

IFYS LTD and Project Paradigm welcome the opportunity to provide a submission on the *Targeted Review of Divisions 270 and 271 of the Criminal Code Act 1995 (Cth)*.

Section 3: Key concepts and definitions;

Australia defines exploitation in section 271.1A to include slavery or a condition similar to slavery, servitude, forced labour, forced marriage, and debt bondage. Whilst the explanation is exhaustive with a broad reference made to slavery or slavery like conditions, an issue arises in that the Modern Slavery Act fails to identify and accurately contextualise the unique experience of child sexual exploitation explicitly congruent with the stance assumed by other international jurisdictions. A good example of this is the positioning of sexual exploitation independently within the overarching definition of exploitation in the UK's own Modern Slavery Act (2015). Project Paradigm has provided a recommendation to the amendment of the Modern Slavery Act (Cth) to include a nuanced understanding of child sexual exploitation to bring this legislation in line with overseas legislative examples. The key elements of our submission are outlined below:

Modern slavery is an umbrella term used to describe a range of serious human rights breaches (**National Action Plan**) including all forms of slavery, human trafficking and exploitation which manifest in many forms. It is often considered to be a hidden crime due to the complex power and control dynamics rendering victims unable to come forward because they are trapped in a cycle of intimidation, fear and shame. The prevalence of the different types of modern slavery across Australia varies by region and may change over time. Reporting is partial and quantifying the number of victims is challenging. At present the *Modern Slavery Act* encompasses criminal offences relating to deprivation of civil liberties, human trafficking, forced marriage and child labour. The National Strategic Partnership on Child Sexual Exploitation are concerned at the omission of child sexual exploitation (CSE) as a recognised type of modern slavery within its definition/s, noting that, in order for the Act to be effective it is imperative that CSE is recognised within a wider continuum of exploitation, violence and abuse.

Currently, under the Act, slavery describes situations where coercion, threats or deception are used to exploit victims and undermine their freedom. The Act defines modern slavery with reference to eight types of serious exploitation; trafficking in persons, slavery, servitude, forced labour, forced marriage, debt bondage, deceptive recruiting for labour or services and the worst forms of child labour. The Act fails to identify the unique experience of child sexual exploitation explicitly.

Under the **National Action Plan to Combat Modern Slavery (2020-2025)**, sexual exploitation is mentioned under trafficking, captured under the 'purpose' field but fails to extrapolate on the issue throughout the remainder of the document.

The **Objectives of the Modern Slavery Act** are that it complements other laws and international conventions that criminalise and forbid slavery. Currently, the Australian Modern Slavery Act legislation stands in stark contrast to international legislation and policies which clearly enshrine child sexual exploitation within the context of human trafficking and modern slavery regimes.

In the USA, CSE is recognised under human trafficking legislation as “sex trafficking of children,” (U.S Advisory Council on Human Trafficking, 2022).

The US Department of Justice defines Human Trafficking as:

“Human Trafficking, also known as trafficking in persons, is a crime that involves compelling or coercing a person to provide labor or services, or to engage in commercial sex acts. The coercion can be subtle or overt, physical or psychological. Exploitation of a minor for commercial sex is human trafficking, regardless of whether any forms of force, fraud or coercion was used,”

(US Department of Justice, 2022).

The US Department of Justice notes that anyone can be trafficked, but in the case of children, those in the welfare or juvenile justice system, who have run away or are homeless, who are unaccompanied or do not have lawful immigration status in the United States are more likely to be targeted as are members of marginalized communities (2022).

Originally prohibited under the 13th Amendment to the U.S Constitution which barred slavery and involuntary servitude in 1865, since 2000, Congress has passed 9 associated bills (US Department of Justice, 2022a). Prior to this, attempts to respond to human trafficking fell under several federal statutes related to involuntary servitude and slavery but these were “narrow and patchwork,” (US Department of Justice, 2022a).

The United Kingdom’s Modern Slavery legislation echoes the US position by clearly articulating that modern slavery includes sexual exploitation, criminal exploitation, and forced labour and domestic servitude and furthermore, children (those aged under 18 years) are considered victims whether or not they have been coerced, deceived or paid to secure their compliance.

Article 4(a) of the Council of Europe Convention on Action against Trafficking in Human Beings (the Convention) defines ‘human trafficking’ as:

“The recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another

person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”

What is being observed: What is Child Sexual Exploitation?

The United Nations says...

Child sexual exploitation is the abuse of a child where some form of remuneration is involved whereby the perpetrators benefit – monetarily, socially, politically, etc. Exploitation constitutes a form of coercion and violence, detrimental to the child’s physical and mental health, development, and education (2015).

Offenders are deceptive and manipulative, targeting children and young people in effective ways, ensnaring, isolating and controlling away from families and support networks, without people to look out for them or recognise the signs that they are being exploited.

