



27 February 2007

Dr Jacqueline Dewar
Committee Secretary
Parliamentary Joint Committee on the Australian Crime Commission
Parliament House
Canberra ACT 2600

BY EMAIL: acc.committee@aph.gov.au

Dear Dr Dewar

Inquiry into the future impact of serious and organised crime on Australian society

Thank you for your invitation to make a submission to this Inquiry.

The terms of reference of the Inquiry are very broad, making it difficult to anticipate all of the human rights issues that might arise from submissions to or recommendations of the Inquiry. If the Parliamentary Joint Committee on the Australian Crime Commission (the Joint Committee) could keep us apprised of submissions to it or recommendations by it, we would be pleased to consider and, if necessary, comment on any human rights implications arising.

The following submission is made under paragraph (d) of the terms of reference. It is based on HREOC's submissions to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Criminal Code (Trafficking in Persons Offences) Bill 2004 [2005] but is updated to reflect subsequent developments.

The transnational organised crime of trafficking in persons

1. Trafficking in persons is a transnational organised crime for the purposes of the United Nations Convention against Transnational Organised Crime (the Convention)¹ and the Trafficking Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organised Crime² (the Trafficking Protocol).
2. Australia signed the Convention on 13 December 2000 and the Trafficking Protocol on 11 December 2002. The Convention came into force on 29 October 2003 and the Trafficking Protocol entered into force on 25 December 2003.
3. Australia ratified the Convention on 27 May 2004 and the Trafficking Protocol on 14 September 2005. The *Criminal Code (Trafficking in Persons Offences) Act 2005* (Cth) was intended to ensure the compliance of Australian law with the Convention and the Trafficking Protocol in order to facilitate the ratification of those instruments.³ The Act was drafted in accordance with the recommendations of several Parliamentary⁴ committees.
4. The UN Office on Drugs and Crime has recently identified Australia as a ‘high destination’ country, mainly for people trafficked from South East Asia.⁵ There are, therefore, real and pressing reasons to ensure effective compliance with the Convention and the Trafficking Protocol.
5. HREOC is concerned that the *Criminal Code Act 1995* (Cth) (the Criminal Code), as amended by the *Criminal Code (Trafficking in Persons Offences) Act 2005*

¹ A/Res/55/25, 8 January 2001.

² G.A. Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/45/49 (Vol. I) (2001), *entered into force* Dec.25, 2003.

³ Senate Legal and Constitutional Legislation Committee: Criminal Code Amendment (Trafficking in Persons Offences) Bill 2004 [2005] (March 2005), p 1.

⁴ Joint Standing Committee on Treaties, Report No 59, Ch 5 Un Convention against Transnational Organized Crime (New York, 15 November 2000); Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the trafficking of women for sexual servitude* (June 2004); *Supplementary report to the inquiry into the trafficking of women for sexual servitude* (August 2005). Senate Legal and Constitutional Legislation Committee: Criminal Code Amendment (Trafficking in Persons Offences) Bill 2004 [2005] (March 2005).

⁵ UN Office on Drugs & Crime *Trafficking in Persons: Global Patterns* (April 2006), 20, 32.

(Cth), does not cause Australian law to comply with all aspects of the Convention and Trafficking Protocol.

The Senate Committee Inquiry into the Criminal Code (Trafficking in Persons Offences) Bill 2004 - Recommendations not implemented by Parliament

6. HREOC's submissions to the Senate Standing Committee on Legal and Constitutional Affairs (the Senate Committee) in its Inquiry into the Criminal Code (Trafficking in Persons Offences) Bill 2004⁶ were largely taken up in the Senate Committee's recommendations.⁷
7. Not all of the Senate Committee's recommendations were implemented by Parliament. In particular, the recommendation 8 in relation to servile marriage was not implemented.

Recommendation 8: Servile marriage

8. Article 3(a) of the Trafficking Protocol defines "Trafficking in persons" as:

The recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

9. As HREOC observed in its answers to questions on notice from the Senate Committee on 1 March 2005, servile marriage is a practice 'similar to slavery' for

⁶ Written submissions may be viewed at: http://www.humanrights.gov.au/legal/submissions/criminal_code_trafficking_bill.html. Answers to questions taken on notice may be viewed at: http://www.humanrights.gov.au/legal/submissions/criminal_code_trafficking_bill_qonn.html. The Report of the Senate Committee may be viewed at: http://www.aph.gov.au/Senate/committee/legcon_ctte/trafficking/report/index.htm.

