

Submission

on the

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

to the

Senate Legal and Constitutional Affairs Committee

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by

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1. Introduction

On 19 June 2012 the Senate referred the *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012* to the Senate Legal and Constitutional Affairs Committee for inquiry and report.

The Bill amends the *Criminal Code Act 1995* (Criminal Code), the *Crimes Act 1914*, the *Migration Act 1958*, the *Proceeds of Crime Act 2002* and the *Telecommunications (Interception and Access) Act 1979* to:

- establish new offences in the Criminal Code of forced labour, forced marriage, organ trafficking, and harbouring a victim;
- seek to ensure that the slavery offence applies to conduct which renders a person a slave, as well as conduct involving a person who is already a slave;
- extend the application of the existing offences of deceptive recruiting and sexual servitude so they apply to non-sexual servitude and all forms of deceptive recruiting;
- increase the penalties applicable to the existing debt bondage offences, to ensure they are in line with the serious nature of the offences;
- broaden the definition of exploitation under the Criminal Code to include all slavery-like practices;
- amend the existing definitions to ensure the broadest range of exploitative conduct is criminalised by the offences, including psychological oppression and the abuse of power or taking advantage of a person's vulnerability, and
- increase the availability of reparations to victims.

Submissions from the public have been invited and are due to be received by 31 July 2012. The Committee is due to report by 13 September 2012.

2. Forced marriage

2.1 Free consent is an essential element of marriage

In 2004 a statutory definition of marriage was incorporated in the *Marriage Act 1961*, primarily in response to concerns that a court may have unilaterally interpreted the common law definition of marriage in a revisionist sense to include the possibility of same-sex marriage.

However, there is a general benefit in having set out clearly in the *Marriage Act 1961* each of the elements that make up the substance of marriage as understood by law in Australia.

Section 5 of the *Marriage Act 1961* provides that marriage means:

the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.

The term “*voluntarily entered into*” refers back to the man and the woman who are entering into a marriage. To enter into marriage “*voluntarily*” excludes all compulsion and requires that the man and the woman each be acting of his or her own accord and by free choice.

This does not preclude “arranged marriages” where the family or other parties play a significant role in selecting or proposing a prospective spouse provided there is, in the last analysis, the clear right for both the man and the woman to consent or to withhold consent to the marriage.

Sections 23(1)(d) and 23B(1)(d) of the *Marriage Act 1961* appropriately provide that “*A marriage is void where the consent of either of the parties is not a real consent because it was obtained by duress or fraud*”.

Section 88D(2)(d) provides rightly that a marriage solemnized in a foreign country is not recognised as valid in Australia if “*the consent of either of the parties was not a real consent for a reason set out in subparagraph 23B(1)(d)(i), (ii) or (iii)*.”

Section 100 of the *Marriage Act 1961* makes it an offence for a person to solemnize or purport to solemnize a marriage, if the person has reason to believe that there is a legal impediment to the marriage or if the person has reason to believe the marriage would be void. This would apply if the person had reason to believe that the valid consent of one party to the purported marriage was lacking.

2.2 New forced marriage offences

The Bill would introduce new offences relating to “forced marriage” into the Commonwealth *Criminal Code*. Proposed new subsection 270.7A(1) would define a “forced marriage” as a marriage where:

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.

Definitions of *coercion* and *threat* would be added to the *Code* by proposed new section 270.1A. The definition of *deceive* and *deception* from section 271.1 of the *Code* would apply.

Taken together these three terms seem to comprehensively cover the means by which a person may be forced into a marriage.

Proposed subsection 270.7A (3) would provide that “*subsection (1) applies whether the coercion, threat or deception is used against the victim or another person*”. This covers the situation where a threat of harm may be made against a person’s family member rather than the person directly.

The offence would apply to any person who engages in conduct that “*causes another person to enter into a forced marriage as the victim of the marriage*”. It would also apply to a person who is a party to a forced marriage if that person is not also a victim unless that person had a reasonable excuse.

These new offences attract a penalty of four years imprisonment for a simple offence and seven years for aggravated offences.

Aggravated offences are those offences in which:

the victim is under 18; the offender, in committing the offence, subjects the victim to cruel, inhuman or degrading treatment; or the offender, in committing the offence engages in conduct that gives rise to a danger of death or serious harm to the victim or another person and is reckless as to that danger.”

Recommendation 1:

The forced marriage offences are an appropriate addition to the Criminal Code and should be adopted.

2.3 Broadening and describing the offence – forced relationship

Proposed subsection 270.7A(2) would provide that, for the purpose of the offence of forced marriage, “marriage” includes marriages recognised under law in a foreign country (that may not be recognised under Australian law) and marriages that would be invalid or void due to defects, such as lack of consent or bigamy. This is appropriate given the purpose of the definition.

