

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

Comments and Recommendations

Submission from Project Respect Inc.

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1. Introduction

Project Respect

Project Respect is one of Australia's leading specialist non-government organisations addressing trafficking in women for prostitution. Project Respect was established in 1998 to work with women in the sex industry to support their human rights, while challenging the structures that limit and undermine these. Project Respect is particularly concerned with violence against women in the sex industry, including trafficking in women for prostitution.

Preliminary comments on the Exposure Draft Criminal Code Amendment (Trafficking in Persons Offences) Bill 2004

Project Respect applauds the Attorney-General's amendments to existing trafficking-related laws, and welcomes the opportunity to comment. Comments made within this document are informed by Project Respect's direct work with women in the sex industry, and extensive research into trafficking. We believe that this legislative change will be another large step forward in the fight against trafficking, and in providing restitution to victims of this crime against humanity.

Firstly, we praise the move for Australia to ratify the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children¹. Project Respect believes that ratifying the Trafficking Protocol shows a commitment to enacting international best practice standards to combat trafficking in persons.

We support this amendment of the Criminal Code, which we believe in addition to aligning Australia with the UN Trafficking Protocol broadens the parameters of trafficking offences, and offers harsher penalties for offenders. In particular, we welcome the introduction of separate offences for domestic trafficking and for debt bondage.

Comments on these items, as well as suggestions for further inclusions, are made in the next section of this document. The third section compares the draft legislation to the UN Protocol. The fourth section recommends further offences for the legislation, and the final section makes concluding comments, addressing points of consideration outside the scope of the legislation itself, but which we believe are vital to a consolidated whole-of-government approach to combating trafficking in persons.

¹ United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 2000; hereafter referred to as the 'UN Trafficking Protocol'.

2. Comments on the Draft Bill

Subsection 270.7 (1)

In relation to deceptive recruiting, some additional points should be made in relation to the curtailment of the victim's freedom. **Items (b) and (d)** refer to the extent to which the victim is free to leave their place of work, and their place of residence. For the duration of their contract, trafficked women's freedom is curtailed, if not explicitly through physical means, then through psychological violence and threats. Consequently women may also be captive while in a temporary living place such as a hotel, in the home of the trafficker or trafficker's associates, or of other women from the place of work and while being transported between these places. We suggest that these items be broadened to include *any other place* in which the victim may be prevented freedom.

Item (c) refers to deception about 'the extent to which the person will be free to cease providing sexual services'. Whereas other women in the sex industry may be able (in theory) to choose the nature of the services they provide and the customers they service, most often trafficked women are not. Also, trafficked women are less able to refuse a customer mid-booking, thus removing themselves from a potentially violent situation. This item should be expanded to reflect these further areas in which women may be deceived in relation to prostitution, namely the extent of their control over:

- Providing sexual services to particular customers;
- Providing certain sexual acts;
- Engaging in sexual acts without condoms; and
- Freedom to end a session with a customer mid-booking.

We also propose that **two additional items** be added. The first refers to deception about the victim's immigration status. Traffickers may engage in illegal practices to obtain visas and travel documents, including lodging false visa applications, obtaining holiday or short-term working visas without the women's permission, and forging or falsifying passports and visas. For example, women may be told that they have a legitimate working visa where in fact theirs is a holiday visa, or that they have been granted a visa specific to prostitution. It must be recognised that a common tactic of traffickers is to deceive the women about their immigration status, and the subsequent ramifications of contravening Australian migration law. Consequently we suggest that an item be added referring to this form of deception, such as 'the fact that their migration may not be lawful and may involve the falsifying of travel and identity documents'.

Secondly, an item should be included which refers to deception about earnings. A woman may enter willingly into an agreement to do prostitution, but be misled about the economic situation, for example the amount she may reasonably charge for a service, any commission withheld by the business and the number of customers attracted by the business. The Code should reflect that this form of deception also occurs, through inclusion of an item such as 'realistic and accurate information about the economic aspects of the engagement'.

