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HOUSE OF REPRESENTATIVES

**CRIMES LEGISLATION AMENDMENT (SLAVERY, SLAVERY-LIKE
CONDITIONS AND PEOPLE TRAFFICKING) BILL 2012**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,
the Hon Nicola Roxon MP)

CRIMES LEGISLATION AMENDMENT (SLAVERY, SLAVERY-LIKE CONDITIONS AND PEOPLE TRAFFICKING) BILL 2012

GENERAL OUTLINE

This Bill amends Divisions 270 and 271 of the *Criminal Code* (the Criminal Code), and section 21B of the *Crimes Act 1914*. Divisions 270 and 271 of the Criminal Code criminalise slavery, slavery-like offences and people trafficking.

Slavery and people trafficking are amongst the most abhorrent of all crimes. These heinous offences are major violations of human rights, and may result in traumatic and lifelong consequences for victims and their families. The Australian Government is committed to combating all forms of slavery and people trafficking, including by ensuring that our strong regime of criminal offences remains relevant and responsive to emerging issues.

The purpose of the Bill is to ensure that the broadest range of exploitative behaviour is captured and criminalised, including by introducing new offences of forced labour, forced marriage, and harbouring a victim, and by clarifying existing offences and their definitions to enhance operational effectiveness. The Bill also increases the availability of reparation orders to individual victims of Commonwealth offences, including people trafficking.

Since the introduction of the existing offences set out in Divisions 270 and 271 of the Criminal Code, the Commonwealth has prosecuted a range of people trafficking and slavery offences involving exploitation in diverse industry sectors.

However, investigations have revealed that people trafficking syndicates are changing their mode of operation to avoid detection, and if detected, to make elements of the offence harder to prove to the standard that satisfies the court and a jury. In addition to this shift in mode of operation, Australian authorities have identified a diversification of the industries into which victims are trafficked, such as the hospitality industry.

Following suggestions from the community that the practice of forced marriage is frequent, but underreported, specific criminalisation of this practice is also warranted.

This Bill aims to ensure that the people trafficking, slavery and slavery-like offences set out in the Criminal Code comprehensively criminalise all forms of slavery and people trafficking.

The Bill is intended to strengthen the existing range of offences against slavery and people trafficking in the Criminal Code to ensure that law enforcement agencies have the best tools available to investigate and prosecute perpetrators. The Bill also establishes a continuum of slavery and slavery-like offences – with an offence of slavery at the most grave end of the spectrum, and an offence of debt bondage at the less grave end of the spectrum.

In summary, the Bill:

- establishes new offences in the Criminal Code of forced labour, forced marriage, organ trafficking, and harbouring a victim
- ensures the slavery offence applies to conduct which renders a person a slave, as well as conduct involving a person who is already a slave

- extends the application of the existing offences of deceptive recruiting and sexual servitude so they apply to non-sexual servitude and all forms of deceptive recruiting
- increases the penalties applicable to the existing debt bondage offences, to ensure they are in line with the serious nature of the offences
- broadens the definition of exploitation under the Criminal Code to include all slavery-like practices
- amends the existing definitions to ensure the broadest range of exploitative conduct is criminalised by the offences, including psychological oppression and the abuse of power or taking advantage of a person's vulnerability, and
- improve the availability of reparations to victims.

FINANCIAL IMPACT STATEMENT

The Bill has no financial impact on Government revenue.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Bill

The objective of the Bill is to strengthen and expand the capability of investigators and prosecutors to combat people trafficking and slavery, in particular for the purposes of labour exploitation, and to facilitate the prosecution of these offences.

The Bill amends the slavery and people-trafficking related offences in the *Criminal Code Act 1995* to ensure the broadest range of exploitative behaviour is captured and criminalised. Measures include the introduction of new offences of forced labour and forced marriage. The Bill also amends the *Crimes Act 1914* to increase the availability of reparation orders to individual victims of Commonwealth offences, including people trafficking.

Specifically, the Bill will:

- introduce new offences of forced labour, forced marriage, harbouring a victim, and organ trafficking – consequential amendments to the *Telecommunications (Interception and Access) Act 1979* (TIA Act) will classify these new offences as 'serious offences' under the TIA Act enabling the interception of communications
- ensure the slavery offence applies to conduct which renders a person a slave, as well as conduct involving a person who is already a slave

- extend the application of the existing offences of deceptive recruiting and sexual servitude so they apply to non-sexual servitude and all forms of deceptive recruiting
- increase the penalties applicable to the existing debt bondage offences, to ensure they adequately reflect the relative seriousness of the offences – consequential amendments to the TIA Act will classify these offences as ‘serious offences’ under the TIA Act enabling the interception of communications
- broaden the definition of exploitation under the Code to include a range of slavery-like practices
- amend existing definitions into the Code to capture more subtle forms of coercion, including psychological oppression and the abuse of power or a person’s vulnerability,
- clarify that the phrase ‘omission to perform an act that by law there is a duty to perform’ in subsection 4.3(b) of the Code (dealing with implied omissions) encompasses not only those duties imposed under Commonwealth law, but also imposed under a State or Territory law or at common law;
- improve the availability of reparations to individual victims of Commonwealth offences, including slavery and people trafficking.

Human rights implications

The Bill promotes the following rights:

- the absolute right to freedom from slavery and forced labour: by introducing a standalone forced labour offence and forced marriage offence, expanding the slavery offence so that it applies to a person not yet a slave, and expanding servitude and deceptive recruiting so that they apply to non-sexual servitude and all forms of deceptive recruiting.
- the rights of children to protection against exploitation, violence and abuse: by increasing the ability to investigate and prosecute exploitative practices (by introducing new offences and expanding definitional aspects of existing crimes) including those listed under international human rights conventions such as economic exploitation of children, sexual abuse or exploitation of children and trafficking of adults and children.
- the right to respect for the family, specifically that no marriage shall be entered into without the free and full consent of the intending spouses: by criminalising forced marriage.
- the right to an effective remedy: by increasing the ability to prosecute trafficking and slavery offences and increasing the availability of reparation orders to individual victims of Commonwealth crimes.
- the right to work and rights in work: by criminalising forced labour and expanding deceptive recruiting to apply to all forms of work, therefore promoting legal and safe working conditions.

The Bill also limits the right to privacy. Article 17 of the *International Covenant on Civil and Political Rights* (ICCPR) provides that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation, and that everyone has the right to the protection of the law against such interference or attacks. The right to privacy may be subject to permissible limitations. In order for an interference with the right to privacy to be permissible, the interference must be authorised by law, be for a reason consistent with the ICCPR and be reasonable in the particular circumstances. Reasonableness, in this context, incorporates notions of proportionality, appropriateness and necessity. In essence, this will require that limitations:

- serve a legitimate objective
- adopt a means that is rationally connected to that objective, and
- the means adopted are not more restrictive than they need to be to achieve that objective.

The consequential amendments to the TIA Act will classify the new offences of forced labour, forced marriage, harbouring a victim, and organ trafficking as well as the amended offences of debt bondage as ‘serious offences’ for the purposes of the TIA Act, which 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.

The powers to intercept communications will be prescribed under the TIA Act and will therefore be authorised by law.

The limitation on privacy serves the legitimate objective of investigating and prosecuting slavery and people trafficking-related offences. This legitimate objective reflects the absolute right to freedom from slavery and forced labour contained in Article 8 of the ICCPR. Australian authorities are increasingly identifying situations of exploitation that are beyond the scope of the current slavery and people-trafficking related offences. It is necessary to ensure that law enforcement agencies have the means to investigate the new offences of forced labour, forced marriage, harbouring a victim, and organ trafficking, as well as the amended offences of debt bondage in the same manner as the current slavery and people trafficking-related offences.

Prosecutions reveal that offenders of slavery and people-trafficking offences are often reliant on mobile phone services to organise such crimes. It is therefore very likely that interception would reveal valuable evidence which will improve the ability of law enforcement agencies to investigate and prosecute these crimes. This is particularly pertinent in an area of crime where a victim’s testimony is often the primary source of evidence. Implementing the consequential amendments to the TIA Act will ensure that enforcement agencies have the power to investigate the new slavery and people-trafficking related offences in the same way they currently investigate similar serious crimes and to prosecute offenders.

Less restrictive alternatives to telecommunications interceptions, such as witness testimony, have proven to provide insufficient evidence for the prosecution of offences similar to those proposed by the Bill. This is particularly the case when witnesses are reluctant to testify. In light of the fact that the offences under the Bill, by their nature, are extremely difficult to investigate, a reliance on voluntary testimonies is an insufficient mechanism.

The ability of law enforcement agencies to intercept communications is limited to the investigation of serious offences for the purposes of the TIA Act, where agencies have applied for, and been issued, an interception warrant by an issuing authority. Issuing authorities may be eligible Judges or nominated Administrative Appeals Tribunal members. The TIA Act requires that in deciding whether to issue an interception, an issuing authority must have regard to how much the privacy of any person or persons would be likely to be interfered with by interception under a warrant. This provides a strict judicial oversight mechanism to prevent arbitrary interference to privacy.

The TIA Act strictly regulates the use and communication of information obtained by law enforcement agencies under interception warrants. Any information collected may only be used for defined purposes and purposes connected with the investigation of serious offences. The TIA Act also imposes a number of recordkeeping and accountability requirements, including a requirement for law enforcement agencies to record particulars of, and report information about, the 'use' and 'communication' of intercepted information. Communications are destroyed where the Chief Officer of the agency is satisfied that the record is no longer required for a purpose permitted by the legislation.

Persons affected by an interception warrant have relevant judicial avenues through which to challenge the validity of the interception and the use of any intercepted communications. They also have the right to access communications being used as evidence against them during prosecution.

The provisions of the Bill do not affect rights to a fair trial and fair hearing, the presumption of innocence and minimum guarantees in criminal proceedings, nor do they affect existing legislation relating to procedural fairness. The Bill and TIA Act do not result in the possibility of certain evidence being declared inadmissible, and any potential inadmissibility determined by a court on the grounds of public interest, resulting in inadequate disclosure of evidence before the accused, would be due to powers proscribed under the relevant laws of evidence.

Conclusion

The Bill is compatible with human rights because it advances the protection of human rights, specifically the right to freedom from slavery and forced labour, and to the extent that it limits human rights, specifically the right to privacy, these limitations are reasonable, necessary and proportionate.

NOTES ON CLAUSES

Clause 1: Short Title

This clause provides that if the Bill were enacted, it should be cited as the *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2012*.

Clause 2: Commencement

This clause sets out when the various parts of the Act commence. This clause specifies that the Act will commence on the day after it receives the Royal Assent.

Clause 3: Schedule(s)

This is a formal clause that enables the Schedules to amend Acts by including amendments under the title of the relevant Act.

Schedule 1 — Criminal Code Amendments

Criminal Code Act 1995

Item 1 – Paragraph 4.3(b) of the *Criminal Code*

This Item amends existing section 4.3 of the Criminal Code which sets out the circumstances in which an omission to perform an act can be a physical element of an offence. This provision is contained in Chapter 2 of the Criminal Code which establishes the general principles of criminal responsibility in Commonwealth law.

Section 4.3 of the Criminal Code provides that an omission to perform an act can only be a physical element if:

- (a) the law creating the offence makes it so, or
- (b) the law creating the offence impliedly provides that the offence is committed by an omission to perform an act that by law there is a duty to perform.

This is where the specific Commonwealth law at issue impliedly provides that a person commits an offence where he or she breaches a duty imposed by a Commonwealth law.

As discussed by the majority of the High Court in the *Commonwealth Director of Public Prosecutions v Poniatowska (2012) 282 ALR 201*, this means that the provision has more limited scope than the position in the general criminal law, as it does not encompass duties imposed under the common law nor the laws of the States and Territories.

To align the operation of paragraph 4.3(b) of the Criminal Code more closely with the general law pertaining to liability for omissions, this Item broadens paragraph 4.3(b) to encompass not only the duties imposed under Commonwealth law, but also the duties imposed under a State or Territory law or at common law.

Item 2 – Section 73.2 of the *Criminal Code* (heading)

This Item repeals the heading of existing section 73.2 of the Criminal Code and replaces it with a new heading.

Currently, section 73.2 of the Criminal Code is titled ‘Aggravated offence of people smuggling (exploitation, or danger of death or serious harm etc.)’. This Item amends the heading of section 73.2 to better reflect the new contents of the section, which are amended by Items 3, 4 and 5 of Schedule 1 (see below). As a result of this Item, the new title for section 73.2 of the Criminal Code will be ‘Aggravated offence of people smuggling (danger of death or serious harm etc.)’.

This Item does not have any substantive effect on the contents or operation of existing section 73.2 of the Criminal Code.

Item 3 – Subsection 73.2(1) of the *Criminal Code*

This Item amends existing subsection 73.2(1) of the Criminal Code by repealing the words, ‘any of the following applies’, and replacing them with the words, ‘either or both of the following apply’.

This Item is a consequential amendment which is necessary as a result of the changes in Item 4 of Schedule 1 (see below). Item 4 of Schedule 1 repeals one of the paragraphs in section 73.2 of the Criminal Code, and the changes in this Item are necessary to ensure section 73.2 of the Criminal Code is structured appropriately.

Item 4 – Paragraph 73.2(1)(a) of the *Criminal Code*

This Item repeals existing paragraph 73.2(1)(a) of the Criminal Code.

Existing paragraph 73.2(1)(a) of the Criminal Code currently provides that a person commits an offence if they commit the offence of people smuggling at existing section 73.1 of the Criminal Code, intending the victim will be exploited after entry into the foreign country. This amendment means that exploitation of a victim after entry into the relevant country will no longer be an element of the aggravated people smuggling offence at section 73.2 of the Criminal Code.

The aggravated people smuggling offence involving exploitation, or a danger of death or serious harm was inserted into the Criminal Code prior to the introduction of specific people trafficking offences in 2005. Conduct that involves the exploitation of a victim after entry into another country is a people trafficking offence, not a people smuggling offence, and as such it is appropriately criminalised by the people trafficking offences in Division 271 of the Criminal Code.

The remaining elements of the aggravated people smuggling offence in existing section 73.2 of the Criminal Code, including those elements relating to people smuggling that gives rise to a danger of death or serious harm, will not be affected.

Items 2 and 3 of Schedule 1 (above) contain consequential amendments which are necessary as a result of this Item.

Item 5 – Subsection 73.2(3) of the *Criminal Code*

This Item repeals the definitions of the terms ‘*forced labour*’, ‘*sexual servitude*’, ‘*slavery*’, and ‘*threat*’ from existing subsection 73.2(3) of the Criminal Code. The three definitions are redundant as they are not used in section 73.2 of the Criminal Code.

This Item has no substantive effect.

Item 6 – Subsections 268.15(3), 268.60(3) and 268.83(3) (definitions of *sexual service*)

This Item will repeal the definitions of the term ‘*sexual service*’ from existing subsections 268.15(3), 268.60(3) and 268.83(3) of the Criminal Code.

As a result of Item 56 of Schedule 1 (below), the definition of the term ‘*sexual service*’ in the Dictionary in the Criminal Code will be identical to the definitions of the term ‘*sexual service*’ in subsections 268.15(3), 268.60(3) and 268.83(3) of the Criminal Code. Accordingly, the local definitions of ‘*sexual service*’ in subsections 268.15(3), 268.60(3) and 268.83(3) of the Criminal Code will be redundant.

This Item will not affect the operation of sections 268.15, 268.60 or 268.83 of the Criminal Code.

Item 7 – Division 270 of the *Criminal Code* (heading)

This Item repeals the existing heading of Division 270 of the Criminal Code and replaces it with a new heading.

Currently, Division 270 of the Criminal Code is titled ‘Division 270—Slavery, sexual servitude and deceptive recruiting’. This Item replaces this heading with a new heading to reflect the new contents of the Division, which are amended by Items 8 to 17 of Schedule 1 (see below). As a result of this Item, the new title for Division 270 of the Criminal Code is ‘Division 270—Slavery and slavery-like conditions’.

This Item does not have any substantive effect on the contents or operation of Division 270 of the Criminal Code.

