

M O D E L C R I M I N A L C O D E

CHAPTER 9

OFFENCES AGAINST HUMANITY

SLAVERY

Report

November 1998

This Report was prepared by the Model Criminal Code Officers Committee. It does not necessarily represent the views of the Standing Committee of Attorneys-General

**MODEL CRIMINAL CODE
OFFICERS
COMMITTEE OF THE
STANDING COMMITTEE OF
ATTORNEYS-GENERAL**

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ISBN 0 642 20962 6

PREFACE

Background to the Model Criminal Code Project

On 28 June, 1990, the Standing Committee of Attorneys-General (SCAG) placed the question of the development of a national model criminal code for Australian jurisdictions on its agenda. In order to advance the concept, SCAG established a Committee consisting of an officer from each Australian jurisdiction with expertise in criminal law and criminal justice matters. That Committee was originally known as the Criminal Law Officers Committee (CLOC), but, in November 1993, the name was changed to the Model Criminal Code Officers Committee (MCCOC) in order to reflect the principal remit of the Committee directly.

The first formal meeting of the Committee took place in May 1991. In July 1992, the Committee released a Discussion Draft of the general principles of criminal responsibility, and, after a great deal of public consultation, delivered a Final Report to SCAG which was released in December 1992. With the exception of the general principles relating to intoxicated defendants, the recommendations in that Final Report formed the basis for the Commonwealth Criminal Code Bill, 1994, which was passed by the Commonwealth Parliament in March, 1995.

In 1994, both the Commonwealth Government and the State and Territory Premiers' Leaders Forum endorsed the Model Criminal Code project as one of national significance.

The Committee has produced a number of Discussion Papers and Final Reports during its life span to date. In December, 1997, the Standing Committee of Attorneys-General requested the Model Criminal Code Officers Committee to examine a Commonwealth proposal to enact laws dealing with "sex slavery". These laws are a part of and depend on laws against slavery generally and laws of this kind quite properly form a part of a modern criminal code. In addition, the Commonwealth proposal was that there be interlocking and complementary State, Territory and Commonwealth laws on the subject, and so the Committee was the obvious choice to review the law and prepare model laws for the purposes of public consultation.

The Committee produced a discussion paper in April 1998 and circulated it as widely as it could with a view to promoting public discussion and consultation with the Committee. The Committee received over 50 submissions and these are listed at Appendix 3. The Committee is grateful for the efforts of all of those who took the time and trouble to contribute to its deliberations.

As with its previous publications, MCCOC has attempted to produce a document which is comprehensive, concise and capable of being understood by the general public as well as those who have some legal expertise. In this Final Report "Model Criminal Code" will be used to refer to the draft legislation

recommended by this paper, the Bill attached to Chapter 2, *The General Principles of Criminal Responsibility* and the Bills attached to Chapter 3 : *Theft, Fraud, Bribery and Related Offences*, Chapter 5 : *Non-fatal Offences Against the Person*, Chapter 6 *Serious Drug Offences*, Chapter 7 *Administration of Justice Offences*, and Chapter 8 *Public Order Offences-Contamination of Goods* . The *Criminal Code Act 1995 (Cth)* enacts the draft Bill attached to the Chapter 2 report, with the exception of the provisions relating to the *O'Connor* defence of intoxication. The drafting of the Commonwealth Act differs slightly from that of the Draft Bill. These changes have been approved by the Standing Committee of Attorneys-General. The report is organised with the proposed Code provision on one page and a commentary explaining the Committee's reasoning and intentions about it on the facing page..

The commentary was written by Mr Matthew Goode, Senior Legal Officer in the South Australian Attorney General's Department.

The Committee welcomes further comments on any aspect of the provisions now proposed in this report. Comments should be sent to:

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Table Of Contents	
Preface	i
Background to the Model Criminal Code Project	i
Committee Members	iii
Table of Contents	v
Historical Development of Existing Law	1
Existing Law In Australia	2
Australia’s International Obligations	3
The Australian Law Reform Commission Proposal	7
The American Experience	9
The Constitutional Position Within Australia and the Responsibility To Legislate	12
The “Sex Slavery” Proposal	17
Model Provisions	22
Commentary	29
Definition of slavery	29
Offences relating to slavery	31
Definition of sexual servitude	33
Sexual servitude offences	35
Deceptive recruiting for sexual services	37
General provisions - jurisdiction and double jeopardy	39

Appendix 1 - Model Criminal Code - Chapter 9	41
Appendix 2 - The operation of criminal justice visitor visas	45
Appendix 3 - List of written submissions received	47

Historical Development of Existing Law

At common law, the position of slavery was equivocal. The feudal tenancy of villeinage was no more and no less than a form of slavery dignified by another name, but that had come to an end by the end of the fifteenth century (Pollock & Maitland, *History of English Law*, volume 1, at 341). There appears not to have been a common law about slavery as such, but rather a collection of court cases about the general doctrines of the law of property (contract, habeas corpus, tortious causes of action and so on) as they applied to specific instances where a slave or slavery was involved. So in 1772, Lord Mansfield could say that “Contract for sale of a slave is good here; the sale is a matter to which the law properly and readily attaches, and will maintain the price according to the agreement” (*Somerset v Stewart* (1772) Lofft 1, 98 ER 499 at 509) and yet refuse to order the production of a slave detained against the will of the slave. In general terms, a chattel slave was like any other piece of property except that the owner was not allowed to destroy it (*Smith v Gould* (1706) 2 Salk 666; 91 ER 567). By 1824, however, at least one judge maintained that the common law had never enforced slavery and another that the common law had not actively enforced the condition, but rather had passively allowed it (*Forbes v Cochrane* (1824) 2 B&C 448, 107 ER 450).

See generally Morris, “Villeinage” as it existed in England, reflects but little light on our subject’: The Problem of the ‘Sources’ of Southern Slave Law” (1988) 32 Am J L Hist 95 especially at 127ff.

Be that as it may, there can be little doubt that the UK Parliament either approved or acquiesced in the slave trade until the end of the eighteenth century. The matter of general principle eventually passed into the hands of Parliament. Subsequent events are neatly summarised by Stephen as follows:

“It is said that in 1786 there were in the trade 130 ships, which carried 42,000 slaves. In 1787 was formed the society for the Suppression of the Slave Trade. The matter was debated in Parliament in 1791, and again in 1798, but Mr Wilberforce, who brought the matter forward, failed to get a majority. Down to 1806, the slave trade continued to be legal, but from that time a series of acts was passed, by which singularly rapid steps changed its character from that of a lawful trade to a capital crime.”. (Stephen, *A History of the Criminal Law of England*, volume 3, at 255).

Beginning in 1807, a sequence of Acts of the UK Parliament transformed participation in the slave trade into very serious criminal offences together with provisions declaring the freedom of slaves and the children of slaves. Capital punishment was imposed in 1824 but repealed in 1833.

While the first legislative sign that the UK Parliament would move to abolish the slave trade came by an Act in May 1806 (46 Geo III, sess 2, c 52), both Houses of Parliament resolved to, in effect, completely abolish the slave trade in June 1806 and this resulted in 1807 in “An Act for the Abolition of the Slave Trade” (47 Geo III, sess 1, c 36). A number of enactments followed at regular intervals, notably 51 Geo III, c 23 (1811), 5 Geo IV, c 113 (1824), 3 & 4 Will IV, c 73 (1833), and 6 & 7 Vict, c 98 (1843). The sequence came to a major halt in 1873 with the *Slave Trade Act*, 36 & 37 Vict c 88 (1873). In the meantime, there had been a large number of Acts of Parliament giving effect to treaties between the UK and other nations. A number are listed in Schedule 2 to the 1873 consolidation. In 1873 itself, 36 & 37 Vict c 59 deals with treaties entered into by the UK with Zanzibar, Muscat and Madagascar. From the very beginning, then, Parliamentary endorsement of international agreements has been a feature of anti-slavery laws.

Existing Law in Australia

No Australian Parliament has dealt directly with the general offence of slavery. The Australian Law reform Commission reviewed the state of the law in 1990 (Australian Law Reform Commission, Report No 48, (1990), *Criminal Admiralty Jurisdiction and Prize*). It is neither necessary nor desirable to repeat their legal analysis and reasoning here. It suffices to note that the Commission concluded that the old UK Imperial enactments still represented the law in Australia. It follows that the criminal offences in force in Australian jurisdictions are those under the series of nineteenth century UK *Slave Trade Acts*, the most important of which was the Act of 1824. The Commission summarised the offences as follows (para 99):

“Section 10 of the 1824 Act makes it an offence punishable by transportation for 14 years or imprisonment with hard labour for three to five years for any person

- to deal or trade in slaves or persons intended to be dealt with as slaves; or to carry away or import slaves or persons to be dealt with as slaves; or to ship or confine on board any ship slaves or persons to be dealt with as slaves for the purpose of their being carried away or imported; or to fit out, man, equip or hire out any ship to achieve any of these objects; or to contract to do any of these things;
- knowingly to lend or advance money or goods, or become security for a loan or advance of money or goods, for any of these objects or contracts; or to contract to do so;

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- knowingly to become guarantor for agents employed or to be employed in accomplishing any of these objects or contracts or to engage as partner or agent in any of these objects or contracts; or to contract to do so;
 - knowingly to ship goods to be employed in accomplishing any of these objects or contracts; or to contract to do so;
 - to act as captain, master, mate, surgeon or 'supercargo' on a ship knowing it is used or intended to be used to accomplish any of these objects or contracts; or to contract to do so;
 - knowingly to insure slaves or any property employed in accomplishing any of these objects or contracts; or to contract to do so;
 - fraudulently to forge any certificates or documents under the Act or publish those forged documents with intent to defraud;
 - to procure, counsel, aid or abet any of these offences.

Under s 11 any person who acts or contracts to act as petty officer, seaman, marine or servant or in any other capacity knowing that their ship is used or intended to be used in accomplishing any of the objects or contracts mentioned above (and any person procuring, counselling, aiding or abetting such an action) is guilty of a misdemeanour and liable to a maximum of two years imprisonment.

Australia's International Obligations

International law contains a large number of international agreements on the outlawing and prevention of the slave trade, both bilateral and multilateral, and Australia is party to a number of them. The first nineteenth century international agreement were bilateral and were designed to abolish the slave trade in the sense that they were aimed at the exploitation of native Africans by European powers and empires. According to Bassiouni ("Enslavement As An International Crime" (1991) 23 NYJ Int Law & Politics 445 at 454), seventy nine separate international instruments and documents have addressed the issue of slavery, the slave trade, slave related practices, forced labour and associated issues. Bassiouni divides these instruments and documents into four distinct categories: (a) specific international instruments arising under the law of peace; (b) general human rights documents; (c) other general international instruments under the law of peace which refer to the area; and (d) international instruments which deal with the area under the laws of armed conflict. Of these, the first two are the most significant.

