

## **Inquiry into**

### **Criminal Code Amendment (Trafficking in Persons Offences) Bill 2004**

#### **Questions placed on Notice: Attorney-General's Department**

##### **Senator Payne**

1. It has been put to the Committee that State and Territory Governments and the Model Criminal Code Officer's Committee [MCCOC] should be consulted in respect of the Bill. Such consultation, it is suggested, is required given the need to ensure clear and complementary Federal-State laws and responses to trafficking, prostitution etc, to avoid any discrepancies with general principles of criminal law and to ensure a consistent and model Criminal Code. It is also noted that the Bill will amend provisions that arose out of earlier recommendations of MCCOC. Do you see any benefit in consulting State and Territory Governments and MCCOC on the Bill itself? If not, why not?

The measures in this Bill, and the ability of the Australian Government to ratify the *United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (the Trafficking Protocol), are not linked to the enactment of complementary State or Territory legislation.

The Bill remains consistent with the model laws that MCCOC developed on slavery and sexual servitude in November 1998. MCCOC is an invaluable forum that develops model laws to ensure clear and complementary Federal-State laws.

States and Territories were consulted both during the negotiation and the ratification of the Trafficking Protocol.

In June 2000, the then Minister for Justice and Customs, Senator the Hon Amanda Vanstone wrote to the State and Territory Attorneys-General about the Protocol. The Commonwealth Government prepared a paper outlining the status of the negotiations for the Standing Committee of Attorneys-General (SCAG) meeting in July 2000. The National Anti-Crime Strategy Lead Ministers were briefed on the Protocol in November 2000.

The Convention was discussed at the Standing Committee on Treaties (SCOT) meeting in May 2001. At that time, the Convention and the three Protocols had appeared on lists of multilateral treaty action under consideration tabled in the Commonwealth Parliament, and they had been on the SCOT list of treaties for some time.

The Protocol was discussed again at the SCOT meeting in November 2003. At this meeting, the Commonwealth Government informed the States and Territories of its intention to table the Convention and the Protocol for consideration by the Commonwealth Parliament's Joint Standing Committee on Treaties.

In the general area of trafficking in persons, the Minister for Justice and Customs has worked closely with his State and Territory counterparts through the Australian Police Ministers' Council (APMC). On 20 October 2003, the Australian Crime

Commissioners' Forum (ACCF) adopted proposals for a national plan of action to combat trafficking in women for the purposes of sexual servitude. The National Policing Strategy to Combat Trafficking in Women for Sexual Servitude for 2004-06 was endorsed by the APMC in July 2004. It includes the following objectives under the heading of 'Regulation and Legislation':

- In those jurisdictions where prostitution is de-criminalised or legalised, review regulatory regimes and structures to offer recommendations for improvements to prevent and deter people trafficking for sexual servitude, including for example:
    - police engagement with sex industry licensing authorities to assist with probity checks
    - requirements for sex workers to be licensed
  - Examine legislative and regulatory regimes to identify improvements so that sexual servitude is comprehensively criminalised as a serious indictable offence, including for example:
    - sexual servitude, slavery and deceptive recruiting offences
    - increased penalties for employing an unlawful non-citizen as a sex worker
    - debt bondage offences
  - Examine legislative and regulatory regimes to identify improvements to ensure Australian police have the necessary powers to effectively investigate people trafficking for sexual servitude.
2. It is argued that the fault element for the proposed trafficking offences should be clarified by inserting an express reference to 'intention' or 'recklessness' before the physical element. Do you agree that there is a need to clarify the fault elements for these offences? If not, why not?

There is no need to put an express reference to 'intention' or 'recklessness' in the proposed trafficking offences because section 5.6 of the Criminal Code applies. Section 5.6 of the Criminal Code specifies whether the fault element of intention or recklessness applies to the offences.

3. The Castan Centre for Human Rights Law recommended that proposed trafficking in children offences [proposed section 271.4 and 271.7] be amended to include the fault element of knowledge that the person trafficked is under 18 years of age. Do you agree? If not, why not?

'Knowledge' is a higher fault element than 'recklessness'. Applying 'knowledge' to the relevant circumstance could mean a person can avoid liability through deliberate disregard of relevant circumstances. To ensure this does not occur, the Bill applies the standard fault element of recklessness to the circumstance. This means the offender will be guilty of the offence if the prosecution can prove the offender was aware of a substantial risk (that the victim was under 18 years).

