Phone – 02 9690 0551
Fax – 02 9690 1013
Post – P. O. Box 2167,
STRAWBERRY HILLS NSW 2012
Street – Suite 9, 245
Chalmers Street, REDFERN
NSW 2016
Email – info@scarletalliance.org.au
Web – www.scarletalliance.org.au

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600
Australia
legcon.sen@aph.gov.au

31 July 2012

Dear Committee Secretary,

Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012

Thank you for the opportunity to comment on the proposed Amendments to the *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012*.

Scarlet Alliance, the Australian Sex Workers Association, is the peak national sex worker organisation in Australia. Formed in 1989, the organisation represents a membership of individual sex workers and sex worker organisations. Through our project work and the work of our membership we have very high access to sex industry workplaces in the major cities and many regional areas of Australia. The organisational membership of Scarlet Alliance who provided these direct services informed the development of this submission and endorse the content.

The Scarlet Alliance Migration Project, staffed and managed entirely by migrant sex workers, was formally first funded in 2009. The project aims to fill the evidence gap ensuring that policy responses to trafficking issues represent the actual experiences of migrant sex workers in Australia. The project works to support evidence based policy development, capacity development of sex worker peer educators in delivering services to migrant sex workers, and produce translated information for distribution to sex workers of Thai, Chinese and Korean language backgrounds.

Scarlet Alliance has played a critical role in informing governments and the health sector, both in Australia and internationally, on issues affecting workers in the Australian sex industry.

Please find attached our submission. Unfortunately, our organisation and membership does not support the proposed amendments as the likely negative impact on sex workers, particularly migrant sex workers, outweighs any perceived gains of these changes. It is unacceptable to lower the threshold of proof and increase the criminalisation of peripheral individuals in order to increase numbers of trafficking prosecutions.

We look forward to appearing at the public hearing on this issue later in the year.

If you would like further information on these recommendations please do not hesitate to contact Scarlet Alliance Migration Project Manager, Jules Kim.

Regards,

Janelle Fawkes
Chief Executive Officer

Kane Matthews
President

Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012
Scarlet Alliance Submission

Scarlet Alliance is deeply concerned at the direction of, intentions behind, and implications of the Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012.

Our submission informed by experiences of migrant sex workers in Australia

Scarlet Alliance member organisations and projects have the highest level of contact with sex workers, including contract workers, in Australia of any agency, government or non-government. Our projects have very high levels of access to sex industry workplaces in the major cities. Many of our sex worker organisations and projects within Australia have CALD (culturally and linguistically diverse) projects employing bi-lingual project workers. These staff provide information, education and support to women who may be working under contract in Australia or who may be experiencing exploitation or trafficking-like conditions.

It is these experiences and the high level of contact and support provided by our membership to CALD communities within the sex industry, including women who have entered Australia under contract, which informs our feedback.

The Amendments do not take a prevention and rights-based approach to trafficking

Scarlet Alliance opposes the direction of the proposed Amendments to the legislative framework. We submit that a rights-based and sex-worker driven approach to sex work and migration and the promotion of evidence-based prevention strategies is the most effective way to combat trafficking. Preventative approaches that address the circumstances that create trafficking should be pursued over criminal justice approaches. The most successful approaches prioritise the needs, agency and self-determination of trafficking victims over criminal prosecutions and increased surveillance. They address labour exploitation through a focus on prevention, industrial rights, occupational health and safety, civil remedies, statutory compensation, and equitable access to visas, migration channels and support.

Increased police surveillance, lower thresholds and no rights for migrant workers

The House of Representatives' Explanatory Memorandum makes obvious the rationales that lie behind these Amendments. The Bill in all its aspects intends to increase the numbers of prosecutions rather than actually assist people experiencing exploitative working conditions in Australia.

The absence of trafficking cases in Australia, scarcity of witnesses and difficulties in prosecution are noted and indeed, lamented, in the Explanatory Memorandum. The United States 2012 Trafficking In Persons Report notes that this year the Australian Federal Police investigators in Human Trafficking Teams identified 11 victims (including six forced labour), a decrease from 31 victims identified in the previous reporting period.[1]

The absence – of trafficking cases, witnesses and successful prosecutions – is not understood as evidence of an absence of trafficking in Australia. Instead, it is used as an excuse to increase police powers, introduce heightened surveillance, lower the thresholds of offences, lower burdens of proof,

[1] TIP Report, p 74. Australia.

criminalise more activities and people, fund law enforcement instead of victim compensation, and increase abilities to bump up prosecution statistics without improving the rights of migrant workers.

Although a human rights rhetoric is used in the Explanatory Memorandum, protecting migrant workers human rights, or providing protections or remedies, is clearly not the catalyst for the Amendments. Indeed, the Bill infringes a number of human rights and makes no attempt to provide key rights found in the Migrant Workers Convention or engage in law reform to address underlying structural, systemic, or state-sanctioned causes of labour exploitation.

Instead, the Explanatory Memorandum states explicitly in its General Outline that the 'purpose' of the Bill is 'to ensure that the broadest range of exploitative behaviour is captured and criminalised', 'intended to strengthen the existing range of offences' and 'to ensure that law enforcement agencies have the best tools available to investigate and prosecute perpetrators.' To do so, the Bill 'increases the penalties' and 'broadens the definitions' of offences.

This is obviously for the purposes of bumping up prosecution figures, instead of and without allocating any active rights, avenues or funding for migrant workers who may be affected by these policies, and without regard for the negative impacts these Amendments will inevitably have on migrant workers in Australia.