Item 8 – Before section 270.1 of the *Criminal Code*

This Item:

- creates two new subdivisions within Division 270 of the Criminal Code (‘Subdivision A—Preliminary’, and ‘Subdivision B—Slavery’), and
- inserts definitions for the terms ‘*coercion*’, ‘*conducting a business*’, ‘*deceive*’, ‘*forced labour*’, ‘*forced marriage*’, ‘*servitude*’, ‘*slavery*’, ‘*slavery-like offence*’ and ‘*threat*’, which apply to the whole of Division 270 of the Criminal Code.

New subdivision – ‘Subdivision A—Preliminary’

As a result of this Item and Item 12 of Schedule 1 (see below), Division 270 of the Criminal Code is divided into four subdivisions. This Item inserts a new heading for the first subdivision, ‘Subdivision A—Preliminary’, before new section 270.1A of the Criminal Code.

New Subdivision A of Division 270 of the Criminal Code contains definitions which apply to the whole Division.

Section 270.1A – Definitions for Division 270

This Item inserts new section 270.1A before existing section 270.1 of the Criminal Code. New section 270.1A provides definitions of the terms ‘*coercion*’, ‘*conducting a business*’, ‘*deceive*’, ‘*forced labour*’, ‘*forced marriage*’, ‘*servitude*’, ‘*slavery*’, ‘*slavery-like offence*’ and ‘*threat*’ for the purposes of Division 270 of the Criminal Code.

Details of each new definition are below.

Coercion

As a result of this Item, the term ‘*coercion*’ is defined for the purposes of Division 270 of the Criminal Code to include coercion by force, duress, detention, psychological oppression, abuse of power, or taking advantage of a person’s vulnerability.

Investigations into slavery and slavery-like offences have revealed that the exploitation of many victims in Australia does not involve abduction, violence or physical restraint. Rather, offenders often use subtle, non-physical means to obtain a victim’s compliance, such as

psychological oppression, the abuse of power or taking advantage of a person's vulnerability. In these circumstances, it has proved challenging to convince juries that the offender's conduct constitutes the offence.

The new definition of coercion is intended to be a non-exhaustive list capturing both physical and non-physical coercive conduct, including the more subtle means by which offenders obtain a victim's compliance.

Conducting a business

As a result of this Item, the term '*conducting a business*' is defined for the purposes of Division 270 of the Criminal Code as including taking any part in the management of the business, exercising control or direction over the business, and providing finance for the business.

The definition is modelled on the definition of conducting a business contained in the existing sexual servitude offence at subsection 270.6(3) of the Criminal Code.

Deceive

As a result of this Item, the term '*deceive*' is defined for the purposes Division 270 of the Criminal Code as having the same meaning as in Division 271 of the Criminal Code (see section 271.1).

The cross-reference to the definition of deceive is being inserted in new section 270.1A of the Criminal Code for ease of reference. Existing section 271.1 defines deceive as 'mislead as to fact (including the intention of any person) or as to law, by words or other conduct'.

This Item also inserts a note in new section 270.1A following the definition of deceive. The note to the definition provides that the term '*deception*' has a corresponding meaning. An identical note will be inserted into existing section 271.1 of the Criminal Code as a result of Item 19 of Schedule 1 (see below). This is consistent with the general approach taken under section 18A of the *Acts Interpretation Act 1901* (Acts Interpretation Act), which provides that the grammatical forms of a particular word or phrase have corresponding meanings.

The reference to the definition of deceive ensures that the term has a consistent meaning between Divisions 270 and 271 of the Criminal Code.

Forced labour

As a result of this Item, the term '*forced labour*' is defined for the purposes Division 270 has having the meaning given by new section 270.6 of the Criminal Code (see Item 12 of Schedule 1, below).

The cross-reference to the definition of forced labour is being inserted in new section 270.1A of the Criminal Code for ease of reference. New section 270.6 defines forced labour as the condition of a person (the *victim*) who provides labour or services if, because of the use of coercion, threat or deception, 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, or to leave the place or area where the victim provides the labour or services.

Forced marriage

As a result of this Item, the term '*forced marriage*' is defined for the purposes of Division 270 of the Criminal Code as having the meaning given by new section 270.7A of the Criminal Code (see Item 12 of Schedule 1, below).

The cross-reference to the definition of forced marriage is being inserted in new section 270.1A of the Criminal Code for ease of reference. New section 270.7A provides that a 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'.

Servitude

As a result of this Item, the term '*servitude*' is defined for the purposes of Division 270 of the Criminal Code as having the meaning given by new section 270.4 of the Criminal Code (see Item 12 of Schedule 1, below).

The cross-reference to the definition of servitude is being inserted in new section 270.1A of the Criminal Code for ease of reference. New section 270.4 defines servitude as 'the condition of a person (the *victim*) who provides labour or services, if, because of the use of coercion, threat or deception, 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, or to leave the place or area where the victim provides the labour or services; and the victim is significantly deprived of personal freedom in respect of aspects of his or her life other than the provision of the labour or services'.

Slavery

As a result of this Item, the term '*slavery*' has the meaning given by existing section 270.1 of the Criminal Code.

The cross reference to the definition of slavery is being inserted in new section 270.1A of the Criminal Code for ease of reference. Existing section 270.1 defines slavery as 'the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including where such a condition results from a debt or contract made by the person'.

Slavery-like offence

As a result of this Item, the term '*slavery-like offence*' is defined as an offence against any of the following provisions (as inserted by this Bill):

- section 270.5 (the servitude offences)
- section 270.6A (forced labour offences)
- section 270.7 (deceptive recruiting for labour or services), or
- section 270.7B (the forced marriage offences).

Threat

As a result of this Item, the term ‘*threat*’ is defined to mean a threat of coercion, a threat to cause a person’s deportation or removal from Australia, or a threat of any other detrimental action, unless there are reasonable grounds for the threat of that action in connection with the provision of labour or services by a person.

This Item also inserts a note in new section 270.1A following the definition of threat. The note to the definition provides that threat includes a threat made by any conduct, whether express or implied and whether conditional or unconditional. The note replicates the definition of threat in the Dictionary in the Criminal Code.

Currently, section 271.1 of the Criminal Code defines ‘*threat*’ as a threat of force, a threat to cause a person’s removal from Australia, or a threat of any detrimental action, unless there are reasonable grounds for the threat of that action. However, investigations into slavery and slavery-like offences have revealed that the exploitation of many victims in Australia does not involve abduction, violence or physical restraint. Rather, offenders often use subtle, non-physical means to obtain a victim’s compliance, such as psychological oppression, the abuse of power or taking advantage of a person’s vulnerability. In these circumstances, it has proved challenging to convince juries that the offender’s conduct constitutes the offence.

This Item expands the definition of threat to include threat of coercion. ‘*Coercion*’ is defined in new section 270.1A to include coercion by force, duress, detention, psychological oppression, abuse of power, or taking advantage of a person’s vulnerability (see above).

This Item also clarifies that reasonable grounds for the threat of any other detrimental action must be in connection with the provision of labour or services by a person. This will ensure that a legitimate threat—for example a threat of an employer to terminate employment due to sustained underperformance—would not amount to a threat for the purposes of Division 270 of the Criminal Code.

This Item broadens the scope of the offences under Division 270 of the Criminal Code to ensure they cover the broadest range of exploitative conduct.

New subdivision – ‘Subdivision B—Slavery’

As a result of this Item and Item 12 of Schedule 1(see below), existing Division 270 of the Criminal Code is to be divided into four subdivisions. This Item inserts a new heading for the second subdivision, ‘Subdivision B—Slavery’, before existing section 270.1 of the Criminal Code.

New Subdivision B of Division 270 of the Criminal Code contains offences relating to slavery.

Item 9 – Before paragraph 270.3(1)(a) of the *Criminal Code*

This Item inserts a new paragraph 270.3(1)(aa) before existing paragraph 270.3(1)(a) of the Criminal Code. New paragraph 270.3(1)(aa) contains the phrase, ‘reduces a person to slavery; or’. The effect this Item is to clarify that an intentional act which results in another person being reduced to slavery constitutes an offence.

The existing slavery offences at section 270.3 of the Criminal Code refer to offences relating to possessing, exercising powers of ownership over, or entering into transactions involving ‘a slave’. Therefore, the offences may have the unintended result of requiring the prosecution to prove the victim was already in a state or condition of slavery at the time the offender possessed, exercised the powers of ownership over, or entered into a transaction involving the victim. As such, the offences as they are currently construed may not cover the situation where the victim is rendered into the state or condition of slavery because of the conduct of the accused.

This amendment ensures that the slavery offences in section 270.3 of the Criminal Code apply whether the victim was already a slave, or was rendered a slave because of the conduct of the offender. As this phrase will form part of existing subsection 270.3(1) of the Criminal Code, conduct that reduces a person to slavery will carry a maximum penalty of 25 years’ imprisonment.

Item 10 – Paragraph 270.3(2)(b) of the *Criminal Code*

This Item removes the words, ‘or slave trading;’ from existing paragraph 270.3(2)(b) of the Criminal Code and replaces them with, ‘, slave trading or the reduction of a person to slavery;’.

The existing slavery offences at subsection 270.3(2) of the Criminal Code refer to transactions involving a ‘slave’, and may be considered to have the unintended result of requiring the prosecution to prove the victim was already in a state or condition of slavery at the time of an offence.

This amendment ensures that the slavery offence applies where an offender 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.

As this phrase will form part of existing paragraph 270.3(2)(b) of the Criminal Code, conduct that involves slave trading or the reduction of a person to slavery will carry a maximum penalty of 17 years’ imprisonment.

Item 11 – Subsection 270.3(3) of the *Criminal Code*

This Item inserts a definition of the term ‘*commercial transaction involving a slave*’ into existing subsection 270.3(3) of the Criminal Code.

As a result of this item, a commercial transaction involving a slave is defined to include a commercial transaction by which a person is reduced to slavery.

The slavery offences at existing section 270.3 of the Criminal Code refer to offences relating to possessing, exercising powers of ownership over, or entering into transactions involving ‘a slave’. Therefore, the offences may have the unintended result of requiring the prosecution to prove the victim was already in a state or condition of slavery at the time the offender possessed, exercised the powers of ownership over, or entered into a transaction involving the victim. As such, the offences as they are currently construed may not cover the situation where the victim is rendered into the state or condition of slavery because of the conduct of the accused.

This definition clarifies that a commercial transaction involving a slave includes a commercial transaction by which a person is reduced to slavery.

Item 12 – Sections 270.4 to 270.9 of the *Criminal Code*

This Item repeals the following sections of the Criminal Code:

- section 270.4 – Definition of *sexual servitude*
- section 270.5 – Jurisdictional requirement
- section 270.6 – Sexual servitude offences
- section 270.7 – Deceptive recruiting for sexual services
- section 270.8 – Aggravated offences, and
- section 270.9 – Alternative verdict if aggravated offence not proven.

In place of the repealed sections, this Item creates two new subdivisions within Division 270 of the Criminal Code (‘Subdivision C—Slavery-like conditions’, and ‘Subdivision D—Offences against Division 270: general’). In addition, this Item inserts the following new sections into the Criminal Code:

- section 270.4 – Definition of *servitude*
- section 270.5 – Servitude offences
- section 270.6 – Definition of *forced labour*
- section 270.6A – Forced labour offences
- section 270.7 – Deceptive recruiting for labour or services
- section 270.7A – Definition of *forced marriage*
- section 270.7B – Forced marriage offences
- section 270.8 – Slavery-like offences—aggravated offences
- section 270.9 – Slavery-like offences—jurisdictional requirement
- section 270.10 – Slavery-like offences—relevant evidence, and
- section 270.11 – Offences against Division 270—no defence of victim consent or acquiescence.

Details of each new provision are below.

New subdivision – ‘Subdivision C—Slavery-like conditions’

As a result of this Item and Item 8 of Schedule 1 (see above), existing Division 270 of the Criminal Code is divided into four subdivisions. This Item inserts a new heading for the third subdivision, ‘Subdivision C—Slavery-like conditions’, before new section 270.4 of the Criminal Code.

New Subdivision C of Division 270 of the Criminal Code contains items relating to slavery-like offences.

Section 270.4 – Definition of servitude

This Item replaces the existing definition of ‘*sexual servitude*’ at section 270.4 of the Criminal Code with a new definition of ‘*servitude*’.

Under existing section 270.4, the term ‘*sexual servitude*’ is defined as 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.

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. This is especially important in order to ensure that investigators and prosecutors have the most appropriate range of offences available to them where the circumstances of a matter do not amount to slavery but nonetheless demonstrate significant inappropriate conduct.

This amendment is intended to broaden the application of an offence of servitude, to ensure conduct involving servitude in any industry is captured and criminalised.

This Item recasts section 270.4 so it defines the term servitude as the condition of a person who provides labour or services and who, because of the use of coercion, threat or deception, would not consider himself or herself free to cease providing the labour or services, or to leave the place or area where the labour or services are provided. The victim must also be significantly deprived of his or her personal freedom in respect of other aspects of his or her life.

It is intended that the timing of the coercion, threats or deception could occur at any stage during the commission of the offence. As a result of new subsection 270.4(2) the coercion, threat or deception could occur against a person who is not the victim, such as a victim’s family or friends. The terms ‘*coercion*’, ‘*threat*’ and ‘*deception*’ are defined in section 270.1A of the Criminal Code (see Item 8 of Schedule 1, above).

Whether a person is ‘not free’ in relation to the matters specified in the definition is intended to be an objective test. It is intended that the court consider whether a reasonable person of the same background and in the same circumstances would have been free to withdraw his or

her labour or services or leave the workplace. Relevant to this determination would be the matters listed in new section 270.10 (see below), including:

- the economic relationship between the alleged victim and alleged offender
- the terms of any contract or agreement between the alleged victim and alleged offender, and
- the personal circumstances of the alleged victim, including their lawful presence in Australia, their understanding of the English language, and their social and physical dependence on the alleged offender.

The fact that a person may suffer a penalty under the terms of a typical employment contract would not of itself amount to being ‘not free’. It is only if the use of coercion, threat or deception effectively denies the person her or his freedom in relation to either ceasing to provide labour or services or leaving the place where those labour or services are provided.

This amendment adds a second tier to the definition of servitude; that the victim is significantly deprived of personal freedom. This is intended to reflect the degree of difference between the offences of slavery and servitude. To establish slavery it must be proved that the accused exercises a power of ownership over the victim. Servitude falls short of ownership, but occurs when the offender’s domination over the victim through coercion, threat or deception is such that the victim is effectively denied her or his freedom in some fundamental respect. This is reflected in the new definition.

As a result of new subsection 270.4(3), a person may be in a condition of servitude whether or not escape from the condition is practically possible for the victim, or whether or not the victim has attempted to escape. The new definition of servitude is intended to apply whether or not physical restraint is used for all, or part of, the period of servitude, and not intended to require the victim’s escape to be impossible.

Section 270.5 – Servitude offences

This Item repeals the sexual servitude offences at existing section 270.6 of the Criminal Code and inserts new offences of servitude at section 270.5. The new offences apply to all forms of servitude, regardless of whether the servitude is sexual in nature.

New section 270.5 of the Criminal Code is divided into subsections under headings as follows:

- subsection 270.5(1) – Causing a person to enter into or remain in servitude
- subsection 270.5(2) – Conducting a business involving servitude, and
- subsections 270.5(3) and 270.5(4) – Alternative verdict of forced labour.

Existing section 270.6 of the Criminal Code criminalises the conduct of a person who causes another person to enter into or remain in sexual servitude, and intends to cause, or is reckless as to causing, that sexual servitude. The provision also criminalises the conduct of a person who conducts a business involving the sexual servitude of other persons.

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 offence so that it covers the broadest possible range of exploitative conduct, regardless of the industry in which the exploitation occurs. This is especially important in order to ensure that investigators and prosecutors have the most appropriate range of offences available to them where the circumstances of a matter do not amount to slavery but nonetheless demonstrate significant inappropriate conduct.

In line with the existing sexual servitude offences, section 15.2 of the Criminal Code (extended geographical jurisdiction – category B) applies to the new servitude offences. This ensures the provisions capture the conduct of Australian citizens, residents or corporations overseas. The principle of double jeopardy also applies, consistent with existing section 270.13 of the Criminal Code.