The first international instrument was the 1815 Declaration Relative to the Universal Abolition of the Slave Trade (Congress of Vienna). Other landmarks against slavery specifically were the 1841 Treaty for the Suppression of the African Slave trade (Treaty of London), the 1885 General Act of the Conference Respecting the Congo (General Act of Berlin), the 1890 Convention Relative to the Slave Trade (General Act of the Brussels Conference), the 1905 International Agreement for the Suppression of the White Slave Traffic, the 1910 International Convention for the Suppression of the White Slave Traffic, the 1921 International Convention for the Suppression of the Traffic in Women and Children, the 1926 Slavery Convention, the 1930 Convention Concerning Forced or Compulsory Labour, the 1933 International Convention for the Suppression of the Traffic in Women of Full Age, the 1947 International Convention for the Suppression of the Traffic in Women and Children, the 1949 International Convention for the Suppression of the White Slave Traffic, the 1953 Slavery Convention, the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery and the 1957 Convention Concerning the Abolition of Forced Labor. This is not a comprehensive list.

Of these specific international instruments, the ALRC identified the 1926 International Convention to Suppress the Slave Trade and Slavery and its 1953 Protocol and the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery as the most significant. Australia is a party to both conventions.

The 1926 Convention was the first concerted and general effort by the international community to draw together and supplement the network of bilateral and multilateral treaties which had come into force in a more or less disorganised fashion before World War I. Parties to the Convention are obliged to take all steps to prevent and suppress the slave trade in their territories and in seas and ships that they control.

The Convention contains two other significant matters requiring further comment. First, it essays a definition of slavery (Art 1):

- “(1) Slavery is the status and condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.
- (2) The slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by

sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade and transport in slaves.”.

Second, the Convention addressed the subject of forced labour. It was considered to be analogous to slavery but not as heinous as it. The parties to the Convention are required to agree that it should be abolished, but the Convention recognises that it may be used for “public purposes” by which is meant a form of public service incumbent on all citizens or a punishment duly applied by the due process of law.

The 1956 Convention was intended to augment or “supplement” the 1926 one, but focuses more on practices analogous to slavery than slavery itself, although the Convention adds the requirement to eliminate the conveying of slaves from one country to another by any means. The parties to the Convention have the right and duty to prosecute and eliminate a series of practices similar to slavery, notably debt bondage, serfdom, forced marriage and the exploitation of children and child labour. Further, the parties to the Convention are required to criminalise the act of inducing another to place themselves or their dependents in a servile status and any agreement or any act of accessoryship in relation to this practice.

The other major modern source of international law and obligation in relation to slavery is to be found in the more modern human rights treaties.

The *general* human rights treaties (aside from those which deal with the conduct of parties to an armed conflict) which refer to slavery are the 1948 Universal Declaration of Human Rights, the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention), the 1955 UN Standard Minimum Rules for the treatment of Prisoners, the 1966 International Convention on the Elimination of All Forms of Racial Discrimination, the 1966 International Covenant on Civil and Political Rights, the 1969 American Convention on Human Rights, the 1975 Charter of Economic Rights and Duties of States, and the 1981 African Charter on Human and Peoples’ Rights.

The most significant of these are the 1948 Universal Declaration of Human Rights and the 1966 International Covenant on Civil and Political Rights.

The 1948 Declaration states (Article 4):

“No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.”.

The 1966 Covenant states (Article 8):

- “(1) No one shall be held in slavery; slavery and the slave trade in all their forms shall be prohibited.
- (2) No one shall be held in servitude.
- (3) (a) No one shall be required to perform forced or compulsory labour;
- (b) Paragraph 3(a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;
- (c) For the purpose of this paragraph, the term ‘forced or compulsory labour’ shall not include:
 - (i) Any work or service, not referred to in paragraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;
 - (ii) Any service of a military character and, in countries where conscientious objection is recognised, any national service required by law of conscientious objectors;
 - (iii) Any service exacted in cases of emergency or calamity threatening the life or well being of the community;
 - (iv) Any work or service which forms part of normal civil obligations.”¹.

Other significant modern multilateral human rights treaties of significance to Australia which mention the subject are the 1979 International Convention on the Elimination of All Forms of Discrimination Against Women which says (Article 6) that “States parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women” and the 1989 International Convention on the Rights of the Child which states (Article 35) that “States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale or traffic in children for any purpose or in any form.”.

¹ *These exceptions to the prohibition on forced labour are similar to those included in the International Labour Organisations Conventions No 29 (1930) and No 105 (1957).*

It is important to note that the range of international agreements referred to above are not confined to chattel slavery. While the variety of international agreements, covenants, conventions and declarations are far from consistent in their coverage of “slave-like” conditions and practices, it is at least clear that the international community wants to mandate national and international action against more than chattel slavery. For example, as a general summary, McDougal, Lasswell and Chen (*Human Rights and World Public Order*, 1980) point out that the general term “servitude” was intended in the context of the 1948 Universal Declaration of Human Rights to include the functional equivalents of slavery including the traffic in women, forced labour and debt bondage. More recently, a Sub-Commission on Prevention of Discrimination and Protection of Minorities set up by the UN Commission on Human Rights has prepared a “Programme of Action for the Prevention of Traffic in Persons and Exploitation of the Prostitution of Others” which was endorsed by the Commission in early 1997.

In addition, it is important to note that slavery has arguably evolved as having a crime against humanity status in international law, although the extent to which such an international crime extends beyond chattel slavery is controversial. For example, enslavement was included in the Nuremberg Charter definition of “Crimes Against Humanity” (Article 6(c)). That Article also condemns “other inhumane acts committed against any civilian population”, and it may be argued that these general words include forced labour practices (see for example McCormack and Simpson, “The International Law Commission’s Draft Code of Crimes against the Peace and Security of Mankind: An Appraisal of the Substantive Provisions” (1994) 5 Crim LF 1 at 20). The International Law Commission’s Draft Code of Crimes against the Peace and Security of Mankind is based on the Nuremberg Charter definition and includes in Article 21, under the heading of “Systematic or Mass Violations of Human Rights”, “... establishing or maintaining over persons a status of slavery, servitude or forced labour...”. The International Law Commission does not define these terms, relying instead on existing definitions in international law described above.

The Australian Law Reform Commission Proposal

The Australian Law Reform Commission concluded that the criminal law in relation to slavery should be reformed. This conclusion cannot be regarded as controversial. The Commission stated (para 108):

“The fact that this area of substantive Australian criminal law is regulated by 19th century Imperial enactments itself demonstrates the need for change. While the application of those enactments in Australia is less obscure than in the case of piracy, their language is archaic and a number of their provisions relate to circumstances and institutions that have either changed or long since fallen into

disuse. More importantly, the appropriate punishments for the offences they create are now uncertain. Australia's international obligations require the trade in slaves to be an offence. Accordingly, these complex Imperial Acts with their uncertain punishments should be replaced with modern and concise Australian statutory offences.”.

The Committee agrees with this position and accordingly *recommends* that the Model Criminal Code contain appropriate provisions, including offences of appropriate severity of punishment, for slave activity.

The more difficult question is the content of the law. The Australian Law Reform Committee recommended the following:

“6.(1) A person must not engage in or in any way knowingly assist another person to engage in the slave trade.

Penalty: life imprisonment.

(2) A person engages in the slave trade who:

(a) does anything to entice, capture, detain or dispose of a person with intent to reduce the person to, or maintain the person in, slavery; or

(b) is in any way involved in the acquisition of a slave with a view to the sale or exchange of the slave; or

(c) does anything involved in the disposal by sale or exchange of a slave; or

(d) does anything else involved in the trade in or transportation of a slave.

(3) ‘Slavery’ means the status or condition of a person over whom any power of ownership (including a power of ownership arising from a debt or contract) is exercised, and ‘slave’ has a corresponding meaning.

(4) This section applies:

(a) to Australia and the coastal sea of Australia; and

(b) to an Australian citizen; and

(c) to a ship on the high seas that is in the course of a voyage to a place in Australia; and

(d) to an Australian ship on the high seas.”.

The draft Bill requires the consent of the Attorney-General for the commencement of any prosecution for this (and other) offences against the draft Bill.

The area of slavery has not been the subject of any other recent domestic law reform recommendations in Australia or any other analogous jurisdiction. The ALRC recommendations may therefore be seen as one starting point for consideration of the desirable content of slavery provisions in the Model Criminal Code. These details will be discussed below. There are, however, other matters of a preliminary nature which require exploration.

The American Experience

As is commonly known, the United States abolished slavery in 1865 after a long and bloody civil war. The formal abolition was achieved by the passage of the thirteenth amendment to the United States *Constitution*, which says:

“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Congress shall have power to enforce this article by appropriate legislation.”².

It may be noted both that the amendment extended beyond slavery to “involuntary servitude” and that Congress was given power to enact laws to enforce the statement of principle. Congress used that power a number of times. It enacted a “peonage” Act in 1867 which, together with later enactments, was the forerunner of 18 USC ss 1581-1588, which, in essence, criminally prohibit the imposition of slavery and involuntary servitude as well as participation in the sale, seizure or transport of slaves. Section 1581 deals with peonage (the compulsion of labour in payment of a debt), s 1583 with enticement into slavery or involuntary servitude and s 1584 with involuntary servitude. The last states:

“Whoever knowingly and wilfully holds to involuntary servitude or sells into any condition of involuntary servitude, any other person for any term, or brings within the United States any person so held, shall be fined not more than \$5,000 or imprisoned not more than five years, or both.”.

2 *The thirteenth amendment fulfilled the promise of the Emancipation Proclamation issued on January 1, 1863. It overruled the decision of the United States Supreme Court in Dred Scott v Sandford (1856) 60 US 393 which effectively ruled that slaves were “property” under the then Constitution and could not sue in a Federal Court. It seems likely that the wording was based on the Northwest Ordinance of 1787. As might be expected, there is a very extensive American literature on the subject. On the history of the thirteenth amendment, see generally, tenBroek, “Thirteenth Amendment to the Constitution of the United States, Condemnation to Abolition and Key to the Fourteenth Amendment” (1951) 39 Calif LR 171 and Buchanan, “The Quest for Freedom: A Legal History of the Thirteenth Amendment” (1974) 12 Houston LR*

However, neither the amendment to the *Constitution* nor Congress defined “involuntary servitude”. According to Haag, (“Involuntary Servitude: An Eighteenth Century Concept In Search of a Twentieth Century Definition” (1988) 19 Pac LJ 873 at 884-885, 898-899), by 1988, the courts had adopted four different definitions of “involuntary servitude”:

“First, involuntary servitude is defined as the use of physical force, or threats of force or legal process to compel a person to perform labour. Second, involuntary servitude is defined as psychological coercion to force the victim to work. A third definition of involuntary servitude requires either a showing of fraud or deceit used against certain persons, or the use of physical force, or the use of physical force, or threat of legal process to compel a person to enter a state of involuntary servitude. A final definition of involuntary servitude states that the techniques utilised to effectuate labor are irrelevant, where the result of the coercion is to force a victim to become a slave. ... The four definitions of involuntary servitude ... can be broadly categorised as a conflict between those cases which examine the means utilised to coerce the victims and those cases which scrutinise the end result of such coercion on the victim.”. (Citations omitted)

The fundamental question of definition came before the Supreme Court of the United States in *US v Kozminski* (1988) 487 US 931. In that case a dairy farmer, his wife and two sons were charged with offences against s 1584 in relation to two intellectually disabled farm workers. The victims had an IQ of 60 and 67 and both had been picked up by the defendant while itinerants and had agreed to work on the farm for food and living quarters. There was evidence that the victim’s lodging was filthy and primitive, that the food provided was appalling and that the victims were subjected to physical abuse. The defendants were instructed not to speak to visitors and when they left the farm, they were retrieved and discouraged from leaving again. They worked 16 hours a day seven days a week.

