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LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

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

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SYDNEY

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SENATE
LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
Wednesday, 23 February 2005

Members: Senator Payne (*Chair*), Senator Bolkus (*Deputy Chair*), Senators Greig, Ludwig, Mason and Scullion

Participating members: Senators Abetz, Barnett, Bartlett, Bishop, Brandis, Brown, Buckland, George Campbell, Carr, Chapman, Colbeck, Conroy, Eggleston, Evans, Faulkner, Ferguson, Ferris, Harradine, Hogg, Humphries, Kirk, Knowles, Lightfoot, Lundy, Mackay, McGauran, McLucas, Nettle, Ray, Ridgeway, Sherry, Stephens, Stott Despoja, Tchen, Tierney and Watson

Senators in attendance: Senators Ludwig, Mason and Payne

Terms of reference for the inquiry:

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

WITNESSES

BISHOP, Ms Karen, Senior Legal Officer, Criminal Law Branch, Attorney-General's Department.....	38
COX, Mr James, Advocacy Officer, Christian Children's Fund Australia	23
EDWARDS, Federal Agent Grant, Coordinator, Transnational Targeting, Australian Federal Police	38
FAIRFAX, Ms Kayte, Policy Officer (Child Trafficking), Policy and Advocacy, World Vision Australia	23
FAWKES, Ms Janelle, President, Scarlet Alliance.....	13
HAWKINS, Ms Catherine, Acting Assistant Secretary, International Crime Branch, Criminal Justice Division, Attorney-General's Department	38
HILL, Federal Agent Bruce, Manager, Border, Australian Federal Police	38
JEFFREYS, Ms Elena, Volunteer Policy Analyst, Scarlet Alliance.....	13
LENEHAN, Mr Craig, Deputy Director, Legal Services Unit, Human Rights and Equal Opportunity Commission.....	1
MALTZAHN, Ms Kathleen, Director, Project Respect	33
McMAHON, Mr Vincent, Executive Coordinator, Border Control and Compliance Division, Department of Immigration and Multicultural Affairs and Indigenous Affairs	38
MOYLE, Ms Sally, Director, Sex Discrimination Unit, Human Rights and Equal Opportunity Commission.....	1
OVINGTON, Ms Kathryn, Senior Legal Officer, International Crime Branch, Criminal Justice Division, Attorney-General's Department	38
SAW, Ms Lee-May, Member, Australian Women Lawyers	23
WATTS, Ms Sharon, Acting Director, Migration Fraud and Investigation Section, Department of Immigration and Multicultural and Indigenous Affairs	38

Committee met at 9.10 a.m.**LENEHAN, Mr Craig, Deputy Director, Legal Services Unit, Human Rights and Equal Opportunity Commission****MOYLE, Ms Sally, Director, Sex Discrimination Unit, Human Rights and Equal Opportunity Commission**

CHAIR—Good morning, ladies and gentlemen. This is a hearing of the Senate Legal and Constitutional Legislation Committee's inquiry into the provisions of the Criminal Code Amendment (Trafficking in Persons Offences) Bill 2004 [2005]. The inquiry was referred to the committee by the Senate on 9 February 2005 for report by 7 March 2005. The bill proposes to amend the Criminal Code Act 1995 to broaden offences relating to trafficking in persons. The bill includes new offences for child trafficking and debt bondage and extends the existing deceptive recruiting for sexual services offence.

The committee has received 15 submissions for this inquiry, all of which have been authorised for publication and are available on the committee's web site. Witnesses are reminded of the notes they have received relating to parliamentary privilege and the protection of official witnesses. Further copies are available from the secretariat. Witnesses are also reminded that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate.

The committee prefers all evidence to be given in public but, under the Senate's resolutions, witnesses have the right to request to be heard in private session. It is important that witnesses give the committee notice if they intend to ask to give evidence in camera.

I welcome the witnesses from the Human Rights and Equal Opportunity Commission. You have lodged a submission with the committee which we have numbered submission No. 9. Do you need to make any amendments or alterations to that submission?

Mr Lenehan—No.

CHAIR—We will begin as we usually do and ask you to make an opening statement, then we will go to questions from the committee.

Mr Lenehan—The Human Rights and Equal Opportunity Commission has authorised me to read this statement on its behalf. We thank the committee for inviting us to appear before the inquiry. The commission has been involved in trafficking issues for several years. That work has included liaising with the community sector, working on trafficking issues and working on raising awareness within the region of trafficking and its causes.

We have also engaged with government agencies working to address trafficking. We have argued in favour of a gender and human rights centred approach to all antitrafficking work, including police work, immigration responses, victim support, repatriation and community awareness. In particular, the commission has advocated a partnership between government and civil society working on trafficking issues to support the victims of trafficking. As a human rights issue we consider that support for victims of trafficking should be at the centre of all trafficking responses. The bill before the committee is to be commended. Subject to the suggestions we make in our submission, we believe that the bill not only reflects the provisions of the trafficking protocol but also is workable.

In its submission the commission has made some drafting suggestions which fall into two general categories. I will briefly outline them. Firstly, we have made a number of suggestions which reflect recommendations by the Parliamentary Joint Committee on the Australian Crime Commission. In particular, we have suggested that the deceptive recruiting and deceptive trafficking provisions cover deception about, firstly, the nature of any sexual services a person will be required to provide and, secondly, the quantity of any debt or purported debt which is owed or will be owed by the person in connection with the engagement. There are also currently some anomalies between the deceptive recruiting and deceptive trafficking offences, with the former including a wider range of matters about which a person may be deceived. We suggest that those additional matters be included in the deceptive trafficking offences.

Our second category of drafting suggestions includes recommendations designed to ensure that the provisions fully meet the obligations Australia would assume if it were to ratify the trafficking protocol. Three issues arise under this head. Firstly, the bill does not currently cover all means of trafficking referred to in the trafficking protocol. Secondly, the proposed offences of trafficking by force or threat include a requirement that the prosecution prove that the force or threats of the accused resulted in consent on the part of the victim. The protocol specifically states that the consent of the victim should be irrelevant in such cases. The commission considers that this element of the offences should be removed. Thirdly, the proposed offences of trafficking by force or threat do not include an element of exploitative purpose. That element 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.

We note that the committee has expressed interest in the use of absolute liability in the bill. That issue arises in the context of the requirement that the prosecution prove consent on the part of the victim for the purposes of the offences of trafficking by force or threats. Absolute liability applies to that result element. However, as I have stated, the commission's view is that this element should simply be omitted. We also note that the committee has expressed interest in the fact that the definition of sexual services in the bill is confined to the commercial use or display of the body of the person providing the service. The trafficking protocol refers more generally to relevant forms of exploitation, including, among other things, the prostitution of others and other forms of sexual exploitation. The term 'other forms of sexual exploitation' does not appear in our view to be limited to a commercial context. As has been suggested in the written submission World Vision has made to the committee, this may require closer scrutiny of the matters covered by the bill, particularly in relation to trafficking for the purpose of forced or servile marriages and the trafficking of children for so-called personal use.

Subject to these suggestions, the commission congratulates the government on the bill. However, the passage of the bill is not the final stage in addressing trafficking. The commission is concerned to ensure that an appropriate focus is maintained on the interests of victims at all stages of government intervention. There have been a number of victims given

support under the government program overseen by the Office for the Status of Women and the commission will continue to monitor the support given to victims of trafficking as the program settles down to ensure that focus is on the support and recovery of the trafficked person.

Also of concern is the system of visas in relation to trafficking. While there have been a number of bridging visas granted and we believe several criminal justice stay visas, we understand there have been no witness protection trafficking visas granted to trafficked victims. The commission considers that it is vitally important for the victims of trafficking—and also to ensure that trafficking in Australia is successfully addressed—that their safety can be assured. The commission recommends ongoing attention be given to ensuring the long-term safety of victims of trafficking, including by provision of long-term visas where that is appropriate. Visas should not be restricted to victims of trafficking only where they have been able to assist a prosecution. 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.

CHAIR—Thank you. Ms Moyle, do you have anything to add?

Ms Moyle—No, I have nothing to add.

Senator LUDWIG—Firstly, in terms of the consultative process, did HREOC make a submission to the exposure draft?

Ms Moyle—No, we did not.

Senator LUDWIG—Was there a reason for that?

Ms Moyle—I could not tell you. I was aware that a bill was out but I do not recall a specific invitation to comment on the exposure draft. I may be wrong in that. I will have to check.

Senator LUDWIG—If you would not mind. That would be helpful. So when did you first become aware of the bill?

Ms Moyle—I could not exactly advise on that score.

Senator LUDWIG—All right. Turning then to one of the first areas you were talking about—which was the deceptive recruiting for sexual services and extending the scope—in order to achieve the purpose of including in the bill abduction, fraud, deception and abuse of power and those other matters that seem to have not been dealt with, would it have been easier to put the definition in the bill in similar terms to that in the protocol? We will hear from the Attorney-General's Department as to how they see it being dealt with. You say that force, threats and deception are included. If they had included trafficking in persons within the definition in the bill do you think that may have solved the problem?

Mr Lenehan—That would certainly be one means of addressing the concerns we have raised and the Castan Centre for Human Rights Law has also raised the issue of whether a simpler means of proscribing this sort of conduct would simply be to adopt the definitions in the Palermo protocol.

Senator LUDWIG—You say that is one means. Another means is what you have suggested: extending the scope of the deception to include those other matters. Is that another way that you could achieve the end result?

Mr Lenehan—That is right. We have attempted to make constructive and practical drafting suggestions, if you like.

Senator LUDWIG—In respect of the non-commercial aspect, do you say that it could include ‘other forms’ as a means of covering the non-commercial use, or do you make no recommendation?

Mr Lenehan—In defining trafficking, the protocol refers to three matters: it requires a certain act, it requires a means of trafficking and it requires a purpose of exploitation. It is the purpose of exploitation that the definition of ‘sexual services’ relates to. We have suggested that, in the protocol, sexual exploitation seems to cover sexual exploitation which does not occur in a commercial context. World Vision has also referred to the notion of servile marriages. That probably falls within another component of the definition of exploitation in the protocol—that is, matters which are similar to slavery. It is accepted internationally that servile marriages fall within the notion and within that term.

Senator LUDWIG—Are you saying that that is being dealt with under that area or that there should be an addition to the bill?

Mr Lenehan—I do not currently have the clear views of the commission on that point, but I am happy to take it on notice and follow it up. It seems to us that that would be one means of clearly covering servile and forced marriages.

Senator LUDWIG—And children as well?

Mr Lenehan—As World Vision have pointed out, there may be a lacunae in the bill as it currently stands which would not extend to that form of exploitation of children.

Senator LUDWIG—Could you have a look at that?

Mr Lenehan—Certainly.

Senator LUDWIG—You are going to check whether the Attorney-General’s Department contacted you or sent you an invitation to comment on the exposure draft. I think the exposure draft was released in September and available on their web site. Following that, they introduced the bill, I think, on 6 December, though I could be corrected on that. At some time in that period, this bill was introduced. I would also like to know whether or not, even during that period, or after that date, the Attorney-General’s Department contacted you for comment in respect of the bill.

Ms Moyle—We will certainly look into that.

Senator LUDWIG—A number of submissions have raised matters such as victim impact statements and the like. On a short reading, the Criminal Code Act 1995 appears to me not to have followed many of the state criminal codes in developing this area of law on victim impact statements and the ability for victims to at least make their views known. Do you think more work needs to be done in that area to ensure that the federal Criminal Code at least catches up with state developments?

Mr Lenehan—Again, that falls into a category of matters on which we do not have the clear views of the commission. Certainly victim impact statements are one thing that is arguably contemplated by the protocol.

Senator LUDWIG—Do you have a view about that?

Mr Lenehan—We do not have a view from the commission. I think the best course would be for us to take that on notice and seek the commission's views.

Senator LUDWIG—In addition to that, you have made some comments in respect of absolute liability. You say a better way is to remove that provision and then, of course, absolute liability does not arise as a consequence. How would that area be dealt with?

Mr Lenehan—We have suggested instead that an element of purpose should be included in the bill. As things stand, the offences of trafficking by force or threat seem to us to potentially overreach what is internationally accepted as the definition of trafficking. In our submission, we have pointed out that that might traverse matters such as people-smuggling offences, as they are popularly known. We see that as a particular issue because we see these offences as not simply having a punishment deterrence role but also as having an educative role in the community and drawing the community's attention to the problems associated with trafficking. If the scope of these offences is unclear, that potential role of the legislation is in our view diminished.

Ms Moyle—So the idea would be that, instead of requiring that the force or threats resulted in the consent of the victim, they resulted in the outcome of exploitation.

Mr Lenehan—Or that they were for the purposes of exploitation.

Senator LUDWIG—World Vision also indicated that they had a view that children were not adequately covered in the operation of the bill, but I note there are specific offences of trafficking in children. Do you have a view as to whether or not trafficking in children is sufficiently covered by the bill?

Mr Lenehan—The commission's view, although we would be happy to put any more specific suggestions for additional offences to the commission for further consideration, is that the bill does adequately address the trafficking of children.

Senator LUDWIG—You make a submission about division 12 of the Migration Act, which includes offences in relation to carriage of noncitizens into Australia. Do you think that should be altered to accord with the protocol or that, as a consequence of this bill, the line between people smuggling and trafficking in persons might be blurred and authorities may not be able to identify which statute or offence to use in those instances?

Mr Lenehan—The point that we obviously have not made clearly enough is the point that I was referring to earlier, which is that trafficking by force or threats as it is currently drafted seems to us to overreach the internationally accepted definition of trafficking and traverse into matters—and we have given an example of one in the written submission—which might be associated with people smuggling. We do not have a particular view on the need to create more offences in relation to people smuggling but we have suggested that if there is consideration or a perceived need to create such further offences, they be done separately and

in those other parts of legislation. Again, that relates to the fact that we see that this legislation has an educative purpose which may be undermined if those sorts of definitions are blurred.

Senator LUDWIG—So your proposal is to effectively amend 271.5(1) to include means of trafficking referred to in the trafficking protocol, remove the element of consent and add an element of purpose in similar terms to that which appears in 271.7(e). That would then alleviate the problem that you say could exist regarding people smuggling under the Migration Act—in other words, the overreach into that area.

Mr Lenehan—Yes.

Senator LUDWIG—With respect to item 9, proposed section 271.2, as we said earlier, one way of dealing with it is to put article 3a of the protocol in terms of the definition within the legislation. The alternative is to include other forms of coercion, the abuse of power or a position of vulnerability or the giving or receiving of payments. Could they be broken up to include adult and children or would they cover all?

Mr Lenehan—They are all means by which a person is trafficked, and the protocol says in relation to children that—and I quote:

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.

You could assume that the best course would be to break them up because for children you do not need to be concerned with means as defined in the protocol.

Senator LUDWIG—I was just trying to explore World Vision’s view. In your view, are the penalties provided in the legislation in respect of debt bondage compatible with similar offences?

Ms Moyle—Certainly the penalty for debt bondage offences is a lot lower than it is for other trafficking offences, but I do not think the commission has a particular view on whether that is sufficient or not.

Mr Lenehan—This might again fall into a category of matters which, if you would like, we are happy to take on notice and seek the commission’s views.

Senator LUDWIG—The Coalition Against Trafficking in Women Australia and the Australian Crime Commission indicate that it should be greater than 12 months. I was interested to know whether you had a view, whether you had looked at that issue and whether it was compatible with similar offences.

