

Human Rights and Equal Opportunity Commission

The MCCOC Secretariat
Criminal Law Division
Attorney-General's Department
Robert Garran Offices
National Circuit
BARTON ACT 2600

Re: Discussion Paper on Slavery

I welcome the opportunity to comment on the Model Criminal Code Officers Committee Discussion Paper on Slavery (the Discussion Paper) and apologise for the delay in providing this submission. The recommendations of the Discussion Paper will, once they are implemented, go a long way towards eliminating the trafficking of women into Australia and the exploitation of women in the country. Although fortunately affecting few women, there is evidence that these practices are continuing. My comments are general and relate primarily to the "sexual servitude" provisions of the Discussion Paper.

1. Jurisdiction

The Commonwealth has power to legislate in relation to slavery and servitude arising from its foreign affairs power. This may relate to conduct that is covered by an international agreement to which Australia is a signatory or that otherwise has an international element.

In relation to conduct that has an international element apart from its coverage by an international agreement, I note that the Minister for Justice, Senator Vanstone recently introduced a Bill, clause 30.4(3) of which makes it an offence for anyone outside Australia to:

procure another person to enter into an engagement in Australia that constitutes sexual servitude by deceiving the person about the nature or other aspect of the engagement; or engage in any trade in other persons for sexual servitude in Australia; or exercise control or direction over, or provide finance for, such conduct.

I commend this initiative. However, it is important to ensure that the legislation is, while constitutionally well grounded and as immune from challenge as possible, also drafted as broadly as federal power allows. I consider that the Commonwealth may have greater scope to legislate than is reflected in the Bill and may extend to cover conduct that occurs entirely within Australia. I suggest that this power arises from the international agreements to which the Commonwealth is a signatory.

At pages 13-14, the Discussion Paper suggests there may be some doubt that the provisions of international agreements give the Commonwealth power to legislate with regard to servitude that occurs entirely on-shore. While Article 8 of the International Covenant on Civil and Political Rights (ICCPR) specifically separates the provisions relating to slavery and servitude, the Discussion Paper suggests that there may be some doubt as to the extent of its coverage in relation to slave like conditions. However, the provisions of the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW) may provide greater certainty for the Commonwealth's power to legislate, at least in relation to women, in this area, than does the ICCPR. Article 6 of CEDAW states:

States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

The international instruments to which Australia is a signatory, particularly CEDAW, the ICCPR and the Convention Against Slavery, should provide sufficient power to the Commonwealth to legislate in relation to most forms of sexual servitude occurring in Australia.

I suggest that the Model Criminal Code Officers Committee recommend to SCAG that, in the light of the seriousness of the conduct concerned, federal legislation should be implemented immediately. It should be drafted as widely as possible, taking account of the provisions of all the relevant international agreements to which Australia is a party.

I consider that the Commonwealth has power to legislate in relation to all conduct specified in the draft provisions of the Discussion Paper, both domestic and international, arising from international agreements to which Australia is a signatory. However, I agree with the comments on pages 13 -14 of the Discussion Paper that the involvement of both the States and Territories and the Commonwealth is vital.

It is important that both the States and Territories and the Commonwealth have access to a range of legislation to deal with the full extent of criminal conduct which comes to their attention. I entirely agree that sexual servitude and slavery should be included in the Model Criminal Code as recommended by the Discussion Paper. It is important that provisions relating to sexual servitude be included in the Model Criminal Code. If stand-alone federal legislation were enacted prior to the introduction of a national code, it could be replaced by that code once it is introduced.

2. The definition of sexual servitude and miscellaneous provisions

The model provisions in the Discussion Paper require that, to establish sexual servitude, a person must not have been free to cease providing sexual services within a reasonable time or on reasonable terms. I disagree that the notion of reasonable time or reasonable terms should be included in the definition of sexual servitude. I would argue that servitude begins as soon as threats or force prevent a person from exercising free will to decline to provide sexual services. The provision of the Model Criminal Code to which paragraph 9.1.3 (1) (a) of the Discussion Paper applies should read:

is not free to cease providing sexual services; or

The length of time of detention in any particular case will assist the determination of whether the victim's state amounted to sexual servitude and will be relevant in relation to sentencing.

The definition of sexual servitude should take account of the particular circumstances in which women may be subjected to exploitation and slave like conditions in Australia. The proposed legislation should be drafted to be responsive to each of these circumstances. Research indicates that the main circumstances are as follows.

