



Australian Sex Workers Association

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Attorney General's Department
Robert Garran Offices
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BARTON ACT 2600

By email: targetedslaveryreviews@ag.gov.au

To the Attorney-General's Department,

Thank you for the opportunity to submit to the targeted review of trafficking, slavery and slavery-like offences in Divisions 270 and 271 of the Commonwealth *Criminal Code Act 1995* (the Criminal Code).

Formed in 1989, Scarlet Alliance, Australian Sex Workers Association, is the national peak for sex workers in Australia. Through our objectives, policies and programs, Scarlet Alliance aims to achieve equality, social, legal, political, cultural and economic justice for past and present workers in the sex industry. Our membership includes state and territory-based sex worker organisations, projects and programs, and individual sex workers across unceded Australia. Through our work and that of our members, we have the highest level of contact with sex workers in Australia of any agency, government or non-government. The work of our members gives them access to sex industry workplaces, both in major cities and many regional areas. Many of our member sex worker peer organisations and projects also employ multilingual project and outreach workers who engage directly with migrant sex workers throughout Australia, across a range of workplaces.

For over three decades we have provided expertise on sex work, and the impacts of trafficking, slavery and slavery-like offences in a variety of federal, jurisdictional, research, service provision, and civil society arenas. Scarlet Alliance has been involved in shaping the debate about the international migration of sex workers. We convene the Asian Migrant Sex Worker Advisory Group, made up of Asian migrant sex workers and Asian migrant sex worker peer educators to guide Scarlet Alliance's work and to ensure that migrant voices are centred in policy and legislation that directly impacts migrant sex workers. Through this group, and through the peer-based outreach programs of our member organisations, we have extensive contact with migrant sex workers, and this unique knowledge and expertise underpins the Scarlet Alliance perspective on migration and sex work.

Many of our member organisations and projects provide representation on state and territory anti-trafficking working groups, and as the peak association Scarlet Alliance has sat on the National Roundtable on Human Trafficking and Slavery since its formation. We were deeply engaged in the 2012 Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill, which recently passed its 10th Anniversary of royal assent.

Between 2009-2018, the Scarlet Alliance Migration Project, staffed entirely by and for migrant sex workers, was funded as part of the Australian Government's response to trafficking to enhance the

capacity of sex worker peer educators in Australia to provide key in-language peer support, education and referrals, information on rights and responsibilities in relation to Australian laws in each jurisdiction, safety in navigating pathways for migration and sex work in Australia, and form partnerships with international sex worker advocacy and support organisations. The project centred migrant sex worker voices in trafficking legislation and policies to challenge the harmful myths and stereotypes about migrant sex workers in policies and public discourse, and partnered with the Australian Institute of Criminology to conduct research by and for migrant sex workers in Australia.¹

This submission is intended to be read in conjunction with our submission to the review of the *Modern Slavery Act 2018* (Cth) dated 13 December 2022, and is endorsed by the following Scarlet Alliance member organisations and projects:

- Respect Inc QLD
- Sex Workers Outreach Project (SWOP) ACT
- Sex Workers Outreach Project (SWOP) NSW
- Sex Workers Outreach Project (SWOP) NT
- SIN SA
- Vixen, Victoria's Peer Sex Worker Organisation
- Scarlet Alliance Tasmanian Sex Worker Project
- Sex Work; Education, Advocacy & Rights WA (SWEAR WA)
- Magenta WA

Please contact our CEO, Mish Pony on (02) 9517 2577 or mish.pony@scarletalliance.org.au if you have any further questions.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Mish Pony', with a long horizontal flourish underneath.

Mish Pony
Chief Executive Officer

¹ Lauren Renshaw et al. [Migrant Sex Workers in Australia](#) (Research and public policy series no. 131, 2015).

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Executive Summary

Scarlet Alliance, Australian Sex Workers Association believes the criminal justice approach must be partnered with equally strong measures targeted towards prevention, education and support for migrant sex workers who are at risk of, or who have experienced trafficking-like work conditions, slavery and slavery-like offences.² Police presence in sex worker workplaces has the effect of pushing migrant sex work underground and making trafficking and slavery-like situations more possible, not less likely. Our state and territory based member sex worker organisations and projects conduct regular and extensive outreach to wherever sex workers work, and are the key mechanism to provide education, address the drivers of trafficking and modern slavery, identify instances of trafficking, slavery and slavery-like offences when they occur in the sex industry, and to provide practical and informed support to, and referrals for migrant sex workers who are at risk of or who have experienced trafficking, slavery and slavery-like practices.

We believe that expanding the current criminal justice approach will not advance the rights of victims/survivors of trafficking, slavery and slavery-like practices. Experience tells us that broadening the scope of these laws will not result in better outcomes, but will result in overcapture, and increase police and immigration surveillance, harassment, arrest and deportation of migrant sex workers.

At consultation meetings for this review, AFP officers described police 'disruption' of migrant sex worker workplaces as a 'successful' method of preventing trafficking or slavery-like crimes. Scarlet Alliance and our members can confirm that migrant sex workers report these actions negatively as police 'raids' or 'undercover stings', while the same actions are referred to by police as 'visits' or

² See the following Scarlet Alliance submissions to government and relevant policy statements in favour of systemic trafficking prevention measures and opposed to expansion of a criminal justice approach:
Scarlet Alliance, Submission to [Inquiry into Human Trafficking](#) (19 February 2016)
Scarlet Alliance, Submission to [Inquiry into Slavery, Slavery like conditions and People Trafficking](#) (28 September 2012)
Scarlet Alliance, Submission on [Crimes Legislation Amendment \(Slavery, Slavery-like Conditions and People Trafficking\) Bill 2012](#) (31 July 2012)
Scarlet Alliance, Submission to Steph Key, Member for Ashford, South Australian Parliament, [South Australian Law Reform](#) (23 May 2012)
Scarlet Alliance, Submission to Consumer Affairs Victoria, [Sexual Slavery Signs in Victorian Brothels](#) (April 2012)
Scarlet Alliance, Submission to the Attorney General's Department, [The Criminal Justice Response to Slavery and People Trafficking; Reparation; and Vulnerable Witness Protections](#) (Feb 2011)
Scarlet Alliance, Submission to [Inquiry into forced and servile marriage in Australia](#) (25 Feb 2011)
[Response to Victorian Recommendations on trafficking for sex work](#) August 2010, endorsed by 18 influential sex worker groups, researchers and supporters
Scarlet Alliance, Submission to [Simpler visas: Creating a simpler framework for temporary and permanent entry to Australia](#) (16 July 2010)
Scarlet Alliance, Submission to Stephen Howells, [Review of Employer Sanctions Legislation – Combating Illegal Work in Australia](#) (30 June 2010)
Scarlet Alliance, '[US State Department Trafficking In Persons Report](#)' (Briefing Paper, January 2008)
Scarlet Alliance, Submission on [Draft Criminal Code Amendment \(Trafficking In Persons\) Bill](#) (25 Oct 2004)
Scarlet Alliance, Submission to the Parliamentary Joint Committee [Inquiry into Trafficking in Women & Sexual Servitude](#) (26 Sep 2003).

‘disruptions’. Media report these police actions as benevolent efforts to ‘identify and support trafficking victims’. In practice the workplaces of Asian migrant sex workers who are not experiencing trafficking or slavery-like conditions are being targeted for raids by police, and those migrant sex workers are being harassed and deported. Also of note is the low number of prosecutions, not on par with the high number of reported police ‘visits’ to migrant sex worker workplaces.

Despite compelling evidence of its limitations and potential harms, Australia’s approach to trafficking, slavery and slavery-like offences remains largely centred in a reactive criminal-justice response, with a focus on policing and surveillance. The implementation of this criminal justice framework has come at enormous cost, with little evidence as to its effectiveness.

Long standing discourse on ending trafficking, slavery and slavery-like practices has centred on the importance of addressing the *drivers* of these practices, i.e. global structural factors that increase migrant workers’ vulnerabilities to exploitation, including a lack of safe and accessible legal migration pathways and information, ‘poverty, economic shocks, gender inequality, disability, lack of access to education, [and] exploitative business practices,’³ underemployment and unemployment, displacement, including because of conflict or natural disasters, discrimination and marginalisation, including gender inequality and weak rule of law.⁴ A reactive response centred in criminal legislation cannot address these drivers, and results in the denial of rights and freedoms for migrant workers through immigration detention and deportation, a lack of access or ability to navigate labour rights, affordable accommodation, health care, and/or government payments and services such as Centrelink and Medicare.