I was also wondering whether you had looked at the area of serious harm. World Vision indicated that they understood that aggravated offences in terms of the word ‘harm’ could include situations of gross harm to victims, such as where a person contracts HIV-AIDS, has a forced abortion, is raped or develops a psychiatric illness. They want to know whether those types of aggravated offences are covered by the word ‘harm’ or whether ‘harm’ is insufficient to contemplate all of them.

Mr Lenehan—Are you asking us to take that on notice?

Senator LUDWIG—I was wondering if you had a view about that.

Mr Lenehan—We certainly do not have the views of the commission. I think the appropriate course would be to take it on notice.

Senator LUDWIG—All right.

CHAIR—Just in practical terms and in terms of some of the questions that Senator Ludwig has asked, the committee must report on this bill on 7 March, so our time frame is extremely narrow and makes it difficult in the public hearing context not to be able to get some of the answers to those questions. For example, Ms Moyle, if not you, who at the commission would know about the consultation process?

Ms Moyle—It would be me. I cannot recall at the moment, so I will make sure I check in the next day or so. It would have come to me, unless there was some serious discrepancy. I will chase up all avenues to make sure that I have not missed anything.

Senator MASON—Mr Lenehan and Ms Moyle, I am going to need your help here. Flipping through your submission and a couple of the other ones, I noticed that two concepts seemed to merge all the time and then part—that is, exploitation and deception. They are not both the same thing, are they?

Mr Lenehan—Are you asking in international terms?

Senator MASON—In terms of the bill and internationally. In the discussion about this bill, those terms are often used interchangeably; but they are not the same thing, are they?

Mr Lenehan—Let me answer from an international perspective, and this is the point that I was making before to Senator Ludwig. The protocol in defining trafficking talks about certain acts, certain means and a purpose of exploitation. Deception falls within the second category; it is a means of trafficking. So it is really that which deception relates to internationally and which to at least some extent the bill addresses. Exploitation is the end purpose. As we have said, that is lacking in some of the offences as they are currently drafted. We think that concept should be put back in.

Ms Moyle—We have talked about exploitation as deception about the nature of the activities that the person will be required to perform. There may be deception about the nature of the activities whether there is exploitation or not. So, in that sense, we have included discussions about exploitation in discussions about deceptive means.

Senator MASON—Something could be deceptive but not exploitative and, indeed, vice versa—it could be exploitative but not deceptive. That is right, isn't it?

Mr Lenehan—We should be clear that it is the purpose of exploitation which is important.

Senator MASON—I will give you an example. If someone has not been deceived in the sense that they know exactly what they are going to have to do when they get to Australia—they have been told, so there is nothing deceptive in that sense—and they get paid more here than they might get paid in country X but much less than a similar sex worker would get paid in Australia, that is exploitation but not deception, isn't it?

Ms Moyle—Often how trafficking works in Australia is that a person will be told they will be doing sex work in Australia but will be deceived as to the conditions in which they will be working.

Senator MASON—Forget the conditions—let us assume they have been told the conditions and have been correctly advised about what they are. The salary or remuneration they receive will be a lot higher in Australia than it might be in Thailand, for example, but it is much lower than an Australian sex worker would achieve. Do you follow me?

Ms Moyle—So there was no deception about the wage, for example?

Senator MASON—Yes. Is there an offence?

Mr Lenehan—No. But, in terms of the international definition of ‘trafficking’, you need to remember that ‘means’ is defined expansively and includes threat, use of force or other forms of coercion, abduction, fraud, deception, abuse of power, abuse of a position of vulnerability or the giving or receiving of payments or benefits to achieve the consent of a person in order to have control over that person. None of those seem to apply to the hypothetical situation in your question.

Senator MASON—Or do they? That is what I want to get to next.

Ms Moyle—There are conceivably circumstances in which women come to work in Australia as contract sex workers. They are bonded but they understand the conditions under which they are coming. There was no deception and they are perfectly clear about that. It may be that it is their second contract, for example, so they know the conditions and there can be no argument that there was deception or clouding of the issues. Under those circumstances it may well be that we are not talking about trafficking. However, I would say that there are certain other offences that a person may have committed. For example, it is not within our workplace relations laws to extract the cost of travel from a person’s employment contract. I would suggest that there would certainly be other offences that the agent or facilitator should be subjected to, but it may not be a trafficking situation.

Senator MASON—I understand that. That is a fair point. I want to get back to the example in my question: someone comes to Australia and they have been told about the conditions and salary et cetera. It has not been deceptive; they have been told exactly what they are going to receive. The person doing the recruiting in that other country has in a sense been quite honest about that aspect. Mr Lenehan, are you telling me that that probably would not be an offence?

Mr Lenehan—I should qualify what I said before in one sense. Although it is not clear from the hypothetical situation as you have put it, it may give rise to the offence as defined in the bill of debt bondage. That would arise if the reasonable value of the relevant services is not applied towards the liquidation of the debt or purported debt or if the length and nature of those services are not limited and defined.

Senator MASON—It could be that. I understand that. It is a fair point.

Mr Lenehan—That approach is reflected in the international definition of trafficking. It is accepted that debt bondage—

Senator MASON—Sure. So there are particular exceptions even to the hypothetical that I have given. Let me move the question on. There has been no deception on the face of it. Can anyone, from a Third World country at any rate, freely enter into an agreement when there is that sort of unequal bargaining power?

Ms Moyle—That is actually a philosophical question of what is constraint.

Senator MASON—It is an important legal question too, surely?

Ms Moyle—It is, and it would be something I guess that would be made on the facts of each case every time. I think we are talking about specific coercion and specific use of unequal power situations in order to ground a criminal offence. But I think that you are right: in every situation we are talking about women and men who have very little economic choice in their lives. Their options are very constrained. At a philosophical level, we can well say, ‘What choice does anybody freely have?’ But I think that must be separated from grounding a criminal offence.

Senator MASON—I tell you why—and I think I can say this. When we were talking about this in one of the backbench committee meetings there was a question about organs being donated. I am not sure that that is the right word, but at any rate the question was about people giving their organs away. Someone might say to someone, ‘We will give you \$US10,000 for a kidney.’ If you ask someone in a Third World country, assuming you give them the money, so that is all aboveboard, the question is: is that exploitation? It might not be deceptive at all but I think it can still be exploitative, can’t it?

Mr Lenehan—It certainly at least comes close and it would most likely belong in the category of abuse of a position of vulnerability.

Senator MASON—Yes.

Mr Lenehan—Let me assist you with that, because like most international agreements—

Senator MASON—Is everyone in the Third World vulnerable, Mr Lenehan?

Mr Lenehan—You are helped out in this respect. The protocol has what is referred to by international lawyers as *travaux préparatoires*, which is similar to an explanatory memorandum or second reading speech. What it says in relation to abuse of a position of vulnerability is that that is understood to refer to any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved. That helps you to some degree. I am not saying that that makes it crystal clear, but internationally at least there seems to be a possible way in which you could say that that constitutes exploitation, remembering that it is exploitative purpose that has to be made out.

Ms Moyle—Certainly the bigger questions you raise are partly the reason why we have our International Development Program, the primary aim of which is to eliminate poverty, because there is a realisation that poverty is one of the greatest constraints, one of the greatest barriers to human rights. So in that regard poverty itself is obviously a constraint. But it is something that needs to be addressed through an international development program rather than through criminal law.

Senator MASON—Ms Moyle, you are right in that it is not so much a legal question as a public policy or humanitarian question. But the running together of the concepts of exploitation and deception is a legal issue and they should be divided—as you did very well, Mr Lenehan—because they are not the same thing. Constantly in the discussion of this legislation people use them together. You have not, but it has been done constantly. That is sloppy.

Mr Lenehan—To be fair to other people making submissions, the bill as currently drafted does to some extent, as we have said, drop out elements of the internationally accepted definition. That is the reason that we have made the drafting suggestions that we have made. As I said to Senator Ludwig earlier, another approach would have been to simply adopt the definition in the Palermo protocol.

Senator MASON—Do you think that would have been helpful?

Mr Lenehan—This is my personal view: it would perhaps have been a clearer way of enacting these offences.

Senator MASON—It would certainly, in a sense, pull the two concepts apart too.

Mr Lenehan—It would. And it would avoid one issue that leaps out at you as you read the legislation, which is that you have a series of ‘nested’, if you like, definitions.

Senator MASON—Thank you very much.

Senator LUDWIG—On the issue of tying together the concept of assisting the prosecution in some way and then maybe getting a visa stay, is that a common element in offences that you have found? There was a case recently of a Thai worker who was not assisted, although she did assist the prosecution, but unfortunately it fell short of a prosecution. I do not know the complete facts of the case and they might speak for themselves. But the point is: does this tying together of assisting the prosecution and then getting a benefit skew the legislation, in your view?

Ms Moyle—In the context of Australian law, I could not give you a definitive answer as to whether that is a common, or otherwise, procedure. In terms of international comparators, I could tell you that best practice countries—like the US and Italy—do not tie the provision of support to the level of assistance that is required under our legislation here. It is part of the mechanism of trafficking, I suppose, that it would be common for a trafficked person to have the level of information that would be required to actually ground that criminal justice stay, in my opinion. The information that they have is often piecemeal and the traffickers often use pseudonyms, so it may be that, while they had information to provide, it is not sufficient to reach the threshold that would allow them to be a useful witness for the prosecution.

Senator LUDWIG—Yes. In this instance they are the victim and they may not know all of the chain of events or causation or be able to point to the people who committed the offences—or range of offences—that the prosecution might be seeking to promote.

Ms Moyle—Exactly. So, in a sense, it is quite a high hurdle for a trafficked person to meet. As I say, internationally, those best practice countries do not require that level of support. They may require that some assistance be given to police, but it does not need to be definitive evidence, if you like.

Senator LUDWIG—What do they provide?

Ms Moyle—I could not cite the legislation to you, but I understand that, particularly in Italy, assistance is provided where a victim is willing to assist police by giving what information he or she has. But in Australia’s case there is a higher threshold. It is not ‘I will tell you what I know’ but ‘I will tell you what I know and the police and prosecution adjudge that to a requisite evidentiary level’.

Senator LUDWIG—So it is that second step where there has got to be consideration. It is, in my words, a ‘way out’. If it is not adjudged to provide sufficient evidentiary value, then you can deny the criminal justice stay visa as a consequence. The alternative could be where you do not need the adjudication, but if it is provided—given that the person is a victim in the circumstances—it may be sufficient to ground the ability to obtain a criminal justice stay visa.

Ms Moyle—Perhaps so. If you look at it from the point of view of a person who has been trafficked, they might agree to tell everything they know, but it is not within their control as to whether they will then get any visa or even support assistance beyond the 30 days—because they do not know whether the police will find that the information that they have given has that evidentiary status.

Senator LUDWIG—And of course the difficulty is that once a person has committed to telling everything that they know, it does have consequences if they are returned to their country of origin. If there is not a prosecution or if it is not adjudged to be sufficient to ground a prosecution and they do not obtain a criminal justice stay visa, they are returned, I suspect.

Ms Moyle—Exactly. And I think this is part of the problem. Once a person approaches police, or is seen to assist police, their safety immediately becomes at risk.

Mr Lenehan—One further thing we should say—and you would have gathered this from reading some of the submissions—is that the assistance provisions in the Palermo protocol are not particularly strong. They give states a fairly wide latitude as to whether or not to assist. Certainly, the issue of returning nationals to other countries is dealt with in fairly optional terms. However, the protocol is without prejudice to other international obligations that states parties have. Relevantly for those purposes, it has been long held under the International Covenant on Civil and Political Rights that, if you return a person to a country where they are exposed to a breach of the covenant—say, inhuman or degrading treatment—and the country that is returning them is aware that there is a real risk of that sort of harm, that in itself constitutes a breach of the convention.

Other relevant international obligations include the Convention on the Rights of the Child, which in article 39 specifically requires that states take all appropriate measures in relation to child victims of any form of neglect or exploitation. The Human Rights Committee has also apparently moved towards implying such obligations into article 8, which relates to slavery or servitude. They have said, in relation to Slovakia, that the states parties:

... should strengthen programmes aimed at providing assistance to women in difficult circumstances, particularly those coming from other countries who were brought into its territory for the purpose of prostitution.

In other words, there appears to be something of a fallacy to the effect that there is no hard obligation to provide assistance. That is certainly not our view. Those obligations I have referred to seem to us to be overriding obligations that would potentially apply in the sorts of situations you have referred to.

Senator LUDWIG—So effectively what you are saying—correct me if I summarise it badly—is that, although the Palermo protocol may not be sufficiently clear on what the obligations might be, there are sufficient other conventions that would fill the void and that

should be adhered to, and there is no excuse to escape it by saying the Palermo protocol is not sufficiently detailed in this area?

Mr Lenehan—That is right.

Ms Moyle—From a purely pragmatic point of view, 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 delinks it from the ability of defence lawyers to claim that the evidence is not as credible as it sounds.

Senator LUDWIG—The thought had crossed my mind that one of the defences would be pursuing that line. If you have to provide all the evidence to be adjudicated on to determine whether or not you obtain a criminal justice stay visa, it might—I am not saying it would—lead you to colour your story to ensure that you fall over the line sufficiently.

Ms Moyle—It certainly is an argument that could be raised by the defence, both in relation to the victim witness and also the police.

Senator LUDWIG—Yes, they could be cross-examined as well about what they offered and what inducements they put to the witness to encourage the person to inform them of the evidence.

Ms Moyle—That is right, and it would assist the police and the victim witness if those were delinked. The police could well say, 'I offered no inducements. These were supports and visas that were offered as a matter of course. It had nothing to do with me. There was no inducement that I could offer.'

CHAIR—Thank you, Mr Lenehan and Ms Moyle.

[9.55 a.m.]

FAWKES, Ms Janelle, President, Scarlet Alliance

JEFFREYS, Ms Elena, Volunteer Policy Analyst, Scarlet Alliance

CHAIR—Welcome. Scarlet Alliance has lodged a submission with the committee, which we have numbered submission No. 2. Do you need to make any amendments or alterations to that submission?

Ms Fawkes—No.

CHAIR—I invite you to make an opening statement. At the conclusion of that we will go to questions from members of the committee.

Ms Fawkes—Scarlet Alliance, the Australian sex workers association incorporated, is the peak body representing sex workers, sex worker organisations, projects, groups and networks at a national level. Our membership ranges from state health department funded projects through to small networks of sex workers. We are a member of AFAO, the Australian Federation of AIDS Organisations, and a member of APNSW, the Asia-Pacific Network of Sex Workers.

I wish to make three main points within my opening address. Those three will cover how Scarlet Alliance does not support the Criminal Code amendment bill and why; why we believe that the issues of migrant sex workers have been overlooked around this issue and why it is important for the committee to understand those issues; and what we see as the unintended consequences of this legislation.

The Scarlet Alliance does not support the Criminal Code amendment bill. Whilst we believe that Australia should make legislative changes to ensure Australia meets the requirements of the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, many of the Criminal Code changes are unnecessary to meet these obligations and will create a series of unintended consequences which could be avoided. The UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, recommends its application without prejudice to how states parties address prostitution in their respective domestic laws.

We believe this is an important factor for the Australian situation, where, as you will know, within many states of Australia the sex industry is either legalised or decriminalised. As such, we believe that many of the elements of this legislation may have unintended consequences for the legal sex industry and in particular for those people who attempt to migrate into Australia to work as sex workers.