Subsection 270.7 (1A)

As described in the Explanatory Notes accompanying the Draft Code, this subsection is intended to, among other things, highlight the ‘*significant power imbalances*’ in the relationship between victim and trafficker. We welcome this important addition, and believe it should be more explicitly recognised. We believe that this imbalance should be spelled out as an item in its own right in the list of admissible evidence, as it is not adequately captured by the already proposed items.

We also suggest that a **new item (d)** be introduced, which treats as evidence a relationship of dependence between the trafficker and the victim, and the power imbalances implicit in this. This suggests a type of dependence other than economic. We suggest that the proposed Item (iii) (‘*the extent of the person’s social and physical dependence on the alleged offender*’) would fall under this heading, as would a **new item (iv)**, violence and the threats of violence against the victim which define that relationship. Violence is used by traffickers as a tool to disempower women. In relationships between traffickers and victims, violence is used to increase the dependence of the victim. Inclusion of this point in the Code would more closely reflect the language of the UN Trafficking Protocol, which states that ‘the abuse of power or of a position of vulnerability’² is a means used by traffickers to exploit the victim. In addition, item (iii) should reflect the psychological dependence of the victim on the trafficker.

The amended text would read:

(1) (a) to (c)

(d) the relationship of dependence between the person and the alleged offender, characterized by:

(iii) the extent of the person’s social, psychological and physical dependence on the alleged offender

(iv) violence carried out by and threatened against the person by the alleged offender

Division 271 – Trafficking in persons and debt bondage

Subdivision A – Definitions

Subsection 271.1 Definitions

Confiscate

We support the broadening of **confiscate**, regarding passports, to include ‘*whether permanently or otherwise*’. This allows for the fact that traffickers often give passports and travel documents back to victims if they know that an immigration raid is imminent. However, in addition to destroying documents, traffickers may perform other damaging acts in relation to the victim’s travel or identity document. They may use them to lodge fraudulent visa applications, which can result in the deportation of the victims on discovery. This needs to be reflected in the Code, which could be amended to include: ‘*and to make false applications on behalf of the person by use of such documents*’.

² Article 3(a)

Deceive

In the past, **deceive** was defined as referring only to the provision of sexual services. This definition appropriately recognises that the act of trafficking can entail a myriad of deceptive acts.

Threat

The proposed amendment reads:

Threat means:

- (a) a threat of force; or
 - (b) a threat to cause a person's removal from Australia; or
 - (c) a threat of any other detrimental action;
- unless there are any reasonable grounds for the threat of that action.

In the existing legislation, the final caveat (*unless there are any reasonable grounds for the threat of that action*) only applies to Item (c), which reads 'a threat of any other detrimental action in connection with the provision of sexual services by a person'. Here it is unclear whether the caveat applies to items (a), (b) and (c) or only to item (c) as in the original. If this change has occurred, we would be concerned that this broadens the interpretation of what constitutes a threat, with the danger of rendering the definition ambiguous. What qualifies as 'reasonable grounds' is subjective, and falls to the jury to decide.

Instead, we propose the altering of this definition to include perceived threat on the behalf of the victim. Victims may have a pervading sense of risk or danger to themselves or their family members, despite no concrete threat being made.

Subdivision B – Offences relating to trafficking in persons

Items 271.2 to 271.6

We support the inclusion of specific offences for trafficking in persons. Where the existing legislation focuses on the end result of trafficking (the sexual servitude), the amendment realises the significance of the trafficking process. This Code seeks to further align Australian legislation with the UN Trafficking Protocol, however we are concerned that the subsections of the code relating to the offence of Trafficking in Persons carry too narrow an interpretation of that Protocol (see Section 3 of this submission).

The explanatory notes to this section state that 'for the purposes of this offence, it does not matter whether the victim's entry or proposed entry is lawful or unlawful under the Migration Act 1958' (p8). In the past, trafficked women have been blamed for circumventing the usual migration channels, and have been represented as opportunists who disregarded the law in their desire to come to Australia. This provision makes clear that trafficked women do not control their mode of migration, and we applaud this.

