



## **Submission to Senate Standing Committee on Legal and Constitutional Affairs**

### **Inquiry into the Crimes Legislation Amendment (Slavery, Slave-like Conditions and People Trafficking) Bill 2012**

#### **Introduction**

The International Commission of Jurists (ICJ), based in Geneva is a non-governmental organisation committed to the primacy, coherence, implementation of international law and principles that advance human rights.

The ICJ was founded in Berlin in 1952. In carrying out its work, the ICJ benefits from a network of autonomous national sections and affiliated organisations located in all continents and in Australia has State Branches of the Australian Section, the Western Australian Branch being one of those.

What distinguishes the ICJ is its impartial, objective and authoritative legal approach to the protection and promotion of human rights through the rule of law.

#### **Comments on the Bill**

The Bill proposes to broaden the definition of exploitation under the Criminal Code to include all slavery-like practices. It adopts definitions from the Criminal Code and includes a new definition of 'servitude' within the Act and three new offences related to servitude, that mirror the definitions of forced labour, with forced labour offences being alternative verdicts to the servitude offences.

The ICJ(WA) makes the following comments on the Bills' use of the following terms in an endeavour to improve the effectiveness of the proposed legislation:

- (a) "threat";
- (b) "servitude";
- (c) "forced marriage"; and
- (d) "forced labour".

#### **THREAT**

At section 270.1A at paragraph (c) the Bill includes in the definition of "threat"

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

The Explanatory Memorandum suggests that the fact

that reasonable grounds for the threat of any other detrimental action must be in connection with the provision of labour or services by a person... will ensure that a

legitimate threat—for example a threat of an employer to terminate employment due to sustained underperformance—would not amount to a threat for the purposes of Division 270 of the Criminal Code

It is not at all clear that the attachment of the concept of ‘reasonableness’ to the threat gives it a quality of ‘legitimacy’ or renders it a threat which ought not to be unlawful within the terms of the legislation. ‘Reasonableness’ is far too broad a concept to achieve that result. A threat is reasonable, in the ordinary sense of the word, if there is a reason for it. It could be reasonable in the sense that the reason for the threat is that the employer wants to make more money from the employee by making it a condition of the employee’s employment that the employee engage in the provision of sexual services which endanger the health of the employee.

A more appropriate form of that sub-paragraph of the definition would be –

a threat of any other detrimental action, unless there the threat of that action is in connection with the provision of labour or services by a person and is a threat which may ordinarily be made to any person in the course of employment, such as a threat to dismiss the employee for failure to perform the employee’s duty

## **SERVITUDE**

The proposed definition of servitude at section 270.4 is the proposed definition of forced labour with an additional requirement that *'the victim is significantly deprived of personal freedom in respect of aspects of their life other than the provision of the labour or the services.'*

At a recent presentation organised by the YLC’s Human Rights and Social Justice working group, a representative of the Australian Federal Police noted that where the provision of labour services in Australia do not fall within the criminal offences of slavery or trafficking the AFP will refer the matter to the Fair Work Ombudsman who has the power to investigate issues including basic workplace rights such as underpayment or non-payment of wages and entitlements and unlawful workplace discrimination.

The Fair Work Act and National Employment Standards (FWA and NES respectively) contain minimum entitlements for all employees in the Australian federal workplace system. If it is not uncommon for the AFP to refer cases to FWA, consideration should be given to the consistency between the proposed definitions of forced labour and servitude by comparison to minimum acceptable standards and conditions of employment under the FWA and NES.

The ordinary meaning of the phrase *'deprived of personal freedom'* is specific to the concept of slavery and does not provide further insight into the threshold that the Bill is proposing to set. It is further noted that there is no measure as to what constitutes being *'significantly deprived'*.

A supplementary list of examples of considerations for determining what types of actions/behavior are significant may assist in providing clarity. Further, a second schedule/list should also specify non-exclusive examples of what types of deprivation fall into the category of being *'in respect of aspects of their life other than the provision of the labour or the services'*. For instance does the control of finances and accounts amount to a prohibited deprivation? If so is there a certain monetary threshold.