4. The Castan Centre recommended that the proposed aggravated offences dealing with cruel, inhuman or degrading treatment [proposed s. 271.3(1)(b) and 271.6(1)(b)] be amended to include a fault element of intention or

recklessness. That is, to require that the person must have intentionally or recklessly subjected the victims to cruel, inhuman or degrading treatment. It is argued that, without such an amendment, it will be unclear what the relevant fault element will be. Do you agree? If not, why not?

Paragraphs 271.3(1)(b) and 271.6(1)(b) create a physical element of circumstance. The operation of section 5.6 of the Criminal Code means that the fault element of 'recklessness' applies to this physical element. This means that the offender will be guilty of the offence if the prosecution can prove the offender was aware of a substantial risk that the victim would be subjected to cruel, inhuman or degrading treatment (see subsection 5.4(1) of the Criminal Code).

5. The Castan Centre argues that proposed sections 271.2(3) and 271.5(3) are "nonsensical and should be omitted". The Centre argues that absolute liability makes no sense in relation to proof of causation which is what is required. A fault element is irrelevant to whether or not a person's consent resulted from the use of force or threats. Do you agree? If not, why not?

For the trafficking in persons offence, subsection 271.2(3) provides that absolute liability applies to the element that the use of force or threats by the perpetrator resulted in the victim giving consent. This means that it is not necessary to prove that the perpetrator knew the force or threats would result in the victim consenting, and that the defence of mistake of fact will not be available. It will still be necessary to show that the trafficker used force or threats against the victim, and that those threats or that force resulted in the victim consenting to the entry or proposed entry to Australia.

If the prosecution was required to prove the defendant was aware that the force or threats would result in the victim's consent, many defendants would be able to escape liability by showing that they did not turn their minds to, or were reckless to, that issue.

Similarly, absolute liability applies to the element of the offence in paragraph 271.5(1)(c) (domestic trafficking offence). Therefore, once it has been shown that the intentional use of force or threats actually resulted in the person obtaining the victim's consent to the transportation, it is not necessary to prove, for example, that the person was aware that the force or threats resulted in that consent.

6. The Castan Centre refers to the need to avoid any overlap between the proposed trafficking offences and the inchoate offences provided in subsections 11(1) and (2) of the Criminal Code. How will the proposed trafficking offences in the Bill relate to section 11 of the Criminal Code? Is there an overlap? If so, is this overlap problematic? If not, why not?

The new offences in the Bill require the prosecution to prove beyond reasonable doubt that the offender either organised or facilitated an entry or receipt. Where the offender's conduct only amounts, for example, to conspiring or attempting to organise entry or receipt, the offender can be charged with the appropriate Division 11 offence, and sentenced accordingly.

7. The Castan Centre argues that the proposed legislation will not criminalise conduct involving the trafficking of people into Australia by foreign nationals and does not appear to apply where Australian nationals or corporations traffick people outside Australia. Is this the case? If so, why? Why does the Bill not adopt a broader jurisdiction (eg, Category D) in the same way as other recently enacted Commonwealth offences?

The Bill criminalises trafficking conduct that relates to the entry or receipt into Australia and the transportation of persons within Australia by any person, including foreign nationals.

Item 4 of the Bill applies Category B jurisdiction to the offences of sexual servitude and deceptive recruiting for sexual services under sections 270.6 and 270.7. Under Category B jurisdiction, a person commits the offence if:

- the conduct constituting the alleged offence occurs wholly or partly in Australia or on board an Australian aircraft to ship, or
- the conduct occurs wholly outside Australia and a result of the conduct occurs wholly or partly in Australia or on board an Australian aircraft or ship, or
- the conduct occurs wholly outside Australia and the person is an Australian citizen, resident or body corporate incorporated in Australia, or
- the alleged offence is an ancillary offence, the conduct constituting that offence occurs wholly outside Australia and the conduct or a result of the constituting the primary offence (to which the ancillary offence relates) occurs or is intended by the person to occur wholly or partly in Australia or wholly or partly on board an Australian aircraft or ship.

Category D offences are generally restricted to the most serious international offences, such as genocide, crimes against humanity and war crimes in the Criminal Code, for which specific resources are available for investigations and prosecutions. There are many very serious crimes to which Category D does not apply.