The Supreme Court unanimously found that this treatment constituted involuntary servitude under the statute, but did not agree on the general test to be employed. O’Connor J, for the majority, held that the statute had to be interpreted on the basis of the understanding of the scope of the Thirteenth Amendment at the time the statute was enacted. That led the majority to a narrow test of “involuntary servitude”, holding that “the use or threatened use of physical or legal coercion is a necessary incident” of involuntary servitude, albeit reserving for future consideration whether evidence of other forms of coercion, notably poor working conditions or the victim’s particular vulnerability would be significant. It is important, though, that the majority judgement disapproved of a line of authority, employed by the courts below in this case, which would criminalise “psychological coercion”, because this would “delegate

to prosecutors and juries the inherently legislative task of determining what type of coercive activities are so morally reprehensible that they should be punished as crimes”.

The significant minority opinion was that of Brennan J who also focused on the original intentions of the legislature but focused on the results of the actions of the defendant rather than the means employed:

“While no one factor is dispositive, complete domination over all aspects of the victim’s life, oppressive working and living conditions, and lack of pay or personal freedom are the hallmarks of that slave-like condition of servitude.”.

While the Supreme Court of the United States has, therefore, taken a narrow view of involuntary servitude, it explicitly did not determine the full extent of the scope of the Thirteenth Amendment. It is interesting to observe the range of situations to which some have attempted to apply that standard or something like it. For example, over the years, various tests have been employed to challenge the military draft (*Arver v US* (1918) 245 US 366); civil conscription for roadwork (*Butler v Perry* (1916) 240 US 328); prohibitions against the desertion of sailors (*Robertson v Baldwin* (1897) 165 US 275); mandatory legal aid provision for indigent criminal defendants (*Sharp v Kansas* (1989) 783 P 2d 343); the incarceration of a material witness (*Hurtado v US* 1973) 410 US 578); mandated child support or property settlements (*Hicks v Hicks* (1980) 387 So 209); police road blocks (*Boyle v City of Liberty* (193) 833 F Supp 1436); mandatory work as an inmate of an institution (*Jobson v Henne* (1966) 355 F 2d 129); and a school district’s mandatory community service programme (*Steirer v Bethlehem Area School District* 789 F Supp 1337, (1992) 987 F 2d 989). In addition, recent arguments have been made that the behaviour of most pimps falls under the slavery or involuntary servitude provisions (Katyal, “Men Who Own Women: A Thirteenth Amendment Critique of Forced Prostitution” (1993) 103 Yale LJ 791) and further that spouses suffering from the battered wife syndrome are held in involuntary servitude by their battering spouse (McConnell, “Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment (1992) 4 Yale J Law & Feminism 207).

There have, of course, been many more such arguments, but this admittedly random selection, all of them unsuccessful, shows how careful one must be before venturing to take the criminal or civil law down a path of analogy to slavery into servile conditions or involuntary servitude. This issue will be explored in more detail below, but it is wise to keep this working illustration in mind.

The Constitutional Position Within Australia and the Responsibility To Legislate

Traditionally, the States and Territories have retained the legislative jurisdiction to deal with general criminal law matters and, of course, the States and Territories were the objectives of the old Imperial legislation which still applies. No State or Territory has legislated in the area of slavery, which is no doubt largely due to the fact that, until the passage of the *Australia Act* 1986, the States and Territories could not pass laws inconsistent with applicable Imperial laws which applied by paramount force. But that is no longer the case, and the States and territories can now do so if the course of action is considered to be wise.

There is no doubt that the Commonwealth can (and should) use its external affairs power (*Constitution*, s 51 (xxix)) to legislate to implement its international obligations under international law generally and the international agreements to which it is signatory described above. It is unnecessary in this context to enter into the debate about the extent to which the external affairs power authorises legislation which goes beyond the strict letter of the relevant international obligation (see, generally, *Commonwealth v Tasmania* (1983) 158 CLR 1, *Polyukhovich v Commonwealth* (1991) 172 CLR 501; *Koowarta v Bjelke-Peterson* (1981) 153 CLR 168. At page 220 of the last case, Stephen J noted that anti-slavery laws fell within the external affairs power). The real question is whether such Commonwealth legislation should be exclusive or a complementary part of a scheme of Commonwealth and State/Territory legislation.

The Australian Law Reform Commission thought that the Commonwealth legislation should cover the field. It said (para 110):

“Matters concerning slavery and the slave trade are likely to arise from events beyond Australia’s shores rather than within Australia itself. ... it will be the international aspects of the offence which come to the fore, particularly is those concerned are not regarded as slaves in their country of origin. Political considerations such as Australia’s relations with that country and out international obligations under the 1926 and 1956 Conventions will have a significance not normally attached to the consideration of ordinary criminal offences. ... Perhaps the most important consideration, however, is that of simplicity. The present Imperial provisions are unsatisfactory and their replacement is desirable. Given the unlikelihood of prosecutions for slavery or slave trading taking place before as Australian court, uniform legislation on this subject in all States and Territories is unwarranted.”.

The Commission recommended *against* going beyond chattel slavery. Why is that so? The Commission offers three reasons. They are:

- “That would go well beyond what is required to replace the existing Imperial slave trading offences, since the Imperial Acts deal with chattel slavery only.”
- “In fact most, if not all, of these practices and institutions have been abandoned in Australia already, and all are either unlawful and void at common law or infringe Commonwealth or State statutory provisions.”
- “If further action is necessary in any of the areas referred to in these Conventions, a simple prohibition of the relevant activity or inclusion within the definition of slavery is not an appropriate approach. The areas of law they touch upon are varied and complex and do not readily lend themselves to general criminal provisions.”

In its submission, the Human Rights and Equal Opportunity Commission suggests the Commonwealth has the power to cover the whole field in this area and has urged the Committee to recommend that Commonwealth legislation cover the field.³ The submission refers to the Convention for the Elimination of All Forms of Discrimination Against Women. Article 6 provides:

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

The Supreme and District Courts of Western Australia submission made a similar point in a wholly different way. They said:

“The difficulty with the present chapter is that the offences as drawn appear to fall within the legislative competence of the Commonwealth parliament alone. ... There is little value in developing a chapter of the Model Criminal Code which is beyond the legislative competence of the States.”⁴

This position is not strong or self-evidently correct. In a Discussion Paper published after the release of the ALRC Report on *Criminal Admiralty Jurisdiction and the Law of Prize*, the Commonwealth Government argued that the ALRC position was “strong” but carefully outlined the arguments against it (*Criminal Admiralty Jurisdiction*, A Discussion Paper, September 1991 at Appendix C page 5):

3 Susan Halliday, *Sex Discrimination Commissioner, Commonwealth Human Rights and Equal Opportunity Commission*, 10 August 1998.

4 The Honourable Mr Justice Scott, *Chairman, Supreme and District Courts Model Criminal Code Committee, Western Australia*, 22 May 1998.

“[The arguments in the Report]... appear to be based on a seemingly arbitrary division between traditional slavery offences and these additional practices. Whether the practices listed in the Supplementary Slave Convention 1956 are prohibited at common law or not, could well depend on what view is taken as to what constitutes the offence in practice. This applies particularly in the case of the practices in relation to women and children. While the Commission appears to have taken a narrow view of these practices, a broader view of what constitutes the practice may be more appropriate to modern interpretations. If such practices as forced marriage or child exploitation were to be viewed in this broader light, they may well prove to be more prevalent than first appears... To draw an arbitrary line between chattel slavery and these additional practices could be seen to fly in the face of the expressed concern of the international community, with practices akin to slavery expressed in a Convention to which Australia is signatory, and from which obligations arise.”.

It may be conceded for the purposes of argument that prosecutions for slavery in the traditional sense are unlikely in the Australian States and Territories on the assumption that what is being talked about is slavery in its traditional sense of chattel slavery particularly racially oriented chattel slavery. There can be little doubt that traditional chattel slavery has *not* disappeared from the world and that the world, as we currently experience it, is more likely to intrude chattel slavery into an Australian jurisdiction outside the shores of what the Commission assumes to be the territorial jurisdiction of State and Territory criminal law. But it is a mistake to be bound by the stereotypes of 150 years ago (although one should not fail to learn from that experience). Chattel slavery is a crime against humanity and should be triable wherever it is found. But chattel slavery is not the only form of this crime, and while one should guard against it, one should also pay attention to modern problems in modern social and international settings.

These modern problems refer not to chattel slavery but, in Western and developed countries, to the more marginal and practices at the edges of international adoption, migration and of domestic child welfare and working conditions. In these situations, Australian society confronts what can be described, and are described by some, as forms of slavery more accurately described as servitude and the traffic in children. Baby selling by the poor to the rich, most often, but not always, in an international setting, and the gross exploitation of (often illegal) migrant and refugee labour are not shadows of the past but realities of the present. In addition, as we shall see, attention has

been turned recently to the more long recognised social and legal ambiguities of servile conditions, again principally involving illegal migrants, in the prostitution industry⁵.

State/Territory involvement in modern manifestations of slave like conditions is vital for two reasons. First, while international law and conventions are clear on their prohibition of chattel slavery and the like, and hence the Commonwealth mandate is also quite clear, less certainty is involved in the coverage of slave like conditions amounting to servitude. Bassiouni comments (at 459):

“The primary reason for these still prevalent manifestations of slavery and related practices is that the basic legal element in international instruments on slavery is the total physical control by one person over another. Whenever the control is less than total, such as when it is partial or limited in time, it is removed from the system of protections developed by these international instruments.”.

Second, modern instances of servitude or slave-like conditions centrally involve State and Territory interests. For example, sweatshops and servile labour conditions concern local laws about employment, servile sex industry practices are intimately tied up with local prostitution prohibition or regulation (depending on the rules of the jurisdiction concerned) and trafficking in children concerns local youth welfare and child protection authorities. These are simply not plain straightforward international and hence Commonwealth matters, but matters in which the interest of the States and Territories are closely concerned and which may well involve vital State or Territory governmental interests.

