

Inquiry into

Criminal Code Amendment (Trafficking in Persons Offences) Bill 2004

Questions Placed on Notice: Attorney-General's Department

Senator Ludwig

1. It has been pointed out to the Committee that the proposed offences in new sections 271.2(2) and 271.5(2) do not cover deception about the matters listed in proposed section 270.7. Is this the case? If so, why?

The new trafficking in persons offences in section 271 cover deception as to the fact that the entry, receipt or arrangements for the victim's stay in Australia will involve the provision of sexual services, exploitation, debt bondage or the confiscation of the person's travel or identity documents.

The new deceptive recruiting offence will cover deception as to all of these elements plus deception as to:

- a. the extent to which the person will be free to leave the place where sexual services are provided
- b. the extent to which the person will be free to cease providing sexual services, and
- c. the extent to which the person will be free to leave his or her place of residence

It is agreed that the new offences in proposed section 271 do not directly align with the amended deceptive recruiting offence in section 270 and that an amendment to ensure deception as to each of these elements is covered in both sections may be appropriate.

2. Do the proposed deceptive recruiting offences cover deception about the nature of any sexual services a person will be required to provide and deception about the quantum of any debt or purported debt? If so, how? If not, why not?

Item 7 of the Bill amends the existing offence of deceptive recruiting in section 270.7 of the *Criminal Code Act 1995* (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.

The amended deceptive recruiting offence covers 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, and
- the fact that the engagement will involve exploitation, debt bondage or the confiscation of the person's travel or identity documents.

The amended offence will apply where the perpetrator deceives a victim about the way they will be required to perform their job. For example, the perpetrator might not allow the victim to have protected sex with clients. This will ensure perpetrators are not able to impose work conditions on the victim that are unacceptable to that person. Nor will perpetrators be able to force a victim to do one type of work when they agreed to do work of a completely different nature.

The amendments to section 270.7 were made in response to the Parliamentary Joint Committee Report, which recommended amending section 270(7) of the Criminal Code to broaden the offence of deception.

Section 270.7 as amended also covers deception as to debt bondage. The new debt bondage offences are available in any circumstance where contracts for personal services are exploitative and deception as to the quantum of a debt or purported debt would be a relevant consideration in determining whether such circumstances existed.

3. A number of submitters – including the Australian Crime Commission - have argued that the penalty for debt bondage should be greater than a maximum of 12 months imprisonment. It is argued that debt bondage is not merely a minor form of slavery. Rather it is an instrumental part of recruitment process used by traffickers and a greater penalty is required to reflect its seriousness and significance in the trafficking process. Why is the penalty for debt bondage only set at a maximum for 12 months imprisonment? Is there a need for greater deterrence?

The new debt bondage offences are designed to complement the existing serious slavery offences. These new offences will target the scenario where a perpetrator forces his or her victim to provide sexual or other services to pay off large 'debts' in return for arranging the victim's entry into Australia.

The debt bondage offences are only intended to operate as an alternative in cases where it may be difficult to prove the commission of one of the more serious offences, such as slavery, which carries a penalty of 25 years imprisonment. Many exploitative debt contract arrangements would be covered by the existing slavery offence which specifically provides for situations arising out of 'a debt or contract made by the person'. (section 270.1 of the Criminal Code)

As it is only intended to cover the least serious instances of exploitative debt contracts, the penalty for the debt bondage offence is 12 months imprisonment. There is a higher penalty where the victim is under the age of 18 of 2 years imprisonment.

Debt bondage and trafficking in persons activity will often occur simultaneously, and sentences may be imposed cumulatively.

4. The Australian Crime Commission is concerned that the definition of 'debt bondage' - and therefore the new debt bondage offences - may not capture the exploitative contract arrangements identified by the Commission's intelligence. See their submission in this regard. Do you agree with the Australian Crime Commission that the definition of "debt bondage" should be redrafted? If not, why not?

The debt bondage offence operates where an offender causes a victim to pledge (a) his or her personal services or (b) those of another person as a security for a debt, where either (c) the reasonable value of those services is not applied to the liquidation of the debt, or (d) the length and nature of the services are not respectively limited or defined.