This subsection would also provide that “marriage” includes “registered relationships” under Section 2E of the *Acts Interpretation Act 1901* and similar relationships registered under the law of a foreign country.

While it is quite appropriate that the same offence provisions apply to forcing a person into a registered relationship as apply to forcing a person into marriage or it would be preferable not to incorrectly describe these relationships as a “marriage” albeit only for the purpose of this section.

Also the Bill makes no provision for the situation where a person is forced into a de facto relationship.

The terminology could usefully be changed from “forced marriage” to “forced relationship”. Subsection 270.7A(2) should be amended to read as a list of what is included in the term “relationship” for the purposes of subsection (1). The list should include “marriage” and “a de facto relationship within the meaning of section 2F of the *Acts Interpretation Act 1901*”.

This would make it clear to all offenders and to victims of all forced relationships that the offence applies to all these various circumstances.

Recommendation 2:

The offence should apply to the broader category of “forced relationships”, including both forced marriages and forced de facto relationships. The terminology should be changed to refer to the offence as “forced relationship” rather than “forced marriage”. The definition of “a relationship” for this purpose should include “a marriage” and “a de facto relationship within the meaning of section 2F of the Acts Interpretation Act 1901 as well as the other elements listed in subsection 270.7A(2).

3. Sexual servitude

3.1 Abolition of specific sexual servitude offences

The Bill proposes abolishing the specific offences related to sexual servitude currently contained in sections 270.4-270.0 of the Code.

The rationale for doing so is that:

Given the rise in the number of individuals identified as being exploited in industries other than the sex industry (for example, hospitality) it is necessary to recast this offence so that it covers the broadest possible range of exploitative conduct, regardless of the industry in which the exploitation occurs.¹

The new offences will be described as “servitude” and “forced labour”.

It is quite appropriate to introduce new offences to ensure that any form of servitude or forced labour is unlawful.

However, treating sexual servitude simply as a species of servitude or forced labour is problematic.

Despite an increase in trafficking for forced labour, according to the US State Department “Australia is primarily a destination country for women subjected to forced prostitution and to a lesser extent, women and men subjected to forced labor.”²

Sexual servitude is inherently different from other forms of servitude because it involves forced acts of sexual intimacy – the violation of a woman’s body, essentially repeated acts of rape. This is not the same as being forced to perform domestic labour or work in a sweat shop.

Criminal law generally treats rape and sexual assault as distinct crimes from other forms of assault.

The Commonwealth *Criminal Code* has separate crimes against humanity offences for “enslavement” (section 268.10) and “sexual slavery” (section 268.15) even though it applies the same penalty to the two offences.

It is important that the Commonwealth *Criminal Code* continues to contain explicit offences that appropriately penalise sexual servitude.

Forcing or coercing a person to provide sexual services should be considered a form of “cruel, inhuman or degrading treatment”. If considered in this light then sexual servitude would be an aggravated offence of servitude and subject, appropriately, to the higher penalty of 20 years imprisonment.

Recommendation 3:

The Bill’s proposal to abolish the specific sexual servitude offences and subsume them under general servitude and forced labour offences should not be supported.

Instead the proposed new section 270.8 should include a new subsection (1A) providing that “For the purpose of subsection (1)(b) if a victim is in a condition of servitude and that victim provides sexual services then the offender is held to subject the victim to cruel, inhuman or degrading treatment.” The effect of this amendment would be ensure that sexual servitude is treated as an aggravated offence of servitude and attracts the higher penalty of 20 years.

3.2 Demand for sexual services from those in sexual servitude

The US State Department notes that:

*Some women from Thailand, Malaysia, South Korea, China, and, to a lesser extent, India, Vietnam, Eastern Europe, and Africa migrate to Australia voluntarily intending to work legally or illegally in a number of sectors, including the sex trade. Subsequent to their arrival, however, some of these women are coerced into prostitution in both legal and illegal brothels. There were news reports that some Asian organized crime groups recruit Asian women to migrate to Australia, sometimes on student visas, and then subsequently coerce them into the sex trade. The women and girls are sometimes held in captivity, subjected to physical and sexual violence and intimidation, manipulated through illegal drugs, and obliged to pay off unexpected or inflated debts to their traffickers.*³

It is noteworthy that several of the prosecutions for sexual servitude offences have involved legal brothels.⁴

The *Age* has reported extensively on how

*Chinese organised crime syndicates are running multimillion-dollar prostitution rackets across Melbourne by bribing officials and exploiting abysmal regulation. The syndicates are linked to human trafficking and arrange for dozens of Asian women to travel from interstate and overseas - often on student visas - to work in brothels. In several instances, figures linked to the illegal prostitution syndicates - including Mulgrave woman Xue Di Yan - are also licensed by the Victorian government to run legal brothels.*⁵

