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Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012

Date introduced: 30 May 2012
House: House of Representatives
Portfolio: Attorney-General
Commencement: The day after Royal Assent

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill's home page, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose

The purpose of this Bill is to make amendments to existing Divisions of the Criminal Code Act 1995 and section 21B of the Crimes Act 1914. The Bill will establish new offences of forced labour, forced marriage, organ trafficking and harbouring a victim. The Bill will also modify the scope and application of existing offences of slavery, deceptive recruiting, sexual servitude and trafficking in persons, and increase the penalty for the offence of debt bondage.


Background

Trafficking in persons is defined in Article 3(a) of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (the Trafficking Protocol) as:

[T]he 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.1

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The exploitation involved in people trafficking can take a variety of forms, including sexual exploitation, forced labour or services, organ harvesting and slavery and slavery-like practices such as debt bondage and sexual or domestic servitude.

While the clandestine nature of people trafficking means that it is difficult to obtain reliable data on its extent, there is general agreement that the practice is widespread. Based only on reported cases, the United Nations Office on Drugs and Crime found in 2006 that victims were trafficked from 127 countries and underwent exploitation in 137 countries around the world. The International Labour Organization (ILO) estimates that 20.9 million people, or three out of every 1000 people worldwide, are the victims of forced labour or trafficking at any given time. While this estimate includes all forms of trafficking for labour and exploitation, it does not capture trafficking for the removal of organs, forced marriage or forced adoption. Of that total, 90 per cent are exploited in the private economy (by individuals or enterprises), with 22 per cent the victims of sexual exploitation and 68 per cent the victims of labour exploitation in activities including agriculture, construction, domestic work and manufacturing. The remaining ten per cent are victims of state-imposed labour, including forced recruitment to armed forces or militia. Over half the victims of trafficking are women and girls, with adults aged 18 or over comprising almost three quarters of the total.

The profits derived from people trafficking are similarly difficult to determine. The ILO estimated in 2005 that the global profits from all forms of forced labour (again capturing all forms of trafficking except for the removal or organs, forced marriage or forced adoption) amounted to US$44.3 billion dollars, or an average of US$4500 per victim, per year.

People trafficking in Australia

As is the case internationally, it is difficult to determine the true extent of people trafficking in Australia. There are wide discrepancies both between the estimates of different non-government organisations and between those estimates and officially detected cases. The Australian Federal Police (AFP) undertook 305 investigations and assessments of people trafficking-related offences between January 2004 and June 2011. As of June 2011, 13 people had been convicted of such

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offences in Australia. As at June 2011, 184 victims had been referred to Australia’s Support for Victims of People Trafficking Program since it was established in 2004, including 165 women and 19 men.

Most of the victims of trafficking identified in Australia to date have been women trafficked for exploitation in the commercial sex industry. However, authorities have begun to identify people trafficked to Australia for exploitation in other industries, including agriculture, construction, hospitality, domestic services and recreation. The AFP began its first organ trafficking investigation in March 2011, but that case was dropped in March 2012 following the death of the woman who was to receive the organ. The case was reported to involve an elderly Sydney woman with kidney problems trafficking a younger woman from the Philippines.

Globally, trafficking for sexual exploitation is more widely detected and prosecuted than other forms of labour trafficking, despite estimates suggesting that other forms of labour trafficking are more prevalent. The UNODC has suggested three key reasons for this, all of which are relevant in the Australian context:

- for many years, criminalisation of trafficking focused only on trafficking for the purpose of sexual exploitation
- law enforcement agencies and the general public have subsequently often viewed trafficking only in the context of sexual exploitation, so that even where detected, forced labour may be addressed under other laws (for example, employment or migration laws) and

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8. Ibid., p. 33.


11. Ibid.

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• while prostitution must be visible to attract potential clients, most other victims of forced labour are less visible to the public, working in locations such as factories, mines and agricultural fields, or private dwellings in the case of domestic servitude.\textsuperscript{12}

The need to ensure that Australian laws criminalising people trafficking, slavery and slavery-like conditions adequately cover the range of purposes for which people may be trafficked was part of the impetus for the reform process that led to this Bill.\textsuperscript{13}

\section*{Current legislative framework}

Australia ratified the \textit{International Convention to Suppress the Slave Trade and Slavery} on 18 June 1927, and the \textit{Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery} on 6 January 1958.\textsuperscript{14} Slavery has been criminalised in Australia since 1824 through the application of the \textit{Slave Trade Act 1824} (United Kingdom).\textsuperscript{15} However, slavery offences were not explicit in Australian law until they were introduced into the Criminal Code in 1999.\textsuperscript{16} Division 270 of the Criminal Code contains a range of slavery offences, including possession and slave trading, and offences relating to sexual servitude and deceptive recruiting for sexual services.

Australia signed the Trafficking Protocol, supplementing the \textit{United Nations Convention against Transnational Organized Crime}, on 11 December 2002.\textsuperscript{17} Trafficking offences were enacted in 2005 through the \textit{Criminal Code Amendment (Trafficking in Persons Offences) Act 2005}, and Australia ratified the Trafficking Protocol on 14 September 2005.\textsuperscript{18} Division 271 of the Criminal Code contains

\begin{itemize}
  \item while prostitution must be visible to attract potential clients, most other victims of forced labour are less visible to the public, working in locations such as factories, mines and agricultural fields, or private dwellings in the case of domestic servitude.\textsuperscript{12}
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\end{itemize}
offences of trafficking in persons into or out of Australia, domestic trafficking of persons and debt bondage.

One purpose of the Bill is to address a number of gaps in the current offence regime, compared with the requirements of the Trafficking Protocol. Australia’s trafficking legislation has been described by a leading expert as ‘incomplete, confusing and overly complicated’, with significant scope for rationalisation.\(^{19}\) While the Bill will provide more comprehensive coverage of conduct relating to slavery and people trafficking, the extent to which it rationalises the offence regime is limited, and these amendments will not remedy the complexity of the scheme. The Criminal Code as amended by the Bill will contain separate offences for transportation, deceptive recruiting, and harbouring, receiving or concealing a victim. Specific offences for forced labour, forced marriage and organ trafficking are also introduced alongside the existing broader trafficking offences.

