

**Discussion Paper: Chapter 9, Offences Against Humanity - Slavery  
Model Criminal Code Officers Committee of the Standing Committee of Attorneys-  
General**

**Issue:**

The proposals in this discussion paper relating to reviewing Australia's laws on slavery now include sex servitude as a form of slavery. Sex servitude only relates to commercial sex. Sex servitude offences single out sex work as an occupation where women are sexually exploited. The Scarlet Alliance contends that in the context of sex work it is the labour of some sex workers which is exploited, and that this discussion paper is confusing 'sexual norms' with 'work norms'.

**Background:**

As part of the process of reviewing the criminal code for Australian jurisdictions, the Model Criminal Code Officers Committee (MCCOC) has produced the current discussion paper on slavery. In December 1997, the Standing Committee of Attorneys General (SCAG) requested that MCCOC examine a Commonwealth proposal to enact laws dealing with "sex slavery". As a result MCCOC has reviewed the law and prepared the current model laws for discussion.

**Current Situation:**

At present Australia relies on the combined effect of four 19<sup>th</sup> Century Imperial Acts to meet its obligations under international conventions. The Acts are archaic and the court (The Colonial Court of Admiralty) used to administer offences against the acts is no longer in existence.

**Suggested Changes:**

The MCCOC has recommended that the following be enacted as part of the Criminal Code of the Commonwealth with supporting legislation from the States and territories:

### **9.1.3 Definition of Sexual Servitude**

(1) For the purposes of this Part, sexual servitude is the condition of a person who is engaged to provide sexual services and who, because of the use of force or threats:

- (a) is not free to cease providing sexual services within a reasonable time or on reasonable terms; or
- (b) is not free to decline to provide sexual services to a particular person or persons; or
- (c) is not free to leave the place or area where the person provides sexual services.

(2) In this section:

*sexual service* means the commercial use or display of the body of the person providing the service for the sexual gratification of others.

*threat* includes a threat of force, a threat to cause a person to be deported or a threat of other legal process.

### **9.1.4 Offences relating to sexual servitude**

(1) A person who:

- (a) causes a person to enter into or remain in sexual servitude; or
- (b) engages in any trade in persons for sexual servitude; or
- (c) procures any person to enter into an engagement that constitutes sexual servitude by deceiving the person about the nature or other aspect of the engagement.

Is guilty of an offence.

Maximum penalty: Imprisonment for 7 years.

(2) For the purposes of this section, engaging in any trade in persons for sexual servitude includes:

- (a) engaging in their acquisition, sale, exchange or transport for sexual servitude; or
- (b) exercising control or direction over, or providing finance for, any such trade.

### **9.1.5 Jurisdiction**

In proceedings for an offence against this Part, it is immaterial:

- (a) that the conduct constituting the offence, or its consequences, occurred outside the jurisdiction; or
- (b) that the person who committed the offence was not an Australian citizen or resided outside of the jurisdiction; or
- (c) that the person against whom the offence was committed was not an Australian citizen or resided outside the jurisdiction.

### **9.1.6 Institution of proceedings**

Proceedings for an offence against this Part must not be commenced without the consent of the Attorney General if the conduct constituting the offence comprises or includes conduct occurring outside Australia. However, a person may be arrested for, charged with, or remanded on custody or bail in connection with, an offence against this Part before the necessary consent has been given.

## The issue :

Labour migration for the purposes of working in the sex industry is nothing more than an element in the international movement of labour, which has been a pronounced aspect of the globalisation process. This process is marked by commoditisation of the Asia-Pacific region and rising aspirations with consumer capitalism. It encompasses ease of transport, communication, trade, expanding multi-national business and economic differentials between countries and regions. According to an ILO (International Labor Organisation) report<sup>1</sup>, 1.5 million Asian women are working abroad, both legally and illegally.