The fact that prostitution is legal in parts of Australia is used by traffickers to help recruit women for sexual servitude. For example, a Korean pimp recently arrested has been reported to have used this approach:

*The broker lured the women, saying that they could work without risk, since prostitution is legal in Australia, and make big money. He introduced 25 women to brothels in Melbourne and Sydney since 2007.*⁶

The US State Department has drawn attention to the link between legalised prostitution and trafficking for sexual servitude since at least 1999:

*Trafficking in East Asian women for the sex trade is a growing problem. Immigration and federal police have developed profiles and identified trends in the industry, but lax laws – including legalized prostitution in parts of the country – make enforcement difficult at the working level.*⁷

The most recent State Department report notes that during 2011:

*The government did not take significant steps to reduce the demand for commercial sex acts.*⁸

One effective measure to reduce demand for commercial sex acts is to introduce penalties for clients who buy or attempt to buy a sexual service.

Penalties for clients are increasingly being introduced into prostitution law by jurisdictions impressed with the successful implementation of this approach in Sweden since 1999.

3.2.1 Sweden

On 1 January 1999, the Swedish Law that Prohibits the Purchase of Sexual Services (the Law) entered into force (*Law That Prohibits the Purchase of Sexual Services*, 1998:408).⁹

National President of FamilyVoice Australia, Dr David Phillips, and his wife Roslyn visited Sweden in 2004 and spoke to Tuve Skånberg, a member of the Swedish Riksdagen (parliament). Mr Skånberg said that Sweden's new prostitution laws which came into operation in 1999 have made a positive impact. Earlier laws against pimping, procuring and running brothels remain, and new laws against buying or attempting to buy sexual services have been added. He said there had not been many prosecutions for buying sex, because warnings were given at the first offence. The new laws have had a significant deterrent effect.

This view was reinforced recently by Patrik Cederlof, who is the Swedish coordinator for the prevention of prostitution and human trafficking. He spoke with Peter Abetz, a member of the WA Legislative Assembly, who recently visited Stockholm on a fact-finding tour.¹⁰ Mr Cederlof reported that Swedish police were aware of around 500 brothels operating in their country in 1999. He now

challenges opponents to show him a brothel – but they have not been able to do so. There is still some prostitution in Sweden, but it mainly involves women operating from apartments who advertise on the internet and provide a mobile phone number. Police track these women and encourage them to join exit support programs.

An official review of the first ten years of the operation of the Law found that:

- Street prostitution had halved in Sweden since the Law came into effect while remaining the same in neighbouring Nordic countries¹¹;
- While the overall incidence of prostitution, including prostitution where contact is made through the Internet, had increased in neighbouring Nordic countries, it had decreased, or at least not increased, in Sweden¹²;
- Trafficking in human beings for sexual servitude is less of a problem in Sweden than in neighbouring Nordic countries and the National Criminal Police consider that the ban on purchasing sexual services is a barrier to human traffickers and procurers establishing business in Sweden¹³; and
- The proportion of men in Sweden that purchase sexual services has decreased with a number of men reporting that the ban had deterred them from continuing to purchase sex.¹⁴

Overall the official report concluded that “*the ban on the purchase of sexual services has had the intended effect and is an important instrument in preventing and combating prostitution.*”¹⁵

3.2.2 Norway

On 1 January 2009 a new law came into effect in Norway making it an offence to purchase a sexual act. Observers already noted a visible decrease in the number of street prostitutes as the law came into effect.¹⁶

3.2.3 United Kingdom

The United Kingdom has introduced a new approach to prostitution law that specifically tackles demand by penalising the paying for sex with a person who is being controlled against their wishes for someone else’s gain.

This policy development followed a thorough investigation of the demand side of prostitution.

Tackling the demand for prostitution is an integral element of the Government’s Co-ordinated Prostitution Strategy and the UK Action Plan on Tackling Human Trafficking, and in January 2008, the Home Office launched a six month review to explore what further action could be taken by Government and statutory agencies to reduce demand.

The Review involved key stakeholders and practitioners, including the Police and the Crown Prosecution Service as well as organisations supporting individuals involved in prostitution. Work undertaken within the Review included an assessment of academic research on sex buyers, an audit of enforcement and prosecution practice in England and Wales to identify best practice, an independent evaluation of approaches to tackling demand in nine other countries, and Ministerial visits to Sweden and the Netherlands to learn more from the differing approaches taken in these countries.