⁷ The Senate Legal and Constitutional Legislation Committee: Criminal Code Amendment (Trafficking in Persons Offences) Bill 2004 [2005] (March 2005), Recommendations 1 – 8.

the purposes of Article 1(c)(i) of the *Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery*.⁸

Trafficking of persons into servile marriage is therefore trafficking for the purposes of exploitation under Article 3(a) of the Trafficking Protocol.

10. Servile marriage is defined in Article 1(c)(i) of the Supplementary Protocol as:

Any institution or practice whereby:

- (i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group, or
- (ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or
- (iii) A woman on the death of her husband is liable to be inherited by another person.

11. The trafficking in persons offences in division 271 of the Criminal Code prohibit trafficking in persons by means of force or use of threats (eg s 271.2(1)) or deception (eg s 271.2(2) and s 271.2(2B)), or in circumstances where a person is reckless as to whether another person will be exploited (eg s 271(1B)), regardless of the means used.⁹

12. Under the definition contained in the Criminal Code *exploitation*, of one person (the *victim*) by another person (the *exploiter*), occurs if:

- a. the exploiter's conduct causes the victim to enter into slavery, forced labour or sexual servitude; or
- b. the exploiter's conduct causes an organ of the victim to be removed and:
 - i. the removal is contrary to the law of the State or Territory where it is carried out; or

⁸ 226 UNTS 3, entered into force 30 April 1957.

⁹ Revised Explanatory Memorandum, Criminal Code Amendment (Trafficking in Persons Offences) Bill 2005 (Cth).

- ii. neither the victim nor the victim's legal guardian consented to the removal and it does not meet a medical or therapeutic need of the victim.

13. The definition of exploitation in the Criminal Code does not explicitly cover servile marriage, so it may not be prohibited under s 271.2(1B). Similarly, because ss. 271.2(1) and 271.2(2) apply to limited means of trafficking (threat or force, or deception only), they would not capture all instances of servile marriage.

14. We therefore submit that:

- the definition of exploitation in the dictionary of the Criminal Code be amended to include servile marriage (this would affect the recklessness as to exploitation offences in ss 271.2(1B) and 271.5(2), the deceptive trafficking offences in ss 271.2(2), 271.2(2B) and 271.5(2A), the aggravated trafficking offences in s 271.3, and the trafficking in children offence in s 271.4), and
- a specific offence of engaging in conduct causing another person to enter into servile marriage (similar to the debt bondage offence in section 271.8) be introduced into the Criminal Code, using the definition of servile marriage in the Supplementary Convention.

Mail order brides as victims of servile marriage

15. We wish to draw to the Committee's attention the fact that women immigrating to Australia as 'mail order brides' may, where the circumstances and conditions of their marriage substantively reflect those described in the Supplementary Convention, be in servile marriages.

16. HREOC is not aware of any publicly available information in relation to the prevalence of servile marriage in Australia.

17. There is some documentation and analysis of the mail-order bride phenomenon in Australia which focuses on Filipino women.¹⁰ Further insight into this phenomenon may be gleaned from the decisions of Courts and Tribunals in migration matters.¹¹
18. Comparative literature provides evidence from Filipino sources of the extent of the phenomenon, including evidence that ‘mail order brides constitute 10% of the marriages between Filipinos and foreign nationals. Between 1989-1994, 95,000 Filipino men and women were engaged to be married to foreigners’.¹²
19. The US Department of State has also published data about Taiwan.¹³

Forced marriage is a form of servile marriage

20. It is HREOC’s view that forced marriage may fall within the ambit of Article 3(a) of the Trafficking Protocol where the elements of the crime of trafficking outlined in Article 3(a) (namely the act, means, and purpose of exploitation) are present.¹⁴ However, the term ‘exploitation’ is not exhaustively defined in the Trafficking Protocol. Regardless of whether forced marriage falls within the definition of ‘exploitation’ for the purposes of the Trafficking Protocol, it is plainly a serious human rights issue.¹⁵ The relevance of forced marriage to people in Australia may be demonstrated by reference to cases dealing with applications for protection visas under the *Migration Act 1958* (Cth), in which applicants allege they would be forced to marry if returned to their country of origin.¹⁶

¹⁰ Cunneen & Stubbs *Violence against Filipino Women in Australia: Race, Class and Gender* (University of Sydney & Institute of Criminology 1997).