Removal of consent as a relevant factor

The Bill proposes to make consent an irrelevant factor in proving that an offence has taken place. Amendments to the *Criminal Code* mean that a victim's consent or acquiescence is not a defense to conduct what would otherwise be an offence. This means that a person's consent or acquiescence to travel for work will be of no relevance when proving a trafficking offence.

Consent is a fundamental element in determining whether an offence has taken place in a range of areas of law. This Amendment – by removing consent as a relevant factor – enters dangerous territory. Sex work policy has been particularly fraught on this issue – anti-sex work feminists have claimed that sex workers cannot consent to sex work, that all sex work is violence, and accused us of false consciousness and brainwashing for decades. This has lead to the criminalisation of our work, with disastrous impacts for sex workers' health and safety.

This Amendment echoes these sentiments and takes them further, applying them to migrant workers. Implicit is an assumption that migrant workers have no agency, free will, and can be treated as minors who cannot make decisions for themselves. In effect, the Australian Government is regulating *who can consent* to travel, work, have sex, and earn money. Not recognising consent limits who can be heard and access justice. In a wider socio-economic and geo-political sense, it takes away the agency of people to work to provide money for their family, prevents people from moving across borders, reinforces racist stereotypes, keeps people in poverty, and prescribes who is able to make rational decisions. Although the laws intend to criminalise acts 'suppressing the person's free will, their self-respect, as well as the ability to make decisions for themselves', this is exactly what the Amendments do to migrant workers by stating that their consent is, according to the Explanatory Memorandum, 'irrelevant'.

The notes on this Amendment in the Explanatory Memorandum do not adequately deal with the significance of consent. They state, 'In prosecutions for slavery and slavery-like offences, consent has been a difficult issue' (31 However in all the prosecuted cases, all the sex workers knew they would be sex working in Australia and had consented to do so. The fact of their consent to sex work was not a barrier in securing the prosecutions.

Consent is a fundamental element under the International Labour Organisation (ILO) *Convention No 29 on Forced or Compulsory Labour*. The term 'forced or compulsory labour' is defined as 'all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily'. Lack of consent is clearly a key element constituting this offence. The Amendments are contrary to this definition on consent.

The Explanatory Memorandum explains the intention behind this Amendment (at 31): 'To allow a defendant to escape liability because his or her offending achieved the desired effect in bringing about these changes in a victim so that the victim appears to acquiesce in his or her treatment would be inexcusable'. However, in such a situation the behaviour of the defendant could be captured under existing laws, but this does not mean that consent is necessarily irrelevant, that it cannot be withdrawn, that it cannot be informed, or that people cannot consent to some acts and not others. Already jurisprudence exists around what constitutes informed consent. Yet the Amendments mean there is no room for consent to be recognised or taken seriously at all.

In essence, this Amendment means that ways in which a person might mount a defence or prove innocence are now thwarted. This is dangerous for people who have been falsely accused, for the purposes of make a government quota. If the Government is concerned with ensuring migrant workers are making informed decisions and understand the terms and conditions of their entry, contracts and visas, a more effective approach would be to provide for the multilingual translation of travel and visa information.

Intercepting communications and breaching privacy

Another significant concern is the Amendments to the *Telecommunications (Interception and Access) Act 1979* that will enable the interception of communications for potential serious offences. Because a number of offences have been redefined or introduced by the Bill, many offences are now classified as 'serious offences' – including forced labour, forced marriage, habouring a victim and organ trafficking, debt bondage – giving extreme latitude and scope to this power.

The Bill will 'enable law enforcement agencies to obtain warrants to intercept communications of persons of interest, including third persons they are likely to be in contact with, for the purpose of investigating these crimes.' This power is extremely wide. Government agencies will be able to intercept, spy on, and tap communications of 'persons of interest' and 'third persons'. Police could tap drivers or security of sex workers, and potentially also services (including sex worker organisations, NGOs or health services). The real possibility of having one's communication tapped will deter migrant workers from making phone calls that may be necessary for support or safety, and will inevitably act to isolate sex workers.

Although the Explanatory Memorandum states that information collected is supposed to only be used for 'defined purposes and purposes connected with the investigation of serious offences', Scarlet Alliance is concerned that this information could be used to investigate and then prosecute people for summary offences (in particular relating to sex work), leading to the harassment, arrest and deportation of migrants. Further, the information/record is to be kept until 'the Chief Officer of the agency is satisfied that the record is no longer required for a purpose permitted by the legislation' (5). Sex workers in some states in Australia systematically have their privacy compromised where they are forced to register on a state or police database and their personal details are kept on permanent record. These records have been used against sex workers in court in proceedings wholly unrelated to their sex work experience. These Amendments pose the same danger. Although people still have judicial avenues through which to challenge the validity of the interception, the burden and expense is upon them to bring the action, after the fact.

The Explanatory Memorandum recognises explicitly that the Bill 'limits the right to privacy'. These impingements on the right to privacy are not 'reasonable'. The 'legitimate objective' given in the Explanatory Memorandum is 'investigating and prosecuting slavery and people trafficking-related offences'. This objective is problematic in itself – it does not propose to end slavery or trafficking in Australia – the focus is purely on investigation and prosecution. The Explanatory memorandum laments that there is not enough evidence to prosecute crimes (witness testimony has 'proven to provide insufficient evidence for the prosecution of offences.'(4)) Further, the means adopted are far more restrictive than they need to be to achieve that objective, and do nothing positive for people experiencing trafficking-like conditions in Australia. The Amendments will only curtail the human rights of migrant workers further.

