



Coalition Against Trafficking in Women Australia
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Assistant Secretary
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Attorney General's Department
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Dear The Assistant Secretary

COMMENTS ON EXPOSURE DRAFT (23/11/2011)

The Coalition Against Trafficking in Women Australia (CATWA) respectfully submits comments on the Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012, as below.

CATWA is the Australian branch of CATW International, which is a Non Governmental Organisation that has Category II consultative status with the United Nations Economic and Social Council. It works locally and internationally to end all forms of sexual exploitation of women and children, especially the violence of prostitution, trafficking and pornography.

Due to our concerns with the Bill, as outlined below, we would like to request a meeting with a representative of the Branch to discuss recent developments in trafficking/slavery in Australia. We believe the Bill in its current form inadequately accounts for the reality of the sex industry in Australia, which has become increasingly reliant on trafficking as a strategy for recruitment. We are available to travel to Canberra at the convenience of the Branch. We have specialist knowledge of sex industry business practice in Australia, and have researched alternative prostitution regulation models in countries like Sweden, Japan and South Korea.

Yours sincerely

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Comments on Exposure Draft (23/11/2011)

The Coalition Against Trafficking in Women Australia (CATWA) would like to commend the Department for its recognition of forced and servile marriage as a potential outcome of trafficking in women in the Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012. CATWA is also pleased that the definition of ‘coercion’ outlined in the Bill expands on that which appears in the 2005 Criminal Code Amendment on trafficking, to include ‘the abuse of power, or of a position of vulnerability’ as means that can be used to achieve the transfer and recruitment of a person for purposes of exploitation.

Nonetheless, CATWA must express concern at three assumptions that appear to underpin the drafting of the Crimes Legislation Amendment:

1. That people in prostitution might owe debt to pimps or brokers (i.e., sex industry recruiters) without this debt evidencing their subjection to debt bondage;
2. That third parties (e.g., brokers or recruiters) might legally and legitimately facilitate the entry of people into prostitution as long as deception, threat, or coercion is not present; and
3. That, with regards to slavery and trafficking, the sex industry might be regulated alongside other industries providing ‘labour’ or ‘services’, as if prostitution has historically posed no special risk with regards to the trafficking and enslavement of women and children.

In our submission, CATWA first addresses each of these three assumptions, and then lists in numbered order drafting-level issues we see as problematic in the Amendment.

CATWA urges the Department to reorient its legislation to more closely mirror the spirit and letter of the United Nations Palermo Protocol. The Australian government ratified the Protocol in 2005, but continues to allow the sex industry to operate legally in many of its state jurisdictions. CATWA believes this lax approach to prostitution renders Australia in breach of Article 9(5) of the Protocol, which requires State Parties to:

adopt or strengthen legislative or other measures...to discourage the demand that fosters all forms of exploitation of persons, especially women and children.

The activities of the sex industry (prostitution, pornography, stripping, peep shows, lap dancing, etc) that are legalised in various parts of Australia currently encourage trafficking through fostering demand for the prostitution of women and children.¹ CATWA encourages the Department to strengthen the provisions of the 2012 Amendment Bill in order that the various state-based prostitution laws might be overridden, and the human rights of women and children in Australia to live free of sexual exploitation might be better upheld.

Assumption (1)

With regard to assumption (1), the Department appears to believe that a prostituted person might owe a debt to her pimp or broker without this debt constituting evidence of her bondage. For example, the Department proposes to legislate in 270.7(1)(d) that *deceiving* a prostituted

¹ See Niklas Jakobsson and Andreas Kotsadam, ‘The Law and Economics of International Sex Slavery: Prostitution laws and trafficking for sexual exploitation,’ Working Papers in Economics, University of Gothenberg, 2010 at <http://andreakotsadam.files.wordpress.com/2010/06/trafficking.pdf>

person as to the existence or amount of debt is an offence, while 270.7(1)(e) specifies that an arrangement of *debt bondage* (as per 271.1A(2)(f)) constitutes an offence (not debt per se).² In other words, the mere existence of debt (as long as no deception as to this debt has been enacted) appears not to be outlawed in the Amendment.³

In drafting the Amendment in this way, the Department appears to create a legal distinction between ‘contracts’ for the repayment of debt enacted between prostituted persons and their pimps/brokers, and the phenomenon of debt bondage. CATWA maintains that this distinction does not exist in reality, and fails to reflect the way in which the sex industry uses debt to organise trafficking. The international non-governmental organisation Anti-Slavery holds a similar view, arguing that:

A person becomes a bonded labourer when their labour is demanded as a means of repayment for a loan...Bonded labourers are forced to work to repay debts their employer says they owe, and they are not allowed to work for anyone else.⁴

It has been understood internationally since the 1949 Convention on the Suppression of Traffic in Persons and the Exploitation of the Prostitution of Others that pimps and brokers use debt as an effective tool to keep women in an industry that the majority want to leave.⁵ Prostitution causes severe physical, psychological, and emotional harm and degradation through subjecting women to sex acts with multitudes of unknown men.⁶