This bill introduces problematic terminology. Scarlet Alliance, in our submission on the exposure draft, were given the option of choosing one of three versions of the definition for debt bondage. In our submission we noted that we preferred the first version because it applied to all industries. However, we understand that changes to the current terminology introduce the new terminology ‘personal service’, which equals sexual service. We believe that this undermines the original spirit of the definition in the exposure draft that we lent our agreement to.

Sex workers are a highly mobile and transient work force, both internationally and across domestic borders. In Australia, over 20,000 people have regular work in the sex industry. Scarlet Alliance members estimate that some of these jobs are held by people from other countries who are either on student visas or overstaying tourist visas. A small number of migrant sex workers, fewer than 400 per year, engage in a financial contract for the purpose of gaining legal entry into the Australian sex industry. These workers in particular have been unable to gain legal entry into Australia. Visas for sex work are simply not available, nor is the occupation able to be indicated on a visa application for fear of denial.

Scarlet Alliance, in our aims of eradicating injustice and inequality experienced by sex workers, sees this practice of denying sex worker visas as discriminatory and ultimately very dangerous. This policy is directly responsible for the illegal status of hundreds of sex workers in Australia each year. As a result, those workers are denied protection within the decriminalised and legal sex industry. By denying sex workers visas to enter Australia, the federal government has created de facto sex industry law. Even though sex industry law is currently determined by states and territories, the status of migrant sex workers is in the hands of the federal government and will be further criminalised under these proposed amendments.

My third point relates to the unintended consequences of this legislation, which we are happy to go into in much more detail later during questions. There are two main issues that we want to cover—absolute liability and ethnographic targeting rather than dealing with the issue as economic and migration driven. The bill will give powers to Australian prosecutors to charge individuals with planning and intending to be involved in trafficking, debt bondage or deceptive recruiting. The consequences of this is a curtailing of human rights and common law. A person is only guilty if an offence is actually committed. The discussion or planning or intention of an event should not be grounds for criminal prosecution. This is in contravention of a recommendation by the UN High Commissioner on Human Rights in her report to the Economic and Social Council entitled *Recommended principles and guidelines on human rights and human trafficking*. On page 5, the report states:

States ... should consider:

1. Taking steps to ensure that measures adopted for the purpose of preventing and combating trafficking in persons do not have an adverse impact on the rights and dignity of persons, including those who have been trafficked.

Our other point is that ethnographic targeting rather than dealing with the issue as economic and migration driven is problematic. Sex workers cannot gain legitimate visas to enter Australia to work and therefore turn to contracts. Admissible evidence, English-speaking status, migrant status: these factors should only be taken into account if it is relevant to that particular case and a judgment deems it relevant.

In conclusion, I would like to read a quote from our submission. Ms Ping Pong, sex worker and employee of Empower Chiang Mai, Thailand—another organisation which is a member of the APNSW—says:

We have certainly met young Australian women who have come to Thailand with no guarantor, no collateral, and little money, just desperation to get out of Australia. Many of them end up working illegally for below award wages e.g. teaching English. How is it that these young women are treated and perceived so differently from me? It certainly seems to be about sex and racism. Young Australian

women are treated as autonomous adults, given visas and left to create their own lives. If I try to get a visa to go to Australia being a Thai woman without a guarantor, without collateral or money it will not be approved in case I am being “trafficked”. It’s ridiculous because if I got a visa or permission to work then no one can exploit me. When my visa is refused I could simply find an agent, agree to a contract and get myself “trafficked”. New laws won’t prevent this any more than the old laws managed to, because we are not chess pieces being moved around the board we are thinking adults, whoever we are wherever we come from we have our own dreams, plans and resources—

our own agency. Ms Ping Pong continues:

As long as professional outsiders continue to make reports and recommendations and create legislation without consulting sex workers the legislation will fail.

CHAIR—Thank you very much. Ms Jeffreys, do you wish to add anything?

Ms Jeffreys—Not at this stage.

CHAIR—I will pursue the question of consultation. Clearly you were involved in the consultation process. You made a comment on the exposure draft last year. How do you regard the consultation process? Do you regard it as a positive process in which you were engaged? Were you satisfied that you were asked for your comments and that you had an opportunity to participate?

Ms Fawkes—We did participate. We were not approached, but we did find out that the process was occurring and we put in a submission, as you are aware. However, we believe that, within the consultation around this bill and around the parliamentary joint commission earlier, the consultation period and hearings lacked the voices of sex workers who have agreed to contracts in order to enter Australia, and of other people who we are making laws about in these cases.

CHAIR—Can you recall how you found out about the exposure draft, as you were not approached or invited to submit by the department?

Ms Fawkes—I cannot recall exactly, but I think I received information after a conference, when somebody commented that the exposure draft was out for comment. I contacted the Attorney-General’s office to inquire about it and was then given details of where the information was available on the web site.

Senator LUDWIG—So you did not receive a letter or an email from the Attorney-General’s Department to indicate there was an exposure draft?

Ms Fawkes—Not at the time when we began our submission. I do not recall whether we received something later, but certainly other people were aware that a submission process had begun, and it was some time after that before we became aware.

Senator LUDWIG—You are the national peak body of sex workers. In other words, would you be the main contact for information about these types of offences or interest in this area?

Ms Fawkes—That is right, and we had participated in the parliamentary joint committee process, so our submission was on the web site. It was clear that we had worked in this area for some time and that our organisation’s contact details were publicly available.

Senator LUDWIG—I think you have made a number of submissions and appeared before parliamentary committees before.

Ms Fawkes—Yes.

Senator LUDWIG—Was it surprising? Did you inquire of the Attorney-General's Department as to why you were not on the list or contacted for a submission originally?

Ms Fawkes—I remember a comment being made by somebody, I am not sure who I spoke to, to the effect that nobody in particular was contacted; it was out for broad consultation. I did find it somewhat concerning and unusual.

Senator LUDWIG—We will check with the Attorney-General's Department about that. It seems from your experience that you have to be diligent in watching their web site over a period of time to find it.

Ms Fawkes—That was my experience of the exposure draft submission period.

Senator LUDWIG—After you provided the submission to the exposure draft, did the Attorney-General's Department contact you about your submission or, alternately, seek additional views?

Ms Fawkes—No, I was certainly not contacted, so Scarlet Alliance was not officially contacted. They may well have contacted via phone one of the individual members of Scarlet Alliance. In particular, Maria McMahon, from the Sex Workers Outreach Project in New South Wales, is the co-author of the submission. Certainly, Scarlet Alliance received no letter and I do not recall any comment from Maria McMahon that they had contacted her about the submission.

Senator LUDWIG—With respect to one of the issues you raised, the debt bondage offence, in the second reading speech it is indicated that it would not criminalise legitimate employment arrangements that are not exploitative or unfair. Do you agree or disagree with that?

Ms Jeffreys—We would have to disagree. The reason is the experience of the Australian sex industry having regard to the history of efforts to crack down on trafficking and sexual servitude by way of amendments to the Criminal Code in 1995 and 1999. We feel that the explicit mention of sexual services in the personal service area definitely oversteps and goes beyond what the international protocol recommends. The international protocol clearly includes sex work as a form of labour, so any exploitation in the workplace or any exploitation in regard to labour includes exploitation in the workplace of a sex worker. We feel that the inclusion of sexual services as a specific part of personal service—in that definition, if you are going to include sexual service you could include another 100 specific things that a person can do that would equal personal service—is totally unnecessary and will continue the history of targeting, criminalising and victimising migrant workers in the legally decriminalised and generally unprosecuted Australian sex industry.

Senator LUDWIG—You then say that you support the intention to ratify the UN protocol. If you say that this bill is inadequate in your view, how do you say it should be met?

Ms Fawkes—We believe that this bill goes over and beyond what is necessary to meet the requirements of the UN protocol in several ways. I refer in particular to the way in which it

introduces or singles out the sex industry as the main focus for this legislation. There are several other areas which are set out in detail in our submission.

Senator LUDWIG—Would it assist in some areas if they included in the bill the actual definition of trafficking from the UN protocol, so that they built the bill around that protocol?

Ms Fawkes—I refer you to the submission that I believe you have received from the Network of Sex Work Projects, which is the global or international sex worker organisation of which we are an affiliated member. Yes, we would agree that the definition of trafficking as it is outlined in the protocol is preferable. We would also point out that within the protocol, even though it does refer to sexual exploitation as an element of trafficking, this term is intentionally left undefined by drafters in order to provide states with latitude in their own drafting processes. Protocol drafters were clear that the document should be utilised without prejudice as to how state parties addressed prostitution in their own domestic laws. So we feel that our situation in Australia, where our industry is legal or decriminalised, could be taken into account in that area.

Senator LUDWIG—Are you saying—and I might summarise it badly—that the drafters of the legislation did not take into account the non-criminal elements of the sex industry in Australia when they drafted it, which has had unintended consequences by criminalising certain elements that would otherwise not be criminal?

Ms Jeffreys—Yes.

Senator LUDWIG—What would be the way around that? Do you make any suggestions as to how they could avoid that in the bill? I have read your submission but I was looking for a bit more information in terms of the specific areas that you think criminalise that activity.

Ms Fawkes—In particular, I would refer you to the definition of debt bondage. That is a particular area where we believe the bill goes beyond what is necessary to meet the protocol. Due to what we believe will result in the explicit targeting of the legal sex industry in Australia under the definition of trafficking, we are also very concerned about the laws in relation to trafficking across domestic borders. For example, a migrant sex worker in Australia should be free to move from one state to another as a result of their work. The NSWP also expresses in their submission that criminalising that will end up criminalising one particular group of migrant workers—that is, sex workers in Australia—and stop their movement across state borders. We have outlined in the executive summary of our submission to the exposure draft that specific reference to sexual activity as included within an exploitative sense will, we feel, result in the targeting of the legal sex industry and migrant sex workers in Australia and that, if trafficking is the economic and migrant issue we all understand it to be, the definition should cover all industries, all work and all exploitation that arises from the involuntary movement of individuals or the trafficking of individuals and not just specifically relate to sex work.

CHAIR—One of the observations you have put at the beginning of the submission on the exposure draft is about what you regard as the potential risk to previous public health outcomes—health status, if you like—of workers. I do not quite get the link, and I would like you to expand on that a little further, please.

Ms Fawkes—In particular, we believe that the current response to trafficking in Australia has been an unprecedented and excessive targeting of sex industry premises for raids by DIMIA and sometimes the Australian Federal Police. The consequence of these actions has been a lessening of contact between those services and our membership, who are funded to provide HIV-AIDS education et cetera and for prophylactic and equipment provision to those premises. As a result of this targeting, the industry, in particular the workplaces that employ mainly South-East Asian women or advertise that they do, is being targeted. As a result, we have found that many of those businesses have moved to acting in a less open manner to avoid detection and to avoid coming under the spotlight of DIMIA. We believe that this has definitely affected the level of information and contact that our membership has with premises employing women, especially from a South-East Asian background, and we believe this will only become worse when a person who has agreed to a contract, entered Australia and is working in a contractual relationship when it is illegal for them to do so is brought under the spotlight if they admit to others that they are working under a contract. Currently, we have quite open relationships with migrant sex workers, in particular, and we are able to provide extensive levels of information and education to those workers. We believe that that will not be the case if certain elements of this bill were to be passed.

CHAIR—I understand the practical implications that you have set out, but let me be the devil's advocate for a moment. The Federal Police and the department of immigration are basically doing their job. They are trying to ascertain the situation and, I assume, where they have evidence, to assist in protecting women who may have been trafficked in that context. We also receive complaints as a committee about the work of DIMIA officers, for example, in rural Australia in relation to fruit picking and things like that, on exactly the same level of concern that you express; although, perhaps not related to their health status. So, how are they supposed to do their job? What is your suggestion?

Ms Fawkes—From the Scarlet Alliance position, we believe that the raids that have occurred within Australia are not based on evidence that trafficking is occurring in those premises but, rather, are relying on the fact that DIMIA works on a quota system. It is therefore in their benefit to target particular premises.

CHAIR—That is a very serious assertion. What evidence do you have?

Ms Fawkes—Of which part?

CHAIR—Of the assertion that they are not working on an evidence based approach but rather meeting a 'quota', to use your terminology.

Ms Fawkes—Simply from the fact of DIMIA's own statistics on the number of people, the types of charges and the types of people who have been picked up in those DIMIA raids. The statistics represent those people as students working on student visas who have been found to have overstayed, to be working in excess of the 20 hours permitted by the limitations of a student visa or to be people who were not legally able to be working.

CHAIR—That is still a part of their job. Do you see the problem from a practical perspective that the committee has with the contention that you make?

Ms Fawkes—I would point out that, whilst it is certainly DIMIA's role to be detecting persons who are working illegally in Australia, we are not seeing this unprecedented level of raids in or on other industries.

CHAIR—Rural workers in certain places of Australia might disagree with you.

Ms Fawkes—The Scarlet Alliance position on this issue is gained largely from the media attention that has been drawn from the DIMIA raids.

CHAIR—That is a different point entirely.

Ms Fawkes—In what way?

CHAIR—You indicated that you were ascertaining your information from the way the media portrays it. I was seeking your advice as to what evidence you had about your concerns.

Ms Fawkes—No—my point about the media is that if, as you say, the same level of attention has been given to regional or rural workers, the way in which DIMIA has included the media in their raids of sex industry premises shows, I think, that they are addressing this industry in a way different from others.

CHAIR—This discussion could go on for some time, because I am the most fortunate beneficiary of hours and hours of estimates evidence on some of the detailed aspects of these questions, but I will not burden you with them, because, as far as I know, you have done nothing to deserve that.

Ms Jeffreys—Even on a very macro level within the sex industry there are workers from all sorts of backgrounds in different brothels. In the primarily Caucasian brothels you might find backpackers, students, people from America and people from England—the same kind of range that you would find in a brothel that has workers from Asian backgrounds. There you would find Australian citizens, travellers, and tourists—a whole range.

It is not the sex industry as a whole that has been targeted, though the ramifications of targeting the Asian brothel industry does spread throughout the entire sex industry. What we object to the most and what comes up in the admissible evidence clauses of the proposed bill is the specific ethnographic targeting of people from non-English-speaking backgrounds, from South-East Asian countries, who are more likely to be on contract. We believe that this targeting—while, yes, it may get DIMIA statistics on paper of people they have busted who are working here illegally—does nothing to improve the government's response to the broader issue of trafficking and how the government can broadly participate in international protocols et cetera.

CHAIR—I take your point. If we had time I would go further on it with you, but we do not have time.

Senator MASON—I was taken by the quote from Ms Ping Pong from Chiang Mai. I discussed with the chair before that the quote is interesting because it reads similarly to evidence we have taken in other committees relating to developing countries wanting to trade with First World countries. From the way you were speaking, Ms Fawkes particularly, you see this bill as a non-tariff barrier to free trade in the international sex industry. That was the

language of Ms Ping Pong and that is the language that you use, that this in a sense is a non-tariff barrier to freer trade—is that right?

Ms Jeffreys—We are talking about the migration of individuals. We are not talking about a brothel in Thailand being able to extend over here—

Senator MASON—I am talking about in Australia. Are you arguing that it is putting up a barrier to people coming to this country to trade in sexual services?

Ms Jeffreys—If you want to see international trade on the basis of an individual worker getting on a plane and coming to Australia and you want to draw that conclusion then—

Senator MASON—I am not passing any value judgment, but the language of Ms Ping Pong was very much the same. I and I think everyone else in this committee have read similar submissions from people in other developing countries. Forget the aspect of sexual service. In terms of exporting their cotton garments, I am serious, it is the same evidence. They are different topics, sure, sex and cotton garments, but it is all about people wanting access to First World markets, whether it is in sex or garments. Do you agree?