This interference on the right to privacy is contrary to rights protected under the *1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*. This treaty provides under Article 7 that State Parties must ensure the rights of all migrant workers without distinction of sex or race. Article 14 provides that no migrant worker will be subject to arbitrary interference or attacks upon their privacy, Article 16 provides that the State will effectively protect migrant workers against threats and intimidation (including by public officials), and Article 25 states that migrant workers shall enjoy treatment not less favourable than that applying to state nationals.[2] Australia is yet to sign or ratify the Convention.[3] If the Australian Government is actually concerned about slavery, servitude and trafficking, Government should immediately ratify the Migrant Workers Convention and adopt the provisions into domestic law.

Harbouring offences will criminalise everyone around sex workers and push them underground

Scarlet Alliance is deeply concerned at the introduction of new harbouring offences. Introducing a new offence for harbouring or receiving a victim of trafficking or slavery is an unnecessary and dangerous offence that seeks to prosecute people who are *not* the perpetrators of trafficking or slavery offences. A person can be found guilty of harbouring or concealing another person where this assists or furthers a third persons purpose in relation to any offence relating to trafficking and slavery. The Explanatory Memorandum notes that 'While it is arguable that conduct involving harbouring, receiving or concealing a victim may already be criminalised under the existing trafficking offences, it is unclear whether these offences adequately target the conduct of a person who facilitates a trafficking offence but is not explicitly involved in transporting, recruiting or trafficking persons' (50).

In effect, this means that the Bill will impact on – and criminalise – people who are *not* traffickers, who are peripherally involved, or caught up unknowingly or unintentionally, or who are intending to assist migrant workers. Further, it could target receptionists, drivers, support staff or colleagues of sex workers. Criminalising everyone around them will make migrant sex workers isolated and hinder their access to support and services. It will force migrant sex workers into more dangerous workplaces, and encourage sex workers to work alone – by criminalising all people who may potentially hire them, and anyone who assists, provides accommodation for or conceals non-citizens. This could also potentially criminalise people providing health/emotional/other support for migrant sex workers. The person can be found guilty regardless of whether the third person has been found guilty or prosecuted, and heavy penalties apply (imprisonment for 12 years). This is a very broad definition and has the danger of encompassing people who are not guilty of trafficking or slavery offences or who are attempting to assist victims.

[2] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990, accessed at http://www2.ohchr.org/english/law/cmw.htm on 17 May 2011.
[3] Status of Ratifications accessed at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&lang=en on 16 May 2011.

Increasing the penalties applicable to the existing debt bondage offences

As travel options are limited for sex workers, many sex workers, particularly those from developing countries, engage in what is perceived to be excess debt in order to travel. We have heard many anecdotal reports of this from sex workers. The application of this offence does not materially help sex workers in this situation who are still subject to the debt once returned to their home country with reduced opportunities to repay the debt.

The way the Amendments treat debt bondage is contradictory. Although debt bondage is usually seen as a lesser offence, and this is acknowledged in the Explanatory Memorandum, the document then goes on to say that 'it is now apparent that the existing penalty for this offence does not appropriately reflect its relative seriousness.' Scarlet Alliance is concerned that the Bill is increasing the penalties for debt bondage merely because it has been easier to prove in court. This is without any attempt for visa reform that would negate the need for sex workers to incur debts in order to travel in the first place.

There is opportunity for sex workers on contract to have these laws used against them. We have heard reports of immigration or the Australian Federal Police being called once sex workers have cleared their debt. These laws are unnecessarily punitive and still negatively affect the people whom they are supposed to help – migrant sex workers. A simpler and more sustainable approach to ending reliance on contracts is to provide safe migration channels through reforms to the *Migration Act 1958*, in addition to Government investment in translation and peer education for migrant populations.

Forced marriage

Scarlet Alliance is concerned at the use of criminal law to eliminate and punish non-Western relationship structures. Criminalising forced marriage will have wide reaching and damaging community consequences. It will mean that people affected by forced marriage may not speak out if there is a possibility their parents will face criminal sanctions. It will increase the likelihood that parents may send their children overseas to be married. It will increase the isolation of the victim from their community and family. A criminal approach to forced marriage brings difficulties in prosecution, when the majority of potential witnesses may be family members and unlikely to testify. It decreases the likelihood that people experiencing forced marriage will seek assistance.

The introduction of a forced marriage offence provides that marriage is a forced marriage if 'because of the use of coercion, threat or deception, one party to the marriage (the *victim*) entered into the marriage without freely and fully consenting' (a widened definition of coercion applies here – discussed below). This is the only offence in the Bill in which consent is actually considered relevant, as it serves the purpose of further criminalisation. Ironically, although the Commonwealth Government does not recognise these relationships at law to construe benefits, it happily recognizes a range of different relationships for the purposes of criminalisation: 'forced marriage is not limited to marriages recognised by Australian law' (23). In fact, marriage can include 'marriage-like relationships' and 'a marriage or registered relationship that is void, invalid, or not recognised by law for any reason' (24).

