

18 February 2005

Mr Owen Walsh
Secretary
Legal and Constitutional Committee
Australian Senate
Parliament House
CANBERRA ACT 2600

Dear Sir

***Re: Inquiry into the Criminal Code Amendment
(Trafficking in Persons Offences) Bill 2004***

Introduction

Your letter of 10 February 2005 invited the Human Rights and Equal Opportunity Commission ('the Commission') to make submissions to the Senate Legal and Constitutional Committee ('the Committee') on the Criminal Code Amendment (Trafficking in Persons) Bill 2004 ('the Bill').

The Commission appreciates the opportunity to make this submission and thanks the Committee for its invitation. Due to the short time the Commission has had to prepare this submission, our comments are necessarily brief. We would be happy to expand upon them should the Committee invite the Commission to attend the public hearing to be held Wednesday 23 February 2005.

The Commission is a body constituted under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) ('the HREOC Act'). The Commission's functions under that Act include:

- inquiring into acts or practices which may be inconsistent with, or contrary to, any human right;
- promoting an understanding and acceptance of human rights in Australia;
- undertaking research to promote human rights;
- examining laws relating to human rights; and
- advising the federal Attorney-General on laws and actions that are required to comply with Australia's international human rights obligations (see section 11(1) of the HREOC Act).

In addition, the Commission has a number of relevant functions under section 48(1) of the *Sex Discrimination Act 1984* (Cth) (SDA) including promotion of an understanding and acceptance of, and compliance with, the SDA; undertaking research for the purpose of promoting the objects of the SDA and reporting to the Attorney-General on action that should be taken by the Commonwealth, on matters relating to discrimination on the ground of sex.

The Commission welcomes the Bill as a significant step in meeting the obligations Australia would assume if it ratified the *Protocol To Prevent, Suppress And Punish Trafficking In Persons, Especially Women And Children, Supplementing The United Nations Convention Against Transnational Organized Crime* ('the Trafficking Protocol'). Australia signed the Trafficking Protocol on 11 December 2002.

The Commission considers that the Bill steps carefully through some of the very difficult issues that surround what is variously described as sex trafficking or contract sex work in Australia. Women who arrive in Australia to engage in sex work may do so in a range of circumstances and often, as the report into people trafficking by the Parliamentary Joint Committee on the Australian Crime Commission (the PJC) notes:

...represent a continuum of those who enter with full knowledge and consent; those who enter with consent but are deceived as to conditions; and those who enter Australia completely deceived as to their work in the sex industry.¹

It may be, for example, that there are circumstances where a contract freely entered into by a woman and an agent for the provision in Australia of sexual services by the woman on the basis of an agreed contract fee should not be considered exploitative or the subject of the criminal law. The debt bondage provisions of the Bill would appear to exclude such situations. Of course, this is not to suggest that there should not be other remedies under workplace relations or common law that ought to apply to provide legal protections to a sex worker in those situations.

Together with the work on immigration procedures, policing practices, government agency co-ordination of anti-trafficking work, support for victims of trafficking and the development of public awareness campaigns, the Bill, amended as suggested below, should allow the Australian Government to meet its obligations under the Trafficking Protocol (when ratified). The Commission congratulates the Government on the development of the Bill.

However, the Commission suggests the following amendments to the Bill to ensure it is comprehensive and fully compliant with the Trafficking Protocol.

Item 7 – New section 270.7(1) of the Criminal Code

Existing section 270.7 of the *Criminal Code* makes it an offence for a person to intentionally deceive another person about the fact that their employment or other engagement will involve the provision of sexual services. Item 7 of the Bill replaces that provision with a new offence that covers deception about an extended range of matters.

The new offence covers deception about:

¹ Parliamentary Joint Committee on the Australian Crime Commission *Report of the Inquiry Into Trafficking of Women for Sexual Servitude* (the PJC report) June 2004.p viii.

- 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;
- the extent to which the person will be free to leave his or her place of residence; and
- the fact that the engagement will involve exploitation, debt bondage or the confiscation of the person's travel or identity documents.

Amendments of this nature were proposed in the PJC report.

In addressing that issue, the PJC stated:

...although a number of women are undoubtedly deceptively recruited on the misapprehension that they are to work in jobs outside of the sex industry, it is clear that the majority of trafficked sex workers understand the nature of the work they are to do in Australia. However, the majority of the deception that occurs relates to the **size of the women's debt, the numbers of clients they must see, and the range of sexual services that they must perform. It is essential therefore, that the offence of deception extends to cover these issues.**² (emphasis added)

The Commission considers it would be useful (and consistent with the recommendations of the PJC) to add provisions to cover deception about:

- 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.