Subsection 270.5(1) – Causing a person to enter into or remain in servitude

The offence of causing a person to enter into or remain in servitude at new subsection 270.5(1) of the Criminal Code applies where a person's conduct causes another person to enter into or remain in servitude. The term '*servitude*' is defined as the condition of a person who provides labour or services and who, because of the use of coercion, threat or deception, would not consider himself or herself free to cease providing the labour or services, or to leave the place or area where the labour or services are provided. The victim must also be significantly deprived of his or her personal freedom in respect of other aspects of his or her life (see the new definition of servitude, above).

The offence of causing a person to enter into or remain in servitude at new subsection 270.5(1) of the Criminal Code carries a maximum penalty of 20 years' imprisonment in the case of an aggravated offence, or 15 years' imprisonment in any other case. The term 'aggravated offence' is defined at new section 270.8 of the Criminal Code (see below).

The penalties for these offences are the same as the existing penalties for the sexual servitude offences in the Criminal Code. The penalties recognise the seriousness of the offences, relative to other trafficking and slavery offences. The penalties provide an appropriate distinction in the continuum of penalties for exploitative conduct, relative to the other offences in Divisions 270 and 271 of the Criminal Code (including those inserted by this Bill).

In accordance with section 5.6 of the Criminal Code, the fault element of recklessness applies to new paragraph 270.5(1)(b) – the question of whether the person's conduct caused another person to enter into or remain in servitude.

Subsection 270.5(2) – Conducting a business involving servitude

The offence of conducting a business involving servitude at new subsection 270.5(2) of the Criminal Code applies where a person conducts any business, and the business involves the servitude of another person or persons. The new offence carries a maximum penalty of 20 years' imprisonment in the case of an aggravated offence, or 15 years' imprisonment in any other case. The term 'aggravated offence' is defined at new section 270.8 of the Criminal Code (see below).

The penalties for these offences are the same as the existing penalties for the sexual servitude offences in the Criminal Code. The penalties recognise the seriousness of the offences,

relative to other trafficking and slavery offences. The penalties provide an appropriate distinction in the continuum of penalties for exploitative conduct, relative to the other offences in Divisions 270 and 271 of the Criminal Code (including those inserted by this Bill).

In accordance with section 5.6 of the Criminal Code, the fault element of recklessness applies to new paragraph 270.5(2)(b) – the question of whether the business involves the servitude of another person or persons.

Subsections 270.5(3) and 270.5(4) – Alternative verdict of forced labour

This Item inserts two new provisions, subsections 270.5(3) and 270.5(4) of the Criminal Code, which allow a court to find a person not guilty of an offence of servitude but guilty of an offence of forced labour in certain circumstances.

New subsection 270.5(3) of the Criminal Code provides that new subsection 270.5(4) applies where the trier of fact (that is, the judge or jury) in a prosecution for a servitude offence is not satisfied beyond a reasonable doubt that the defendant is guilty of an offence of servitude, but is satisfied beyond a reasonable doubt that the defendant is guilty of the corresponding offence of forced labour. The table at new paragraph 270.5(3)(b) of the Criminal Code provides that:

- the offence at new subsection 270.6A(1) of the Criminal Code is the corresponding forced labour offence for the servitude offence at new subsection 270.5(1) of the Criminal Code, and
- the offence at new subsection 270.6A(2) of the Criminal Code is the corresponding forced labour offence for the servitude offence at new subsection 270.5(2) of the Criminal Code.

In addition to the elements of the forced labour offences in new section 270.6A of the Criminal Code (see below), the servitude offences in new section 270.5 of the Criminal Code require that the victim must be significantly deprived of his or her personal freedom. As such, where it has not been proven that the victim was significantly deprived of his or her personal freedom, but the remaining elements of the offence of servitude have been proven, then the elements of the new offence of forced labour will have, in effect, been proven.

As a result of new subsection 270.5(4) of the Criminal Code, the trier of fact may only find the person on trial for a servitude offence not guilty of that offence but guilty of the corresponding offence of forced labour if the person has been afforded procedural fairness in relation to that finding.

Section 270.6 – Definition of forced labour

This Item inserts a definition of the term ‘*forced labour*’ at new section 270.6 of the Criminal Code.

The term forced labour is currently defined under section 73.2 of the Criminal Code as the condition of a person who provides labour services (other than sexual services) and who, because of force or threats:

- is not free to cease providing labour or services; or
- is not free to leave the place or area where the person provides labour or services.

This definition is repealed by this Bill (see Item 5 of Schedule 1, above).

The *International Labour Organization (ILO) Convention No. 29 on Forced or Compulsory Labour* defines the term ‘forced or compulsory labour’ 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’. In keeping with the ILO definition, the new definition of forced labour at section 270.6 adopts the concept of labour services being obtained by more subtle forms of coercion, rather than only through force or threats.

Under new subsection 270.6(1) of the Criminal Code, the term forced labour is defined as the condition of a person who provides labour or services if a reasonable person in the position of the victim would not consider himself or herself to be free to either cease providing the labour or services, or to leave the place or area where the victim provides the labour or services, because of the use of coercion, threat or deception.

As a result of new subsection 270.6(2) the coercion, threat or deception could occur against a person who is not the victim, such as a victim’s family or friends. As a result of new subsection 270.6(3), a person may be in a condition of forced labour whether or not escape from the condition is practically possible for the victim, or whether or not the victim has attempted to escape. The definition of forced labour is intended to be broad enough to apply whether or not physical restraint is used for all, or part of, the period of forced labour.

The timing of the coercion, threats or deception could occur at any stage during the commission of the offence. The terms ‘*coercion*’, ‘*threat*’ and ‘*deceive*’ are defined in accordance with new section 270.1A of the Criminal Code (see Item 8 of Schedule 1, above). The new definition is not specific to any particular type of labour or services, and applies regardless of the industry the victim works in.

The question of whether a person is ‘free’ in relation to the matters specified in the definition of forced labour is an objective test. The ‘reasonable person test’ requires the court to consider whether a reasonable person of the same background and in the same circumstances would have been free to withdraw his or her labour or services, or to leave the workplace. As a result of new section 270.10 of the Criminal Code (see below), the court may have regard to any of the following:

- the economic relationship between the alleged victim and alleged offender
- the terms of any contract or agreement between the alleged victim and alleged offender, and
- the personal circumstances of the alleged victim including their lawful presence in Australia, their understanding of the English language and their social and physical dependence on the alleged offender.

The fact that a person may suffer a penalty such as termination of employment under the terms of a typical employment contract will not of itself amount to being ‘not free’. It is only if the use of coercion, threat or deception effectively denies the person her or his freedom in relation to either ceasing to provide labour or services or leaving the place where those labour or services are provided.

Section 270.6A – Forced labour offences

This Item inserts new offences of forced labour at new section 270.6A of the Criminal Code after new section 270.6. New section 270.6A of the Criminal Code is divided into subsections under headings as follows:

- subsection 270.6A(1) – ‘Causing a person to enter into or remain in forced labour’, and
- subsection 270.6A(2) – ‘Conducting a business involving forced labour’.

Currently, forced labour is only criminalised under the Criminal Code where it is connected to the offence of people trafficking. Exploitation is currently defined in the Dictionary in the Criminal Code to include a number of circumstances, one of which is where the offender’s conduct causes the victim to enter into forced labour. This Bill inserts standalone offences of forced labour (see below), which will ensure that, in addition to prosecuting a trafficker, a situation of forced labour exploitation at the place of destination could also be prosecuted.

It is intended that an offence of forced labour may apply in circumstances where the offender’s conduct does not constitute servitude, yet is more serious than an offence of debt bondage. The forced labour offences add to the continuum of slavery and slavery-like offences – with an offence of slavery at the most serious end of the spectrum, and an offence of debt bondage at the less-serious end of the spectrum.

The new offences are not limited to the provision of sexual services or any other particular type of service or labour. Whether the offence applied in a particular circumstance would be determined by the nature of the relationship between the victim and their ‘employer’, and not by the type of activity performed, however hard or hazardous, or the legality or illegality of the work under Australian law.

These offences are not intended to apply in circumstances that arise from standard relationships between an employee and an employer. This is because the forced labour offences only apply where a reasonable person in the position of the victim would not consider himself or herself to be free to cease providing labour or services, or to leave the place or area where the victim provides labour or services, because of the use of coercion, threat or deception.

For example, where reasonable grounds exist for the threat of detrimental action in connection with the provision of labour or services by a person under a standard employment contract, the conduct will not amount to forced labour. This is to ensure that a legitimate threat, for example a threat to terminate employment due to sustained underperformance, will not amount to a threat for the purposes of Division 270.

The offences should be differentiated from the new servitude offences at section 270.5, which are intended to apply where, in addition to being able to restrict the movements of the victim, an offender also had the capacity to use the victim in a substantially unrestricted manner for the duration of the victim's servitude.

This Item also inserts a note at the end of new section 270.6A. The note provides that that during a trial for an offence against new section 270.5 (servitude offences) the trier of fact (that is, the judge or jury) may find a defendant not guilty of that offence but guilty of a forced labour offence under new section 270.6A. The new offence of servitude requires that in addition to the elements of forced labour (consideration of not being free to either cease providing labour or services or leave a place where such labour or services are provided), the victim must be significantly deprived of his or her personal freedom. As such, where it has not been proven that the victim was significantly deprived of his or her personal freedom, but the remaining elements of the offence of servitude have been proven, then the elements of the new offence of forced labour will have, in effect, been proven.

In line with other offences criminalising exploitative conduct, section 15.2 of the Criminal Code (extended geographical jurisdiction – category B) applies to the new forced labour offences. This ensures the provisions capture the conduct of Australian citizens, residents or corporations overseas. The principle of double jeopardy also applies, consistent with existing section 270.13 of the Criminal Code.

Existing section 10.5 of the Criminal Code applies to the offences of forced labour. Section 10.5 provides that a person is not criminally responsible for an offence if the conduct constituting the offence is justified or excused by or under a law. This means that coercion by force of law will not constitute an offence of forced labour. Practically, this exception to the offences of forced labour may arise in circumstances where a person has been convicted of an offence and sentenced to a community service order, as well as in circumstances of military service, emergencies or where other civil obligations exist.

Subsection 270.6A(1) – Causing a person to enter into or remain in forced labour

The offence of causing a person to enter into or remain in forced labour at new subsection 270.6A(1) of the Criminal Code applies where a person's conduct causes another person to enter into or remain in forced labour. The term '*forced labour*' is defined at new section 270.6 (see above).

The offence of causing a person to enter into or remain in forced labour at new subsection 270.6A(1) of the Criminal Code carries a maximum penalty of 12 years' imprisonment in the case of an aggravated offence, or nine years' imprisonment in any other case. The term aggravated offence is defined at new section 270.8 of the Criminal Code (see below).

The penalties for these offences recognise the seriousness of the offences, relative to other trafficking and slavery offences. The penalties provide an appropriate distinction in the continuum of penalties for exploitative conduct, relative to the other offences in Divisions 270 and 271 of the Criminal Code (including those inserted by this Bill).

In accordance with section 5.6 of the Criminal Code, the fault element of recklessness applies to new paragraph 270.6A(1)(b) – the question of whether the person's conduct caused another person to enter into or remain in forced labour.

Subsection 270.6A(2) – Conducting a business involving forced labour

The offence of conducting a business involving forced labour at new subsection 270.6A(2) of the Criminal Code applies where a person conducts any business, and the business involves the forced labour of another person or persons. The new offence carries a maximum penalty of 12 years' imprisonment in the case of an aggravated offence, or nine years in any other case. The term 'aggravated offence' is defined at new section 270.8 of the Criminal Code (see below).

The penalties for these offences recognise the seriousness of the offences, relative to other trafficking and slavery offences. The penalties provide an appropriate distinction in the continuum of penalties for exploitative conduct, relative to the other offences in Divisions 270 and 271 of the Criminal Code (including those inserted by this Bill).

In accordance with section 5.6 of the Criminal Code, the fault element of recklessness applies to new paragraph 270.6A(2)(b) – the question of whether the business involves the forced labour of another person or persons.

Section 270.7 – Deceptive recruiting for labour or services

This Item inserts a new offence of deceptive recruiting for labour or services at section 270.7 of the Criminal Code.

The new offence applies where a recruiter engages in conduct, and does so with the intention of inducing the victim to enter into an engagement to provide labour or services, and the conduct causes the person to be deceived about any one of the following matters (which are specified in new paragraph 270.7(c)):

- (i) the extent to which the victim will be free to leave the place or area where the victim provides the labour or services
- (ii) the extent to which the victim will be free to cease providing the labour or services
- (iii) the extent to which the victim will be free to leave his or her place of residence
- (iv) if there is or will be a debt owed or claimed to be owed by the victim in connection with the engagement—the quantum, or the existence, of the debt owed or claimed to be owed
- (v) the fact that the engagement will involve exploitation or the confiscation of the victim's travel or identity documents, or
- (vi) if the engagement is to involve the provision of sexual services—that fact, or the nature of the sexual services to be provided (for example, whether those services will require the victim to have unprotected sex).

The new offence carries a maximum penalty of nine years' imprisonment in the case of an aggravated offence, or seven years' imprisonment in any other case. The term 'aggravated offence' is defined at new section 270.8 of the Criminal Code (see below). The penalties are consistent with the penalties for the existing offence of deceptive recruiting for sexual services, and recognise the seriousness of the offences relative to other trafficking and slavery offences. The penalties provide an appropriate distinction in the continuum of penalties for

exploitative conduct, relative to the other offences in Divisions 270 and 271 of the Criminal Code (including those inserted by this Bill).

In line with the existing offence of deceptive recruiting for sexual services, section 15.2 of the Criminal Code (extended geographical jurisdiction – category B) applies to the new deceptive recruiting offence. This ensures the provisions capture the conduct of Australian citizens, residents or corporations overseas. The principle of double jeopardy also applies, consistent with existing section 270.13 of the Criminal Code.

This provision replaces the offence of deceptive recruiting for sexual services at existing section 270.7 of the Criminal Code, which criminalises the conduct of a person who deceptively recruits another person for sexual services. The existing section provides a list of matters which the offender may deceive the victim about with the intention of inducing the victim into an engagement to provide sexual services.

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 amend this offence so it applies more broadly to situations of deceptive recruiting for all types of labour or services, regardless of industry.

This Item ensures the offence of deceptive recruiting for sexual services applies to deceptive recruiting regardless of industry by replacing references to sexual services with the phrase ‘labour or services’. New subparagraph 270.7(c)(vi) specifically accounts for deception about the fact that the engagement for labour or services involves sexual services, or about the nature of those services. This paragraph provides the example that deception about the nature of sexual services could include deception about the fact the victim will be required to have unprotected sex. This example is illustrative only, and is not the only matter about which a victim may be deceived.

As a result of Item 56 of Schedule 1 (see below), the term ‘*sexual service*’ means the use or display of the body of the person providing the service for the sexual gratification of others. The term is not limited to commercial sexual services.

Section 270.7A – Definition of forced marriage

Section 270.7A inserts a definition of the term ‘*forced marriage*’ into the Criminal Code.

For the purposes of Division 270 of the Criminal Code, subsection 270.7A(1) defines a forced marriage as one where, because of coercion, threat or deception, a person (the victim) entered into the marriage without freely and fully consenting.

The terms ‘*coercion*’, ‘*threat*’ and ‘*deception*’ are defined in section 270.1A of the Criminal Code, as amended by Item 8 of Schedule 1 (see above). The intention is that these terms capture a broad range of conduct (both physical and non-physical) that may be used by a person to cause a victim to enter a marriage without their full and free consent.

For the purpose of defining forced marriage in this Bill, forced marriage is not limited to marriages recognised by Australian law. Subsection 270.7A(2) defines ‘*marriage*’ to include: a registered relationship within the meaning of section 2E of the Acts Interpretation Act; a marriage recognised under a law of a foreign country; a relationship registered under a law of a foreign country that is of the same or a similar type as any registered relationship

within the meaning of section 2E of the Acts Interpretation Act; and a marriage or registered relationship that is void, invalid or not recognised by law for any reason.

A registered relationship within the meaning of section 2E of the Acts Interpretation Act is a *de facto* relationship that is registered under a prescribed law of a State or Territory.