We do, however, question the application of the offences to trafficking operations involving more than one operator (referred to as 'syndicates'). The offences refer only to the 'first person'. Is this suitably equipped to prosecute trafficking operations where different stages of the trafficking process are carried out by individuals? For example, will someone who acts as a 'courier' (accompanying the women to Australia on behalf of the

trafficker/s but not complicit in the end exploitation) be liable under this law? Furthermore, does this also apply in circumstances where the trafficker acts through an agent, and is not *per se* the 'first person' as mentioned in the amendment?

Finally, we question the differences between the Trafficking in persons (271.2) and the Domestic trafficking in persons (271.5) offences. The Domestic trafficking in persons item does not include the provisions relating to deceptive recruiting. As such, it does not reflect the UN Protocol definition of trafficking in persons (see Section 3 for more detail), nor does it adequately reflect the trafficking process. It fails to account for the trafficker willfully subjecting the victim to (in the language of the Code, 271.2) '*the provision of sexual services, exploitation, debt bondage or the confiscation of the other person's travel or identity documents*'. We suggest that the offences be made as uniform as possible.

Subsection 271.3 (1)(c)

This section outlines the aggravated offence of trafficking in persons. At 1 (c) it outlines that a person commits this offence if he/she 'engages in conduct that gives rise to a danger of death or serious harm to the victim'. It is important to make it clear that harm, or violence, can be psychological as well as physical. Traffickers often subdue their victims by means of psychological violence, and this needs to be set out in the Code.

Subdivision C – Offences relating to debt bondage

271.8 Offence of debt bondage

Project Respect supports the inclusion of specific offences relating to debt bondage. Offences relating to slavery are already covered by the Slavery offences in the Criminal Code Section 270.3. Consequently we argue that a specific offence relating to debt bondage for sexual servitude is most appropriate in this context. Debt bondage for sexual servitude is a unique circumstance, and different to the selling of labour in other contexts. In this situation, trafficked women have no control over the many damaging and dangerous aspects of the prostitution they are forced to do to repay their 'debt'. They are forced to provide intimate services, to sell their bodies, to clients who they cannot choose. The physical and psychological effects are long-lasting and significant.

We believe the **third** option should form part of the amended Code. Where the first two options legitimise some form of debt arrangement, the third version reflects our view that debt arrangements in the sex industry are entirely unacceptable. We absolutely reject the first and second options for this offence. In every state and territory it is illegal to be forced into sex, because this indicates the absence of consent. If a contract exists for sexual services then the act of sex – or any sexual services provided – cannot be clearly consensual. A woman's choices to refuse sex is clearly undermined by a prior contract to provide prostitution sex. It should never be acceptable for a woman's sexual services to be used to repay debt.

We have reservations about the way in which this offence would be prosecuted in court, should Options 1 or 2 be incorporated. Project Respect has audited trials involving victims of trafficking. Often, where women acknowledge any knowledge of any part of the trafficking process, defence lawyers have represented them as complicit in their trafficking and their breach of migration law. We would be concerned that the provision in the definitions for the first two options (Dictionary 10 & 11: '*debt bondage... if (c) the*

reasonable value of those services is not applied toward the liquidation of the debt or purported debt; or (d) the length and nature of those services are not respectively limited and defined) may make this offence difficult to prove in court. If an alleged victim showed any awareness of the existence of a debt and the conditions of it, defense lawyers may argue that the victim was aware of the debt arrangement and therefore was not exploited. This adds further support to a problematic aspect of the existing legislation – that women are not victims and traffickers cannot be penalised unless deception occurs. We would argue strongly that, whether the above conditions were met or not, a contract for sex work is never acceptable.

This is in keeping with the UN Protocol, which sets out that

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 used³.

Subparagraph (a) is the definition of trafficking, namely

‘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 organs⁴.