The Australian Crime Commission expressed concern that the debt bondage offence would not capture the 'exploitative contracts' where the exploitative feature of the arrangement is that the 'up front contract amount' the person charges the contracted individual is disproportionately higher than the cost of bringing that individual into Australia.

Provided either (c) or (d) is satisfied, excessive up front contract amounts would come within the debt bondage offence. However, where persons enter into a contractual arrangement and neither of those elements is present, in the absence of factors such as fraud or coercion, such contracts are not be regarded under the Commonwealth's legislative regime as 'criminal'. This is the case even where the terms of that contract appear unfair to one of the parties.

The debt bondage offence contains important protections designed to ensure that the court or jury is able to take into account the significant power imbalances between people traffickers and their victims. The offence permits a court or jury to treat a broad range of information as admissible evidence, including:

- the economic relationship between the victim and alleged offender
- the terms of any contract or agreement, and
- the personal circumstances of the victim.

Subsection 271.8(2) provides that a judge or jury *may* take these factors into account, and does not prevent the court from considering other relevant information. The provision does not provide an exhaustive list of what evidence is admissible, nor does it limit the admissibility of evidence under the Commonwealth *Evidence Act* or equivalent State and Territory legislation.

Where an exploitative contract amounts to 'forced labour' as defined in existing section 73.2 of the Criminal Code, it will be covered by a number of existing and new offences. This includes:

- the existing slavery offence (section 270.3)
- the existing sexual servitude offence in (section 270.6)
- the amended deceptive recruiting offence (section 270.7(1))

- the new offences of trafficking in persons (section 271.2(2))
 - aggravated trafficking in persons (section 271.3)
 - trafficking in children (section 271.4)
 - domestic trafficking (section 271.6(2))
 - aggravated domestic trafficking (section 271.6), and
 - domestic trafficking in children (section 271.7).
5. Why does the Bill not introduce a presumption that the victim is a child where the victim's age is uncertain and that there are reasonable grounds to believe the victim is a child? See in this regard the submission by World Vision.

At this stage there are no presumptions as to age included in the Bill.

The Bill contains three offences that specifically relate to victims who are children (under 18 years of age). These offences in sections 271.4, 271.7 and 271.9 carry higher penalties. In those provisions, the age of the child is a physical element of circumstance to which the Criminal Code automatically applies the fault element of 'recklessness'. 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).

Recklessness is the lowest of the four standard fault elements created by the Code. Both the Criminal Code and the common law reflect the fact that fault must be proven for each physical element of an offence for a person to be guilty because it is generally neither fair, nor useful, to subject people to criminal punishment for unintended actions or unforeseen consequences unless these resulted from an unjustified risk (ie recklessness).

6. Why does the Bill not contain specific offences dealing with situations where, as part of trafficking, a victim suffers egregious harm? See in this regard each of the types of harm detailed on page 15 of World Vision's original submission to the Attorney-General's Department.

The aggravated offences are available where the offender has committed the basic trafficking offence, and, in committing that offence, his or her conduct has subjected the victim to cruel, inhuman or degrading treatment, or, in committing that offence, his or her conduct has given rise to a danger of death or serious harm to the victim.

The definition of serious harm would include each of the matters listed in A to H of World Vision's original letter¹ and would therefore come within the scope of the aggravated offences. The prosecution would only be required to prove that, in committing the offence of trafficking, the trafficker's conduct gave rise to a danger of death or serious harm, and the trafficker was reckless as to that danger.

¹ Those matters are that the victim contracts HIV/AIDS, is mutilated, dies, is raped, becomes pregnant, has a forced abortion, suffers severe psychiatric illness or physical injury.

The Criminal Code defines ‘harm’, ‘harm to a person's mental health’,² and ‘serious harm’ in the following terms:

harm means physical harm or harm to a person's mental health, whether temporary or permanent. However, it does not include being subjected to any force or impact that is within the limits of what is acceptable as incidental to social interaction or to life in the community.

harm to a person's mental health includes significant psychological harm, but does not include mere ordinary emotional reactions such as those of only distress, grief, fear or anger.

serious harm means harm (including the cumulative effect of any harm):

- (a) that endangers, or is likely to endanger, a person's life; or
- (b) that is or is likely to be significant and longstanding.