In contrast, some countries have enacted broader trafficking offences that capture many of the types of conduct outlined in the Trafficking Protocol in a single offence or a small number of offences. For example, section 279.01 of the Canadian Criminal Code contains a single offence that captures recruitment, transportation, transfer, receipt, holding, concealment and harbouring a person for the purpose of exploiting a person or facilitating their exploitation.\(^{20}\)

**Marriage arrangements and trafficking**

It is not clear how widespread forced marriage is in Australia, and the situation is blurred given the possibility of fraudulent ‘sham’ marriages to obtain visas for people trafficked into the country. The Australian Institute of Criminology reports that:

> the role that marriage can play in the trafficking of women is an issue of concern in the east Asia region, as it is in other parts of the world (including south Asia). International marriage is part of a wider gendered migration process informed by cultural and societal norms about the institution of marriage. In general, there are a number of ways in which marriage may be used in the trafficking of persons. Fraudulent marriage, forced or servile marriage, international and online marriage brokering and arranged marriages have all been identified as enabling women to be trafficked into a variety of exploitative situations.

> It should be noted, however, that arranged marriages, customary marriage practices or marriages that have been formed through online dating and introductory services are not in and of themselves trafficking or exploitative. These types of marriage arrangements can protect

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people from being trafficked and exploited. Conversely, in some cases such marriages have been found to increase vulnerability.21

Forced marriage is defined as the absence of full and free consent by both parties, often as the result of coercion or deceit. Servile marriage refers to situations in which a person is considered a chattel that can be sold, transferred or inherited into marriage. There has been debate as to whether forced and servile marriage could be captured as a people trafficking offence in Australian law. To put it beyond doubt, the Government is introducing specific offences into the Criminal Code.

Consultation

The Government released a public discussion paper on forced and servile marriage on 22 November 2010.22 This was followed by the release of a second public discussion paper, The Criminal Justice Response to Slavery and People Trafficking; Reparation; and Vulnerable Witness Protections (the trafficking discussion paper), two days later at the third National Roundtable on People Trafficking.23 The trafficking discussion paper canvassed a range of issues, including possible changes to people trafficking and related offences, reparation for victims and protections for vulnerable witnesses. The results of those consultations informed the development of an Exposure Draft of the Bill that was released for comment on 23 November 2011.24

Basis of policy commitment

The Government’s review of the criminal justice response to slavery and people trafficking was prompted by:

- the identification of victims in Australia being exploited in sectors other than the commercial sex industry
- changes to the techniques used by traffickers (such as the use of less overt methods of control), in response to law enforcement activity, prosecutorial strategy and changes to migration laws

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22. R McClelland (Attorney-General) and B O’Connor (Minister for Home Affairs and Justice), Public comment sought on forced and servile marriage reforms, media release, 22 November 2010, viewed 24 July 2012, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F379204%22


24. B O’Connor (Minister for Home Affairs and Justice), C Bowen (Minister for Immigration and Citizenship) and K Ellis (Minister for the Status of Women), Slavery-like offences to become crimes, media release, 23 November 2011, viewed 24 July 2012, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F1443477%22

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• potential gaps in the legislative framework compared to the Trafficking Protocol and
• the need to ensure adequate protection and support for victims.\textsuperscript{25}

The Government has emphasised its commitment to both a strong criminal justice response and protections for victims.\textsuperscript{26} In announcing consultations on people trafficking, the then Minister for Home Affairs and Justice stated:

Today I released a discussion paper canvassing options for improving our legal framework to stop trafficking and better meet the needs of victims ... It is important that we look at the existing criminal sanctions to ensure that law enforcement agencies have the best tools to investigate and prosecute the perpetrators of labour trafficking ... One victim of human trafficking is one too many - that’s why we’re dedicating funding, resources and time to working with non-government organisations to address this crime.\textsuperscript{27}

In her second reading speech, the Attorney-General continued both themes, stating that the Bill will protect the most vulnerable in Australia and ensure perpetrators and facilitators of trafficking and slavery cannot escape prosecution\textsuperscript{28}:

The bill reflects the government’s commitment to doing all it can to prevent slavery and people trafficking. It is easy to say no. It is harder to stand up and do the right thing. And that is what this Bill is about.\textsuperscript{29}

Policy position of non-government parties

The Australian Greens support the Bill but have expressed concern that it does not ensure victims of people trafficking and related offences receive adequate support. In a media release issued on 30 May 2012, the Greens called on the Government to change the eligibility criteria for visas available to victims of trafficking. In particular, the Greens called for changes to ensure that visas are available on the basis of need, not whether a victim is helpful to a prosecution, and the introduction of a new humanitarian visa class for trafficking victims.\textsuperscript{30} This issue is part of the broader people trafficking landscape, and was also raised by a number of stakeholders in submissions to the Senate.

\begin{footnotes}
\item[25] Attorney-General’s Department, \textit{The criminal justice response to slavery and people trafficking; reparation; and vulnerable witness protections}, op. cit., p. 3, pp. 11–12 and pp. 17–34.
\item[26] \textit{Public comment sought on forced and servile marriage reforms}, op. cit.; \textit{A better justice system to combat human trafficking}, op. cit.
\item[27] \textit{A better justice system to combat human trafficking}, op. cit.
\item[29] Ibid., p. 6227.
\item[30] S Hanson-Young, \textit{Bill to combat people trafficking a good start but priority should be supporting victims: Greens}, media release, 30 May 2012, viewed 30 July 2012, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F1677734%22
\end{footnotes}

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inquiry into the Bill and earlier consultations. However, changes relating to visa conditions would be covered under the immigration portfolio and are outside the scope of these amendments.