8. The Castan Centre has identified some apparent problems with the definition of 'deceives' proposed in new section 271.1. That is, in contrast to the Code's existing definition of 'deception', it does not refer to a fault element. The proposed definition also does not appear to apply to subsection 270.7(1) of the Code which contains a reference to 'deceives'. Do you agree that this is a problem? If not, why not?

The definition of 'deceive' in the Bill relates to the new trafficking in persons and domestic trafficking in persons offences in subsections 271.2(2) and 271.5(2) of the Bill. New subsection 271.1 defines 'deceive' to mean mislead as to fact (including the intention of any person) or as to law, by words or other conduct. The Criminal Code fault elements apply and are not repeated in the definition.

The Bill amends section 270.7 of the Criminal Code. That offence currently includes the word 'deceives', and no definition is provided by the Code for that offence. It is

agreed that Division 270 of the Code should be amended to include the same definition of 'deceive' that the Bill includes in proposed Division 271.

9. Submitters have argued that the proposed trafficking offences do not comply with the definitions set out in the Trafficking Protocol, thereby raising doubts about compliance with Australia's international obligations. The Castan Centre, for example, recommends that the proposed offences be redrafted to simplify them and to ensure that they meet Australia's obligations? Do you agree? If not, why not?

The provisions have been drafted by the Office of Parliamentary Counsel using modern drafting language. The Bill, in combination with other measures already in place, meets the requirements of the Trafficking Protocol. Following passage of the Bill, the Australian Government will be able to ratify the Trafficking Protocol.

The comparative table below demonstrates that the terms used in the Trafficking Protocol are covered by the provisions in the Bill and in the existing provisions in the Criminal Code.

The following table provides information about how the expressions used in the Trafficking Protocol are covered by the Bill.

	<b>Trafficking Protocol Terminology</b>	<b>Which provisions in the Trafficking Bill cover this?</b>
<b>What does Trafficking in Persons include?</b>	recruitment (article 3(a))	amended deceptive recruiting offence (section 270.7(1)) organises or facilitates the entry (sections 271.2, 271.3 and 271.4)
	transportation (article 3(a))	organises or facilitates the entry, proposed entry, or receipt (sections 271.2, 271.3 and 271.4) organises or facilitates the transportation (sections 271.5, 271.6 and 271.7)
	transfer (article 3(a))	organises or facilitates the entry, proposed entry, or receipt (sections 271.2, 271.3 and 271.4) organises or facilitates the transportation (sections 271.5, 271.6 and 271.7)
	harbouring (article 3(a))	organises or facilitates the entry, proposed entry, or receipt (sections 271.2, 271.3 and 271.4) organises or facilitates the transportation (sections 271.5, 271.6 and 271.7)
	receipt (article 3(a))	organises or facilitates the entry, proposed entry, or receipt (sections 271.2, 271.3 and 271.4) organises or facilitates the transportation (sections 271.5, 271.6 and 271.7)

	<b>Trafficking Protocol Terminology</b>	<b>Which provisions in the Trafficking Bill cover this?</b>
<b>'Means' of Trafficking</b>	threat (article 3(a))	use threats (sections 271.2(1), 271.3(1), 271.5(1) and 271.6(1))
	force (article 3(a))	use force (sections 271.2(1), 271.3(1), 271.5(1) and 271.6(1))
	coercion (article 3(a))	use force or threats (sections 271.2(1), 271.3(1), 271.5(1) and 271.6(1))
	abduction (article 3(a))	use force (sections 271.2(1), 271.3(1), 271.5(1) and 271.6(1))
	fraud (article 3(a))	amended deceptive recruiting offence (section 270.7(1)) deceives (sections 271.2(2), 271.3(1), 271.5(2) and 271.6(1))
	deception (article 3(a))	amended deceptive recruiting offence (section 270.7(1)) deceives (sections 271.2(2), 271.3(1), 271.5(2) and 271.6(1))
	abuse of power or position of vulnerability (article 3(a))	amended deceptive recruiting offence (section 270.7(1)) deceives (sections 271.2(2), 271.3(1), 271.5(2) and 271.6(1)) debt bondage (sections 271.8(1) and 271.9(1))
	benefits to achieve consent of person having control over another (article 3(a))	existing slavery offence (section 270.3)