It is, therefore, the case that legislative coverage of servitude going beyond the Imperial enactments and the international agreements recorded above will fall outside of any strict constitutional mandate to implement them. The Australian Law Reform Commission recognised this. It said (para 112):

“Australia is obliged to bring about the complete abolition or abandonment of these institutions [debt bondage, serfdom, forced marriage, transfer or inheritance of women, the exploitation of children or child labour and compulsory or forced labour] and practices in Australia ‘progressively and as soon as possible’. Some of these practices may fall under the Convention definition of

5 For a study of current problems of this kind, concentrating on illegal migrant workers but also including prostitution, see Ruggerio, “Trafficking in Human Beings: Slaves in Contemporary Europe” (1997) 25 *Int J Sociology of Law* 231. See also Bassiouni, “Enslavement As An International Crime” (1991) 23 *NYJ Int Law & Politics* 445 at 457ff for modern manifestations internationally of servitude, including debt bondage, forced labour, sweatshops, and the traffic in children

slavery and will thus be abolished under the proposed new Commonwealth statutory offence. Insofar as they do not, it is inappropriate to consider the implementation of those provisions in this Report.”.

In December 1997, the Commonwealth Justice Minister, Senator Amanda Vanstone, warned that Australia had insufficient laws to stop women being forced into “sex slavery”. She has argued that Australia needs legislation which targets the traffickers that recruit, organise and profit from those engaged in prostitution and sexual exploitation (see, for example, the *Brisbane Courier Mail*, 13/12/97, p 9) and the Standing Committee of Attorneys-General referred the issue to the Model Criminal Code Officers Committee for examination and report. As a result, the Committee issued a discussion paper in April 1998. The overwhelming response from consultation was that legislation in some form was desirable. Only three submissions favoured relying on existing offences.⁶

After the discussion paper was issued the Commonwealth Government introduced the *Criminal Code Amendment (Slavery and Sexual Servitude) Bill 1998* into the House of Representatives based on the draft Bill in the discussion paper. However the Bill lapsed when the Federal election was called. It is notable that the Bill as introduced by the Commonwealth provided for a more limited view of the jurisdictions of the Australian courts to try the offences to be enacted by the Bill and that it specified that it was not intended to exclude or limit the operation of any other law of the Commonwealth or any law of a State or Territory.⁷

The Committee does not propose to recommend changes to the jurisdictional split agreed between Commonwealth and State and Territory Governments. It takes the view that it is not its business to do so, beyond pointing out that, as a matter of practice and policy, there may be a role for both tiers of government in this area. As a general rule, the Committee does not deal with such matters,

6 *Victoria Police, 29 June 1998; the Combined sex worker, AIDs and Jurist organisations submission, 1 July 1998; and the WA Supreme and District Courts submission, 22 May 1998. Most law enforcement agencies favoured having the proposed offences - the AFP, WA and Tasmania Police. The NSW DPP was also in favour of having offences.*

7 *The Commonwealth Bill provided for broad jurisdiction within and outside Australia for the slavery offence but took a more restrictive approach in relation to the sexual servitude offence. It provided that a person commits the sexual servitude offence only if the conduct constituted the alleged offence is to any extent engaged in outside Australia and the sexual services to which the alleged offence relate are to any extent provided, or to be provided within Australia (clause 30.4(1)). It provides that it does not matter if the person is or is not an Australian citizen or resident but requires the consent of the Attorney-General to the prosecution where the accused is not a citizen or resident or incorporated in Australia (clauses 30.5 and 30.6). Finally, the Bill specifically says that it is not intended to exclude or limit the operation of any other law of the Commonwealth or any law of a State or Territory (clause 30.7).*

although, of course, they are of inevitable importance when, in particular, the implementation of specific international obligations are involved. The Committee contents itself with pointing out that while traditional ways of thinking about things say that slavery is an “international matter” and therefore one for implementation by the Commonwealth while rape (for example) is a “domestic matter”, and therefore one for implementation by the States and Territories, it is nevertheless true that both involve the implementation of international agreements. There mere fact that as a federation, we tend to think of issues as belonging to particular boxes of “jurisdiction” within the federation does not necessarily mean that they are best dealt with in that way. The same is true of “sex slavery”.

The “Sex Slavery” Proposal

Commonwealth interest in “sex slavery” or “sexual servitude” pre-dates the issue of the discussion paper by several years. From the beginning the Commonwealth proposal focused on the international trade in women and children for the purposes of prostitution with particular attention being given to the traffic in people from Asian countries to Australia for commercial sexual purposes. A part of that trade involves the recruitment of children or young women from the poorer regions of developing countries, their import into Australia and employment in the sex trade in Australia under conditions which amount to “slavery”, “involuntary servitude” or under what might be called servile conditions⁸.

The Australian Federal Police (AFP) have reported to the Commonwealth Attorney-General that there are a number of people and organisations involved in the trafficking of women for the purposes of prostitution, many of which use false travel documents and/or are also involved in narcotics trafficking, that large sums of untaxed money are involved and that the women concerned are under contract of “debt bondage”, are isolated, coerced, held against their will and are unaware of the kind of employment for which they have been recruited. Fourteen “incidents” have come to the notice of AFP since January 1996. In addition, the Committee has been informed that instances of this kind of happening are being investigated by the National Crime Authority (NCA).

Clearly, there are a variety of arrangements and consequences alleged. In some cases and to various degrees, any pay received by the workers is offset by real or contrived debts or costs for board and lodging, and the degree to which the women are subjected to confinement and restriction is hard to ascertain but can also be reasonably assumed to be variable. It is alleged that some organisers

8 *The Report of the Commonwealth Parliament's Joint Standing Committee on Foreign Affairs, Defence and Trade on **Human Rights and Progress Towards Democracy in Burma** (October 1995) called attention to the problem and recommended that attention be given to the question of legislating against the organisers of this trade.*

and recruiters are Australian nationals and some are not. It is also alleged on grounds that are not entirely reasoned in a transparent way, that current law does not address the issue of the criminalisation of these activities. That matter will be discussed below in more detail.

The original Commonwealth proposal was for the enactment of three kinds of offences criminalising the behaviour of:

- (a) those who, while outside Australia, recruit persons to engage in prostitution in Australia in servile conditions;
- (b) those who, while in Australia, recruit persons to engage in prostitution overseas in servile conditions;
- (c) those who, while in Australia, recruit and/or employ persons in Australia, as prostitutes, in servile conditions.

It was proposed that categories (a) and (b) should be Commonwealth offences and category (c) should be State/Territory offences. These offences were proposed to be a part of the Model Criminal Code and, in particular, in relation to (a) and (b), a part of the Commonwealth *Criminal Code Act*, 1995. The object of the legislation was and remains to target and make specific criminal provision for those who organise and/or facilitate the trade rather than those who are the objects of it. It was proposed that each component have essentially two offences; a first kind which attacks recruitment with the intention that the person recruited be engaged in prostitution in servile conditions; the second which attacks recruitment being reckless as to whether the person recruited will be engaged in prostitution in servile conditions AND the person recruited was in fact engaged in prostitution in servile conditions.

It should be noted that these are all preparatory offences in a combined sense; they have parts of conspiracy in them, and the word “recruit” is used instead of the more traditional “procure” employed at common law and in the general principles of the Model Criminal Code (MCC, Ch 2, s 402 and *Criminal Code Act* (Cth), s 11.2 [“aid, abet, counsel or procure” in both cases]). In addition, the proposed offence based on intention resembles attempt in that it punishes the doing of an act with the intention that something else will happen. Indeed, it is said that “recruit” is preferred to “procure” because it implies that the consequence or result actually intended must have happened. In this sense and in the general policy thrust of the Commonwealth proposals, these proposals bear marked similarities to those involved in the enactment of the Commonwealth *Crimes (Child Sex Tourism) Amendment Act*, 1994. There is, however, a possible distinction. Compared to the subject-matter of the child sex tourism legalisation, there is less likelihood that the behaviour the subject of the offence will also be a criminal offence in a number of overseas countries in which it may be committed.

As the discussion above should make clear, the definition of “servile conditions” is a key point in the proposal. The last form of the proposal contained the following definition:

“‘Servile conditions’ include but are not limited to one or a combination of any of the following conditions:

- (i) where a person, employed to engage in prostitution, is not free to terminate that employment, or is not free to terminate it within a reasonable time and/or on reasonable terms;
- (ii) where a person, employed to engage in prostitution, is not free to decline to render sexual services to a particular person or persons;
- (iii) where the employer of a person employed to engage in prostitution, may transfer the person’s contract of employment [to be defined] to another employer, without that person’s consent;
- (iv) where a person, employed to engage in prostitution, is not free, without fear of retribution, to leave his or her place of employment or residence according to his or her wishes or choosing;
- (v) where a person’s sexual services are pledged to another as security for a debt, and the value of those services, as reasonably assessed, is not applied towards the liquidation of the debt or the length and nature of the sexual services to be rendered are not reasonably limited and defined;
- (vi) where the payment which a person derives from being employed to engage in prostitution is so unreasonable that the employment is in the nature of employment under servitude.”.

A number of submissions argued that the notion of sexual servitude should be broadened to deal with either:

- (a) servitude of a non-sexual kind; or
- (b) what was alleged to be sexual malpractice that did not amount to servitude as such but could be said to have similar effects.

An example of the first kind of submission is that provided by the New South Wales Department for Women.⁹ The general point of a part of the submission was as follows:

“The problems encountered by illegal workers in the sex industry are labour related issues. Non-recognition of such suggests a moral agenda. ... The Department is aware that workers in the clothing, textile and footwear sector, particularly outworkers, are at risk of serious levels of exploitation. Outworkers are often newly arrived migrants with limited English skills and little understanding of Australian culture, laws and services, who work at home and consequently remain isolated. Although many workers are here legally, they are misled in relation to their industrial rights and the security of their immigration status. Subcontractors exercise enormous power ... Some encourage workers to claim Social Security or not pay tax to cover the shortfall in their wages, then reveal the full illegality of the action, and threaten to tell government agencies or the police which they say, will result in the worker being deported.”

Some submissions argued that the proposed offences should extend to other *non-commercial* sexual relationships, notably the specific area of “mail order brides”. Indeed, some went so far as to urge bringing a great deal of domestic violence under this sort of offence. For example, the South Australian Women’s Legal Service stated:¹⁰

“...the incidence of control, abuse and exploitation of women who are sponsored to enter Australia as partners of Australian citizens constitutes a very significant problem for the Australian community. ... Anecdotal evidence from women, particularly women from other countries and cultural backgrounds, continue to suffer enforced isolation, excessive control by their partners through threats of force and, frequently, varying degrees of physical and emotional violence. ... *We consider the distinction between commercial and domestic sexual servitude to be an irrelevant one. ...* We submit that although some aspects of domestic control and abuse of women may be covered by existing laws, the creation of a separate offence dealing with the issue is warranted.” (emphasis added).