This sets out that consent is irrelevant where exploitation has occurred. Regardless of the existence of a formal or informal debt contract whose conditions were or were not made known, the very act of trafficking removes the victim of the freedom to consent.

We also suggest that this item be flexible in recognising the varied nature of debt arrangements. For example, many women are trafficked by syndicates, in which more than one person may have a debt arrangement with the victims, and debt contracts may be transferred between operators. In these situations many debt arrangements for the one woman may exist or have existed, and numerous sales may have taken place. We question whether the proposed debt bondage offence takes this into account, and allows for more than one prosecution for multiple debts.

Finally, we query the sentence for this offence, of 12 months. Debt bondage is as instrumental a part in the trafficking process as the recruitment and transport as laid out in the Trafficking in Persons offences. We therefore suggest that the term be lengthened to reflect the seriousness of the crime and its significance in the trafficking process.

Dictionary Item – *debt bondage for sexual services*

As discussed above, we strongly support the insertion of **Item 12**, the definition for the third debt bondage option, with the following amendment.

The definition requires that the victim ‘pledge’ his or her sexual services, or another’s, as security for a debt. This suggests that women knowingly enter into a debt arrangement whose terms and conditions they are familiar with. This is not always the case. Women may be unaware that they are engaged in a debt contract, and where they are aware they may not know about the amount which they owe, the way in which they must repay it, and

³ Article 3(b)

⁴ Article 3(a)

the time they have to repay it. Consequently we suggest that the definition be reworded to reflect this. It must be clear that traffickers will deceive victims about many aspects of the process. Not telling victims about the debt contract is a common part of deceptive recruiting.

3. Alignment with the UN Protocol

Although we commend the move to ratify the UN Protocol, and believe this amendment to the Criminal Code is an important step towards this, we are concerned that the Protocol in its entirety is not reflected. These points are laid out below:

Proposed Trafficking in persons offences (Items 271.2 to 271.6)

The UN Protocol sets out the means by which traffickers may exploit their victims⁵. The variety of these means is included in the definition reproduced in the Explanatory Notes to the Draft Code, but is not reflected in the language of the code itself. The means of trafficking recognised in the Protocol are as follows:

- ‘Use of threat or force or other forms of coercion;
- Abduction;
- Fraud;
- Deception;
- The abuse of power or of a position of vulnerability; and
- The giving or receiving of payments or benefits to achieve the consent of a person having control over another person’

The proposed legislation places emphasis on coercion, deception and payments (through the debt bondage provisions), but does not refer to abduction or fraud. We would argue that a Trafficking in Persons legislation which seeks to embrace the UN Trafficking Protocol, and address all forms of trafficking in persons, needs to address the myriad of ways in which traffickers recruit, transport, transfer, harbour and receive persons. While deceptive recruiting is a significant technique used by traffickers of women for sexual servitude, it is not the only technique.

Consent

We further reiterate the importance of Article 3 (b), which states that a victim’s consent is deemed irrelevant should charges of trafficking in persons be proven against her trafficker. No perception that a woman freely consents to sexual exploitation is relevant, regardless of the potential existence of a ‘contract’ or debt arrangement.

Exploitation

We support the proposed definition of exploitation, which is in line with that recommended by the UN Protocol.

⁵ Article 3(a)

4. Further recommendations

Though the Government's attention to the issue trafficking in women for sexual servitude has been overwhelmingly positive, there are a number of areas which we believe deserve more attention. The following are recommendations of items which deserve further attention, and are not covered by the draft legislation:

1. Penalise businesses which knowingly engage trafficked women

This would apply to owners of brothels and other establishments which provide sexual services, which engage women who have been trafficked for sexual servitude. A provision for this would ensure the prosecution of brothel owners who were not necessarily involved in the trafficking of the women, but who sold her services on her entry into Australia

2. Penalise men who buy sex from trafficked women

This would apply to men who knowingly or recklessly purchase sexual services from a trafficked woman. Such a law places an onus on men buying prostitution sex to seek to ascertain if the woman is trafficked. It should be made clear that purchasing sexual services from a trafficked woman is equivalent to non-consensual sex, which is rape.