The Review concluded that there was evidence to support the development of a new offence to criminalise those who are found to be paying for sex with a person who is being controlled against their wishes for someone else’s gain. The new offence should be a strict liability offence

*meaning that it will be irrelevant whether the sex buyer knew that the prostitute was controlled or not. This will help to achieve the goal of reducing the size of the 'sex market' by sending a clear message that those who pay for sex should consider the potential implications of their actions. Penalties for the new offence should be in line with other offences which target demand for prostitution. This would mean a non-custodial penalty, with a fine of up to £1000 (fine level 3).*¹⁷

The new offence was added as Section 53A of the *Sexual Offences Act 2003* by amending legislation passed in 2009.

3.2.4 France

In April 2011 a parliamentary commission report recommended the adoption of the Swedish approach of criminalising the purchase of sex.

In December 2011 the National Assembly voted unanimously by a show of hands a cross-party, non-binding resolution which is due to be followed by a bill.

The resolution said the country should seek "*a society without prostitution*" and that sex work "*should in no case be designated as a professional activity*".

It urged abolition at a time when "*prostitution seems to be becoming routine in Europe*".¹⁸

The foreshadowed legislation would introduce six-month prison sentences and fines of 3,000 euros for clients of prostitutes.¹⁹

3.2.5 New offence

It would be appropriate for the Commonwealth to introduce a new strict liability offence of purchasing a sexual act with a person who is being held in sexual servitude.

Recommendation 4:

The Bill should be amended to include a new offence of purchasing a sexual act with a person who is in sexual servitude.

4. Organ trafficking

Item 38 of Schedule 1 of the Bill would introduce new offences of organ trafficking into the Commonwealth *Criminal Code*.

The offences will relate to the trafficking of a person into or out of Australia (new section 271.7B) or within Australia (new section 271.7D).

The offence will be engaged when the removal of organs would be contrary to the law of the State or Territory where it is carried out. The offence would also apply when neither the victim nor the victim's guardian has consented to the removal and it would not meet a medical or therapeutic need of the victim.

The principle of altruism provides a solid foundation to organ donation for transplant and research in Australia. This principle excludes any commercial gain by a donor or their family from consenting to the use of organs or tissue for transplant or research.

The principle is rooted in a view of the human body as having an inherent dignity and value because it always the body of a human person. Laws against slavery, prostitution and the manufacture of pornography reflect, at least in part, this notion of the human body as ‘unavailable for sale’ even by the person whose body it is. In a society that abandons this view of the human body, poor women sell their bodies in prostitution, poor men sell a kidney and poor parents sell their children.

Organ and tissue donation for transplant or research is rightly seen as an act of human solidarity in which a person freely and without reward donates a part of their body for the good of another or, in the case of research, for humanity generally.

The new offences would apply to any attempt to pay for organs if the removal were to be carried out in Australia as this is against the law in every State and Territory.

However, the new offences do not seem to cover the circumstance where a person is taken out of Australia for the purpose of removing an organ in exchange for payment if the person consents to the removal.

His defect should be remedied by explicitly providing that it is an offence to traffick a person out of Australia for the purpose of organ removal in exchange for valuable consideration regardless of any consent by the person or the person’s guardian.

Recommendation 5:

The new offences relating to trafficking for organ removal should be supported. However, the Bill should be amended to provide that it is an offence to traffick a person out of Australia for the purpose of organ removal in exchange for valuable consideration regardless of any consent by the person or the person’s guardian.

5. Endnotes

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4. Louis Andrews, “Brothel madam sentenced to long prison spell for keeping sex worker as a slave”, *Canberra Times*, 24 May 2012: <http://www.canberratimes.com.au/act-news/brothel-madam-sentenced-to-long-prison-spell-for-keeping-sex-worker-as-a-slave-20120524-1z6dy.html> ; Rachel Olding, “Brothel owner charged over human trafficking”, *Sydney Morning Herald*, 3 February 2012: <http://www.smh.com.au/nsw/brothel-owner-charged-over-human-trafficking-20120202-1qvoo.html>
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 12. *Ibid.*, p 8.
 13. *Ibid.*, p 9.
 14. *Ibid.*, p 9.
 15. *Ibid.*, p 11.
 16. "Sex doesn't sell: Norway cracks down on prostitution", *ABC News*, 1 Jan 2009: <http://www.abc.net.au/news/stories/2009/01/01/2457808.htm>
 17. "Tackling The Demand For Prostitution: A Review", Home Office, London, 2008, p 3: <http://www.homeoffice.gov.uk/documents/tackling-demand?view=Binary>
 18. <http://www.assemblee-nationale.fr/13/propositions/pion3522.asp>
 19. "French move to ban prostitution by punishing clients", , 7 Dec 2011: <http://www.bbc.co.uk/news/world-europe-16047284>