9 Ms R Henderson, Director General, Department of Women NSW, 9 July 1998. Similar submissions were received from Commonwealth Department of Immigration and Multicultural Affairs, 3 July 1998; Criminal Bar Association of Victoria, 29 June 1998; and the ACT Women Lawyers Association, 9 July 1998.

10 Ms L Bruchanan, Solicitor, Womens Legal Service SA Inc, 4 August 1998. The Committee received a number of submissions along these lines.

While this may all be so, it was not and is not part of the brief given to the Committee, which was slavery in general and sexual servitude in particular. In general terms, the Committee is of the opinion that to describe such practices in law or in fact as “slavery” devalues the core meaning of the word and the very serious nature of the crime against humanity involved in chattel slavery and true debt bondage and involuntary servitude. It may be that the Committee’s recommended “sexual servitude” offence can provide a useful model with which to address any proposed criminalisation of illicit outworker practices in other industries. But that is not a matter for the Committee. Nor will the Committee be party to the criminalisation of some forms of domestic violence as “crimes against humanity”, however much the forms of domestic violence described in the submission are to be appropriately condemned by society. The Committee does not condone any of these practices. It simply points out that this is not the context in which to deal with them.

It should also be acknowledged that a number of these submissions went on to argue that the Committee should make recommendations about the treatment of victims of these crimes and, in particular, about their treatment as refugees and their immigration status.¹¹ The general point was that in the absence of sympathetic treatment of the victims of these crimes, there would be inadequate incentive for them to report on and give evidence against the perpetrators. That may be so, but these issues are well beyond the terms of reference given to the Committee. However, the Committee has included as Appendix 2 of this report a summary of the current position in relation to the immigration status of such people. Should any reader wish to comment on this issue, the Committee will direct the comments to the appropriate part of the Commonwealth Government.

11 *Community Consultation on Sexual Slavery and Servitude, South St Kilda, 16 July 1998; Department of Women NSW, 9 July 1998; Women’s Legal Resource Group (Vic), 13 July 1998; Women’s Electoral Lobby (SA), 7 July 1998; ACT Women Lawyers, 9 July 1998; Commonwealth Office of the Status of Women, 7 July 1998; and Womens Legal Centre (ACT), 1 July 1998.*

Model Provisions

Introduction

Slavery

The Committee began by considering the need to replace existing law, such as it is, criminalising slavery and, in particular, chattel slavery. The Report of the Australian Law Reform Commission had made a more than merely persuasive case for doing so and had suggested an appropriate model with which to begin. The Committee decided that the words of the ALRC offence should be augmented by the words of the relevant international agreements which spelled out the notion of the slave trade in more detail.

The more difficult question was whether or not to attempt to create a general offence of involuntary servitude. The dissenting opinion of Brennan J in *Kozminski* developed a convenient starting point which would look something like the following:

- “(1) Any person who holds another in involuntary servitude or sells another into any condition of involuntary servitude, for any term is guilty of an offence.
- (2) ‘**Involuntary servitude**’ includes the use of physical force, or the use of physical force, or threat of legal process or fraud or deceit used against any person, or to compel a person, to enter a state of involuntary servitude.
- (3) While no one factor is dispositive, complete domination over all aspects of the victim’s life, oppressive working and living conditions, and lack of pay or personal freedom are the hallmarks of that slave-like condition of involuntary servitude.”.

The Committee indicated in the discussion paper it could not recommend such a general offence. While it understood very well what was the target of such an offence, it could not contemplate the effect of such a wide and indefinite offence on, for example, the modern approach to industrial relations or the employment of innovative sanctions such as community service and home detention by courts and correctional institutions.

Some submissions argued from various standpoints that the Committee should deal with prostitution as such, either by recommending its legalisation, or by refusing to deal with and restrict the freedom of women to earn money and thereby better their lot in life.¹² The Committee takes the view that this is not

¹² *The Combined sex worker, AIDS and Jurist organisations submission, 1 July 1998*; ; *Department of Women NSW, 9 July 1998*; *Womens Legal Resource Group (Vic), 13 July 1998*; *ACT Women Lawyers, 9 July 1998*; and *Womens Legal Centre (ACT), 1 July 1998*.

in its terms of reference and declines to enter into the fray of general prostitution law reform. On the other hand, some submissions argued that the slavery and sexual (or general involuntary) servitude offences should be merged, so that there was only one offence.¹³ The Committee has made clear the reasons why it is unable to accept this idea, both in the discussion paper and in this report, and was unpersuaded by any arguments made to the contrary.

Debt Bondage

The Committee was well aware that the traditional definition of slavery and the slave trade in Imperial legislation (and in places where Imperial legislation was re-enacted, such as New Zealand) was really a product of the early nineteenth century because it was directed specifically at the nineteenth century (and earlier) practices that social reformers were determined to outlaw. This was traditional chattel slavery pure and simple, and really directed at the shipping of Africans to North America and associated plantations at that time. History shows that the reformers had a very hard time even getting agreement on that agenda.

But times have changed. In particular, attention was directed, particularly after the American Civil War, to the variation of what can be called “debt bondage”. An adaptation of the definition of “debt bondage” from the 1956 Convention would look like the following:

“Involuntary servitude also includes the case where a person’s services or work are pledged to another as security for a debt, and the value of that work or those services, as reasonably assessed, is not applied towards the liquidation of the debt or the length and nature of the work or services to be rendered are not reasonably limited and defined or not reasonably related to the amount of the debt.”.

The USA has debt bondage or peonage statutes because that was an historic practice there and in Mexico. The international conventions after 1945 also included debt bondage and like practices because they were then extended beyond traditional chattel slavery to involuntary servitude.

The Committee was therefore left with the decision whether to include the practice of “debt bondage” in the slavery offence. The Australian Law Reform Commission had decided to do so, and the Committee, while conscious of the problems that even this partial venture into incorporation of the more vague notion deriving from involuntary servitude may pose, was persuaded that linking

13 *Immigrant Women’s Support Group, 13 July 1998; Department of Women NSW, 9 July 1998; Womens International League for Peace and Freedom, 3 July 1998; Commonwealth Department of Immigration and Multicultural Affairs, 3 July 1998; Office of the Status of Women, Tasmania, 2 July 1998; Womens Legal Centre (ACT), 1 July 1998; National Council of Women of Tasmania, 25 June 1998; Criminal Bar Association of Victoria, 29 June 1998.*

the notion of debt bondage to the central definition of slavery as the exercise of the powers of ownership over a person would restrict the potential breadth of the offence to acceptable limits.

Submissions generally agreed that debt bondage should be included in the definition of slavery, but suggested the Committee could improve the way in which the specific wording of the provisions accomplished the task. The Committee has carefully considered the draft with these suggestions in mind.

‘Sex Slavery’ or ‘Sexual Servitude’

In the discussion paper the Committee expressed the opinion that the original Commonwealth proposals could be improved significantly. In particular:

It was not clear why the worst manifestations of the targeted behaviour are not caught by existing criminal provisions (quite apart from the obvious prostitution and immigration offences). Existing offences against the person (assault, threatening and so on) and violence related dishonesty offences (notably extortion, and fraud) plus the general law on complicity and conspiracy would seem to attack the essence of the perceived problem. New offences should be carefully formulated with the relationship between existing criminal law and the new offences in mind. This is also true in another sense. Prostitution is subject to quite different legal regimes in the various States and territories and those regimes are volatile. These offences must take the relationship between servitude and legal aspects of prostitution carefully into account.

It seems clear that a well founded case of traditional slavery in this kind of area will succeed if the proof is there. In *Decha-Iamsakun* [1993] 1 NZLR 141 (noted (1993) 17 Crim LJ 117), the Crown case was that D imported a Thai woman to New Zealand, paying for her return ticket and passport. She worked as a prostitute for him, and paid most of her earnings to him. D made an offer to sell the woman to an undercover police officer for a sum of money. He was convicted of a slavery offence because of the offer to sell. It is quite clear that the offer to sell would be an offence under a traditional slavery offence - as it should be. It was therefore necessary not only to formulate a slavery offence but to consider with care the nature and history of the relationship, discussed above, between traditional slavery on one hand and wider concepts of servitude and debt bondage on the other.

The key to the proposed provisions is, of course, the notion of ‘servile conditions’. The various suggested components were very wide when compared to international and US definitions of slavery and slave like conditions. Many people on employment contracts

are not “free” to terminate the contracts in reality because of the nature and effect of contractual obligations or industrial relations laws, and many otherwise “legal” prostitutes are not free to decline to render sexual services to assigned clients. The same is true of not being free to leave one’s place of employment without retribution. The common retribution is loss of employment. This is a very common condition of employment. The last “catch-all” component will require evidence to be given about the going rate for sexual services and one wonders who will be ready and able to provide such expert opinion evidence.

While the Committee considers that the worst examples of the conduct covered by the proposed offences will be caught clearly by existing criminal offences, it recognises that its remit from the Standing Committee of Attorneys-General was to make its best attempt at criminal sanctions directed to the problem identified by the Standing Committee. The Committee therefore devised a version of an involuntary servitude series of offences employing the criteria suggested by the Commonwealth as manifestations of the specific prostitution related topic referred to the Committee. It therefore concentrated on the indicia of involuntary servitude, that is, the use of force, or threats of various kinds, in order to compel a person into the provision of sexual services with the effect that that person is deprived of freedom of movement or personal decision-making. The offences are properly called “sexual servitude” as they are based on servitude criteria rather than slavery criteria.

Jurisdiction

Crimes against humanity are crimes against international law and are also known as crimes *jure gentium*. According to international law on the three commonly agreed crimes against humanity - piracy, slavery and genocide - there are no jurisdictional limitations. The offender can be tried wherever he or she is found, wherever he or she is alleged to have acted. In short, what is known as “universal jurisdiction” applies. Australian courts should have jurisdiction to try the defendant wherever the conduct or its consequences happened, whether the accused or the victim are Australian citizens or residents or not. There should be no jurisdictional limits to these offences at all.

It is a serious question whether the Commonwealth and the States/Territories have the constitutional power to legislate for universal jurisdiction. The most relevant decision is that of the High Court in *Polyukhovich* (1991) 172 CLR 501. That case concerned Commonwealth war crimes legislation which had the effect of making a person liable to serious criminal sanctions in relation to acts committed outside Australia when there was no relevant connection with Australia at all. The High Court held the legislation to be a valid enactment of the Commonwealth.

The judgments in the case are lengthy and diverse. It suffices for present purposes to say that a clear majority held that the Act was a valid use of the external affairs power despite the fact that, in this particular instance, there was an undoubted element of retrospectivity about it. Interestingly, Toohey J held in addition that the Act was a valid exercise of the power of the Commonwealth to enact legislation punishing crimes against international law which attracted “universal jurisdiction”.