Marriage has been described broadly for the purposes of Division 270 to capture a range of marriage and marriage-like relationships that affect the legal status of the parties, involve a similar level of formal recognition and commitment, and which may carry legal or religious consequences. The provision will capture a relationship which for all intents and purposes is considered to be a marriage by the parties and their community. This will ensure the new forced marriage offences (introduced below) are not limited to circumstances involving marriages recognised by Australian law, but extend to other marriage-like relationships, where similar harmful conduct is involved.

Under subsection 270.7A(3), the definition of forced marriage applies whether the coercion, threat or deception is used against the victim or another person. This includes for example, a threat made against a member of the victim's family or the victim's friend.

Section 270.7B – Forced marriage offences

Section 270.7B inserts two forced marriage offences.

Currently, the Criminal Code does not explicitly criminalise the act of causing a person to enter into a forced marriage. It is possible, however, that a forced marriage or the circumstances within a forced marriage may be covered by existing provisions in the Criminal Code. For example, a person who brings another person (the victim) to Australia for the purpose of a forced marriage may commit an offence of trafficking in persons (see existing section 271.2 of the Criminal Code). If the victim of a forced marriage is subjected to a condition of sexual servitude within a marriage, an offence of sexual servitude may apply (see existing section 270.6 of the Criminal Code).

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. This will help to ensure that the offences within Division 270 and 271 of the Criminal Code cover the field in relation to a broad range of conduct involving trafficking in persons and slavery and slavery like practices.

This will also ensure that Australia fulfils its international obligations that marriages are entered into with the full and free consent of each spouse. These obligations are set out in the *International Covenant on Civil and Political Rights*, the *Convention on the Elimination of all Forms of Discrimination Against Women*, the *International Covenant on Economic, Social and Cultural Rights*, the *Convention on the Elimination of All Forms of Racial Discrimination*, the *Hague Convention on Celebration and Recognition of the Validity of Marriages*, and the *Universal Declaration of Human Rights*.

Article 16 of the *International Convention on Elimination of All Forms of Discrimination Against Women*, for example, requires State Parties to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular, ensure, on a basis of equality of men and women, the same right to freely choose a spouse and to enter into marriage only with their free and full consent, among

other things. These international obligations require effective and appropriate measures to be in place to address the practices of forced marriage.

The definition of forced marriage would include marriages (as described in new subsection 270.7A(2)) involving persons who have been transferred, sold or inherited into a marriage with no right to refuse. These types of marriages are otherwise known as ‘servile marriages’ as defined in the *Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery 1956*. For a person (the victim) to be transferred, sold or inherited into a marriage, there would generally be coercion (i.e. by the abuse of power or by taking advantage of a person’s vulnerability), threat or deception used by another person. For this reason, the intention is that a servile marriage falls within the definition of forced marriage, and the offence provisions described below apply.

Where a person has been transferred, sold or inherited into a marriage with no right to refuse, this may also amount to an offence of slavery.

In line with the existing approach to slavery-like conduct in Division 270 of the Criminal Code, section 15.2 of the Criminal Code (extended geographical jurisdiction – category B) applies to the new forced marriage offences. This ensures the provisions capture the conduct of Australian citizens, residents or corporations overseas. The principle of double jeopardy also applies, consistent with existing section 270.13 of the Criminal Code.

Subsection 270.7B(1) – Causing a person to enter into a forced marriage

New subsection 270.7B(1) inserts an offence of causing a person to enter into a forced marriage.

The offence 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. The offence captures not only persons who use coercion, threats or deception to cause the victim to enter the marriage, but also those whose conduct may contribute to the victim entering a marriage into which they were coerced, threatened or deceived by someone else.

For example, Party A organises the ceremony for the wedding of Party B (the victim) and Party C. Party A may be caught by the offence if he/she organised the wedding ceremony aware that by doing so, there was a substantial risk that the victim would enter into a forced marriage, and having regard to the circumstances known to Party A, it is unjustifiable to take that risk.

The offence applies if the coercion, threat or deception was used against another person such as a member of the victim’s family or a friend, in order that the victim enter the marriage (pursuant to new subsection 270.7A(3), see above).

The new offence carries a maximum penalty of seven years’ imprisonment in the case of an aggravated offence, or four years’ imprisonment in any other case. The term ‘aggravated offence’ is defined at new section 270.8 of the Criminal Code (see below). The penalties recognise the seriousness of the offences relative to other trafficking and slavery offences. The penalties provide an appropriate distinction in the continuum of penalties for exploitative conduct, relative to the other offences in Divisions 270 and 271 of the Criminal Code (including those inserted by this Bill).

In accordance with section 5.6 of the Criminal Code, the fault element of recklessness applies to new paragraph 270.7B(1)(b) – the question of whether the person’s conduct caused another person to enter into a forced marriage as the victim of the marriage.

The extensions of criminal responsibility in Chapter 2 of the Criminal Code apply to this offence, for example, to capture the conduct of individuals who aid, abet, counsel or procure the marriage, or who conspire with another person to bring about the marriage.

Subsection 270.7B(2) – Being a party to a forced marriage

New subsection 270.7B(2) inserts an offence of being a party to a forced marriage. The offence is directed at the spouse who is not a victim of the forced marriage.

In accordance with section 5.6 of the Criminal Code, the fault element of recklessness applies to new section 270.7B(2). The exception to this will be the application of strict liability to paragraph 270.7B(2)(c) as discussed below.

The offence captures a person who is reckless as to whether they are a party to a marriage (new paragraph 270.7B(2)(a)) and reckless as to the fact that the marriage is forced (new paragraph 270.7B(2)(b)), i.e. that their spouse entered the marriage because of coercion, threat or deception. However, pursuant to new paragraph 270.7B(2)(c), only a person who is *not* a victim of the forced marriage will be caught by this offence and strict liability applies to this element of the offence (as provided by new subsection 270.7B(3)). The application of strict liability to this element has been included to avoid the anomalous situation whereby the prosecution would be required to prove beyond reasonable doubt, that the defendant knew, intended, or was reckless as to whether they were *not* a victim of the forced marriage. Often, there will not be evidence going to a defendant’s state of mind in relation to this issue. Consequently, if the prosecution was required to prove fault in relation to this element, it could significantly undermine the effectiveness of this offence. The prosecution would still have to prove that the defendant was not a victim, based on the evidence available.

By application of strict liability to this element, a defendant would have a defence of honest and reasonable mistake of fact. Under this defence, a defendant must have turned his/her mind to the existence of the facts, and be under a mistaken but reasonable belief about those facts. A defence of reasonable excuse is also available in relation to this offence under new subsection 270.7B(4). This defence is discussed below.

By application of new subsection 270.7A(3), the forced marriage may have been caused by coercion, threat or deception used against the victim or used against another person such as a member of the victim’s family or a friend.

The offence does not capture a person who is not aware that the marriage they were entering into may have been a forced marriage. Nor does it capture a person who was aware that the marriage may have been forced, but who was also a victim of the forced marriage (for example, where they too entered the marriage because they were subject to coercion, threat or deception by a family member).

The new offence carries a maximum penalty of seven years’ imprisonment in the case of an aggravated offence, or four years’ imprisonment in any other case. The term ‘aggravated offence’ is defined at new section 270.8 of the Criminal Code (see below). The penalties recognise the seriousness of the offences relative to other trafficking and slavery offences. The penalties provide an appropriate distinction in the continuum of penalties for exploitative

conduct, relative to the other offences in Divisions 270 and 271 of the Criminal Code (including those inserted by this Bill).

The extensions of criminal responsibility in Chapter 2 of the Criminal Code applies to this new offence, for example, to capture the conduct of individuals who aid, abet, counsel or procure the marriage, or who conspire with another person to bring about the marriage.

New subsection 270.7B(4) creates a defence of reasonable excuse. A person would not commit an offence against subsection 270.7B(2) if the person can show that they had a reasonable excuse for being a party to a forced marriage. For example, a person may be aware that threats of physical harm have been made against the victim by the victim's father if she does not get married. On this basis, the person enters the marriage in order to protect the victim from the threats of harm, with the agreement of the victim. In this type of circumstance, it would be inappropriate to prosecute that person for an offence of forced marriage.

The defendant bears the evidential burden of pointing to evidence which would establish the defence of reasonable excuse for entering into the forced marriage. The burden of proof lies with the defendant as the elements needed to establish a reasonable excuse would likely be peculiarly within the knowledge of the defendant, and it would be significantly more difficult for the prosecution to disprove than for the defendant to establish. For example, the discussions that the defendant has been privy to, and their reasoning for entering the marriage, may only be known by the defendant.

Section 270.8 – Slavery-like offences—aggravated offences

This Item inserts a new section 270.8 of the Criminal Code which defines the term 'aggravated offence' for the purposes of Division 270 of the Criminal Code. This section replaces the existing aggravated offence provision at section 270.8 of the Criminal Code.

Currently, section 270.8 provides that an offence will only be aggravated if the victim is under 18 years old at the time of the offence. Existing section 270.8 also provides that only an offence under the sexual servitude or deceptive recruiting for sexual services offences at existing sections 270.6 and 270.7 may be aggravated.

However, investigations and prosecutions for slavery-like offences under Division 270 have highlighted that, notwithstanding the age of the victim, the circumstances of offending in some cases involves more serious exploitation than is required to amount to a base offence. Where these circumstances exist, an aggravated offence attracting a higher penalty may be warranted. For example, forcing a victim to work while severely ill may be considered cruel or degrading treatment, and may therefore warrant an aggravated charge.

This Item replaces the existing aggravated offences provision at section 270.8 to take into account the more serious nature of the exploitation found in some offending. New section 270.8 broadens the definition of aggravated offence, and provides that a slavery-like offence against Division 270 of the Criminal Code is an aggravated offence if any one of three circumstances applies.

The relevant circumstances are set out in new subsections 270.8(1)(a) – (c) of the Criminal Code as follows:

- (a) the victim was under 18 years old at the time of the offence
- (b) in committing the offence, the offender subjects the victim to cruel, inhuman or degrading treatment, or
- (c) in committing the offence, the offender engages in conduct that gives rise to a danger of death or serious harm to the victim or another person, and is reckless as to that danger.

New subsection 270.8(2) provides that if the prosecution intends to prove an aggravated slavery-like offence, the charge must allege the relevant aggravated offence. This requirement is consistent with existing subsection 270.8(2), and means that the defendant must be charged with the relevant aggravated offence if the prosecution intends to lead evidence on the relevant aggravating factor. For example, if the prosecution intends to provide the victim was subjected to cruel, inhuman or degrading treatment by the defendant during commission of the offence of forced labour, the defendant must be charged with forced labour involving cruel, inhuman or degrading treatment.

New subsection 270.8(3) provides that, if the trier of fact (that is, the judge or jury) is not satisfied that the defendant is guilty of the aggravated slavery-like offence, but is otherwise satisfied that the defendant is guilty of the corresponding slavery-like offence, the trier of fact may find the defendant not guilty of the aggravated offence but guilty of the corresponding slavery-like offence.

Where the trier of fact is not satisfied that the aggravating circumstances have been proven beyond reasonable doubt, but is satisfied the base offence has been proven beyond reasonable doubt, the defendant may be found guilty of the base offence. This reflects the fact that for a defendant to be charged with an aggravated offence, they must first have been suspected of committing the base offence.

New subsection 270.8(4) provides that the trier of fact may only find the person on trial for an aggravated slavery-like offence not guilty of that offence but guilty of corresponding slavery-like offence if the person has been afforded procedural fairness in relation to that finding.

New section 270.1A (see Item 8 of Schedule 1, above) defines the term ‘*slavery-like offence*’ for the purposes of Division 270 of the Criminal Code as an offence against any one of the following provisions:

- section 270.5 (the servitude offences)
- section 270.6A (forced labour offences)
- section 270.7 (deceptive recruiting for labour or services), or
- section 270.7B (the forced marriage offences).

Accordingly, new section 270.8 provides that, if a defendant commits an offence against new section 270.5, 270.6A, 270.7, or 270.7B of the Criminal Code, and one of the additional circumstances in new subsections 270.8(1)(a) – (c) is satisfied, the relevant offence will be an aggravated offence. The relevant penalties for the aggravated slavery-like offences are specified in the provisions containing the slavery-like offences.

It is intended that the conduct of the offender should be the relevant factor in determining whether the offence was aggravated, rather than the industry in which the exploitation took place. For example, the fact that a slavery-like offence involved exploitation within the sex industry is not in itself intended to warrant an aggravated charge as inherently cruel, inhuman or degrading treatment of the victim. However, the circumstances surrounding a slavery-like offence (including an offence involving exploitation within the sex industry) may amount to cruel, inhuman or degrading treatment, or a danger or death or serious harm to the victim.

Section 270.9 – Slavery-like offences—jurisdictional requirement

This Item inserts a new section 270.9 of the Criminal Code, which contains a jurisdictional requirement for the slavery-like offences contained within Division 270. The section is titled ‘Slavery-like offences—jurisdictional requirement’.

Section 15.2 of the Criminal Code (extended geographical jurisdiction – category B) provides that, if section 15.2 applies to a Commonwealth offence, a person does not commit the offence unless (relevantly):

- the conduct constituting the offence either occurs wholly or partly in Australia, or wholly or partly on board an Australian aircraft or ship, or
- the conduct constituting the offence occurs wholly outside Australia, and a result of the conduct occurs wholly or partly in Australia, or wholly or partly on board an Australian aircraft or ship, or
- the conduct constituting the offence occurs wholly or outside Australia, and the offender was as Australian citizen, Australian resident, or a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory at the time of the offence.

Existing subsections 15.2(2) and 15.2(4) of the Criminal Code also provide defences to Commonwealth offences to which section 15.2 applies in certain circumstances. Existing section 270.5 of the Criminal Code provides that section 15.2 applies to the existing sexual servitude and deceptive recruiting for sexual services offences at respective sections 270.6 and 270.7. However, as the offences at existing sections 270.6 and 270.7 are being repealed and replaced with new sections criminalising a broader range of exploitative conduct, it is important that the existing jurisdictional requirement provision is modified to reflect the amendments.

New section 270.9 provides that section 15.2 of the Criminal Code (extended geographical jurisdiction – category B) applies to a ‘*slavery-like offence*’. The term slavery-like offence is

defined in new section 270.1A of the Criminal Code (see Item 8 of Schedule 1, above) as an offence against any one of the following provisions:

- section 270.5 (the servitude offences)
- section 270.6A (forced labour offences)
- section 270.7 (deceptive recruiting for labour or services), or
- section 270.7B (the forced marriage offences).

The effect of this Item is to broaden the application of the jurisdictional requirement by providing that it applies to all the slavery-like offences in Division 270, not just to the existing sexual servitude and deceptive recruiting for sexual services offences.

Section 270.10 – Slavery-like offences—relevant evidence

This Item inserts a new section 270.10 of the Criminal Code after new section 270.9. The section is titled ‘Slavery-like offences—relevant evidence’.

New section 270.10 provides a list of matters a trier of fact (that is, the judge or jury) may have regard to in determining whether the alleged victim of an offence against Division 270 has been coerced, threatened or deceived. The relevant matters are listed at new subsection 270.10(2), and include the economic relationship between the alleged victim and alleged offender, the terms of any contract or agreement between the alleged victim and the alleged offender, and the personal circumstances of the alleged victim including their lawful presence in Australia, their understanding of English and the extent of their social and physical dependence on the alleged offender.

The list of matters at subsection 270.10(2) is not intended to be exhaustive. That is, the trier of fact in a particular case may have regard other things in determining a matter relating to the alleged victim of an offence against Division 270 of the Criminal Code, not only those matters listed in new subsection 270.10(2) of the Criminal Code.

New subsection 270.10(3) provides that new subsection 270.10(1) does not prevent the prosecution or the defence leading other evidence in the proceedings, limit the manner in which evidence may be given, or limit the admissibility of evidence.

This new provision applies to the slavery-like offences under Division 270 and will ensure these matters can be considered by a court in determining any whether an alleged victim was coerced, threatened or deceived. For example, many victims of slavery-like offences may be economically powerless, socially isolated, and from culturally and linguistically diverse backgrounds, making them particularly vulnerable to an offender’s conduct, and it is important that these facts are taken into account by courts.

It is intended that the matters listed in the new provision could be considered regardless of the circumstances of the slavery or slavery-like offence. The new provision will not prevent the leading of any other evidence in the relevant proceedings, or limit the manner in which evidence may be adduced or the admissibility of evidence.