Significantly, female labour is rarely recognised as work. In most societies, woman's role and identity as wife and mother are considered biological rather than economic and social. The work women have always done, and continue to do, is considered a "natural" aspect of being female, respectively as a "natural part" of women's responsibility to supplement family subsistence. Expectations and socialisation- including religious tenets circumscribing the role of women- oblige women to fulfil their "duties" as daughter, wife and mother. Thus the work that women do every day is not viewed as work, but as the fulfillment of their natural role.<sup>2</sup> It is this that subjects women to discrimination in education and work and restricts their work to unregulated, unskilled areas of labour.

Within a gendered labour market, sexual or domestic work are two of the few income generating options available to women, especially from poorer countries or regions, to make a living. Many women consciously enter prostitution or domestic work and move in and out of a particular activity during their lifetime.<sup>3</sup>

Since women have few opportunities to travel independently and to work legally in destination countries they are heavily dependent on recruiting agencies and brokers and thus at risk of falling victim to criminal networks. It could be said that restrictive immigration laws work indirectly in favour of traffickers, who will always find ways to circumvent laws, while they increase the dependence of the women who want to migrate- again, a favourable situation for criminal networks.<sup>4</sup>

Anti-immigration attitudes and policies, especially in Northern countries, act to discredit women seeking asylum by referring to them and to other persons in economic need as "false refugees".<sup>5</sup>

Currently for many sex workers their only means of coming to Australia to work is through a contract system with an agent. The system of contracts differs as to the amount of money agreed upon, the system of payment, length of visas and living arrangements. It is their illegal status as workers rather than the nature of their work that is a potent form of control in the hands of their employers<sup>6</sup>.

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<sup>1</sup> Lim, Lin Lean and Oishi, Nana. *International Labour Migration of Asian Women, Distinctive Characteristics and Policy Concerns*. ILO, Geneva, February 1996.

<sup>2</sup> Afshar, Haleh, ed. *Women, Work and Ideology in the Third World*. Tavistock Publications, 1985.

<sup>3</sup> Wijers, Marjan and Lap-Chew, Lin. *Trafficking in Women, Forced Labour and Slavery - Like Practices in Marriage, Domestic Labour and Prostitution*. STV(Dutch Foundation Against Trafficking in Women) & GAATW (Global Alliance Against Trafficking in Women), Utrecht, 1997, pg. 45.

<sup>4</sup> Wijers, M & Lap-Chew, L, op cit, pg. 57.

<sup>5</sup> Pheterson, G. pg 102. *Right to Asylum, Migration and Prostitution in The Prostitution Prism*, Amsterdam University Press, 1996.

<sup>6</sup> *Alleged Trafficking of Asian Sex Workers in Australia*. A joint statement of policy drafted by the Prostitutes Rights Organisation for Sex Workers, the Sex Workers Outreach Project, Workers in Sex Employment in the ACT, Self-Help for Queensland Workers in the Sex Industry, the Support,

The public discourse mainly conducted through the media to describe the movement of Asian sex workers into Australia is fraught with panic mode polemics and is devoid of rigid, substantiated, factual data. Murray<sup>7</sup> contends that rigid analysis of this commentary displays stereotypes/myths around 'trafficking' and 'debt bondage' which become truths through repetition. There is lack of information and research and the media has focused on sensationalising Asian workers as weak, stupid AIDS carriers who can never choose to enter the sex industry.

### **Scarlet Alliance Response:**

The Scarlet Alliance asserts that these amendments are discriminatory towards the sex industry, since the definitions of "sexual servitude" and "sexual service" explicitly apply to commercial sexual services. There is no reference made to servile marriage or sexual servitude occurring in contexts outside of the sex industry. In the body of the discussion paper it is stated that the need for these types of offences is related to the problem of illegal migrants, in the prostitution industry<sup>8</sup>. This claim would point to the Government equating illegal workers in the industry (particularly from Asian countries) with slavery *per se*, whereas they are separate issues.

If the Government's concern were about sexual exploitation, then the obvious public policy response would be to enact general provisions within the criminal law relating to sexual exploitation. Further, sexual exploitation offences should exist irrespective of the context, whether the problem arises in the sex industry, in the privacy of the home or in a public space. Likewise if there are concerns about exploitation of labour, then the most effective way to deal with this issue is to have general exploitation of labour laws that apply to all work places and industries. Neither of these concepts are mentioned or analysed in the discussion paper and this points to a moral agenda being at play that confuses work norms with sexual norms.