Ms Fawkes—I would like to—

Senator MASON—I was fascinated by Ms Ping Pong's evidence.

Ms Fawkes—If you were fascinated by that, I would refer you to Empower, the organisation which she represents. We placed a report from Empower in our first submission through the parliamentary joint committee, which was quite extensive. We have also placed in our submission to you a further report from Empower about the outcomes of antitrafficking responses in Thailand and their negative impact. One of the elements of our submission was that we see that the barriers to the sex industry being excepted—as other legal industries are, in that we do except workers from other countries coming in to work in a whole range of industries—intensify or increase many of the problems around this issue.

Senator MASON—In essence, you are saying—and this would be the evidence of Ms Ping Pong, I suspect—that this legislation is paternalistic and potentially racist. Is that right?

Ms Fawkes—Yes.

Senator MASON—And that in the definition of exploitation we are talking about slavery, forced labour and sexual servitude. What you are really saying is that we do not need that bit about sexual servitude, that in effect slavery and forced labour would be enough.

Ms Fawkes—That is right.

Ms Jeffreys—Yes.

Ms Fawkes—Many of the other elements that have been discussed around issues which need to be included in legislation are covered in other pieces of legislation.

Senator MASON—I wanted to ask questions about contract debt and everything else, but we do not have the time. Can I make one last point, Madam Chair?

CHAIR—Sure.

Senator MASON—I asked Mr Lenehan and Ms Moyle a question before about exploitation and deception. If you read through the legislation, the assumption seems to be that sexual services are exploitative. That seems to be the assumption—is that right?

Ms Jeffreys—In our understanding of the bill, we see that as an assumption, yes.

Senator MASON—Mr Lenehan was very good and explained that in fact if we adopted the international covenant it would be a lot clearer than it is in this legislation. You may agree with that. It is interesting to look at item 11 about the definition of exploitation. In part B, which talks about causing an organ to be removed, deception does not come into it. In other words, if an organ is removed, the assumption is that there is exploitation and deception is in effect irrelevant. In part A, which talks about slavery, forced labour or sexual servitude, the assumption is that there would have to be deception because if you freely enter into sexual service that is fine. Does that make sense? In other words, if you look at the definition of exploitation in item 11, part B deception is irrelevant. The very fact that you have given an organ means that there has been exploitation—full stop. But in part A, if you give a sexual service, there must also be an element of deception. Your argument is that by putting A and B together the assumption is there is deception or exploitation in both cases.

Ms Jeffreys—Not necessarily, but if you then include the parts of admissible evidence such as a person's English speaking status, their migration status and their economic relationship to the accused and the debt bondage definition, then it starts to build up a picture where a sex worker's consent does not matter any more because of all those other factors. But you are right: if you wanted to depict just that very specific definition of exploitation, perhaps some sex workers who are in the country—

Senator MASON—It builds your thesis, doesn't it? You are saying all these elements put together build up the picture that innately there is exploitation of sex workers, which is really your argument—is it not? Your argument is that this bill fundamentally is saying that foreign sex workers, particularly Asian ones, are exploited.

Ms Fawkes—That is right.

Ms Jeffreys—The fact that only non-Australian citizens can be considered to be trafficked is another huge discriminatory element. Where within this bill is the protection for Australian citizens who are deceptively recruited and trafficked?

Senator MASON—This is another point that would come under civil protection, industrial relations legislation and so forth—would it not? This is being criminalised.

Ms Jeffreys—Yes.

Senator MASON—That is another topic. Thank you.

CHAIR—That is true. Just on that point, in regard to the list that is under the new section 271(11) about the jurisdictional requirement for offences related to domestic trafficking in persons, only one of those paragraphs needs to be met—is that right?

Ms Jeffreys—Yes.

CHAIR—So it does not mean that it is only the paragraph that refers to the individual being an alien for the purposes of the Constitution. Does it really exclude Australians?

Ms Jeffreys—I do not have it in front of me, but we felt that this bill is not targeted at Australians who are victims of trafficking.

CHAIR—I understand that and I do not think anyone on the committee is disagreeing with you. Would you have a look at 271(11) for me, please?

Ms Jeffreys—I do not have it with me.

CHAIR—Not now; after the hearing. Could you advise the secretariat of your view about that as soon as you can?

Ms Jeffreys—Yes, we can get back to you on that.

CHAIR—Thanks very much. Thank you both. Your submission and your evidence have been very helpful to the committee. We appreciate you appearing this morning.

[10.35 a.m.]

COX, Mr James, Advocacy Officer, Christian Children's Fund Australia

FAIRFAX, Ms Kayte, Policy Officer (Child Trafficking), Policy and Advocacy, World Vision Australia

SAW, Ms Lee-May, Member, Australian Women Lawyers

CHAIR—Good morning and welcome. Do you have anything to say about the capacity in which you appear?

Ms Saw—I am also the media officer and a committee member of Women Lawyers New South Wales.

CHAIR—World Vision has lodged a submission with the committee, which we have numbered 12. Do you need to make any amendments or alterations to that submission?

Ms Fairfax—Not at this stage.

CHAIR—Are you all appearing in support of the same submission? There are no separate submissions from CCF and AWL, are there?

Ms Fairfax—They endorsed our original submission.

CHAIR—I invite you to make an opening statement. At the conclusion of that we will go to questions from members of the committee.

Ms Fairfax—Good morning. Thank you for inviting us to the hearing today. My two colleagues, as I have explained, represent two of the eight organisations that originally endorsed our submission to the Attorney-General's Department of October last year and our recent submission, which was put in last week. World Vision, as you know, is an international child focused agency. We work in almost 100 countries to transform the lives of people living in poverty.

Human trafficking has increasingly become an issue in our work in the Asia-Pacific region, where we work in 14 countries. We work with communities, national NGO partners, government and international organisations such as the IOM on projects relating to prevention, prosecution, rehabilitation and reintegration, among others. It is from this experience in the field that we consider that we have something to offer the government in the development of its action plan and this legislation. It is a different front line, if you like, based in Asia, while some other organisations contributing have their front line in Australia.

World Vision has welcomed the government's interest in the issue of people trafficking and the introduction of this legislation as part of the action plan to eradicate trafficking in persons. We have also welcomed the consultation process that has accompanied parts of the package. Last year we were interviewed for the community awareness campaign, and in October we made the legal submission that I mentioned.

The submission that we are discussing today presents a revised set of amendments, which have been developed from our original submission after meeting with Nicola Roxon and Senator Chris Ellison and staff from the Attorney-General's Department, so it has been through some legal consultation with that department. The principles remain the same. I

should mention, however, that we are happy with the changes that were made from the draft bill to the bill that is being considered today.

World Vision and our submission partners agree 100 per cent with the government's view that one trafficking victim is one too many. We are concerned that law and policy in Australia relating to all trafficking victims, particularly children, be adequate, appropriate and based on internationally agreed human rights standards. We are concerned that the action plan in general and the legislation in particular has a narrow focus on sex trafficking and on adults. In particular, we support the rights of trafficked children, who are most vulnerable to the abuse and exploitation of traffickers.

We know from our experience in the field that children are less likely to know their rights or to be able to enforce them when they have been trafficked, and they are more susceptible to trauma and injury from child trafficking and related crimes, with psychosocial and physical consequences that can last a lifetime. For some children there is no recovery from trafficking; for others, it can take an incredibly intensive amount of work. We note that children have been trafficked into Australia before; we have heard of four cases in the 1990s—there could be others. Given the extent of trafficking internationally, especially in the Asia region, we are concerned that there are likely to be cases in the future. We are also concerned that trafficked children may be currently undetected in Australia. We say this because there has been a lack of public research into the incidence of child trafficking—we will refer to that point later.

We note that Australia has already made a clear commitment to children by ratifying the Convention on the Rights of the Child and signing the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children. The convention and the protocol call for strong, specific legislation and action to uphold the rights of all trafficking victims, particularly children. The Convention on the Rights of the Child has a range of articles that apply to child trafficking—in particular: article 35, which obliges governments to take all appropriate measures to prevent child trafficking for any purpose or in any form; and article 4, which calls for states to undertake all appropriate legislative, administrative and other measures for the implementation of the rights outlined in the CRC. The way that this should be done is very clear: article 3 states that the best interests of the child should be a primary consideration in such measures.

The UN recommended principles on human rights and human trafficking also recommend that children's best interests be considered paramount at all times, including their protection and care. This should not be made conditional on their capacity or willingness to cooperate in legal proceedings, as currently seems to be the case in Australia. The protocol also directs states to protect and assist victims of trafficking with full respect for their human rights. So it is on this basis that World Vision has made its recommendations.

We would like to see pre-emptive law where we understand that child trafficking has occurred in Australia and may occur again. Considering the nature and the seriousness of the crime against children in particular, we would like to see the law and policy in Australia being right now—let us get it right now and save problems in the future. Let us provide maximum protection for children from the start, based on principles that we have already agreed to.

We would also like to see a victim centred approach versus a criminal justice approach. A victim centred approach is likely to be more effective because well-supported victims of trafficking—particularly children—are less likely to be re trafficked and are more likely to testify against traffickers, leading to a lessening in trafficking and deterrence for traffickers. We consider this approach is more appropriate for everyone, but particularly for children.

We have made several recommendations in this submission, particularly around a child-specific offence of child sexual servitude. We argue for separate offences because children's experiences of trafficking are different; they have different needs and rights to adults. We recommend that 'sexual services' also be amended to include non-commercial use and exploitation in cases of cross-border trafficking. Clearly, there are cases—and this occurred in the 1990s—where children have been trafficked for non-commercial purposes. We also recommend that the committee consider whether the bill adequately covers the trafficking of adults for non-commercial sexual exploitation.

We also support the recommendations of the 2004 report into people trafficking by the Parliamentary Joint Committee on the Australian Crime Commission: to broaden the offence of deception and to include deception regarding the kind of services to be provided, whether they are of a sexual nature or not. We also support the recommendation to consider adopting the use of victim impact statements in sentencing. This is because we support anything that increases the victim's perspective in criminal proceedings as an access to justice issue.

In particular, with respect to children, we commend for your consideration the UNICEF guidelines for the protection of the rights of child victims of trafficking. We consider this very good practice to enhance children's rights, and we feel that Australia could go further in the adoption of such measures. In particular, we urge the adoption of child and gender sensitive police and court procedures, which the protocol also refers to. We consider trafficking as an extremely serious form of child abuse with a very high risk of retraumatisation. Further, we recommend that such provisions that are available already in, for example, the Crimes Act be extended to all victims of trafficking. We are concerned that those provisions currently cover sexual offences only, and our experience shows that child victims of any form of trafficking are seriously at risk of retraumatisation and the effects of abuse.

We are also concerned that the bill adopts what we have termed a broadly constructed rather than an inclusive approach to its definitions. It has stuck very closely to the protocol definitions and yet we feel that it could go further. We are concerned that some forms of exploitation, such as marriage or adoption, would not necessarily be clearly recognised by the courts in interpretation in the future. We are concerned that leaving too much to the discretion of the courts and their interpretation could run the risk of these forms of exploitation not being covered. We have referred the committee to an example from last decade of a Supreme Court judgment on a rape case.

We would also like to raise the issue of aggravated offences. We have discussed this with the Attorney-General's staff, but we would still like to refer it to the committee for your consideration as to whether the issues of pregnancy and forced abortion are adequately covered by the definition of 'harm' in the Criminal Code.

In conclusion, we urge the government to broaden its focus. I do understand that it is not only about sex trafficking, but sex trafficking does appear to be a significant focus of the measures in this legislation and the broader package. We urge the government to fund primary public research into all forms of trafficking in Australia, including child trafficking and interstate trafficking domestically. Lastly, we do hope that there are more opportunities in the future for non-government organisations to have an ongoing regular dialogue, with feedback, with the government on the implementation of the package in the next few years.

CHAIR—Thank you. Would anyone else like to make any comments at this stage?

Mr Cox—Not at the moment.

CHAIR—We will go straight to questions.

Senator LUDWIG—I note that you made a submission on the exposure draft. Was your organisation contacted?

Ms Fairfax—No, we were not.

Senator LUDWIG—How did you become aware of it?

Ms Fairfax—I heard about it at the conference.

Senator LUDWIG—Which conference?

Ms Fairfax—There was a conference in Canberra last year on trafficking which the Attorney-General's Department attended. Richard Fairbrother gave a presentation. There was concern expressed by members of the audience at that conference. There were people there—including one of the speakers, who was an academic—who did not even know what was happening with the protocol or the legislation. There seemed to be frustration from the department that we—non-government people at the conference—did not know what was going on with the trafficking changes. I made the point that we needed to track what was going on across four or five different government departments, because there was no centralised web site, for example, to be updated, and that obviously was not working for some people. So he said, 'There's going to be process coming up; check the web site.' That is what I think we all did, and that is how we found out about it.

Senator LUDWIG—So you were not written to specifically?

Ms Fairfax—No. There was no official correspondence.

Senator LUDWIG—Subsequent to that you made a submission on the exposure draft. Did you receive feedback from the Attorney-General's Department on that?

Ms Fairfax—No, I did not get anything. I believe I received an acknowledgment of the submission, but I had no feedback at all. I ended up following it up myself and speaking to someone who used to work for the department, and I received some informal feedback that way. I did not get any formal feedback until I contacted Senator Ellison, and then went and actually met him—and there were three staff from the Attorney-General's Department sitting there, which was very helpful.

Senator LUDWIG—Was that post the introduction of the bill?

Ms Fairfax—That was two weeks ago.

Senator LUDWIG—With respect to the concerns that you raised in the exposure draft, how much of that has now been settled since the meeting that you had with Senator Ellison and his three staff?

Ms Fairfax—Our submission was in two parts. The first covered general recommendations relating to the action plan overall and some of the principles that we felt we would like to see incorporated in the whole package. When I think about it, that ended up in that submission because there was no other opportunity, seemingly, to get that message across to government formally. The second half covered specific legislative amendments.

Since then, World Vision has met with Nicola Roxon and with Senator Ellison's office and there has been a series of revisions. So we have been through two sets of revisions. The first half has dropped off, and we would like to raise some of those issues if there is a possibility for dialogue later. The second half has gone from about 12 amendments down to four or five that we have in the submission we have presented today. We took the advice of the Attorney-General's Department on nearly all the amendments. We went through legal technicalities in our meeting two weeks ago but there are a couple that we are still referring to the committee for final decision.

Senator LUDWIG—As far as you are concerned, the bill should be amended to take on some of those suggestions about those issues that are enumerated 1 through to 4 in your submission.

Ms Fairfax—Some of them are things that were agreed to in that meeting with Senator Ellison, in the sense that we were told: 'We'll look at that. That sounds viable.' In section 4 we discuss the inclusion of examples in the bill or the explanatory memorandum. Senator Ellison said in that meeting that he would look at including the examples we had given in the memorandum or the second reading speech to guide court interpretation. We have had further legal advice since then that that is a real risk and that we cannot rely on that to have those examples covered, so we are now back to saying we would like them in the bill.

CHAIR—On that very point of the aggravated offences, are they the only things that you think should be included as aggravated offences?

Ms Fairfax—We did have a longer list, but it has been refined.

CHAIR—Somebody being intentionally infected with HIV or something like that.

Ms Fairfax—We did have those things. We had a longer list, but we were advised that they are covered by what is already in the bill.

Senator LUDWIG—And you accept that?