The offence is extraordinarily wide in its ambit. The offence is so broad that it captures a person who intentionally engages in conduct reckless as to whether that conduct causes a person (the victim) to enter into a forced marriage, but also 'those whose conduct may contribute to the victim entering a marriage' (25) – this could include siblings offering advice, or conversations with mentors or family, friends in a parent or person's decision-making. The explanatory memorandum makes it clear that

wedding planners can be criminalised – offering this as a specific example, where a (perhaps wholly unconnected) person organises a wedding ceremony and was aware that there was a substantial risk that the victim would enter a forced marriage. The definition of forced marriage applied 'whether the coercion, threat or deception is used against the victim or another person' (for example, family or friend) (24). Further, it is an offence to be a party to a forced marriage (directed at the spouse who is not a victim). Painting one party as a victim and the other as the perpetrator is divorced from the contexts in which arranged marriages occur. The Explanatory Memorandum makes it clear that the extensions of criminal responsibility apply to this offence – to capture the conduct of people who aid, abet, counsel or procure the marriage, or who conspire with another person to bring about the marriage. In effect, this means entire communities can be criminalised. The offence carries between four and seven years imprisonment.

People get married for a range of reasons, including cultural reasons, including in the west. In some cases, people decide to engage in sham marriages (or are 'forced' to) because of the discriminatory and restrictive migration laws and policies in Australia. For sex workers, it is extremely difficult to obtain a visa if you are over thirty and do not have a large amount of money to study – in this case a spousal visa is the only legal way to sex work in Australia.

The Explanatory Memorandum clearly illustrates the offence is unnecessary. It explains that there are already existing provisions for the current Criminal Code to deal with forced marriage. It is possible for it to be covered by trafficking offences (if a person is brought in from overseas) or sexual servitude if this applies within a marriage. There is no need for further criminalisation.

The logic given in the Explanatory Memorandum also makes no sense – '*To ensure* the conduct involved in forcing a person into marriage is recognised as a crime in its own right (*regardless of whether there was exploitation within the marriage*) the specific criminalisation of forced marriage *is required*'. (24) There is no evidence that criminalisation of any kind is required here. There appears to be no consultation with people who have undergone arranged marriages into their experiences to suggest criminalisation is *required*. Couples in happily arranged marriages may then have their entire families and communities prosecuted under a White law that does not respect or understand their customs, religions or traditions.

Forced marriage offences are effectively government-endorsed racism, criminalising non-western customs, traditions and religious practices, relationship structures, communities and criminalising difference. These Amendments have the potential to criminalise entire families and communities.

Smuggling now a trafficking offence

In this Bill, there is no visa reform or recognition of discriminatory migration policies that disadvantage people from developing countries. There is no recognition of the ways in which people rely on third party agents to travel *because of* restrictive migration policies. These third parties give people opportunities to travel and collect money to negate risk.

Instead, the Amendments mean that some forms of people smuggling now constitute trafficking. The Amendments place blame upon people creating opportunities to travel, rather than on restrictive migration laws that prevent travel.

While UN Conventions define a trafficking offence as involving deception force or threat (smuggling does not have this element) – the Bill proposes to make smuggling offences count as trafficking

offences, with no requirement to prove this element of deception, force of threat. The Bill makes wholly different offences of 'trafficking', just to meet trafficking prosecution numbers.

These Amendments create a new category of trafficker that extends the definition of the UN Protocol. In the Protocol, exploitation is an inherent element of trafficking… Now, it is enough for exploitation to be an *effect* of facilitating someone's travel, not part of it. It is now enough to have the act and purpose but not the means – exploitation could just be an effect, This is dangerous because in Australia, migrant workers do not have equitable access to industrial rights mechanisms, especially when their work is not considered legal. Exploitation then occurs *because* of the lack of rights provided to migrants workers from the Australian government. Now, people facilitating entry will be punished for the exploitation of migrant workers that occurs at the hands of the Australian Government.

Changed definition of coercion and threat

Amendments to the definition of coercion significantly broaden the offence. The intention behind this redefinition is clearly to broaden the ambit in order to obtain more successful prosecutions. As the Explanatory Memorandum states 'it has proved challenging to convince juries that the offender's conduct constitutes the offence'(10). Under this Bill, coercion can include 'taking advantage of a person's vulnerability'. Scarlet Alliance is concerned that this could potentially criminalise a range of people, such as clients, lawyers, NGOs, media, and third parties profiting from facilitating travel (travel agents), who all could be construed as 'taking advantage' of a person's vulnerability.

The definition of threat is also expanded to include threat of coercion. Again, the Explanatory Memorandum states that 'it has proved challenging to convince juries that the offender's conduct constitutes the offence' (12). This Amendment is unnecessary, and the inclusion of these elements are redundant and dangerously broad. The current definition of threat already contains threat of 'any detrimental action' which captures and includes physical or psychological threats contained in 'coercion'.

Conducting a business – criminalising everyone around a sex worker

The Bill then criminalises further people around sex workers. The definition of conducting a business (now includes 'taking any part in the management of the business, exercising control or direction over the business, and providing finance for the business.' This means that (for forced labour or servitude offences, for example), a large number of people around a migrant worker may be prosecuted. For example – a bank could be prosecuted for loaning money to a sex industry business, newspapers for printing sex worker advertisements, or receptionists working for a sex service provider. Already discrimination occurs from banks (in Australia sex workers report not being able to get loans from banks, and in India, sex workers have responded by starting their own bank,) as well as from newspapers (higher advertising premiums and discriminatory policies against sex workers have been consistently documented). These Amendments would perpetuate discriminatory practices against sex industry businesses and act towards making our profession unworkable. We are also concerned that parts of management or businesses who have no knowledge of exploitation can be liable. Evidence from Sweden, where everyone around a sex worker is criminalised, illustrates that this isolates sex workers from crucial support and services.

