



Castan Centre for Human Rights Law

Submission to the Senate Legal and Constitutional Legislation Committee

INQUIRY INTO THE CRIMINAL CODE AMENDMENT (TRAFFICKING IN PERSONS OFFENCES) BILL 2004

Summary of Recommendations:

- That the Bill be referred for MCCOC consultation to ensure that it accords with the general principles of criminal responsibility set out in the *Criminal Code* (Cth) and is drafted with the specific inquiry into the relationship between existing criminal law and the new offences in mind;
- That the fault element be clarified for trafficking offences by inserting the words 'intentionally or recklessly' before the physical element;
- That the proposed section 271.4 (trafficking in children) and section 271.7 (domestic trafficking in children) include the fault elements of knowledge that the other person is under the age of 18;
- That the proposed sections 271.2(3) and 271.5(3) be omitted;
- That a fault element should be included in section 271.3(1)(b) and section 271.6(1)(b) (and indeed s 73.2(1)(b)) to read 'the first person, in committing the offence, intentionally or recklessly subjects the victim to cruel, inhuman or degrading treatment';
- That either the legislation excludes the charging of inchoate offences (attempts, complicity, incitement, conspiracy) in relation to the trafficking offences or changes 'organises or facilitates' to 'recruits' while leaving open the possibility of charges for attempted recruitment and the like;
- That Category D jurisdiction is more appropriate to the trafficking offences than Category B;
- That the proposed definition of 'deceive' in s 271.1 apply also to Division 270; and
- That trafficking be defined in s 271.1 in accordance with the definition of the Palermo Protocol and the subsequent offences be simplified so that they criminalise trafficking without attempting to include definitions within them.

About the Authors

The Castan Centre for Human Rights Law is a Centre located within the Law Faculty of Monash University. Established in 2000, it seeks to bring together the work of national and international human rights scholars, practitioners and advocates from a wide range of disciplines in order to promote and protect human rights. It does so by way of teaching, scholarly publications, public education, applied research, collaboration and advice work, consultancies and advocacy.

This report is prepared by Professor Bernadette McSherry and Joanna Kyriakakis on behalf of the Centre. Professor McSherry holds the Louis Waller Chair of Law at Monash University and is Associate Dean (Research) in the Faculty of Law. She is the co-author of *Principles of Criminal Law* (2001) (with Simon Bronitt) and *Australian Criminal Laws: Critical Perspectives* (2004) (with Bronwyn Naylor) as well as numerous refereed articles in the areas of criminal law, international criminal law and mental health law. In 1990 she worked as a legislative draftsman with the Office of Chief Parliamentary Counsel (Vic). Joanna Kyriakakis is a Doctor of Juridical Science candidate and research assistant in the Faculty of Law.

Introduction

It is clear that the basis for an effective criminal justice response to the trafficking of women and children lies in an adequate legal framework. The government is to be applauded for taking up the recommendations of the Parliamentary Joint Committee of the Australian Crime Commission's Report entitled *Inquiry into the Trafficking of Women for Sexual Servitude* (June 2004) in relation to the enactment of legislation fulfilling Australia's obligations under the United Nation's *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (the Palermo Protocol).

It is presumed that the *Criminal Code Amendment (Trafficking in Persons Offences) Bill 2004* (Cth) will be enacted **together with a separate Act** confirming Australia's compliance with the Palermo Protocol. The *International Criminal Court Act 2002* may serve as a model in this regard. The principal object of the latter Act was to facilitate compliance with Australia's international obligations under the Statute of the International Criminal Court. Amendments to the *Criminal Code* (Cth) then became the subject of the *International Criminal Court (Consequential Amendments) Act 2002*.

In this submission, we will concentrate on the *Criminal Code Amendment (Trafficking in Persons Offences) Bill 2004* (Cth) from the viewpoint of domestic criminal law. It is essential that the proposed changes to the pre-existing framework of offences relating to sexual servitude (originally recommended by the Criminal Code Officers Committee) not only complies with international law

obligations but also **fits within the pre-existing domestic framework of the principles of criminal law.**

Given the exceedingly short time frame for submissions, we will concentrate on the broader issues raised by the current proposed sections.

