

**Exposure Draft Criminal Code Amendment (Trafficking in Persons Bill) 2004
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Submitted by World Vision Australia¹

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Submission to:

Assistant Secretary, Criminal Law Branch, Attorney General's Department
By email trafficking.offences@ag.gov.au



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Introduction

World Vision Australia and its submission partners welcome the opportunity to make a submission to the Attorney General's Department in relation to the important new draft legislation proposed 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 victims² and Australian society.

World Vision Australia also welcomes this consultation process more broadly, as it did the consultation around the domestic awareness strategy, as providing a critical opportunity for government to engage with a range of 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. We therefore 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.

World Vision Australia and its submission partners are concerned that law and policy in Australia relating to all trafficking victims, and particularly to trafficked children, should be adequate, appropriate and based on human rights. 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 the child's vulnerability to extreme poverty.

Human trafficking is an international problem. Internationally, children are trafficked within and across borders for various forms of exploitation, including prostitution, pornography and other forms of sexual exploitation, domestic servitude, begging, labour exploitation, restaurant work, factory work, contraband "mules" (for example to carry drugs across borders), marriage, benefit fraud, adoption and organ removal.³ UNICEF estimates that 1,000 to 1,500 Guatemalan babies and children are trafficked each year for adoption by couples in North America and Europe and suggests that girls as young as 13 (mainly from Asia and Eastern Europe) are trafficked as "mail-order brides."⁴ Previously, Australia has decided to disallow direct adoptions from countries like Cambodia because of a 'failure to ratify the Hague Convention and to act against traffickers'.⁵

² 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.

³ Most of these forms of exploitation were identified as occurring in child trafficking to England by Carron Somerset (ECPAT UK) in her presentation at the conference on human trafficking in London on 30 June 2004.

⁴ http://www.unicef.org/protection/index_exploitation.html

⁵ 'Babies for Sale', Sydney Morning Herald, 16/12/03, p 11

While the incidence of child trafficking into Australia has been very low, some cases have been noted during the 1990s.⁶ The nature and seriousness of the crime demands that it be addressed preemptively where possible. The existence of adequate law and policy in relation to child victims of trafficking will become increasingly necessary as child trafficking victims are identified in Australia in future; which we believe is inevitable, given the extent of child trafficking internationally. Child trafficking may be occurring in Australia undetected: 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.

International legal principles

We submit that the rights of the child should be at the centre of Australian law and policy responses on trafficking that may relate to children. As a signatory to the Convention on the Rights of the Child (CRoC) Australia is obliged to ensure domestic legislation conforms with the principles of CRoC (see Article 4). Rights and obligations set out in the Convention should therefore be a central feature of Australia's approach to trafficking. In particular, the following obligations of CRoC are relevant to law and policy on trafficking and should be incorporated into any legislative change considered by the Australian Government:

- Article 2: respecting the rights of the child without discrimination;
- Article 3: making the best interests of the child a primary consideration in any action concerning children, whether undertaken by public or private social welfare institutions, courts, administrative authorities or legislative bodies;
- Article 6: recognizing the child's right to life; ensuring their survival and development to maximum extent;
- Article 9: ensuring children are not separated from his/her parents against their will;
- Article 11: taking measures to combat the illicit transfer and non-return of children aboard;
- Article 12: ensuring child's participation in matters affecting the child;
- Article 20: giving a child temporarily or permanently deprived of their family environment, or in whose own best interests cannot be allowed to remain in that environment, special protection and assistance;
- Article 32: recognising the right of a child to be protected from economic exploitation and from performing hazardous work or work that interferes with a child's education or development;
- Article 34: undertaking to protect children from all forms of sexual exploitation and sexual abuse;
- **Article 35: taking appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form;**

⁶ As presented at the 'Stop the Traffic' Conference (2003) by B.McMenamin, National Director, Child Wise

- Article 36: protecting the child against all other forms of exploitation prejudicial to any aspects of the child’s welfare;
- Article 39: taking all appropriate measures to promote physical and psychological recovery and social reintegration of child victims of neglect, exploitation, abuse, torture or other form of cruel, inhuman or degrading treatment or punishment or armed conflict.

We submit that Article 3 of the Optional Protocol to the CRoC on the sale of children, child prostitution and child pornography should also be considered in relation to trafficking law and policy in Australia. Article 3 provides that states shall criminalise:

- sexual exploitation of the child;
- transfer of child organs for profit;
- engagement of a child in forced labour;
- inducing consent for the adoption of a child in violation of applicable international law on adoption;
- prostitution; and
- pornography.