**Position of major interest groups**

The majority of stakeholders are supportive of the changes and clarifications that this Bill proposes. However, in its submission to the Senate inquiry, Scarlet Alliance states that it is deeply concerned at the amendments contained in the Bill and the intention behind them, which it sees as an attempt to increase prosecutions at the expense of greater assistance to victims. Its submission argues for greater focus on preventative over criminal justice responses.  

**Human rights implications**

As required under Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*, the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act, and considers it compatible. The Bill promotes:

- the absolute right to freedom from slavery and forced labour
- the rights of children to protection against exploitation, violence and abuse
- the rights to respect for the family [in the context of forced marriage]
- the right to an effective remedy [through more offences and the availability of reparation orders for victims] and
- the right to work and rights in work.

The Explanatory Memorandum discusses and justifies the limitations on the right to privacy that the Bill proposes. The Bill does not raise any unreasonable infringements of human rights obligations.

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32. Explanatory Memorandum, p. 4.

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Financial implications

The Explanatory Memorandum states that the Bill has no financial impact on government revenue. Any impact on investigative and prosecutorial agencies will be expected to be absorbed within existing resources.

Committee consideration

The Bill was referred to the Senate Legal and Constitutional Affairs Committee on 19 June 2012 for inquiry and report by 13 September 2012.

More information on the progress of the Senate Committee’s inquiry can be found at the Committee’s website.

Main issues

Reparation, compensation and protection of vulnerable witnesses

Article 6 of the Trafficking Protocol contains measures that parties are required to take to assist and protect victims of people trafficking. The matters covered include:

- ensuring there are measures in place that offer victims the possibility of obtaining compensation for damage suffered
- protecting the privacy and identity of victims
- the provision of information to victims on relevant court and administrative proceedings and
- assistance to enable victims’ views and concerns to be presented and considered at appropriate stages throughout criminal proceedings.

Under section 21B of the Crimes Act, a judicial officer may order a federal offender to make reparation to a person who has suffered loss as a direct result of the offence. Item 2, Schedule 2 of the Bill will amend paragraph 21B(1)(d) so that an offender may be ordered to make reparation to any person in respect of any loss suffered, or any expense incurred, by the person by reason of the offence. This will improve the availability of reparations for victims of Commonwealth offences.

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33. Explanatory Memorandum, p. 2.

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However, many stakeholders would like to see more significant reforms to the support available to victims of people trafficking and other Commonwealth crimes.

Reparation for non-economic loss

The amendment to paragraph 21B(1)(d) of the Crimes Act will broaden the pool of potential recipients of reparations. However, there is still a need for greater clarity around the intended availability of reparations with respect to non-economic losses.

The Australian Law Reform Commission (ALRC) considered this issue in the context of an inquiry into sentencing of federal offenders. In its final report, published in 2006, the ALRC recommended legislative amendments to clarify that reparation orders may be made with respect to any loss suffered by reason of the offence, regardless of whether the loss is economic or non-economic. The recommendation was made on the basis that there are a range of Commonwealth offences that could result in non-economic losses and that there is no reason in principle to distinguish between different forms of loss.\(^\text{36}\)

Many stakeholders support the changes in the Bill but have called for an additional amendment to explicitly provide that a reparation order may be made in relation to non-economic loss such as pain and suffering.\(^\text{37}\) The United Nations Special Rapporteur on trafficking in persons, especially women

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and children (Special Rapporteur) also suggested such an amendment.  

38 Frances Simmons of Anti-Slavery Australia has called for the same amendment and also for changes to enable the victim (or a representative) to apply for a reparation order.  

Victim compensation

The ALRC (then the Law Reform Commission) recommended the establishment of a federal victim compensation scheme in 1980, and went into some detail on a proposed model.  

40 The then Minister for Home Affairs was reported in early 2008 as planning to introduce a federal charter of victims’ rights, including access to compensation.  

41 However, the issue was not canvassed in the trafficking discussion paper, and statements made by representatives of the Attorney-General’s Department during May 2012 Senate estimates hearings indicate such a scheme is not currently being considered.  

While it was not canvassed in the trafficking discussion paper, several stakeholders raised the issue of a federal victims’ compensation scheme in response to questions posed in that paper about access to reparation orders. The latest report of the Anti-People Trafficking Interdepartmental Committee contains a concise summary of stakeholder concerns:

The public consultation sought views on the availability of reparation orders in Commonwealth criminal proceedings. Respondents supported amending section 21B of the Crimes Act 1914.


41 J Pearlman, ‘Rights charter to vindicate victims’, The Sydney Morning Herald, 7 February 2008, p. 4, viewed 1 August 2012,  

http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2FN0LP6%22  

42 I Anderson (First Assistant Secretary, Criminal Justice Division), Senate Legal and Constitutional Affairs Legislation Committee, Budget estimates 2012–2013: Attorney-General’s Portfolio, 24 May 2012, p. 157, viewed 1 August 2012,  

http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Festimate%2F491ff9e9-09f8-477a-8714-7ca7430b793d%2F0009%22

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(Cth) to provide for any loss suffered “by reason of the offence” rather than for any loss suffered by a person “as a direct result of the offence”. However, respondents pointed to a number of hurdles for victims seeking to obtain reparations.