Where the offender forces the victim to commit a crime against another person (Item H), and this satisfies the other elements of the aggravating offence (for example, by forcing the victim to commit the crime, the victim is endangered), this will also come within the aggravated offence.

7. How does the Bill proscribe trafficking of adults and children for the purpose of non-commercial sexual exploitation?

‘Sexual service’ is defined to mean the commercial use or display of the body of the person providing the service for the sexual gratification of others.

The definition of sexual services is consistent with that proposed by MCCOC in their 1998 Report on Slavery and has been adopted by jurisdictions including Victoria, New South Wales, South Australia and the ACT. The definition of sexual service is also consistent with the existing definition of sexual service under section 270.4 of the Criminal Code (that relates to sexual servitude). At this stage, it is not proposed that this definition be expanded to include non-commercial sexual services.

Under Australia's federal system of government, criminal law enforcement is primarily a matter for the States and Territories, with each managing their own criminal justice system and related programs including policing, administration of the courts and prison systems. The regulation of sexual abuse, sexual assault and related matters is generally a matter for the States and Territories.

The States and Territories have very strong regimes to protect individuals from assault and sexual assault. For example, section 61I of the New South Wales *Crimes Act 1900* provides for an offence of ‘sexual assault’. Under that provision, any person who has sexual intercourse with another person without that person’s consent is guilty of an offence with a penalty of up to 14 years imprisonment. The definition of ‘sexual intercourse’ under section 61H includes ‘penetration’ by means of a surgical implement. Similarly, under section 38 of the Victorian *Crimes Act 1958* the offence of rape carries a maximum penalty of 25 years imprisonment. The State and Territory legislation is broad enough to cover situations where the person does not directly abuse or assault the victim but otherwise participates in or facilitates that conduct.

² ‘Harm to a person's mental health’ will be a subset of both ‘harm’ and ‘serious harm’

The measures in this Bill complement the State and Territory legislation.

8. Why does the Bill make no provision for the use of victim impact statements in sentencing those who commit the offences proposed in the Bill?

Section 16A(2)(d) of the *Crimes Act 1914* (Crimes Act) provides that in determining the sentence to be imposed on a person in respect of a federal offence, the court must take into account the personal circumstances of any victim of the offence.

Evidence given to the court as to the matters in either of these paragraphs may include a statement by the victim of the offence about his or her experience of the impact of the offence.

9. Why does the new offence of trafficking in persons not require that the conduct be for the purpose of exploitation whereas the new trafficking in children offence does? See in this regard in this regard the submission by HREOC and the concerns raised therein.

HREOC expressed concern that, while the general trafficking offence in proposed section 271.2(1) does not include an element of ‘purpose of exploitation’, the trafficking in children offence in section 271.4 does include such an element. The elements of these offences are different.

The general trafficking offences in section 271.2 require either the use of force or threats, or the use of deception about certain matters, including that the victim will be exploited. These offences are available whether the victim is a child or an adult.

The trafficking in children offence in section 271.4 does not require the prosecution to prove that the offender threatened the child, used force against the child, or deceived the child. In addition, whether the child ‘consented’ to the conduct is irrelevant to the offence. It is only necessary to prove that the offender intended or was reckless as to the fact that the child would be used to provide sexual services or otherwise exploited.

10. Submitters have argued that proposed section 271.2(1) departs from the Trafficking Protocol in that 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. The Protocol states that the consent of a trafficking victim to the intended exploitation shall be irrelevant where any of the means set forth in subparagraph 6(a) of the Protocol have been used. These include the use of force and threats. Moreover, one can envisage situations involving trafficking by force in which there will, by definition, be no consent. Why is the consent requirement necessary for the purpose of the proposed offence? Does the Department agree that the requirement should be removed? If not, why not?

The *United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (the Trafficking Protocol) provides that the consent of the victim to the ‘intended exploitation’ should be irrelevant. The Bill is consistent with this. The victim’s consent to the trafficking activity does not provide an excuse or defence for the trafficker.

The key issue for the prosecution to establish is the use of force or threats by the offender to obtain the victim's consent to the activity.