The Importance of the Model Criminal Code Officers Committee

It is unclear whether the proposed legislation has been checked by the Model Criminal Code Officers' Committee.

On 28 June 1990, the Standing Committee of Attorney-Generals ('SCAG') placed on its agenda the question of the development of a uniform criminal code for all Australian jurisdictions. SCAG established the Criminal Law Officers Committee ('CLOC'), now known as the Model Criminal Code Officers Committee ('MCCOC'), to draft a criminal code for the Commonwealth which would serve as the model to be adopted in the States and Territories.

In July 1992, the CLOC released its first Discussion Paper setting out the general principles of criminal responsibility.¹ There followed a period of public consultation resulting in 52 written submissions. A Final Report was released in December 1992.² The recommendations in the Final Report formed the basis of the Criminal Code Bill 1994 (Cth) which was passed in March 1995. Since that time, the MCCOC has issued over 20 discussion papers and final reports dealing with substantive crimes.³

One of the areas scrutinised by the MCCOC were the additions to the *Criminal Code* relating to slavery and sexual servitude. The current Division 270 was enacted on the basis of the recommendations set out in the MCCOC's Report *Offences Against Humanity: Slavery* (November 1998). The current Bill proposes to amend aspects of the Division 270 offences, as well as introduce a new Division 271 dealing with offences in trafficking in persons and debt bondage. Whilst debt bondage was considered by the MCCOC in its previous consultation process, trafficking in persons generally and the offences as now specifically proposed do not appear to have been the subject of MCCOC consultation.

The MCCOC noted in its slavery report that the worst manifestations of the behaviour being targeted by the then proposed sex slavery and sexual servitude offences were already caught by existing criminal law. Notwithstanding, they concurred that there was value in including offences specifically targeting slavery activity in the *Criminal Code* (Cth). They noted that the overwhelming

¹ CLOC, Parliament of Australia, *Model Criminal Code: General Principles of Criminal Responsibility*, Discussion Draft (1992).

² CLOC, Parliament of Australia, *Model Criminal Code: General Principles of Criminal Responsibility*, Final Report (1992).

³ See generally Matthew Goode, 'Constructing Criminal Law Reform and the Model Criminal Code' (2002) 26 *Criminal Law Journal* 152 for an overview of the process leading to the formulation of the *Criminal Code Act 1995 (Cth)*.

submissions made in response to their 1998 Discussion Paper were in support of introducing specific criminal laws aimed at slavery and its incidents.

However, the MCCOC cautioned for a need to ensure that the new offences were consistent with the general principles of criminal law within the *Criminal Code* and with existing criminal laws, in particular the relationship between servitude and legal aspects of prostitution. They noted that prostitution is subject to different and volatile legal regimes in the States and Territories.

In our view, it is imperative that the current Bill be referred to the MCCOC to be considered via its standard consultation and reporting process so as to avoid any discrepancies with general principles of criminal law and to maintain the project of crafting a consistent and model Criminal Code.

We now turn to some of the discrepancies that need to be addressed.

Discrepancies with Existing Domestic Criminal Law Principles

Chapter Two of the *Criminal Code* (Cth) sets out the General Principles of Criminal Responsibility. It is essential that the proposed amendments to the *Criminal Code* (Cth) fit within this framework. The following are possible discrepancies with these principles.

Physical and Fault Elements

Section 3.1(1) of the *Criminal Code* (Cth) sets out the general principle of criminal law that an offence consists of physical elements and fault elements.

The proposed trafficking offences do not use the usual words denoting fault elements - 'intention' or 'recklessness'. It may be that the legislature wants to cast a very broad net in relation to these offences, but without a fault element, the offences do not comply with the general principle that the prosecution must prove both a subjective fault element (*mens rea*) and physical element (*actus reus*) for serious offences. This principle was set out by the High Court in *He Kaw Te h v The Queen* (1985) 157 CLR 523. If the offences are enacted without a subjective fault element, there will undoubtedly be a challenge to their validity on the basis of offending against this principle.