According to figures released by the Department of Immigration and Multicultural Affairs (DIMA), of 10,138 overstayers located in 1996-97, 21% (2103) admitted they had been working.<sup>9</sup> The figures for detected sex workers working illegally for the period July '97-May '98 is 21. With extrapolation for increased numbers with time and for the entire year, this represents 0.9% of all illegal workers. This hardly represents a huge problem, in fact what these figures indicate is that the problem of people working illegally in Australia must be very large in other industries. Yet, there has not been a call from Australian Governments to enact specific legislation which only applies to workers in those industries.

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Information, Education, Referral Association of Western Australia, the South Australian Sex Industry Network, the Prostitutes Association of South Australia, the prostitutes Association of the Northern Territory for Health, Education and Referral, Cybelle Sex Worker Organisation asmania, Sydney Sexual Health Centre, the Queer and Esoteric Workers Union and representatives of the Asian sex working communities.

<sup>7</sup> Murray, A. *Of Peers and Queers: Sex, Subcultures and AIDS Discourses in the Asia-Pacific*. Monash Asia Institute 1998.

<sup>8</sup> Discussion Paper, Chapter 9: Offences Against Humanity, Slavery, Model Criminal Code Officers Committee, pg. 13, April 1998.

<sup>9</sup> Fact Sheet 80: Locating Overstayers in Australia, Department of Immigration and Multicultural Affairs.

The Textile, Clothing and Footwear Union (TCFUA) has stated that outworkers typically work 12-18 hour days, 7 days a week. They receive about one fifth to a third of the award rate of pay and have no access to even the minimum conditions enjoyed by other workers in Australia today.<sup>10</sup> In considering these aspects one might equate this with slave labour. It points to the central issue for illegal workers in the sex industry, that it is unregulated and “out of sight” industries which are more likely to expose workers to exploitative working conditions.

The AFP (Australian Federal Police) claims that it “is aware of the existence of international criminal syndicates involved in the movement of women from South-East Asia into Australia for prostitution. There is evidence of organised crime groups making multi-million dollar profits from such prostitution, much of it untaxed and moved offshore, large scale use of fraudulent documents, and the involvement of international criminal networks. There have also been links with suspected drug traffickers.”<sup>11</sup> The following are offences which the AFP say are available to them to get at the perpetrators:

Federal: drugs importation, conspiracy, forge and utter of Commonwealth documents, official corruption, taxation offences including undeclared income and fail to submit tax returns, money laundering, currency offences including structuring and undeclared export of currency, passport offences, visa application malpractice, contravene visa conditions including working without authority and remaining in Australia past the Temporary Entry permit expiry date, harbouring of illegal immigrants and contrived marriages.

State: narcotics distribution, offences against the person, such as unlawful confinement and kidnapping and prostitution and associated offences (where applicable).<sup>12</sup>

It is quite obvious from the above that police are aware of who the perpetrators are, that only a handful of people are involved and that numerous offences already exist in all Australian jurisdictions to apprehend perpetrators. Greater efforts should be put into enforcing existent laws. Research conducted by Brockett and Murray in 1991-93 also indicates that the same “handful of people” were operating then as in 1998. One might ask why?<sup>13</sup>

From an economic point of view, Australia is overlooking a large source of revenue. Investigations indicate that a considerable proportion of this illicit income is being forwarded overseas by various means. One financial probe conducted by the AFP in 1994 on suspected persons and premises identified 280 transactions, totalling over A \$1.3m, which related to the movement of funds to Thailand, Malaysia, Singapore, Indonesia, Hong Kong and Macau . These funds reflect both the forwarding of prostitutes’ earnings to their country and the payment to organisers and facilitators in these countries.<sup>14</sup>

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<sup>10</sup> TCFUA Media Release, 29 May 1997.