New subdivision – ‘Subdivision D—Offences against Division 270: general’

As a result of this Item and Item 8 of Schedule 1 (see above), existing Division 270 of the Criminal Code is divided into four subdivisions. This Item inserts a new heading for the fourth subdivision, ‘Subdivision D—Offences against Division 270: general’, before new section 270.11 of the Criminal Code.

New Subdivision D of Division 270 of the Criminal Code contains general provisions which apply to the whole Division.

Section 270.11 – Offences against Division 270—no defence of victim consent or acquiescence

This Item inserts a new section 270.11 of the Criminal Code. New section 270.11 clarifies that a victim’s consent or acquiescence is not a defence to conduct that would otherwise be an offence under Division 270 of the Criminal Code.

In prosecutions for slavery and slavery-like offences, consent has been a difficult issue. While judges have generally directed juries that consent by a victim is not a defence to a charge, some judges have also indicated that consent may be relevant to an assessment of whether a person was in fact reduced to a state of slavery – for example, see *Ho v The Queen; Leech v The Queen* [2011] VSCA 344 (11 November 2011), at paragraphs 80 and 83. However, the *Protocol to Suppress, Prevent and Punish Trafficking in Persons, especially women and children* (the Trafficking Protocol) makes it clear that consent of a victim is irrelevant (see Article 3(b)).

People trafficking or reducing a person to a state of slavery or servitude often involves suppressing the person’s free will, their self-respect, as well as the ability to make decisions for themselves. 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.

Accordingly, a general provision will be inserted into Division 270 clarifying that a victim’s consent or acquiescence is not a defence to conduct that would otherwise constitute any element of an offence against the Division. A corresponding provision will be inserted into Division 271 as a result of Item 48 of Schedule 1 (see below).

Item 13 – Section 270.12 of the *Criminal Code* (heading)

This Item repeals the heading of existing section 270.12 of the Criminal Code and replaces it with a new heading. The existing heading of section 270.12 of the Criminal Code is, ‘Other laws not excluded’. As a result of this Item, the heading of section 270.12 of the Criminal Code will be, ‘Offences against Division 270—other laws not excluded’.

This Item will ensure that the headings for sections within Division 270 of the Criminal Code are consistent. This Item does not have any substantive effect.

Item 14 – Section 270.12 of the *Criminal Code*

This Item inserts the text, ‘(1)’ before the text at existing section 270.12 of the Criminal Code.

This amendment means that the text in existing section 270.12 of the Criminal Code will become subsection 270.12(1) of the Criminal Code, and is a consequential amendment necessitated by the amendment at Item 15 of Schedule 1 (below), which adds additional subsections to the provision.

Item 15 – At the end of section 270.12 of the *Criminal Code*

This Item inserts two new subsections into existing section 270.12 of the Criminal Code, following the existing text at section 270.12.

Without limiting the application of the existing savings provision in section 270.12 of the Criminal Code (as amended by this Bill), new subsection 270.12(2) provides that Division 270 of the Criminal Code is not intended to exclude or limit the concurrent operation of any other Commonwealth law, or a law of a State or Territory which either:

- criminalises an act or an omission that is criminalised by Division 270, or
- criminalises conduct which is similar to an act or an omission that is criminalised by Division 270.

New subsection 270.12(3) of the Criminal Code provides that new subsection 270.12(2) operates irrespective of whether the other law does one or more of the following:

- provides a different penalty from the offence in Division 270, and/or
- provides a different fault element or elements from the offence in Division 270, and/or
- provides for different defences from the offence in Division 270.

Most States and Territories have enacted sexual servitude and deceptive recruiting offences that would allow them to prosecute instances of trafficking for the purposes of sexual exploitation. Section 270.12 of the Criminal Code currently provides that Division 270 is not intended to exclude or limit the operation of any other law of the Commonwealth or any law of a State or Territory.

This Item strengthens the operation of the existing savings provision at section 270.12 of the Criminal Code by further clarifying that the Commonwealth and State and Territory offences can operate concurrently. This is intended to ensure no that inconsistency could be found between Division 270 and any State or Territory laws criminalising similar offences. For consistency, this amendment is modelled on savings provisions set out at existing section 300.4 of the Criminal Code.

Item 16 – Section 270.13 of the *Criminal Code* (heading)

This Item repeals the heading of existing section 270.13 of the Criminal Code and replaces it with a new heading. The existing heading of section 270.13 of the Criminal Code is, ‘Double

jeopardy'. As a result of this Item, the heading of section 270.13 of the Criminal Code will be, 'Offences against Division 270—double jeopardy'.

This Item will ensure that the headings for sections within Division 270 of the Criminal Code are consistent. This Item does not have any substantive effect.

Item 17 – Section 270.14 of the *Criminal Code*

This Item repeals section 270.14 of the Criminal Code.

Existing section 270.14 of the Criminal Code defines the term '*Australia*' for the purposes of Division 270. However, as the term is also defined in an identical manner in the Dictionary in the Criminal Code, section 270.14 is redundant.

Item 18 – Section 271.1 of the *Criminal Code*

This Item inserts the words '*coercion* has the same meaning as in Division 270 (see section 270.1A)' in existing section 271.1 of the Criminal Code. Existing section 271.1A contains definitions for Division 271.

This amendment ensures that the term '*coercion*' has a consistent meaning between Divisions 270 and 271. New section 270.1A defines the term coercion to include coercion by force, duress, detention, psychological oppression, abuse of power, or taking advantage of a person's vulnerability (see Item 8 of Schedule 1, above).

Item 19 – Section 271.1 of the *Criminal Code* (at the end of the definition of *deceive*)

This Item inserts a note into existing section 271.1 of the Criminal Code, following the definition of '*deceive*'.

The note provides that the term '*deception*' has a corresponding meaning with the term 'deceive', consistent with section 18A of the Acts Interpretation Act. Existing section 271.1 of the Criminal Code defines '*deceive*' as 'mislead as to fact (including the intention of any person) or as to law, by words or other conduct'. This Item is intended to clarify that the word '*deception*', as the noun of the verb deceive, means the act of misleading as to fact (including the intention of any person) or as to law, by words or other conduct. This is consistent with the general approach taken under section 18A of the Acts Interpretation Act, which provides that the grammatical forms of a particular word or phrase have corresponding meanings.

An identical note will be inserted into existing section 270.1A of the Criminal Code as a result of Item 8 of Schedule 1 (see above).

This item ensures that the term has a consistent meaning between Divisions 270 and 271 of the Criminal Code.

Item 20 – Section 271.1 of the *Criminal Code*

This Item inserts the words '*exploitation* has the meaning given by section 271.1A' in existing section 271.1 of the Criminal Code. Existing section 271.1A contains definitions for Division 271.

This amendment ensures that the term '*exploitation*' has a consistent meaning between Divisions 270 and 271. New section 271.1A defines 'exploitation' as occurring if one person's conduct causes the victim to enter into slavery or a similar condition, servitude, forced labour, forced marriage or debt bondage (see Item 22 of Schedule 1, below).

Item 21 – Section 271.1 of the Criminal Code (definition of *threat*)

This Item inserts the words '*threat* has the meaning given by section 270.1A' in existing section 271.1 of the Criminal Code. Existing section 271.1 contains definitions for Division 271.

This amendment ensures that the term 'threat' has a consistent meaning between Divisions 270 and 271. New section 270.1A defines 'threat' to mean a threat of coercion, a threat to cause a person's deportation, or a threat of any other detrimental action, unless there are reasonable grounds for the threat of that action in connection with the provision of labour or services by a person (see Item 8 of Schedule 1, above).

Item 22 – After section 271.1 of the *Criminal Code*

Section 271.1A – Definition of exploitation

This Item inserts a new section 271.1A following existing section 271.1 of the Criminal Code. New section 271.1A of the Criminal Code inserts a definition of the term '*exploitation*' for the purposes of Division 271 of the Criminal Code. The existing definition of 'exploitation' in the Dictionary in the Criminal Code will be repealed by Item 52 of Schedule 1 (see below).

The new definition of the term 'exploitation' is modelled on the existing definition, but is broader so that it provides coverage for exploitation in all its forms.

Under the existing Dictionary definition, *exploitation* of one person (the *victim*) by another person (the *exploiter*) occurs if:

- (a) the exploiter's conduct causes the victim to enter into slavery, forced labour or sexual servitude; or
- (b) the exploiter's conduct causes an organ of the victim to be removed and:
 - (i) the removal is contrary to the law of the State or Territory where it is carried out; or
 - (ii) neither the victim nor the victim's legal guardian consented to the removal and it does not meet a medical or therapeutic need of the victim.

This Item amends the existing definition of 'exploitation' in the Criminal Code to ensure that it provides broad coverage for exploitation in all its forms. This Item amends the definition of exploitation to include debt bondage and slavery-like practices such as forced marriage (which includes servile marriage). This Item also amends the definition so that it refers to servitude, rather than sexual servitude. In addition, this Item removes the reference to removal of a victim's organs as standalone offences criminalising organ trafficking will be inserted as a result of Item 38 of Schedule 1 (see below).

Item 23 – Paragraphs 271.2(1)(b) and (c) of the *Criminal Code*

This Item omits the phrase, ‘force or threats’ from existing paragraphs 271.2(1)(b) and (c) of the Criminal Code, and substitutes the phrase, ‘coercion, threat or deception’.

Existing section 271.2 of the Criminal Code establishes a number of offences criminalising trafficking in persons. Existing subsection 271.2(1) of the Criminal Code provides that a person commits an offence of trafficking in persons where the first person facilitates the entry, proposed entry or receipt of a person into Australia (paragraph 271.2(1)(a)), the first person uses ‘force or threats’ (paragraph 271.2(1)(b)), and the use of ‘force or threats’ results in the first person obtaining the other person’s compliance in respect of that entry, proposed entry or receipt (paragraph 271.2(1)(c)). The offence carries a maximum penalty of 12 years’ imprisonment.

The term ‘force or threats’ in subsection 271.2(1) of the Criminal Code arguably means that the prosecution must prove a defendant used physical methods (such as violence or restraint) to obtain the alleged victim’s compliance. However, investigations into people trafficking offences have revealed that offenders’ modes of operation often involve conduct that is not physical. Rather, offenders often use subtle, non-physical means to obtain a victim’s compliance, including psychological oppression, the abuse of power or taking advantage of a person’s vulnerability.

This Item broadens the application of the trafficking in persons offence at subsection 271.2(1) of the Criminal Code by expanding the means through which an offender could obtain a victim’s compliance. By omitting the words ‘force or threats’ and replacing them with ‘coercion, threat or deception’ in paragraphs 271.2(1)(b) and (c), the offence at subsection 271.2(1) applies where a person uses coercion, threat, or deception to obtain another person’s compliance. Under new section 270.1A, the terms ‘*coercion*’, ‘*threat*’ and ‘*deceive*’ are defined to include non-physical elements (such as psychological oppression, abuse of power, or taking advantage of a person’s vulnerability) (see Item 8 of Schedule 1, above).

This Item is intended to ensure the offence of trafficking into Australia is sufficiently broad to provide for circumstances where the offender uses more subtle forms of coercion to obtain a victim’s compliance. It is intended that the timing of the coercion, threats or deception could occur at any stage during the commission of the offence. The penalty for the offence of trafficking in persons at existing subsection 271.2(1) of the Criminal Code is not affected by this amendment.

Item 24 – Paragraphs 271.2(1A)(b) and (c) of the *Criminal Code*

This Item omits the phrase, ‘force or threats’ from existing paragraphs 271.2(1A)(b) and (c) of the Criminal Code, and substitutes the phrase, ‘coercion, threat or deception’.

Existing section 271.2 of the Criminal Code establishes a number of offences criminalising trafficking in persons. Existing subsection 271.2(1A) of the Criminal Code provides that a person commits an offence of trafficking in persons where the first person facilitates the exit or proposed exit of a person from Australia (paragraph 271.2(1A)(a)), the first person uses ‘force or threats’ (paragraph 271.2(1A)(b)), and the use of ‘force or threats’ results in the first person obtaining the other person’s compliance in respect of that exit or proposed exit (paragraph 271.2(1A)(c)). The offence carries a maximum penalty of 12 years’ imprisonment.

The term ‘force or threats’ in subsection 271.2(1A) of the Criminal Code arguably means that the prosecution must prove a defendant used physical methods (such as violence or restraint) to the alleged victim’s compliance. However, investigations into people trafficking offences have revealed that offenders’ modes of operation often involve conduct that is not physical. Rather, offenders often use subtle, non-physical means to obtain a victim’s compliance, including psychological oppression, the abuse of power or taking advantage of a person’s vulnerability.

This Item broadens the application of the trafficking in persons offence at subsection 271.2(1A) of the Criminal Code by expanding the means through which an offender could obtain a victim’s compliance. By omitting the words ‘force or threats’ and replacing them with ‘coercion, threat or deception’ in paragraphs 271.2(1A)(b) and (c), the offence at subsection 271.2(1A) applies where a person uses coercion, threat, or deception to obtain another person’s compliance. Under new section 270.1A, the terms ‘*coercion*’, ‘*threat*’ and ‘*deceive*’ are defined to include non-physical elements (such as psychological oppression, the abuse of power, or taking advantage of a person’s vulnerability) (see Item 8 of Schedule 1, above).

This Item is intended to ensure the offence of trafficking from Australia is sufficiently broad to provide for circumstances where the offender uses more subtle forms of coercion to obtain a victim’s compliance. It is intended that the timing of the coercion, threats or deception could occur at any stage during the commission of the offence. The penalty for the offence of trafficking in persons at existing subsection 271.2(1A) of the Criminal Code is not affected by this amendment.

Item 25 – Paragraphs 271.2(2)(b) and (2A)(b) of the *Criminal Code*

This Item omits the phrase, ‘or debt bondage’ from existing paragraphs 271.2(2)(b) and (2A)(b) of the Criminal Code.

As a result of Item 22 of Schedule 1 (above), the term ‘debt bondage’ will be included in the definition of ‘*exploitation*’. Accordingly, the references to debt bondage in existing paragraphs 271.2(2)(b) and (2A)(b) of the Criminal Code are redundant.

Item 26 – Section 271.3 of the *Criminal Code* (heading)

This Item repeals the existing heading of section 271.3 and substitutes a new heading.

Existing section 271.3 of the Criminal Code is titled ‘Aggravated offence of trafficking in persons’. As a result of this Item, the heading of section 271.3 will be, ‘Trafficking in persons—aggravated offence’.

This Item will ensure that the headings for sections within Division 271 of the Criminal Code are consistent. This Item does not have any substantive effect.

Item 27 – Subparagraph 271.3(1)(a)(i)

This Item omits the text ‘; and’, and replaces it with, ‘; or’.

Currently, paragraph 271.3(1)(a) of the Criminal Code contains two subparagraphs, which are separated by the word ‘and’. This Item would replace the word ‘and’ with the word ‘or’ to

ensure stylistic consistency between existing section 271.3 of the Criminal Code and new section 271.7C (see Item 38 of Schedule 1, below).

This Item has no substantive effect.

Item 28 – Subparagraph 271.3(1)(c)(i)

This Item inserts the words ‘or another person’ after the word ‘victim’ in existing subparagraph 271.3(1)(c)(i) of the Criminal Code.

Existing section 271.3 of the Criminal Code provides an aggravated offence of trafficking in persons. Paragraph 271.3(1)(c) provides that a person commits an aggravated offence of trafficking in persons if, in committing an offence of trafficking in persons, the offender engages in conduct that gives rise to a danger of death or serious harm to the victim, and is reckless to that danger.

By inserting the words ‘or another person’, this Item has the effect of criminalising the conduct of a person who, in committing an offence of trafficking in persons, engages in conduct that gives rise to a danger of death or serious harm to the victim or another person, and is reckless to that danger. This amendment reflects the fact that an offender’s conduct may affect other persons aside from the trafficked person. For example, the offender may physically harm another person in order to obtain the victim’s compliance in such a way as to give rise to a ‘danger of death or serious harm’.

