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Castan Centre for Human Rights Law

Submission on the Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012

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Introduction

We thank you for the opportunity to comment upon this important piece of legislation.

As a party to the 2000 *United Nations Convention against Transnational Organised Crime* ('*CTOC*'), Australia has an obligation under international law to implement fully the definition of trafficking in persons in the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (2000) ('*Trafficking Protocol*'). Article 5 of the *Trafficking Protocol* requires the criminalisation of trafficking in persons as per the definition in Article 3 of the *Trafficking Protocol*. This requirement extends to criminalisation of both transnational and domestic trafficking in persons.

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Summary of the Bill

The current Bill amends the current **Division 270** of the Criminal Code, and creates some new offences under a new heading: **Slavery and slavery-like conditions**. It also makes some changes to the existing **Division 271** of the Criminal Code, which is headed **Trafficking in Persons and debt bondage**.

Division 270 creates new offences in relation to servitude (s270.5); forced labour (s270.6A); deceptive recruiting (s270.7); and forced marriage (s270.7B).

The legislation clarifies many elements of these offences: it provides definitions of servitude (s270.4); forced labour (s270.6); deceptive recruiting (s270.7(c)); and forced marriage (s270.7A). It provides guidance on the nature of the relevant evidence for these offences (s270.10) and clarifies that there is no defence of victim consent or acquiescence (s270.11).

It also creates new offences in **Division 271** in relation to organ trafficking (Sub-division BA) and harbouring a victim (Sub-division BB); and expands the offence of debt bondage (s271.9).

We will not comment upon the organ trafficking offences.

Executive Summary:

The positive features of this Bill are that it:

- Recognises that exploitation occurs in the provision of both labour and other services, including sexual services;
- Extends the application of these offences to persons who conduct a business connected with the exploitation;
- Extends the application of the existing offences of deceptive recruiting and sexual servitude so that they apply to all forms of deceptive recruiting and non-sexual servitude;
- Fully implements the definition in Article 3 of the *Trafficking Protocol* for the offences of deceptive recruiting;
- Introduces new offences of organ trafficking;
- Recognises that exploitation includes harbouring a victim, in accordance with the definition in Article 3 of the *Trafficking Protocol*;
- Recognises new forms of trafficking such as 'forced marriage'; and
- Clarifies that exploitative conduct is criminalised by the offences, including psychological oppression and the abuse of power or taking advantage of a person's vulnerability (s270.1A (d)-(f)).

Our **conclusions** are that the Bill has the following problems:

- There continues to be incomplete and inconsistent implementation of the *Trafficking Protocol* definition in the Criminal Code;
- There is unnecessary privileging of concepts of 'slavery' and 'forced labour' which are subsets of trafficking as provided in the *United Nations Convention against Transnational Organised Crime* and the *Trafficking Protocol* definition;
- There is inconsistent application of aspects of the *Trafficking Protocol* definition in the Criminal Code and narrowing of the concept of 'exploitation' in that definition;
- There is introduction of a narrow concept of 'forced marriage' that does not fit with evidence of the nature of the problem; and
- The scope of anti-trafficking measures is narrowed by prescriptive definitions.

Our overall **recommendation** is that:

- Full consideration should be given to Australia's international obligations under the *United Nations Convention against Transnational Organised Crime* and the *Trafficking Protocol*.

This means that the *acts* of trafficking need to described; and the legislation needs to focus on intention to exploit.

Consideration should also be given to extending the jurisdictional reach of this crime to fully capture the transnational character of trafficking in persons.

Specifically, a broader term than 'sexual services' should be employed in the Bill. The term used in the *Trafficking Protocol*, namely 'sexual exploitation' captures a broader range of exploitive behaviours.

Consideration should be given to elaborating upon the meaning of 'forced marriage' to better capture the exploitation which occurs as a result of 'marriage migration'.