There is a need to achieve consistency between the definition and application of servitude/forced labour provisions as proposed under the amendments and the current minimum employment

standards in Australia. Specifically, consideration should be given as to whether a failure to observe an employment entitlement is sufficient to make out deprivation of a personal freedom. Moreover, consideration should be given to the practical difficulties of determining which jurisdiction an action should be pursued in for forced labour or servitude. If the AFP is already 'blurring the lines' by referring some cases to FWA's Ombudsman, how should a prospective applicant approach the matter of which avenue to use to enforce their rights should the proposed amendments be approved and enacted.

## **FORCED MARRIAGE**

Section 270.7A of the proposed Bill provides that a marriage is a 'forced marriage' if 'because of the use of coercion, threat or deception, one party to the marriage (the victim) entered into the marriage without freely and fully consenting'.

The attempt to criminalise Forced Marriage, which is regarded as a 'practice similar to slavery' in the *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery* (1956)<sup>i</sup> and to provide a separate penalty for an aggravated offence as defined in section 270.8 of the proposed Bill is commendable because it is not only consistent with Australia's obligations under international law, but also because it strongly reinforces the notion that in Australia marriage is between consenting adults.

It is noted that in the Australian Government's Discussion Paper on Forced and Servile Marriage the two terms are used interchangeably although in the proposed legislation primacy is given to forced marriage and the absence of consent to marriage rather than the situation as described in the Introduction to the Discussion Paper where servile marriage is described as 'a practice similar to slavery' where a person is considered 'a 'chattel' who can be sold, transferred or inherited into marriage.'<sup>ii</sup> Servile marriage appears to have a strong ownership component that may not be as evident in forced marriage. Consideration could be given to a clear distinction between forced marriage and servile marriage which *prima facie* appears to be inherently 'cruel, inhuman or degrading' as per section 270.8 Slavery-like offences – aggravated offences.

Any attempt to criminalise forced marriage must be sensitive to Australia's increased ethnic, cultural and religious diversity along with the diversity of 'marriage like' relationships in Australia.<sup>iii</sup> Legislative change to criminalise forced marriage should be accompanied by a holistic outreach program designed to inform and engage with people from ethnically, culturally and linguistically diverse backgrounds. Essentially this should be designed to ensure that such communities have an appreciation of the basic intent and provisions of the new legislation and, that community based grassroots initiatives accompany legislative change in order to support and educate victims and potential victims of forced marriage and also facilitate attitudinal and behavioural change among ethnically and culturally diverse communities in Australia where forced marriage and servile marriage may currently be condoned.<sup>iv</sup> Such outreach programs should also promote an awareness of the potential interface between forced marriage, servile marriage and domestic violence.

## FORCED LABOUR

Forced labour is defined in section 270.6 as 'the condition of a person (the victim) who provides labour services if, because of the use of coercion, threat or deception, a reasonable person in the position of the victim would not consider himself or herself to be free:

- (a) to cease providing the labour or services; or
- (b) to leave the place or area where the victim provides the labour or services.

The inclusion of coercion as defined in section 270.1A is welcomed along with the provision in section 270.6 (2) that: 'Subsection (1) applies whether the coercion, threat or deception is used against the victim or another person' and provision in section 270.6 (3) that recognises that a condition of forced labour is not dependent on the potential for escape from the condition.

However, there is some concern as to how the proposed objective 'reasonable person' test will be interpreted and applied and specifically what characteristics 'a reasonable person in the position of the victim' would require to satisfy this test.

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Chair

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<sup>i</sup> *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery* (1956) <http://www2.ohchr.org/english/law/slavetrade.htm>

<sup>ii</sup> Australian Government, Attorney General's Department, Discussion Paper 'Forced and Servile Marriage' <http://www.ag.gov.au>, p.3

<sup>iii</sup> See Women's Legal Services NSW, Submission to Australian Attorney-General's Department on forced marriages aspect of the Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill (23 January 2012), <http://www.womenslegalnsw.asn.au/downloads/law-reform/2012WLSNSW-AGD-Slavery-likeConditionsBill>, pp 1-3.

<sup>iv</sup> See also Australian Immigrant and Refugee Women [AIRWA] submission on forced and servile marriage <http://www.fecca.org.au> 25 February 2011