Forced labour

Scarlet Alliance does not support the introduction of new offences of forced labour under Division 270 of the *Criminal Code Act 1995* (270.6 and 270.6A). This offence is unnecessary as the elements, aside from (b), are already covered in the offence of servitude. A reasonable person test has now been added – The offence now includes whether 'a reasonable person in the position of the victim would not consider himself or herself to be free to cease providing the labour or services'. The only purpose of this additional law seems to be to lower the threshold of proof so that a person can be found guilty of forced labour in the case that servitude cannot be established or proven. Forced labour is now criminaised as a standalone offence –currently it is an offence where it is connected to the offence of people trafficking and thus already covered in the legislation.

Under a forced labour offence, the offender must have 'the capacity to use the victim in a substantially unrestricted manner for the duration of the victim's servitude' (21). It is unclear what this means for sex workers, and we are concerned that this could include an employer or sex industry business operator giving a person shifts or clients.

Introducing this offence takes all the mistakes made by former legislation that focused on the sex industry, and repeats and applies those same mistakes to all other industries. As stated above, labour exploitation should be dealt with in an industrial relations framework, with increased avenues for statutory compensation to redress exploitative work conditions, and equitable access for migrant workers to Australian justice mechanisms, arbitration processes and industrial rights protections without necessity of police involvement or fear of arrest or deportation.

Servitude

Scarlet Alliance welcomes the removal of 'sexual servitude' from headings and definitions of servitude. This is an important step in recognising that anti-trafficking legislation has had a skewed focus on the sex industry. However, this inequity does not warrant further criminal justice approaches to labour exploitation across other industries. Rather, criminal justice approaches have driven sex workers underground, inhibited sex workers' access to basic services, consumed significant (financial and labour) resources, and have been unsuccessful in improving working conditions for sex workers. The best approach to addressing labour exploitation across all industries remains through a focus on prevention, labour protections, civil remedies and statutory compensation. The significant resource spend on criminalisation and surveillance of trafficking could have been spent on improving rights and working conditions for migrant workers. This would result in far better outcomes, assisting victims and addressing the causes that create vulnerabilities to exploitation.

Instead the Amendments further a criminal justice approach across other industries. The Explanatory Memorandum states, 'Given the rise in the number of individuals identified as being exploited in industries other than the sex industry (for example, hospitality), it is necessary to recast this definition so it applies more broadly to situations of exploitation in all industries.' (15)

The definition is broadened to the extent that 'the timing of the coercion, threats or deception could occur at any stage during the commission of the offence'. Further, the coercion, threat or deception 'could occur against a person who is not the victim, such as a victim's family or friends'. The causal link is becoming increasingly stretched. Factors listed as 'relevant' in determining whether a person is 'not free' for the purposes of the definition includes 'the economic relationship between the alleged victim and alleged offender', the 'terms of any contract or agreement', and 'their understanding of the English language'. The servitude offences now apply whether or not escape from the condition is practically possible, and whether or not the victim has attempted to escape. Application of English

skills as an indicator of trafficking is a dangerous and racist step. This will limit the already limited employment opportunities for migrant workers as employers will be reluctant to employ someone with limited English skills for fear of being perceived as a trafficker.

If servitude can't be proven, but all the elements were proven except that the victim was significanty deprived of their personal freedom, there is now an alternative verdict of forced labour. Servitude offences will apply when the circumstances of a matter 'do not amount to slavery but nonetheless demonstrate significant inappropriate conduct' (17). What constitutes 'significant inappropriate conduct' is vague – industrial offence, excessive laws, unpaid wages *because* migrant workers don't have ready access to remedies. Migrant workers continue to be seen as victims, rather than workers deserving of positive rights.

The offence of 'causing a person to enter into or remain in servitude' applies where a person's conduct causes another person to enter into or remain in servitude. The term servitude includes that 'the victim must be significantly deprived of his or her personal freedom in respect of other aspects of his or her life' (17). The fact that a person lives and works in the same place can be used to demonstrate that a person is living in servitude. However, such living arrangements are often common for sex workers, who stay or live in brothels to avoid commuting, or because they've been advanced a large sum of money in an unsecured loan. Predominantly it is because of the difficulties in securing accommodation in many cities in Australia. This is recognised to be the case for permanent residents and citizens of Australia but is even more difficulty for migrants.

Slavery and slavery-like offences

Amendments to the *Criminal Code* mean that slavery offences now apply to conduct where a person is not yet a slave, but where a person is (at any later point in time) 'reduced to slavery'. The effect is that an intentional act (a person gives someone a job, refers them to a friend, introduces them to an acquaintance, supports their marriage) which results in another person being reduced to slavery (even sometime later as no time limit is placed on the application of the offence) causes an offence whereby that original person is liable. This is an enormous stretch of causal connection. Conduct that reduces a person to slavery (even unknowingly, which could include a colleague or friend facilitating access to work/acquaintances, support) will carry a maximum penalty of 25yrs imprisonment.

Slave trading

Amendments to the Criminal Code replace the words 'slave trading' with 'slave trading or the reduction of a person to slavery'. The implication of this section is that it may cover a change in business owner. For example, where one business sells a sex industry business to another person, who implements poor working conditions, this Bill means that the original owner could be responsible – and liable, and criminalised – for 'slave trading' or engaging in conduct that has 'reduced a person to slavery'. There is no time limit imposed, meaning that conduct could occur, and ten years later, after a series of events, a person is enslaved, and the original owner could be prosecuted.

The offence also applies where a person 'was reckless as to whether a transaction involved the reduction of a person to slavery, and not only where the offender was reckless as to whether the person was already a slave' (13). This could potentially mean that clients could be prosecuted for not enquiring into the working conditions of workers. The Amendments criminalise 'commercial transaction involving a slave' – including a commercial transaction by which a person is reduced to slavery. Because there is no requirement for knowledge or intention, this could include airlines, travel agents or migration agents. Instead of deferring responsibility, Government should take

responsibility by providing access to rights and translated materials for migrant workers as a first step to ensuring improved working conditions.