	<b>Trafficking Protocol Terminology</b>	<b>Which provisions in the Trafficking Bill cover this?</b>
<b>Exploitation</b>	exploitation of prostitution of others (article 3(a))	existing slavery and sexual servitude offences (sections 270.3 and 270.6) amended deceptive recruiting offence (section 270.7(1)) new offences of trafficking (271.2(2), aggravated trafficking (271.3), trafficking in children (271.4), domestic trafficking (271.6(2), aggravated domestic trafficking (271.6), and domestic trafficking in children (271.7)
	sexual exploitation (article 3(a))	existing slavery and sexual servitude offences (sections 270.3 and 270.6) amended deceptive recruiting offence (section 270.7(1)) new offences of trafficking (271.2(2), aggravated trafficking (271.3), trafficking in children (271.4), domestic trafficking (271.6(2), aggravated domestic trafficking (271.6), and domestic trafficking in children (271.7)
	forced labour or services (article 3(a))	existing slavery and sexual servitude offences (sections 270.3 and 270.6) amended deceptive recruiting offence (section 270.7(1)) new offences of trafficking (271.2(2), aggravated trafficking (271.3), trafficking in children (271.4), domestic trafficking (271.6(2), aggravated domestic trafficking (271.6), domestic trafficking in children (271.7), debt bondage (271.8), aggravated debt bondage (271.9)

	<b>Trafficking Protocol Terminology</b>	<b>Which provisions in the Trafficking Bill cover this?</b>
<b>Exploitation contd.</b>	slavery (article 3(a))	existing slavery and sexual servitude offences (sections 270.3 and 270.6) amended deceptive recruiting offence (section 270.7(1)) new offences of trafficking (271.2(2), aggravated trafficking (271.3), trafficking in children (271.4), domestic trafficking (271.6(2), aggravated domestic trafficking (271.6), domestic trafficking in children (271.7), debt bondage (271.8), aggravated debt bondage (271.9)
	practices similar to slavery (article 3(a))	debt bondage (271.8), aggravated debt bondage (271.9)
	servitude (article 3(a))	existing slavery and sexual servitude offences (sections 270.3 and 270.6)
	removal of organs (article 3(a))	existing slavery and sexual servitude offences (sections 270.3 and 270.6) amended deceptive recruiting offence (section 270.7(1)) new offences of trafficking (271.2(2), aggravated trafficking (271.3), trafficking in children (271.4), domestic trafficking (271.6(2), aggravated domestic trafficking (271.6), domestic trafficking in children (271.7), debt bondage (271.8), aggravated debt bondage (271.9)

	<b>Trafficking Protocol Terminology</b>	<b>Which provisions in the Trafficking Bill cover this?</b>
<b>Trafficking in children</b>	need not include any of the ‘means’ listed above (article 3(c))	Trafficking in children does not require any of the ‘means’; it is established where the offender organises or facilitates the entry, receipt, or transfer, intending or reckless that the child will be exploited or used to provide sexual services (sections 271.4 and 271.7)
	child means under 18 years (article 3(a))	aggravated existing offences of sexual servitude and slavery – child is under 18 (section 270.8) aggravated amended offence of deceptive recruiting – child is under 18 (section 270.8) new offences of trafficking in children (271.4), domestic trafficking in children (271.7), aggravated debt bondage (271.9) – child is under 18 years

	<b>Trafficking Protocol Terminology</b>	<b>Which provisions in the Trafficking Bill cover this?</b>
<b>Criminalization</b>	criminal offence if committed intentionally (article 5(1))	all the existing, amended and new offences require intentional conduct by the offender
	attempting to commit offence (article 5(2)(b))	attempt is covered for all the existing, amended and new offences by existing section 11.1 of the Criminal Code
	participating as an accomplice (article 5(2)(c))	aiding, abetting, counselling or procuring is covered for all the existing, amended and new offences by existing section 11.2 of the Criminal Code
	organising or directing commission of an offence (article 5(2)(c))	organising is specifically included in the new offences of trafficking (271.2(2), aggravated trafficking (271.3), trafficking in children (271.4), domestic trafficking (271.6(2), aggravated domestic trafficking (271.6) and domestic trafficking in children (271.7) directing the commission is covered by both the existing aid, abet, counsel or procure provision in section 11.2 of the Criminal Code, as well as the existing incitement provision in section 11.4 of the Criminal Code