A human rights and evidence-based approach to sex work, migration and trafficking should be pursued over criminal justice approaches. The most effective approaches focus on education and prevention, and aim to address the circumstances that lead to trafficking, slavery or slavery-like practices, prioritise the needs, agency and self-determination of migrant sex workers by facilitating equitable access to visas, migration channels and support, industrial rights, civil remedies and statutory compensation. Anti-trafficking policy has historically targeted sex worker workplaces. As a result, sex workers have borne the brunt of policy, policing and Border Force practices. Asian and migrant sex worker workplaces are still disproportionately impacted. Unless these impacts are taken into account and learnt from, it is likely the expansion of the Criminal Code Div 270 and 271 will contribute to further harm. For this reason, the voices of sex workers as represented by Scarlet Alliance and our membership are critical.

The implementation of a rights-based framework that addresses the global drivers of trafficking, slavery and slavery-like offences is an effective approach supported by both international and Australian human rights bodies.⁵ The implementation of a rights-based framework would involve the following actions to ensure equity for migrant sex workers:

³ Australian Government, [Review of Australia’s Modern Slavery Act 2018](#) (Issues Paper, August 2022), 30.

⁴ Australian Government, [National Action Plan to Combat Modern Slavery 2020-25](#) (2020), 11.

⁵ Australian Human Rights Commission, Submission to the [UN Special Rapporteur on Trafficking in Persons, Australian Mission, 17-29 November 2011](#) (14 November 2011) 5.

1. Australia must become a signatory of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.⁶
2. Sex work must be fully decriminalised in each state and territory of Australia.
3. Anti-discrimination protections must be implemented for sex workers and migrants in all jurisdictions as an urgent human rights issue.
4. Sex workers must have access to safe and accessible migration pathways. This includes providing migrant sex workers with access to translated information, accessible migration avenues that do not require workers to use the assistance of a third party, and access to long-stay visas that recognise sex work as skilled labour.
5. Stronger rights-based mechanisms of redress must be developed to protect the labour rights of migrant sex workers. Migrant sex workers need access to industrial mechanisms to claim compensation, redress exploitative working conditions and access legal aid and support.
6. Sex worker peer organisations must be financially supported to run projects and provide services by and for migrant sex workers. This strengthens the human, civil and political rights of migrant sex workers, increases our autonomy, agency and self-determination, and is the most effective way to address trafficking, slavery and slavery-like offences in the sex industry.
7. A support framework for victims/survivors of trafficking and slavery and slavery-like practices must be implemented that does not necessitate engagement with police in order to access support. This includes enabling additional referral pathways from a diverse range of culturally appropriate organisations.
8. Effective approaches address trafficking, slavery and slavery-like practices through a focus on prevention, industrial rights, workplace health and safety, civil remedies, statutory compensation, rights-based non-criminal justice pathways, and equitable access to visas, migration channels and support.
9. The current inadequate ‘assurance protocol’ must be replaced with a ‘firewall’ between the Fair Work Ombudsman, Safe Work Australia jurisdictional bodies and the Department of Home Affairs to protect migrant workers from visa-related repercussions when they speak out against trafficking, slavery and slavery-like practices, exploitation and/or industrial issues.
10. A new substantive visa category must be created to allow migrant workers with outstanding claims for workplace entitlements to remain in the country with working rights until their claim has been settled.

During the course of this review, Scarlet Alliance members have observed systemic bias in favour of police and other enforcement body interests. Scarlet Alliance members assess that the review is weighted towards a punitive criminal justice response, and that the input of the AFP will likely be prioritised above the interests of those most impacted, including migrant sex workers. In stakeholder meetings around the country, our members observed the AFP behaving as stakeholders, despite already having the role of review collaborative partners.⁷

The focus of Scarlet Alliance’s submission is directed towards the implementation of an evidence- and rights-based framework that addresses the drivers of trafficking, slavery and slavery-like practices, with particular focus on the discussion questions most relevant to migrant sex workers. As such, we have not addressed the discussion questions directed at trafficking, slavery and slavery-like

⁶ United Nations Office of the High Commissioner, [International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families](#), GA Res 45/158 (18 December 1990, in force 1 July 2003).

⁷ Australian Government, [Targeted Review of Divisions 270 and 271 of the Commonwealth Criminal Code Act 1995 \(Cth\)](#) (Discussion Paper, 7 December 2022), 30.

offences in orphanages and other institutional settings (questions 9-10 and 32-33), forced marriage offences (questions 18-20), Div 270's aggravating circumstances, alternative verdict and relevant evidence provisions (questions 22-24), wording of the domestic trafficking provisions (question 28) Div 271's aggravating circumstances provision (question 30) and organ trafficking offences (questions 34-35).

Question 1: Interactions between Divisions 270 and 271 and other laws and frameworks

Question 1	Are stakeholders observing interactions between offences in Divisions 270 and 271 and other laws and frameworks that are impeding, or have the potential to impede, effective investigations and prosecutions of offences in Divisions 270 and 271?
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As noted by the Review of Australia's *Modern Slavery Act 2018* Issues Paper, a major barrier to the successful functioning of modern slavery legislation is a lack of understanding and unwillingness to address the drivers of modern slavery from reporting entities.⁸ Similarly, functionality of Divs 270 and 271 and other aspects of the *National Action Plan to Combat Modern Slavery 2020-25* are inhibited by a lack of political will to genuinely engage with the drivers of trafficking, slavery and slavery-like practices, and disproportionate focus on enforcement and prosecution.

The strict immigration and anti-trafficking policies comprising Australia's 'border control' approach are selective, difficult to navigate, inaccessible to many people and 'designed to allow a state sanctioned traffic in the labour-power of migrant workers but at the same time prevent those workers from accessing the rights and protections formally assured to worker citizens,'⁹ such as access to labour rights and services such as Centrelink and Medicare.

Research into the causal elements of trafficking and slavery shows that Australia's migration approach *increases* migrant sex worker vulnerability to trafficking and slavery.¹⁰ Without engagement with the structural drivers **created by** Australian immigration and labour policies and global maldistribution of wealth, the functionality of Divs 270 and 271 and legislation such as the *Modern Slavery Act 2018* (Cth) will remain impeded, anti-trafficking efforts will remain limited and, in many cases, misguided or even harmful.

The criminalisation of sex work, or regulation by complex licensing frameworks, generates additional vulnerabilities to labour exploitation, and impedes the reporting and investigation of crimes against sex workers. In criminalised jurisdictions, sex workers' ability to seek information, support and health care is 'severely limited by the risk of prosecution.'¹¹ The impact of criminalisation on policing practices and attitudes toward sex workers, alongside the potential of

⁸ *Review of Modern Slavery Act 2018* (n 3) 56-8.

⁹ Julia O'Connell Davidson, 'De-canting "Trafficking in Human Beings", Recentring the State' (2016) 51(1) *The International Spectator* 58, 68.

¹⁰ Elaine Pearson, 'Australia' in Mike Dottridge (ed) *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights around the World* (GAATW, Bangkok 2007) 28, 52.

¹¹ Christine Harcourt et al, 'Sex Work and the Law' (2005) 2(3) *Sexual Health* 121, 123.

further surveillance, criminalisation or deportation, impedes the ability of sex workers to report crime.¹² A long history of police refusal to act when sex workers do report crime also impedes reporting.¹³

The decriminalisation of sex work has been proven to create the most enabling environment to ensure that migrant sex workers are afforded workplace rights, have access to legal, health and supportive services and bilingual peer educators, and to reduce organised crime and police corruption.¹⁴ The implementation of robust and effective anti-discrimination protections for sex workers is also vital to ensuring that sex workers have full and equitable access to housing, healthcare, community support and industrial redress mechanisms.¹⁵

Migrant sex workers who have experienced trafficking, slavery and slavery-like offences must also be safe to seek support, regardless of how they frame their experience or whether they participate in the criminal justice process. This can only be achieved through the creation of safe and accessible migration pathways, access for migrant workers to redress mechanisms such as Fair Work, Work Safe and legal aid, and the creation of a 'firewall' between these bodies and the Department of Home Affairs to protect migrant workers from visa-related repercussions when they speak out against trafficking, slavery and slavery-like practices or industrial issues. These protections must exist regardless of whether the contact results in prosecution or a substantive case.

The full decriminalisation of all forms of sex work in every state and territory in Australia, alongside effective anti-discrimination protections and a 'firewall' between the Fair Work Ombudsman, Safe Work jurisdictional bodies and the Department of Home Affairs, are all integral to the successful operation of anti-trafficking legislation, and for the access of all sex workers to industrial redress mechanisms such as the Fair Work Ombudsman, Work Safe and other jurisdictional tribunals.

Understanding migrant sex work **AS WORK** would support migrant sex worker access to labour rights and civil industrial relations systems. Current police practices of arbitrary intervention into migrant sex worker workplaces raises concern within the Scarlet Alliance membership about potentially racist targeting and ongoing poor relationships between the sex worker community and police. It is not unusual for sex workers to not trust police and to fear Border Force.