It is extremely unlikely that a pimp would allow a prostituted person to leave a brothel/escort agency to repay a contracted debt through working in a non-sex industry job. Pimps have great difficulty recruiting and retaining women for prostitution, and offer women financial credit (or impose fees and fines) precisely so that these women will have little choice but to remain. For example, a sex industry broker (i.e., ‘recruiter’) might pay in advance for a woman’s flight ticket to Australia, and this advance payment might constitute a ‘debt’ contracted between the two parties that is free of any coercion, threat, or deception. However, it is most improbable that the broker will thereafter allow the woman to undertake fruit picking as a means of repaying the debt, given that he will have recruited her precisely for the benefit of his own brothel, or the brothel of an associate pimp. Brokers are unlikely to recruit women without having a specific plan for their prostitution (from which the broker will continue to profit).

CATWA is concerned that the prevalence and seriousness of debt bondage in organising

² Notwithstanding this, CATWA is unsure whether the definition of ‘exploitation’ in 271.1A is actually intended to apply to 270.7(1)(e).

³ See also 271.2(2)(b) which rules against ‘exploitation’, but 271.2B(c)(v) allows for the existence of debt as long as there is no deception as to the nature of this debt. These provisions also appear to establish an unfortunate legal distinction between ‘debt’ and ‘debt bondage’.

⁴ http://www.antislavery.org/english/slavery_today/bonded_labour.aspx

⁵ <http://www.prostitutionresearch.com/pdf/Prostitutionin9Countries.pdf>

⁶ See Pamela Downe, “‘The people we think we are’: the social identities of girls involved in prostitution,” in Kelly Gorkoff and Jane Runner (eds), *Being heard: the experiences of young women in prostitution* (Manitoba, Canada: Fernwood Publishing, 2003); Melissa Farley (ed), *Prostitution, trafficking, and traumatic stress* (New York: Harworth Press, 2003); Kendra Nixon, Leslie Tutty, Pamela Downe, Kelly Gorkoff, and Jane Ursel, “‘The everyday occurrence’: violence in the lives of girls exploited through prostitution,” *Violence Against Women*, Vol. 8, 2002, pp. 1016-1043; Ruth Parriott, ‘Health experiences of twin cities women used in prostitution: survey findings and recommendations,’ (WHISPER: Minneapolis, 1994) available at <http://www.angelfire.com/mn/fjc/healthex2.html>.

the trafficking of women into prostitution in Australia is being downplayed by organisations like Scarlet Alliance that see ‘debt contracts’ for women’s ‘migration’ to Australia to ‘work’ in prostitution as a benign phenomenon.⁷ In reality, traffickers create an imaginary ‘debt’ (supposedly constituting the cost of flights, accommodation, food, etc) owed by women who must then submit to prostitution to ‘repay’ the debt. According to documented cases, traffickers set these ‘debts’ at greatly inflated amounts of \$35,000 or more.⁸

If the Department does seek to create a distinction between debt and debt-bondage in relation to the sex industry, then the CATWA believes the Department must establish a regulatory regime to ensure fair conditions for the repayment of this debt. How will the debt contracts be audited to ensure no element of bondage is present? How will an individual’s capacity to repay the debt through leaving prostitution and working in a non-sex industry sector be assessed? How will debt in the absence of coercion be established for any individual, especially given 270.1A(f)?

Assumption (2)

With regard to assumption (2), the Department appears to believe that third parties (e.g., brokers or recruiters) might legally and legitimately facilitate the entry of people into prostitution as long as deception, threat, or coercion is not present. This assumption is apparent in the provisions of Division 271, which require ‘coercion, threat, or deception’ or ‘exploitation’ to be present for a charge of trafficking to be brought. CATWA believes these requirements render the Australian Commonwealth Government non-compliant with the Palermo Protocol, which defines ‘exploitation’ as the ‘exploitation of the prostitution of others’ (Article 3(a)), and therefore deems any facilitation of a person’s entry into prostitution as a trafficking violation.

In contrast, the 2012 Bill allows for an actor to legally facilitate the entry of a person into prostitution, as long as they do not use coercion, threat, or deception, and as long as that person is not ‘exploited’. However, the 2012 Bill does *not* define prostitution per se as ‘exploitation’. This differs from the Palermo Protocol. Accordingly, the 2012 Bill legalises the trafficking of people into Australia’s sex industry as long as this is achieved through legitimate ‘debt’ (for example), rather than threat, coercion, or deception. CATWA would argue that the Palermo Protocol seeks to outlaw the very existence of middlemen, brokers, recruiters (i.e., ‘traffickers’), rather than just modify their behaviour to exclude threats, coercion, and deceit.