Instead, the majority of submissions called for a Commonwealth compensation scheme for victims of trafficking or other Commonwealth offences against the person, and/or the harmonisation of the existing state and territory statutory schemes. Respondents pointed to the fact that no two schemes are the same, with different eligibility requirements, different timeframes, different caps on the maximum compensation and different access to compensation for pain and suffering. In practice, a state or territory offence will generally be required. 43

Among the hurdles highlighted by stakeholders for victims seeking reparations are that:

- reparation orders may only be made in the event of a successful prosecution, yet few people trafficking cases make it to court, and even fewer result in conviction 44
- the making of a reparation order is discretionary and 45
- in contrast to a government funded compensation scheme, the extent of reparations depends upon the defendant’s ability to pay. 46

None of those hurdles will be addressed by the limited amendment to the Crimes Act made by the Bill. In that context, it is worth noting that none of the 13 offenders convicted under Divisions 270 and 271 of the Criminal Code to 30 June 2011 appear to have been ordered to make reparation. 47 A number of submissions to the Senate inquiry support establishment of a federal compensation scheme or, alternatively, harmonisation of the existing state and territory schemes. 48 Either option, 49

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44. ACRATH, op. cit., p. 3; Good Shepherd, op. cit., p. 10; ICJA, op. cit., p. 8; LCA, op. cit., p. 22; VSA, Submission to the Attorney-General’s Department, The criminal justice response to slavery and people trafficking; reparation; and vulnerable witness protections, February 2011, viewed 7 August 2012, http://www.victimsupport.org.au/UserFiles/File/VSA%20SUBMISSION%20HUMAN%20TRAFFICKING%20CJS%202011.pdf
45. ACRATH, op. cit.; ALHR, op. cit.; LCA, op. cit.
46. ALHR, op. cit.; Good Shepherd, op. cit.; ICJA, op. cit., p. 8; LCA, op. cit.; VSA, The criminal justice response to slavery and people trafficking; reparation; and vulnerable witness protection, op. cit.
47. This statement is based on examination of the judgments relating to the nine cases, which resulted in 13 convictions, listed in Trafficking in persons: the Australian Government response: 1 July 2010–30 June 2011, op. cit., Appendix 1.

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if approached with the particular needs of victims of Commonwealth crimes in mind, could overcome the obstacles outlined above and provide more equitable and access to compensation.

The Special Rapporteur also criticised the absence of a comprehensive national framework for victim compensation in the June 2012 report on her mission to Australia. Establishment of a scheme was one of the formal recommendations she made to the Government.49

Vulnerable witness protections and victim impact statements

The Government sought stakeholder views on protections for vulnerable witnesses through the trafficking discussion paper, which outlines the limited protections currently available for Commonwealth cases and the shortcomings of the existing framework. In summary, the Crimes Act provides a range of protections for child witnesses in proceedings for particular offences, including child sex offences and people trafficking. However, those protections are not available to vulnerable adult witnesses, such as victims of slavery or trafficking, or to child witnesses in other Commonwealth proceedings. While state and territory provisions may be applied to Commonwealth proceedings under section 68 of the Judiciary Act 1903, there are differences in the protections available under those provisions.50

Again, the key suggestions from stakeholders are summarised in the latest report of the Anti-People Trafficking Interdepartmental Committee:

Respondents highlighted the need for better protection for victim witnesses with suggestions including:

- allowing victim impact statements in Commonwealth matters, with appropriate safeguards to preserve the right to a fair trial
- allowing the evidence of a victim at trial to be recorded and subsequently tendered at retrial
- introducing procedures similar to those used for witnesses in sexual matters in the states and territories, such as testimony pre-recorded or by video link, and protection from harsh and unnecessary cross-examination in relation to sexual history

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49. JN Ezeilo, op. cit., p. 16 and p. 21.
50. Attorney-General’s Department, The criminal justice response to slavery and people trafficking; reparation; and vulnerable witness protections, op. cit., pp. 24–28.

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• ensuring the availability of suppression orders in Commonwealth criminal proceedings and
• providing victims with access to private legal representation or advocacy during trial.\textsuperscript{51}

That report, which was tabled in November 2011, states that submissions to the consultation ‘are now being considered by the Government which will make a decision on next steps in due course.’\textsuperscript{52} There has not yet been an announcement on whether, and if so how, the Government intends to respond to the suggestions of stakeholders.

\textbf{Inconsistent criminalisation of deceptive information about working conditions}

Section 270.7 of the Criminal Code currently criminalises deceptive recruiting for sexual services. It provides that it is an offence for a person, with the intention of inducing another person to enter into an engagement to provide sexual services, to deceive that other person about the fact the engagement will involve the provision of sexual services, or about exploitative conditions of the engagement. **Item 12, Schedule 1** of the Bill includes the repeal and replacement of section 270.7 of the Criminal Code to replace the existing offence with a broader offence of deceptive recruiting for labour or services to cover all industries. The Explanatory Memorandum states:

\begin{quote}
Given the rise in the number of individuals identified as being exploited in industries other than the sex industry (for example, hospitality), it is necessary to amend this offence so it applies more broadly to situations of deceptive recruiting for all types of labour or services, regardless of industry.\textsuperscript{53}
\end{quote}

The rationale behind the amendment seems to apply equally to two of the trafficking offences in Division 271 of the Criminal Code, specifically subsections 271.2(2B) and (2C). Subsection 271(2B) applies if:

• a person organises or facilitates the entry, proposed entry or receipt of another person into Australia
• there is an arrangement for the other person to provide sexual services in Australia and
• the first person deceives the other about the nature of the sexual services to be provided or about exploitative conditions of the arrangement.

\begin{footnotes}
\item[53] Explanatory Memorandum, p. 23.
\end{footnotes}
Subsection 271.2(2C) provides an equivalent offence that applies to exit from Australia (except that it does not cover receipt in the other country). However, the Bill contains no equivalent amendments to those offences.

A further question arises as to the appropriateness of the penalties attached to the different offences. While the offences criminalise different acts (recruitment versus transportation), the means (deception) and the purpose (exploitation) are the same. Yet the maximum penalty for the deceptive recruiting offence at section 270.7 is imprisonment for up to seven years (nine years for an aggravated offence), while the penalty for the trafficking offences is imprisonment for up to 12 years (20 years for an aggravated offence). This discrepancy seems to arise due to the distinction in the Criminal Code between trafficking offences that involve transportation and those that do not, despite no such distinction having been made in the Trafficking Protocol. In contrast, the Trafficking Protocol lists transportation as one action among many which, together with a means of obtaining compliance and for the purpose of some form of exploitation, comprise the offence of trafficking in persons.