<sup>11</sup> Briefing Paper on Movement of South East Asian Women for Prostitution in Australia. AFP briefing Paper, pg. 1, Feb, 1995.

<sup>12</sup> AFP, op cit, pg. 6.

<sup>13</sup> Brockett, L and Murray, A, 1994 ‘ Thai sex workers in Sydney’ in Perkins R. et al. Sex Work and Sex Workers in Australia. UNSW Press, Sydney, 1994.

<sup>14</sup> AFP, op cit, pg. 4.

This raises a number of issues. One is that clearly the AFP is aware of who the perpetrators are but are not doing anything about it and the other is the potential economic benefits particularly through tax revenue that Australia is missing out on. Where these workers allowed to come to Australia legally to work under short term contracts, not only would these workers enjoy the same working conditions as local workers but the Australian Government would derive revenue through tax collection from the employers and employees. Further, Australia benefits from the fact that those workers spend some of their money locally.

The fact that the Government refuses to see the problems encountered by illegal workers in the sex industry as labour related issues points to a moral agenda at play. The Attorney General's Department is making a distinction between the utilisation of sex as part of ones labour/work<sup>15</sup> and other kinds of work. Undoubtedly, labour type problems exist in many industries, yet the Federal Government is not doing anything about those. It would appear to be engaging in political grandstanding.

The Scarlet Alliance is particularly concerned at the plight of those illegal sex workers who come and work in Australia. The suggested legal amendments to criminal codes will do nothing to stop these workers coming to Australia. Instead it will force them to endure even worse working conditions than they may currently find themselves in. As it becomes more difficult to contract women to work in the Australian sex industry, the workers are subject to increased debt. In 1990, the estimated cost of contracts ranged between \$15,000.00 to \$20,000.00<sup>16</sup>, in 1996 contract fees have risen to \$35,000.00 to \$40,000.00<sup>17</sup>. This fact puts workers under strong pressure to make money as quickly as possible before the Department of Immigration deports them, resulting in workers being encouraged or forced to take increased health risks when working.

The cost of enforcement is high, since it involves police, Department of Immigration staff, court appearances, lawyers fees, detention and deportation.

Further, the combined effects of media hype, police and Department of Immigration activity results in the workers being pushed further "underground", keeping themselves, or being kept away from mainstream society and channels of information. This makes it harder for supporting organisations including HIV/AIDS outreach workers to provide safe sex education information and safe sex supplies.

The most important support that the Australian Government could provide for these workers is to ratify the UN *International Convention on the Rights of All Migrant Workers and their Families* (the 'Migrant Workers Convention'). The Convention attempts to balance

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<sup>15</sup> Sex work uses the whole body.

<sup>16</sup> Brockett, L. & Murray, A., 1994. 'Thai sex workers in Sydney' pg. 192 in Perkins R. et. al.: Sex work and Sex Workers in Australia. UNSW Press, Sydney, 1994.

<sup>17</sup> Purser, P. 1996. 'Empowerment for International Sex Workers' pg. 22, National AIDS Bulletin 10:5.

the right of all States to control immigration, against the urgent need to further human rights in this area. As Bosniak has noted,

The International Convention seeks to accommodate these competing concerns by providing human rights protections to undocumented migrants which are substantial but less extensive to those provided to documented migrants, and through ensuring states' continuing authority in spheres of immigration control and national "membership policy".<sup>18</sup>

Article 2 (1) of the Convention defines the term "migrant worker" to include any "person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national." As such, the Convention would extend protection to migrant workers in irregular situations, including women working illegally in the Australian sex industry.

Several Articles of the Convention are particularly relevant to these women. For example, Article 25 of the Convention states that

- (1) Migrant workers shall enjoy treatment not less favourable than that which applies to nationals of the State of employment in respect of remuneration and:
  - (a) Other conditions of work, that is to say, overtime, hours of work, weekly rest, holidays with pay, safety, health, termination of employment relationship and any other conditions of work which, according to national law and practice are covered by this term.