We submit that article 13 of Convention 28 of the Hague Convention on the Civil Aspects of International Child Abduction is also relevant. This Convention imposes a duty on states to perform investigations with the ‘competent authorities’ of a child’s country of origin before returning a child to their country of origin.

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime (December 2000) (“**Trafficking Protocol**”), signed by Australia in 2002, is also of central relevance to the development of Australian law and policy on trafficking. After many years of international negotiation, 117 states⁷ have agreed to a definition of trafficking which is contained in Article 3 of the Trafficking Protocol and is as follows:

- (a) *“Trafficking in persons” shall mean 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 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. 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;*
- (b) *The consent of the victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;*

⁷ http://www.unodc.org/unodc/en/crime_cicp_signatures_trafficking.html

- (c) *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 means set forth in subparagraph (a) of this article;*
- (d) *“Child” shall mean any person under eighteen years of age.*

The Trafficking Protocol requires that, in addition to taking action to prevent and combat trafficking (Article 9(1)(a)) and protecting victims of trafficking against revictimisation against traffickers (Article 9(1)(b)), states should take steps to protect and assist trafficked persons. This includes providing some confidentiality and protection against offenders when a victim provides evidence or assistance to law enforcement or appears as a witness in a prosecution. It also requires states to consider implementing measures to provide for the psychological and social recovery of victims of trafficking including, in appropriate cases, in cooperation with non-government organisations and other elements of civil society (Article 6(3)). The Protocol also requires states to consider adopting measures that permit victims of trafficking to remain in its territory temporarily or permanently, in appropriate cases giving consideration to humanitarian and compassionate factors (Article 7). Article 10 requires states to facilitate information sharing and training, including by providing training for law enforcement, immigration and other relevant officials in the prevention of trafficking in persons, and to consider human rights and child and gender sensitive issues.

General Recommendations

World Vision Australia and its submission partners recommend the following:

1. Treaty ratification

We recommend that where Australia has not yet either signed or ratified any treaties relating to the trafficking of children and their exploitation, it should do so as a matter of priority. These include:

- ILO Convention (No. 182) concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour
- Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography
- Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict

2. Adherence to CRoC and the Trafficking Protocol

Australian law and policy on trafficking should adhere to the spirit of and obligations contained within relevant international law, especially CRoC, its optional protocols and the Trafficking Protocol.

3. Adoption of the general principles contained in the UNICEF Guidelines

We submit that the following principles, as set out by UNICEF on pages 3 – 4 in its guidelines to protect the rights of children victims of trafficking in south-eastern Europe

(“**UNICEF Guidelines**”), should underpin Australian trafficking policy and law that may relate to children:

- **Best interest of the child** – 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.
- **Right to non-discrimination** – All child victims, non-national as well as resident children, are entitled to the same protection and rights. They must be considered as children first and foremost. All considerations of their status, nationality, race, sex, language, religion, ethnic or social origin, property, disability, birth or other status shall not impact on their rights to protection.
- **Respect for the views of the child** – A child victim who is capable of forming his or her views enjoys the right to express those views freely in all matters affecting him or her, for example, in decisions concerning his or her possible return to the family or country of origin.
- **Right to information** – Child victims must be provided with accessible information about, for example, their situation, their entitlements, services available and the family reunification and repatriation process. Information should be provided in a language which the child victim is able to understand. Suitable interpreters shall be provided whenever child victims are questioned/interviewed or require access to services.
- **Right to confidentiality** – Information about a child victim that could endanger the child or the child’s family members must not be disclosed. All necessary measures must be taken to protect the privacy and identity of child victims. The name, address or other information that could lead to the identification of the child or their family members, shall not be revealed to the public or media. The permission of a child victim must be sought in an age appropriate manner before sensitive information is disclosed.
- **Right to be protected** – As a signatory to the CRoC the Australian Government has a responsibility to protect and assist child victims and to ensure their safety.
- **Expedient decisions** – All decisions regarding child victims must be taken expeditiously, to minimise the negative effects of a continuing uncertain and insecure situation on the child and, where relevant, their family.

4. **The ‘3P’ approach - prevention, protection and prosecution**

Adherence to the Trafficking Protocol and CRoC requires improvements to the exposure draft *Criminal Code Amendment (Trafficking in Persons Offences) Bill 2004* (“**Exposure Draft**”) but of itself, even an improved Exposure Draft cannot sufficiently

address trafficking law and related policy in Australia. Rather, a whole of government approach must deliver **prevention** of trafficking, **protection** of trafficking victims and **prosecution** of trafficking crimes. These three facets of trafficking law and policy are essential and inter-related.