The Modern Slavery Act (Cth) outlines modern slavery as conduct which would constitute:

- (a) an offence under Division 270 or 271 of the *Criminal Code*; or
- (b) an offence under either of those Divisions if the conduct took place in Australia; or
- (c) trafficking in persons, as defined in Article 3 of the Protocol to Prevent, Suppress and punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, done at New York on 15 November 2000 ([2005] ATS 27);
- (d) or the worst forms of child labour, as defined in Article 3 of the ILO Convention (No. 182) concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, done at Geneva on 17 June 1999 ([2007] ATS 38).

Expanding on the United Nations Human Rights Instruments, the preamble states that Parties to this Protocol declare effective action against trafficking. Exploitation is clearly captured within the definitions listed under subsection c, Article 3 terms which states

- (c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article;
- (d) "Child" shall mean any person under eighteen years of age.

Within **Australia’s international engagement strategy on human trafficking and modern slavery: delivering in partnership** report, it clearly articulates that the crimes of trafficking and slavery are not only viewed as criminal offences but as human rights violations and highlights the crucial role that Governments play in combatting modern

slavery in their own jurisdictions, as lawmakers, regulators and through law enforcement.

Recommendations:

Australia does not currently have a consistent national definition of CSE making it difficult for practitioners and agencies to identify, monitor and respond effectively (Royal Commission into Institutional Responses to Child Sexual Abuse, 2017). Much of the discourse and language relating to CSE within a social policy and law enforcement context, focuses on online grooming or child exploitation material (CEM) (CDPP, 2019), both of which, while important issues, distract from CSE that takes place in-person in communities (Townson, 2019).

Project Paradigm wishes to see a nationally consistent definition of CSE as it pertains to community contexts coupled with the Modern Slavery Act, amended to reflect child sexual exploitation under the definition and descriptions of child trafficking and a clear reference made to CSE. The fragmented nature of the supporting documents that have been designed to support community understandings of the Modern Slavery Act legislation need to be realigned so all definitions of modern slavery are consistent and inclusive of CSE in its own right.

Section 5: Division 271 – Trafficking in Persons;

“Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of abuse of power or of a position of vulnerability or of the giving and receiving of payments or benefits to achieve the consent of a person having control of another person, for the purpose of exploitation...,” defined as per Article 3 of the Trafficking Protocol. At present, in cross-border trafficking offences, there is a requirement that the trafficking offence involves crossing an Australian boarder. This implies a physical, geographical movement for the offence to be made.

- Currently definitions of coercion, threat and deception are used to achieve the physical elements of trafficking in person’s offence.
- ‘Sexual services’ is used in the context of Australian child trafficking offences.

Recommendations:

It is our organisational position that these offences should be amended so as to remove the physical, geographical movement across a border to a broader understanding that trafficking offences do not necessitate geographical movement to constitute the offence alone. It’s imperative that legislation acknowledges that traffickers can use sophisticated schemes that take victims hundreds of miles away (taxis, buses, trains, air travel) from their homes or exploit them right in their own neighbourhoods. Both scenarios constitute an offence of trafficking. The term, ‘proposed transportation’ should also be included so as to recognise the trafficker’s intent to move a person for the purpose of exploitation regardless of whether or not movement has indeed occurred. We support the use of explanatory commentary under the offence that unpacks trafficking to iterate it is irrelevant within the charge if the person/s consents to the

travel. We also support the use of legislation that also highlights intent to commit a trafficking offence, namely harbouring, providing, obtaining, soliciting, patronizing, aiding, abetting, counselling or procuring.

Coercion, threats and deception could be coupled with manipulation, promise or inducement and fall under the banner of force, fraud and coercion. Force includes physical restraint, physical harm, sexual assault, beatings and threats to harm loved ones/family members. Monitoring and confinement is often used to control victims, especially during early stages of victimization to break down the victim's resistance. Fraud includes false promises regarding employment, wages, working conditions, love, marriage, or better life. Over time, there may be unexpected changes in work conditions, compensation or debt agreements, or nature of relationship and coercion, includes threats of serious harm to or physical restraint against any person, psychological manipulation, document confiscation, and shame and fear-inducing threats to share information or pictures with others or report to authorities. We support the inclusion of an accompanying statement that iterates the notion that while consent may have initially been given it was not informed and as such is rendered meaningless by the actions or intent of the traffickers.

It is crucial that the legislation recognises and comprehends the complex sophisticated power and control dynamics that occur with respect to CSE. There are patterns of vulnerability and victimisation whereby young people are specifically targeted, methodically groomed and entrapped in to sexual activity. The complexity of the transactional nature of CSE often engenders conflicting feelings in victims because they might be receiving something in return for abuse. Young people may find themselves in constrained circumstances within which they feel that they are making informed 'choices' and therefore present as being in 'control.' This dichotomy frequently impedes the capacity of professionals to recognise when abuse is occurring.