Recommendation 1: Sex work must be fully decriminalised in all Australian states/territories, with the implementation of specific, robust and effective anti-discrimination protections for sex workers in relevant legislation. In the course of this review, recognise the harmful impacts of anti-trafficking policy and policing on sex workers, and ensure no further harm is caused to sex workers by any amendments to the Criminal Code recommended by this review.

¹² Zahra Stardust et al. "'I Wouldn't Call the Cops if I was Being Bashed to Death': Sex Work, Whore Stigma and the Criminal Legal System' (2021) 10(3) *International Journal for Crime, Justice and Social Democracy* 142, 148.

¹³ Ibid, 149-150. See also Elena Jeffreys, Erin O'Brien and Janelle Fawkes '[The Case for Decriminalisation: Sex Work and the Law in Queensland](#)' (Crime and Justice Briefing Paper, Crime, Justice and Social Democracy Research Centre, Queensland University of Technology, June 2019) 3.

¹⁴ Basil Donovan et al, 'Improving the Health of Sex Workers in NSW: Maintaining Success' (2010) 21(4) *New South Wales Public Health Bulletin* 74.

¹⁵ Sarah Spina-Matthews '[With anti-discrimination changes, Northern Territory has some of the world's most progressive sex work laws. It wasn't always that way](#)', *ABC News* (online, 27 November 2022).

Recommendation 2: As part of the targeted review of Australia’s visa framework,¹⁶ and in consultation with Scarlet Alliance, amend the *Migration Act 1958* (Cth) and associated frameworks to ensure safe and accessible pathways for migrant workers.

Recommendation 3: Replace the current inadequate ‘assurance protocol’ with a ‘firewall’ between the Fair Work Ombudsman, Safe Work jurisdictional bodies and the Department of Home Affairs to protect migrant workers from visa-related repercussions when they speak out against exploitation or industrial issues.

Recommendation 4: Provide resourcing for sex worker peer organisations to run projects and provide services by and for migrant sex workers. This strengthens the human, civil and political rights of migrant sex workers, increases our autonomy, agency and self-determination, and is the most effective way to address exploitation and trafficking in the sex industry.

Questions 2-4: Use of technology in offences and future-proofing Divisions 270 and 271

Question 2	To what extent have stakeholders encountered cases where technology (including devices and platforms) has been used by perpetrators to facilitate, recruit, advertise or exploit victims and survivors into trafficking in persons, slavery or slavery-like practices?
Question 3	Are there gaps in offences in Divisions 270 and 271 that would prevent their application to cases where technology is used to facilitate, recruit, advertise or exploit victims and survivors into trafficking in persons, slavery or slavery-like practices? If so, what are the observed gaps and how might they be addressed?
Question 4	Are Divisions 270 and 271 appropriately future-proof and flexible enough to apply to the misuse of new and emerging forms of technology and online conduct? If not, why not, and are specific changes to Divisions 270 and 271 recommended?

While it is important that Divs 270 and 271 are able to respond to change, specific references to the use of technology within Divs 270 and 271 are unlikely to capture any conduct not already within the scope of the provisions and risk creating conflicts with (pending) amendments to the Privacy Act¹⁷. Scarlet Alliance believes that this kind of amendment would not benefit sex workers who have experienced trafficking of slavery-like offences, and would create a significant risk of harm for all sex workers due to creating potential for government agency overreach areas of privacy that are likely to be protected by law very soon.

The Criminal Code already contains extensive provisions targeting cases where technology is a major feature that are outside the scope of this review.¹⁸ These provisions sit alongside Commonwealth

¹⁶ See Action Item 20, [National Action Plan to Combat Modern Slavery 2020-25](#) (n 4) 25.

¹⁷ Australian Government Attorney Generals Department, [Privacy Act Review Report](#), 2023.

¹⁸ See Discussion Paper (n 7), 22.

legislation directed towards harmful online behaviours,¹⁹ and existing broad police powers for the interception of communications relating to trafficking, slavery and slavery-like offences.²⁰

Any extension of Divs 270 and 271 to specify the use of technology in offending risks severe over-capture of the normal business of sex workers, restricting sex workers' access to technology that allows us to work safely and autonomously, and create unintended consequences for all technology end-users and commercial providers. Over the last decade, sex workers across the globe have experienced loss of access to technological tools and services at exponential rates, being denied services such as web hosting²¹ and social media,²² as well as financial services such as bank accounts, insurance, merchant facilities and payment processing facilities.²³ This has largely been a result of a global trend towards laws and policies that create obligations for private entities to respond to what governments envision as online and real-world harms. Corporations, particularly in the finance and technology sectors, have responded to a wide scope of legal liability to 'combat trafficking,' 'prevent money-laundering' or 'protect children' by introducing crude content moderation practices that result in the deplatforming of sex workers or denial of service altogether,²⁴ resulting in the loss of digital and real-world tools used by sex workers to conduct business safely.

The over-capture of sex workers' regular business (including important safety and harm reduction strategies) by 'anti-trafficking' legislation targeted towards online activity has been well-documented. The United States legislation *Allow States and Victims to Fight Online Sex Trafficking Act of 2017* (known as FOSTA-SESTA) has *created* significant barriers to sex workers' ability to work independently and *increased* reliance on third parties through loss of income, lack of access to health information and harm reduction strategies, and lack of access to peer support and networking.²⁵ As of June 2021, the legislation has generated a single prosecution, and has yet to produce a successful conviction for a victim/survivor of trafficking.²⁶ FOSTA-SESTA's impacts have had global reach, with the closure of sex worker advertising sites hosted in the United States negatively impacting sex worker income and safety, even in decriminalised environments such as NSW and Aotearoa New Zealand.²⁷

The operation of Divs 270 and 271 offences targeting the use of technology would present insurmountable challenges for the providers of technological products and services as well as their

¹⁹ See Scarlet Alliance, [Submission 36 to Senate Standing Committee on Communications](#), Parliament of Australia, *Online Safety Bill 2021* (3 March 2021) for comment on Australia's online safety legislation.

²⁰ Explanatory Memorandum, [Crimes Legislation Amendment \(Slavery, Slavery-like Conditions and People Trafficking\) Bill 2012 \(Cth\)](#), 2-3.

²¹ Julie Fenwick, ['Australian Sex Workers Have Been Removed From Linktree. What They Are Doing Is Not Illegal'](#), *Vice* (online, 21 January 2022).

²² Carolyn Bronstein, ['Deplatforming Sexual Speech in the Age of FOSTA/SESTA'](#) (2021) 8(4) *Porn Studies* 367, 371-4.

²³ Lavender Baj, ['How Australian Banks Are Legally Discriminating Against Sex Workers'](#), *Junkee* (10 November 2021).

²⁴ Mike Callaghan, [Independent Review of the Banking Code of Practice 2021](#) (Final Report, 26 November 2021) 101.

²⁵ Danielle Blunt and Ariel Wolf, ['Erased: The Impact of FOSTA-SESTA and the Removal of Backpage on Sex Workers'](#) (2020) (14) *Anti-Trafficking Review* 117, 118-120.

²⁶ United States Government Accountability Office, Report to Congressional Committees GAO-21-385, [Sex Trafficking, Online Platforms and Federal Prosecutions](#) (June 2021) 1.

²⁷ Erin Tichenor, ["'I've Never Been So Exploited": The Consequences of FOSTA-SESTA in Aotearoa New Zealand'](#) (2020) (14) *Anti-Trafficking Review* 99.

regulators, exacerbating existing issues where entities who do not understand trafficking are charged with preventing it, and attempt to comply with these responsibilities by implementing broad policies that do not differentiate between sex work and trafficking, slavery and slavery-like offences.²⁸ The procurement of evidence for a charge made under this kind of provision could encourage violations of user privacy, require or encourage proactive monitoring of user activity, and/or position technology products and services as proxy detectors of trafficking.

Scarlet Alliance does not support any additions to Divs 270 and 271 specifying the use of technology in offending, as these offences already cover scenarios where technology is used to facilitate offending, and legislation targeted towards the use of technology in trafficking offending has been shown to negatively impact on sex workers ability to conduct business safely, and to increase sex workers' vulnerability to exploitation. The consideration of such changes prior to the outcomes of the Privacy Act review would be premature and counterproductive, with impacts beyond the sphere of trafficking prevention, modern slavery detection or sex work. The privacy rights of all users of technology and relevant companies would be unintentionally impacted if hasty amendments to the Criminal Code were made.

Recommendation 5 Do not amend Divisions 270 and 271 to create offences relating to the use of technology, as the existing offences already apply to scenarios where technology is used in offending, and the creation of additional offences risks overcapture of sex workers' regular business activities and important safety and harm-reduction strategies.

Recommendation 5a If a decision is made to expand Divisions 270 and 271 or introduce other legislation creating offences targeted towards the use of technology in trafficking, slavery and slavery-like offences, these provisions must be drafted in consultation with Scarlet Alliance to ensure the least risk of harm to migrant sex workers, and postponed until after amendments to the Privacy Act are completed.