Prevention

We welcome the Exposure Draft and its place in a package of activities and reforms to combat trafficking into and within Australia. The Action Plan to Eradicate Trafficking in Persons recognises the importance of complementing criminalisation of trafficking with programs to prevent trafficking, including community awareness raising and victim support. However we are concerned that:

- the community awareness strategy is too narrowly focused on sex trafficking, of adult women, and will not adequately address demand; and
- the package as a whole does not adequately pre-empt the incidence of child trafficking – a key aspect of prevention.

We urge the Australian Government:

- to broaden its program focus to address other forms of trafficking in Australia (such as marriage) – see attached ‘Boy in the Field’ image, from the ‘Look beneath the surface’ campaign (USA-based) which captures the diverse end purposes that trafficked victims may find themselves in. While it is acknowledged that human trafficking in Australia does not have the same profile as the USA and UK, for example, we urge the Government to ensure adequate research is conducted into other forms of trafficking potentially occurring in Australia, and programs developed accordingly; and
- to develop and generously resource programs that reduce *demand* for trafficking victims in Australia and abroad (for example, through child sex tourism). Clearly, reducing the demand for human trafficking is a key strategy in its prevention.

Prevention also requires victim support programs that rehabilitate victims of trafficking and decrease the likelihood of re-trafficking, including by coordination with other countries to implement workable prevention and repatriation programs offshore. The Government is urged to ensure any victims of trafficking repatriated from Australia are effectively supported in their reintegration.

Protection

Protection includes processes to assist trafficking victims to feel and be secure during court and administrative processes. We are concerned that:

- the current visa arrangements do not adequately protect trafficking victims who do not or cannot assist in investigation or prosecution - after a 30 day period, support is only available to victims who have been useful to an investigation or prosecution of traffickers. All trafficking victims need state support and protection, not only those giving evidence.

The provision of victim support programs and the availability of visa rights to remain in Australia, rather than return to places where the victim may be vulnerable to trafficking or re-trafficking, are crucial. A genuine commitment to protecting trafficking victims also includes protection for those who have been trafficked outside Australia and then entered Australia by some other means, not just to those who are trafficked to Australia.

Prosecution

Trafficking victims who are comprehensively supported through state resources – including economic, psychological and social support - are more likely to have the courage and strength to provide evidence to investigations and prosecutions of trafficking. Accordingly, we submit that protection is crucial to prosecution and even the implementation of the best possible criminal laws on trafficking will fall short unless protection and prevention is also provided. We submit that those countries that best support trafficking victims, such as Italy and the USA, are the countries where the most successful prosecutions of traffickers occur.

5. A victim-centred approach

It is submitted that Australian trafficking law and policy should be victim-centred. A victim-centred approach considers and addresses the impact of trafficking on victims and implements law and policy in response to those impacts. A victim-centred approach to trafficking is likely to be effective because well-supported victims of trafficking are less likely to be re-trafficked, and are more likely to testify against traffickers, leading to the diminution of trafficking and the deterrence of traffickers. A victim-centred approach has the breadth of scope to address the needs of victims in source, transit and destination countries and in post-trafficking contexts. It empowers trafficking victims.

A victim-centred approach can be compared with other, sub-optimal approaches to trafficking, such as:

- a. a criminal justice approach, which focuses on the law enforcement and prosecutions and only consequentially leads to assistance for trafficking victims, for example, if they assist a prosecution by acting as witness;
- b. a border control approach, in which resources are disproportionately allocated to strengthening borders and punishing those who make irregular border crossings, rather than protecting, assisting and empowering victims regardless of their migration status; and
- c. a blind-folded approach, in which responses to trafficking are under-resourced and victims of trafficking are unassisted and overlooked because the nature and extent of the trafficking problem is ignored.

A victim-centered approach is therefore also the most appropriate for child victims of trafficking, and is best equipped to address the special needs and rights of child victims of trafficking.

6. **Trafficking visas**

The Federal Government should increase eligibility for visas for trafficking victims beyond the current bridging visa F and trafficking witness protection visas.⁸ 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.

The application process for these visas and their granting should be quarantined from the prosecution process, to avoid suggestions that victims give evidence only to obtain a visa. It is particularly important that child victims of trafficking can remain in Australia when necessary for their protection, without being required to testify in court or provide evidence to law enforcement officials (CRoC Article 3).