Background:

The nature of trafficking and the Trafficking Protocol definition

An agreed definition and concept for trafficking in persons is central to an adequate response to the issue. The nature of trafficking is encapsulated in the *Trafficking Protocol* definition. It is a process which mostly involves a number of people. Most of the persons trafficked into Australia are from the Asia-Pacific region.[1]

The evidence suggests that trafficking from the region takes place through the actions of a chain of persons. For example in *AZ (Trafficked women) Thailand* CG [2010] UKUT 118 (IAC) there was evidence that the women were tricked into travelling overseas to work by a 'friend'; that they were 'escorted' through immigration in their country of origin, and forced to work in the sex industry at destination. Similar scenarios apply for women and men trafficked into Australia (see McSherry, B.M**.** and Kneebone, S.Y., 'Trafficking in Women and Forced Migration: Moving Victims Across the Border of Crime into the Domain of Human Rights' (2008) 12 *International Journal of Human Rights* (No. 2) 67-87). Likewise, in the context trafficking for labour exploitation into this country, the evidence suggests that a chain of persons is involved. For example, for people trafficked under the 457 visa scheme, the chain includes recruiters in country of origin, and sponsors and employers in Australia (*Fryer v Yoga Tandoori House* [2008] FMCA 288).

[1] Jacqueline Joudo Larsen and Lauren Renshaw 'People Trafficking in Australia, Trends & issues in Crime and Criminal Justice' *Australian Institute of Criminology,* June 2012; see also United States Department of State (*2012) Trafficking in Persons Report - Australia*, 19 June 2012, available at: http://www.unhcr.org/refworld/docid/4fe30ce6c.html [accessed 30 July 2012].

We are concerned that the provisions of the Australian Criminal Code do not capture sufficiently the essence of trafficking or criminalise on the basis of the experience of trafficked persons. Moreover, the Code does not fully criminalise transnational trafficking. That is, it does not fully implement Australia's obligations under the *United Nations Convention against Transnational Organised Crime*.

Article 3(a) of the *Trafficking Protocol* sets out the elements of trafficking as requiring an *act*, *means* and *purpose*. The end purpose is exploitation (for which intention to exploit the person is required – discussed below).[2] Exploitation is defined to include, 'at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs'. This is an inclusive definition which can be used to incorporate new forms of trafficking in persons.

All three elements are separate but are interlinked, and ***all must be present*** for 'trafficking in persons' to occur within the meaning of the *Trafficking Protocol* definition. See *Responses to Human Trafficking* pp 105-114.

Do the new offences in Division 270 incorporate all 3 elements of the *Trafficking Protocol*?

Response: No; the *acts* of trafficking are not described, and moreover the purpose of trafficking is not prescribed.

No reference to acts of trafficking

There is a common pattern for the offences, namely: servitude (s270.5); forced labour (s270.6A); and forced marriage (s270.7B). They occur where there is relevant 'conduct' which *causes* a person to be in the position (or 'condition') of servitude, forced labour or in a forced marriage, where a person has engaged in 'conduct' which 'causes' another person (the 'victim') to enter into that state. That is the *acts* of trafficking are not described, although separate offences of ***deceptive recruiting*** (s270.7) (discussed below) and harbouring a victim (Sub-division BB) of **Division 271** are created.

Rather the emphasis of the offences is on the *means* or conduct which causes a person to be in the relevant position. All offences occur where there is 'coercion, threat or deception'. 'Coercion' is defined in **s270.1A** to include: force, duress, psychological oppression and 'the abuse of power' or 'taking advantage of a person's vulnerability' (s270.1A (a) (b) (d)-(f)). 'Coercion' also includes 'detention '(s270.1A (c)).

'Threat' includes 'threat of coercion' and can include:

> (b) a threat to cause a person's deportation or removal from Australia; or
>
> (c) a threat of any other detrimental action, unless there are reasonable grounds for the threat of that action in connection with the provision of labour or services by a person.

[2] UNODC, Anti-Human Trafficking Manual for Criminal Justice Practitioner (2009), Module 1, pp 5-6, available at: http://www.ungift.org/doc/knowledgehub/catalogue/AHT-Manual-for-CJP-all.pdf.