**Possible gaps in the trafficking offence regime**

**Item 38, Schedule 1** of the Bill introduces new offences of organ trafficking that apply where a person organises or facilitates any of the following, reckless as to whether their actions will result in the removal of an organ from another person contrary to Subdivision BA, Division 271 of the Criminal Code:

- the entry or proposed entry, or the receipt, of the other person into Australia (subsection 271.7B(1))
- the exit or proposed exit of the other person from Australia (subsection 271.7B(2)) or
- the transportation or proposed transportation of the other person from one place within Australia to another place in Australia (section 271.7D).

**Section 271.7A** sets out when removal of a person’s organ is contrary to the Subdivision.

In combination with the new offence of harbouring a victim, the new offences seem to cover three of the five acts associated with trafficking as set out under the Trafficking Protocol, namely transportation, harbouring and receipt. However, the recruitment of a person for the purpose of illegal organ removal does not appear to be captured. While the deceptive recruiting offence will be expanded by item 12, Schedule 1 of the Bill, the amended offence will only capture recruitment for the provision of labour or services.

Gaps may also remain in Australia’s offence regime with respect to the transfer of a person through means such as coercion, threats or deception for the purposes of exploitation (including illegal organ removal, but also other forms such as servitude and forced labour). The Trafficking Protocol lists transfer as a separate act to transportation, but does not define what is meant by the term. The
official records of the negotiations leading up to adoption of the Trafficking Protocol do not clarify the matter. Aside from the definition of trafficking, which mirrors that of the Trafficking Protocol, the term transfer is used only in relation to forced marriage in the United Nations Office of Drugs and Crime’s model law:

‘Forced or servile marriages’ shall mean any institution or practice in which . . . [t]he husband of a woman, his family or his clan has the right to transfer her to another person for value received or otherwise.\(^{54}\)

The European Union appears to have attempted to clarify the term in its Directive on preventing and combating trafficking in human beings and protecting its victims, in which it directs member states to criminalise ‘recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons’ (emphasis added).\(^{55}\) If the term is taken to refer to the transfer of control over a person, transfer may not be adequately covered by the Commonwealth offence framework as amended by the Bill. The only form of exploitation for which transfer would clearly be covered would be slavery, where under section 270.3 it is an offence to engage in slave trading. However, if a person were to exchange or transfer control over another person, it could perhaps be argued that the second person was in a condition of slavery within the meaning of section 270.1, which provides that:

For the purposes of this Division, slavery is the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including where such a condition results from a debt or contract made by the person.

To exchange or transfer control over another person would seem to fall within the exercise of a power attaching to the right of ownership. Parliament may wish to consider whether it is sufficient to rely on section 270.1, or if further amendments are required to ensure transfer of persons is properly accounted for in Australia’s offence regime.

Profiting from servitude or forced labour

The Bill will introduce a revised offence of conducting a business involving servitude (subsection 270.5(2)) and a new offence of conducting a business involving forced labour (subsection 270.6A(2)). The offences will apply if a person intentionally conducts any business,

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reckless as to whether the business involves the servitude or the forced labour, respectively, of another person or persons.56 ‘Conducting a business’ will be defined in section 270.1A as including:

- taking any part in the management of the business
- exercising control or direction over the business and
- providing finance for the business.

Project Futures, Project Respect and Women’s Health West suggest that this definition should be expanded to include receiving profit from a business to ensure that those profiting from exploitation but not involved in the business, such as organised criminal groups, are captured.57

The definition of conducting a business included in the Bill is the same as the existing definition. That the definition is not exhaustive is confirmed by the Explanatory Memorandum for the Bill that inserted the current definition, which stated that ‘[t]he definition is inclusive so that other conduct that amounts to conducting a business but not expressly covered by the definition would be caught by the offence’.58 It seems it would be open, but not necessary, for a court to determine that someone receiving a significant portion of the profits from a business involving servitude or forced labour was conducting a business.

Alternatively, such a person could be charged with an offence of dealing in the proceeds of crime under Division 400 of the Criminal Code. The penalties for those offences differ according to the level of fault and the value of the proceeds. Where a person is reckless as to the fact that the money or property is proceeds of crime, or the fact that there is a risk that it will become an instrument of crime, the maximum penalties range from imprisonment for six months for dealing with proceeds of less than $1000 up to imprisonment for 12 years for dealing with proceeds of more than $1 million. The issue would be whether these penalties are considered adequate when compared to those that could be imposed for conducting a business involving servitude (20 years imprisonment for an aggravated offence, otherwise 15 years) or forced labour (12 years imprisonment for an aggravated offence, otherwise nine years).

56. Standard fault elements apply to the physical elements of the offences in accordance with section 5.6 of the Criminal Code Act 1995.

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A possible approach could be the introduction of an offence of benefitting from trafficking or slavery along the lines of what the United States has enacted. Section 1593A of the *United States Code* provides that:

> Whoever knowingly benefits, financially or by receiving anything of value, from participation in a venture which has engaged in any act in violation of section 1581(a), 1592, or 1595(a), knowing or in reckless disregard of the fact that the venture has engaged in such violation, shall be fined under this title or imprisoned in the same manner as a completed violation of such section.\(^{59}\)

This approach would be consistent with the offence in Division 272 of the Criminal Code of benefitting from child sex tourism. Section 272.18 provides that a person commits an offence if he or she engages in conduct with the intention of benefitting from an offence against Division 272, where the conduct is reasonably capable of resulting in the person benefitting from such an offence.