International best practice in relation to trafficking visas can be found in Italy, where:

- Article 18 of Law 286 of 1998 provides renewable six month stay permits to victims of severe exploitation who are in danger as a result of escaping.
- The stay permit includes an obligation for the victim to take part in a social assistance and reintegration program offered by NGOs and community projects in Italy.
- The stay permit includes access to social services and education, enrolment with state employment bureau and access to employment.
- The stay permit does not require the victim to take part in investigations or prosecution.

7. **Multi-agency protocols regarding child trafficking victims**

Protocols should be established between social services, police, immigration, non-government organisations and migration advisors in relation to appropriately interacting with and assisting trafficking victims, especially children.

8. **Training**

All those who interact with trafficking victims, particularly child victims, should receive specialised training, including in the areas of:

- a. Intelligence gathering;
- b. Detecting and identifying trafficking victims, including accompanied and unaccompanied minors;
- c. Interviewing trafficking victims, especially victims of unlawful detention, sexual violence and child victims;
- d. Repatriation and reintegration;
- e. Educating and/or retraining;
- f. Advising;
- g. Legal remedies;

⁸ Contained in regulations 2.06AK and 2.07AJ of the *Migration Regulations 1994 (Cth)*.

- h. Child health; and
- i. Child rights.

All areas should include training on child trafficking and child-centred approaches to ensure trainees understand child victims' rights and needs, are gender-sensitive and are equipped with the appropriate skills to assist children. Training should also increase understanding of the trends and patterns of child trafficking, and the characteristics and behaviours of child victims of trafficking and their traffickers. As stated by UNICEF⁹:

All those who interact and work with children vulnerable to trafficking need to be able to recognize the signs and respond accordingly. A teacher needs to recognize in a child the warning signs of a troubled home. Likewise, police raiding a brothel need to know to search for girls who have come from other countries, since they are often trafficking victims. A border guard with limited awareness of trafficking may not react when seeing young children crossing a border without their parents.

9. Repatriation and reintegration

It should be recognised that child trafficking victims are vulnerable to re-trafficking and severe stigmatisation so repatriation should only be done after a transparent and reviewable determination of the child's likely safety upon return to the country of origin. The use of non-reviewable discretions in the granting of visas for humanitarian reasons, such as exist pursuant to sections 351 and 417 of the *Migration Act 1958 (Cth)*, would be inappropriate.

In addition, where child victims are involved (see UNICEF Guidelines):

- The best interests of the child shall remain the primary consideration
- Their views should be part of any consideration of family reunification and/or return to the country of origin and in identifying a durable solution for the child.
- Child victims should not be returned to their country of origin if, following a risk and security assessment, there are reasons to believe that they or their family are in danger. In those cases, children should be allowed to stay permanently in Australia.

10. Regional cooperation

It is submitted that Australia should engage in regional cooperation on trafficking, such as has already begun to occur in relation to human smuggling. It is recommended that Australia explore the development of a regional anti-trafficking treaty along the lines of the European Convention Against Trafficking in Human Beings, and assist the region in implementing trafficking law and policy, particularly the rights and obligations in CROC and the Trafficking Protocol.

11. Presumption of age

It is recommended that, in accordance with the UNICEF Guidelines, where the age of a victim is uncertain and there are reasons to believe she/he is a child, the presumption

⁹ <http://www.unicef.org/protection/trafficking.pdf>

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.

12. Compensation

Australia should raise awareness about trafficking victims' rights under the various victims of crimes compensation acts, and the victims should be permitted to stay in Australia to pursue such compensation or civil remedies against traffickers. Provisions under sentencing acts for restitution to victim should also be used.

13. Access to justice

Following UNICEF Guidelines on best practice treatment of trafficked children, we submit that in criminal proceedings:

- Child victims should be fully informed about security issues and criminal procedures before deciding whether or not to testify in criminal proceedings against traffickers.
- Child victims of trafficking should have recovery and reflection time before deciding whether or not to pursue criminal proceedings against the traffickers.
- Assistance to a child victim of trafficking should not, under any circumstances, be conditional on the child's willingness to act as a witness.
- The taking of a statement by a law enforcement officer or investigating judge should not inhibit or delay family reunification or the return of child victims to the country of origin if it is in the best interests of the child.
- Law enforcement authorities, in cooperation with social services and non-governmental organisations, should make available necessary legal representation, as well as interpretation into the native language of the child if necessary.
- 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.