Unprotected sex as an indicator of deceptive recruiting

Scarlet Alliance is concerned about the inclusion of unprotected sex as an indicator of deceptive recruiting. Particularly problematic is at 270.7 of the *Criminal Code*, where 'Deceptive recruiting for labour or services' includes the recruiter deceiving a person about the nature of sexual services to be provided, including 'whether those services will require the victim to have unprotected sex' (270.7(1)(f)(ii)). Laws criminalising unprotected sex have always been unsuccessful and counterproductive. Sex workers in Australia continue to have the highest rates of condom use (consistently over 90%), with no measurable differences between migrant, CALD or non-migrant workers. This has been the findings of numerous research projects including, Perkins et al (1979, 1985), Donovan et al(2010), SWOP NSW (2000) , Zi Teng and Scarlet Alliance (2006/07), Sydney Sexual Health Centre (1994) Sydney Sexual Health Centre (2004, 2006). There are no cases of sex worker to client transmission of HIV in Australia and rates of STI's among sex workers are low.

It would be sufficient for (f) to include deception about 'the nature of services provided' and leave the section broad enough to encompass all industries and workplaces. Deception as to the nature of services to be provided could occur in any industry – and is fundamentally a labour rights issue. Sex workers are skilled in range of services, which may not involve risk, and many successfully negotiate risks and act as safe sex educators for their clients.

Funding misdirected towards surveillance, with no Commonwealth compensation scheme

Amendment to Paragraph 21B(1)(d) of the *Crimes Act 1914* relating to the reparation for offences increases the scope of what can be claimed. Where a person is convicted of a federal offence, the court may order that the offender make reparations in respect of any loss suffered 'or any expense incurred, by the person by reason of the offence.' The proposed scope is wider – it includes any loss or expense 'by reason of' instead of 'as a direct result of' but there are still no provisions for instances where the perpetrators cannot pay. There is still no Commonwealth accountability for reparations for trafficking offences. There is no Commonwealth compensation scheme for victims of crime and this is an issue that requires immediate attention.

Scarlet Alliance welcomes changes to the *Crimes Act* making it easier for victims to access reparations. The Amendments mean that reparations can be accessed where (damage) is caused *by reason of* the offence (formerly as a *direct result of).* However, compensation must still be provided by the 'trafficker', and there is no Commonwealth Government compensation scheme prescribed.

The large amounts of funding now being delivered towards surveillance could be spent far more effectively as part of a Commonwealth compensation scheme. The Bill speaks of 'serious offences' but they are clearly not deemed serious enough to warrant compensation. Funding speaks as to the intention of the Bill and how seriously victims and migrant workers and human rights are actually treated. If the Government is seriously concerned about human rights and ending labour exploitation, it is fundamental they invest in a Commonwealth compensation scheme that would have significant positive impacts on people's lives, instead of investing in police power to bolster prosecutorial figures on paper.

Victim support remains conditional upon police assistance and contribution to investigation

Support for victims of trafficking is currently conditional upon a sex workers' 'contribution to a criminal investigation'. This means that migrant sex workers can only access support if they agree to cooperate with police, are referred by police to the support program, and make a "contribution" to a prosecution case. Making support conditional upon police assistance is problematic – support is not conditional for other victims. Further, migrant sex workers involved in trafficking investigations then face increased immigration scrutiny if they want to return to Australia. They are returned by the Australian government to their home country, their debt remains, and they have reduced means of repaying the debt, leading to increased vulnerability and an increased reliance on traffickers for future travel.

Scarlet Alliance submits that access to justice and support should not be conditional upon police assistance. The Australian government should increase avenues for statutory compensation and redress for exploitative work conditions that do not necessitate contribution to a criminal investigation, and provide access to services for sex workers affected by trafficking-related crimes who do not wish to go to the police. This is supported by the UN Special Rapporteur on Trafficking who recommends as an action for Australia to remove the necessity for contribution to an investigation in order to access support.

The fact that the Bill contains no Amendments providing unconditional victim support illustrates clearly that victim support and migrant worker rights are not the catalyst, or even interest, behind these proposed laws. The continuing conditions of victim support make it clear that migrant workers are expendable to the Government unless useful to improve their prosecution statistics and international reputation.

Equitable access to industrial rights mechanisms

Instead of introducing further criminal laws, the Government should increase avenues for statutory compensation to redress exploitative work conditions that do not require contribution to a criminal investigation. Migrant sex workers who experience poor working conditions often do not have access to industrial rights mechanisms for fear of prosecution or deportation. The Fair Work Ombudsman provide remedies regardless of a persons' citizenship status but are obliged to report any illegalities, including irregular migration status. Migrant sex workers need equitable access to Australian justice mechanisms, arbitration processes and industrial rights protections, akin to Australian citizens, without fear of arrest or deportation.

No need for separate trafficking laws

Terms like trafficking, debt bondage, servitude and slavery are wide umbrella terms that have lost meaning, clouded the existing range of specific offences, and been used to criminalise and persecute migrant sex workers. Previous cases brought under trafficking legislation in Australia have could have easily been dealt with under existing legislation.