(a) The exploitation and trafficking of foreign national women as prostitutes into or within Australia

This is the circumstance with which the Discussion Paper is mainly concerned and I am satisfied that the proposed provisions adequately address these cases. I commend the Model Criminal Code Officers Committee's inclusion in the definition of threat "a threat to cause a person to be deported or a threat of other legal process" (para 9.1.3 (2)).

It is important that criminal provisions are introduced in conjunction with appropriate accompanying legislation wherever necessary. Criminal provisions must be supported by legislation to ensure that

victims are not further victimised by the legal process.

Victims should be provided with refuge, counselling and access to government services, including legal aid. Those with irregular immigration status should not be deported without having access to legal advice about their status. I note the provisions to allow applications for visas by foreign national spouses of Australians who have suffered domestic violence. I recommend that similar provisions be considered in relation to those who have come to the attention of immigration officials as a result of the proposed criminal provisions relating to sexual servitude. Access to a visa of this kind would require a number of elements to be satisfied:

- that return home would cause hardship, for example through the stigma attached to having been a prostitute; and
- that there is evidence of the person having been in sexual servitude (as defined by the criminal legislation) while in Australia.

This would require immigration rules to be drafted. Those who have come to the attention of immigration officials as a result of the criminal provisions relating to sexual servitude should be automatically entitled to apply for a visa under existing refugee provisions.

I suggest that the Model Criminal Code Officers Committee recommend that appropriate support be provided to victims of sexual servitude and that immigration rules be drafted to ensure that visas are available in appropriate cases.

(b) Exploitation of women sponsored as the spouses or fiancées of Australian men. While I have no reason to doubt that most of these relationships are genuine and functional, there have been a number of studies in Australia concerning the exploitation of women who are sponsored to Australia as spouses or fiancées of Australian men.

In 1997, the Race Discrimination Commissioner of the Human Rights and Equal Opportunity Commission produced a report entitled *Violence against Filipino Women*. That report was prepared by Chris Cunneen and Julie Stubbs from the Institute of Criminology, University of Sydney. Commissioned following concerns about the levels of homicide of Filipino women in Australia, particularly in the context of sponsored immigration through marriage to Australian men, the report states:

The deregulation of trade, and the internationalisation of labour markets has sustained and entrenched an international order in which women from developing countries are themselves 'traded' as workers, or wives. The Philippines government has promoted the export of labour (or brides) as a measure that eases unemployment and generates much needed foreign exchange (p 3).

The report points out that it is

- particular racialised and gendered stereotypes of Filipino women which contribute to the commodification of Filipino women and render them accessible to men with economic power (p 6).

The report notes that a large proportion of Filipino women migrating to Australia (approximately 70%) were sponsored as the fiancées or spouses of men who were Australian residents (p 9). It cites a number of other recent reports that provides case studies of serial sponsorship of Filipino women in which the women were subjected to physical, sexual and emotional abuse (p 16).

In 1994, the Australian Law Reform Commission considered the particular vulnerability of women who do not have permanent residency. One of the submissions to the *Equality Before the Law Inquiry* states that

- this threat of possible deportation provides a strong incentive for women to stay in an abusive

marriage. Frequently, this lack of permanency forms the basis of blackmail and threats by an abusing partner to get the woman to stay with him. (*Equality Before the Law* Pt1 AGPS 1994, 219.)

The proposed model criminal code provisions relating to sexual servitude should apply here. I recommend that the Model Criminal Code Officers Committee ensure that the provisions are drafted with a view to complete coverage of serious cases of this kind.

I am pleased that immigration rules have been amended to ensure that women in this situation who have suffered domestic violence have been covered by a particular visa class. Once again I suggest that the Model Criminal Code Officers Committee recommend that appropriate support be provided to victims of this kind of sexual servitude.

(c) Exploitation of Australian women as prostitutes. The Discussion Paper notes, at page 14, that

[s]ervile sex industry practices are intimately tied up with local prostitution prohibition or regulation? . These are simply not plain straightforward international and hence Commonwealth matters, but matters in which the interests of the States and Territories are closely concerned and which may well involve vital State or Territory governmental interests.

Although, as noted above, I consider that international agreements would allow the Commonwealth to cover the field in relation to sexual servitude offences, I commend the initiative that would see all cases the subject of a model criminal code. It is important that police and criminal justice systems of both levels of government, federal and State, are able to deal with cases of this kind.

Comment: [H][H][H]

I hope these comments are of use to you and, once again, I apologise for the delay in providing this submission.

Yours sincerely

**Susan Halliday
Sex Discrimination Commissioner
Human Rights and Equal
Opportunity Commission**

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