Item 29 – At the end of section 271.3 of the *Criminal Code*

This Item inserts a new subsection 271.3(3) after existing subsection 271.3(2) of the Criminal Code. Existing section 271.3 of the Criminal Code creates an aggravated offence of trafficking in persons. Subsection 271.3(2) provides that, where the trier of fact (that is, the judge or jury) in a trial for the aggravated offence of trafficking in persons is not satisfied that the defendant is guilty of the aggravated offence but is satisfied the defendant is guilty of an offence of trafficking in persons in section 271.2 of the Criminal Code, the trier of fact may find the defendant not guilty of the aggravated offence of trafficking in persons and guilty of an offence against section 271.2 of the Criminal Code.

New subsection 271.3(3) clarifies that the trier of fact may only find the person on trial for an offence against section 271.3 of the Criminal Code but guilty of an offence against section 271.2 of the Criminal Code if the person has been afforded procedural fairness in relation to that finding.

This Item also inserts a note in new section 271.3 following new subsection 271.3(3). The note provides a cross-reference to section 271.2 of the Criminal Code, which provides for offences of trafficking in persons.

This amendment is intended as a clarification of the existing provision, and does not change its operation. This is because a failure to provide procedural fairness would be grounds for a successful appeal in any trial.

Item 30 – Subsection 271.4(3) of the *Criminal Code*

This Item repeals subsection 271.4(3) of the Criminal Code.

Subsection 271.4(3) of the Criminal Code defines the term ‘*sexual service*’. However, the amendment to the definition of the term ‘*sexual service*’ in the Dictionary in the Criminal Code will make this definition redundant (see Item 56 of Schedule 1, below).

Item 31 – Paragraphs 271.5(1)(b) and (c) of the *Criminal Code*

This Item omits the phrase, ‘force or threats’ from existing paragraphs 271.5(1)(b) and (c) of the Criminal Code, and substitutes the phrase, ‘coercion, threat or deception’.

Existing section 271.5 of the Criminal Code establishes a number of offences criminalising domestic trafficking in persons. Existing subsection 271.5(1) of the Criminal Code provides that a person commits an offence of domestic trafficking in persons where the first person facilitates the transportation or proposed transportation of another person from one place in Australia to another place in Australia (paragraph 271.5(1)(a)), the first person uses ‘force or threats’ (paragraph 271.5(1)(b)), and the use of ‘force or threats’ results in the first person obtaining the other person’s compliance in respect of that transportation or proposed transportation (paragraph 271.2(1)(c)). The offence carries a maximum penalty of 12 years’ imprisonment.

The term ‘force or threats’ in subsection 271.5(1) of the Criminal Code arguably means that the prosecution must prove a defendant used physical methods (such as violence or restraint) to the alleged victim’s compliance. However, investigations into people trafficking offences have revealed that offenders’ modes of operation often involve conduct that is not physical. Rather, offenders often use subtle, non-physical means to obtain a victim’s compliance, including psychological oppression, the abuse of power or taking advantage of a person’s vulnerability.

This Item broadens the application of the domestic trafficking in persons offences at subsection 271.5(1) of the Criminal Code by expanding the means through which an offender could obtain a victim’s compliance. By omitting the words ‘force or threats’ and replacing them with ‘coercion, threat or deception’ in paragraphs 271.5(1)(b) and (c), the offence at subsection 271.5(1) applies where a person uses coercion, threat, or deception to obtain another person’s compliance. Under new section 270.1A, the terms ‘*coercion*’, ‘*threat*’ and ‘*deceive*’ are defined to include non-physical elements (such as psychological oppression, abuse of power, or taking advantage of a person’s vulnerability) (see Item 8 of Schedule 1, above).

This Item is intended to ensure the offence of trafficking into Australia is sufficiently broad to provide for circumstances where the offender uses more subtle forms of coercion to obtain a victim’s compliance. It is intended that the timing of the coercion, threats or deception could occur at any stage during the commission of the offence. The penalty for the offence of domestic trafficking in persons at existing subsection 271.5(1) of the Criminal Code is not affected by this Item.

Item 32 – Paragraph 271.5(2A)(b) of the *Criminal Code*

This Item omits the words, ‘or debt bondage’ from existing paragraph 271.5(2A)(b) of the Criminal Code.

Existing subsection 271.5(2A) of the Criminal Code provides for an offence of domestic trafficking in persons. As a result of Item 22 of Schedule 1, a reference to debt bondage will

be included in the definition of the term ‘*exploitation*’. As such, the reference to debt bondage in existing paragraph 271.5(2A)(b) is redundant.

Item 33 – Section 271.6 of the *Criminal Code* (heading)

This Item repeals the existing heading of section 271.6 of the Criminal Code and substitutes a new heading.

Section 271.6 of the Criminal Code is currently titled, ‘Aggravated offence of domestic trafficking in persons’. As a result of this Item, the heading of section 271.6 will be, ‘Domestic trafficking in persons—aggravated offence’.

This Item will ensure that the headings for sections within Division 271 of the Criminal Code are consistent. This Item does not have any substantive effect.

Item 34 – Subparagraph 271.6(1)(c)(i) of the *Criminal Code*

This Item inserts the words, ‘or another person’ after the word ‘victim’ in existing subparagraph 271.6(1)(c)(i) of the Criminal Code.

Existing section 271.6 of the Criminal Code provides an aggravated offence of domestic trafficking in persons. Paragraph 271.6(1)(c) provides that a person commits an aggravated offence of domestic trafficking in persons if, in committing an offence of trafficking in persons, the offender engages in conduct that gives rise to a danger of death or serious harm to the victim, and is reckless to that danger.

By inserting the words ‘or another person’, this Item has the effect of criminalising the conduct of a person who, in committing an offence of domestic trafficking in persons, engages in conduct that gives rise to a danger of death or serious harm to the victim or another person, and is reckless to that danger. This amendment reflects the fact that an offender’s conduct may affect other persons aside from the trafficked person. For example, the offender may physically harm another person in order to obtain the victim’s compliance in such a way as to give rise to a ‘danger of death or serious harm’.

Item 35 – At the end of section 271.6 of the *Criminal Code*

This Item inserts a new subsection after existing subsection 271.6(2) of the Criminal Code. Existing section 271.6 of the Criminal Code creates an aggravated offence of domestic trafficking in persons. Subsection 271.6(2) provides that, where the trier of fact (that is, the judge or jury) in a trial for the aggravated offence of domestic trafficking in persons is not satisfied that the defendant is guilty of the aggravated offence but is satisfied the defendant is guilty of an offence of domestic trafficking in persons in section 271.5 of the Criminal Code, the trier of fact may find the defendant not guilty of the aggravated offence of trafficking in persons and guilty of an offence against section 271.5 of the Criminal Code.

New subsection 271.6(3) clarifies that the trier of fact may only find the person on trial for an offence against section 271.6 of the Criminal Code but guilty of an offence against section 271.5 of the Criminal Code if the person has been afforded procedural fairness in relation to that finding. This amendment is a clarification of the existing provision, and does not change its operation. This is because a failure to provide procedural fairness would be grounds for a successful appeal in any trial.

This Item also inserts a note in section 271.6 following new subsection 271.6(3). The note provides a cross-reference to section 271.5 of the Criminal Code, which provides for offences of domestic trafficking in persons.

Item 36 – Section 271.7 of the *Criminal Code*

This Item omits the phrase, ‘(1) A person’ in existing section 271.7 of the Criminal Code, and replaces it with the phrase, ‘A person’.

This amendment is a consequential amendment which is necessary as a result of Item 37 of Schedule 1 (below), which repeals the second subsection in existing section 271.7 of the Criminal Code. The meaning and application of existing section 271.7 of the Criminal Code will not be affected by this Item.

Item 37 – Subsection 271.7(2) of the *Criminal Code*

This Item repeals subsection 271.7(2) of the Criminal Code.

Currently, section 271.7 of the Criminal Code is divided into two subsections. Subsection 271.7(1) of the Criminal Code establishes an offence of domestic trafficking in children. The subsection uses the term ‘*sexual services*’. Existing subsection 271.7(2) of the Criminal Code defines the term ‘*sexual service*’. The amendment to the definition of sexual service in the Dictionary in the Criminal Code will make this definition redundant (see Item 56 of Schedule 1, below). The meaning and application of existing section 271.7 of the Criminal Code will not be affected by this Item.

Item 38 – After section 271.7 of the *Criminal Code*

This Item creates two new subdivisions within Division 271 of the Criminal Code, and inserts seven new provisions after existing Subdivision B of Division 271 of the Criminal Code.

The first subdivision inserted by this Item is titled, ‘Subdivision BA—Organ trafficking’, and contains the following new provisions:

- new section 271.7A – Removal of organs contrary to this Subdivision
- new section 271.7B – Offence of organ trafficking—entry into and exit from Australia
- new section 271.7C – Organ trafficking—aggravated offence
- new section 271.7D – Offence of domestic organ trafficking, and
- new section 271.7E – Domestic organ trafficking—aggravated offence.

The second subdivision inserted by this Item is titled, ‘Subdivision BB—Harbouring a victim’, and contains the following new provisions:

- new section 271.7F – Harbouring a victim, and
- new section 271.7G – Harbouring a victim—aggravated offence.

Details of each new subdivision and provision are below.

New subdivision – ‘Subdivision BA—Organ trafficking’

As a result of this Item, two new subdivisions will be inserted into existing Division 271 of the Criminal Code. The first new subdivision, ‘Subdivision BA—Organ trafficking’, is inserted after existing section 271.7 of the Criminal Code.

New Subdivision BA of Division 271 of the Criminal Code contains provisions relating to organ trafficking.

Section 271.7A – Removal of organs contrary to this Subdivision

This Item inserts a new section 271.7A of the Criminal Code. New section 271.7A of the Criminal Code is titled, ‘Removal of organs contrary to this Subdivision’.

Under existing section 271.2(1B) of the Criminal Code, a person commits an offence of trafficking in persons if the person organises or facilitates the entry or proposed entry, or the receipt, of another person into Australia and in doing so is reckless as to whether the other person will be exploited, either by the first person or another, after that entry or receipt. The offence carries a maximum penalty of 12 years’ imprisonment.

Currently, the Dictionary in the Criminal Code defines ‘*exploitation*’ as occurring where, *inter alia*:

- (b) the exploiter's conduct causes an organ of the victim to be removed and:
 - (i) the removal is contrary to the law of the State or Territory where it is carried out
 - (ii) neither the victim nor the victim's legal guardian consented to the removal and it does not meet a medical or therapeutic need of the victim.’

Australia is obliged under the Trafficking Protocol to criminalise organ trafficking. Article 3 of the Trafficking Protocol states:

‘... “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 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. ...’ [emphasis added]

Accordingly, it is clear from the text of the Trafficking Protocol that Australia is obliged to criminalise the conduct of a person is involved in trafficking persons for the purpose of organ removal, regardless of whether the organ is actually removed. This is consistent with Australia’s approach to the existing standalone trafficking offences, which apply regardless of whether the victim is actually subsequently exploited after the movement. Rather, those offences apply based on the purpose of the movement.

However, it is arguable that words ‘causes an organ of the victim to be removed’ in the definition of exploitation require the organ to actually be removed to complete the offence of organ trafficking. This may have the unintended result that a person who intends to remove a

victim's organ after entry into Australia escapes liability for the offence simply because the victim manages to escape before their organ is removed. An offence of attempt could be considered in circumstances where an organ was not removed. However, this would involve inherent difficulties because the application of an attempt charge involves the fault elements of an offence changing from recklessness to intention or knowledge.

New section 271.7A of the Criminal Code provides that the removal of a person's organ is contrary to Subdivision BA of Division 271 of the Criminal Code if either:

- the removal, or entering into an agreement for the removal, would be contrary to the law of the State or Territory where it is, or is to be, carried out (new paragraph (a) of section 271.7A), or
- neither the victim, nor the victim's guardian, consents to the removal, and it would not meet a medical or therapeutic need of the victim (new paragraph (b) of section 271.7A).

New paragraph 271.7A(a) means that it would be contrary to Subdivision BA of Division 271 of the Criminal Code to remove an organ if doing so, or entering into an agreement to do so, would be contrary to the law of the State or Territory where the removal is, is to be, carried out. Each State and Territory has legislation that regulates the removal of organs and other tissues. For example, in New South Wales, section 32(1) of the *Human Tissue Act 1983* (NSW) (Human Tissue Act) prohibits trading in tissues. Among other things, section 32 of the Human Tissue Act also criminalises entering into a contract or an agreement under which any person agrees, for valuable consideration, to the sale or supply of tissue. Section 4 of the Human Tissue Act provides that the term 'tissue' includes organs. Consequently, new paragraph 271.7A(a) of the Criminal Code means that it would be contrary to Subdivision BA of Division 271 of the Criminal Code to remove an organ in New South Wales if the removal is the result of an agreement or contract for valuable consideration.

New paragraph 271.7A(b) means that it would be contrary to Subdivision BA of Division 271 of the Criminal Code to remove an organ if the victim or their guardian did not consent to the removal, and removing the organ would not meet a medical or therapeutic need of the victim. Accordingly, new paragraph 271.7A(b) makes it contrary to Subdivision BA of Division 271 of the Criminal Code to remove a person's organ without their consent or the consent of their guardian, if the removal would not be medically necessary. The 'consent' referred to in paragraph 271.7A(b) must be full and free consent. Accordingly, the victim or their guardian must not have been coerced or induced – monetarily or otherwise – into consenting to the removal of the victim's organ. New section 271.11A would apply if there is a question about the consent being full and free (see Item 48 of Schedule 1, below). Importantly, new paragraph 271.7A(b) does not prevent a doctor or medical professional removing an organ of a person without their consent, or that of their guardian, if doing so would save the person's life or avoid significant harm to that person.

New section 271.7A of the Criminal Code effectively provides a definition of what it means to remove an organ contrary to Subdivision BA of Division 271 of the Criminal Code. This will ensure the standalone offences in new sections 271.7B, 271.7C, 271.7D and 271.7E operate effectively (see below).

Section 271.7B – Offence of organ trafficking—entry into and exit from Australia

This Item inserts a new section 271.7B of the Criminal Code. New section 271.7B of the Criminal Code is titled, ‘Offence of organ trafficking—entry into and exit from Australia’.

Section 271.7B creates two offences of organ trafficking. The first new offence applies where a person is trafficked into Australia (subsection 271.7B(1)), and the second applies where a person is trafficked from Australia (subsection 271.7B(2)).

Entry into Australia

New subsection 271.7B(1) of the Criminal Code provides that a person commits an offence of organ trafficking if the person engages in conduct consisting of the organising or facilitation of the entry or proposed entry, or the receipt of another person into Australia, and is reckless as to whether that conduct will result in the removal of an organ of the victim contrary to Subdivision BA of Division 271 of the Criminal Code, either by the offender or another person, after or in the course of that entry or receipt.

New subsection 271.7B(1) includes a note stating that section 271.7A details when the removal of an organ will be contrary to Subdivision BA of Division 271 of the Criminal Code. New section 271.7A (see above) of the Criminal Code provides that the removal of a person’s organ is contrary to Subdivision BA of Division 271 of the Criminal Code if either:

- the removal, or entering into an agreement for the removal, would be contrary to the law of the State or Territory where it is, or is to be, carried out (new paragraph (a) of section 271.7A), or
- neither the victim, nor the victim’s guardian, consents to the removal, and it would not meet a medical or therapeutic need of the victim (new paragraph (b) of section 271.7A).

A maximum penalty of 12 years’ imprisonment applies to this offence. This is consistent with the maximum penalties for the existing trafficking offences in Division 271 of the Criminal Code, and is in keeping with the continuum of offences for exploitative conduct in the Criminal Code (as amended by this Bill).

This offence is intended to cover circumstances where the victim’s organ is removed, as well as where such removal was planned but did not eventuate (including attempts). In addition, the offence is designed to cover circumstances where the individual’s organ is removed, or an attempt is made to remove it, during travel from another country to Australia.

As a result of Item 45 of Schedule 1 (below), section 15.2 of the Criminal Code (extended geographical jurisdiction – category B) applies to the new organ trafficking offence. This ensures the provisions capture the conduct of Australian citizens, residents or corporations overseas. The principle of double jeopardy also applies, consistent with existing section 271.13 of the Criminal Code.