Contract law, migration law, employment law, occupational health and safety law, fair work law and criminal law already cover offences such as sexual assault, unpaid wages, breach of contract, false imprisonment, fraud, falsification of documents, usury (lending money at exorbitant rates), minimum wage, underage sex work, underage marriage, sham marriages, domestic violence, and allowing a non-citizen working in breach of a visa. Under these laws existing remedies are available which involve less court time, less cost, and better outcomes, for victims and government.

Using human rights rhetoric to reduce access to human rights: Australia is behind international standards in providing legal protection for migrant workers

Any new anti-trafficking approaches must not unnecessarily disrupt the human rights of other workers, particularly the human rights of affected migrant workers. The Amendments use the rhetoric of international human rights law but in fact impinge upon human rights and do no not actively support migrant access to human rights or ratification of the Migrant Workers Convention. While human rights and 'respect for the family' are cited, a criminal justice approach is still employed that will inevitably restrict migrant workers' access to justice, services, industrial rights mechanisms. Criminalisation of forced labour is offered as a means to respect 'the right to work and rights in work' and a means for 'promoting legal and safe working conditions'. International human rights law is being used to justify law and order crackdowns, punitive policies, criminal justice responses, and not actually being used to enhance access to human rights. Although no human right is absolute – it is curtailed to the extent that it doesn't intrude on other human rights – the fundamental approach of these Amendments is flawed.

Criminal Justice approaches to trafficking have increased the stigma and marginalisation of migrant sex workers, led to the criminalisation of our workplaces, and undermined efforts to address labour exploitation. International human rights organisations increasingly report that the greatest threat to the health, safety and human rights of migrant sex workers is government anti-trafficking policy.[4] In our experience, the criminal justice response outlined in the new laws replicates and continues the negative impact of anti-trafficking approaches to date. Criminalisation creates a legal framework that gives people less access to human rights, instead of actually affording people those rights in the first place.

Scarlet Alliance does not support the criminalisation of what is essentially an industrial relations issue. The majority of trafficking-related crimes can be covered within existing criminal laws and/or redressed within the labour framework. Experts attending an international consultation in Prague on the Human Rights Impact of Anti-Trafficking Measures (including advisors to the UN High Commission and representatives from the ILO and IOM) agreed that sex workers do not need a separate set of trafficking laws.[5]

A number of international human rights protections are vital for sex workers. These include: The right to self determination (Art 1 ICCPR; Art 1 ICESCR); the right to liberty and security of person, including not being subjected to arbitrary arrest or detention (Art 9 ICCPR); the right not to be subjected to arbitrary or unlawful interference with their privacy (Art 17 ICCPR); the right of peaceful assembly (Art 21 ICCPR); the right to freedom of association with others (Art 22 ICCPR); the right to work and opportunity to gain a living by work which one freely chooses (Art 6, ICESCR); the right to just and favourable conditions of work, including safe and healthy working conditions (Art 7 ICESCR); the right to freedom of movement and residence within the borders of each state (UDHR 13); the right to partake in government (Art 21 UDHR); the right to free choice of profession (CEDAW Art 11); the right to social security and paid leave (Art 11 CEDAW); the rights of migrant workers to not be subject to arbitrary interference or attacks upon their privacy (Art 14 MWC); the rights of migrant workers to be recognised without distinctions of sex or race (Art 7 MWC); and the rights of migrant workers to be protected by the state from threats and intimidation (Art 16 MWC); and the rights of migrant workers to enjoy treatment not less favourable than state nationals (Art 25 MWC). In

[4] Jeffrey Dabbhadatta et al., 'Changes in Migration Status and Work Patterns in Asian Sex Workers attending a Sexual Health Centre', 2008, 43; Scarlet Alliance, *Submission to Commonwealth Attorney General's Department*, 2004, 4; Elaine Pearson, 'Australia', *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights Around the World*, Global Alliance Against Traffic in Women, October 2007, 52; Busza, Castle et al., (2004) 'Trafficking and health', *British Medical Journal* 328: 1269-1371 at 3.

[5] Scarlet Alliance, *Submission to the Attorney General on the Criminal Justice Response to Slavery and People Trafficking; Reparation; and Vulnerable Witness Protections*, 2011, 4.

addition, The World Association for Sexual Health has produced a Millennium Declaration of Sexual Rights which is adapted by ASSERT, the Australian Society of Sex Educators and Therapists. ASSERT lists 'freedom of choice in adult sexual relationships' and 'freedom to experience and express sexual pleasure', free from 'legal or social sanctions' as 'fundamental and universal rights.'[6]

Australia must move forward with haste in ratifying these international human rights treaties and declarations, without reservations, and in adopting all their provisions into domestic law.

Intentions of the Amendments are flawed: Criminal justice outcomes do not justify the negative impacts of policing migrant sex workers: Criminal law as a tool of oppression

The Attorney Generals Department states that the Bill is aimed at ensuring 'the broadest range of exploitative behaviour is captured and criminalised'. That the new laws will criminalise more activity is not a reason to introduce such laws. The criminal justice outcomes of existing laws do not justify the negative impact past and current policing efforts have had on sex workers' work conditions and human rights. Criminal justice approaches to trafficking, raid and rescue operations, and harassment and detention of Asian sex workers have driven migrant sex workers underground and created barriers to accessing justice, outreach, peer education, industrial rights and occupational health and safety. Criminalisation has increased migrant sex workers' risk of harm and exploitation. Scarlet Alliance is concerned that the same mistakes are now going to be made, this time giving more power to the Criminal justice system to implement what is a flawed approach.

These Amendments do not recognise the ways in which criminal laws historically have persecuted minority groups, including people of colour, migrants and sex workers, resulting in increased persecution and incarceration. This Bill demonstrates fundamental misunderstandings about the role of law, prisons, borders and policing migration in human rights.