Subsection 271.2(1) creates an offence where the victim's consent 'to the entry into Australia' is obtained by force or threats. The offence will be made out where the victim consented to participate in forced labour on arrival in Australia, provided the victim's consent to come to Australia was obtained through the use of force or threats.

11. Submissions make the point that the best legislation in the world is meaningless if victims still fear being returned to their home countries after helping the police. The recent case of 'Julia' highlights the risk that women will be detained and deported even if they have helped the police if their information does not bring about a prosecution. What is the government doing to ensure this gap in the trafficking package is addressed?

The trafficking visa regime is a balanced one which provides support to people in genuine need of protection and who are assisting law enforcement agencies with their investigations.

The Government's package to combat trafficking put in place new and specific arrangements to enable women who have assisted law enforcement authorities with an investigation or prosecution to remain in Australia if they would be in danger if they returned home. These women may be eligible for the grant of a Witness Protection (Trafficking) visa. The grant of a Witness Protection (Trafficking) visa is not dependent on either the institution of, or successful conclusion of, a prosecution.

The Government's policy is clearly to seek the return and reintegration of the victim. Assistance in this repatriation process is available to victims of trafficking who do not stay in Australia, whether they have assisted an Australian law enforcement investigation or not.

If, following repatriation, any victims wish to provide new or further information that may assist in a possible investigation or prosecution, the AFP International Network will facilitate this process.

12. How does the trafficking package address broader trafficking issues such as trafficking for non-sexual purposes, and what are the views of the government on this?

All elements of the broader trafficking package apply equally to all forms of trafficking, with the exception of the community awareness strategy which is specifically targeted at trafficking for sexual purposes.

The new visa regime applies to all victims of trafficking, regardless of the industry to which they may have been trafficked. Around 10 of the people involved in cases referred by the Department for Immigration and Multicultural and Indigenous Affairs to the Australian Federal Police have worked outside the sex industry.

The Government's victim support program is available to victims of all trafficking in persons offences, whether sex-related or not. Two suspected victims of domestic servitude have already participated in the program.

Australia's anti-trafficking activities in East Asia adopt a holistic approach. All projects address both adult and child victims of trafficking, and do not differentiate between sex trafficking and other forms of trafficking.

These measures ensure that the Government is able to comprehensively combat trafficking in persons for all purposes.

13. There is currently a paucity of information available on which to base trafficking policy and legislation for trafficking for non-sexual purposes. Is the government planning primary research into other (non-sexual) forms of trafficking (e.g. labour trafficking into construction, hospitality and fruit-picking industries)?

The Government will investigate currently available information and consider options for further research and information gathering.

14. Other than the small community awareness program which is likely to focus on the sex industry in Australia, how is the government addressing demand for trafficking, given that this is an important part of the Trafficking Protocol that the government is planning to ratify this year?

The Government's package to combat trafficking in persons has adopted strong measures, on the domestic and international front, to combat trafficking in persons and associated activity.

Existing legislation provides a strong deterrent to trafficking in persons, by imposing sentences of 20 years or more for slavery and sexual servitude offences. The amended and new offences contained in the Criminal Code Amendment (Trafficking in Persons Offences) Bill 2004 will build on existing legislation to comprehensively criminalise all forms of trafficking in persons. These offences will attract appropriately severe maximum penalties, for example 20 years maximum for the offence of trafficking children into Australia.

The Government's legislative action is matched by complementary initiatives taken by Australian agencies to proactively prevent the incidence of trafficking in persons:

- (a) AusAID funds a range of programs in Asia specifically targeted at the prevention of trafficking in women and children. These programs include the \$8.5 million Asia Regional Cooperation to Prevent People Trafficking Project, which aims to strengthen the criminal justice systems in Thailand, Cambodia, Laos and Burma, and a Child Wise project specifically aimed at preventing Child Sex Tourism in South East Asia
- (b) The AFP is engaged with its counterparts in key source countries in South East Asia to foster international law enforcement cooperation and build awareness of transnational crime.
- (c) DIMIA has a Senior Migration Officer Compliance (SMOC) based in Thailand to focus exclusively on people trafficking issues in the Asian region, particularly South-East and North Asia. The SMOC works closely with the Australian Federal Police and key regional stakeholders to combat people

trafficking. The SMOC has participated in the delivery of training to law enforcement agencies, and built productive working relationships with government and non-government organisations (NGOs), in Thailand, Cambodia, Indonesia, China, and South Korea. The SMOC also works closely with AusAID and local NGOs in Thailand on victim support and return and re-integration issues.