Ms Fairfax—At some point, you have to hope that the advice is correct. We had 'contracts HIV/AIDS, mutilation, dies, rape, pregnancy, abortion, suffers psychiatric illness or physical injury or is forced to commit a crime against another person'. We were advised that most of those came under the current definition of harm and that other laws would cover being forced to commit a crime against another person. So the ones that are left which we feel are not clearly covered by harm are forced pregnancy and abortion.

Senator LUDWIG—In your view.

Ms Fairfax—Yes.

Senator LUDWIG—Is there a document that I can rely on which is the definitive view you have of what changes you seek to the bill now?

Ms Fairfax—That would be the one we gave you last week.

Senator LUDWIG—So that is not this one here?

Ms Fairfax—I am not sure which one you are referring to, I am sorry.

Senator LUDWIG—The one you put in as your submission.

Mr Cox—Dated 17 February?

Senator LUDWIG—Yes.

Ms Fairfax—That is it. That was last Friday.

Senator LUDWIG—They are the issues that you say remain unaddressed in the current bill.

Ms Fairfax—Yes.

Senator LUDWIG—You say child trafficking is not specifically detailed enough. Can you explain to me the areas that you say it should include? Currently, the bill has offences of trafficking in children, in addition to—

Ms Fairfax—The issue that we are really talking about now is child sexual servitude, which is an end purpose of trafficking, so children can be trafficked into sexual servitude. We are concerned that the sexual servitude and slavery act does not sufficiently cover children because it refers to the use of force or threats, and the protocol makes it very clear that that is not relevant in the case of children.

Senator LUDWIG—Could you take me to that point?

Ms Fairfax—Page 3 of our submission from last week.

Senator LUDWIG—No, in the bill itself. That is probably the easiest way to look at it.

Ms Fairfax—The slavery and sexual servitude act—

Senator LUDWIG—So it is not within this bill. You say there is a deficiency in terms of the current legislation.

CHAIR—There is another piece of legislation.

Senator LUDWIG—Yes.

Ms Fairfax—Section 270.4 of the sexual servitude act, which is in fact an amendment act to the Criminal Code. Section 270.4, definition of sexual servitude, states:

For the purposes of this division, sexual servitude is the condition of a person who provides sexual services and who, because the use of force or threats, is not free to cease sexual services or is not free to leave the place or area where a person provides sexual services.

That is not relevant to the case of children under the protocol, which defines child trafficking as not needing the use of force or threats or any coercive means. So we are concerned about

the inconsistency there and concerned that the end purpose of trafficking is not covered sufficiently within the current legislation.

Senator LUDWIG—So you are saying that the amendment that is proposed does not meet the protocol in terms of what you have just outlined in 270.4?

Ms Fairfax—It does not cover child sexual servitude.

Senator LUDWIG—And it should, in your view?

Ms Fairfax—Yes.

Senator LUDWIG—The UN protocol does, and the bill does not.

Ms Fairfax—The legislation, yes.

Senator LUDWIG—The bill proposed does not, and existing legislation does not, so therefore there is a gap.

Ms Fairfax—That is right.

Senator LUDWIG—And the other areas? Is that the only area in terms of child—

Ms Fairfax—That is what remained after the revisions, yes.

Senator LUDWIG—So the issue of child debt bondage, child slavery—

Ms Fairfax—We were advised that the slavery definition did cover it and was sufficient, and it covered debt bondage as well.

Senator LUDWIG—And you are satisfied with that explanation?

Ms Fairfax—Yes, at this point.

Senator LUDWIG—If that changes between now and the time we report, which is shortly, so this week, you might like to contact us.

Ms Fairfax—Okay, by Friday, close of business. Thank you.

Senator LUDWIG—In terms of the victims support area, you say that there should be greater victim support? Do you think there should be amendments within the bill in this area?

Ms Fairfax—Yes. We have two issues around that. The first issue is ensuring that the current provisions—

Ms Saw—In the Commonwealth Crimes Act. We are talking about part IAD of the Crimes Act.

Senator LUDWIG—I do not have that with me.

Ms Saw—Essentially, section 15YB to section 15YR covers all the specific things we have listed in our recommendations—such as the use of video evidence and CCTV.

Senator LUDWIG—A lot of that is already found in state legislation, isn't it? In other words, state courts can take such things into consideration.

Ms Fairfax—The level of coverage does seem to be quite inconsistent so we are looking for consistency for a federal offence.

Senator LUDWIG—Your submission asks whether the proposed offence provisions adequately cover trafficking for non-commercial sexual exploitation. What are your concerns there?

Ms Fairfax—If you wouldn't mind, we will just jump back to the previous point about state versus federal.

Ms Saw—Basically, as a piece of legislation the Criminal Code informs the other federal legislation that sits under it. The view of World Vision and Australian Women Lawyers is that there should be specific sections in the Criminal Code that deal with the provision of evidence by children. We are saying that it is important that these provisions apply not just to sex offences. Under the Crimes Act, the sections are specific to the interviewing of children for sexual offences, whereas we feel that, in the case of trafficking, it is important that these sorts of provisions also exist for non-sexual offences.

Ms Fairfax—That is again referring to what I was discussing before about the risk of retraumatisation to children. There are certainly specific effects for sex trafficking and sex abuse, but 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. We know in Australia, from research done by Project Respect last year, that this is not just a fear but that it is occurring. Videos have been sent back to families with footage of that trafficking victim engaging in sexual services with their client. This happens now.

Ms Saw—If such provisions are able to improve the quality of evidence and the ability of witnesses to provide evidence in courts, in our view it is important that they are adopted.

Senator LUDWIG—How do you say that the non-commercial use you mentioned in recommendation 2 should be addressed in the bill?

Ms Fairfax—This did go through quite a lot of discussion with Senator Ellison's office. Our concern here is simply that, if we keep talking about commercial sexual services, we are missing forms of exploitation sexually that are not commercial. This particularly applies to children—for example, someone coming over and being used for making private pornography, or private sex abuse in the home or shared with a person's friends. Quite simply, that is not covered by that definition. So we are seeking to have that amended to cover non-commercial sexual exploitation.

Senator MASON—That could relate to both children and adults, couldn't it?

Ms Fairfax—It could, definitely. It is just that it gets a little more difficult with adults in terms of consent to sexual services and those kinds of things. Trafficking into marriage does occur in Australia, for example. When that involves adults, that is a form of sexual servitude that is not commercial. We would like to see the bill adequately covering those forms of non-commercial sexual exploitation for adults as well. We have been advised by the Attorney-General's Department that this can only cover trafficking into Australia across the border, because of its mandate coming from the protocol, but clearly we would like this to cover domestic trafficking too.

Senator LUDWIG—How was that explained?

Ms Fairfax—I personally am not trained in law.

Ms Saw—Sorry, how was what explained?

Senator LUDWIG—There are offences of domestic trafficking in persons.

Ms Fairfax—Yes. I must say it did not seem that clear to me, but it was explained to me—

Senator LUDWIG—Your evidence was that it does not cover domestic trafficking in persons, but there is an offence of domestic trafficking in persons.

Ms Fairfax—Yes, but my understanding of the explanation was that that covered ‘on-trafficking’, if you like—if you traffic across the border and then you traffic domestically—and not purely domestic trafficking interstate, for example. This was because the protocol referred to international trafficking, mostly. Therefore when I asked whether it could cover domestic cases of non-commercial trafficking I was advised, ‘No, it can only cover a child being trafficked into Australia for that purpose.’

Senator LUDWIG—We might ask Attorney-General’s to clarify that.

Ms Fairfax—It would be good to go into that.

Senator MASON—I do not have many questions at all; I just want to summarise this in my own mind. You are seeking to protect children—I understand that—and you see child offences as aggravated offences. That is consistent with the criminal law generally, isn’t it? We are going to protect the more vulnerable citizens and so forth.

Ms Saw—We actually have not said in our submissions that child offences per se are aggravated offences. We are actually only saying that forms of egregious harm should be classified as aggravated offences. This is in cases a. and b. on page 9 where the victim becomes pregnant and where a forced abortion results.

Ms Fairfax—We are asking for separate offences. Proposed section 271.4, Offence of trafficking in children, is a separate offence to the other trafficking offence, and we support that. We would like to see separate offences because we feel it better captures the different nature of children’s experiences of trafficking. That is why we are talking about child sexual servitude, for example.

Senator MASON—You are right at one level but children’s experiences are probably different in relation to all sorts of criminal conduct. I am just trying to think in terms of the criminal law architecture of the Commonwealth. Generally there are offences for adults and then for children. It is often for sexual assault, for example. It is, in effect, an aggravated offence if a child is sexually assaulted. You would appreciate that, wouldn’t you?

Ms Fairfax—Absolutely. It is just that in this case with the protocol it recognises that the conditions for trafficking differ between adults and children. Force and threats need to be used for an adult but not for a child.

Senator MASON—I was going to get to that next. We have aggravated offences for vulnerable people. I understand that. But the point is that consent is not a relevant issue here, is it?

Ms Fairfax—No. Not with children.

Senator MASON— That is the difference. It is because the exploitation is assumed.

Ms Fairfax— Yes.

Senator MASON— I do not mean to say that it is all simple. There are two things. Firstly, there are aggravated offences. You may want to express them differently in different offences but in effect the penalty is greater. But, secondly, there is no sense of consent. So we do not have the problem the ladies from Scarlet Alliance were assuming—that you can have adult sex workers working in this country from overseas that may do so of their own free will. Let us assume that. In the case of children, there is never an example of informed consent. That is all I wanted to add.

Ms Fairfax— That is right. Consent is not relevant. Use of force or threats is not relevant.

CHAIR— Thank you very much, Ms Fairfax and colleagues. There may be a couple of issues which the committee needs to follow up with you after we conclude the hearing. We will do that as quickly as we can and would appreciate your responses as quickly as you can. Thank you very much.

[11.13 a.m.]

MALTZAHN, Ms Kathleen, Director, Project Respect

Evidence was taken via teleconference—

CHAIR—Welcome. Project Respect has lodged a submission with the committee, which we have numbered submission No. 6. Do you need to make any amendments or alterations to that submission?

Ms Maltzahn—No.

CHAIR—I apologise for the delay in coming to you this morning. We were just a little over time with other witnesses. I invite you to make a short opening statement and at the conclusion of that we will go to questions from committee members.

Ms Maltzahn—From Project Respect's perspective, we welcome the draft legislation. We see it as a really important step forward. I think it does a number of key things, if we are going to continue addressing the issue of trafficking. One of the more substantial things, I think, is that the legislation puts us in line with the UN protocol in terms of recognising that the perception around terms and conditions of prostitution is an important component of any antitrafficking attempts. In doing that, it makes the legislation much more workable. We also were really pleased to see the inclusion of the debt bondage provisions. The legislation is an important contribution and the government is to be applauded on that.

We would say, however, that even with the best legislation in the world, if we do not have clear and adequate support processes for women then the legislation is going to be less powerful than it could be. One of the things that we are concerned about is the current linking of visas, and indeed support, to prosecution processes. We note that that is in contrast to the situation in other places, such as the United States and Italy, where women are expected to give information to police, but where their ongoing support in those countries is not linked to being involved in prosecutions. Perhaps I will leave it at that and respond to questions.

CHAIR—Thank you very much. Would you explain to the committee the role of Project Respect?

Ms Maltzahn—I am sorry to have left that out. We are a non-government organisation based in Melbourne. We work broadly on issues affecting women in the sex industry. We have a focus on violence against women, amongst other issues, and this of course includes trafficking for prostitution. We have been involved in the issue of trafficking for some time and we played, I believe, a key role in putting the issue back on the national agenda. We do direct work—things such as providing support and information et cetera—with women who have been trafficked. We do a range of work but I will not talk now about the work that is not connected to trafficking. We also do research and advocacy around trafficking issues and we look at networking with other organisations to provide better support and to do better research and advocacy.

CHAIR—Thank you.

Senator LUDWIG—In relation to the consultative process that you went through, were you contacted by the Attorney-General's Department about making comments on the exposure draft? How did you come to know about that?

Ms Maltzahn—To be perfectly honest, I cannot remember whether or not they formally told us. We have had intermittent dealings with the Attorney-General's Department for some time, so I knew that the bill was coming. I cannot remember whether I was formally or informally advised that we could comment.

Senator LUDWIG—You made a comment on the exposure draft?

Ms Maltzahn—Yes, we did.

Senator LUDWIG—Did you receive any feedback from the Attorney-General's Department with respect to the comments you provided to the department?

Ms Maltzahn—From memory, no.

Senator LUDWIG—When the bill was introduced into the House were you advised of that or asked to make any further comments about the final black-letter law?

Ms Maltzahn—Again, from memory, no.

Senator LUDWIG—Were you satisfied with the consultative process for this bill?

Ms Maltzahn—Certainly we had an opportunity to comment, and we did that, and certainly I would say that the Attorney-General's Department has done a very good job on this bill. It would have been good to know when it was coming to parliament, but we found out nonetheless. Generally, yes, I have been happy with the consultative process, I suppose because I think the result in terms of the legislation has been good. Of course, as I said earlier, we think there needs to be a broader consideration of the issues that will make the legislation viable or not.

Senator LUDWIG—Some submissions have indicated that a definition of trafficking as per the UN protocol might have been of greater assistance in the bill itself. Do you have a view about that?

Ms Maltzahn—I think anything that adds in the UN definition is probably a good idea. I do not have the draft exposure bill in front of me, I am afraid, so I cannot remember the specifics of what is there. But, yes, I think if we are operating within the United Nations framework, as we are, it is good to have the definitions in there explicitly.

Senator LUDWIG—Have you had an opportunity to look at some of the other submissions that have been made to the committee?

Ms Maltzahn—No, I have not.

Senator LUDWIG—In your submission you suggest that visas and support should be delinked from prosecutions. I wonder what you see as the problem there.

Ms Maltzahn—There are a number of problems. At a very practical level what we have is a situation where women who go ahead with a prosecution are in the difficult position where they can, and I believe will, be accused of helping with the prosecution only because they want to get something out of it. We saw in the committal hearings in Melbourne related to 417 Brunswick Street that the AFP was attacked for having provided support. The defence lawyers said things like, 'Didn't you buy sheets at Target for these women?' The implication was that their help was not fairly given: it was not given out of a sense of wanting justice but rather to secure themselves some material or other gain. I imagine that those sorts of attacks will

continue. I think that puts both the DPP and the AFP—and indeed women—in a difficult position. So I think there are practical problems with having something that looks as though it is rewarding being involved in prosecutions.

I also think that the problem with having a link to prosecutions is that some women who are genuine victims of trafficking will, for a variety of reasons, not be involved in prosecutions and that if we link prosecutions to either visas or support we risk having women fall through the gaps. There are a number of scenarios. The first is, for example, a woman who has absolutely been trafficked but does not know enough about who trafficked her and even where she had been to be able to be of use to police. As it stands, if you do not have that sort of information, you are not eligible for a criminal justice visa and your only option is repatriation. There are also women who are too scared to help police. For example, I have spoken to someone who said, ‘I understand that the police can protect me, although I have some concerns about how possible that is long term, but they cannot protect my family. So if I go forward in a prosecution I risk hurting the people whom I came to this country to help in the first place.’ That puts women in a difficult position.