It seems clear that the decision in *Polyukhovich* is sufficient authority to empower the Commonwealth version of these offences to claim universal jurisdiction. There can be little doubt that slavery and its incidents are crimes against international law attracting universal jurisdiction and further that the decision in *Polyukhovich* extends beyond war crimes to other established crimes against international law. Indeed, a number of judgments quoted with approval from the decision of the Privy Council in *In Re Piracy Jure Gentium* [1934] AC 586. This decision was, in essence, an advisory opinion on the content of piracy and in the course of it, the Privy Council said (at 589):

“...whereas according to international law the criminal jurisdiction of municipal law is ordinarily restricted to crimes committed on its terra firma or territorial waters or its own ships, and to crimes by its own nationals wherever committed, it is also recognised as extending to piracy committed on the high seas by any national on any ship, because a person guilty of such piracy has placed himself beyond the protection of any State. He is no longer a national, but ‘hostis humani generis’ and as such he is justiciable by any State anywhere.”.

It was submitted in the discussion paper to be clear that the Commonwealth has jurisdiction to enact a crime of slavery and, involuntary servitude as well, in relation to any act committed by any person anywhere and no submission disagreed. Indeed the submission of former Chief Justice, Sir Harry Gibbs positively agreed with this conclusion. However it is also highly likely that the States and Territories do not have such a wide power. The Committee does not intend to enter into a technical debate about the limits of the powers of the States and Territories for such purposes because the principles are not clear and the area of State and Territory criminal jurisdiction in relation to crimes against humanity is unexplored territory. The Committee contents itself with noting that it may be wise as a matter of practice that the Commonwealth is given the exclusive jurisdiction to deal with matters which require the application of universal jurisdiction and that the States and Territories confine their attention to local manifestations of such conduct which may affect local interests directly.

It will be a matter for Ministers to determine to what extent they would wish to take jurisdiction, both in relation to within the Commonwealth of Australia both as a matter of federation and in relation to matters external to the country. The recent Commonwealth Bill took the position that it did not operate to the

exclusion of the jurisdiction of the States and Territories to enact laws in the field, but took a less ambitious view than the Committee of its responsibility in relation to events external to Australia. The Bill provided for wide jurisdiction in relation to the slavery offence but, in relation to the offence of sexual servitude, provided:

- (a) the person was amenable to the jurisdiction of the Australia courts only if the conduct constituting the alleged offence related to sexual services which were provided or were to be provided, within Australia; and
- (b) that the consent of the Attorney-General is required if the accused is not a citizen or resident or incorporated outside Australia.

CHAPTER 9 - OFFENCES AGAINST HUMANITY

PART 9.1 - SLAVERY AND SEXUAL SERVITUDE

9.1.1 Definition of “slavery”

For the purposes of this Part, *slavery* is the condition of a person over whom the powers attaching to the right of ownership are exercised. Slavery includes any such condition of a person resulting from a debt owed or contract made by the person.

9.1.2 Slavery remains unlawful

Slavery remains unlawful and its abolition is maintained, despite the repeal by this Code of Imperial Acts relating to slavery.

Note. The following Imperial Acts (to the extent that they remain in force in the jurisdiction) are to be repealed on the enactment of this Part:

- 5 George IV, ch 113 (the Slave Trade Act 1824)
- 3 & 4 William IV, ch 73 (the Slavery Abolition Act 1833)
- 6 & 7 Victoria, ch 98 (the Slave Trade Act 1843)
- 35 & 36 Victoria, ch 19 (Pacific Islanders Protection Act 1873)
- 36 & 37 Victoria, ch 88 (Slave Trade Act 1873)
- 38 & 39 Victoria, ch 51 (Pacific Islanders Protection Act 1875)

9.1.3 Slavery offences

- (1) A person who intentionally:
 - (a) keeps a slave; or
 - (b) takes part in slave trading,is guilty of an offence.
Maximum penalty: Imprisonment for 25 years.
- (2) For the purposes of this section, slave trading includes:
 - (a) the capture, transport or disposal of a person for the purpose of reducing the person to slavery; or
 - (b) the purchase or sale of a slave; or
 - (c) any commercial transaction involving a slave,or exercising control or direction over, or providing finance for, any such act.
- (3) A person who enters into a transaction for the purpose of securing the release of a person from slavery does not commit an offence against this section.

9.1.1 Definition of Slavery

The section circulated for comment in the discussion paper was largely adopted from the recommendations of the Australian Law Reform Commission, noted above. However, the definition incorporated a notion of 'debt bondage', but only where that condition results in a condition judged to confer a 'right of ownership' over the person. Since the Committee decided against recommending a general offence of 'involuntary servitude', any general notion of debt bondage needed to be in the general 'slavery' offence.

There were a number of submissions which urged the Committee to update and improve the way the definition is worded.¹⁴ This was easier said than done. The Committee was anxious not to move from the traditional understanding of what constitutes slavery so as not to bring in conduct that expands the meaning of the term. While the definition has been streamlined it remains similar to that which was circulated by the ALRC and the Committee in the discussion paper.

14 *Community Consultation on Sexual Slavery and Servitude, South St Kilda, 16 July 1998; WA Supreme and District Courts submission, 22 May 1998; Womens International League for Peace and Freedom, 3 July 1998; Immigrant Womens Support Group, 13 July 1998; and Peter Berman, NSW Deputy Senior Crown Prosecutor, 7 May 1998.*

9.1.1 Definition of “slavery”

For the purposes of this Part, *slavery* is the condition of a person over whom the powers attaching to the right of ownership are exercised. Slavery includes any such condition of a person resulting from a debt owed or contract made by the person.

9.1.2 Slavery remains unlawful

Slavery remains unlawful and its abolition is maintained, despite the repeal by this Code of Imperial Acts relating to slavery.

Note. The following Imperial Acts (to the extent that they remain in force in the jurisdiction) are to be repealed on the enactment of this Part:

- 5 George IV, ch 113 (the Slave Trade Act 1824)
- 3 & 4 William IV, ch 73 (the Slavery Abolition Act 1833)
- 6 & 7 Victoria, ch 98 (the Slave Trade Act 1843)
- 35 & 36 Victoria, ch 19 (Pacific Islanders Protection Act 1873)
- 36 & 37 Victoria, ch 88 (Slave Trade Act 1873)
- 38 & 39 Victoria, ch 51 (Pacific Islanders Protection Act 1875)

9.1.3 Slavery offences

- (1) A person who intentionally:
 - (a) keeps a slave; or
 - (b) takes part in slave trading,is guilty of an offence.
Maximum penalty: Imprisonment for 25 years.
- (2) For the purposes of this section, slave trading includes:
 - (a) the capture, transport or disposal of a person for the purpose of reducing the person to slavery; or
 - (b) the purchase or sale of a slave; or
 - (c) any commercial transaction involving a slave,or exercising control or direction over, or providing finance for, any such act.
- (3) A person who enters into a transaction for the purpose of securing the release of a person from slavery does not commit an offence against this section.

9.1.2 Slavery Remains Unlawful

It has been suggested that as the proposed legislation will involve the repeal of the listed Imperial enactments it would be prudent for the Bill to contain a statement that slavery remains abolished. The abolition of slavery is mainly achieved by the proposed offences, however it is desirable to include a clear statement that it is abolished for all purposes - not just the criminal law. The discussion paper did not list the Imperial enactments that can be abolished. Governments will welcome any comments on the proposed list. The list is derived from the report of the Australian Law Reform Commission on this topic published in 1990.

9.1.3 Offences Relating to Slavery

This section is again based on the recommendations of the Australian Law Reform Commission which were in turn based on a modernisation of traditional offences. The Committee decided, however, that the offence of slavery could not credibly fail to prohibit what might be called the act of keeping another person in the condition of slavery. The reformers of the nineteenth century clearly aimed their attack on the slave trade itself, in part because they knew well that no attack of slave ownership by itself would possibly carry the day. That is not the case nearly two centuries later. The discussion paper draft model Bill therefore contained an offence of “possessing” as slave on the basis that this was a familiar status offence designed to supplement the principal offences aimed at an illicit trade. The most obvious example is drugs offences but there are others, notably forgery, housebreaking and receiving offences. On consultation, however, it was pointed out that the result of the discontinuity between the idea of ownership and possession meant that there would be instances of the exercise of rights of ownership which would not be caught by the idea of possession.¹⁵ The Committee thought that this criticism was correct, and struggled with concepts with which to describe carefully (and grammatically) what it wanted to catch. In the end, the idea of “keeping” a slave was settled upon.

The other major difference from traditional slavery offences is that the Committee decided to include within it the notion of managing or financing the slave trade. The concept was incorporated by analogy from the Committee’s discussion paper version of drug offences. This is also the case in relation to the notion of ‘sexual servitude’ in s 9.1.4 below.

The Committee now proposes that the maximum penalty for this most serious offence be 25 years imprisonment. This makes it the same as that recommended by the Committee for manslaughter and aggravated causing of serious harm and appropriately makes it higher than aggravated kidnapping (19 years).

15 *Community Consultation on Sexual Slavery and Servitude, South St Kilda, 16 July 1998; WA Supreme and District Courts submission, 22 May 1998; Womens International League for Peace and Freedom, 3 July 1998; Immigrant Womens Support Group, 13 July 1998; and Peter Berman, NSW Deputy Senior Crown Prosecutor, 7 May 1998.*

9.1.4 Definition of “sexual servitude”

- (1) For the purposes of this Part, *sexual servitude* is the condition of a person who provides sexual services and who, because of the use of force or threats:
 - (a) is not free to cease providing sexual services; or
 - (b) 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 means:

 - (a) a threat of force; or
 - (b) a threat to cause a person’s deportation; or
 - (c) a threat of any other detrimental action unless there are reasonable grounds for the threat of that action in connection with the provision of sexual services by a person.

9.1.5 Sexual servitude offences

- (1) A person:
 - (a) whose conduct causes another person to enter into or remain in sexual servitude, and
 - (b) who intends to cause, or is reckless as to causing, that sexual servitude,is guilty of an offence.

Maximum penalty: Imprisonment for 15 years.

Maximum penalty (aggravated offence): Imprisonment for 19 years.
- (2) A person:
 - (a) who conducts any business that involves the sexual servitude of other persons; and
 - (b) who knows about, or is reckless as to, that sexual servitude,is guilty of an offence.

Maximum penalty: Imprisonment for 15 years.

Maximum penalty (aggravated offence): Imprisonment for 19 years.
- (3) For the purposes of this section, conducting a business includes:
 - (a) taking any part in the management of the business; or
 - (b) exercising control or direction over the business; or
 - (c) providing finance for the business.

9.1.4 Definition of Sexual Servitude

The discussion paper explained that the key to the definition of 'sexual servitude' is that the notion requires proof of force or threats in relation to the various manifestations of sexual servitude, and relates only to the provision of commercial sexual services. That being so, the Committee saw no need to adopt a restrictive notion of 'sexual services' as such. In particular, the Committee was anxious to avoid the use of the term "prostitution", which is defined by statute in a number of jurisdictions and which has attracted some judicial interpretation. Most submissions did not object to the terms 'sexual servitude' and 'sexual services'.¹⁶ The confining concepts also meant that the Committee was not troubled by the breadth of the manifestations listed in subsections (1)(a)-(b).