Brokers are active in Australia’s sex industry, as the following excerpt from a 2009 Victorian report shows:

The majority of [interviewed] licensee and enforcement and regulatory respondents detailed knowledge of practices whereby groups of Asian workers, primarily from Korea, China and Thailand, were working in and being provided to licensed brothels by ‘brokers’ or agents. This data emerged from interviews with licensees who indicated that they had been offered groups of workers by brokers or agents who approached them. Licensees indicated that on occasion managers brought particular groups of workers into brothels with whom they appeared to have some prior relationship. Such patterns were also observed by some brothel workers, where particular managers offered

⁷ http://www.scarletalliance.org.au/library/subagd_2011a/

⁸ See, for example, <http://www.law.uq.edu.au/documents/humantrafficking/case-reports/Anon-1-2010.pdf>

shifts to specific groups of workers.⁹

CATWA believes the activities of brokers should be more strictly legislated against in the 2012 Bill, on the basis that these activities constitute a crucial component of trafficking, regardless of whether explicit ‘coercion, threat, or deception’ is used.

Assumption (3)

With regard to assumption (3), the Department appears to believe that, with regards to slavery and trafficking, the sex industry might be regulated alongside other industries providing ‘labour’ or ‘services’, as if prostitution has historically posed no special risk with regards to the trafficking and enslavement of women and children. The sex industry-specific provisions in Division 270 have been erased in favour of an approach that attempts to encompass the possibility of slavery and trafficking in all industries. While CATWA recognises that slavery and trafficking exist in industries outside prostitution, we believe the Department should not be deceived as to the specific and unique risks of trafficking and slavery that are inherent to the operation of systems of prostitution. It is also well known that prostitution for trafficking is the most common form of the crime. CATWA welcomes the Department’s awareness of the provisions of the Palermo Protocol in its defining of ‘coercion’ in Division 270. 270.1A(e) and (f) are commendable. However, CATWA would question why the Department fails to similarly reflect the spirit and letter of the Palermo Protocol in Division 271, especially given this Division addresses trafficking specifically.

Specific issues in the 2012 Bill

1. 270.1A should additionally include 270.1A(g) *Debt* as a crucial and pervasive tool of coercion in the sex industry.
2. With regard to 270.1A(c), what does the Department envisage ‘reasonable grounds’ for the threat of detrimental action might be?
3. Why has the Department newly introduced a reasonable person test for 270.4(1)(a)? The burden of proof is amplified as a result of this addition, which will make attaining convictions more difficult.
4. Is 270.6 applicable in jurisdictions in which prostitution is illegal?
5. Why is intent retained in 270.7(1) when it has been erased from the provisions covering servitude? CATWA sees no reason to include reference to intent in this provision.
6. Does 270.7(1)(d) contradict 270.7(1)(e) (with regard to debt bondage being outlawed in the definition of ‘exploitation’), or does the Department draw a distinction between debt and debt bondage?
7. With regard to 270.7(1)(e), does the definition of ‘exploitation’ in Division 271 also apply to Division 270?
8. ‘The amount of money that can be earned’ and ‘The existence of fines and fees’ should be added to 270.7(1)(f).
9. 270.7A(1) unnecessarily introduces consideration of ‘full and free consent’. The phrase ‘without freely and fully consenting’ should be deleted in this provision. Consent is not deemed relevant in the other provisions of the Division, and should similarly not become a consideration in the context of ‘marriage’.
10. With regard to 270.7B(3), what does the Department consider a ‘reasonable excuse’ to

⁹ Sharon Pickering, JaneMaree Maher and Alison Gerard, ‘Working in Victorian Brothels,’ Consumer Affairs Victoria, 2009, p. 43 at [http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Reports_and_Guidelines_2/\\$file/CAV_Monash_Report_Brothels.pdf](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Reports_and_Guidelines_2/$file/CAV_Monash_Report_Brothels.pdf)

be? Why are 'reasonable excuses' introduced as a factor for consideration only in this provision of the Act?

11. Why is recklessness specified as the fault element in 270.8(3)? CATWA believes this sentence should be deleted.
12. It is difficult to contemplate under what circumstances someone might be convicted under 271.7A. On the one hand, 271.7A(b)(i) provides for a third party committing any offence, while 271.7A(d) specifies the offence must be either slavery or trafficking. If a person is guilty of harbouring a trafficking victim, why should their guilt be assuaged by the fact that a third party might not be found guilty of an offence? Under the current Bill, a person who harbours a trafficked woman for supply to a legal brothel would be acting inside the law. CATWA believes that 271.7A needs substantial revision to reflect the reality of the sex industry's operations in which people who harbour trafficked women in inner-city flats are crucial actors. Brothels and escort agencies often do not retain trafficked women on their premises, and so must be connected with actors who maintain apartments where the women are kept. It is these actors who are often the 'middlemen' operating between pimps and traffickers. While CATWA welcomes the penalty increase for this group of criminals, we believe that 4 years is an inadequate sentence, given how crucial the activity of harbourers is to the business of prostitution and trafficking.
13. With regard to 271.9, CATWA believes that any debt taken out over a person in prostitution (and particularly a child) should be viewed as evidence of trafficking/slavery. It makes little sense to make a distinction between debt and 'debt bondage', particularly in relation to child victims of slavery and trafficking.
14. The Bill should reflect the reality that some victims of the sex industry are enslaved in prostitution through the provision of addictive drugs.
15. Is 'coercion' in Division 271 defined in the same way as Division 270?