Questions 5-8: Coercion, threat and deception

Question 5	What kind of conduct may constitute deception through omission as relevant to offences in Divisions 270 and 271 of the Criminal Code?
Question 6	Should reforms be considered to broaden the application of Divisions 270 and 271 to explicitly include conduct that includes deception by omission?
Question 7	What unintended consequence might arise that would require consideration in drafting any reforms to the definition of deceive?
Question 8	Do the definitions of coercion, threat and deception collectively capture the types of conduct used in offending in Divisions 270 and 271, including subtle forms of coercion? If not, why not, and are specific solutions recommended?

²⁸ See Scarlet Alliance, [Submission on Review of Australia's Modern Slavery Act 2018 \(Cth\)](#) (13 December 2022).

Deception through omission

As noted in the Discussion Paper, the kinds of control present in Div 270 and 271 offences tend to be psychological rather than physical,²⁹ which can complicate successfully identifying and prosecuting these offences.

Scarlet Alliance does not support the widening of the definition of ‘deception’ to include omission/inaction. The definition of deception within the Divs 270 and 271 is already broad; as ‘mislead[ing] as to fact (including the intention of any person) or as to law, by words or other conduct,’³⁰ includes direct verbal deception and other deceptive conduct. The inclusion of ‘other conduct’ means the offence already applies to scenarios where an offender engages in any obfuscation as to their intention or the intention of another.

Coercion

‘Coercion’ in Divs 270 and 271 **already includes** ‘using force, duress, detention, psychological oppression, abuse of power and/or taking advantage of a person’s vulnerability,’ clearly covering non-physical forms of oppression.

The development of the National Principles to Address Coercive Control (the National Principles) to inform Commonwealth and state/territory governments and other decision-makers as to how coercion may manifest in family violence contexts may be helpful to some victims/survivors of coercive control. However, there is no evidence that these Principles will be appropriate for application to trafficking, slavery and slavery-like offences.

Coercive control definitions are focussed on intimate partnerships and do not account for the power dynamics between employees and employers. For example, coercive control includes financial control, which is inherent to employment relationships; there are always elements of financial control implicit between workers and managers. We are concerned that a definition created for a specific set of circumstances will be mismatched to the context of Divs 270 and 271 offences.

An expanded definition of ‘coercion’ informed by coercive control may expose migrant sex workers to increased scrutiny and surveillance, and risks the over-capture of conduct that is not trafficking, slavery or slavery-like practices. This furthers an environment of mistrust between migrant sex workers and enforcement agencies,³¹ and disincentivises migrant sex workers from reporting Divs 270 and 271 offences and other serious crime.³²

It is positive that the Discussion Paper proposes consideration of the relationships between trauma and the conduct of coercion, threat or deception. However, Scarlet Alliance does not believe that expanding Criminal Code definitions of ‘coercion’ or ‘deception’ is a trauma-informed approach. Addressing the trauma experienced by survivors must include access for victims/survivors to trauma-informed services, regardless of their choice to participate in the criminal justice process. Scarlet Alliance also notes that the decision to participate in the criminal justice process, and

²⁹ Discussion Paper (n7) 26.

³⁰ *Criminal Code Act 1995* (Cth), s 271.1.

³¹ Samantha Lyneham, [‘Attrition of human trafficking and slavery cases through the Australian criminal justice system’](#) (Trends & issues in crime and criminal justice No. 640, November 2021) 11-12.

³² See Zahra Stardust et al (n 12) 148-9.

self-framing of the victim/survivor experience may change over time. In a trauma-informed process this self-determination would be respected.

The harms experienced by victim/survivors who agree to participate in the criminal justice process are well-documented,³³ and can be compounded by years of uncertainty as offenders move through the criminal justice process.³⁴ At a minimum and as a matter of urgency, the entitlements offered in the Support for Trafficked People Program must be offered to any person who is identified as having experienced trafficking, slavery or slavery-like practices, or suspected trafficking, slavery or slavery like practices, regardless of whether they participate in the criminal justice process.

Recommendation 6: Do not extend the definition of ‘deceive’ in sections 270.1A and 271.1 to include conduct by omission/inaction. The existing definition already captures this kind of conduct and further expansion of the definition is not warranted. This kind of conduct would be impossible to prove, and prosecution of this conduct would risk re-traumatising victims/survivors.

Recommendation 7: Do not widen the definition of ‘coercion’ in sections 270.1A and 271.1 to include understandings informed by the National Principles to Address Coercive Control. There is insufficient evidence that these meanings can be applied to labour contexts or scenarios where trafficking, slavery or slavery-like practices is suspected.

Recommendation 8: Delink access to the Support for Trafficked People Program from participation in the criminal justice process, making these services available to any person who is identified as having experience of suspected trafficking, slavery or slavery-like offence.

Question 11: Irrelevance of consent

Question 11	Is the principle of irrelevance of consent adequately enshrined in Divisions 270 and 271? If not, why not, and how could this be addressed?
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Scarlet Alliance believes that the trafficking, slavery and slavery-like offences in Divs 270 and 271 are designed to achieve successful prosecutions rather than to assist migrant workers who have experienced trafficking, slavery and slavery-like practices.

The irrelevance of consent as a factor in proving that a Div 270 or 271 offence has taken place implies an assumption that migrant workers have no agency or free will, and can be treated as minors who cannot make decisions for themselves. While there may be circumstances where a migrant sex worker who has experienced trafficking or slavery-like work conditions is unduly influenced to view their experience in a certain way, a victim/survivor-centred and trauma-informed approach must give migrant sex workers who have experienced trafficking, slavery and slavery-like practices the agency to frame their own experiences, and allow space for this framing to evolve or change over time. Further, the irrelevance of consent in Criminal Code Div 270 and 271 causes migrant sex workers who want support to address industrial issues through civil protections to be caught up in a criminal

³³ See [‘Coroner critical of detention centre care’](#), ABC News (online, 24 April 2003) and Elena Jeffreys, [‘Truth and visas will set Asian sex workers free’](#), *The Sydney Morning Herald* (online, 4 April 2008).

³⁴ Elaine Pearson (n 10) 38-41.

justice framework instead. In these situations the principle of irrelevance of consent reduces access to a labour rights framework and prevents pursuit of civil remedies that would address workplace issues in a systemic (and preventative) manner.

The delinking of access to the Support for Trafficked People Program from participation in the criminal justice process would empower migrant sex workers at risk of, or who have experienced trafficking or slavery-like crimes to pursue civil redress if that is their preference.

Recommendation 3: Replace the current inadequate ‘assurance protocol’ with a ‘firewall’ between the Fair Work Ombudsman, Safe Work jurisdictional bodies and the Department of Home Affairs to protect migrant workers from visa-related repercussions when they speak out against exploitation or industrial issues.

Recommendation 4: Provide resourcing for sex worker peer organisations to run projects and provide services by and for migrant sex workers. This strengthens the human, civil and political rights of migrant sex workers, increases our autonomy, agency and self-determination, and is the most effective way to address exploitation and trafficking in the sex industry.

Recommendation 8: Delink access to the Support for Trafficked People Program from participation in the criminal justice process, making these services available to any person who is identified as having experience of suspected trafficking, slavery or slavery-like offence.

Recommendation 9: Remove the debt bondage provision (section 270.7C), as these arrangements are more appropriately dealt with through industrial rights mechanisms such as Fair Work, WorkSafe and jurisdictional tribunals. Should the debt bondage provision be retained, the term ‘personal services’ should be replaced with ‘labour or services’ throughout s 270.7C in order to align this section with the rest of Divs 270 and 271.

Questions 12-16: Slavery and slavery-like offences

Question 12	Is additional guidance required to strengthen consistent understandings on the duration and continuity of a condition of slavery, servitude and forced labour? If so, what form might this guidance take?
Question 13	Would it be desirable to legislate and include additional guidance about factors that might indicate significant deprivation? If so, what form might this take? Are there other options that might be preferable or useful to help clarify the distinction between servitude and forced labour?
Question 14	Should subsection 270.10(1) be expanded to make explicit that factors at subsection 270.10(2) can apply to deliberation of whether a reasonable person in the position of a victim and survivor would have felt free to cease providing labour or services or to leave the place where they are providing those labour or services?
Question 15	Do the list of matters at subsection 270.10(2) provide appropriate guidance? If not, why not, and what additional or different factors should be considered?

Question 16	Do the definitions of servitude and forced labour adequately capture the circumstances that are relevant to establishing whether a person has offered themselves voluntarily to provide labour or services? If not, why not, and are specific alternatives recommended?
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Expanding the criminal justice response

The above discussion questions highlight the ineffectiveness of continuously expanding ineffective criminal legislation, rather than investment in a review of Australia’s migration legislation and frameworks, and facilitating access to redress mechanisms for migrant workers.