Following UNICEF guidelines on best practice treatment of trafficked children, we submit that in civil proceedings:

- Child victims should be provided with information regarding their right to initiate civil proceedings against traffickers and other persons involved in their exploitation.
- Law enforcement authorities should adopt measures necessary to protect the rights and interests of child victims at all stages of judicial proceedings against alleged offenders and during procedures for obtaining compensation.
- Law enforcement authorities should undertake to ensure that child victims are provided with appropriate access to justice and fair treatment, restitution and compensation including prompt redress.
- Law enforcement authorities, in cooperation with social services and non-governmental organisations, should make available necessary legal representation to bring an action within an appropriate court or tribunal, as well as interpretation into the native language of the child, if necessary.

Following UNICEF Guidelines on best practice treatment of trafficked children, we submit that concerning the security and protection of child victims/witnesses:

- Child victims who agree to testify should be accorded special protection measures to ensure their safety and that of their family members, in Australia and their country of origin, and in transit countries where applicable.
- When victim/witness protection cannot be ensured in a child's country of origin, measures should be taken to allow them to obtain permanent resettlement in Australia, or if safety cannot be ensured here either, resettlement should be arranged in a third country.

Exposure Draft Specific recommendations

14. Distinction between smuggling and trafficking

World Vision Australia and its submission partners are concerned that the new trafficking offence in proposed section 271.2 targets smuggling, rather than trafficking, because the offence does not include as an element of the trafficking crime that the *purpose is exploitation*. We strongly recommend against any possible blurring of distinction between smuggling and trafficking. As the purpose of exploitation is the defining difference between trafficking and smuggling, it should clearly underpin all legislation addressing trafficking.

15. Children-specific trafficking offences

Matters relating to child trafficking including child debt bondage, child servitude or child slavery should be addressed in separate offences from those targeting these offences in relation to adults. These crimes 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 unworkable and 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.

16. Forms of exploitation

The Exposure Draft 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. As such, it is submitted that trafficking offences (and policy responses) should encompass broad forms of exploitation, including:

- a. Labour,
- b. Exploitative activities which may be illegal, such as begging, petty theft and acting as contraband mules to smuggle drugs or other illicit material,
- c. Child pornography (including performance)
- d. Organ removal,

- e. Sexual exploitation, including non-commercial,
- f. Adoption,
- g. Domestic service,
- h. Marriage.

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 defined exhaustively rather than inclusively. It is submitted that the current definition would preclude prosecution for other types of exploitation such as forced adoption or marriage.

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:

- (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. "*

17. Sexual services

The definition of “sexual services” contained in the existing Division 270 of the Criminal Code and unchanged by the Exposure Draft, 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. Accordingly, it is recommended that the definition of “sexual services” should be amended to include non-commercial use and exploitation.

18. Aggravated offences

It is submitted that proposed section 271.3 should include an “or” at the end of each sub-paragraph so that it is clear that each of the situations listed give rise to aggravated circumstances.

It is recommended that the Exposure Draft be changed to include a broad range of aggravated offences in situations where as part of the trafficking crime, the victim suffers egregious harm. Such an approach is taken in the relevant legislation in the Philippines. Aggravated sentences should apply in situations where the victim:

- a. contracts HIV/AIDS,
- b. is mutilated,

- c. dies,
- d. is raped,
- e. becomes pregnant (particularly if the victim is a minor),
- f. has a forced abortion,
- g. suffers severe psychiatric illness or physical injury, or
- h. is forced to commit a crime against another person.

19. Related offences

Following the example of the Philippines, and adding further ideas, it is recommended that it should be an offence to:

- a. Lease space of building to be used for trafficking;
- b. Provide false documents in relation to trafficking;
- c. Advertise trafficking, the services of a trafficked person or the product of trafficked labour;
- d. Assist in the entry and exit to the country for trafficking;
- e. Deprive or destroy travel documents;
- f. Transport or accompany a trafficking victim;
- g. Knowingly have sex with or transact with a trafficking victim;
- h. Commit migration fraud - offences relating to the provision of false and misleading information about migration status.
- i. Employ trafficked persons either knowingly or recklessly – such measures would also serve an important educative role in the community, by setting and strengthening labour standards and ethical employment practices.