Exit from Australia

New subsection 271.7B(2) of the Criminal Code provides that a person commits an offence of organ trafficking if the person engages in conduct consisting of the organising or facilitation of the exit or proposed exit from Australia, and is reckless as to whether that conduct will result in the removal of an organ of the victim contrary to Subdivision BA of Division 271 of the Criminal Code, either by the offender or another person, after or in the course of that entry or receipt.

New subsection 271.7B(2) includes a note stating that section 271.7A details when the removal of an organ will be contrary to Subdivision BA of Division 271 of the Criminal Code. New section 271.7A (see above) of the Criminal Code provides that the removal of a person's organ is contrary to Subdivision BA of Division 271 of the Criminal Code if either:

- the removal, or entering into an agreement for the removal, would be contrary to the law of the State or Territory where it is, or is to be, carried out (new paragraph (a) of section 271.7A), or
- neither the victim, nor the victim's guardian, consents to the removal, and it would not meet a medical or therapeutic need of the victim (new paragraph (b) of section 271.7A).

A maximum penalty of 12 years' imprisonment applies to this offence. This is consistent with the maximum penalties for the existing trafficking offences in Division 271 of the Criminal Code, and is in keeping with the continuum of offences for exploitative conduct in the Criminal Code (as amended by this Bill).

This offence is intended to cover circumstances where the victim's organ is removed, as well as where such removal was planned but did not eventuate (including attempts). In addition, the offence is designed to cover circumstances where the individual's organ is removed, or an attempt is made to remove it, during travel from Australia to another country.

As a result of Item 45 of Schedule 1 (below), section 15.2 of the Criminal Code (extended geographical jurisdiction – category B) applies to the new organ trafficking offence. This ensures the provisions capture the conduct of Australian citizens, residents or corporations overseas. The principle of double jeopardy also applies, consistent with existing section 271.13 of the Criminal Code.

Section 271.7C – Organ trafficking—aggravated offence

This Item inserts a new section 271.7C of the Criminal Code. New section 271.7C of the Criminal Code is titled, 'Organ trafficking—aggravated offence'.

New section 271.7C has three subsections. New subsection 271.7C(1) provides that a person commits an aggravated offence of organ trafficking in certain circumstances. Subsections 271.7C(2) and (3) provide for alternative verdicts of a base offence of organ trafficking in certain circumstances.

New subsection 271.7C(1) provides that a person commits an aggravated offence of organ trafficking in relation to a victim if any one of four circumstances applies. Those circumstances are set out at paragraphs 271.7C(1)(a) – (d) as follows:

- (a) the victim is under 18 years old at the time of the offence of organ trafficking, or
- (b) the offender commits the offence of organ trafficking and intends that an organ of the victim will be removed contrary to Subdivision BA of Division 271 of the Criminal Code, either by the offender or another person, and:
 - (i) in the case of an offence against new subsection 271.7B(1), after or in the course of entry into Australia, or
 - (ii) in the case of an offence against new subsection 271.7B(2), after or in the course of exit into Australia, or
- (c) the offender, in committing the offence of organ trafficking, subjects the victim to cruel, inhuman or degrading treatment, or
- (d) the offender, in committing the offence of organ trafficking, engages in conduct that gives rise to a danger of death or serious harm to the victim or another person and is reckless to that danger.

New paragraph 271.7C(1)(a) means that a person commits an aggravated offence of organ trafficking if the victim was under 18 years old at the time of the conduct that constitutes the offence. Such conduct would equate to trafficking in children, and is considered more serious than trafficking in adults.

New paragraph 271.7C(1)(b) means that a person commits an aggravated offence of organ trafficking if the person intends that the victim will have their organ removed after or during the entry into, or exit from, Australia. The base offences of organ trafficking at new section 271.7B applies where a person engages in conduct consisting of the organising or facilitation of the entry or proposed entry into, or exit or proposed exit from, Australia, and is reckless as to whether that conduct will result in the removal of an organ of the victim. New paragraph 271.7C(1)(b) means that, where the offender intends the victim's organ will be removed after transportation, the offender will have committed an aggravated offence. This is because intention necessarily involves a higher degree of culpability.

New paragraph 271.7C(1)(c) means that a person commits an aggravated offence of organ trafficking if the person, in committing the offence of organ trafficking, subjects the victim to cruel, inhuman or degrading treatment. This means that, where a victim is subjected to particularly cruel, inhuman or degrading treatment by the offender during the commission of the offence of organ trafficking, the offender the offender will have committed an aggravated offence. For example, if the victim was accommodated in a small, confined space for the duration of the transportation, without access to food, water or proper sanitation, it may constitute cruel, inhuman or degrading treatment by the offender and warrant a charge of aggravated organ trafficking.

New paragraph 271.7C(1)(d) means that a person commits an aggravated offence of organ trafficking if the person, in committing the offence of organ trafficking, engages in conduct that gives rise to a danger of death or serious harm to the victim or another person and is reckless to that danger. For example, this means that, where a person causes serious harm to the victim or another person in order to obtain the person's compliance to the removal of their organ or the transportation to or from Australia, the offender will have committed an aggravated offence. In addition, it might arise if the offender removes the organ in unsafe conditions, such as where an offender uses implements that have not been properly sterilised.

New section 271.7C includes a note stating that section 271.7A details when the removal of an organ will be contrary to Subdivision BA of Division 271 of the Criminal Code. New section 271.7A (see above) of the Criminal Code provides that the removal of a person's organ is contrary to Subdivision BA of Division 271 of the Criminal Code if either:

- the removal, or entering into an agreement for the removal, would be contrary to the law of the State or Territory where it is, or is to be, carried out (new paragraph (a) of section 271.7A), or
- neither the victim, nor the victim's guardian, consents to the removal, and it would not meet a medical or therapeutic need of the victim (new paragraph (b) of section 271.7A).

A maximum penalty of 25 years' imprisonment applies to an aggravated offence of organ trafficking where the victim is under 18 years old at the time of the offence. A maximum penalty of 20 years' imprisonment applies to an aggravated offence of organ trafficking in any other case. These penalties are consistent with the maximum penalties for the existing aggravated trafficking offences in Division 271 of the Criminal Code, and are in keeping with the continuum of offences for exploitative conduct and aggravating factors in the Criminal Code (as amended by this Bill).

New subsection 271.7C(2) of the Criminal Code provides that, where a trier of fact (that is, the judge or jury) in a prosecution for an offence of aggravated organ trafficking is not satisfied beyond a reasonable doubt that the defendant is guilty of an offence of aggravated organ trafficking, but is satisfied beyond a reasonable doubt that the defendant is guilty of an offence of organ trafficking (that is, an offence against new section 271.7B), the trier of fact may find the defendant not guilty of the aggravated offence but guilty of an offence against new section 271.7B.

As a result of new subsection 271.7C(3) of the Criminal Code, the trier of fact may only find the person on trial for an aggravated offence of organ trafficking not guilty of that offence but guilty of an offence of organ trafficking if the defendant has been afforded procedural fairness in relation to that finding.

This reflects the fact that, in a trial for an offence of aggravated organ trafficking, the prosecution would need to prove every element of the base offence of organ trafficking, in addition to the aggravating elements.

As a result of Item 45 of Schedule 1 (below), section 15.2 of the Criminal Code (extended geographical jurisdiction – category B) applies to the new organ trafficking offence. This ensures the provisions capture the conduct of Australian citizens, residents or corporations

overseas. The principle of double jeopardy also applies, consistent with existing section 271.13 of the Criminal Code.

Section 271.7D – Offence of domestic organ trafficking

This Item inserts a new section 271.7D of the Criminal Code. New section 271.7D of the Criminal Code is titled, ‘Offence of domestic organ trafficking’.

New section 271.7D of the Criminal Code provides that a person commits an offence of domestic organ trafficking if the person engages in conduct consisting of the organising or facilitation of the transportation or proposed transportation of a person from one place in Australia to another place in Australia, and is reckless as to whether that conduct will result in the removal of an organ of the victim contrary to Subdivision BA of Division 271 of the Criminal Code, either by the offender or another person, after or in the course of that transportation.

New section 271.7D includes a note stating that section 271.7A details when the removal of an organ will be contrary to Subdivision BA of Division 271 of the Criminal Code. New section 271.7A (see above) of the Criminal Code provides that the removal of a person’s organ is contrary to Subdivision BA of Division 271 of the Criminal Code if either:

- the removal, or entering into an agreement for the removal, would be contrary to the law of the State or Territory where it is, or is to be, carried out (new paragraph (a) of section 271.7A), or
- neither the victim, nor the victim’s guardian, consents to the removal, and it would not meet a medical or therapeutic need of the victim (new paragraph (b) of section 271.7A).

A maximum penalty of 12 years’ imprisonment applies to this offence. This is consistent with the maximum penalties for the existing trafficking offences in Division 271 of the Criminal Code, and is in keeping with the continuum of offences for exploitative conduct in the Criminal Code (as amended by this Bill).

This offence is intended to cover circumstances where the victim’s organ is removed, as well as where such removal was planned but did not eventuate (including attempts). In addition, the offence is designed to cover circumstances where the individual’s organ is removed, or an attempt is made to remove it, during travel from one place in Australia to another place in Australia country. The offence applies where a victim is transported within a Territory, or where the victim is transported across a border between a State or Territory and other State or Territory.

As a result of Item 47 of Schedule 1 (below), a person only commits an offence against section 271.7D of the Criminal Code if any one or more of circumstances set out in existing section 271.11 of the Criminal Code applies. The principle of double jeopardy also applies to offences against section 271.7D, consistent with existing section 271.13 of the Criminal Code.

Section 271.7E – Domestic organ trafficking—aggravated offence

This Item inserts a new section 271.7E of the Criminal Code. New section 271.7E of the Criminal Code is titled, ‘Domestic organ trafficking—aggravated offence’.

New section 271.7E has three subsections. New subsection 271.7E(1) provides that a person commits an aggravated offence of domestic organ trafficking in certain circumstances. Subsections 271.7E(2) and (3) provide for alternative verdicts of a base offence of domestic organ trafficking in certain circumstances.

New subsection 271.7E(1) provides that a person commits an aggravated offence of domestic organ trafficking in relation to a victim if any one of four circumstances applies. Those circumstances are set out at paragraphs 271.7E(1)(a) – (d) as follows:

- (a) the victim is under 18 years old at the time of the offence of domestic organ trafficking, or
- (b) the offender commits the offence of domestic organ trafficking and intends an organ of the victim will be removed contrary to Subdivision BA of Division 271 of the Criminal Code, either by the offender or another person, after arrival at the place to which the person has been transported, or in the course of the transportation, or
- (c) the offender, in committing the offence of domestic organ trafficking, subjects the victim to cruel, inhuman or degrading treatment, or
- (d) the offender, in committing the offence of domestic organ trafficking, engages in conduct that gives rise to a danger of death or serious harm to the victim or another person and is reckless to that danger.

New paragraph 271.7E(1)(a) means that a person commits an aggravated offence of domestic organ trafficking if the victim was under 18 years old at the time of the conduct that constitutes the offence. Such conduct would equate to trafficking in children, and is considered more serious than trafficking in adults.

New paragraph 271.7E(1)(b) means that a person commits an aggravated offence of domestic organ trafficking if the person intends that the victim will have their organ removed after or during the transportation within Australia. The base offence of domestic organ trafficking at new section 271.7D applies where a person engages in conduct consisting of the organising or facilitation of the transportation or proposed transportation of a person from one place in Australia to another place in Australia, and is reckless as to whether that conduct will result in the removal of an organ of the victim. New paragraph 271.7E(1)(b) means that, where the offender intends the victim’s organ will be removed after transportation, the offender will have committed an aggravated offence. This is because intention necessarily involves a higher degree of culpability.

New paragraph 271.7E(1)(c) means that a person commits an aggravated offence of domestic organ trafficking if the person, in committing the offence of domestic organ trafficking, subjects the victim to cruel, inhuman or degrading treatment. This means that, where a victim is subjected to particularly cruel, inhuman or degrading treatment by the offender during the commission of the offence of organ trafficking, the offender the offender will have committed an aggravated offence. For example, if the victim was accommodated in a small,

confined space for the duration of the transportation, without access to food, water or proper sanitation, it may constitute cruel, inhuman or degrading treatment by the offender and warrant a charge of aggravated organ trafficking.

New paragraph 271.7E(1)(d) means that a person commits an aggravated offence of domestic organ trafficking if the person, in committing the offence of domestic organ trafficking, engages in conduct that gives rise to a danger of death or serious harm to the victim or another person and is reckless to that danger. For example, this means that, where a person causes serious harm to the victim or another person in order to obtain the person's compliance to the removal of their organ or the transportation within Australia, the offender the offender will have committed an aggravated offence. In addition, it might arise if the offender removes the organ in unsafe conditions such as not a properly sterilised procedure.

New subsection 271.7E(1) includes a note stating that section 271.7A details when the removal of an organ will be contrary to Subdivision BA of Division 271 of the Criminal Code. New section 271.7A (see above) of the Criminal Code provides that the removal of a person's organ is contrary to Subdivision BA of Division 271 of the Criminal Code if either:

- the removal, or entering into an agreement for the removal, would be contrary to the law of the State or Territory where it is, or is to be, carried out (new paragraph (a) of section 271.7A), or
- neither the victim, nor the victim's guardian, consents to the removal, and it would not meet a medical or therapeutic need of the victim (new paragraph (b) of section 271.7A).

A maximum penalty of 25 years' imprisonment applies to an aggravated offence of organ trafficking where the victim is under 18 years old at the time of the offence. A maximum penalty of 20 years' imprisonment applies to an aggravated offence of organ trafficking in any other case. These penalties are consistent with the maximum penalties for the existing aggravated trafficking offences in Division 271 of the Criminal Code, and are in keeping with the continuum of offences for exploitative conduct and aggravating factors in the Criminal Code (as amended by this Bill).

New subsection 271.7E(2) of the Criminal Code provides that, where a trier of fact (that is, the judge or jury) in a prosecution for an offence of aggravated domestic organ trafficking is not satisfied beyond a reasonable doubt that the defendant is guilty of an offence of aggravated domestic organ trafficking, but is satisfied beyond a reasonable doubt that the defendant is guilty of a an offence of domestic organ trafficking (that is, an offence against new section 271.7D), the trier of fact may find the defendant not guilty of the aggravated offence but guilty of an offence against new section 271.7E.

As a result of new subsection 271.7E(3) of the Criminal Code, the trier of fact may only find the person on trial for an aggravated offence of organ trafficking not guilty of that offence but guilty of an offence of organ trafficking if the defendant has been afforded procedural fairness in relation to that finding.

This reflects the fact that, in a trial for an offence of aggravated organ trafficking, the prosecution would need to prove every element of the base offence of organ trafficking, in addition to the aggravating elements.

As a result of Item 47 of Schedule 1 (below), a person only commits an offence against section 271.7E of the Criminal Code if any one or more of circumstances set out in existing section 271.11 of the Criminal Code applies. The principle of double jeopardy also applies to offences against section 271.7E, consistent with existing section 271.13 of the Criminal Code.

New subdivision – ‘Subdivision BB—Harbouring a victim’

As a result of this Item, two new subdivisions will be inserted into existing Division 271 of the Criminal Code. The second new subdivision, ‘Subdivision BB—Harbouring a victim’, is inserted before after new section 271.7E of the Criminal Code.

New Subdivision BB of Division 271 of the Criminal Code contains two provisions relating to harbouring victims.

Section 271.7F – Harbouring a victim

This Item inserts an offence of harbouring a victim section 271.7F of the Criminal Code.

Under new section 271.7F, a person (the **first person**) commits an offence if the first person harbours, receives or conceals another person (the **victim**) (new paragraph 271.7F(1)(a)), the harbouring, receiving or concealing of the victim assists, or furthers the purpose of, the commission of any ‘third person offence’ (new paragraph 271.7F(1)(b)), and the ‘third person offence’ is an offence against Division 271 (apart from the new offence of harbouring a victim itself) or Division 270 (new paragraph 271.7F(1)(c)). The new offence carries a maximum penalty of 12 years’ imprisonment. The new penalty is considered appropriate given the relative seriousness of assisting with, or furthering the purpose of, a third person’s trafficking, slavery or slavery-like offence.