Scarlet Alliance notes that the criminal justice response is only one aspect of the *National Action Plan to Combat Modern Slavery 2020-25*. While factors likely to increase the effectiveness of the legislation have been identified,³⁵ focusing on the conviction rates for Div 270 and 271 offences does not provide a complete or accurate picture of Australia’s anti-trafficking response. Rather than expanding Divs 270 and 271, or inserting further material into existing offences as outlined in the discussion questions, investment must be directed towards evidence-based strategies outside of the criminal justice framework, including the creation of safe and accessible migration pathways and facilitating access to industrial redress mechanisms for migrant workers. Specific critiques of the proposed amendments are provided below.

Additional legislative guidance

The Discussion Paper proposes inserting additional material into Div 270 in an attempt to distinguish the different offences.³⁶ The existing offences are all broad in scope; there is no evidence that uncaptured conduct is occurring that requires additional or broader legislation to address, nor that inserting additional material will provide assistance for the investigation or prosecution of existing offences. Rather than acting as a viable substitute for the lack of case law, inserting additional material risks increasing the legislation’s complexity and interpretation difficulties, which have both been identified as factors contributing to attrition rates for these offences.³⁷

Use of the ‘reasonable person’ test

Similarly, expanding s 270.10(1) to specify that the list of factors outlined in s 270.10(2) may be used to determine whether ‘a reasonable person in the position of the victim’ would not have felt free to cease working or leave (as required by the servitude (ss 270.4-5) and forced labour (ss 270.6-6A) offences) will not increase the likelihood of proving these offences.

As the Discussion Paper notes, decision-makers (especially juries) may have difficulty appropriately accounting for the impact of trauma on a hypothetical ‘reasonable person’ in the position of the

³⁵ For example, resourcing of accurate translation services, judicial and community education, appropriate and practical training for investigators, prosecutors and victim support providers, and inter-agency relationship building. See Samantha Lyneham (n 31) 13-15.

³⁶ Specifically, inserting additional guidance on duration and continuity required to establish a Div 270 offence, including additional guidance as to what factors may indicate ‘significant deprivation’ required by s 270.4, and including additional guidance on the definitions of ‘servitude’ and ‘forced labour’ in ss 270.4 and 270.6 - see Discussion Paper (n 7) 32-34.

³⁷ Samantha Lyneham (n 31) 13-14.

survivor would or could have acted.³⁸ However, explicitly pointing decision-makers to the considerations in s 270.10(2) does not mitigate the concern that the use of ‘reasonable person’ test in determining these offences is fundamentally ineffective and inappropriate.

The use of the ‘reasonable person’ test as a threshold for these offences nullifies the relationship of migrant sex workers who have experienced trafficking, slavery or slave-like practices to their own experiences. Without adequate context or understanding, decision-makers with Australian citizenship rights (often in the form of a jury of laypeople) are tasked with determining how a ‘reasonable person’ (i.e. themselves) would have experienced the victim/survivor’s circumstances. The ‘reasonable person’ test should be removed from the servitude (ss 270.4-5) and forced labour (ss 270.6-6A) offences. The threshold for the offence should be how the aggrieved party perceived the circumstances, having regard to the factors outlined in s 270.10(2) as well as any other relevant factors.

Recommendation 10: Do not amend Division 270 to include further guidance on the duration and continuity required to establish an offence, further guidance on factors that may indicate ‘significant deprivation’ or further material differentiating the slavery and slavery-like offences. These amendments will further contribute to the over-complexity of the legislation, and are unlikely to assist investigators and decision-makers.

Recommendation 11: Remove the ‘reasonable person in the position of the victim’ test from the servitude (sections 270.4-5) and forced labour (sections 270.6-6A) offences. The threshold for this test should appropriately be whether the *victim* considered themselves to be free to leave or cease providing labour or services, having regard to the factors listed in section 270.10 and any other relevant factors.

Question 17: Deceptive recruitment

Question 17	Does the deceptive recruiting offence continue to be fit-for-purpose and provide an appropriate investigation and prosecution option where more serious labour exploitation offences cannot be made out?
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Scarlet Alliance believes the deceptive recruiting offence is not fit for purpose, and retains an inappropriate focus on the sex industry by specifying in s 270.7(c)(vi) that deceptive conduct includes ‘if the engagement is to involve the provision of sexual services—that fact, or the nature of sexual services to be provided (for example, whether those services will require migrant sex workers who are experiencing potential trafficking, slavery or slavery-like practices, to have unprotected sex).’

This specificity continues to demarcate the sex industry within the trafficking, slavery and slavery-like offences despite data indicating that the **majority of these offences occur outside of the sex**

³⁸ Discussion Paper (n 7) 34.

industry.³⁹ The inclusion of the example of ‘whether those services will require the victim to have unprotected sex’ as an indicator of deceptive recruiting also creates a de facto re-criminalisation of workers’ choices and use of safety strategies in their workplaces.

Laws criminalising unprotected sex have always been unsuccessful and counterproductive. Sex workers provide a range of different services, which may or may not involve scenarios where use of safer sex products provide an effective barrier to minimise transmission of sexually transmitted infections (STIs) and/or blood-borne viruses (BBVs). Sex workers in Australia continue to have high rates of condom use, with no measurable differences between migrant and non-migrant workers,⁴⁰ and rates of STIs/BBVs among sex workers in Australia remain consistently low.⁴¹

However, in jurisdictions where sex work (or aspects of sex work, such as providing sexual services without the use of a condom) is criminalised, sex workers report experiencing stigma from police and barriers to reporting crime,⁴² with migrant sex workers reporting additional aspects of racism and scrutiny of visa status when they attempt to report crime.⁴³

The term ‘**labour or services**’ is already used throughout Div 270,⁴⁴ and is applicable to both sex industry and non-sex industry contexts. Scarlet Alliance submits that s 270.7(c)(vi) should be amended to ‘if the engagement is to involve the provision of **labour or services** —that fact, or the nature of the labour or services to be provided.’ This leaves the section sufficiently broad to encompass all industries and workplaces. Deception as to the fact that labour or services will be provided, or the nature of labour or services to be provided could occur in any industry, and the deceptive recruitment for labour and services should be treated equitably, regardless of the industry.

Recommendation 12: Amend section 270.7(c)(vi) to apply to the provision of ‘**labour or services**’, with deception about ‘the nature of labour or services to be provided’ applicable to all industries and workplaces.

Question 21: Debt bondage

Question 21	Does the debt bondage offence continue to be fit-for-purpose and provide an appropriate investigation and prosecution option where more serious labour exploitation offences cannot be made out?
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³⁹ For the period 2015-2016, the majority of referrals to the Australian Federal Police and the Support for Trafficked People Program were unrelated to the sex industry (76.9% and 81% respectively). For the period 2017-2020, 85% of referrals did not involve the sex industry. See Interdepartmental Committee on Human Trafficking and Slavery, Australian Government, [Trafficking in Persons – The Australian Government Response 1 July 2015 – 30 June 2016](#) (2016) 1 and Interdepartmental Committee on Human Trafficking and Slavery, Australian Government, [Trafficking in Persons – The Australian Government Response 1 July 2017 – 30 June 2020](#) (2021) 17.

⁴⁰ Lauren Renshaw et al. (n 1) 54.

⁴¹ See Linda Selvey et al. [Law and Sex worker Health \(LASH\) Study: A summary report to the Western Australian Department of Health](#) (School of Public Health, Curtin University 2017) 1.

⁴² Zahra Stardust et al. (n 12) 148.

⁴³ Ibid, 148-149.

⁴⁴ In the definition of ‘threat’ in s 270.1A, in the definitions of ‘servitude’ and ‘forced labour’ in s 270.4 and s 270.6, and throughout the deceptive recruiting offence at s 270.7.

Scarlet Alliance believes that the debt bondage offence (s 270.7C) is not fit for purpose, and is inappropriate as a ‘lesser charge’ when other Div 270 offences cannot be established. This provision has the potential to negatively impact the people it purports to help – migrant sex workers.

As travel options and migration pathways to Australia for sex workers (alongside many other types of workers) are limited, many sex workers, particularly those from developing countries, engage in what is perceived to be excess debt in order to travel. The application and enforcement of this offence does not materially help sex workers in this situation who are still subject to the debt once returned to their home country, with reduced opportunities to repay the debt. We have heard from members of our Asian Migrant Sex Worker Advisory Group that the threat of these provisions may be used against sex workers who are party to these kinds of arrangements, and of sex workers being reported to the Department of Immigration or the Australian Federal Police once debts have been cleared.

Ending reliance on debt contracts requires the provision of safe and accessible migration channels for all workers, and the ability of migrant workers, including migrant sex workers, to access industrial and workplace rights and protections through mechanisms such as Fair Work and jurisdictional tribunals. The current debt bondage provision provides no recourse for migrant workers who may be party to an unfair contract, creating a lack of clarity as to reasonable terms, lack of accessible enforcement and lack of access to financial compensation.