The Note to 270.1A explains '***Threat*** includes a threat made by any conduct, whether express or implied and whether conditional or unconditional ...'. Importantly s270.4(2) (the servitude offence) and s270.6(2) (the forced labour offence) include situations where 'coercion, threat or deception' is used against both the 'victim or another person'. This is important as threats to harm family members in the country of origin are frequently employed as a technique to retain control over a trafficked person at destination. Moreover recruitment in country of origin may be formal (through a legally licensed agency) or informal (unlicensed agency or other person). However these threats are often made by persons in the country of origin who facilitated the movement of the 'victim'.

In comparison to the *Trafficking Protocol* there is no reference to abduction, or fraud as a relevant *means.* However as the focus of **Division 271** is still on movement of persons (see below), this omission is not significant.

The causal link: the intention to exploit?

The proposed amendments elaborate upon how the causal link between the conduct and the position or relevant 'condition') is established. Section **270.10** elaborates upon the nature of the relevant evidence to establish coercion, threat or deception under Division 270. Importantly this provision is replicated in **s271.11A** for **Division 271**. Section **270.10(2)** states:

(2) The following matters are covered by this subsection:
(a) the economic relationship between the alleged victim and the alleged offender;
(b) the terms of any written or oral contract or agreement between the alleged victim and the alleged offender;
(c) the personal circumstances of the alleged victim, including but not limited to:
(i) whether he or she is entitled to be in Australia under the *Migration Act 1958*; and
(ii) his or her ability to speak, write and understand English or another language; and
(iii) the extent of his or her social and physical dependence on the alleged offender.

There are several points to note about this provision:

- It assumes a direct causal relationship between the 'alleged victim and the alleged offender'. In practice, as stated above a number of persons are involved in facilitating the movement \ recruitment of a person into a trafficking situation.

- However, in some respects this provision appears to codify the essence of the trafficking definition, which focuses upon the means employed to prove **intention to exploit** a vulnerable person (see *Responses to Human Trafficking* pp109-114). Whilst this provision usefully describes some circumstances of vulnerability, including a 'victim's' immigration status and lack of language skills, it is limited in one respect. It focuses upon the 'victim's' vulnerability rather than the intention to exploit. By contrast the UNODC Model Trafficking Law suggests that the focus should be on the state of mind of the perpetrator rather than the victim (*Responses to Human Trafficking* p111). Although s270.11 clarifies that the 'victim's' consent to the prohibited conduct is irrelevant, this provision does not focus upon the intention to exploit (see *Responses to Human Trafficking* p114-116).

- Further the fact that a separate offence of ***debt bondage*** is contained in Division 271 and not Division 270 results in this 'means' being omitted from Division 270. In practice, this is a very common way in which control over victims is retained both in country of origin and at destination. Although the practice may be covered by 'coercion, threat or deception', the failure to include it specifically in Division 270 is concerning. Our research in the GMS indicated that a specific reference to debt bondage is included in implementing legislation in many countries in the region (*Responses to Human Trafficking* p 116; Table 4.1, pp162-176)

- By contrast to the current Bill, the *Anti-Trafficking in Persons Act*, BE 2551 (2008)[3] of the Royal Thai Government simply defines the 'means' to include:

  threat or use of force, abduction, fraud, deception, abuse of power, or of the giving of money or benefits to achieve consent of a person, having control over another person in allowing the offender to exploit the person under his control ***for the purpose of exploitation***.[4]

  Although s270.8 creates aggravated offences for Division 270 when there is 'reckless' behaviour s270.8(1)(c)(ii) this is not the same *mens rea* as *intentional* conduct.

- Moreover the new offence of **deceptive recruiting (s270.7)** refers to the 'conduct' of a 'recruiter' who 'engages in the conduct with the *intention* of inducing another person (the *victim*) to enter into an engagement to provide labour or services', which causes that person to be deceived. Thus it captures the three elements of the *Trafficking Protocol* definition, namely: *act*, *means* and *purpose*.

  It defines what the purpose is in terms of the end purpose exploitation (s270.7(c)), namely: the extent to which the victim will be free to leave the place or area where the victim provides the labour or services, or his \ her 'place of residence'; or the extent and terms of any debt; or the fact that the engagement will involve exploitation, or the confiscation of the victim's travel or identity documents (s270.7(c)(v)). Finally s270.7(c)(vi) contains a provision elaborating upon what amounts to exploitative 'sexual services' (see below - **The meaning of exploitation**). See also comment below re extra-territorial application. Who is the 'recruiter'? In practice there is a chain of persons who 'recruit'.