Item 9 – Proposed section 271.2(2)

Proposed section 271.2(2) makes it an offence for a person to organise or facilitate the entry, proposed entry or receipt of another person into Australia where there is deception about the fact that the entry, receipt or arrangements made in Australia will involve the provision of sexual services, exploitation, debt bondage or the confiscation (whether temporary or permanent, or destruction) of the other person's travel or identity documents.

Unlike the new section 270.7, proposed section 271.2(2) will not 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;
- the extent to which the person will be free to leave his or her place of residence.

It is unclear why those matters were not included in proposed section 271.2(2) and the Commission is of the view that it would be desirable to do so. The Commission also considers that it would be useful to include the other 'deception matters' suggested by the Commission above in relation to 270.7 (quantum of debt and nature of sexual services).

Similar comments apply to proposed section 271.5(2) (domestic trafficking by means of deception offence).

² See para 4.31.

Item 9 – Proposed section 271.2(1)

Proposed section 271.2(1) criminalises organising or facilitating the entry, proposed entry or receipt of another person into Australia by means of force or threats.

Force, threats and deception are three means of trafficking in persons identified in Article 3(a) of the Trafficking Protocol, which states:

“Trafficking in persons” shall mean 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.

Article 5(1) require states parties to:

...adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally.

Taken together, proposed sections 272.2(1) and (2) and 270.7(1) would go some way to satisfying those obligations. However, they would not cover the following ‘means’ of trafficking identified in article 3:

- other forms of coercion;
- the abuse of power or of 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.

The Commission considers those matters should be included in the new regime.

Section 271.2(1) departs from the Trafficking Protocol in some other material respects.

First, the offence includes a requirement of consent – the force or threats must result in the first person obtaining the other person’s consent to the entry into Australia etc. Absolute liability applies to that element³ meaning it is necessary only to prove that the person used threats or force, and that those threats or that force in fact resulted in the victim consenting. The prosecution is not required to prove awareness on the part of the defendant that the force or threats would result in the victim’s consent.

While this diminishes the possible obstacle which might otherwise be posed by the requirement of consent, the Bill still arguably fails to satisfy the requirements of the Protocol, which states:

³ See proposed section 271.2(3) and section 6.2 of the *Criminal Code*.

The consent of a victim of trafficking in persons to the intended exploitation set forth in [the definition in article 3 subparagraph (a)] shall be irrelevant where any of the means set forth in subparagraph (a) [including force and threats] have been used.⁴

It is unclear why the requirement of consent was considered necessary for the purpose of section 271.2(1). Indeed, one can envisage situations involving trafficking by force in which there will, by definition, be no consent. The Commission considers that consideration should be given to removing that element.

Second, the offence in proposed section 271.2(1) does not include an element of ‘purpose of exploitation’, which is contemplated by the definition in article 3(a) of the Trafficking Protocol. This is somewhat odd given that, in the Explanatory Memorandum, it is said:

New section 271.2 creates a new offence of trafficking in persons. This offence targets the transportation of persons to Australia by means of force, threats or deception. Force, threats and deception are three means of trafficking in persons identified in Article 3(a) of the Trafficking Protocol. This offence expands the existing slavery and sexual servitude offences. Whereas the existing offences focus on ‘final’ exploitation of the person, the new offence includes transporting the person **for the purposes of exploitation**. This is one of the practices contemplated in the Trafficking Protocol.

Such an element is implicit in the deception offences in section 270.7(1) and 271.2(2). That is because the matters about which a person must be deceived relate (directly or indirectly) to matters which the article 3(a) of the Trafficking Protocol defines as the minimum content of ‘exploitation’.⁵ Moreover, such a purpose element is included in the specific offence regarding children in proposed section 271.4 which requires the prosecution to prove that:

- (c) in organising or facilitating that entry or proposed entry, or that receipt, the [defendant]:
 - (i) intends that the other person will be used to provide sexual services or will be otherwise exploited, either by the [defendant] or another [person], after that entry or receipt; or
 - (ii) is reckless as to whether the other person will be used to provide sexual services or will be otherwise exploited, either by the [defendant] or another [person], after that entry or receipt.

For the trafficking of adults, the presence of an intention of exploitation would allow the prosecution to charge the defendant with the aggravated offence in section 271.3(1). However, the absence of a similar element in section 271.2(1) will mean that the primary offence could potentially apply to a situation in which a person smuggling people by boat to Australia uses force or threats to coerce smuggled people to disembark and enter Australian territory. This perhaps demonstrates that the proposed offence extends beyond the trafficking of people (as defined in the Trafficking Protocol) and reaches into circumstances relating to the smuggling of people. As the Attorney General’s Department noted in its submissions to the PJC:

⁴ Article 3(b) of the Trafficking Protocol.

⁵ 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.