The debt bondage provision also uses the term ‘personal services’ which is defined in the Code’s dictionary schedule,⁴⁵ but is not used elsewhere in Divs 270 or 271. Should the debt bondage provision be retained, we submit that the term ‘personal services’ be replaced with ‘labour or services’ throughout s 270.7C in order to align this section with the rest of Divs 270 and 271.

Recommendation 9: Remove the debt bondage provision (section 270.7C), as these arrangements are more appropriately dealt with through industrial rights and protections mechanisms such as Fair Work and jurisdictional tribunals. Should the debt bondage provision be retained, the term ‘personal services’ should be replaced with ‘labour or services’ throughout s 270.7C in order to align this section with the rest of Divs 270 and 271.

Questions 25-27: Division 271 - ‘movement’ element

Question 25	Should the cross-border trafficking offences (including trafficking in children) be amended so that they do not require the physical movement of a person? If so, how could this be achieved through amendments to the offences?
Question 26	Does organising or facilitating entry or exit or proposed entry or exit or receipt of a person adequately capture the relevant actions that comprise the ‘act’ in trafficking in persons? If not, why not, and what alternate or additional terms are recommended?
Question 27	Should the domestic trafficking offences (including trafficking in children) be

⁴⁵ As ‘any labour or service, including a sexual service, provided by a person,’ see *Criminal Code Act 1995* (Cth) Sch 3 (*Criminal Code Dictionary*).

	amended so that they do not require the physical movement of a person? If so, how could this be achieved through amendments to the offences?
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Scarlet Alliance submits that there should be no amendments to Div 271 removing the requirement of physical movement of a person. **It is essential that ‘movement’ across a border remains an element of all Div 271 offences, as this element distinguishes this conduct from Div 270 offences.**

Movement is also an essential element for the identification of Div 271 offences . As noted above, there is **no evidence** that offending is not adequately captured by the legislation. The legislation already covers a broad range of conduct, including online/technology facilitated conduct and proposed conduct.⁴⁶ The barriers identified by those charged with enforcement of offending is not that they are encountering conduct that falls outside of the scope of the legislation, but rather a lack of training in identifying offending and compiling evidence.⁴⁷

Recommendation 13: Do not extend Division 271 to remove the requirement of physical movement/proposed physical movement from the offences. This element is essential to the differentiation of Division 271 offences from other kinds of offending, and is an important element for the identification of this conduct.

Question 29: Division 271 - ‘means’ and ‘purpose’ elements

Question 29	Do the definitions of coercion, threat and deception collectively capture the conduct used by traffickers to achieve the physical elements of a trafficking in persons offence?
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The definitions of ‘coercion’, ‘threat’ and ‘deception’ already capture a broad range of offending, including physical and psychological conduct, and conduct directed towards potential victim/survivors or to others. **As with the proposals to extend other aspects of Divs 270 and 271, there is no evidence of offending not already captured by the current provisions,** and further legislative complexity may create barriers to identifying and prosecuting offending.

Further, as noted in our response to the definition of [‘coercion’](#) above, continuing to expand the legislation is unlikely to capture further offending, but does risk over-capture of conduct that is not trafficking, slavery or slavery-like offending. This furthers an environment of mistrust between migrant sex workers and police, and creates barriers for migrant sex workers to report Divs 270 and 271 offences and other serious crime.

Our recommendation for this section can be found at **Recommendation 5** and **Recommendation 6** above: do not extend the definitions of ‘coercion’ or ‘deception’, as there is no evidence that this would capture further offending, but would risk over-capture of conduct that is not trafficking, slavery or slavery-like offending , encourage increased surveillance of migrant sex workers, and generate further mistrust between police and migrant sex workers.

⁴⁶ Discussion Paper (n 7) 43.

⁴⁷ Samantha Lyneham (n 28) 14-15.

Question 31: Division 271 - 'sexual services'

Question 31	Is the term 'sexual services' appropriate in the context of Australia's child trafficking offences? If not, are alternate terms suggested? If the term is not appropriate in the context of child trafficking, is it appropriate in the context of trafficking involving adult victims and survivors? What might the unintended consequences be if the term was changed, noting it is used throughout offences in Division 271? Does the phrase 'provide sexual services or will otherwise be exploited' adequately capture the forms of exploitation that may be present in, or driving, child trafficking?
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The inclusion of the term 'sexual services' in the context of Australia's child trafficking offences is a direct consequence of the historical preoccupation with cases of trafficking, slavery and slavery-like practices within the sex industry, despite evidence demonstrating that most of these offences occur outside of sex industry contexts.⁴⁸

The detrimental impacts of this myopic focus were observed by the United Nations Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo who stated 'I have observed that the issue of trafficking in persons in Australia is sexualized and often conflated with prostitution... There is a need to move away from over-sexualizing the discourse on trafficking, which invariably contributes to the common stereotype of victims of trafficking as being women and girls forced into prostitution or other forms of sexual exploitation', in order to accurately identify the wide range of contexts where trafficking offending may occur.⁴⁹ Previous reviews of this legislation have already removed the distinction between these offences occurring in the sex industry and other industries within the trafficking, slavery and slavery-like offences in Division 270 and 271, acknowledging that these offences occur in a variety of different contexts and that the legislation should capture all kinds of exploitative conduct.⁵⁰

It is understandable that advocates for young people in this space find the term 'sexual services' to have an inappropriate commercial connotation and does not centre the victim/survivor experience. Scarlet Alliance believes that the use of the term 'sexual services' throughout Division 271 retains the harmful focus on the sex industry described above, and is particularly inappropriate for inclusion in child trafficking offences. Our suggestions for each section where the term 'sexual service' appears are outlined in the table below:

Section	Proposed change	Rationale
271.2(2)	Organising or facilitating entry or proposed entry, or receipt, with deception about the fact that the other person's entry or proposed entry, the other person's receipt or any arrangements for the other person's	Exploitation covers a range of slavery and slavery-like practices and is applicable to conduct that may occur within or outside the sex industry.

⁴⁸ Interdepartmental Committee on Human Trafficking and Slavery (n 36).

⁴⁹ United Nations Special Rapporteur on trafficking in persons, ['UN expert calls for greater focus on the rights and needs of victims'](#) (Media Release, 1 December 2011).

⁵⁰ Crimes Legislation Amendment Bill 2012 (Cth) (n 20) 15.

	<p>stay in Australia, will involve the provision by the other person of sexual services or will involve the other person's exploitation or the confiscation of the other person's travel or identity documents.</p>	<p>This creates uniformity with s 271.2(1B), where the offender may be reckless to any kind of exploitation that may occur, with this offence differentiated by the conduct of deception towards the victim.</p> <p>Alternatively, this conduct may already be captured by s 271.2(1) - organising or facilitating entry or proposed entry, or receipt, using coercion, threat or deception to obtain compliance.</p>
271.2(2A)	<p>Organising or facilitating exit or proposed exit, with deception about the fact that the other person's exit or proposed exit is for purposes that involve the provision by the other person of sexual services outside Australia or will involve the other person's exploitation or the confiscation of the other person's travel or identity documents.</p>	<p>Exploitation already covers a range of slavery and slavery-like practices and is applicable to conduct that may occur within or outside the sex industry.</p> <p>This creates uniformity with s 271.2(1C), where the offender may be reckless to any kind of exploitation that may occur, with this offence differentiated by the conduct of deception towards the victim.</p> <p>Alternatively, this conduct may already be captured by s 271.2(1A) - organising or facilitating exit or proposed exit, using coercion, threat or deception to obtain compliance.</p>
271.2(2B)	<p>Organising or facilitating entry or proposed entry, or receipt, and (b) there is an arrangement for the other person to provide sexual labour or services in Australia; and (c) the first person deceives the other person about any of the following: (i) the nature of the sexual labour or services to be provided; (ii) the extent to which the other person will be free to leave the place or area where the other person provides sexual labour or services; (iii) the extent to which the other person will be free to cease providing sexual labour or services; (iv) the extent to which the other person will be free to leave his or her place of residence; (v) if there is a debt owed or claimed to be owed by the other person in connection</p>	<p>As discussed in our response to Question 17 above, deceptive recruitment may occur in any industry.</p> <p>The term labour or services is already used throughout Divs 270 and 271, and includes all types of work/services.</p>

	with the arrangement for the other person to provide sexual labour or services—the quantum, or the existence, of the debt owed or claimed to be owed.	
271.2(2C)	Organising or facilitating exit or proposed exit, and (b) there is an arrangement for the other person to provide sexual labour or services outside Australia; and (c) the first person deceives the other person about any of the following: (i) the nature of the sexual labour or services to be provided; (ii) the extent to which the other person will be free to leave the place or area where the other person provides sexual labour or services; (iii) the extent to which the other person will be free to cease providing sexual labour or services; (iv) the extent to which the other person will be free to leave his or her place of residence; (v) if there is a debt owed or claimed to be owed by the other person in connection with the arrangement for the other person to provide sexual labour or services—the quantum, or the existence, of the debt owed or claimed to be owed.	As above.
271.4(1)	Organising or facilitating entry or proposed entry, or receipt of a person under the age of 18, with intention or recklessness to whether that person will be used to provide sexual services or will be otherwise exploited, either by the first person or another, after that entry or receipt.	Exploitation covers a range of slavery and slavery-like practices and includes scenarios of sexual exploitation. The use of the term ‘sexual services’ is not appropriate when discussing the exploitation of children.
271.4(2)	Organising or facilitating exit or proposed exit of a person under the age of 18, and with intention or recklessness to whether that person will be used to provide sexual services or will be otherwise exploited, either by the first person or another, after that exit.	As above.
271.5(2A)	Organising or facilitating the transportation of another person from one	Exploitation already covers a range of slavery and slavery-like practices and is applicable to