Section 5.6 of the *Criminal Code* imports a subjective fault element in the absence of an offence creating one. It imports 'intention' as the fault element for the physical element consisting of conduct and recklessness as the fault element for the physical element consisting of a circumstance or a result. It could be argued that 'organising or facilitating' the entry of another person into Australia is conduct which will have the subjective fault element of intention attached to it pursuant to section 5.6. However, this seems a rather roundabout way of importing a fault element into what is a very serious offence.

We recommend that the fault element be clarified for trafficking offences by inserting the words 'intentionally or recklessly' before the physical element.

In addition, it is recommended that the proposed section 271.4 (trafficking in children) and section 271.7 (domestic trafficking in children) include the fault elements of knowledge that the other person is under the age of 18, given the severity of the punishment for this offence.

Absolute Liability

The proposed sections 271.2(3) and 271.5(3) state that 'absolute liability applies to paragraph 1(c)'. This paragraph deals with a causal issue of consent resulting from the use of force or threats.

This seems inordinately strange to domestic criminal lawyers. 'Absolute liability' is a term that is generally used to refer to statutory **offences** where the prosecution does not need to prove a fault element and where the accused cannot raise evidence of a mistake of fact.⁴ This is reflected in section 6.2(1) of the *Criminal Code* (Cth) which refers to **offences** of absolute liability.

It is true that section 6.2(2) of the *Criminal Code* (Cth) opens up the way for 'absolute liability' to apply to a particular physical element of an offence such that no fault element applies and no defence of mistake of fact is available. Why legislators decided to include this unusual subsection is beyond the scope of this submission.

In any case, absolute liability make no sense in relation to proof of **causation** which is what s 271.2(1)(c) requires. A fault element is irrelevant to whether or not a person's consent **resulted** from the use of force or threats; nor is any defence of mistake of fact.

In our view, the proposed sections 271.2(3) and 271.5(3) are nonsensical and should be omitted.

Aggravated Offences

There is already a structure of aggravated offences in the *Criminal Code* (Cth) (for example sections 71.13; 73.2; 73.3, 270.8). The proposed aggravated offences of s 271.3 and s 271.6 follow along the lines of s 73.2(1) which deals with the aggravated offence of people smuggling.

Our recommendation here is that a fault element should be included in s 271.3(1)(b) and s 271.6(1)(b) (and indeed s 73.2(1)(b)) to read 'the first person, in committing the offence, intentionally or recklessly subjects the victim to cruel, inhuman or degrading treatment'.

⁴ S Bronitt and B McSherry, *Principles of Criminal Law* (Sydney: LBC, 2001) at 189ff.

This is because s 5.6(2) of the *Criminal Code* (Cth) states that if the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness will be deemed to be the fault element. It is unclear that this is what the legislature intends in relation to this offence.

Inchoate Offences

In its *Offences Against Humanity, Slavery* Report (November 1998, pp 18ff), the Model Criminal Code Officers Committee pointed out that there was an overlap between their proposed sexual servitude offences and inchoate offences (attempts, complicity, incitement, conspiracy). The Committee recommended the use of the word 'recruit' because it implies that the consequence or result actually intended must have happened.

The proposed sections 271.2, 271.4 and 271.5 use the words 'organises or facilitates'. It is unclear how these offences tie in with sections 11.2(1) and 11.2(1). Section 11.2(1) criminalises attempts to commit a crime. Will it be possible to attempt to organise or facilitate transportation? Section 11.2(1) criminalises aiding, abetting, counseling or procuring an offence. Will it be possible to counsel or procure the organisation or facilitation of transportation?

It may be that the way in which the proposed offences are worded cast the net too far and encroach upon the pre-existing inchoate offences.

We recommend that either the legislation excludes the charging of inchoate offences (attempts, complicity, incitement, conspiracy) in relation to the trafficking offences or changes 'organises or facilitates' to 'recruits' while leaving open the possibility of charges for attempted recruitment and the like.

