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Dear Attorney-General's Department

1) Thank you for the opportunity to comment on the proposed amendments to Divisions 270 and 271 in the Criminal Code, as set out in the *Exposure Draft of the Crime Legislation Amendment (Slavery, Slavery-Like Conditions and People Trafficking) Bill 2012*. There are many positive aspects to the draft, particularly the proposed inclusion of stand-alone offences of forced labour and servitude, the expansion of the deceptive recruiting offences to cover non-sexual labour and the increase in penalty for debt bondage. However, in our view, there are still some important issues that need to be further considered. We have set these issues out below.

“Coercion”

- 2) Under the proposed amendments, the concept of “coercion” will become central to the offences of servitude, forced labour, forced marriage, trafficking in persons, and domestic trafficking in persons. As noted in our previous submission, we agree that coercion is part of the *modus operandi* of traffickers.¹ From this perspective, we can certainly see the value of ensuring that the Criminal Law has the capacity to address coercive practices.
- 3) However, we also consider it is vital to ensure that Australia’s slavery, forced labour and trafficking in persons laws are clear, so that they can be readily understood and applied. In our view the definition of “coercion” proposed in the Exposure Draft needs to be further refined. In the proposed amendments, would coercion constitute a physical element of these offences, a fault element, or is it a physical element that implies an underlying fault element (eg: violence undertaken to achieve a particular aim)? We have looked for some commentary or case law on this but, in the time available, have not found anything that makes the issue clear to us.
- 4) We note that the concept of coercion is used in the war crimes section of the Criminal Code (Cth) and also in State and Territory criminal offences. Also, the concept of coercion is defined in the US trafficking law, in a manner that seems reasonably clear²:

¹ F.David and A.Gallagher, Submission AGD Discussion Paper, 1 March 2011.

² *Victims of Trafficking and Violence Protection Act of 2000 (US)*, section 103 Definitions, <http://www.state.gov/g/tip/laws/61124.htm>

“COERCION- The term ‘coercion’ means--

- (a) threats of serious harm to or physical restraint against any person;*
- (b) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or*
- (c) the abuse or threatened abuse of the legal process.”*

Servitude and forced labour offences

- 5) As previously noted, we are very supportive of the inclusion of stand-alone offences of servitude and forced labour in the Criminal Code. However, once again, we consider it is vital that the offences are clear, so they can be readily applied and understood. In our view, some aspects of the proposed new offences are ambiguous. For example:
 - a) What does it mean to be “significantly deprived of personal freedom”?
 - b) What does it mean to be “free” (or not free) to cease providing labour or services, or to leave a place?
- 6) In our view, it would be productive to examine the national laws of other countries on forced labour and servitude, to see how these difficult issues could be either further refined or avoided, through different drafting approaches. For example, US law on forced labour, rather than referring to whether or not a person is “free”, criminalizes the conduct of knowingly providing or obtaining labour through specified acts or means:

United States Code, Title 18, Part 1, Chapter 77, section 1589:

Forced labour

Whoever knowingly provides or obtains the labour or services of a person—

- (1) by threats of serious harm to, or physical restraint against, that person or another person;*
- (2) by means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labour or services, that person or another person would suffer serious harm or physical restraint; or*
- (3) by means of the abuse or threatened abuse of law or the legal process,*

shall be fined under this title or imprisoned not more than 20 years, or both. If death results from the violation of this section, or if the violation includes kidnapping or an attempt to kidnap, aggravated sexual abuse or the attempt to commit aggravated sexual abuse, or an attempt to kill, the defendant shall be fined under this title or imprisoned for any term of years or life, or both.

Withholding of passports and other precursor conduct

- 7) In our previous submission, we recommended that consideration be given to criminalizing a broader range of practices that support the *modus operandi* of traffickers. These might be described as pre-cursor conduct. Withholding a person's passport is the most obvious example, but charging of "good behaviour bonds" is another, as is making false promises of assisting a person to achieve permanent residency (both practices noted in recent research on trafficking in Australia³).
- 8) As presently drafted, there are no offences of this nature. The confiscation of a person's travel or identity documents may be relevant to the offence of deceptive recruiting (270.7 in the Exposure Draft) or trafficking in persons under s271.2(2) and (2A) but only if the victim has been *deceived* about the fact that these documents will be withheld. This seems to be missing the point. In our view, the critical conduct is the actual confiscation of a person's travel or identity documents, not the deception about whether or not this will happen (a fact which is likely never discussed in many instances).
- 9) There is an offence addressing confiscation of identity and travel documents under US law:

Sec. 1592. Unlawful conduct with respect to documents in furtherance of trafficking, peonage, slavery, involuntary servitude, or forced labor

(a) Whoever knowingly destroys, conceals, removes, confiscates, or possesses any actual or purported passport or other immigration document, or any other actual or purported government identification document, of another person--

`(1) in the course of a violation of section 1581, 1583, 1584, 1589, 1590, 1591, or 1594(a);

`(2) with intent to violate section 1581, 1583, 1584, 1589, 1590, or 1591; or

`(3) to prevent or restrict or to attempt to prevent or restrict, without lawful authority, the person's liberty to move or travel, in order to maintain the labor or services of that person, when the person is or has been a victim of a severe form of trafficking in persons, as defined in section 103 of the Trafficking Victims Protection Act of 2000,

shall be fined under this title or imprisoned for not more than 5 years, or both.