	<p>place in Australia to another place in Australia, with deception about the fact that the transportation, or any arrangements the first person has made for the other person following the transportation, will involve the provision by the other person of sexual services or will involve the other person's exploitation or the confiscation of the other person's travel or identity documents.</p>	<p>conduct that may occur within or outside the sex industry.</p> <p>This creates uniformity with s 271.5(2), where the offender may be reckless to any kind of exploitation that may occur, with this offence differentiated by the conduct of deception towards the victim.</p> <p>Alternatively, this conduct may already be captured by s 271.5(1) - organising or facilitating the transportation or proposed transportation of another person from one place in Australia to another place in Australia using coercion, threat or deception to obtain compliance.</p>
271.5(2B)	<p>Organising or facilitating the transportation of another person from one place in Australia to another place in Australia (b) there is an arrangement for the other person to provide sexual labour or services; and</p> <p>(c) the first person deceives the other person about any of the following:</p> <p>(i) the nature of the sexual labour or services to be provided;</p> <p>(ii) the extent to which the other person will be free to leave the place or area where the other person provides sexual labour or services;</p> <p>(iii) the extent to which the other person will be free to cease providing sexual labour or services;</p> <p>(iv) the extent to which the other person will be free to leave his or her place of residence;</p> <p>(v) if there is a debt owed or claimed to be owed by the other person in connection with the arrangement for the other person to provide sexual labour or services—the quantum, or the existence, of the debt owed or claimed to be owed.</p>	<p>As discussed in our response to Question 17 above, deceptive recruitment may occur in any industry.</p> <p>The term labour or services is already used throughout Divs 270 and 271, and includes all types of work/services.</p>
271.7	<p>Organising or facilitating the transportation of a person under the age of 18 from one place in Australia to another place in Australia; with intention or recklessness to whether that person will</p>	<p>Exploitation covers a range of slavery and slavery-like practices and includes scenarios of sexual exploitation.</p> <p>The use of the term 'sexual services' is not</p>

	<p>be used to provide sexual services or will be otherwise exploited, either by the first-mentioned person or another, during or following the transportation to that other place.</p>	<p>appropriate when discussing the exploitation of children.</p>
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Recommendation 14: Remove the term ‘sexual services’ from the child trafficking offences (sections 271.4 and 271.7). Use of the term ‘sexual services’ is not appropriate when discussing offences relating to children, and the use of ‘exploitation’ within these sections appropriately captures offending against children.

Recommendation 15: Remove the term ‘sexual services’ where it appears in the adult trafficking offences (sections 271.2(2), 271.2(2A), 271.2(2B) and 271.2(2C)). Specific references to ‘sexual services’ retain a myopic and harmful focus on trafficking within the sex industry, making it difficult to identify trafficking offences in other contexts. The use of the terms ‘exploitation’ and ‘labour or services’ are already used throughout Divisions 270 and 271, and capture a wide range of offending scenarios, including trafficking involving deceptive recruitment in all industries.

Question 36: Division 271 - harbouring offences

Question 36	Is Australia’s harbouring offence fit for purpose? If not, why not and are specific changes recommended?
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Scarlet Alliance believes that the harbouring offence (section 271.7F) is not fit for purpose, and is an unnecessary and dangerous offence that seeks to prosecute people who are not the perpetrators of Div 270 and 271 offences at the expense the wellbeing of migrant workers who are at risk of, or who have experienced trafficking, slavery or slavery-like practices.

A person can be charged if he or she ‘harbours, receives or conceals’ a person, and that conduct assists with a Div 270 or 271 offence (to a recklessness standard) or furthers the purpose of a Div 270 or 271 offence (absolute liability), regardless of whether the perpetrator of the Div 270 or 271 offence is charged or convicted.

Section 271.7F could be applicable to any person who interacts with a migrant sex worker who is experiencing trafficking, slavery or slavery-like practices by providing them housing or assisting with financing or other support, including housemates, friends and partners, translators and support workers. This broad definition serves to isolate people who have experienced offences of Div 270 or 271 from community support in Australia, necessitating participation in the criminal justice process and potentially compounding the impacts of trauma. Migrant sex workers who have experienced trafficking, slavery or slavery-like practices, along with all migrant workers, must have access to culturally-appropriate community support, including translation services, housing, healthcare and community services.

Recommendation 4: Provide resourcing for sex worker peer organisations to run projects and provide services by and for migrant sex workers. This strengthens the human, civil and political rights

of migrant sex workers, increases our autonomy, agency and self-determination, and is the most effective way to address exploitation and trafficking in the sex industry.

Recommendation 16: Remove the harbouring offence in section 271.7F.

Question 37: Division 271 - range of offences

Question 37	Are the full range of separate trafficking offences helpful to law enforcement agencies? Do the number or range of offences cause challenges or complications with investigations and prosecutions?
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The separation of the Div 270 and 271 offences, with the latter differentiated by the element of 'movement', is useful for the investigation and identification of these offences. However, the number of offences, combined with vague and over-complicated definitions, makes the legislation unwieldy and ineffective overall.

While it is clear that the intention of the legislation is to ensure criminalisation of the broadest range of exploitative conduct, the reality is this does not effectively lead to successful prosecutions of offenders, nor to addressing the broader drivers of migrant labour exploitation. As discussed above, a criminal justice response can only ever be one aspect of an anti-trafficking strategy, and this legislation's complexity has been identified as a barrier to its successful functioning.⁵¹ Continuing to broaden the scope of Divs 270 and 271 risks negatively impacting the human rights of migrant sex workers who have experienced trafficking, slavery or slavery-like conditions, over-capturing the normal business practices of migrant sex workers, and invites surveillance and scrutiny of those workers' support networks.

As outlined in this submission, Scarlet Alliance believes that the implementation of an evidence and rights-based approach targeted at *prevention* s is the only sustainable and effective approach to end trafficking, slavery and slavery-like practices. For migrant sex workers, this involves access to industrial redress mechanisms and jurisdictional criminal law without fear of visa-related repercussions (see **Recommendation 3**), the facilitation of community participation through the provision of funded peer-services (see **Recommendation 16**), delinking of access to Support for Trafficked People program from participation in the criminal justice system (see **Recommendation 7**), and the creation of safe and accessible migration pathways (see **Recommendation 2**).

Questions 38-39: Division 271 - jurisdictional requirements

Question 38	Is it desirable to explore amending the requirement that a person be trafficked across an Australian border so that Australia's trafficking offences can cover offshore conduct perpetrated by Australian citizens, permanent residents and Australian bodies corporate? What might the consequences (including unintended) of this change be?
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⁵¹ Samantha Lyneham (n 31) 13-14.

Question 39	Are the jurisdictional requirements of Australia’s domestic trafficking in persons offences appropriate? If not, why not and what changes or solutions are recommended?
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Scarlet Alliance does not oppose the intention to capture offshore offending by Australian citizens, permanent residents and corporations, however notes the difficulties mentioned in the Discussion Paper in legislating and enforcing offshore offending. This highlights the need for peer organisations to form international partnerships with a focus towards education and prevention.

The jurisdictional requirements for the domestic trafficking offences are limited by the circumstances where the Australian Government can implement legislation relating to states and territories, meaning that domestic trafficking offences must involve conduct occurring to any extent outside Australia, inter-state commercial conduct, conduct involving transportation within, to or from a territory, conduct by a corporation or conduct involving postal, telegraphic or telephonic services.

These limitations highlight **the importance of movement as an essential element of all trafficking offences**, and also the difficulties of implementing Commonwealth criminal legislation to capture domestic interstate conduct. Trafficking practices occurring domestically within Australia are already subject to state/territory criminal and industrial legal frameworks, and these frameworks are usually better resourced and understood by investigators and legal practitioners.