15. What is the government doing to ensure the legislation and victim support programme is designed to meet the specific needs and rights of children as outlined in the Convention on the Rights of the Child?

The Government's existing legislation criminalising conduct related to trafficking in persons includes offences for slavery (section 270.3), sexual servitude (section 270.6), and deceptive recruiting for sexual purposes (section 270.7)³. The Criminal Code provides for higher penalties for those offences where the victim is a child (section 270.8).

The Bill builds upon those existing offences and creates new offences specifically targeted at trafficking in children. Consistent with the existing regime, these offences carry higher penalties where the offences are committed against children. These new offences include:

- a new trafficking in children offence in section 271.4, which carries a maximum penalty of 20 years in prison, compared with 12 years for the basic adult offence of trafficking in persons in section 271.2
- a new offence of domestic trafficking in children in section 271.7, which carries a maximum penalty of 20 years in prison, compared with 12 years for the basic adult offence of domestic trafficking in persons in section 271.5, and
- a new offence of aggravated debt bondage targeted at debt bondage of persons under 18 years, which carries a maximum penalty of 2 years, compared with 12 months for the adult equivalent offence of debt bondage in section 271.8.

The Bill also amends the deceptive recruiting for sexual services offence, but does not change the penalty regime.

Australia also has existing protections for child witnesses and child complainants, in proceedings for all federal sex offences (including sexual servitude and deceptive recruiting) to ensure that children are able to testify as freely and effectively as possible. Some of those protections are contained in Part 1AD of the Crimes Act – *Protections of children in proceedings for sexual offences*. For example, section 15YI of the Crimes Act provides for the evidence of a child witness to be given by means of closed-circuit television (some limited exceptions to this rule apply). Section 15YJ provides that a child witness may choose an adult to accompany him or her while giving evidence. Section 1515YE provides that the court may disallow a question to a child witness if it is inappropriate or unnecessarily aggressive.

³ The Bill amends the elements of the deceptive recruiting for sexual services offence, but does not change the penalties.

Although no children have been placed on the Government's victim support program to date, the program is available to children and is sufficiently flexible to provide for the special needs of children.

16. What is being done to ensure the contractors for the victim support programme have specific training in the needs and rights of trafficked children?

The Support for Victims of People Trafficking Program is managed by the Office for Women within the Department of Family and Community Services (and previously the Office for the Status of Women). OFW manages the victim support program through a contract with Southern Edge Training (SET).

The staff at SET have expertise in counselling, psychology or social work. The contractors undergo induction training, including detailed information about the victim support program, safety issues and information on children.

17. Is the government planning to establish multi-agency protocols between social services, relevant government departments, police, immigration, non-government organisations, contractors and migration advisors to appropriately interact with and assist trafficking victims, especially children?

A Communication and Operation Protocol has been developed between the AFP, DIMIA, the Office for Women in FACS and the contractor for the victim support program, Southern Edge Training, for interaction with and assisting trafficking victims. The Protocol is appropriately flexible to provide for the special needs of children.

18. What level of specialized training is provided for government and contractor staff who interact with trafficking victims? What is the resource figure for this training? What kinds of training relate to children?

The key agencies involved in providing training to government and contractor staff who interact with trafficking victims are the Australian Federal Police, AusAID, the Department of Immigration and Multicultural and Indigenous Affairs and the Office for Women in the Department of Family and Community Services. Information about the training provided by each of these agencies is set out below:

(a) Australian Federal Police

In support of the whole of Government approach to the trafficking of women and children, in 2004 the Australian Federal Police (AFP) developed the People Trafficking Specialist Investigations Training Program. The program content emphasises responding to the victimisation of trafficked women and children. The program is initially directed towards skilled investigators from within the AFP and is conducted on a three week residential basis. Two such programs have been successfully completed and a third program, including participants from the Royal Thai Police, is being conducted. Future training programs will also be offered to partner government agencies and Australian and international law enforcement agencies on a cost recovery basis.