¹¹ For instance, *Watson, Irwin Roy* [2003] MRTA 40 (where concerns were expressed as to whether the relationship in question was of that nature) and *Marshall, Anzhela* [2001] MRTA 0233 (where the visa applicant alleged that she was a ‘mail order bride’).

¹² D Hunt and C Ana-Gatbonton *Filipino Women and Sexual Violence: Speaking Out and Providing Services* <<http://www.iwss.org.au/forumpapers.html>>, citing Catherine Paredes-Maceda *Data from Filipino women and intermarriages* (1995).

¹³ *Trafficking in Persons Report 2006*.

¹⁴ This view is also shared by the United Nations Office on Drugs and Crime as indicated in the *Report of the Special Rapporteur on the human rights aspects of the victims of trafficking in persons, especially women and children, Sigma Huda, to the Human Rights Council at its Fourth Session* (A/HRC/4/23), at paragraph 18.

¹⁵ See Article 16, UDHR; Article 23(3) ICCPR; Article 16(b) of the CEDAW; Articles 19 & 35 CROC and Article 1 Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage.

¹⁶ *SZITJ v Minister for Immigration & Anor* [2006] FMCA 1196.

21. In the UK, approximately 250 forced marriages are reported to the UK Foreign Office each year and the Government suggests that many more instances are unreported.¹⁷
22. The *Marriage Act 1961* (Cth) (Marriage Act) imposes penalties on persons going through marriage ceremonies with persons under the marriageable age or without the consent of persons whose consent is required for the conduct of the ceremony.¹⁸ But the Marriage Act does not impose criminal sanctions where consent to marry is obtained through duress or other force or a person is trafficked to another country for the purpose of forced marriage.
23. Forced marriage should be considered a form of exploitation for the purposes of the Criminal Code.
24. We therefore submit that:
- the definition of exploitation in the dictionary of the Criminal Code be amended to include forced marriage as a form of exploitation, and/or
 - the proposed new offence of engaging in conduct causing another person to enter into servile marriage be expressed to include forced marriage.

¹⁷ See Foreign Office website at:
<http://www.gco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowaPage&c=Page&cid=1094234857863>

¹⁸ See s 95 and Part II of the Marriage Act 1961 (Cth).

Other outstanding matters

25. As mentioned above, most but not all of HREOC's submissions were taken up in the Senate Committee's recommendations in its Report on the Criminal Code Amendment (Trafficking in Persons Offences) Bill 2004 [2005]. In particular, HREOC's submissions in relation to penalties for debt bondage offences and victim impact statements were not the subject of any recommendations by the Senate Committee.

Penalties for debt bondage offences

26. While HREOC is not aware of any domestic legislative provisions that would provide guidance as to the adequacy of the penalty imposed in debt bondage cases, some assistance may be gained from legislation enacted in other jurisdictions.

27. In the United Kingdom, the *Sexual Offences Act 2003* (UK) imposes a maximum penalty of seven years imprisonment (and a minimum of six months imprisonment) for conduct:

- that 'causes or incites another person to become a prostitute' or
- which is aimed at controlling the activities of another person in relation to their prostitution 'in the expectation of *gain* for [themselves] or a third person'.

Under the Act 'gain' is defined as including 'the discharge of an obligation to pay or the provision of goods or services (including sexual services) gratuitously or at a discount' (s 52 and s 53 of the *Sexual Offences Act 2003* (UK)).

28. Under the Canadian *Criminal Code* a person who:

- for the purposes of gain, exercises control, direction or influence over the movements of a person in such manner as to show that he is aiding, abetting or compelling that person to engage in or carry on prostitution with any person or generally; or
- lives wholly or in part on the avails of prostitution of another person,

is liable to imprisonment for a maximum period of 10 years (ss 212(1)(h) and (1)(j) of the *Criminal Code*, respectively).

