

14 March 2023

Dear Attorney-General's Department,

Thank you for the opportunity to contribute to the *Targeted Review of Divisions 270 and 271 of the Criminal Code Act 1995 (Cth)*. In the time available, we have not been able to respond to all of your questions but have instead noted issues of particular concern.

Alignment of Divisions 270 and 271 with international law, standards and best practice

As noted in the Discussion Paper, the legislative regime in Divisions 270 and 271 of the Criminal Code seeks to give effect Australia's international legal obligations, which are found in at least fifteen international treaties.

While many gaps have been closed, there are still some differences between Australia's criminal laws, and the international legal framework. A thorough review is beyond what is possible in the time available for this consultation. However, some examples include the following:

- Existing trafficking offences focus heavily on movement, either across international boundaries or within Australia. The reasons for this are unclear. The Trafficking Protocol and Article 34(2) of the *United Nations Convention against Transnational Organized Crime* clearly require States to criminalise trafficking in persons crimes, irrespective of whether they have a transnational element or not.¹
- The definition of trafficking in the UN Protocol makes it clear that "harbouring" is one of the acts involved in the trafficking process. This is not captured within the existing "trafficking in persons" offences as these all require movement. As presently drafted, Australia's harbouring law (s271.7F) refers to harbouring a victim, but only where this assists a third party. This fails to capture situations, seen in Australia, where (for example) a domestic worker is kept or *maintained* in a dwelling for the benefit of the family, through coercion, threats or deception. While the forced labour offence remains an alternative, this attracts a lesser penalty (9 years) than the trafficking in persons offence provisions (12 years).
- Treaty law refers to broad obligations not just to criminalise but also to *prevent* these crimes.² Arguably, this gives legislators in Australia wider powers to tackle precursor conduct, such as withholding of passports, or charging disproportionately

¹ See the *Legislative Guide to the UN Convention against Transnational Organized Crime and its Protocols*, Part 2, at 47, 'transnationality must not be drafted as an essential element of the offence of trafficking... under domestic law'. See also the Interpretative Note to Article 34 included in the travaux préparatoire, "The purpose of this paragraph is, without altering the scope of application of the draft convention... to indicate unequivocally that... the transnational element and the involvement of organized criminal group are not to be considered elements of those offences for criminalisation purposes." UNODC, *Travaux Préparatoires of the Negotiations of the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, 2006.

² See for example, Article 9 of the UN Trafficking Protocol.

large fees and bonds (typically held outside of Australia) for job placement and other labour/migration related services.

We recommend that a review of the extent to which Divisions 270 and 271 depart from Australia's treaty obligations be undertaken, as an adjunct to the current review.

Extension of "deception" to include omissions

As noted in the Discussion Paper, the term "deceive" is defined in s271.1 of the Criminal Code as "mislead as to fact (including the intention of any person) or as to law, by words or other conduct." This definition applies throughout Divisions 270 and 271. As such, 'deception' requires evidence that the offender has undertaken some *positive act or conduct* to deceive, such as providing false information. In contrast, intentionally withholding information would likely not meet the definition of "deceive". You have asked what type of conduct might constitute deception through omission, as relevant to the offences in Divisions 270 and 271?

Modern slavery cases are exemplified by power imbalances, which are then abused for personal gain. A key power imbalance seen again and again in the cases to date has been information asymmetry, where offenders have superior access to, or understanding of information about working and living conditions, visa and other legal requirements, and 'normal' business practices in Australia. Misuse and abuse of this information asymmetry is one of the ways that offenders are able to manipulate their victims.

Accordingly, it is highly likely that deception in these cases will involve not just outright lies, but also deception through omission or withholding of information. For example, an offender might say, "I need your passport for immigration" in the context of discussions that imply efforts are being made to secure permanent residency, but then never actually mention that "I have not submitted your visa application and have no intention of ever doing so".

Deception by omission seems particularly relevant to the deceptive recruitment offence. As presently drafted, s270.7 would require evidence that the offender had taken positive steps to mislead the victim about one of the factors specified in s270.7(c), such as passport retention or quantum of debt.