Sections of the Luxembourg Criminal Code provide a good example of provisions regarding related offences. For example, article 379bis prohibits: “Owning, directly or through a third party, managing, directing or running a brothel or similar establishment” and “Knowingly allowing all or part of a hotel, guest house, night club or any other premises of which one is the owner or landlord to be used for the prostitution of others”. It is acknowledged that prostitution is legal (in regulated forms) in most states in Australia and is an area of state, rather than federal, jurisdiction. Accordingly, the Luxembourg example would need to be adapted to apply to establishments where stipulated forms of exploitation (rather than prostitution) occur.

20. Trafficking methods

The Trafficking Protocol definition defines trafficking as including

“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 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.”

The proposed new trafficking offences in sections 271.2 to 271.7 only include “organise or facilitate the entry or proposed entry in Australia, or the receipt in Australia of another person”. It is submitted that important parts of the internationally defined crime

of trafficking have been left unaddressed by the proposed trafficking offences, including where abduction, fraud, deception, or abuse of power or vulnerability are used by traffickers. It is submitted that the proposed trafficking crimes should be amended to better reflect the methods of trafficking set out in the Trafficking Protocol.

In particular, we recommend consideration of the offence in article 379bis of chapter VI of the Luxembourg Criminal Code, which targets, among other things, the taking advantage of vulnerability creating an offence for:

“Employing, inciting or abducting any person, even with their consent, for the purpose of prostitution or immoral activities, in the Grand Duchy of Luxemburg or abroad, in order to satisfy the desires of others. If the victim is employed, incited or abducted by fraud or using violence, threats, abuse of authority or any other form of constraint, and effectively engages in prostitution or immoral activities, or if the offender takes advantage of the particularly vulnerable situation of the victim, such as their illegal or precarious administrative situation, pregnancy, ill health or an infirmity or physical or mental disability, the sentence shall be one to five years.”

21. Chain of traffickers

We are concerned that the trafficking offences in proposed sections 271.2 to 271.7 do not target each of the persons involved in the chain of trafficking. It is submitted that the offence would better target each participant in the trafficking continuum of recruitment to transport to exploitation if the conduct occurred *for the purposes of exploitation*. Further, where the proposed legislation makes it an offence where a person “commits the offence intending that the victim will be exploited” (section 271.3(a)) or “intends that the other person will be used to provide sexual services or will be otherwise exploited” this should be changed to address circumstances where the person commits the offence for the purpose of exploitation or knowing that the purpose of others, with whom they are acting in concert, is exploitation.

22. Debt bondage

It is submitted that the first version of the debt bondage offence on page 9 of the exposure draft is preferable to the other two versions because the other two versions do not cover non-sexual debt bondage. It is submitted that the definition of debt bondage should be amended to include circumstances where a *manifestly excessive debt* is used against a person, as is contemplated by state trafficking legislation in Victoria where section 60AB(2) provides that:

“(2) A person who, by the use of-

- (a) force; or*
- (b) a threat; or*
- (c) unlawful detention; or*
- (d) fraud or misrepresentation, including by omission; or*
- (e) a manifestly excessive debt-*

causes another person to provide, or to continue providing, commercial sexual services is guilty of an offence and liable to level 4 imprisonment (15 years maximum).”

23. Threat

It is submitted that the definition of “threat” should be expanded to include a threat of harm to the family or friends of the victim. Although this arguably is included in the inclusion of “threat of any other detrimental action”, it is important normatively and as a deterrent to include threat of harm to others, because this is typical trafficker modus operandi.

24. Deceptive recruiting

It is 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.

25. Children’s rights to support and protective services

It is submitted that the Bill include specific mention of the rights of child trafficking victims to broader services and protections such as adequate and appropriate housing, carers, specialised counselling, medical care, legal advice, recreation, education etc – detailed recommendations can be found in the attached UNICEF guidelines.

26. Clear laws

Federal criminal law relating to trafficking should be set out clearly and comprehensively so that it has a better normative effect, is easier to teach, and is readily adaptable as a model for introduction at state level. In Australia’s federal system it is important that states implement mirror legislation in case the Commonwealth trafficking laws are found to lack constitutional power.

LOOK BENEATH THE SURFACE

**HUMAN TRAFFICKING IS
MODERN-DAY SLAVERY**

**A victim of trafficking may look like
many of the people you help everyday.**

Ask the right questions and look for clues. You are vital because you may be the only outsider with the opportunity to speak with a victim.

There are safe housing, health, immigration, food, income, employment, legal and interpretation services available to victims, but first they must be found.

If you think someone is a victim of trafficking, **call 1.888.3737.888**
For more information about human trafficking visit www.acf.hhs.gov/trafficking.