There are also women who are genuine victims of trafficking but will not be good witnesses. They will not be helpful in prosecutions for a whole variety of reasons and, because they are not helpful in prosecutions, they will not be able to stay and get some recovery time here, not because they are not in genuine need but simply because it might be counterproductive in a trial. All those things work together to mean that it is a very unpredictable system for women. What we are asking is that they come out of a very unpredictable system where they have been really exposed to the whims of traffickers, people who have promised them one thing and done another, only for us to say, ‘Trust us. Help the police. We are not sure what will happen. We are not sure if you can stay in this country. We are not sure, even if you tell us a whole lot of things, whether we will send you home or not.’ We also somehow link their restitution and recovery from the crime to what we can get out of them. All of that means that women are hesitant to talk to police. That is really counterproductive.

Senator MASON—I have a question that relates to evidence given earlier today by the Scarlet Alliance. They quoted a Ms Ping Pong, who is a sex worker in Chiang Mai in northern Thailand. Ms Ping Pong said—and I would like your reaction to it:

We have certainly met young Australian women who have come to Thailand with no guarantor, no collateral, and little money, just a desperation to get out of Australia. Many of them end up working illegally for below award wages e.g. teaching English. How is it that these young women are treated and perceived so differently from me? It certainly seems to be about sex and racism. Young Australian women are treated as autonomous adults, given visas and left to create their own lives.

She goes on to say that this does not apply to Asian women coming to this country. In effect, Ms Ping Pong is saying that this legislation is paternalistic and patronising, if not racist. What do you think about that?

Ms Maltzahn—I have a number of responses. Firstly, I believe that, worldwide, the impetus to do something about trafficking has come from countries—and, indeed, from women’s organisations within countries—that are destination countries. For example, I lived in the Philippines, where women in the sex industry and women more broadly were very

concerned not that women's autonomy was not being respected but that their desire to move to another country was being exploited. So I think it is difficult to argue that this is racist when a lot of the impetus for change on trafficking has come from the women who have themselves been trafficked and from their communities and countries.

Secondly, this legislation is essentially about saying that women can agree to cross borders and do prostitution and a whole manner of things, but when it gets to the point where they are being compelled to have sex, want to stop and cannot, that is a crime. It does not matter where that comes from—

Senator MASON—It is not a crime in Australia. For Australian sex workers to have to continue to work is not necessarily criminal conduct in this country.

Ms Maltzahn—It is criminal conduct to force someone to have sex when they do not want to.

Senator MASON—Oh yes, that is; but that is a slightly different issue.

Ms Maltzahn—At the heart of trafficking is making people, in this case, have sex when they do not want to, when they cannot stop. When that is a systematic process, our legislation says it is a crime against humanity. I do not think this legislation is saying, 'If you're coming into this country and you're happy with the conditions of your prostitution, we're going to come over the top and prosecute you.' There may be immigration issues, but this legislation is not about that. As I understand it, when a woman says, 'Yes, I consented to come; yes, I knew I would be doing prostitution; but I did not imagine that I would experience this level of exploitation and violence,' this legislation is about saying that we will back that woman up. So I think they are different issues, and it is easy to confuse the migration issue with the crime.

The other thing the UN protocol does—and I think it is important—is say that women's choices are constrained and we need to recognise that. So it is not enough to say, 'She came here and she should be happy with it.' If the woman later says, 'I didn't have a lot of choices and, having made the choices available to me, I found them to be damaging,' again, I think this legislation says, 'Someone should not be able to benefit either sexually or financially from the fact that you were not able to remove yourself from that situation.'

Senator MASON—I take your point. What you are saying is that it is not, as Ms Ping Pong says, just a matter of being an autonomous woman; it is complicated by economic and other factors.

Ms Maltzahn—That is right. I think it is easy to depict women from Thailand as somehow lacking autonomy and Australian women as being fine; neither of those scenarios are true. It is about saying that, for a whole range of structural reasons, some people's ability to move safely is more limited and we should provide women with protection where they want it. I cannot see a prosecution working where the woman keeps saying, 'I am happy with what is happening'—she is not going to be a good witness—but it does mean that those woman who have been saying, 'This is not what I imagined,' will have some protection under our law and will not be told, 'You are just a contract worker whose contract has gone wrong.'

Senator MASON—You might agree, then, that there is a big difference between young Australian women going to Thailand to engage in the teaching of English and Thai women coming to this country to engage in sexual services? You might accept there is a difference—I think there is—but you would say there are structural differences that account for that and that that should be understood and reflected in the legislation?

Ms Maltzahn—I think so, but I would also say that, if a young Australian woman in Thailand found herself in a situation where she could not stop doing whatever job it was, you should look at her as a victim of trafficking. One of the beauties of both our legislation and the UN protocol is that it is not about who it happens to; it is about certain acts. In the US, I believe, there has been some attention given to domestic trafficking, where people are moved within the country—US citizens—and I think our legislation has that provision. It does say that it is what happens to you and, in effect, it could happen to anyone, but of course we know that some people are more at risk of this.

Senator MASON—Thank you.

CHAIR—Thank you, Ms Maltzahn, I think that concludes questions. Again, I apologise for the delay in coming to you this morning.

Ms Maltzahn—Thank you for the opportunity to speak.

[11.32 a.m.]

BISHOP, Ms Karen, Senior Legal Officer, Criminal Law Branch, Attorney-General's Department

HAWKINS, Ms Catherine, Acting Assistant Secretary, International Crime Branch, Criminal Justice Division, Attorney-General's Department

OVINGTON, Ms Kathryn, Senior Legal Officer, International Crime Branch, Criminal Justice Division, Attorney-General's Department

EDWARDS, Federal Agent Grant, Coordinator, Transnational Targeting, Australian Federal Police

HILL, Federal Agent Bruce, Manager, Border, Australian Federal Police

McMAHON, Mr Vincent, Executive Coordinator, Border Control and Compliance Division, Department of Immigration and Multicultural Affairs and Indigenous Affairs

WATTS, Ms Sharon, Acting Director, Migration Fraud and Investigation Section, Department of Immigration and Multicultural and Indigenous Affairs

CHAIR—Welcome. Before we begin, I remind senators that, under the Senate's procedures for the protection of witnesses, departmental representatives should not be asked for opinions on matters of policy. If necessary, they must also be given the opportunity to refer those matters to the appropriate minister. I note we do not have submissions from any of the departments, but I would ask whether anyone has an opening statement.

Ms Hawkins—Thank you for inviting us to the committee today. It is our pleasure to be here to assist the committee on this important legislation. The bill before the committee, the second reading speech of the minister, and the explanatory memorandum represent the government's position on the bill. That being said, I thought it was worth while to place the bill in the context of the broader antitrafficking package that the government has got on foot at the moment.

The bill before the committee is a key part of the government's \$20 million package to combat trafficking in people. It is a whole-of-government approach. The fact that it is a whole-of-government approach in the \$20 million package is underlined by the number of colleagues that I have at the table today. My branch, the International Crime Branch, is responsible for coordinating the whole-of-government package. My colleague in the Criminal Law Branch is responsible for the detail of the bill that is before the committee today. My colleagues in the AFP are obviously at the front line of detection and investigation of trafficking offences. My colleagues in DIMIA obviously play a role in this package as well, as has been discussed in evidence before the committee already this morning.

The government's package to combat the trafficking of persons has got four key elements. Prevention is obviously the first element—and there is a range of initiatives that go to that objective—and then detection and investigation is the second element, while criminal prosecution is the third element, and victim support and rehabilitation is the fourth element. With those very brief opening words that set this bill in the context of the third element of the action plan to eradicate trafficking, I will leave it there. We are now in the committee's hands to assist them with their consideration of the bill.

CHAIR—Does anyone else wish to make a comment at this stage?

Mr McMahon—I wish to note that we have put together some data that we thought the committee might find helpful. It outlines referrals to the AFP. They provide a detailed break-up of those referrals as well as bridging visa F activity, which is the initial stage of the identification of people we believe could be subject to such trafficking.

CHAIR—Thank you, that is helpful. Let us start with the question which has been a theme of some of our discussions this morning—the question of consultation. I am not sure I speak on behalf of the entire committee, but I am personally surprised that a piece of legislation which you, Ms Hawkins, have described as a very important government initiative has a consultation approach that is based on people being really lucky if they catch it on the web site or if they happen to have been at the conference last year, rather than a formal consultation approach where the department corresponds with interested stakeholders and makes an effort to ensure that appropriate feedback is received from individuals and organisations.

Ms Hawkins—We have been listening to the evidence this morning, obviously, and have heard the committee's views and the views of witnesses. It is worth talking about the kind of consultation that has prefaced the government's consideration of this package. As I said, this bill is part of a much broader package. The Minister for Justice and Customs, back in June 2003, hosted a roundtable with a range of NGOs where he sought their views on what the nature of the package should be. That roundtable consultation was put together after consultation with the Sex Discrimination Commissioner and the list of attendees was put together in consultation with the then Office of the Status of Women. There was subsequently, in November 2003, an NGO forum on domestic human rights. This is a forum that the Attorney General's Department organises from time to time. At that NGO forum on human rights, one of my colleagues, who is not with us any more, made a 30-minute presentation that actually focused on the people-trafficking package. The purpose of having someone from the department speak about the people-trafficking package was to broaden the net of stakeholders that were directly contacted about the development of the package.

The minister put out a press release in relation to the bill, which is obviously the focus of the committee's deliberations today, on 31 August 2004 entitled 'New offences to target destructive trade in human lives'. That press release was put up on the department's web site; it was given quite some prominence on the web site. It was also picked up in the media at the time. The particular issue that I would draw to the committee's attention, which perhaps made this consultation process slightly different to other consultation processes, is that the media release was put out immediately prior to the calling of the last federal election. After the bill had been released, after it had been exposed for public comment, it meant that the department was under the caretaker convention obligations and that limited the way that we could engage with stakeholders on that bill.

CHAIR—So if it had not been for the caretaking convention, you would have written to all of the people concerned and you would have asked them to make a formal submission. Is that correct?

Ms Hawkins—It is fair to say that the fact that the election came along and the caretaker period was as it did affect the way that we consulted.

CHAIR—I do not think that that is an answer to my question, with respect.

Senator LUDWIG—That is all you are going to get.

CHAIR—It would seem. A number of the submissions—World Vision and the Castan Human Rights Centre—have discussed the need for complementary federal, state and territory legislation that deals with trafficking and prostitution. We were wondering, in terms of the broader consultation, if you like, whether the Model Criminal Code Officers Committee were consulted about the provisions of this bill.

Ms Bishop—The Model Criminal Code Officers Committee did prepare a discussion paper and a report on sexual servitude and slavery, which are already provisions of the Criminal Code and have been picked up by a number of jurisdictions. The final report was in November 1998. A number of the key elements of this package are straight from that—for example, the definition of sexual services. But in terms of consultation with MCCOC on this particular aspect, the answer is no. 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.

CHAIR—I might come back to that.

Senator LUDWIG—Did it go through SCAG or the Attorney-General's—

Ms Bishop—No, it did not.

Senator LUDWIG—If you were going to cover the field, wouldn't it have gone through SCAG to inform them that this was going to be an area that you had an interest in, that you were going to make further amendment to and that you were going to sign the relevant protocol, with a subsequent view to ratifying it and then seeking to meet the protocol by legislative process?

Ms Hawkins—It would be usual practice for us to go to SCAG for a matter if we were seeking the states' and territories' actual cooperation in legislative implementation. But I think what my colleague Karen Bishop was getting at before was that, because we had constitutional power to proceed with this legislation, SCAG was not necessarily the best mechanism for us to use to consult with the states. That being said, there are other mechanisms by which we consult with the states in relation to treaty action. There is the Joint Standing Committee on Treaties and this protocol is on a schedule that would be before the states and territories through that kind of mechanism to let them know what is going on.

Senator LUDWIG—What consultation with the states went on in relation to this bill?

Ms Hawkins—I would need to take that on notice, in order to give you the details of when JSCOT was informed about it. I do not have that with me today.

Senator LUDWIG—No, this is a separate question. I understand what you said in relation to the treaty, but this is in respect of the bill. In respect of the bill, did you write to or contact relevant state authorities and advise them of the intention to cover the field in this area?

Ms Hawkins—No, I understand that we did not write to the states and territories to talk to them about that intention. My understanding is also that in a matter such as this, when we do have the power to progress with legislation, it is not necessarily standard practice that we would automatically write to the states and territories.

Senator LUDWIG—So you just cover the field without consulting with them in this area—is that what you are telling us?

Ms Hawkins—In this instance, I am telling you that we did not consult directly with the states and territories.

Senator LUDWIG—Why wouldn't you? This covers both intrastate and interstate. In other words, there is potential for the ACC, joint operations and task forces to be formed which target this area and which includes state police. It seems surprising that you would not then say, 'This is a significant area of law that we are going to amend' to, in my words, 'toughen up the area'.

Ms Hawkins—I think it is worth saying at this point—I do not want to give you the wrong impression—that there has been a lot of cooperation.

Senator LUDWIG—I know there has been cooperation. I am talking about the bill. Let us be specific about this. I notice that there are two broad areas that you focus on. In your introduction you said there is cooperation in this area and for the programs, which is \$20 million—I am familiar with the press release that says that—but let us just talk about the bill.

Ms Hawkins—I am not sure that I can add anything to what I have said to you. I can take it on notice. We can go back and look at what we did, directly with the states and territories, on the bill. I am happy to elaborate on that by writing back to the committee.

Senator LUDWIG—Thank you. In terms of the drafting issues, such as where there is a view by a number of submitters that the definition in the protocol should be included within the bill, do you have a view about that? Why did you not include that?

Ms Hawkins—We have listened to the evidence that has been given by witnesses this morning on that issue. In relation to the way in which the Australian government looks at its international obligations, when it comes to having to implement those international obligations into domestic legislation, as you know, the Office of Parliamentary Counsel are the expert drafters at the Commonwealth level who are involved in drafting. We have to strike the right balance between making sure that we implement the essence of our international obligations, as set out in an international instrument, and making sure that the way it is done is consistent with the way in which Commonwealth laws are drafted. There is a balance to be struck; we have to make sure that we have the essence of our international obligations put into Australian domestic legislation in a way that is clear and consistent with the approach taken in domestic laws. Just to add to that, we would not necessarily say, as our starting point, 'This definition in an international instrument is the only right way that we should implement our international obligations,' because there are other issues that we have to consider.

Senator MASON—The government has done that in the context of doing that?

Ms Hawkins—That is right.

Senator LUDWIG—Do you say that the bill meets all of the obligations legislatively in the UN protocol?

Ms Hawkins—It is the government's view that the existing laws that are in place, together with the provisions in the bill, do implement Australia's obligations under the protocol.

Senator LUDWIG—Do you say that the Human Rights and Equal Opportunity Commission miss the point when, in their submission, they say that the bill does not address issues such as 'the nature of any 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', which comes in under 270.7?

Ms Hawkins—I would not say that my colleagues in the Human Rights and Equal Opportunity Commission have missed the point. What I would say is that the language of international obligations does give nation states a certain amount of latitude to implement, appropriately and consistently with their domestic practice, those obligations. I think the government would say that there could be different interpretations about the way in which that is done. Some people, as we have already heard in evidence before the committee, think that we could bolster the way that we have implemented our obligations under the protocol, but it is the government's view that we have struck the right balance in the legislation before the committee in a way that does actually implement the obligations under the protocol.

Senator LUDWIG—Do you say, in terms of 271.2(2), that you do not need to cover deception about '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', or is it met in some other way?

Ms Hawkins—As I say, our view in the Australian government is that the way in which those offences are cast does implement the breadth of the obligations in the convention.