The nature of modern slavery crimes is such that victims will likely be subject to a climate of fear or mistrust where it is not safe to ask questions. This creates the perfect conditions for an unscrupulous person to manipulate a situation to their advantage, by not revealing key facts and then simply saying "I was never asked the question". Requiring a positive act or conduct to deceive is inappropriate, given the nature of the crime. The definition of "deceive" in s271 should be amended so as to include deception by omission.

Recognising a broader range of exploitative purposes

As presently drafted, the definition of exploitation is exhaustive, with the result that exploitation must involve causing a person to enter into one of the following conditions:

slavery, servitude, forced labour, forced marriage or debt bondage. In contrast, the UN Trafficking Protocol refers to exploitation including “at a minimum” a list of prohibited purposes.

One option canvased in the Discussion paper is the idea of including a paragraph or clause that more broadly describes what might constitute a condition of exploitation. This is an idea worth exploring. For example, Marija Jovanovic has asserted that it is possible to articulate the necessary and sufficient conditions for the notion of exploitation that bounds together practices listed in the definition of human trafficking. Referring to moral philosophy and emerging jurisprudence, she asserts that in the trafficking context exploitation requires three elements:

“...a) abuse of vulnerability of an exploitee; b) excessive (disproportionate) gains acquired through the actions of an exploitee; c) sustained action (the practice takes place over a period of time).”³

The inclusion of three elements along this line – abuse of vulnerability, excessive gains, and sustained action over time - would go a long way to enabling emerging forms of modern slavery to be covered by the Criminal Code, without the need to amend and update as these are brought to light.

Coercion and abuse of vulnerability

As defined in the Criminal Code, “coercion” includes “coercion by any of the following: forced, duress, detention, psychological oppression, *abuse of power, taking advantage of a person’s vulnerability*” (emphasis added). This list reflects many of the “means” noted in the definition of trafficking in persons in the UN Trafficking Protocol.

Conceptually and practically, while “abuse of power” and “taking advantage of vulnerability” can occur alongside coercion, this is not always the case.⁴ For example, it might constitute an abuse of power for a teacher to require a child to perform unpaid labour but this may not require coercion. Equally, asking a migrant domestic worker to take on additional care duties for visiting members of the family may be taking advantage of vulnerability but require little coercion. Subsuming abuse of power and taking advantage of vulnerability under coercion in Divisions 270 and 271 effectively narrows the range of “means” available to prove either forced labour or human trafficking offences. This is concerning, given the many subtle ways that offenders find to effectively control victims.

Accordingly, it is recommended that “abuse of power” and “taking advantage of vulnerability” are specifically addressed in the Divisions 270 and 271 offences, alongside “coercion, threat and deception”. This would require amendment to the definitions of servitude, forced labour and forced marriage, as well as amendment to the trafficking offences.

³ Marija Jovanovic, “The Essence of Slavery: Exploitation in Human Rights Law” (2020) 20 (4) *Human Rights Law Review*, 674-703, 692.

⁴ Marija Jovanovic, “The Essence of Slavery: Exploitation in Human Rights Law”, (2020) 20 (4) *Human Rights Law Review*, 674-703, 692.

Intervening across the spectrum of behaviour

While the crimes of slavery, servitude, forced labour and human trafficking are by their very nature all serious crimes, they do not occur in isolation. Rather, they tend to be extreme instances of less severe but far more prevalent practices.

Back in 2010, one of the authors noted in research on labour trafficking that:

“... by far the largest number of cases of exploitation (defined broadly) fall somewhere short of slavery or trafficking in persons. This raises the policy question of whether Australian criminal laws are intervening at the right point in the spectrum of exploitative behaviour. It is arguable that to be relevant, Australia’s laws need to focus not only on the extreme forms of slavery and forced labour, but also the more prevalent lesser forms of exploitative behaviour that nonetheless have serious consequences for the people affected. These less forms of exploitative behaviour are arguably precursors to more serious criminal conduct and they contribute to an environment that tolerates various forms of exploitation.”⁵

While this research was conducted some time ago, we would argue that the principle remains current. Accordingly, in addition to examining the existing offences, it is relevant to consider if there are forms of “less serious” related or precursor conduct that are not yet criminalised that usefully could be. This could include, for example, withholding a person’s passport (without more), charging excessive recruitment fees or requiring payment of bonds (including where these are held overseas). Equally, there may well be a variety of practices that, while not serious enough to constitute forced labour or slavery, or even debt bondage, are both prevalent and harmful.