However the Committee has decided to refine the way in which the confining concepts are expressed. An important concern raised in the submissions was that the provision might capture 'threats' which one might expect in the ordinary course of employment.

The Committee has also moved away from the previous formula which referred to the victim as being by reason of force or threats not free to cease providing sexual services within a reasonable time or on reasonable terms. This has been replaced by a simple reasonable grounds exception.

The Committee believes it assists to list threat of force or deportation as examples of unwarranted threats but agrees with criticism that the reference to other legal process should be removed as a specific example as it could mislead people.¹⁷

It was also decided to remove from the definition the mention of being free to decline to provide services to a particular person or persons. The Committee is concerned that such a serious offence should not apply where someone is happy to provide sexual services, is free to leave, is not beaten or subject to other force; but simply refuses to kiss any clients. It should not be the case that an employer who threatens to sack the person on that basis should be able to be charged with the sexual servitude offence. While there are more serious issues, such as the policy in relation to condoms, the object of these offences is to regulate servitude, not prostitution.

¹⁶ *There was strong support for not using the word 'prostitution' from WA Police, 3 June 1998 because of difficulties with judicial interpretation, while Mr Edward J Free, Bible Teacher, 17 June 1998 said 'Let us call an immoral industry what it really is!!'*

¹⁷ *The Law Society of NSW (31 July 1998) points out people have a social duty to report breaches of the law and the offence should not suggest otherwise. However, the threat is not the only element of the offence and deportation needs to be specified because of the particular relevance of that type of threat.*

9.1.4 Definition of “sexual servitude”

- (1) For the purposes of this Part, *sexual servitude* is the condition of a person who provides sexual services and who, because of the use of force or threats:
 - (a) is not free to cease providing sexual services; or
 - (b) 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 means:

 - (a) a threat of force; or
 - (b) a threat to cause a person’s deportation; or
 - (c) a threat of any other detrimental action unless there are reasonable grounds for the threat of that action in connection with the provision of sexual services by a person.

9.1.5 Sexual servitude offences

- (1) A person:
 - (a) whose conduct causes another person to enter into or remain in sexual servitude, and
 - (b) who intends to cause, or is reckless as to causing, that sexual servitude,is guilty of an offence.

Maximum penalty: Imprisonment for 15 years.
Maximum penalty (aggravated offence): Imprisonment for 19 years.
- (2) A person:
 - (a) who conducts any business that involves the sexual servitude of other persons; and
 - (b) who knows about, or is reckless as to, that sexual servitude,is guilty of an offence.

Maximum penalty: Imprisonment for 15 years.
Maximum penalty (aggravated offence): Imprisonment for 19 years.
- (3) For the purposes of this section, conducting a business includes:
 - (a) taking any part in the management of the business; or
 - (b) exercising control or direction over the business; or
 - (c) providing finance for the business.

There were a number of submissions which expressed the view that there will never be a time when it is reasonable (or warranted) for a person to be deprived of the freedom to refuse the provision of sexual services.¹⁸ This is incorrect. The reality of sex work is that where someone is employed to provide sexual services, there is invariably an obligation under the contract to deal with an assigned customer. To do otherwise would broaden the offence to the extent it would mean almost all employment of sex workers would be caught by the serious sexual servitude offence. This may be the desired result for some people,¹⁹ but is outside the main object of the offence and certainly cannot be made such a serious offence.

The definition of threat also now includes threats to another person, (for example, the victim's child). This is consistent with other threat offences in the Model Criminal Code and was raised in the Women's Legal Resource Group (Victoria) submission.

9.1.5 Sexual Servitude Offences

These offences are related to the slavery offence but are a lesser form of personal servitude.

The modifications to this offence are much more substantial. The key change from the discussion paper draft is that the Committee no longer believes it should be necessary in the procuring offence for the prosecution to prove the person was deceived about the nature or other aspect of the engagement to provide sexual services. The conduct here is correctly and adequately caught by the general causing to enter into sexual servitude offence. Requiring the prosecution to prove deception would place an unnecessary step in the proof of the offence. All the deception does is put the offender and victim into proximity. It is the offenders conduct after that which induces entry into sexual servitude. That conduct could vary considerably ranging from 'friendly' deceptive cajoling to very unpleasant pressure. It may be threats or use of force. The point is that it concerns a victim entering an engagement to provide sexual services which the victim is not free to leave. The offence should not require the use of any particular means to induce entry into sexual services in those circumstances.

This rethink of the offence has also led the Committee to conclude that there is also a need for a preparatory offence which focuses on someone who simply deceives a person to enter into sexual services, (let alone sexual servitude). The new offence is discussed below.

18 *Community consultation on Sexual Slavery and Servitude (South St Kilda), 16 July 1998; Victorian Deaf Society, 29 June 1998; Immigrant Womens Support Service, 13 July 1998; Human Rights and Equal Opportunity Commission, 10 August 1998; and the Commonwealth Office of the Status of Women, 7 July 1998.*

19 *Some submissions were quite direct about this and proposed that prostitution be completely banned, for example, Marion Smith, Convenor of the Social Issues Committee of the Presbyterian Women's Association, 25 July 1998.*

9.1.6 Deceptive recruiting for sexual services

- (1) A person who, with the intention of inducing another person to enter into an engagement to provide sexual services, deceives that other person about the fact that the engagement will involve the provision of sexual services is guilty of an offence.

Maximum penalty: Imprisonment for 7 years.

Maximum penalty (aggravated offence): Imprisonment for 9 years.

- (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.

9.1.7 Increased penalty for aggravated offences relating to sexual servitude

- (1) For the purposes of this Part, an offence against section 9.1.5 or 9.1.6 is an aggravated offence if the offence was committed against a person under the age of 18 years.
- (2) If the prosecution intends to prove an aggravated offence, the charge must allege that the offence was committed against a person under that age.
- (3) In order to prove an aggravated offence, the prosecution must prove that the accused intended to commit, or was reckless as to committing, the offence against a person under that age.

There was overwhelming support for a substantial increase in the penalties for the sexual servitude offence. In the discussion paper the Committee favoured a maximum penalty of 7 years imprisonment because of similarity of the proposed offence to threat, unlawful detention and causing harm offences which have penalties in the same range. On reflection, the conduct is much closer to what is involved in slavery than is suggested by a maximum penalty of 7 years and includes much more sinister elements than the threat and unlawful detention offences. The penalty should also be assessed in the context of sexual offences where the maximum penalty for the basic offence is 15 years imprisonment. Added to this were calls for special attention to situations where children are the victim.²⁰ Consistent with the Committee's policy in relation to other chapters of the Model Criminal Code, it is proposed the maximum penalty where the victim is under age of 18 years is 19 years imprisonment. The aggravated penalty provision, section 9.1.6, is consistent with the approach taken elsewhere in the Model Criminal Code.

9.1.6 Deceptive recruiting for sexual services

This preparatory offence is aimed at a very limited class of deceptions designed to recruit sex workers by concealing the fact that the engagement will be one involving the provision of sexual services. It does not matter whether the sexual services in prospect will involve any element of servitude. Specific preparatory deception in relation to actual sexual servitude would be covered by attempt.

The justification for this offence is that it targets quite a specific kind of social evil, which is akin to the harms which we penalise as fraud, though it does not fall within the fraud prohibitions. So far as sexual servitude offences are concerned, it is a true preparatory offence. The defendant is penalised because this kind of conduct will frequently be a prelude to sexual servitude. The threat is narrowly defined in recognition of the fact that employment engagements to provide sexual services are *sui generis*.

The maximum penalty for this offence would be substantially less than the penalty for sex servitude offences - 7 years imprisonment.

²⁰ For example, the submissions of the National Children and Youth Law Centre, 29 June 1998; Womens Legal Centre (ACT), 1 July 1998; and the Commonwealth Office of the Status of Women, 7 July 1998.

9.1.8 General provisions

(1) Territorial nexus

In proceedings for an offence against this Part, it is immaterial whether the accused engaged in the conduct constituting the offence within or outside this jurisdiction.

(2) No nationality requirement

In proceedings for an offence against this Part, it is immaterial whether the accused is or is not an Australian citizen or a resident of Australia.

(3) Institution of proceedings

Proceedings for an offence against this Part must not be commenced without the consent of the Attorney General if:

- (a) the conduct constituting the offence is to any extent engaged in outside Australia; and
- (b) the accused is not an Australian citizen, a resident of Australia or a body incorporated by or under a law of the Commonwealth or of a State or Territory.

However, a person may be arrested for, charged with, or remanded in custody or released on bail in connection with, an offence against this Part before the necessary consent has been given.

(4) Double jeopardy

If a person has been convicted or acquitted in any other jurisdiction of an offence against a law of that jurisdiction in respect of any conduct, the person cannot be convicted of an offence against this Part in respect of that conduct.

9.1.8 General provisions

Jurisdiction: Territorial nexus and no nationality requirement

This section has been drafted in order to give effect to the policy of taking 'universal jurisdiction' discussed in the commentary above. The Committee notes that the equivalent provisions in any Commonwealth legislation is likely to be more sophisticated because of the need to carefully define Commonwealth, State and Territory responsibilities. As has been mentioned above, the Committee's main focus is the substance of the offences, however the main point being made here is that it is appropriate for these offences to be the subject of universal jurisdiction.

Institution of proceedings

In light of the policy in favour of 'universal jurisdiction' and the seriousness of the offences, particularly the moral stigma attached to them, the Committee was of the opinion that occasions may well arise when considerations of the response of another country against the accused may arise in the decision whether to institute proceedings or not and therefore thought that, the consideration of the Minister in such cases is warranted.

Double jeopardy

It is important with offences of this type that the rules in relation to double jeopardy are stated.

CHAPTER 9 - OFFENCES AGAINST HUMANITY

PART 9.1 - SLAVERY AND SEXUAL SERVITUDE

9.1.1 Definition of “slavery”

For the purposes of this Part, *slavery* is the condition of a person over whom the powers attaching to the right of ownership are exercised. Slavery includes any such condition of a person resulting from a debt owed or contract made by the person.

9.1.2 Slavery remains unlawful

Slavery remains unlawful and its abolition is maintained, despite the repeal by this Code of Imperial Acts relating to slavery.