Question 40: Penalties

Question 40	Do the penalties contained in Divisions 270 and 271 appropriately reflect the seriousness of the offences? If not, why not?
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The penalties for Divs 270 and 271 reflect the serious natures of trafficking, slavery and slavery-like offending, with aggravating circumstances increasing penalties for offences,⁵² and provisions allowing for alternative verdicts in cases where more serious offences cannot be proved.⁵³ If the offences in Divs 270 and 271 are expanded, care must be taken to ensure that penalties remain proportionate to offending, and that investigators and prosecutors are given relevant and appropriate training to ensure that the correct conduct is captured.⁵⁴ Increasing penalties for Divs 270 and 271 offences will not reduce instances of trafficking, slavery or slavery-like practices or act as a deterrent. The drivers of trafficking, slavery and slavery-like offences outweigh the ability of penalties to provide general or specific deterrence, and continued focus on policing and prosecution will remain ineffective until Australia’s response to ending trafficking, slavery and slavery-like practices addresses these drivers.

Question 41: Challenges with victim and survivor testimony

⁵² See ss 270.8 and 271.3.

⁵³ See ss 270.5(3)-(4).

⁵⁴ Samantha Lyneham, (n 31) 15.

Question 41	Do stakeholders have recommendations about how Divisions 270 and 271 can take a victim and survivor-centred approach and reduce reliance on victim and survivor testimony while maintaining the core elements of the offences that align with international law and standards?
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We commend the Discussion Paper’s consideration of the impacts of trauma on people who have experienced trafficking, slavery and slavery-like practices, but believe that empowering choice in the investigation and prosecution of Divs 270 and 271 offences is an essential aspect of a victim/survivor-centred approach. This includes allowing migrant sex workers who have experienced these offences to frame their own experiences, make meaningful choices about participation in the criminal justice process, have access to compensation, and facilitate testimony if they wish to participate in prosecution.

For migrant sex workers who have experienced trafficking, slavery and slave-like practices and who choose to participate in the criminal justice process, witness statements and testimony are essential to understanding their experiences. Without centering these narratives, investigations risk being overly-informed by police and prosecutorial perspectives, and not accurately reflecting the experiences of migrant sex workers who have experienced these offences. Empowering victim/survivor agency within the criminal justice system involves lessening the traumatic impact of in-court testimony,⁵⁵ timely prosecutions, trauma-informed healthcare access for victim/survivors, adequate resourcing of translation services, culturally and linguistically appropriate peer support, inter-agency relationship building and training and education on dealing with victims/survivors of Divs 270 and 271 offences for investigators, prosecutors and the judiciary.⁵⁶

Question 42: Victim/survivor defences and the non-punishment principle

Question 42	Do the general defences in the Criminal Code (including duress) sufficiently capture the contexts in which a victim and survivor may commit an offence in connection to their experience of trafficking in persons, slavery or slavery-like practices? If not, why not, and what are the deficiencies? What form might additional protections for victims and survivors take?
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Scarlet Alliance supports in principle the codification of the non-punishment principle within Divs 270 and 271, to enshrine that migrant sex workers who have experienced trafficking, slavery or slavery-like practice should not be punished for unlawful acts committed as a direct consequence of being subjected to these practices.⁵⁷ The annunciation of this principle is an important enabler to identifying victims/survivors of trafficking, slavery and slavery-like offences,⁵⁸ and to provide clear reassurance to victims/survivors wishing to report these practices. General defences are only relevant if a person is prosecuted, and while police and prosecutorial discretion minimises the

⁵⁵ See Discussion Paper, (n 7) 57.

⁵⁶ Samantha Lyneham, (n 31) 12-14.

⁵⁷ Australian Government, (n 15) 57.

⁵⁸ See Committee on the Elimination of Discrimination against Women, General Recommendation No. 38 on trafficking in women and girls in the context of global migration, UN Doc. CEDAW/C/GC/38 (20 November 2020) 98.

likelihood of prosecution of victim/survivors in practice, this alone does not provide clear reassurance and empowerment to report offending.

Careful implementation of the non-punishment principle is required to ensure clarity on the nature of offences captured, and the link required between victimisation and offending.

Recommendations

Recommendation 1: Sex work must be fully decriminalised in all Australian states/territories, with the implementation of specific, robust and effective anti-discrimination protections for sex workers in relevant legislation. In the course of this review, recognise the harmful impacts of anti-trafficking policy and policing on sex workers, and ensure no further harm is caused to sex workers by any amendments to the Criminal Code recommended by this review.

Recommendation 2: As part of the targeted review of Australia's visa framework, and in consultation with Scarlet Alliance, amend the *Migration Act 1958* (Cth) and associated frameworks to ensure safe and accessible pathways for migrant workers.

Recommendation 3: Replace the current inadequate 'assurance protocol' with a 'firewall' between the Fair Work Ombudsman, Safe Work jurisdictional bodies and the Department of Home Affairs to protect migrant workers from visa-related repercussions when they speak out against exploitation or industrial issues.

Recommendation 4: Provide resourcing for sex worker peer organisations to run projects and provide services by and for migrant sex workers. This strengthens the human, civil and political rights of migrant sex workers, increases our autonomy, agency and self-determination, and is the most effective way to address exploitation and trafficking in the sex industry.

Recommendation 5: Do not amend Divisions 270 and 271 to create offences relating to the use of technology, as the existing offences already apply to scenarios where technology is used in offending, and the creation of additional offences risks overcapture of sex workers' regular business activities and important safety and harm-reduction strategies.

Recommendation 5a: If a decision is made to expand Divisions 270 and 271 or introduce other legislation creating offences targeted towards the use of technology in trafficking, slavery and slavery-like offences, these provisions must be drafted in consultation with Scarlet Alliance to ensure the least risk of harm to migrant sex workers, and postponed until after amendments to the Privacy Act are completed.

Recommendation 6: Do not extend the definition of 'deceive' in sections 270.1A and 271.1 to include conduct by omission/inaction. The existing definition already captures this kind of conduct and further expansion of the definition is not warranted. This kind of conduct would be impossible to prove, and prosecution of this conduct would risk re-traumatising victims/survivors.

Recommendation 7: Do not widen the definition of 'coercion' in sections 270.1A and 271.1 to include understandings informed by the National Principles to Address Coercive Control. There is insufficient evidence that these meanings can be applied to labour contexts or scenarios where trafficking, slavery or slavery-like practices is suspected.

Recommendation 8: Delink access to the Support for Trafficked People Program from participation in the criminal justice process, making these services available to any person who is identified as having experience of suspected trafficking, slavery or slavery-like offence.

Recommendation 9: Remove the debt bondage provision (section 270.7C), as these arrangements are more appropriately dealt with through industrial rights mechanisms such as Fair Work, WorkSafe and jurisdictional tribunals. Should the debt bondage provision be retained, the term ‘personal services’ should be replaced with ‘labour or services’ throughout s 270.7C in order to align this section with the rest of Divs 270 and 271.

Recommendation 10: Do not amend Division 270 to include further guidance on the duration and continuity required to establish an offence, further guidance on factors that may indicate ‘significant deprivation’ or further material differentiating the slavery and slavery-like offences. These amendments will further contribute to the over-complexity of the legislation, and are unlikely to assist investigators and decision-makers.

Recommendation 11: Remove the ‘reasonable person in the position of the victim’ test from the servitude (sections 270.4-5) and forced labour (sections 270.6-6A) offences. The threshold for this test should appropriately be whether the *victim* considered themselves to be free to leave or cease providing labour or services, having regard to the factors listed in section 270.10 and any other relevant factors.

Recommendation 12: Amend section 270.7(c)(vi) to apply to the provision of ‘labour or services’, with deception about ‘the nature of labour or services to be provided’ applicable to all industries and workplaces.

Recommendation 13: Do not extend Division 271 to remove the requirement of physical movement/proposed physical movement from the offences. This element is essential to the differentiation of Division 271 offences from other kinds of offending, and is an important element for the identification of this conduct.

Recommendation 14: Remove the term ‘sexual services’ from the child trafficking offences (sections 271.4 and 271.7). Use of the term ‘sexual services’ is not appropriate when discussing offences relating to children, and the use of ‘exploitation’ within these sections appropriately captures offending against children.

Recommendation 15: Remove the term ‘sexual services’ where it appears in the adult trafficking offences (sections 271.2(2), 271.2(2A), 271.2(2B) and 271.2(2C)). Specific references to ‘sexual services’ retain a myopic and harmful focus on trafficking within the sex industry, making it difficult to identify trafficking offences in other contexts. The use of the terms ‘exploitation’ and ‘labour or services’ are already used throughout Divisions 270 and 271, and capture a wide range of offending scenarios, including trafficking involving deceptive recruitment in all industries.

Recommendation 16: Remove the harbouring offence in section 271.7F.