Jurisdiction

In domestic criminal law, the traditional 'territorial' approach has been that all crime is local, and a state should only exercise its powers to try and punish offenders where the offence was committed within its geographical boundaries. That is, crimes should be tried where they were committed.

Sections 15.2 to 15.4 of the *Criminal Code* (Cth) (which were inserted in 1999) dramatically broaden the scope of criminal jurisdiction. The proposed section 270.5 refers to category B jurisdiction for the deceptive recruiting provisions. Similarly, the proposed section 271.10 applies Category B jurisdiction to the trafficking of people into Australia and section 271.11 sets out new jurisdictional boundaries in relation to 'domestic' trafficking.

Category B covers Australian citizens or residents anywhere in the world, subject to a foreign law defence. This means that the legislation does not criminalise conduct involving the trafficking of people into Australia by foreign nationals and does not appear to cover the situation where Australian nationals or corporations traffick people outside of Australia.

It is arguable that the Palermo Protocol requires a more global approach to the matter. The recently enacted terrorism offences in the *Criminal Code* (Cth), the child sex tourism offences and offences of genocide, war crimes and crimes against humanity all attract Category D jurisdiction. This category covers anyone anywhere regardless of citizenship or residence.

Category D jurisdiction appears to reflect the international law concept of 'universal jurisdiction', the scope of which has been the subject of much academic debate.

In recommending the categories of extended geographic jurisdiction, the MCCOC obviously wished to allay any fears of an overreaching federal criminal jurisdiction with the following comment: 'Naturally, it is intended that extended forms of jurisdiction will only be applied where there is justification for this, having regard to considerations of international law, comity and practice'.⁵

In our view, Category D jurisdiction is more appropriate to the trafficking offences than Category B. There are numerous benefits in Australia, as a developed nation with an efficient and sophisticated legal system, regulating its nationals in their overseas activities and non-nationals who traffick people into Australia. In our view this is demanded by the Palermo Protocol.

Definitions

The Definition of Deceives

Section 133.3 of the *Criminal Code* (Cth) already provides a definition of 'deception' which is similar to that proposed in section 271.1 for 'deceives'. However, section 271.1 leaves out any reference to a fault element. In comparison, section 133.3 states:

deception means an intentional or reckless deception, whether by words or other conduct, and whether as to fact or as to law, and includes:

- (a) a deception as to the intentions of the person using the deception or any other person;

It is preferable to include a fault element somewhere in these offences as outlined above.

⁵ MCCOC, Parliament of Australia, *Model Criminal Code – Chapter 4: Damage and Computer Offences Report* (2001), 242.

In addition, the proposed definition of 'deceive' in s 271.1 appears to relate only to the offences in Division 271. This means that there is no definition of 'deceives' for subsection 270.7(1) of the *Criminal Code*.

It is recommended that the proposed definition apply also to Division 270.

The Definition of Trafficking

Division 271 establishes offences relating to trafficking in persons, yet does not have a definition of the term 'trafficking' in the definition section (s 271.1). It is unclear why the proposed trafficking offences subsume a definition within them rather than have a definition section and then criminalise the conduct.

We recognise that legislators are faced with a number of problems in this area, not the least of which is how to define trafficking. Terms such as 'human trafficking', 'people smuggling' or 'alien smuggling' are often used interchangeably.

The Palermo Protocol contains a complicated definition of trafficking. Article 3 states:

For the purposes of this Protocol:

- (a) "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;
- (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;
- (c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article;
- (d) "Child" shall mean any person under eighteen years of age.

We recommend that trafficking be defined in s 271.1 in accordance with the definition of the Palermo Protocol and the subsequent offences be simplified so that they criminalise trafficking without attempting to include definitions within them. The current proposed sections refer to the use of force or threats, but do not refer to other forms of coercion or the purpose of exploitation. This means that the trafficking offences do not comply with the definition set out on the Palermo Protocol, raising doubts about whether the legislation complies with Australia's obligations.

We are grateful for the opportunity to make a submission to this enquiry and can be contacted at Bernadette.McSherry@law.monash.edu.au or Joanne.Kyriakakis@law.monash.edu.au should any further information be required.

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21 February 2005