



Australian
Human Rights
Commission

Exposure Draft Bill *Crimes Legislation
Amendment (Slavery, Slavery Like
Conditions and People Trafficking) Bill 2012*

**AUSTRALIAN HUMAN RIGHTS COMMISSION SUBMISSION TO THE
ATTORNEY GENERAL'S DEPARTMENT**

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ABN 47 996 232 602
Level 3, 175 Pitt Street, Sydney NSW 2000
GPO Box 5218, Sydney NSW 2001
General enquiries 1300 369 711
Complaints info line 1300 656 419
TTY 1800 620 241

Australian Human Rights Commission
www.humanrights.gov.au

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1 Introduction

1. The Australian Human Rights Commission makes this submission to the Attorney-General's Department on its Exposure Draft Bill Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012.

2 Summary

2. The Commission welcomes the Exposure Draft Bill Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012 and appreciates the opportunity to provide comment on the Exposure Draft Bill.
3. The Commission reaffirms its comments in its submission to the Senate Legal and Constitutional Committee on the Criminal Code Amendment (Trafficking in Persons) Bill 2004¹, relevant to the proposed amendments in the Exposure Draft Bill.

3 Recommendations

4. The Commission welcomes and supports the Exposure Draft Bill as an important measure towards bringing Australian laws on trafficking and slavery into line with Australia's human rights obligations.
5. The Commission recommends:
 - **Recommendation 1:** the Criminal Code be amended to make it clear that the consent of a victim of trafficking is not relevant where force, coercion or deception has been used.
 - **Recommendation 2:** the Exposure Draft Bill be amended to ensure that trafficking victims are not liable to prosecution or punishment for offences committed as a direct consequence of their status as a trafficking victim.

4 Australia's human rights obligations

6. Wherever possible, the national legal framework should reflect international best practice and be consistent with Australia's international human rights obligations.
7. Australia has obligations relating to trafficking in persons under a number of international treaties. In particular, Australia ratified the United Nations Convention against Transnational Organised Crime in 2004 and its supplementary Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children in 2005 (Trafficking Protocol).
8. Article 5(1) of the Trafficking Protocol requires states parties to

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

9. Article 3(a) provides

‘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

10. The *Criminal Code Act 2005* (Cth) establishes Australia’s trafficking offences. Australia’s human trafficking and related laws currently do not comprehensively reflect the full suite of Australia’s international legal obligations in this area.

11. The Commission welcomes and supports the Exposure Draft Bill as a significant step towards meeting Australia’s obligations under the Trafficking Protocol.

5 Slavery and slavery-like offences

12. According to the United Nations Office on Drugs and Crime International Framework for Action to Implement the Trafficking in Persons Protocol, national anti-trafficking laws should address all forms of exploitation with reference to international human rights standards including fundamental principles and rights.²

13. The Commission welcomes the intention of the Exposure Draft Bill to criminalise a range of exploitative behaviours as ‘slavery-like’ offences including, servitude, forced labour, serfdom, forced marriage, servile marriage and debt bondage.

14. The Commission notes that it will be necessary to provide definitions of ‘serfdom’ and servile marriage’ under s 270.1A (Definitions for Division 70), as they are currently the only offences that remain undefined.

5.1 Forced labour

15. Proposed s270.6A of the Exposure Draft Bill establishes new ‘forced labour’ offences, including causing a person to enter into or remain in forced labour and conducting a business involving forced labour.

16. Australia has an obligation to ‘suppress’ forced labour under the ILO Convention 1930.³ Further, the International Covenant on Economic, Social and Cultural Rights protects the right to freely choose one’s work.⁴ Under the International Covenant on Civil and Political Rights Australia also has an

obligation to ensure no one is required to perform ‘forced or compulsory labour’.⁵

17. Proposed s270.6 establishes the following definition of ‘forced labour’

270.6 Definition of *forced labour*

(1) For the purposes of this Division, **forced labour** is the condition of a person (the **victim**) who provides labour or services if, because of the use of coercion, threat or deception, a reasonable person in the position of the victim would not consider himself or herself to be free:

(a) to cease providing labour or services; or

(b) to leave the place or area where the victim provides labour or services.

(2) Subsection (1) applies whether the coercion, threat or deception is used against the victim or another person.