Relevant examples of conduct to consider could include the following:

- Holding another person’s passport without a reasonable explanation.
- Using coercion, deception, threats or abuse of power to secure unpaid or poorly paid labour (or indeed another benefit).
- Abuse of vulnerability (without any need for coercion, deception, threats or abuse of power) to secure unpaid or poorly paid labour.
- Seeking or taking excessive fees and bonds (held outside of Australia) for migration or labour related services.
- Withholding earnings from vulnerable workers.

Deceptive Recruitment

The fact that there have been no prosecutions for the deceptive recruitment offence suggests this offence is not yet operating as a realistic alternative where more serious

⁵ Fiona David, Labour Trafficking, Australian Institute of Criminology Research and Public Policy Series, 2010, 49-50.

labour exploitation offences cannot be made out. Issues with the definition of “deceive” are noted above.

As drafted, the conduct that is currently called deceptive recruitment (s270.7(c)), which attracts a 7 year term of imprisonment, could perhaps be better described as “aggravated deceptive recruitment”. As framed, deceptive recruitment involves a person being deceived, not just about the nature of the work they will do or their conditions, but rather about their freedom to stop working, freedom of movement, and freedom to leave their place of residence.

If the intention is to make an alternative option available where the elements of forced labour cannot be made out, consideration could be given to introducing a “lesser” form of deceptive recruitment such as:

- deception about the nature of work to be undertaken;
- deception about working conditions related to safety and health;
- deceiving a person about the likelihood of securing permanent residency or other immigration outcomes.

Servitude and “Significant Deprivation of Personal Freedom”

Given the servitude offence has never been used, it would seem necessary to either clarify elements of the offence, or provide additional guidance about factors that indicate “significant deprivation”. To avoid narrowing the offence, these could be drafted as discretionary and non-exhaustive considerations.

Relevant examples of the types of conduct in question are provided by the European Case of *Siliadin*⁶. In finding the victim in that case was subject to “servitude” the court noted the following features:

- Excessive hours of work. (She worked 15 hours per day, seven days per week.)
- Family obligation and decisions being made for her. (She had been brought to France by a relative of her father and had not chosen to work for the couple in question.)
- Her young age. (She was a minor, “vulnerable and isolated”.)
- Her living situation. (She “had no means of living elsewhere than in the home of” the offenders “where she shared the children’s bedroom”.)
- Abuse of that vulnerability. (“She was entirely at Mr and Mrs B.’s mercy, since her papers had been confiscated and she had been promised that her immigration status would be regularised, which had never occurred.”)
- Restrictions on her movement. (She was unable to leave the house except to take the family’s children to school.)

⁶ Siliadan, paragraphs 122-129. *Case of Siliadin v France (Application no. 73316/01)*, European Court of human Rights, 26 July 2005.

It is recommended that consideration is given to whether these could provide useful additional (inclusive) guidance about the meaning of being “significantly deprived of personal freedom”.

Forced marriage

As noted in the review, the forced marriage offences have not been used. This is despite referrals having been received, and ample instances of situations of young women needing help to stop a forced marriage situation from occurring.

The authors note the relevance of ensuring broader discussions of “coercive control”, being undertaken in the context of family and domestic violence, are brought to bear on the Criminal Code Divisions 270 and 271. As noted in previous research, one of the characteristics of forced labour offences in Australia has been the use of a combination of subtle means to create a climate of fear, and thereby ensure effective control over a person.⁷ The parallels with family violence and the need for judicial approaches to take account of the impact of trauma should be further explored and considered.

The Government has indicated a willingness to progress reform in this area and has advised that it is developing enhanced civil protections and remedies for victims and survivors of forced marriage to provide additional options for victims and survivors to seek support and protection. We commend the government for this commitment and welcome the opportunity to provide further comment and input on this important work.

Thank you once again for the opportunity to contribute to this review of Divisions 270 and 271 of the Criminal Code.

We would welcome the opportunity to discuss the reform process in further detail.

Yours sincerely,

Fiona David and Olivia Hicks.

⁷ Fiona David, *Labour Trafficking*, 2010, 27, 46. See also *Trafficking of Women for Sexual Purposes* by Fiona David, Australian Institute of Criminology Research and Public Policy Series, 2008, 39.