Note. The following Imperial Acts (to the extent that they remain in force in the jurisdiction) are to be repealed on the enactment of this Part:

- 5 George IV, ch 113 (the Slave Trade Act 1824)
- 3 & 4 William IV, ch 73 (the Slavery Abolition Act 1833)
- 6 & 7 Victoria, ch 98 (the Slave Trade Act 1843)
- 35 & 36 Victoria, ch 19 (Pacific Islanders Protection Act 1873)
- 36 & 37 Victoria, ch 88 (Slave Trade Act 1873)
- 38 & 39 Victoria, ch 51 (Pacific Islanders Protection Act 1875)

9.1.3 Slavery offences

- (1) A person who intentionally:
 - (a) keeps a slave; or
 - (b) takes part in slave trading,is guilty of an offence.
Maximum penalty: Imprisonment for 25 years.
- (2) For the purposes of this section, slave trading includes:
 - (a) the capture, transport or disposal of a person for the purpose of reducing the person to slavery; or
 - (b) the purchase or sale of a slave; or
 - (c) any commercial transaction involving a slave,
or exercising control or direction over, or providing finance for, any such act.
- (3) A person who enters into a transaction for the purpose of securing the release of a person from slavery does not commit an offence against this section.

9.1.4 Definition of “sexual servitude”

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

- (a) is not free to cease providing sexual services; or
- (b) 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 means:

- (a) a threat of force; or
- (b) a threat to cause a person’s deportation; or
- (c) a threat of any other detrimental action unless there are reasonable grounds for the threat of that action in connection with the provision of sexual services by a person.

9.1.5 Sexual servitude offences

(1) A person:

- (a) whose conduct causes another person to enter into or remain in sexual servitude, and
- (b) who intends to cause, or is reckless as to causing, that sexual servitude,

is guilty of an offence.

Maximum penalty: Imprisonment for 15 years.

Maximum penalty (aggravated offence): Imprisonment for 19 years.

(2) A person:

- (a) who conducts any business that involves the sexual servitude of other persons; and
 - (b) who knows about, or is reckless as to, that sexual servitude,
- is guilty of an offence.

Maximum penalty: Imprisonment for 15 years.

Maximum penalty (aggravated offence): Imprisonment for 19 years.

- (3) For the purposes of this section, conducting a business includes;
 - (a) taking any part in the management of the business; or
 - (b) exercising control or direction over the business; or
 - (c) providing finance for the business.

9.1.6 Deceptive recruiting for sexual services

- (1) A person who, with the intention of inducing another person to enter into an engagement to provide sexual services, deceives that other person about the fact that the engagement involves the provision of sexual services is guilty of an offence.

Maximum penalty: Imprisonment for 7 years.

Maximum penalty (aggravated offence): Imprisonment for 9 years.

- (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.

9.1.7 Increased penalty for aggravated offences relating to sexual servitude

- (1) For the purposes of this Part, an offence against section 9.1.5 or 9.1.6 is an aggravated offence if the offence was committed against a person under the age of 18 years.
- (2) If the prosecution intends to prove an aggravated offence, the charge must allege that the offence was committed against a person under that age.
- (3) In order to prove an aggravated offence, the prosecution must prove that the accused intended to commit, or was reckless as to committing, the offence against a person under that age.

9.1.8 General provisions

- (1) **Territorial nexus**

In proceedings for an offence against this Part, it is immaterial whether the accused engaged in the conduct constituting the offence within or outside this jurisdiction.

- (2) **No nationality requirement**

In proceedings for an offence against this Part, it is immaterial whether the accused is or is not an Australian citizen or a resident of Australia.

(3) **Institution of proceedings**

Proceedings for an offence against this Part must not be commenced without the consent of the Attorney General if:

- (a) the conduct constituting the offence is to any extent engaged in outside Australia; and
- (b) the accused is not an Australian citizen, a resident of Australia or a body incorporated by or under a law of the Commonwealth or of a State or Territory.

However, a person may be arrested for, charged with, or remanded in custody or released on bail in connection with, an offence against this Part before the necessary consent has been given.

(4) **Double jeopardy**

If a person has been convicted or acquitted in any other jurisdiction of an offence against a law of that jurisdiction in respect of any conduct, the person cannot be convicted of an offence against this Part in respect of that conduct.

An explanation of the operation of criminal justice visitor visas

Most matters concerning the right of individuals to be present in Australia are governed by the *Migration Act 1958* ('the Act'), which is administered by the Department of Immigration and Multicultural Affairs ('Multicultural Affairs'). Criminal Justice Visitor Visas, which comprise Part 2, Division 4 of the Act, provide a means for a person to be present in Australia when no other form of visa is available if that person is required for the administration of criminal justice. The Criminal Justice Visitor visa ('CJV visa') scheme is of direct relevance for non-Australian persons who may be the victims of practices proscribed by this discussion paper.

Generally speaking, non-Australians do not have any right to be present in Australia unless they have been granted a valid visa. Non-Australians in Australia who possess such a visa are described by the Act as *lawful non-citizens*; non-Australians in Australia without such a visa are *unlawful non-citizens* (sections 13 and 14 of the Act). The Act obliges Multicultural Affairs to detain unlawful non-citizens and remove them from Australia as soon as reasonably practicable: ss189 and 198 of the Act.

A non-Australian who is present in Australia without a visa, or who has a visa obtained on a fraudulent basis (such as on the basis of a false identity), or who contravenes the conditions of his or her visa (usually by working when prohibited from doing so) will generally be detained and removed from Australia following cancellation of any visa he or she may have.

The non-Australian victims of sexual servitude will often fall into this category. In many instances they will be present in Australia on the basis of a visa granted to a false identity, or will be working in contravention of his or her visa. Although the testimony of these witnesses will often be crucial to the prosecution of individuals for offences proscribed by this discussion paper, they will not be permitted to remain in Australia unless issued a CJV visa.

The process of issuing such a visa is relatively straightforward, although it does require close co-operation between several agencies. In practice, it is usually the Federal or State police forces or Director of Public Prosecutions offices which require the presence of the non-Australian witnesses in Australia. The relevant agency (the requesting agency) may arrange for the issue of a CJV visa if the non-Australian is required for the 'administration of criminal justice'. The phrase 'administration of criminal justice' is defined by section 142 of the Act to essentially be the investigation of a criminal offence, the prosecution of a person for an offence, or the punishment by imprisonment of a person for the commission of an offence. The second aspect of this definition, namely the 'prosecution' component, will be of most relevance here. The components of the 'administration of criminal justice' definition are to be broadly interpreted: see the unreported decision of Justice Nathan of the Victorian Supreme Court in *re Barudea*, dated 7 March 1995. The 'prosecution' component will certainly include the period comprising the trial of the accused and any appeal that may follow.

Appendix 2

Having identified a particular non-Australian as a person whose testimony is required for a prosecution, the requesting agency may issue a CJV certificate under the relevant provision of Division 4: see sections 145-148 of the Act. The appropriate provision is dictated by whether the requesting agency is a Federal or State body, and whether the witness is presently in Australia or not. Having identified the appropriate section, the requesting agency may issue a CJV certificate. If the witness is present in Australia, the certificate prevents the removal of the witness from Australia by Multicultural Affairs: section 150 of the Act. In either case the valid issue of the CJV certificate is a necessary precondition for the issue of a CJV visa by Multicultural Affairs to the non-Australian.

In order for a visa to issue, the Act requires Multicultural Affairs to be satisfied that certain costs pertaining to the non-Australian will be met by the requesting agency. These are the costs of keeping the non-Australian in Australia, and the costs of bringing the non-Australian to Australia and removing him or her from Australia following the giving of testimony. The requesting agency is required to give a written undertaking to Multicultural Affairs that it will meet all relevant costs.

After being satisfied that the prescribed costs will be met, that the non-Australian is correctly identified (usually by means of a passport) and that the non-Australian is genuinely required in Australia for the administration of criminal justice, Multicultural Affairs will arrange for the issue of a CJV visa to the non-Australian. The entire process, from the issue of the certificate to the issue of the consequent issue of the visa, can be effected very rapidly if required. More commonly however the process can take a day or so.

The visa is open-ended and remains in existence for as long as the non-Australian is required to be present in Australia for the administration of criminal justice.

Following completion of the giving of testimony, the non-Australian witness will no longer be required in Australia for the 'administration of criminal justice'. The requesting agency is required to arrange for the cancellation of the CJV certificate issued in relation to the witness: section 162 of the Act. The cancellation of the certificate automatically results in the cancellation of the CJV visa issued to the witness: section 164 of the Act. If this were to occur whilst the non-Australian remained in Australia, and the person does not qualify to remain in Australia on other grounds, then he or she would become an unlawful non-citizen and liable to immediate detention and removal by Multicultural Affairs. However, in most cases the requesting agency arranges for the non-Australian to depart Australia voluntarily prior to cancellation of the certificate.

Overall, the CJV system is an effective means of arranging for non-Australian witnesses to give their testimony in Australia in situations where they could not otherwise gain a visa to enter or remain in Australia.

List of written submissions received

Submissions were received from the following contributors and were considered by the Committee in preparing this report:

Peter Berman, Deputy Senior Crown Prosecutor's Chambers

NSW Legal Aid

Aboriginal Legal Service of WA (Inc)

The Hon Justice Scott, Supreme and District Courts Model Criminal Code Committee (WA)

Sir Harry Gibbs

Linda Matthews, Commissioner for Equal Opportunity

Australian Reproductive Health Alliance

John & Shirley McConville

Edward Free, Bible Teacher

Western Australia Police

Tasmania Police

Australian Bureau of Criminal Intelligence

Lesley Anne Beards

NSW Director of Public Prosecutions

Queensland Indeterminate Sentenced Prisoners Association

NSW Baptist Churches

Australian Institute of Criminology

Australian Federal Police

Social Issues Committee, Catholic Women's League

Brenda & John Chant

S M Chilton

The Coalition Against Trafficking in Women - Australia

Victoria Criminal Bar Association

National Children's & Youth Law Centre

Combined sex worker, AIDS and Jurist organisations submission (Scarlet Alliance, Australian Federation of AIDS Organisations, Australian National Council on AIDS and Related Diseases, The International Commission of Jurists (Australian Chapter), and the Asia Pacific Network of Sex Work Projects)

Appendix 3

Australian Law Reform Commission
The National Council of Women, Tasmania
Women's Legal Centre, Canberra
South Australian Medical Women's Society
Department of Education, Community & Cultural Development, Office of
the Status of Women, Hobart
Department of Immigration & Multicultural Affairs
Victoria Police
Centre for Philippine Concerns-Australia, Brisbane
Ms L. Bruchanan, Solicitor, Womens Legal Service (SA)
Women's International League for Peace and Freedom
Office of Status of Women - Department of Prime Minister & Cabinet
Peninsula Presbyterian Charge
ACT Legal Aid Office
Women's Electoral Lobby (SA) Inc
Customer Service, Victorian Deaf Society
Immigrant Women's Support Service, West End
Women's Legal Resource Group Inc, Melbourne
Women's Action Alliance (Vic) Inc, Victoria
Department for Women, Woolloomooloo
Community Consultation on Sexual Slavery & Servitude, South St Kilda
WA Director of Public Prosecutions
Mrs Marion Smith
South Australian Parliamentary Counsel
NSW Law Society
Human Rights & Equal Opportunity Commission
Mrs Margaret Blackman
NESB, SWOP
The Committee is grateful to all contributors for their thoughtful submissions.