The goal of obtaining more successful prosecutions needs to be seriously re-examined. In a policy/legal framework in which sex workers face discriminatory visa requirements, do not have access to safe migration, do not have equitable access to industrial rights mechanisms, fear police because of regular raids, detention and harassment, and are isolated from health and support services, who do these laws actually assist? They will result in more migrants being imprisoned, precluding safe migration, and perpetuating wealth divides.

The more extreme the Government intervention, the greater the adverse impact on those the Government is seeking to protect. People come to Australia hoping to earn money to support themselves and their families. Interruption to this adversely affects their livelihood and their families who rely on them.

Evidence shows police are inappropriate regulators for the sex industry

Consistent and systemic evidence of corruption clearly demonstrates that police are inappropriate regulators for the sex industry. Increased policing and further criminalisation will severely affect sex workers' willingness to engage with police in the event of a crime. One of the major drivers for decriminalisation in NSW was the findings of the Wood Royal Commission showing 'a clear nexus between police corruption [in the NSW Police Force] and the operation of brothels.'[7] In criminalised jurisdictions in Australia Christine Harcourt et al. have found that individual sex workers' ability to seek information, support and health care is 'severely limited by the risk of prosecution.'[8] In their

[6] ASSERT NSW, accessed at http://www.assertnsw.org.au/?page_id=256 on 14 February 2012; World Association for Sexual Health, Millennium Declaration, accessed at http://www.worldsexology.org/sites/default/files/Millennium%20Declaration%20%28English%29.pdf on 14 February 2012.

[7] New South Wales Government (1997), Royal Commission into the NSW Police Service: Final Report – Corruption, 13.

[8] Christine Harcourt et al., 'Sex Work and the Law' at 123.

study, Charlotte Woodward and Jane Fischer found that 'illegal sex workers were more likely to report being harassed (42% compared with 13% of legal sex workers)' by police, and that this harassment included verbal abuse, racial insults, stalking, phone calls and requests for sexual favours.[9]

There have been inadequate changes to the Migration Act during this review

The Migration Act 1958 is listed on the Attorney General's Department website as a piece of 'Key Legislation' relating to 'Australia's people trafficking and slavery offences'. However, despite this prime opportunity, there have been inadequate changes to the Migration Act during this review.

The Australian Migration System requires reform in order to allow for safe migration. At present, conditions for trafficking are created by Australia's discriminatory immigration policies, which favour specific 'skilled' migration from industrialised countries, disadvantage workers from low-income countries, and create a lack of opportunities for sex workers to migrate legally.

Barriers to labour migration include a lack of access to visas and lack of access to migration information generally. Scarlet Alliance has found that migrant sex workers are almost always on a compliant work visa, but are not always aware of their work rights under that visa. There is a lack of quality translated materials, and materials that exist have not always been included effectively. This lack of access to information, combined with a general suspicion and distrust of the Australian migration system is a direct cause of migrant workers':

- vulnerability to trafficking
- vulnerability to slavery
- vulnerability to debt bondage
- vulnerability to exploitation.

The Attorney Generals Department should be considering how the Department of Immigration and Citizenship's policies can cease contributing to the exploitation of people from other countries.

Government must invest in prevention: Current levels of investment are inadequate

There is no need for trafficking to occur in Australia. Trafficking can be prevented by existing infrastructure in Australia. However, a prevention approach needs significantly improved Government investment.

In her presentation for the Asia Pacific Network of Sex Workers in Calcutta in 1998, Lin Chew noted that instead of a 'repressive' model, governments should adopt an 'empowering model', aimed at enhancing and restoring the rights of migrant sex workers, provide support and assistance in an enabling environment and increase autonomy and self-determination. As Chew argues, such an approach would include understanding sex work as a legitimate occupation, recognising the agency of women and girls, strengthening the political and civil rights of sex workers, increasing access to resources, training and jobs, and mobilising for self-representation and participation at all levels.[10]

[9] Charlotte Woodward and Jane Fischer, Woodward, C. & Fischer, J. (2005). Regulating the world's oldest profession: Queensland's experience with a regulated sex industry. *Research for Sex Work*, June, 16-18. Page 17.

[10] Lin Chew, 'Prostitution and Migration: Issues and Approaches', presented to *Asia Pacific Network of Sex Workers*, Calcutta, 1998.

Government *must* introduce escalating investment, with minimal disruption when seeking to improve migrant workers' employment conditions. These approaches need investment, and current levels of investment are inadequate. Scarlet Alliance estimates we would require up to six times the amount of anti-trafficking project funding that we currently have in order to run a genuine prevention program.

Steps the Australian Government should take to prevent trafficking include:

- **Providing safe, legal channels and equitable access for sex workers (particularly from lower-income countries) to migrate to Australia. This would reduce the need for migrant sex workers to rely on third party agents to travel for work;**
- **Providing translated information on visa access and conditions, industrial rights, human rights, justice mechanisms and relevant laws in multiple languages. This is a key step to enhancing the rights of migrant sex workers;**
- **Increasing resources to multilingual peer education through culturally appropriate projects within sex-worker organisations, translated resources and community engagement. This would strengthen the human, civil and political rights of migrant sex workers and increase our autonomy, agency, self-determination and access to avenues for redress in the event of a crime;**
- **Decriminalise sex work to create a supportive legal framework for improved migrant and CALD sex worker rights. Decriminalisation of sex work will assist in the prevention of circumstances that cause trafficking and reduce the legal barriers in accessing support and services.**