating on victims whatever their age, but the consequences of child trafficking are especially pernicious and multiple, not least because the child may suffer the repercussions for the rest of his/her life.’

For any victim of child abuse, the risk of retraumatisation during an investigation or court case is very high. Child complainants or witnesses in Australian trafficking cases would face a similar risk of retraumatisation, but children trafficked from overseas would also suffer additional trauma from being separated from their community and native language,

‘the psychological impact of isolation and domination on children is... aggravated if the child is relocated to a place where s/he cannot speak or understand the language and thus is condemned to silence’<sup>7</sup>.

It is presumed that none of the children trafficked into Australia during the 1990s spoke English as a first language.

Critically, World Vision notes a further factor that often compounds the trauma of any complainants or witnesses in trafficking cases – the extreme fear of punishment from their traffickers for giving evidence/after testifying, whether to themselves or their families, in their destination (Australia) or home country.

**World Vision considers that while sexual exploitation has its own specific trauma effects, all trafficked children experience trauma and all require protection from retribution by traffickers.**

**World Vision therefore recommends that**

- a) The Bill be amended to reflect, at a minimum, the provisions of the *Crimes Act* and the *Child Sex Tourism Act*. These provisions state that evidence is to be by video, the child’s other sexual experiences cannot be used against him/her, disallows inappropriate cross-examination, use of closed-circuit television, exclusion of people from the courtroom and a bar on publication of the child’s name or any names which would identify the child. The amendments should either reiterate the divisions in the *Crimes Act* contained in Part IAD or specifically state that Part IAD of the *Crimes Act* will apply to the giving of evidence in trials of offences brought under the Trafficking legislation.
- b) these provisions (outlined above, in part a) be extended to *all* child victims of trafficking, not just victims of sex trafficking.

#### **4) Inclusion of examples in the Bill or explanatory memorandum**

In defining terms and offences, the proposed Bill adopts a broadly constructed rather than inclusive approach, and closely follows the definitional parameters provided by the *UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*. While understanding that this approach follows conventional drafting technique in Australian law, World Vision is concerned that broadly constructed definitions risk leaving too much up to the interpretive discretion of the courts. It is possible, for example, that under the current definition of *exploitation* in the proposed Bill – which refers to ‘slavery’, ‘forced labour’, ‘sexual servitude’ and ‘organ removal’ - trafficking into *marriage* or *adoption* would not be easily recognised as forms of exploitation.

<sup>7</sup> IPEC (2002) Unbearable to the Human Heart: Child trafficking and action to eliminate it, p29

World Vision is concerned to see that the Bill captures all forms of trafficking-related exploitation in ways that will be clear to the courts. Australian legal history holds important lessons in this regard. Just last decade, in a Victorian rape case, a Supreme Court judge argued that because the 17 year old woman ‘was unconscious...at the time that her body was violated, she was not traumatised.’<sup>8</sup>

### **a) Forms of exploitation**

The Bill has a strong focus on trafficking for sexual exploitation. Trafficking is a dynamic global crime and anti-trafficking laws need to be flexible and broad enough to capture changing illicit markets and practices.

The Trafficking Protocol defines trafficking 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”. We are concerned that the proposed definition of “exploitation” in the proposed legislation is constructed such that the current definition would preclude prosecution for other types of exploitation such as forced adoption or marriage.

Our submission of October 28, 2004, recommended that several forms of exploitation be included in the Bill under the definition of ‘exploitation’. In our meeting with Minister Chris Ellison, we were advised us that these forms could be listed in Explanatory Memorandum to the Bill or the second reading speech. Further consultation, however, suggests that this may lead to situations where legal decisions are made without reference to the Explanatory Memorandum.

World Vision still therefore urges the Committee to consider a definition of exploitation in the Bill that includes:

‘prostitution of others or other forms of exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs, forced adoption and marriage’.

We submit that such a definition would more clearly capture offences such as:

- a. Exploitative activities which may be illegal, such as begging, petty theft and acting as contraband mules to smuggle drugs or other illicit material,
- b. Child pornography (including performance),
- c. Non-commercial sexual exploitation, and
- d. Domestic service.

In cases of child trafficking for the purpose of labour exploitation, note that Article 3 of ILO Convention 182, which the government is urged to ratify as soon as possible, defines the worst forms of child labour as follows:

"... *the term the worst forms of child labour comprises:*

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<sup>8</sup> Unreported, Supreme Court of Victoria, 10 November. Discussed in Scutt, J (1997) *The Incredible Woman: Power and Sexual Politics*



- (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;*
- (b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;*
- (c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;*
- (d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children. "*

**b) Aggravated offences**

In our original submission, World Vision recommended that a range of offences be included as aggravated offences, as forms of egregious harm. In our meeting with Minister Chris Ellison, legal staff advised that the following offences would be examined to establish whether they are covered by definition of 'harm' in Criminal Code, and if not, could be included in the Explanatory Memorandum or the second reading speech.

- a. becomes pregnant (particularly if the victim is a minor),
- b. has a forced abortion

**World Vision urges the Committee to consider whether the definition of 'harm' in the Criminal Code adequately covers the above offences.**