(3) The victim may be in a condition of forced labour whether or not:

(a) escape from the condition is practically possible for the victim; or

(b) the victim has attempted to escape from the condition.

18. The Commission supports expanding slavery-like offences in the Criminal Code to include stand-alone ‘forced labour’ offences. This recognises that not all forced labour victims have been trafficked and is consistent with Australia’s international human rights obligations.
19. Further, the Commission supports the acknowledgment in the Exposure Draft Bill that a victim may be in a condition of forced labour whether or not escape is possible or the victim has attempted to escape. This recognises the more subtle forms of psychological control that can be evident in cases of human trafficking.

5.2 Forced marriage

20. Proposed s270.7B of the Exposure Draft Bill establishes new ‘forced marriage’ offences, including causing a person to enter into a forced marriage and being party to a forced marriage, through the use of coercion, threat or deception.
21. Proposed s270.7A defines a marriage as a forced marriage if
- because of the use of coercion, threat or deception, one party to the marriage (the **victim**) entered into the marriage without freely and fully consenting.
22. The Commission notes that ‘registered relationship’ is defined under s 22B of the *Acts Interpretation Act 1901*, and not s 2E, as currently noted in the Exposure Draft Bill.

23. Forced marriage is defined by Article 1 of the Supplementary Convention to be an ‘institution or practice similar to slavery’.⁶ The Trafficking Protocol defines exploitation at a minimum, to include practices similar to slavery.⁷
24. Accordingly, the Commission supports including ‘forced marriage’ offences as stand-alone offences under Australian law, consistent with Australia’s obligations under international law.

5.3 Servitude

25. Proposed s 270.5 of the Exposure Draft Bill establishes new ‘servitude’ offences, including causing a person to enter or remain in servitude and conducting a business involving servitude.
26. Proposed s 270.4 of the Exposure Draft Bill provides
- (1) For the purposes of this Division, **servitude** is the condition of a person (the **victim**) who provides labour or services, if, because of the use of coercion, threat or deception:
 - (a) a reasonable person in the position of the victim would not consider himself or herself to be free:
 - (i) to cease providing the labour or services; or
 - (ii) to leave the place or area where the victim provides the labour or services; and
 - (b) the victim is significantly deprived of personal freedom in respect of aspects of his or her life other than the provision of the labour or services.
 - (2) Subsection (1) applies whether the coercion, threat or deception is used against the victim or another person.
 - (3) The victim may be in a condition of servitude whether or not:
 - (a) escape from the condition is practically possible for the victim; or
 - (b) the victim has attempted to escape from the condition.
27. The Commission supports expanding slavery-like offences in the Criminal Code to include ‘servitude offences’.
28. The Commission notes that the offence of ‘conducting a business involving servitude’ should be defined to include owning a business involving servitude. The offence should be applicable to both the owner of the business as well as the managers in charge of conducting business.
29. As discussed above, the Commission welcomes the acknowledgment in the Exposure Draft Bill that a victim may be in a condition of servitude whether or not escape is possible or the victim has attempted to escape.

5.4 **Deceptive recruitment for labour or services**

30. Proposed s 270.7 of the Exposure Draft Bill makes it an offence for a person to induce another person to enter into an agreement by deceiving the person about the person's freedom of movement, freedom to cease providing the labour or services, the quantum of any debt owed, the nature of sexual services to be provided or the confiscation of the person's identity or travel documents.
31. The Criminal Code currently contains an offence of deceptive recruiting for sexual services.⁸ The Commission supports the establishment of an offence of deceptive recruitment for labour services.

6 **Coercion and threat**

32. Proposed s 270.1A expands the definition of 'coercion' to include abuse of power and taking advantage of a person's vulnerability.
33. The Commission welcomes the expanded definition of coercion. Traffickers may employ subtle, non-violent forms of control over their victims.⁹ In *R v Tang* the High Court adopted a broad understanding of possession and control to establish 'slavery' under the *Criminal Code*.¹⁰
34. The proposed definition of coercion in s 270.1A of the Exposure Draft Bill more adequately recognises the complex nature of coercion and reflects Australia's obligations under the Trafficking Protocol.
35. Equally the Commission welcomes the comprehensive definition of threat that recognises threats can be express or implied, conditional or unconditional, and as a state of affairs, can occur over a period of time.