**Obtaining services from a trafficked person**

In its 2010 report on its inquiry into people trafficking for sex work, the Victorian Drugs and Crime Prevention Committee recommended that intentionally, knowingly or recklessly obtaining sexual services from trafficked women be criminalised in that state.\(^{60}\) In its response to the report, the Victorian Government supported the recommendation in part, arguing that obtaining the services of a trafficked sex worker would be covered by existing offences such as rape or indecent assault if the client was aware of the risk of the worker’s lack of consent ‘due to force, fear of force or other harm or unlawful detention’.\(^{61}\)

Some stakeholders have called for the introduction of an equivalent offence at the Commonwealth level.\(^{62}\) Scarlet Alliance has expressed strong opposition to introduction of such an offence, arguing that it would have no material impact on the extent of sex trafficking and that similar laws in Sweden

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have harmed sex workers. However, it should be noted that the Swedish law criminalises the purchase of sexual services outright, not only where the person providing the service has been trafficked. The trafficking discussion paper stated that:

While there is merit in the offence proposed by Victoria, were the Commonwealth to enact an offence of this type – that is, on which liability would be transferred to third parties – it would need to do so in respect of both sex and other forms of exploitation including forced labour.

While sexual services are provided directly by a particular individual, that would not be the case with all forms of forced labour. This does not necessarily mean a broader offence should not be considered. However, it could make framing a suitable offence applicable to all forms of forced labour, without criminalising too broad a range of conduct, a difficult and complex task.

Key provisions

Schedule 1 – Criminal Code amendments

Item 1 of the Bill amends a provision in Chapter 2 of the Criminal Code, a chapter outlining the general principles of criminal responsibility. Section 4.3 states that an omission to perform an act can only be a physical element of the offence if: (a) the law creating the offence makes it so, or (b) the law creating the offence impliedly provides that the offence is committed by an omission to perform an act that by law there is a duty to perform. This is where the specific Commonwealth law at issue impliedly provides that a person commits an offence where he or she breaches a duty imposed by a Commonwealth law.

As discussed by the majority of the High Court in the Commonwealth Director of Public Prosecutions v Poniatowska (2011) 282 ALR 201 this means that section 4.3 has more limited scope than the position in the general criminal law, as it does not encompass duties imposed under the common law nor the laws of the states and territories.

The principles of criminal responsibility stated in the Code proceed from the view that the criminal law should be certain and that its reach should be able to be ascertained by those who are the subject of it. Section 4.3 is a reflection of those ideas. The exceptions to the general

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65. Attorney-General’s Department, The criminal justice response to slavery and people trafficking; reparation; and vulnerable witness protections, op. cit., pp. 17–18.


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principle that it states do not extend to criminalising the omission of any act which is able to be causally related to a result of conduct.\footnote{Commonwealth Director of Public Prosecutions v Poniatowska [2011] HCA 43 (26 October 2011) at 44.}

The amendment will remove ‘by law there is a duty to perform’ and substitute ‘there is a duty to perform by a law of the Commonwealth, state or a territory, or at common law’.

Item 4 will repeal existing paragraph 73.2(1)(a) of the Criminal Code which criminalised the circumstances where a victim is knowingly exploited after entry to a foreign country. This is people trafficking conduct and is best placed in Division 271 of the Criminal Code, not as an aggravated people smuggling offence in section 73.2.

Item 5 repeals subsection 73.2(3) of the Code, which is a definitions section. The terms in this subsection (forced labour, sexual servitude, slavery and threat) are not used in section 73.2 of the Criminal Code so are superfluous to the operation of this section.

Item 8 inserts a Definitions section for Division 270 and defines the terms of coercion, conducting a business, deceive, slavery-like offence and threat, and provides cross-references to definitions of other terms outlined in subsequent sections.

Item 9 makes an amendment to existing paragraph 270.3(1)(a) of the Code. This section is a catch-all provision for slavery conduct. The amendment will insert new subparagraph 270.3(1)(aa) making it an offence to intentionally reduce a person to slavery. Item 10 will make a similar amendment to paragraph 270.3(2)(b) of the Code, addressing when a person recklessly reduces a person to slavery.

Item 11 amends subsection 270.3(3) to note that a commercial transaction involving a slave includes a commercial transaction by which a person is reduced to slavery.

Item 12 will repeal existing sections 270.4 to 270.9 of the Code and replace them with a new framework for slavery-like conditions. Proposed subsection 270.4 will provide that:

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.

\footnote{Commonwealth Director of Public Prosecutions v Poniatowska [2011] HCA 43 (26 October 2011) at 44.}

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Proposed subsection 270.4(1) will apply whether the coercion, threat or deception is used against the victim or another person (proposed subsection 270.4(2)).

Further, servitude may still exist in a situation whether or not escape is practically possible or the victim has attempted to escape from the conditions (proposed subsection 270.4(3)).

Servitude offences are then outlined in proposed section 270.5. The offences carry a penalty of either 20 years (for aggravated servitude), or 15 years in any other case.

Proposed subsection 270.5(3) will allow the court to find the defendant not guilty of a servitude offence but guilty of a forced labour offence in section 270.6A. Proposed subsection 270.5(4) makes such a change conditional on there being procedural fairness in relation to that finding of guilt.

Forced labour is defined in proposed section 270.6. A person is a victim of forced labour if, they provide labour or services and, due to coercion, threat or deception, a reasonable person in the victim’s position would not consider themselves to be free to cease providing the labour or services, or to leave the place or area where those services are provided.

Two new offences relating to forced labour are established under this Bill, in proposed section 270.6A. A person is guilty of an offence if he or she engages in conduct that causes another person to enter into or remain in forced labour. The penalty is nine years imprisonment, or 12 years in the case of an aggravated offence. These penalties seem reasonable and appropriate in the context of this Division.