It is important to distinguish between people smuggling ... and people trafficking. The Protocol Against the Smuggling of Migrants by Land, Sea and Air, which also supplements the United Nations Conventions against Transnational Organized Crime, defines 'smuggling in migrants' as: 'the procurement, in order to obtain directly or indirectly a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.'⁶

For similar reasons, the Commission considers it would be desirable to avoid overlap between people smuggling and people trafficking offences (to the extent possible). That could be achieved by amending the offence in section 271.2(1) such that it includes an element in similar terms to that in 271.4(c). That amendment and the removal of the element of consent would more closely reflect the terms of the Trafficking Protocol.

If the hypothetical circumstances described above are considered to require further specific criminal sanctions, the Commission considers it preferable that they be dealt with in Division 12 of the *Migration Act 1958* (Cth) which includes offences in relation to carriage of non-citizens into Australia without documentation (section 229), organising bringing groups of non-citizens into Australia (section 232A) and bringing non-citizens into Australia in contravention of that Act (section 233).

The Commission considers that proposed section 271.5(1) (domestic trafficking in persons) should similarly be amended to:

- cover the additional '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 section 271.7(c) (domestic trafficking in children).

Further work

While the passage of the Bill should mean Australia would largely comply with its obligations under the Trafficking Protocol (once ratified), there remains considerable work to be done before Australia could be considered to have achieved a standard of best practice in addressing trafficking in people.

First, little is known about labour trafficking, but there are indications that the problem is greater than is generally known.⁷ The provisions of the Bill appear appropriately to capture labour trafficking, although the adequacy of the provisions should be monitored as more is discovered about this human rights abuse.

⁶ Parliamentary Joint Committee on the Australian Crime Commission *Inquiry Into Trafficking of Women for Sexual Servitude*, AGD, Submission 36, p 7.

⁷ See, for example, Parliamentary Joint Committee on the Australian Crime Commission *Report of the Inquiry Into Trafficking of Women for Sexual Servitude* (the PJC report) June 2004.

Secondly and of more significant concern, is the adequacy of the protection and support provided to trafficked people. Initial support is provided to people who are assessed as likely to have been trafficked and who are of interest to police for investigation or prosecution of a trafficking offence.⁸ Longer term support is tied to the victim's material assistance with the investigation and prosecution of trafficking offences, and a criminal justice stay visa is granted.⁹ It remains unclear whether trafficked people who have assisted the prosecution or investigation of a trafficking offence may be able to remain in Australia after the expiry of a criminal justice stay visa.

The Commission has concerns about the conditional linkage between the provision of support for victims of trafficking and their assistance with investigation and prosecution of trafficking offences: victims of trafficking suffer significant human rights abuses within Australia, and the Commission considers that the Australian Government should assist their recovery while they remain in Australia. Certainly, the Trafficking Protocol urges states parties to implement "...measures to provide for the physical, psychological and social recovery of victims of trafficking in persons".¹⁰

Restricting access to recovery and support programs to those women who undertake to assist the investigation or prosecution of trafficking offences and to those women whose evidence is considered to be of value, means that many victims of trafficking would not be eligible for any assistance despite suffering significant human rights abuses. From a human rights point of view, access to these programs should be on the basis of need.

On a more pragmatic level, these restrictions also understandably limit the willingness of trafficked people to assist police and prosecutions. They take a significant risk in doing so, and may be reluctant to assist if their protection and support are conditional not only on their willingness to assist but on the police and prosecution assessment of the strength of their evidence. Even if assistance is provided, the witness remains at risk after she has given evidence, but it is unclear if any kind of assistance will be available once the criminal justice stay expires.

Further, international experience indicates that an inference that evidence has been exchanged for support may be drawn in hearings for trafficking offences where support for the witness is tied to prosecutions. This may allow attacks on the credibility of the trafficked woman and weaken the strength of a prosecution case.

These issues were discussed in the PJC report. The report concluded that the scheme was appropriately targeted. However, the Commission remains concerned about this issue. Certainly those countries with internationally recognised best practice programmes do not tie support and recovery programs to police or prosecution assistance. The Commission recommends that this situation be reviewed to ensure the system works to promote the human rights of trafficked women and to deliver adequate prosecution outcomes.

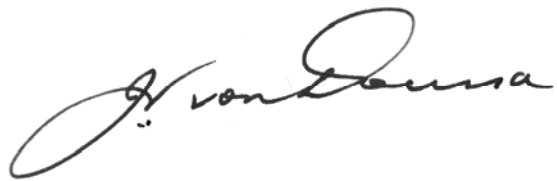
⁸ Parliamentary Joint Committee on the Australian Crime Commission *Report of the Inquiry Into Trafficking of Women for Sexual Servitude* (the PJC report) June 2004, para 3.69.

⁹ Parliamentary Joint Committee on the Australian Crime Commission *Report of the Inquiry Into Trafficking of Women for Sexual Servitude* (the PJC report) June 2004, para 3.74.

¹⁰ Article 6.

Again, thank you for the opportunity to make this 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" and a distinct "QC" at the end.

John von Doussa QC