Senator LUDWIG—I just remain unconvinced. Can you point to me where either you have met it in the bill or where HREOC or I have misinterpreted how we read the UN convention in terms of not covering those issues in relation to deception? I am sure you have read the Human Rights and Equal Opportunity Commission's submission where they say at item 9:

Unlike the new section 270.7, proposed section 271.2(2) will not cover deception about—

and they then list three matters that deception will not cover. You might say that is not in the protocol, in which case that is news to me on my reading—but I could be wrong and I am happy for you to point me in the right direction. It may be that you do not need to meet it because it is in another law of the state, in which case you can point me to that. Or it may be that you disagree with HREOC's submission in that it is covered or that HREOC have got it wrong and it is not needed to be covered. There are probably a couple of other alternatives you could tell me about, but we could start somewhere.

Ms Bishop—I think that we need to consider the basic offence of trafficking in persons and the elements of that offence separately from the deceptive recruiting offence which is amended by item 7 of the bill. While they cover different types of conduct, when you look at them together, and particularly in conjunction with the other offence provisions in this bill,

they do meet the obligations. It would be the view of the government that it is not necessary to replicate each type of conduct in the different offences because they are targeting essentially slightly different conduct.

Senator LUDWIG—If a person is not free to leave a place or an area where they provide sexual services, what offence would that be under the bill?

Ms Bishop—There are two options. If you could satisfy the elements of the deceptive recruiting offence itself, which is item 7, which the bill amends, it would be an offence under that provision. But there would also be—

Senator LUDWIG—Where would it be an offence under that provision?

Ms Bishop—That would be the case where the person was under the impression when they came here that they would be free to leave the place of work or the place of residence.

CHAIR—Are you specifically referring to proposed clause (1)(b) of item 7?

Ms Bishop—Yes.

CHAIR—Could you help us by being more specific in response to further questions.

Ms Bishop—Where a person is confined might also be an offence under relevant state and territory legislation. Offences of unlawful confinement and those kinds of things might also be relevant regardless of the trafficking status of the person.

CHAIR—It is the relevant state and territory legislation which we have not explored.

Ms Bishop—I have not got any material on that here, but I can certainly provide further information to the committee if that is what you would like.

Senator LUDWIG—What we are seeking from you is how the bill meets the protocol. You have said that the bill meets the protocol, and now you say that in conjunction with state law it meets the protocol. Other submissions have pointed out gaps, but you say that those submissions are either mistaken about those gaps, they are met within the bill or they are met by state law. It would be helpful if you could point out how, in conjunction with this bill and state law, you meet the protocol if you then rely on state law. Which state law do you rely on, especially given that you have not consulted with the states? They might not be aware that they have offence provisions which can progress this issue as well.

Ms Hawkins—If I can just clarify: we are not relying on state and territory law in order to—

Senator LUDWIG—That is what Ms Bishop just said. Are you correcting that, or have I got it wrong? I am happy to get it wrong.

Ms Hawkins—I am not accusing you of getting it wrong; I am just clarifying the evidence that we are giving. I think Ms Bishop was, for completeness, just adding that it could also be an offence under state and territory law.

Senator LUDWIG—So ‘in addition’?

Ms Hawkins—That is right.

Senator LUDWIG—Is the ‘the extent to which the person will be free to cease providing sexual services’ in relation to deception? That is at 270.7.

Ms Bishop—Yes, that is in 270.7(1)(c) and reads ‘free to cease providing sexual services’.

Senator LUDWIG—In item 9 by HREOC, which is proposed section 271.2(1), you have picked up ‘forced threats and deception’ but it appears, in their view, that you have not picked up matters such as ‘coercion’, ‘abduction’, ‘fraud’ or ‘abuse of power’. Do you have a view about that? They say that the commission considers those matters should be included in the new regime, those matters being other forms of coercion, the abuse of power, 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.

Ms Bishop—The answer to that issue is a little complicated. As a starting point, the government has taken the view that force, threats and deception—those three alternative means of trafficking—in combination cover the field regarding what the trafficking protocol requires of us. Coercion, for example, would come under force or threats, depending on the precise circumstances of the conduct engaged in by the person.

Senator LUDWIG—The abuse of power?

Ms Bishop—I think that would also come within the meaning of ‘force and/or threats’.

Senator LUDWIG—Which one, or do you say both?

Ms Bishop—I think it would depend on the exact circumstances presented to the court.

Senator LUDWIG—And the giving or receiving of payments or benefits to achieve the consent of a person?

Ms Bishop—I think that would also come within it; there would also be issues about whether there was actually consent in that case.

Senator LUDWIG—Which one do you say it would come within: force, threats or deception?

Ms Bishop—I think it would come within ‘force and/or threats’.

Senator LUDWIG—Do you have a definition of ‘force’? There is a definition of ‘threat’ in 271.1.

Ms Bishop—For the purposes of the division, there are definitions of ‘deceive’ and ‘threat’ in 271.1.

Senator LUDWIG—‘Threats’ are a threat of force, a threat to cause a person’s removal from Australia or a threat of any other detrimental action. Do you say that would potentially encompass those three items?

Ms Bishop—That is my understanding, yes.

CHAIR—Why was the language used in the bill preferred over the language of the protocol?

Ms Bishop—Just by way of clarification, are you talking about language for the definitions that we are talking about now?

CHAIR—Broadly speaking, yes.

Ms Bishop—My understanding is that we have tried to adopt, as closely as we possibly can, the language used in the protocol but bearing in mind the Criminal Code, which is the fundamental starting point for Commonwealth criminal law provisions. The drafting has tried to encompass the words and essence of the protocol while fitting in with the scope of the Commonwealth Criminal Code.

Senator MASON—I think we all understand that you are amending an existing act and already the architecture of the act is there. But doesn't Senator Ludwig have a point when he says that force, threats and deception are not necessarily encompassed by abuse of power? In the ordinary use of that language, I can imagine an abuse of power situation where there is no force, threat or deception.

Ms Hawkins—We are in the area here of drafting techniques and construction. I personally have not been involved in the technical development of the bill but, from my many years of experience in drafting legislation, I suspect that we are now having precisely the same kinds of questions and discussion as those that have already occurred between officers in the department and OPC as they grappled with this exact issue of how to make sure we are getting the sense of Australia's obligations under the UN protocol while making sure that we are not radically departing from the way we usually proceed with Criminal Code offences and offences under the Crimes Act. Just trying to strike that balance is the short answer to the chair's question about why the language in the code was preferred over the language in the protocol. It is just trying to strike the right balance between making sure that we have implemented our obligations effectively and, from a drafting point of view, consistent with the way we usually proceed with legislation.

CHAIR—I am struck, again, with the question of lack of consultation with the Model Criminal Code Officers Committee. If you look at the Castan centre's submission to this committee it has some very useful information about the processes that the Model Criminal Code Officers Committee undertook in the 1990s, specifically in relation to the report Ms Bishop referred to from 1998 and so on. A number of the offences, including trafficking in persons generally and the offences as now specifically proposed, the Castan centre submission advises, do not in fact appear to have been the subject of MCCOC consultation. They go on to say that the MCCOC 'cautioned a need' to ensure:

... the new offences were consistent with the general principles of criminal law within the *Criminal Code* and with existing criminal laws, in particular the relationship between servitude and legal aspects of prostitution. They noted that prostitution is subject to different and volatile legal regimes in the States and Territories.

So it seems to me—and probably, I think, to other members of committee—that for the sake of a comprehensive approach to the drafting it would have been logical to refer it to the MCCOC.

Ms Bishop—We noted that the Castan Centre for Human Rights Law did suggest that the bill go before MCCOC or be considered by MCCOC. While we value the very specific role that MCCOC plays in the development of model criminal offences and model criminal laws, MCCOC is more concerned with consultation and development of legislation for implementation by states and territories. The Australian government has drafted many offences that are specific to its jurisdiction and has inserted those offences into the Criminal

Code taking into account the special circumstances of the Commonwealth and the requirements that the code imposes on those laws.

CHAIR—Do you know how many times MCCOC has been brought forward to this committee as the body that should be used for the consultation purpose and that we should work through to make sure the provisions in the codes are consistent and so on? Do you know how many times that has happened?

Ms Bishop—No.

CHAIR—No. Well, I cannot count them either—there are too many.

Senator MASON—Senator Ludwig and the chair have raised this very interesting point, so I have a suggestion, because the question was so delicately and appropriately put by Senator Ludwig. Is the problem, in putting these offences in the Criminal Code as criminal offences, that force, threats and deception fit well within the criminal law whereas abuse of power and the other elements that Senator Ludwig mentioned before do not fit quite so well into criminal offences? Therefore we have narrowed the application of the act so it fits within criminal offences and we have left the others out and narrowed the range of offences. In effect, we have criminalised the protocol and in doing so we have narrowed its impact. Is that right?

Ms Hawkins—If you are asking us: have we taken a narrow interpretation to implementing the protocol—if that is your question?

Senator MASON—Yes.

Ms Hawkins—I do not think we have taken a narrow approach to implementing the protocol. We have done exactly what you have said, which is, in the Australian government's view, criminalise the offences we need to in the protocol. We have done it in a way that is, in our view, implementing the obligations while being consistent with the way we draft, which I think is maybe a slightly different—

Senator MASON—It is just that the words that are used—‘force, threats and deception’—are words from the criminal law whereas ‘abuse of power’ is not a phrase that is comfortable within the criminal law. My point is—and Senator Ludwig, when he made this point before, I think was saying—‘That's fine what you have done, but by criminalising this activity you have narrowed the application of the protocol.’ From what I can tell—I might be wrong—that would seem to be what is happening. I have to be convinced otherwise, I suppose. I am not saying it should not have been criminalised, but you may have narrowed the application of the protocol by adopting criminal law terms.

Senator LUDWIG—World Vision raised an issue about the consultative process. The submission that they have put in contains those issues that they say remain unaddressed. Is that your understanding from the consultative process that you have adopted with World Vision—that they are the matters that are still outstanding as far as World Vision is concerned?

Ms Hawkins—Having listened to the evidence from World Vision this morning, the answer to that question is that there are some issues that they raised that perhaps we would refer to in a slightly different way. As I understand it, there are some issues that World Vision

are raising that at this stage are not in the bill. But obviously, 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.

Senator LUDWIG—I was just trying to tie down whether you agree that those are the ones that remain outstanding in terms of World Vision, given their earlier contact with you.

Ms Hawkins—Yes. To give a simple answer: I do understand that some of the issues that World Vision raised they have already put to the minister. We are aware of those issues and we are aware that in some instances they do want the bill to be extended, yes.

Senator LUDWIG—In relation to child-specific offences, their view is that there should be one dealing with servitude. I think I have got that right. Do you say that the child trafficking offences are complete within here? In other words, do they relate both to offences of trafficking in children and to domestic trafficking? Does that cover all the matters that the UN protocol requires in terms of children? Do you say that the World Vision submission is therefore wrong, that it does not require separate offences, or that it is simply a different way of examining the issue?

Ms Bishop—The government takes the view that the existing offences, including the sexual servitude offence—which of course applies equally to a child and to an adult and does not have an element of consent—as well as the new provisions in the bill, including both the international and domestic child-specific trafficking provisions, in combination meet the obligations under the protocol.

Senator LUDWIG—So you do not see the need for a separate child sexual servitude offence?

Ms Bishop—No, we do not consider that at the moment there is a need for an additional offence that relates strictly to children. Part of the reasoning behind that is the already very high penalty that applies to that offence. In general, where there is an aggravated offence by virtue of the victim being a child, as there is with the international and domestic trafficking in children offences—the aggravating element being that the victim is a child—that is reflected in the high penalty that is applied to that offence. There is not really any scope to do that with the sexual servitude offence that exists in the Criminal Code at the moment.

Senator LUDWIG—The current elements, they say, do not meet the protocol in the case of children. Do you disagree with that?

Ms Bishop—I do not agree that we have not met the protocol obligations in relation to children. The issue is the consent of the child, but the government's position is that consent of the child is not an element of the relevant offences.

Senator LUDWIG—What about involving the use of force or threats? These elements, they say, are not relevant in the case of children and therefore do not meet the requirements of the trafficking protocol.

Ms Bishop—I am just checking my bill, but certainly the new offence of trafficking in children does not require there to be any force or threats or deception.

Senator LUDWIG—That is how I read it as well. That is why I asked you specifically about whether these were the matters that you still felt were outstanding. My problem—which the committee might share with me—is trying to establish which areas are the ones that you say you have addressed and which are the areas that you say are still outstanding.

Ms Hawkins—I think it is helpful to have gone through it in detail. That is why I hesitated when I started answering your question: some issues are already addressed in the bill and some are not. The one that we have just been talking about is an example of one of their concerns which, in our view, is already addressed in the bill.

Senator LUDWIG—That is why I raised it. When I first read this submission I thought that it was actually addressed in the bill. I read it a couple of times to work out whether or not I was wrong or if we are simply at cross-purposes. You say that it is contained within the bill, but it remains—even after their consultative process with you—as one of the outstanding matters.

Ms Hawkins—That is right.

Ms Bishop—My understanding is that World Vision were actually hoping for an aggravated sexual servitude offence. That is not an offence in this bill; that offence is already in the Criminal Code. They were hoping that we would include a new offence of sexual servitude where the victim is a child.

Ms Hawkins—I will go another round on that and answer your question about what is an outstanding issue. From the Australian government's point of view, that is not an outstanding issue, because we think it is already covered. As I understand it, World Vision is requesting that there be a specific provision included in this bill. So, on one level, that is an outstanding issue.

Senator LUDWIG—That is helpful, thank you. In terms of the phrase 'commercial use', a number of submitters indicated that non-commercial exploitation can occur and that it should be included in the bill in order to meet the protocol. Do you have a view about that?

Ms Hawkins—Some other organisations are requesting a change or changes that are different to what is in the bill at the moment. This is another one of those issues. The definition of 'sexual service' in the bill is consistent with the previous definition of sexual service under section 270.4 of the Criminal Code, which relates to the definition of sexual servitude. The chair might be pleased to hear that this definition is consistent with that proposed by MCCOC in their 1999 report on slavery, and it has been adopted in other jurisdictions. This is an example of where, at the Commonwealth level, we have looked to existing definitions so that the provision that we are implementing is consistent with current practice.

Senator LUDWIG—The view that World Vision seems to have is that the provision does not adequately cover trafficking of adults in non-commercial sexual exploitation. Do you say that that is not a matter that you are required to address in this bill to meet the protocol—it is an additional matter?

Ms Hawkins—That is right.

Senator LUDWIG—Is that why you disagree with World Vision on the matter of adopting that—because in your view it goes above and beyond that which the protocol requires?

Ms Hawkins—The bill represents the line where the government thinks that the appropriate balance is struck. We have already heard in evidence this morning that there is a range of views in the community as to the appropriate extent of criminalisation of trafficking and related matters. The provision in the bill at the moment represents the government's view that we have struck the right balance.

Ms Bishop—I just add that the basic offence of trafficking in persons in section 271.2 does not rely on definitions of exploitation, forced labour or debt bondage. It is the basic offence where there is simply either force or threats used, and that force or threats actually result in the person consenting to being trafficked. So in that particular offence there is no need to prove the sort of exploitation—or, indeed, whether there was any exploitation when the person arrived. That goes a little bit beyond what the protocol requires, but the Australian government has taken the view that that is of sufficient criminality that it should be reflected in the Criminal Code.

Senator LUDWIG—You do not use the word 'commercial' in there.

Ms Bishop—No. The word 'commercial' appears only in the definition of sexual services, which is at the end of the bill.

Senator LUDWIG—Which is consistent with the original definition.

Ms Bishop—Yes, that is correct.