Article 25(3) provides that

State Parties shall take all appropriate measures to ensure that migrant workers are not deprived of any rights derived from this principle by reason of any irregularity in their stay or employment. In particular, employers shall not be relieved of any legal or contractual obligations, nor shall their obligations be limited in any manner by reason of any such irregularity.

The Convention would also require State Parties to provide deportees with a reasonable opportunity to settle any claim for wages or other entitlements.<sup>19</sup>

In the Vienna Declaration, states are urged to consider ratifying, at the earliest possible time, the Migrant Workers Convention<sup>20</sup>. Accordingly, the Convention is listed in the National

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<sup>18</sup> L. Bosniak, Human Rights, State Sovereignty and the Protection of Undocumented Workers Under the International Migrant Workers Convention. *International Migration Review*, 737, 737.

<sup>19</sup> Art 22(6)

<sup>20</sup> Vienna Declaration and Programme of Action, World Conference on Human Rights, 1994, recommendation 33.

Action Plan as a human rights instrument that Australia should consider ratifying<sup>21</sup>. Interdepartmental consideration of the Convention's provisions is presently underway.

Under the *Migration Reform Act 1992* (Cth), the Australian Government has arrangements with for example the UK and Canadian governments such that women from these countries can get short term working visas. A similar system could be set up with countries in the Asia-Pacific region. Women holding such visas would be able to work legally as sex workers in those jurisdictions where sex work is legalised or decriminalised. In those jurisdictions that have a system of legalised brothels this could be taken further and employers could sponsor workers to work in the industry. A code of practice could be developed for brothel operators to comply with. Under this scenario the women would only be required to repay their employers the cost of their airfare.

It is likely that the introduction of working visas or sponsorship for sex workers would be widely criticised as supporting the sexual exploitation of women, and particularly the sexual exploitation of women from poor countries due to the plethora of misinformation on the subject which exists and needs to be countered. Against this, it could be argued that Australia does not have an obligation to end the practice of prostitution *per se*, but rather the exploitation of the prostitution of women<sup>22</sup>. Given the existing policies that are based on targeting agents and not even considering the ramifications for these workers, it is arguable that the obligation to end the exploitation of prostitution of women is better achieved by a more pragmatic policy that seeks to address the health and safety needs of these women. The available evidence suggests that overseas workers in the Australian sex industry are in a particularly vulnerable and dangerous position with respect to infection with STDs (sexually transmitted diseases) and HIV, and that they are a public health risk<sup>23</sup>. Given that the Federal government is committed to minimising the spread of these diseases, the suggestion is that undocumented migrants in the sex industry be given employment rights as this is likely to increase their use of health care and sex education programs and increase their bargaining power with clients and employers. That is, the granting of employment rights for these workers is one strategy for reducing the spread of STDs among these workers and among the general community.

It is clear that a punitive approach which targets the agents who facilitate passage into Australia of Asian sex workers will achieve little without consideration of the complexity of issues involved. The Australian Government must consider the rights of undocumented migrant sex workers as central to any public policy response and the simplistic notion of adding new laws to the repertoire of laws which already exist is not a solution. At the very least standard minimum rules should be put in place for the treatment of undocumented migrant sex workers.

*“ I have been to Australia, Germany, Japan, Austria and Belgium and back to Australia. The first time was dreadful. I had to see dozens of men each day, no condoms. I don't want to talk about it. But since then I have found a much better*

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<sup>21</sup> National Action Plan. AGPS, 1994.

<sup>22</sup> Art 6, Convention on the Elimination of Discrimination Against Women (CEDAW).

<sup>23</sup> Briefing Paper on Movement of South East Asian Women for Prostitution in Australia, AFP, pg. 4.

(broker). I will come back again. I hope I am not arrested next time until I have made plenty of money. I had only just started making money this time.... I pretend to the police that I was not a prostitute in Thailand and that I want to go back. That way I will get voluntary departure rather than being deported” (Thai sex worker awaiting deportation).<sup>24</sup>

### **Recommendations:**

The Federal Government should not single out “sex servitude” offences committed in the sex industry, in doing so the Government discriminates against the sex industry.