We oppose the use of 'sexual services' in the context of Australia's child trafficking offences. The term 'sexual service' has a commercial connotation with implying consent to a business arrangement or transaction. The Revised Explanatory Memorandum contextualises the use of sexual services. However, it is our position that the term 'service' diminishes and trivialises the severity and exploitative nature of the crime which encapsulates commercial sexual activity, prostitution and participation in child sexual abuse and the production of child exploitation material, whilst simultaneously ignoring the preceding elements of grooming and coercion that are likely to have occurred beforehand.

Trafficking in Persons - orphanages;

"Exploitation', the definition of which includes slavery, servitude, forced labour, debt bondage, deceptive recruiting and forced marriage, fails to accurately report the type of exploitation that occurs within orphanages or other institutional settings also referred to on occasion as 'paper orphaning' - where children are 'constructed on paper through documentation as orphans.'

Children are placed in orphanages for a myriad of reasons including poverty, natural disasters, armed conflict, homelessness, family conflict, neglect, illness, discrimination, and disability. Orphanages and institutional care settings are considered safe havens for children where care providers are led to believe that orphanages will provide better standards of material support, including the provision of food, shelter, clothing, health care and education. Research shows that there are complex relationships between orphanages, CSE and other harmful practices. Institutional care settings are emerging as the third most prominent site of CSE in South-East Asia (AIS, 2019).

Recommendations

Whilst there is prevalence of orphanage trafficking occurring in countries where there is significant tourism and profit made from foreign donors, adopters and volunteers, Australia, given it's complicated history with the Stolen Generation and documented abuses of power undertaken across institutional settings, needs to ensure that its legislation pertaining to orphanages and institutional settings remain vigilant, informed and responsive. We support the adoption of the term 'institution-related trafficking' which has been coined to refer to all the manifestations of trafficking in the context of institutional care for children. Project Paradigm supports mandated specialist training for children in care as set out by LUMOS,

- Ensuring child-centric, integrated, individualised and trauma-informed support for suspected and identified child victims of trafficking.
- Provide children in residential care and care leavers with appropriate information and advice to equip them with the knowledge to stay safe.
- Provide care leavers with vocational training and work opportunities.
- Inform all children about their right to issue complaints and report abuse.

Challenges with the reasonable person test

A feature of both the servitude and forced labour definitions, is the existence of the reasonable person test. The reasonable person test is an objective and hypothetical test commonly used within Australian law to establish a benchmark for predictable, expected behaviour. With the existence of coercion, threat or deception, the reasonable person test is applied to determine whether a reasonable person of the same background, in the same circumstances would have behaved in the same manner as the respective victim and survivor.

Recommendations

With respect to the reasonable person test, our concerns focus upon whether this test will ever/has ever been applied to children and young people across exploitative offences? We feel that this test would not adequately consider the impact of complex power and control dynamics on the decision making capabilities of young people. Often vulnerable young people impacted by CSE struggle to identify themselves as victims of exploitation as they have been deliberately targeted, methodically groomed and gradually introduced into what they consider a consensual 'relationship'. 'Young people

once in a 'relationship' then find themselves in an increasingly abusive, deceptive, emotionally manipulative, restrictive situation with few avenues for external help seeking, support and guidance therefore drastically impacting their decision making capabilities. We propose that the reasonable person test not be applied to those young people in this unique situation without careful consideration and appropriate guidance by individuals with specific knowledge about the experience of CSE and trafficking as it pertains to children and young people. It is widely accepted that a best practice approach is one that is contextual to the victim's situation, sensitive and trauma informed.

Challenges with victim and survivor testimony

Australian law provides protection for vulnerable witnesses giving evidence in Commonwealth criminal proceedings, including victims and survivors of trafficking and other slavery-related offences. However, there remains a strong reliance on victim and survivor testimony.

Recommendations

Research reflects a high attrition rate in child sexual offence cases given the often traumatic and lengthy judicial processes. We consider that additional measures are necessary to ensure that children and young people and their families are adequately supported throughout their legal journey. Longitudinal research undertaken by Elmi et al (2018) revealed that CSA victims who testified more than once showed higher levels of emotional distress and secondary victimization two years after the initial assessment was undertaken. We support trauma informed, child centric programs such as the New South Wales pilot program, Child Sexual Offences Evidence Program (CSOEP), which pre-records children's evidence and appoints "witness intermediaries" who help children to understand questions and articulate answers effectively. We would also support additional mandatory measures for services funded to support children and their families throughout this process and encourage the inclusion of mandatory CSE training for those involved within the court system - judges, bench clerks, associates, magistrates.

This submission was prepared for and on behalf of **IFYS LTD** and **Project Paradigm** by:

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