29. United States federal law treats debt bondage type offences as part of the continuum of trafficking offences. A person who 'recruits, entices, harbours, transports, provides or obtains by any means' a person knowing that force, fraud or coercion will be used to cause the person to engage in a commercial sex act is liable for 20 years imprisonment (see §1591 of the *Victims of Trafficking and Violence Protection Act 2000* (Public Law 106-386)).
30. Article 2(b) of the Convention defines a serious crime as one incurring a minimum of four years' imprisonment. To reflect the fact that trafficking in persons is a serious crime for the purposes of the Convention, it is logical to expect that domestic laws implementing the Trafficking Protocol would impose sentences that are consistent with this definition.
31. In HREOC's view, the Convention, and the approaches adopted in those comparative jurisdictions correctly recognise that more substantial penalties may be required in at least some instances of debt bondage.

Victim impact statements

32. Article 6(2)(b) of the Trafficking Protocol requires each State Party to ensure that its domestic legal or administrative system contains measures that provide to victims of trafficking in persons, in appropriate cases:
- [a]ssistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence.
33. Provision for such statements may also be required by Australia's existing international obligations. For example, article 12 of the *Convention on the Rights of the Child*¹⁹ states:
1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters

¹⁹ Opened for signature 20 November 1989, 1577 United Nations Treaty Series 3; entered into force 2 September 1990, ratified by Australia 17 December 1990.

affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in **any judicial and administrative proceedings affecting the child**, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.²⁰

It has been suggested that the right to be heard in judicial proceedings should be interpreted broadly to:

include all those situations where the proceedings may affect the child [including when] he or she initiates them, for instance by introducing a complaint as a victim of ill treatment.²¹

34. In light of the above, HREOC supports the introduction of victim impact statements for the purposes of the offences created by the *Criminal Code (Trafficking in Persons Offences) Act (2005)* (Cth) as a measure which is consistent with Australia's existing international obligations and the terms of the Trafficking Protocol.
35. Any provisions should be drafted consistently with the principle that the views of a trafficked person should be presented in a manner not prejudicial to the rights of the defence. As noted above, HREOC understands that such statements would only be received after conviction. However, a statement which made false allegations of a serious nature could still adversely affect a defendant's right to be dealt with fairly during sentencing (particularly if, for example by reason of their lack of specificity, they are of a nature which is difficult for the defendant to rebut).
36. One means of avoiding any possible prejudice in that process would be to leave the reception of such statements to the discretion of the Court, which is the

²⁰ Emphasis added.

²¹ Office of the High Commissioner for Human Rights *Manual on Human Rights reporting under six major international human rights instruments* Geneva 1997 p 428.

approach which has been adopted in New South Wales.²² As a further protection, it could be specified that, in exercising that discretion, the Court should consider any prejudice that might be caused to the defence through the reception of such a statement.

Summary of further suggested amendments to the Criminal Code

37. In summary, HREOC suggests that the Criminal Code be amended in the following ways:

- the definition of exploitation in the dictionary of the Criminal Code be amended to include servile marriage;
- a specific offence of engaging in conduct causing another person to enter into servile marriage be introduced into the Criminal Code, using the definition of servile marriage in the Supplementary Convention;
- the definition of exploitation in the dictionary of the Criminal Code be amended to include forced marriage;
- the proposed new offence of engaging in conduct causing another person to enter into servile marriage be expressed to include forced marriage.
- more substantial penalties may be required in at least some instances of debt bondage, and
- introduce victim impact statements for the purposes of the offences created by the *Criminal Code (Trafficking in Persons Offences) Act (2005)* (Cth) as a measure which is consistent with Australia's existing international obligations and the terms of the Trafficking Protocol.


Relevant Research

²² Unless the primary victim has died as a direct result of the offence (see ss 28(2) and (3) *Crimes (Sentencing and Procedure) Act 1999* (NSW)).

38. We take this opportunity to draw your attention to HREOC's collaboration on the ongoing ARC project 'Australia's Response to Trafficking in Women: Towards a Model for the Regulation of Forced Migration in the Asia-Pacific Region', which is led by Dr Julie Debeljak of the Monash University Faculty of Law.

We would be pleased to answer any questions you may have in relation to our submission.

Yours sincerely

A handwritten signature in black ink, reading "John von Doussa". The signature is written in a cursive style with a large, looping initial "J".

John von Doussa QC
President
on behalf of the Human Rights and Equal Opportunity Commission.