7 **Consent**

36. The Criminal Code does not explicitly state that consent of adult trafficking victims is irrelevant where means including force, threats or coercion are used. However, the Trafficking Protocol is clear that 'consent' is nullified when the trafficking situation has involved deception, coercion or other means.¹¹
37. **Recommendation 1:** The Commission recommends that the Criminal Code be amended to make it clear that the consent of a victim of trafficking is not relevant where force, coercion or deception has been used.

8 **Immunity from prosecution**

38. The UNODC *Model Law Against Trafficking in Persons* includes an optional provision that ensures victims of trafficking are not charged, arrested, detained or prosecuted for offences committed by them to the extent that such involvement is a direct consequence of their having been the victim of trafficking.¹² Similar protections from prosecution should be made available to trafficked persons in Australia.

39. **Recommendation 2:** The Commission recommends that the Exposure Draft Bill be amended to ensure that trafficking victims are not liable to prosecution or punishment for offences committed as a direct consequence of their status as a trafficking victim.

9 Penalties

40. The Commission supports the proposed increase in penalty for the offence of debt bondage from a maximum penalty of 2 years imprisonment to 7 years. This increased penalty reflects the seriousness of the offence.

10 Implementation

41. To ensure full and proper implementation of the proposed amendments to the criminal legislation, the Commission notes the importance of the government providing appropriate and accessible information on the amendments for victims of exploitation, law enforcers, judiciary and court officials, employer and industry groups, unions, and community organisations and service providers who may have contact with people who have been exploited under these offences.
42. The Commission notes the importance of undertaking culturally appropriate forms of engagement with communities within which forced marriage may be occurring. It is necessary for accessible and appropriate awareness raising programs to be undertaken with affected communities, including provision of culturally aware and linguistically appropriate information. There would also be value in ensuring cultural competency training to service providers, Australian Federal Police and legal services dealing with forced marriage cases; and in ensuring that any victims of forced marriage are able to access culturally appropriate support services and accommodation.
43. The Commission further notes the importance of a holistic approach to implementation, including ensuring that victims of trafficking have access to affordable and appropriate support services including accommodation, English language classes, reparations and other remedies and that such access not be dependent on contributions to criminal justice processes.

¹ Human Rights and Equal Opportunity Commission, *Submission to the Senate Legal and Constitutional Committee on the Criminal Code Amendment (Trafficking in Persons) Bill 2004* (2005). At http://www.hreoc.gov.au/legal/submissions/criminal_code_trafficking_bill.html.

² United Nations Office on Drugs and Crime, *International Framework for Action to Implement the Trafficking in Persons Protocol* (2009), 18.

³ International Labour Organisation, *Convention concerning Forced or Compulsory Labour 1930* (ILO No. 29). See also International Labour Organisation, *Abolition of Forced Labour Convention 1957* (ILO No. 105).

⁴ *International Covenant on Economic, Social and Cultural Rights* (1996), art 6, at <http://www2.ohchr.org/english/law/cescr.htm> (viewed 12 January 2012).

⁵ *International Covenant on Civil and Political Rights* (1966), art 8(a), at <http://www2.ohchr.org/english/law/ccpr.htm> (viewed 12 January 2012).

⁶ *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery* (1956).

⁷ Article 3(a)

⁸ *Criminal Code Act 1995* (Cth), art 270.7

⁹ UNODC *Model Law Against Trafficking in Persons* (2009), 22 available at www.unodc.org/unodc/en/frontpage/2009/July/model-law-on-trafficking-in-persons-.html.

¹⁰ *R v Tang* HCA 39 (2008)

¹¹ Article 3(b) provides that the consent of a victim of trafficking is irrelevant where any means, including coercion, deception, abuse of vulnerability is used.

¹² United Nations Office on Drugs and Crime, *Model Law Against Trafficking in Persons* (2009), art 10; see also *The Recommended Principles and Guidelines on Human Rights and Human Trafficking of the Office of the United Nations High Commissioner for Human Rights*, UN Doc E/2002/68/Add.1, Recommended principle 7; Council of Europe, *Convention on Action against Trafficking in Human Beings* 2005, article 26, available at http://www.coe.int/t/dghl/monitoring/trafficking/Docs/Convntn/CETS197_en.asp#TopOfPage (viewed 12 January 2012).