Program presenters are subject matter experts drawn from within the AFP and external agencies throughout Australia and overseas, including Australian Government departments, the Royal Melbourne Institute of Technology, the Australian National University and non-government organisations including the International Organisation of Migration and the Asia Regional Cooperation to Prevent People Trafficking.

\$170,000 is allocated to training for people trafficking each year for the four year duration of the funding.

(b) AusAID

The Australian-funded Child wise Tourism project (A\$590,000 in AusAID funding) continues to build the capacity of National Tourism Associations in seven countries in South East Asia to deliver training programs in prevention of and response to child sex tourism in tourism 'hot spots'. The Australian-funded IOM Return and Reintegration of Trafficked Women and Children (over A\$5 million in AusAID funding) provided training to government agencies, NGOs and mass organisations in six countries to strengthen assistance to victims of trafficking. Phase 2 of this project continues to provide training and build capacity in Laos and Burma. Australia's ARCPPT (A\$8.5 million in AusAID funding) also provides training to various agencies including police and immigration officials on investigation techniques and methods to deal with trafficking victims.

A significant component of the funding provided by AusAID for each of these projects is allocated to training.

(c) DIMIA

People Trafficking General Awareness training has been delivered to over 370 DIMIA and law enforcement officers nationally. The training focused on a range of topics, including the trafficking phenomenon, economic, social and cultural factors, identification of trafficking indicators, referral procedures and the new visa arrangements. DIMIA officers also undertake gender sensitivity and cultural diversity training in relation to interview assessments.

Under current practices, DIMIA's role is to identify indicators of trafficking and to immediately refer persons to the AFP.

DIMIA has no specific training for children. The key operational procedure is quick referral and child welfare agencies are alerted if any child is found working in the sex industry, irrespective of whether they are Australian citizens.

A resource figure for training provided by DIMIA in these fields is not readily available.

(d) Office for Women

The Support for Victims of People Trafficking Program is managed by the Office for women within the Department of Family and Community Services (and

previously the Office for the Status of Women). OFW manages the victim support program through a contract with Southern Edge Training (SET)

SET staff have expertise in counselling, psychology or social work. All staff undertake induction training, which includes detailed information about the victim support program, health and safety issues, appropriate support for victims and information on children.

Southern Edge Training provides ongoing mentoring with a senior case manager for each case manager. Southern Edge Training conducts fortnightly meetings with each state office to exchange information, and on alternative fortnights holds national meetings with all of the states for the same purpose. The figure for this training is not readily available, as it forms part of the contract management fee for Southern Edge Training.

19. What is the current level of financial benefits given to trafficking victims under the Victim Support Package? What has the government done to implement the recommendation of the Parliamentary Joint Committee on the Australian Crime Commission to urgently reassess these payments benchmarked against benefits available to Witnesses under Protection Scheme?

The current level of financial benefits given to trafficking victims under the Victim Support Package includes:

Phase 1

- hotel accommodation (up to \$750 per week for fully furnished, secure accommodation within close proximity to the AFP);
- a \$500 emergency allowance for essentials like clothing and toiletries;
- a food allowance of \$80 per week; and
- a living allowance of \$80 per week.

Phase 2

- rental accommodation (fully furnished, secure accommodation within close proximity to the AFP). Previously this was funded through the client's Special Benefit and Rent Assistance, but is changing to programme-funded accommodation;
- a \$500 emergency allowance if required for furnishings (this will not usually be necessary under the new arrangements of providing programme-funded furnished accommodation); and
- access to Special Benefit (currently set at \$320 per fortnight, which matches clients' food and living allowance during Phase 1).
- Throughout Phases 1 and 2, clients have access to Medicare and the Pharmaceutical Benefits Scheme; legal services (a maximum of 3 appointments per client); training and social support (including English language training, budgeting skills and counselling); and vocational guidance.

The Government's response to the PJC report on trafficking is being finalised.

20. Who did the Department consult or contact in respect of the exposure draft of the Bill and when? Who wrote to the Department or the Minister seeking information or commenting on that draft?

The consultation that prefaced the introduction of the Bill included consultation with a broad range of Government and non-Government stakeholders on the Government's broader trafficking in persons package.