Thus it seems that the proposed offences of servitude (s270.5); forced labour (s270.6A); and forced marriage (s270.7B), which come within the meaning of 'exploitation' the *Trafficking Protocol* are conceptualised partly as instances of trafficking, but do not fully comply with

[3] *The Anti-Trafficking in Persons Act 2008* (Kingdom of Thailand) BE 2551 30 January 2008, [Pravit Roykaew, Office of the Attorney General trans. < http://www.no-trafficking.org/content/Laws_Agreement/laws_agreement_pdf/trafficking_in_persons_act_b.e%202551%20(eng.).pdf>].

[4] Ibid, s 6(1). See also the Belgian *Penal Code art 433*, which defines exploitation as '*the intent to put somebody to work or permitting the person to be put into work where conditions are contrary to human dignity'.*

the *Trafficking Protocol* definition. The language of the *Trafficking Protocol* (ie 'victims') is employed but the definition is not fully implemented.

Within Division 270 (as in the whole Criminal Code) there is inconsistent implementation of the *Trafficking Protocol* definition.

The meaning of exploitation and implementation in the Criminal Code

As is explained in *Responses to Human Trafficking* pp 114 -116 'exploitation' is the mental component or '*mens rea*' of the offence of trafficking,[5] namely that the actions were done with the intention of exploiting the individual. As Gallagher notes, it is sufficient that conduct was engaged in with the intention to exploit the person in one of the enumerated ways.[6]

Fundamentally, the definition is triggered by the fact that, at the destination, it becomes clear that the victim has been deceived and is being exploited. Gallagher says:

> *in the case of adult victims, establishing a situation of trafficking under the terms of the Trafficking Protocol requires more than an act and an intended purpose; the "action" intended to lead to exploitation must have been made possible through the use of a specified means such as coercion, deception, or the abuse of authority.* [7]

That is, ***the definition focuses on processes rather than outcomes***, upon actions rather than actual exploitation. However, with the exception of the new deceptive recruiting offence (s270.7), ***Division 270 of the Criminal Code focuses upon outcomes rather than processes***.

In practice exploitation encompasses both bringing a person into an exploitative situation and maintaining the exploitation.[8] Thus the new offence of Harbouring a victim (Sub-division BB) which applies to both Division 270 and Division 271 offences (s271.7F(1)) would be unnecessary if Article 3 of the *Trafficking Protocol* definition were implemented in its entirety into Australian law. It should be noted that the acts referred to in Article 3 of the definition include both 'harbouring' and 'receipt of a person', but the latter is not included in the Bill.

The meaning of exploitation: sexual services

Exploitation is defined in Article 3 of the *Trafficking Protocol* to include, 'at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs'.

We submit that the proposed offences in Division 270 cover a narrower range of circumstances than those covered by the *Trafficking Protocol* definition. In essence Division 270 turns the Article 3 definition on its head by focusing upon *some* of the exploitative 'conditions' which are examples of, or a subset of trafficking. Whilst slavery and forced

[5] Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, 2010), 34.
[6] Ibid.
[7] Anne T Gallagher, 'Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway' (2009) 49(4) *Virginia Journal of International Law* 789, 814.
[8] Gallagher (2010), above 47.

labour are well known examples of exploitation which are already prohibited under international law (*Responses to Human Trafficking* pp119-120 and pp121-124), this Bill elevates them to central position and in so doing misses other and new forms of exploitation.

For example whilst the servitude and forced labour offences in the Bill now focus on 'forced labour or services', the proposed deceptive recruiting offence refers additionally to 'sexual services' (see proposed s270.7(c)(vi)), which is consistent with the existing trafficking offences in the Criminal Code (see ss271.2(2), (2A), (2B) and (2C)). However, we submit that this concept of 'sexual services' is narrower than the scope of 'exploitation' under the *Trafficking Protocol* definition, which refers to the 'exploitation of the prostitution of others or other forms of sexual exploitation' (*Responses to Human Trafficking* pp117-118).