The Commonwealth should encourage and support state and territory governments to decriminalise all forms of prostitution, thereby improving working conditions for all sex workers including migrant sex workers.

The Commonwealth Government should recognise sex work as a legitimate occupation and investigate the possibility of amending Federal discrimination laws to make it unlawful to discriminate on the grounds of “profession, occupation, trade or calling”<sup>25</sup>.

The Commonwealth Government should review Australian labour laws (Cth, state and territory) to ensure compliance with ILO Conventions, including:

ILO Convention No. 122: Employment Policy Convention, particularly Article 1 (1) & Article 1 (2) and allow freedom of choice to work in the sex industry.

ILO Convention No. 111: Discrimination (Employment and Occupation) Convention, Article 1(1) and Article 1 (3) and allow equality of opportunity for those who want to work in the sex industry to do so.

ILO Convention No. 29: Forced Labour, which provides that each ratifying member shall undertake to suppress the use of forced or compulsory labour in all its forms within the shortest possible period with a view to complete suppression.

The Federal Government should consider ratifying the Migrant Convention as a matter of urgency.

The Commonwealth should investigate the use of existing legislation both Federal and State to prosecute agents for offences such as forgery<sup>26</sup> and uttering<sup>27</sup>, conspiracy<sup>28</sup>, passport offences, offences against liberty including kidnapping<sup>29</sup>,

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<sup>24</sup> Making Sex Work Safe. Network of Sex Work Projects, pg 26.

<sup>25</sup> For example see the *Discrimination Act 1991* (ACT).

<sup>26</sup> *Crimes Act 1914* (Cth) s.63, *Criminal Code 1913* (WA) s473, *Criminal Code 1899* (Qld) s484, *Crimes Act 1958* (Vic) s83A, *Crimes Act 1900* (NSW) s250-299.

<sup>27</sup> For example *Crimes Act 1914* (Cth) s64, *Criminal Code 1913* (WA) s473.

<sup>28</sup> For example *Crimes Act 1958* (Vic) s321, *Criminal Code 1913* (WA) s558, *Criminal Law Consolidation Act 1935* (SA) s267, *Criminal Code 1899* (Qld) s541, *Crimes Act 1914* (Cth) s86.

<sup>29</sup> For example *Criminal Code 1913* (WA) s332, *Criminal Code 1899* (Qld) s354, *Crimes Act 1958* (Vic) s63A.

unlawful confinement and deprivation of liberty<sup>30</sup>, offences against the person including obtaining financial advantage by deception<sup>31</sup>, threats to inflict serious injury<sup>32</sup>, abduction<sup>33</sup>, extortion<sup>34</sup>, money laundering, procuring and migration offences.

The Commonwealth should recognise that restrictive immigration policies contribute to the potential exploitation of international sex workers. Therefore we recommend that the Commonwealth review visa granting mechanisms and laws with the aim of allowing migrant workers to work in the sex industry legitimately for short periods of time.

The Commonwealth should ensure the support of sex industry experts (i.e. sex worker organisations) when legislating in this area.

The Commonwealth should abandon the proposed legislation as it will further drive migrant workers to the most marginal fringes of the sex industry making it difficult for support and HIV organisations to supply them with information and safe sex supplies.

Accurate research in this area should be supported.

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<sup>30</sup> For example *Criminal Code* 1913 (WA) s333, *Criminal Code* 1899 (Qld) s355.

<sup>31</sup> For example *Crimes Act* 1958 (Vic) s82.

<sup>32</sup> For example *Criminal Code* 1899 (Qld) s359, *Criminal Code* 1913 (WA) s338B, *Crimes Act* 1958 (Vic) s21-22.

<sup>33</sup> For example *Criminal Code* 1899 (Qld) s351, *Crimes Act* 1958 (Vic) s55, *Crimes Act* 1900 (NSW) s86-91.

<sup>34</sup> For example *Criminal Code* 1899 (Qld) s416, *Crimes Act* 1900 (NSW) s99, *Crimes Act* 1958 (Vic) s94.