The Department consulted extensively with the Australian Federal Police, the Office of the Status of Women, Commonwealth Director of Public Prosecutions, Department of Immigration and Multicultural and Indigenous Affairs, Department of Employment and Workplace Relations and Department of Foreign Affairs and Trade during the preparation of the Bill.

The Minister for Justice and Customs issued a press release about the Bill on 31 August 2004. The Exposure Draft of the Bill was prominently placed on the Department's web site with the heading 'Exposure Draft Criminal Code Amendment (Trafficking in Persons Offences) Bill 2004'. The web site included a brief summary of the Bill, an invitation to comment on the Bill (by 18 October 2004), email and postal addresses for submissions, and a link to the Bill and Explanatory Notes about the Bill.

Submissions on the Exposure draft of the Bill were received from:

- Coalition Against Trafficking in Women Australia (CATWA) (Sheila Jeffreys and others) – 6 October 2004
- Catholic Women's League Australia (CWLA) (Jess Wurf) – 15 October 2004
- Zonta International District (Ros Kinder) – 17 October 2004
- National Council of Women of Australia (NCWA) (Sheila Byard) – 17 October 2004
- Sexual Service Providers Advocacy Network (SSPAN) (Delaney Bliss) – 18 October 2004
- Australian Federation of AIDS Organisations (AFAO) (John Goodwin) – 18 October 2004
- Mary Robertson – private citizen – 18 October 2004
- Australian Crime Commission (ACC) (Brian Dargan) – 18 October 2004
- Presbyterian Women's Association of Australia in NSW (Marion Smith) – 18 October 2004
- Scarlet Alliance (Janelle Fawkes) – 25 October 2004
- Jennifer Burn (Senior Law Lecturer, UTS) – 26 October 2004
- Project Respect (Kathleen Maltzahn) – 26 October 2004
- World Vision (Kayte Fairfax) – 28 October 2004

21. [Further to Attorney-General's Department evidence of 23 Feb 05]: Concerns have been expressed regarding the use of **absolute liability** elements in some of the proposed offences (eg subsection 271.2(3)). For example, Scarlett Alliance is concerned that it is a 'breach of human rights and may result in unfair application of this law' (submission 2, p. 5). What is your response to these concerns?

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.

22. [Further to Attorney-General's Department evidence of 23 Feb 05]: Concerns have been raised that the Code's definition of 'sexual services' refers only to the **commercial use** or display of a person's body, and say that the definition should be amended to include non-commercial sexual use and exploitation of children (World Vision).
World Vision also asks whether the definition adequately covers the trafficking of adults into non-commercial sexual exploitation (eg, forced marriage)
What is your response to these concerns?

The definition of sexual services is consistent with that proposed by MCCOC in their 1998 Report on Slavery and has been adopted by jurisdictions including Victoria, New South Wales, South Australia and the ACT. The definition of sexual service is also consistent with the existing definition of sexual service under section 270.4 of the Criminal Code (that relates to sexual servitude). At this stage, there is no proposal to amend the definition of sexual service.

The trafficking in children offence in section 270.4 is available where the offender was 'reckless' as to the fact that the trafficked child would be either 'used to provide sexual services' or 'otherwise exploited' by the offender or by another person. This could include a variety of conduct, including child pornography.

Where a trafficked person is 'forced' into marriage, this conduct might constitute 'slavery' under the existing section 270.3 Criminal Code offence. The existing

slavery offence in section 270.3 of the Criminal Code carries a heavier penalty than the trafficking offences in the Bill.

Under Australia's federal system of government, criminal law enforcement is primarily a matter for the States and Territories, with each managing their own criminal justice system and related programs including policing, administration of the courts and prison systems. The regulation of sexual abuse, sexual assault and related matters is generally a matter for the States and Territories.

23. [from page 29 of the Proof Hansard]

Did you write to or contact relevant State authorities and advise them of the intention to cover the field in this area?

[from page 30 of the Proof Hansard]

Which state law do you rely on, especially given that you have not consulted with the states?

State and Territory authorities were not consulted about the content of the Bill. The measures in this Bill, and the ability of the Australian Government to ratify the Trafficking Protocol, are not linked to the enactment of complementary State or Territory legislation.