Proposed section 270.7 will target recruiting another person deceptively as to the extent to which that person (the victim) will be

- free to leave
- free to cease providing the labour or service
- free to leave his or her place of residence
- if there is or will be a debt owed or claimed to be owed by the victim in connection with the engagement – the quantum, or the existence, of the debt owed or claimed to be owed
- the fact that the engagement will involve exploitation, or the confiscation of the victim’s travel or identity documents or
- if the engagement is to involve the provision of sexual services – that fact, or the nature of sexual services to be provided.

This offence is an extension of the existing offence that only applies to sexual services. The penalty for this offence is imprisonment for seven years, or nine years in the case of an aggravated offence.

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**Forced marriage** is defined in **proposed section 270.7A**. Where a party has not freely and fully consented to the marriage, because of the use of coercion, threat or deception, a marriage is a ‘forced marriage’.

The term marriage is then defined to include the following:

- a registered relationship within the meaning of section 2E of the *Acts Interpretation Act 1901* (this will, by definition, include registered de facto partnerships)
- a marriage or similar registered relationship recognised under a law of a foreign country and
- a marriage or marriage-like relationship that is void, invalid or not recognised by law, including where one party has not freely or fully consented (because of an incapacity) or where a party is married to more than one person.

The scenario of a forced marriage where a family member or friend coerces, threatens or deceives the victim into the marriage is addressed by paragraph (3) of this definition.

Causing a person to enter into a forced marriage and being a party to a forced marriage are two new offences created by this Bill. **Proposed subsection 270.7B(1)** will create an offence, punishable by four years (or seven years if aggravated), to engage in conduct that causes another person to enter into a forced marriage as the victim of the marriage. Further, **proposed subsection 270.7B(2)** will create an offence of being a party to a forced marriage. A person commits an offence if the person is party to a forced marriage and that person is not a victim of the forced marriage. The penalty for this offence is four years imprisonment (or seven years if an aggravated offence).

Slavery-like offences are defined in **proposed section 270.1A** as an offence against any of the following provisions: section 270.5 (servitude), 270.6A (forced labour), section 270.7 (deceptive recruiting for labour or services) or 270.7B (forced marriage). **Proposed section 270.8** will create an aggravated offence for slavery-like conduct if any of the following applies:

(a) the victim is under 18;

(b) the offender, in committing the offence, subjects the victim to cruel, inhuman or degrading treatment;

(c) the offender, in committing the offence:

(i) engages in conduct that gives rise to a danger of death or serious harm to the victim or another person and

(ii) is reckless as to that danger.

**Proposed subsection 270.8(3)** allows a person to be found guilty of a corresponding slavery-like offence if that person is found not guilty of the aggravated offence.

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**Proposed section 270.9** explicitly outlines that section 15.2 of the Code (extended geographical jurisdiction – Category B) applies to a slavery-like offence.68

When considering whether a slavery-like offence has been committed, the trier of fact may have regard to any of the following matters under **proposed subsection 270.10(2):**

(a) the economic relationship between the alleged victim and the alleged offender;

(b) the terms of any written or oral contract or agreement between the alleged victim and the alleged offender;

(c) the personal circumstances of the alleged victim, including but not limited to:
   (i) whether he or she is entitled to be in Australia under the *Migration Act 1958*; and
   (ii) his or her ability to speak, write and understand English or another language; and
   (iii) the extent of his or her social and physical dependence on the alleged offender.

**Proposed section 270.11** will make it explicit that an offender is not able to use as a defence in a proceeding for an offence under Division 270 that the victim consented to, or acquiesced in, conduct constituting any element of the offence. **Proposed section 271.11B, at item 48 of Schedule 1** of the Bill, is the equivalent provision that applies to Division 271.

**Item 15** clarifies the concurrent application of state and territory law in the areas of trafficking that it covers, such as sexual exploitation. Section 270.12 is intended to ensure that other jurisdictions’ similar offences are not excluded or limited in their operation. Explicitly, the Bill proposes that section 270.12 operates whether or not the other laws are different in fault element, defence or penalty. This modifies the usual constitutional precedence accorded to Commonwealth laws.

**Item 22** will insert a new definition of exploitation in Division 271 of the Code. **Proposed section 271.1A** will define exploitation as one person causing another (the victim) to enter into slavery, slavery-like conditions, servitude, forced labour, forced marriage or debt bondage.

**Item 28** inserts the words ‘or another person’ after the word ‘victim’ in subparagraph 271.3(1)(c)(i), which will criminalise the conduct of a people trafficking offender who acts in a way that puts the victim or another person in danger of death or serious harm.

**Item 38** will insert a **new Subdivision BA – Organ trafficking** and **new Subdivision BB – Harbouring a victim** into Division 271 of the Code.

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68. Section 15.2 of the Criminal Code prescribes that the conduct of Australian citizens, residents or corporations overseas (as well as wholly or partly in Australia), is captured by the proposed provisions.

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Proposed section 271.7A specifies that the removal of a person’s organ is conduct that falls under Subdivision BA if the removal, or entering into an agreement for the removal, would be contrary to the law of the state or territory where it is, or is to be, carried out; or neither the victim, nor the victim’s guardian, consent to the removal, and it would not meet a medical or therapeutic need of the victim.

The offence provision for organ trafficking is proposed section 271.7B. The offence are separated by the organisation or facilitation of entry (or proposed entry) or exit (or proposed exit).

Under proposed subsection 271.7B(1) a person commits an offence of organ trafficking if

(a) the offender engages in conduct consisting of the organisation or facilitation of the entry or proposed entry, or the receipt, of another person into Australia; and

(b) the offender is reckless as to whether the conduct will result in the removal of an organ of the victim contrary to this Subdivision, by the offender or another person, after or in the course of that entry or receipt.

Proposed subsection 271.7B(2) provides an equivalent offence that applies to exit from Australia (except that it does not cover receipt in the other country).

The penalty for both offences is imprisonment for 12 years.