The term 'service' is not defined in the Bill as a separate concept. However, the Criminal Code defines 'sexual service' as: 'the commercial use or display of the body of the person providing the service for the sexual gratification of others' (see the dictionary). This Bill omits the term 'commercial'. But as we suggest below, the Bill seems to contemplate that the context of the proposed deceptive recruiting offence is the sex industry. Exploitation under the scope of 'sexual services' is thus much narrower than the 'exploitation' under the *Trafficking Protocol* definition.

Whilst we understand that in Australia there are different regulatory responses to prostitution and that this is a contentious issue, the omission of 'other forms of sexual exploitation' as an example of 'exploitation' is a concern. As we explain in *Responses to Human Trafficking* pp117-118, this phrase was probably intended to cover a range of exploitive sexual practices, which often occur against women and children in tandem with exploitation, in contexts other than the sex industry. The sole example which is provided in s270.7(c)(vi) of the Bill (namely 'unprotected sex') suggests that the focus of this provision of the Bill is solely the protection of sex workers.

This example is an indication of how the meaning of 'exploitation' in the *Trafficking Protocol* definition has been narrowed by the Bill.

The meaning of exploitation: forced marriage

A second example of the narrowing of the meaning of 'exploitation' and the consequences of not implementing the *Trafficking Protocol* definition is the definition of 'forced marriage' in proposed s270.7A. This is circumscribed to situations where there is 'coercion, threat or deception' to *enter into* the marriage.

However, the extensive literature and evidence of exploitative marriage arrangements indicates that most women enter into such arrangements willingly only *subsequently* to find that they have been duped or misled either as to the character or qualities of their husband, the nature of the marriage relationship, or the true nature of the duties that will be expected of them. The concept of 'forced marriage' covers a spectrum of circumstances, as does the concept of trafficking in persons, between outright coercion and voluntary action. Moreover there is a blurring of the distinction between labour and sexual exploitation

This provision is another example of the failure of the drafters of this Bill to fully incorporate the concept of trafficking as per the *Trafficking Protocol* definition, which as stated above involves a process, and intention to exploit. It is another example of the misunderstandings that arise because Article 3 of the *Trafficking Protocol* definition is not implemented in its entirety into Australian law.

Other general comments

Sections 271.4 and 271.7 of the Criminal Code dealing with 'Child Trafficking' implement the *Trafficking Protocol* definition. We believe the drafters of this Bill could have considered a similar approach in drafting the other sections.

Pursuant to s 271.9 of the Bill aggravated debt bondage refers to, inter alia, subjecting a person to '*cruel, inhuman and degrading treatment*', or conduct that gives rise to *danger of death or serious harm*. Identical phrases/terminology are used in other provisions (s270.8, and s271.7C). We are concerned that while the later offences carry up to20 and 25 years of imprisonment respectively, the maximum penalty for aggravated debt bondage (s271.9) is only 7 years.

In terms of slavery like offences (s270.9) and trafficking that involve a transnational element (s271.10) of the Criminal Code refers to Category B Jurisdiction. This Bill adopts the same approach. As the application of Category B is limited to Australian citizens and permanent residents, we are concerned that those who organise/facilitate the trafficking of other into Australia are not subject to Australian jurisdiction.

Conclusion

It has previously been pointed out that Division 271 places too much emphasis on movement into sexual servicing, and that is has an anti- migration rather than anti-trafficking focus.[9] We submit that the current Bill has also turned its back on the anti-trafficking framework; and that it over emphasises historical (albeit fundamental) concepts of slavery and forced labour and similar situations involving such 'conditions', at the expense of capturing the whole picture of trafficking. Whilst it has many positive elements, it also has many flaws as a result of incomplete and inconsistent implementation of the *Trafficking Protocol* definition.

[9] Bernadette McSherry 'Trafficking in Persons: A Critical Analysis of the New Criminal Code Offences' (2006-2007)18 *Current Issues in Criminal Justice, 385,* 387.