CHAIR—If a person is trafficked to participate in the production of the sort of pornography that I think Ms Fairfax referred to that is done within a so-called family environment or within a home and a commercial product is not being produced, is that form of trafficking still covered?

Ms Bishop—Provided that there was force or threats that resulted in the person being trafficked under the first offence.

CHAIR—What about a child?

Ms Bishop—Either you could look to whether the child was otherwise exploited or you could rely on the basic offence.

CHAIR—That would probably be adequate exploitation to satisfy the offence, wouldn't it?

Ms Bishop—I am sorry, Chair?

CHAIR—That scenario which Ms Fairfax drew would probably be adequate exploitation to satisfy the offence, wouldn't it?

Ms Bishop—It is probably going to be—again, depending on the circumstances.

Senator MASON—When we heard the evidence from World Vision, from Ms Fairfax, she was concerned about the different experiences that children face and that they demand greater protection. Let us assume there is no force, no threats and no deception and we have a 17-year-old woman from an Asian country who consents to working as a sex worker in this country. Would an offence have been committed under this bill?

Ms Bishop—No, I do not believe it would have been—where the person was consenting and where she had not been deceived about the circumstances in which she found herself.

Senator MASON—From memory—and I do not want to put words in Ms Fairfax's mouth—I think her argument was that force, threats, deception and so forth should be irrelevant in respect of children; that there could be no free consent and that this bill should apply to children irrespective of that. I think that was her argument, Chair. And that, I think, Ms Bishop, is the rub.

Ms Bishop—If I can just clarify what I said: where the person is under the age of 18, under the offence of trafficking in children there is no requirement to prove any force or threats or deception, provided that the trafficker intends that, or is reckless as to whether, the 17-year-old will be involved in sexual services or otherwise exploited. So consent, threats, force and deception are not relevant.

Senator MASON—Here we go—'or otherwise exploited'. Is there a statutory assumption that a 17-year-old engaging in sexual services is exploited?

Ms Bishop—I do not know that there would be an assumption that they were exploited. What the bill is saying is that if they are involved in the provision of commercial sexual services and they have been brought into Australia then that is the offence. My understanding is that that is consistent with the protocol and the age listed in the protocol.

Senator MASON—It is an offence irrespective of any sense of exploitation?

Ms Bishop—That is correct.

Senator LUDWIG—The Human Rights and Equal Opportunity Commission have a different view about absolute liability, that you do not need the provision if you adopt their approach. Other submitters argue that it exceeds conventions and, as such, should not be included in the bill. What is the justification for including absolute liability in the bill?

Ms Bishop—Absolute liability is applied only in a very limited way to particular elements of two of the offences—the basic trafficking and the basic domestic trafficking offences—where the offender has used force or threats. Because of that force or those threats, the victim has in fact consented to the trafficking conduct. The view was taken by the government that it should not be necessary for the prosecution to show that it was an intentional result or that it was a knowing result but that, if in fact the use of that force or those threats was a factor in that person giving their consent, no additional fault element should be required for the giving of that consent.

CHAIR—So what do you say to the Castan centre's submission where it says that 'absolute liability makes no sense in relation to proof of causation', which is what s 271.2(1)(c) requires, and that a 'fault element is irrelevant to whether or not a person's consent resulted from the use of force or threats—nor is any defence of mistake or fact'.

Ms Bishop—I think the converse argument would be if you were to require an intention that your force or threats were going to result in the person giving their consent. The government has taken the view that that is not the level of fault we are looking for in these offenders; it is sufficient that they have simply used either force or threats and, because of

that, the victim subjectively decides to consent to the trafficking conduct. So we think it is a sensible application of that fault element.

CHAIR—It is an unusual provision from the perspective of domestic criminal law—the use of absolute liability. Where else does it happen?

Ms Bishop—It is very rarely used, and it is extremely rarely used in offences applying to all of the elements. There are some very specific rules that have been gleaned from these kinds of hearings that the department use as guidance when we are applying absolute liability.

Senator MASON—And the Scrutiny of Bills Committee—is that right?

Ms Bishop—Yes, definitely.

Senator MASON—Very good.

Senator LUDWIG—You also have a guide that you have to adhere to when including this, and it provides for having to demonstrate why you need to include it. That was the purpose of the question. I still have not really heard the why.

Ms Bishop—I can give you some words from that guide, because I have an extract here. We believe that this is a circumstance where this is relevant. It says that, where absolute liability is applied to a particular physical element of an offence, which is what has occurred here, it is appropriate where the requirement to prove fault of that particular element undermines, or will undermine, the deterrent effect of the offence and there are legitimate grounds for penalising persons for whom you cannot prove fault in relation to that particular element. In this particular circumstance, we are still requiring intention—that the person intentionally used force or threats. That is the physical conduct element of this offence. The consent itself is the result element to which recklessness would normally automatically apply under the Criminal Code. However, we have decided that it should not be a requirement of the prosecution to prove that they were reckless so that their conduct resulted in the consent but that, subjectively, their conduct of force or threats did in fact result in the person consenting.

Senator LUDWIG—Why is it necessary to do that—the why? What is the problem? Why does the law require the use of absolute liability? Is there a perceived need to include it, and what is that need?

Ms Bishop—The perceived need would be that it would be difficult. Given the evidence that we would anticipate receiving in relation to these kinds of offences, it would be difficult to determine what sort of evidence would actually show that they were aware of a substantial risk—that their conduct would result in the person giving consent. That is the definition of recklessness which, as I said, would normally apply to a result element of this kind. As I mentioned, it was considered that it was sufficient that, subjectively, the person did consent because the trafficker intentionally applied force or threats.

Senator LUDWIG—So you are saying that you would not be able to get enough evidence to substantiate any—

Ms Bishop—To substantiate it—and also for deterrent reasons as well. If it is known that any trafficker who applies force or threats is going to face a very difficult battle in terms of proving that their force or threats did not result in the consent, it is considered that that will have a greater deterrent effect.

Senator MASON—Ms Bishop, Ms Hawkins and Ms Ovington, I think you have a rest now.

Ms Hawkins—We appreciate that—thank you!

Senator MASON—I think I need to ask the federal agents about this. What is the extent of this problem? How much trafficking is there for the purposes of sexual servitude and other labour? How big is the problem?

Federal Agent Edwards—That is a commonly asked question. Globally, it is a difficult question to answer. At the moment, the TSET teams—the transnational sexual exploitation and trafficking teams—are fully focused on investigating these matters. I can give you statistics on the number of investigations and the number of victims we have identified. In terms of the intelligence, looking at whether you can balance the Project Respect numbers of 1,000 or the Scarlet Alliance numbers of 300, at the moment we are sitting with a total of 38 people we have quantifiably identified as victims of trafficking for the purposes of sexual exploitation.

Senator MASON—Over what period is that?

Federal Agent Edwards—That is since the introduction of the legislation in 1999.

CHAIR—What happens to people who were trafficked before 1999?

Federal Agent Edwards—The legislation is not retrospective. We have had some instances where that has occurred. Where we have been informed that victims are in the country, we have worked with our state colleagues. If the victim has been trafficked, the offence of rape has occurred, so we look at other options that are available in terms of trying to work prosecutions around the information and the evidence that the victims have. But we certainly cannot look at it from a Commonwealth perspective.

Senator MASON—You said 38 victims. That is not necessarily the same thing as 38 successful prosecutions.

Federal Agent Edwards—No. We have not had a successful prosecution yet. We are still in the processes. At the moment we have five matters before the court. Hopefully some of those will come to fruition this year, depending on the backlog in the courts.

Senator MASON—How many prosecutions have you mounted since 1999?

Federal Agent Edwards—There have been 91 investigations.

Senator MASON—How many prosecutions have there been from those investigations? I am not asking about successful prosecutions, just prosecutions.

Federal Agent Edwards—We have 14 people before the courts at the moment who have been charged with offences under the appropriate legislation. If you would like to encompass it, five investigations have led to the prosecutions that we have before the courts at the moment.

Senator MASON—Do you think the new amendments will assist you in mounting successful prosecutions?

Federal Agent Edwards—Yes. The strengthening and harmonising of the legislation will assist us further in achieving our goals.

Senator MASON—Do you think you would have had more successful prosecutions if this legislation had been around since 1999?

Federal Agent Edwards—That is a difficult question to answer. Not having exposure to it, it is a little hard to compare.

Senator MASON—There have been that many prosecutions and no-one has been successfully prosecuted. There is a lot of talk, and the government is asking the parliament to pass legislation that is very powerful and, as always, impinges on people's rights and so forth—and we have not had one successful prosecution.

Federal Agent Edwards—There is no prosecution that has gone through the system of the courts yet. We are still waiting. We have some prosecutions that have gone from committal that are waiting to go to trial.

Federal Agent Hill—We have refocused our resources within the AFP over the last year, particularly with the package that has come into play. As a result of that package you will find that most of those prosecutions are a result of resources being dedicated to this crime type. It is a bit unfair to look at the spectrum of figures since 1999. If we focus over the last year, we have had a dramatic change in direction in what we have been doing.

Federal Agent Edwards—If I could put it in context, the first of those arrests took place in 2003, prior to the introduction of the package. So if you take it from 2003 until the present, those investigations and those arrests have all taken place since May 2003.

Senator MASON—I only raise it because it is an issue that has been flagged in the media and so forth, and here we are today. I want to know what the scale of it is. Do you have intelligence that this is a major preoccupation of either organised crime or semi-organised crime?

Federal Agent Edwards—If I could be blunt, and I say this in the context of the environment that we operate in, the women are perceived by the criminals as another commodity. They are a commodity like drugs, firearms et cetera. Where there is an opportunity to exploit a commodity to make money out of it, they move. They are fluid. There are not necessarily dedicated organised crime groups that deal solely in trafficking. There are certainly organised crime groups that will smear themselves across the myriad of opportunities that exist to make money. That is the bottom line.

Senator MASON—But we have also heard evidence today from the Scarlet Alliance that you can have people here on a student visa from any part of the world offering themselves up to perform sexual services.

Mr McMahon—That is correct.

Senator MASON—What I am saying is that I am just not sure about the scale of the problem. People seem to have the sense that if there is an Asian woman in the local brothel then there must be sexual servitude involved. That was the public rancour for a while. But in fact that may not be the case at all. She might be a student and she might be doing it very much of her own free will and making some pocket money.

Mr McMahon—Can I make a couple of comments—

Senator MASON—We can get overexcited by the scale of the problem.

Mr McMahon—First of all, the government's position, which it basically had to declare, is that there are fewer than 100 people trafficked to Australia each year. You may know that the state department TIP office—their trafficking in persons office—have put us into tier 1, which suggests that there are more than 100. That is why we focused on the 100 number. There is no way, in respect of any set of statistical data, that we can come near 100. Since the legislation started in December 1999, we have referred 139 people to the AFP. The AFP also have some collection—

CHAIR—If I could just clarify: this table that you handed up that refers to 139 persons is a table that spans from 1999 to the current date.

Mr McMahon—Correct. I am sorry; it is not at the top of the table and it should have been. It covers a number of years. Particularly in the last two years, we have adopted a very low threshold for referrals. In other words, we do not make a judgment as to whether or not someone is trafficked; we simply refer when we see a sign that could mean trafficking. Consequently, our numbers are at the high end of that business.

Senator MASON—That is most helpful. Thank you.

Senator LUDWIG—In relation to the migration area, has there been any work done with the Australian Federal Police to work out whether the criminal justice stay visa is appropriate, sufficient and of assistance in being able to progress investigations?

Mr McMahon—The criminal justice stay visa has been around for a long time. What has changed more recently is that we have introduced two new visas. One of them is the bridging visa F, and the purpose of that was to give the AFP more time to consider the circumstances of a case before the mandatory provisions of the Migration Act came into play or a woman decided to leave because she was in detention. The second visa that was introduced was the witness protection trafficking visa. Between them, those visas have been designed to facilitate the prosecution of traffickers.

I heard some of the evidence earlier and there is no doubt there is a strong belief in government that, if you are really going to be effective against traffickers, you must get prosecutions. So you need systems that work together, at least at one level, which are going to assist in the prosecution. It does not mean other parts of the package do not assist and support repatriation while they are back in the country. Certainly in our discussions with the AFP—and I will hand it over to the AFP—I think we have concluded, particularly with the protocols that were put in place around these visas, that they have facilitated and assisted the prosecution process.

CHAIR—Just before you do hand over, Mr McMahon, what about the evidence we have received today about the perception of conditionality, if you like, of the provision of visas and support to a positive result in the prosecution process?

Mr McMahon—Can I first of all say that the visa system is indifferent to the success of the prosecution. It does require assistance in respect of the investigation and possibly in respect of the prosecution. 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. But, in the end, as to whether or not that link results in a legal deficiency is really outside my purview. I think that will be tested in the courts.

CHAIR—Certainly. Does the department have any role in determining or even assessing the nature of the situation into which a trafficked person may be being returned in terms of the country of receipt and that individual's treatment once their visa status here expires and they are required to leave Australia?

Mr McMahon—No, we do not. The AFP will make an assessment, if a person has assisted in an investigation, as to whether or not that person may be subject to threat. In essence, what we have tried to do is work at both ends of the system. One of them is the prosecution end in Australia; the other is to try to work with authorities in other countries. If you look at the statistics on those we find working illegally in the industry, you will find that they are predominantly Thai women. Consequently, we have developed quite extensive links with Thai authorities, including the posting of our only person offshore who is dedicated to sex-trafficking issues. AusAID of course has made some expenditure on it. I noticed that DFAT is not represented here—

CHAIR—No room at the table!

Mr McMahon—but AusAID does have some programs in place. The AFP work extensively in Thailand on the return of women. Of course, sometimes it is difficult because for many of the women—and this applied before the legislation and still applies—even if they are trafficked, their primary concern is to continue earning income, and therefore they may be quite uncooperative with us. That has always been a problem. Certainly, a lot of the arrangements which have been put in place, including the use of NGOs, have been to allow them to make some level of informed decision about whether or not they will assist with the prosecution.

CHAIR—Do the AFP wish to make any additional comments?

Federal Agent Edwards—There were a number of questions that DIMIA answered then but suffice to say that, since the introduction of the package and the visas, the result certainly is reflected in the number of arrests and prosecutions we have had subsequent to that, which I think gives relevance to the direction we are taking.

Federal Agent Hill—There is an important point to make on the repatriation side of things. We have had 12 women repatriated to Thailand. One of those girls, when originally presented to the AFP, did not want to assist. As a result of that repatriation, she went back to Thailand, was looked after by the relevant government department over there and the AFP, and she then came forward again. As result of her testimony, we have now locked up a couple of principals in Australia and five syndicate members in Thailand. That is indicative of the system working. Cases like that showcase the fact that the holistic approach we are taking is very successful.

CHAIR—Thank you, Agent Hill.

Senator LUDWIG—I will put the rest of my questions on notice.

CHAIR—We have a number of questions that will need to be answered on notice, both because of the constraints on our time here today and because of a number of issues raised during the hearing this morning that we have not had a chance to get to. You will be aware that there is a keenness for this to be returned to the Senate that is matched by the reporting date that the committee was given of 7 March. We are therefore keen for all assistance in helping us answer those questions and draft our report. If I could encourage you to assist us in that process, as you always do, that would be very helpful. I thank all of the officers. It has been useful having the three agencies at the table. We do appreciate that. I thank all the other witnesses who have appeared today. If there is any information you think you need to bring to the committee's attention, including other matters raised during the hearing that were not addressed in this discussion, please do.

Committee adjourned at 12.41 p.m.