The aggravated offence is in proposed section 271.7C. Elements of the aggravated offence are any of the following:

(a) victim is under 18;

(b) the offender commits the offence intending that an organ of the victim will be removed contrary to this Subdivision either by the offender or another person:

(i) if the offence of organ trafficking is an offence against subsection 271.7B(1) – after or in the course of entry into Australia; or

(ii) if the offence of organ trafficking is an offence against subsection 271.7B(2) – after or in the course of exit from Australia.

(c) The offender, in committing the offence, subjects the victim to cruel, inhuman or degrading treatment;

(d) The offender, in committing the offence:

(i) engages in conduct that gives rise to a danger of death or serious harm to the victim or another person; and

(ii) is reckless as to that danger.

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The penalty for this aggravated offence is imprisonment for 20 years, or 25 years if the victim is under 18.

New offences of domestic organ trafficking and aggravated domestic organ trafficking are also inserted in this Subdivision. Under proposed section 271.7D, a person commits an offence of domestic organ trafficking if:

(a) the offender engages in conduct consisting of the organisation, or facilitation, of the transportation or proposed transportation of another person, from one place in Australia to another place in Australia; and

(b) the offender is reckless as to whether the conduct will result in the removal of an organ of the victim contrary to this Subdivision, by the offender or another person, after or in the course of that transportation.

The penalty for this offence is 12 years imprisonment.

Proposed section 271.7E inserts an aggravated offence of domestic organ trafficking into the Criminal Code. A person commits an aggravated offence of domestic organ trafficking if any of the following applies:

(a) the victim is under 18;

(b) the offender commits the offence intending that an organ of the victim will be removed contrary to this Subdivision, either by the offender or another person, after arrival at the place to which the person has been transported, or in the course of transportation;

(c) the offender, in committing the offence, subjects the victim to cruel, inhuman or degrading treatment;

(d) the offender, in committing the offence:

(i) engages in conduct that gives rise to a danger of death or serious harm to the victim or another person; and

(ii) is reckless as to that danger.

The penalty for this aggravated offence is imprisonment for 20 years, or 25 years if the victim is under 18.

Harbouring a victim

Proposed section 271.7F creates an offence of harbouring a victim. If a person harbours, receives or conceals another person and that conduct assists or furthers a third person’s commission of another offence in Division 271 or any offence against Division 270, the person is guilty of an offence, with a penalty of imprisonment for four years. The person must be shown to have been reckless as to

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whether the harbouring, receipt or concealing of the victim would assist or further the third person’s commission of such an offence.

An aggravated offence is established under proposed section 271.7G. The Bill states that the aggravated offence has a penalty of seven years imprisonment. The original Explanatory Memorandum, in discussing this provision, erroneously stated that:

the aggravated offence of harbouring a victim carries a maximum penalty of 20 years’ imprisonment.\textsuperscript{69}

This has since been corrected to state that, consistent with the Bill, the maximum penalty is seven years’ imprisonment.\textsuperscript{70}

**Debt bondage**

**Item 40** will amend the penalty that applies to the offence of debt bondage in section 271.8 from 12 months to four years to more appropriately reflect its relative seriousness.

**Item 42** will repeal and replace the existing offence of aggravated debt bondage in section 271.9. Currently, the penalty for this offence is two years’ imprisonment. The new penalty will be seven years’ imprisonment. The revised offence will apply where the offender commits an offence of debt bondage in relation to another person and any of the following applies:

(a) the victim is under 18;

(b) the offender, in committing the offence, subject the victim to cruel, inhuman or degrading treatment;

(c) the offender, in committing the offence:

(i) engages in conduct that gives rise to a danger of death or serious harm to the victim or another person; and

(ii) is reckless as to that danger.

**Item 48** will insert two new provisions after section 271.11. The judge or jury, in considering an offence in this Division, may have regard to the following relevant matters:

- the economic relationship between the alleged victim and alleged offender
- the terms of any contract or agreement between the alleged victim and the alleged offender and

\textsuperscript{69} Explanatory Memorandum, p. 52.


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• the personal circumstance of the alleged victim including their lawful presence in Australia, their understanding of English and the extent of their social and physical dependence on the alleged offender.

This list is not exhaustive and proposed subsection 271.11A(4) specifies that the list does not prevent the leading of any other evidence. 71

Proposed section 271.11B is inserted to avoid doubt that it is not a defence for offences in this Division 271 that a person (the alleged victim) consented or acquiesced in, conduct constituting any element of the offence. Proposed section 270.11, at item 12 of Schedule 1 of the Bill, is the equivalent provision that applies to Division 270.

Schedule 2 – Amendments of other Acts


An important amendment made by Schedule 2, Item 2 is the change to paragraph 21B(1)(d) of the Crimes Act that will allow an order to be made for an offender to make reparation to any person for loss suffered ‘by reason of the offence’ (instead of ‘as a direct result of the offence’). This amendment is outlined in detail under the Main issues section of this digest.

Schedule 3 formally states that offences in this Bill apply on or after the day the Act commences.

Concluding comments

There has been extensive public consultation on the proposed legislative changes in this Bill and the majority of stakeholders are supportive of any measures that enhance the protection of people from servitude, trafficking, slavery and similar exploitative practices. The Government may wish to consider a formal review five years after enactment of the revised Divisions 270 and 271 of the Criminal Code, to assess the efficiencies and effectiveness of the specific new offences. Consideration could be given at that point to whether a simpler, more streamlined set of offences, as exist in some other jurisdictions, would be more appropriate. Investigations and cases in this area need to be closely scrutinised to ensure the perpetrators are deterred and punished and the victims are appropriately compensated.

In its current form, this Bill will appropriately address previously identified gaps in Australia’s compliance with the Trafficking Protocol. However, it is disappointing that the Bill does not address other issues canvassed in the trafficking discussion paper and raised by stakeholders during

71. Explanatory Memorandum, p. 59.

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consultations, in particular better protections for vulnerable witnesses and a compensation scheme for victims of Commonwealth offences.