³ David F (2010) *Labour Trafficking*, Australian Institute of Criminology, Canberra: see for example at page 24, (referring to interviews conducted with staff of the then Workplace Ombudsman).

(b) Subsection (a) does not apply to the conduct of a person who is or has been a victim of a severe form of trafficking in persons, as defined in section 103 of the Trafficking Victims Protection Act of 2000, if that conduct is caused by, or incident to, that trafficking.

10) In our view, it would be productive to look for other examples of laws that seek to criminalize relevant pre-cursor conduct, whether this is withholding of passports, fraudulent promises of permanent residency or requiring payment of bonds, and see how they could be adapted to the Australian legal context.

Expanded definition of exploitation

11) As we noted in our previous submission, we support the expansion of the concept of “exploitation” to include other forms of exploitation, already explicitly mentioned in the Protocol. This is achieved by the new definition of exploitation, in section 271.1A of the Exposure Draft. At present, the concepts of “serfdom” and “servile marriage” are not defined. Is the intention that the courts will interpret these concepts by reference to international law? These terms are given further meaning in Article 1 of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery.⁴

Trafficking offences

12) The Exposure Draft proposes some changes to the trafficking in persons offences in s271.2, including the expanded definition of exploitation and the inclusion of deception and coercion. However, even with the proposed amendments, s271.2 retains the existing focus on movement, through a requirement of some form of entry or exit to/from Australia, to constitute a trafficking in persons offence. In our view, this is problematic and contrary to the relevant international legal standard.

13) We appreciate that the proposed new offences of servitude, forced labour, forced marriage and harbouring substantially expand the coverage of the Criminal Code, when Divisions 270 and 271 are considered together. However, the fact remains that at present, serfdom and servile marriage, two important slavery-like practices, and removal of organs are now only criminalized if there is an element of entry to or exit from Australia (or movement within Australia, according to the “domestic trafficking” offence in s271.5). While these practices could potentially be captured by other offences, it is surely not the intention of the legislation to both restrict and complicate their application in this way.

Jurisdictional requirements for domestic trafficking offences

14) The Exposure Draft does not propose any changes to the jurisdictional requirements for domestic trafficking offences (section 271.11). In our view,

⁴ 226 U.N.T.S. 3, entered into force April 30, 1957.

it is important to re-examine these jurisdictional requirements in light of the requirements under the UN Trafficking Protocol. The current jurisdictional requirements are likely to result in some very illogical outcomes. For example, it would appear to be a crime to move a person from one place in the Northern Territory to another for exploitation (applying 271.11(c)) but precisely the same conduct, committed entirely within Western Australia, might not meet the jurisdictional test.

15) The 2004 Explanatory Memorandum for the Bill that introduced the domestic trafficking offences seems to assume that the external affairs power could not be relied on for these, so the drafters drew on a range of other Constitutional heads of power.⁵ We query why this was considered necessary. The Trafficking Protocol and Article 34(2) of UNTOC require States to criminalize trafficking in persons crimes, irrespective of whether they have a transnational element or not.⁶ Accordingly, it seems very likely if not certain, that the external affairs power would support legislation criminalizing domestic trafficking in persons. It is unclear to us why the drafters thought it was necessary to have recourse to the telecommunications, corporations, territories and others powers with regard to domestic trafficking, when they could have simply relied on the external affairs power here.

16) Thank you for the opportunity to comment on the Exposure Draft.

Fiona David

Anne Gallagher

⁵ Explanatory Memorandum, Criminal Code Amendment (Trafficking in Persons Offences) Bill 2004, Parliament of the Commonwealth of Australia, page 12.

⁶ See the Legislative Guide to the United Nations Convention against Transnational Organized Crime and its Protocols, Part 2, at 275-276: “transnationality must not be required as a proof in a domestic prosecution ... transnationality is not required as an element of domestic offences.” See also the Interpretative Note on Article 34 included in the travaux préparatoires: “[t]he purpose of this paragraph is, without altering the scope of application of the convention ... to indicate unequivocally that the transnational element and the involvement of an organized criminal group are not to be considered elements of those offences for criminalization purposes.” United Nations Office on Drugs and Crime, Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto (2006)