3. Penalise traffickers who mislead as to migration status

Traffickers take advantage of women who have been misled or are unclear about their migration status. They may even lodge fraudulent visa applications on behalf of women they are trafficking. This makes the woman guilty of breaching the Migration Act, and can have legal consequences as well as jeopardising any subsequent visa applications. This needs to be recognised as a punishable offence which has a close relationship with trafficking in persons, that is reflected in the legislation.

4. Protect witnesses at trial

When these cases go to trial, women should not be required to give evidence in person. Forcing them to come face-to-face with their traffickers could prejudice the evidence they give, as well as being an extremely painful and potentially damaging process. Child witnesses and victims of rape are not obliged to give evidence in person, because of, amongst other things, their vulnerable position. Keeping in mind the relationship of dependence and exploitation between trafficker and victim, the same should apply to trafficked women.

5. Use Victim Impact Statements at trial

The Parliamentary Joint Committee on the Australian Crime Commission Inquiry into the Trafficking of Women for Sexual Servitude (2003) concluded that the impact of the crime on the witness should be considered at trials. It concluded that this was necessary 'given the nature and effect of the sexual trafficking offences on the victim', offences which are 'undeniably serious'⁶. We suggest that there be a requirement for Victim Impact Statements to be considered at trials.

⁶ The Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the Trafficking of Women for Sexual Servitude*, 2003, Item 4.34, p52

5. Concluding comments

This amendment would make welcome improvements on the existing sexual servitude legislation. There are, however, a few final points which are crucial to a consistent, whole-of-government approach to combating trafficking which is aligned with international recommendations.

The UN Protocol addresses not only the criminal offence of trafficking in persons, but a broader framework for addressing the crime and rehabilitating its victims.

The draft exposure bill will certainly bring Australia in line with the best approaches internationally, and the federal government is to be congratulated for this step. However, even the best legislation in the world will fail if complementary aspects, such as support for trafficked women, are inadequate. Ultimately, good legislation can be undermined by weaker policy responses.

Given this, we strongly urge the government to change the current visa framework for trafficked women. Specifically, we recommend a new system where women are assessed for a trafficking visa *before* they agree to help police investigations or prosecutions. At present, women are deterred from coming forward to the authorities because they fear if they cannot help police they will be removed from Australia, regardless of their perceptions of either danger in their home country, or indeed their desire to recover from the violence they have experienced. In addition, the current trafficking visas can neither be applied for victims themselves, nor can decisions be appealed. This lack of transparent is problematic given that trafficking victims have often been mis-informed and/or prevented from understanding the processes they are caught up in. Our counter-trafficking responses must very carefully avoid in any way, however inadvertently, replicating non-transparent process of trafficking.

Creating a provision for women to apply for visas prior to agreeing to help police would also remove the ability for defence teams to argue that women are only helping police because they want a visa, or indeed that they are fabricating stories to win a visa. Furthermore, it would signal that the Australian government believes all trafficking victims are entitled to recovery in Australia, not only those that can help the government. This is pursuant to the UN Protocol which recommends that

...each State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases⁷.

Furthermore, the Protocol refers to the importance of prevention through 'research, information and mass media campaigns and social and economic initiatives'⁸. The Government, through its \$20 million dollar trafficking initiative in 2003, has already made moves towards this, and we strongly support any further campaigns and initiatives which help to eradicate trafficking in women for sexual servitude.

⁷ Article 7 (1)

⁸ Article 9 (2)

Finally, it remains to address the demand for prostitution. Supply is only necessary where the demand exists, and as long as the demand for trafficked women exists, the trade will continue. The UN Protocol recommends that

States Parties shall adopt or strengthen legislative or other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking⁹.

The proposed legislative amendments go a long way towards preventing the crime, however it can never be emphasised enough that trafficking is an exploitative act.

⁹ Article 9 (5)