As a result of new subsection 271.7F(2), recklessness applies to new paragraph 271.7F(1)(b) – the question of whether the harbouring, receiving or concealing of the victim assists, or furthers the purpose of, the commission of any ‘third person offence’.

Pursuant to new subsection 271.7F(3), absolute liability applies to paragraph 271.7F(1)(c) of the Criminal Code – the fact that the ‘third person offence’ is an offence against Division 271 (apart from the new offence of harbouring a victim itself) or Division 270 of the Criminal Code. The application of absolute liability to this element of the offence means that there is no fault element for the physical element at new subsection 271.7F, and that the defence of mistake of fact under section 9.2 of the Criminal Code would not be available to the defendant. The existence of absolute liability does not make any other defence unavailable.

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. In addition, other Commonwealth legislation may be insufficient to comprehensively criminalise the harbouring, receiving or concealing of a victim of slavery or slavery-like practices.

For example, a brothel owner and/or manager may not be involved in recruitment or facilitating the entry of a victim. However, they may allow, either knowingly or recklessly,

a sex worker to work at the premises in circumstances where the person is either in a condition of servitude or is debt bonded to a third party. In such a case, the primary offender will be the person who trafficked the victim or manages the debt. However, the brothel owner and/or manager would be culpable for their role in facilitating the primary offender's conduct, and the new offence of harbouring a victim would criminalise this.

Existing section 271.2 of the Criminal Code criminalises the conduct of a person who 'organises or facilitates the entry or proposed entry, or the receipt, of another person into Australia', and section 271.4 refers to the same conduct where the victim is under 18 years old at the time of the offence. While these provisions may capture the conduct of a person who facilitates a trafficking entry offence, it is not certain that they would extend to a person who harbours, receives or conceals a person who has already entered Australia.

Existing section 233E of the *Migration Act 1958* contains an offence of concealing and harbouring non-citizens. This offence is designed to address irregular migration and is not sufficient for the purposes of people trafficking, primarily as it makes no reference to exploitation as an element of the offence. For that reason, the penalties for that offence are also insufficient. Further, this offence is not applicable to domestic trafficking or to slavery or slavery-like offences.

In order to comprehensively criminalise the conduct of individuals involved in facilitating the offence a people trafficking, slavery, or slavery-like offence, this Item creates a new offence of harbouring a victim. The new offence reflects the definition of 'trafficking in persons' in the Trafficking Protocol, which includes the harbouring or receipt of persons for the purpose of exploitation.

Under new subsection 271.7F(4), a person could be convicted of an offence against new subsection 271.7F(1) whether or not there has been a conviction or prosecution for the 'third person offence'. This is important to ensure that, where the person responsible for the trafficking or exploitative conduct is not able to be identified, or is not able to be prosecuted for any reason, the new offence of harbouring a victim is still effective.

The new offence is not intended to criminalise a person who unknowingly receives services from a victim, such as the client of a sex worker who is a victim of a trafficking or a trafficking-related offence. The new offence is also not intended to apply to a person whose only intent is to provide help to or comfort a victim of trafficking or a trafficking-related offence.

As a result of Item 45 of Schedule 1 (below), section 15.2 of the Criminal Code (extended geographical jurisdiction – category B) applies to the new offence of harbouring a victim. This ensures the provisions capture the conduct of Australian citizens, residents or corporations overseas. The principle of double jeopardy also applies, consistent with existing section 271.13 of the Criminal Code.

Section 271.7G – Harbouring a victim—aggravated offence

This Item inserts an aggravated offence of harbouring a victim at section 271.7G of the Criminal Code.

The new aggravated offence applies where a person (the *offender*) commits the new offence of harbouring a victim (see new section 271.7F of the Criminal Code, above), and the victim

is under 18 years old at the time of the offence. The new aggravated offence of harbouring a victim carries a maximum penalty of 20 years' imprisonment. The new penalty is considered appropriate given the relative seriousness of assisting with, or furthering the purpose of, a third person's people trafficking, slavery or slavery-like offence where the victim is under 18 years old at the time of the offence.

The offence of harbouring is intended to capture the conduct of a person who assists with, or furthers the purpose of, a third person's people trafficking, slavery or slavery-like offence, but who does not commit such an offence themselves. As subjecting a victim to cruel or inhuman treatment, or engaging in conduct that gives rise to a danger of death or serious harm, constitutes an offence of trafficking or a slavery or slavery-like practice itself, the aggravating conduct for the purposes of this offence is limited to circumstances in which the victim is under 18 years old at the time of the offence.

Under new subsection 271.7G(2), where the trier of fact (that is, the judge or jury) is not satisfied beyond a reasonable doubt that the defendant is guilty of the aggravated offence of harbouring a victim, but is satisfied beyond a reasonable doubt that the defendant is guilty of the offence of harbouring a victim at section 271.7F, the defendant may be found guilty of an offence against section 271.7F. This means that, where a court is not satisfied the victim was under 18 years old at the time of offence, the defendant could be convicted of the base offence of harbouring a victim.

New subsection 271.7G(3) provides that the trier of fact may only find the person on trial for an aggravated offence of harbouring a victim not guilty of that offence but guilty of an offence against section 271.7F if the defendant has been afforded procedural fairness in relation to that finding.

As a result of Item 45 of Schedule 1 (below), section 15.2 of the Criminal Code (extended geographical jurisdiction – category B) applies to the new aggravated offence of harbouring a victim. This ensures the provisions capture the conduct of Australian citizens, residents or corporations overseas. The principle of double jeopardy also applies, consistent with existing section 271.13 of the Criminal Code.

Item 39 – Subsection 271.8(1) of the *Criminal Code*

This Item omits the text, '(1)' from existing subsection 271.8(1) of the Criminal Code.

Existing section 271.8 of the Criminal Code provides for an offence of debt bondage. Existing subsection 271.8(2) provides a list of matters a trier of fact (that is, the judge or jury) may have regard to in determining whether a person has caused another person to enter into debt bondage. The relevant matters are listed at paragraphs subsection 271.8(2)(a) to (c), and include the economic relationship between the alleged victim and alleged offender, the terms of any contract or agreement between the alleged victim and the alleged offender, and the personal circumstances of the alleged victim including their lawful presence in Australia.

Existing subsection 271.8(3) provides that subsection (2) does not prevent the prosecution or the defence from leading any other evidence in proceedings for an offence of debt bondage, or limit the manner in which evidence may be adduced, or limit the admissibility of evidence.

As a result of Item 48 of Schedule 1 (see below), a general provision will be inserted into Division 271 of the Criminal Code that provides that the trier of fact in a debt bondage matter may consider the same matters that are listed at existing subsection 271.8(2) of the

Criminal Code. Item 48 of Schedule 1 also inserts a provision that replicates the text in existing subsection 271.8(3) of the Criminal Code. Accordingly, existing subsections 271.8(2) and (3) of the Criminal Code will be redundant.

This Item is a consequential change necessary as a result of Items 41 and 48 of Schedule 1 (see below), and reflects the fact that, as a result of those Items, section 271.8 will no longer need to be broken down into subsections.

In light of Item 48 of Schedule 1 (see below), this Item has no substantive effect on the operation of the offence of debt bondage at existing subsection 271.8 of the Criminal Code.

Item 40 – Subsection 271.8(1) of the *Criminal Code* (penalty)

This Item repeals the existing penalty applicable to the base offence of debt bondage at existing subsection 271.8(1) of the Criminal Code and substitutes a penalty of four years' imprisonment.

Existing section 271.8(1) criminalises the conduct of a person who intentionally causes another person to enter into debt bondage. The term '*debt bondage*' is defined in the Dictionary of the Criminal Code as the status or condition that arises where a person pledges his or her personal services, or the personal services of another person under his or her control as security for a debt owed, or claimed to be owed, if the debt is manifestly excessive, the reasonable value of those services is not applied toward the liquidation of the debt or purported debt, or the length and nature of those services are not respectively limited and defined. The existing penalty for the base offence of debt bondage at section 271.8(1) is 12 months' imprisonment.

The debt bondage offences were inserted into the Criminal Code by the *Criminal Code Amendment (Trafficking in Persons Offences) Act 2005*. The Explanatory Memorandum for the Criminal Code Amendment (Trafficking in Persons Offences) Act states that the low penalty for the base offence enables the offence to be dealt with summarily, and reflects the relative seriousness of the offence. It was intended that the offence of debt bondage would provide an alternative in cases where it may be difficult to prove the commission of one of the more serious trafficking offences.

However, it is now apparent that the existing penalty for this offence does not appropriately reflect its relative seriousness. Enforcement of a debt is often one of the most significant factors pointing to the exercising of ownership over another person. Enforcement of a debt is usually accompanied by other factors such as restriction on movement and high levels of control, although victims are not necessarily physically confined.

Further, as the debt bondage offence must be tried summarily (whereas other trafficking offences are dealt with on indictment), it means debt bondage cannot be placed on the indictment as an alternative for a jury to consider if it cannot reach a decision on a slavery or people trafficking charge, or if it considers the facts do not warrant conviction for slavery or people trafficking. Finally, it is undesirable to put a victim through an additional separate trial for a debt bondage offence.

This Item increases the penalty for the base debt bondage offence at existing section 271.8 of the Criminal Code from 12 months' imprisonment to four years' imprisonment, which ensures that the penalty is sufficient to reflect the relative seriousness of the offence. The

amendment also has the effect of making the debt bondage offence an indictable offence, which means it could be included as an alternative count in an indictment for a trafficking offence or another slavery-like practice.

Item 41 – Subsections 271.8(2) and (3) of the *Criminal Code*

This Item repeals existing subsections 271.8(2) and (3) of the Criminal Code.

Existing section 271.8 of the Criminal Code provides for an offence of debt bondage. Existing subsection 271.8(2) provides a list of matters a trier of fact (that is, the judge or jury) may have regard to in determining whether a person has caused another person to enter into debt bondage. The relevant matters are listed at paragraphs subsection 271.8(2)(a) to (c), and include the economic relationship between the alleged victim and alleged offender, the terms of any contract or agreement between the alleged victim and the alleged offender, and the personal circumstances of the alleged victim including their lawful presence in Australia.

Existing subsection 271.8(3) provides that subsection (2) does not prevent the prosecution or the defence from leading any other evidence in proceedings for an offence of debt bondage, or limit the manner in which evidence may be adduced, or limit the admissibility of evidence.

As a result of Item 48 of Schedule 1 (see below), a general provision will be inserted into Division 271 of the Criminal Code that provides that the trier of fact in a debt bondage matter may consider the same matters that are listed at existing subsection 271.8(2) of the Criminal Code. Item 48 also inserts a provision that replicates the text in existing subsection 271.8(3) of the Criminal Code. Accordingly, existing subsections 271.8(2) and (3) of the Criminal Code will be redundant.

Item 42 – Section 271.9 of the *Criminal Code*

This Item repeals section 271.9 of the Criminal Code (the aggravated offence of debt bondage) and substitutes a new section 271.9.

Existing section 271.9 provides that a person commits an offence of aggravated debt bondage if the person commits an offence of debt bondage in relation to a person who is under 18 years old at the time of the offence. The term ‘*debt bondage*’ is defined in the Dictionary in the Criminal Code as the status or condition that arises where a person pledges his or her personal services, or the personal services of another person under his or her control as security for a debt owed, or claimed to be owed, if the debt is manifestly excessive, the reasonable value of those services is not applied toward the liquidation of the debt or purported debt, or the length and nature of those services are not respectively limited and defined. The existing aggravated offence of debt bondage carries a maximum penalty of two years’ imprisonment.

Investigations into people trafficking and slavery-like offences have highlighted that, notwithstanding the age of the victim, the circumstances of offending in some cases involves more extreme exploitation than is required to amount to an offence. Where these circumstances exist, an aggravated offence attracting a higher penalty may be warranted.

For example, subjecting the victim to cruel, inhuman or degrading treatment could include forcing a debt bonded worker to sleep in sub-human conditions, and conduct giving rise to a danger of death or serious harm to the victim could include where a sex worker is forced to

perform sexual services without the use of prophylactics to protect against sexually transmitted infections.

In addition, it is now apparent that the existing penalty of two years' imprisonment for this offence does not appropriately reflect its relative seriousness. Enforcement of a debt is often one of the most significant factors pointing to the exercising of ownership over another person. Enforcement of a debt is usually accompanied by other factors such as restriction on movement and high levels of control, although victims are not necessarily physically confined. When debt bondage also involves circumstances in where the victim is under 18 years old at the time of the offence, or where the offender, in committing the offence, either subjects the victim to cruel, inhuman or degrading treatment, or engages in conduct that gives rise to a danger of death or serious harm to the victim or another person, and is reckless as to that danger, the existing penalty of two years' imprisonment is insufficient.

New section 271.9 of the Criminal Code provides that an offence of debt bondage is aggravated in circumstances where the victim is under 18 years old at the time of the offence (new paragraph 271.9(1)(a)), or where the offender, in committing the offence, either subjects the victim to cruel, inhuman or degrading treatment (new paragraph 271.9(1)(b)), or engages in conduct that gives rise to a danger of death or serious harm to the victim or another person, and is reckless as to that danger (new paragraph 271.9(1)(c)). This Item also increases the penalty applicable to the aggravated offence of debt bondage from two years' imprisonment to seven years' imprisonment. This increased penalty ensures that the penalty is sufficient to reflect the relative seriousness of the offence.

This Item strengthens the existing aggravated offence of debt bondage provision at section 271.9 of the Criminal Code to take into account the more serious nature of the exploitation found in some offending.

It is intended that the conduct of the offender should be the relevant factor in determining whether the offence was aggravated, rather than the industry in which the debt bondage arrangement arose. For example, the fact that a debt bondage arrangement exists within the sex industry is not in itself intended to warrant an aggravated charge as inherently cruel, inhuman or degrading treatment of the victim. However, the circumstances surrounding the debt bondage arrangement may amount to cruel, inhuman or degrading treatment, or a danger or death or serious harm to the victim.

Where a defendant is charged with the aggravated offence of debt bondage, the prosecution would be required to prove the base offence and the aggravating circumstances beyond reasonable doubt. Under new subsection 271.9(2), where the trier of fact (that is, the judge or jury) is not satisfied beyond a reasonable doubt that the defendant is guilty of the aggravated offence of debt bondage, but is satisfied beyond a reasonable doubt that the defendant is guilty of the offence of debt bondage at section 271.8, the defendant may be found guilty of an offence against section 271.8. This means that, where a court is not satisfied the relevant aggravating factor exists, as outlined at new paragraphs 271.9(1)(a) – (c), the defendant could be convicted of the base offence of debt bondage.

New subsection 271.9(3) provides that the trier of fact may only find the person on trial for an aggravated offence of debt bondage not guilty of that offence but guilty of an offence against section 271.8 if the defendant has been afforded procedural fairness in relation to that finding.

Item 43 – Subdivision D of Division 271 of the *Criminal Code* (heading)

This Item repeals the existing heading of Subdivision D of Division 271 of the Criminal Code and replaces it with a new heading.

Existing Subdivision D of Division 271 of the Criminal Code is currently titled ‘Subdivision D—General provisions relating to offences under this Division’. As a result of this Item, Subdivision D will be titled, ‘Subdivision D—Offences against Division 271: general’.

This Item will ensure that the headings for subdivisions within Division 271 of the Criminal Code are consistent. This Item does not have any substantive effect.

Item 44 – Section 271.10 of the *Criminal Code* (heading)

This Item repeals the heading of existing section 271.10 of the Criminal Code and replaces it with a new heading.

Existing section 271.10 of the Criminal Code is titled, ‘Jurisdictional requirement for offences other than offences related to domestic trafficking in persons’. As a result of this Item, the heading of section 271.10 of the Criminal Code will be, ‘Jurisdictional requirements—offences other than domestic trafficking in persons or organs’.

Existing section 271.10 of the Criminal Code contains a jurisdictional requirement for the offences contained within Division 271 aside from the offence of domestic trafficking in persons. By their nature, the domestic trafficking offences occur within Australia and as such have different jurisdictional requirements. As a result of Item 38 of Schedule 1 (see above), new domestic organ trafficking offences will be inserted into Division 271 of the Criminal Code. This Item is a consequential amendment necessary as a result of Item 38 of Schedule 1 (see above) to ensure the title of section 271.10 appropriately reflects its contents.

This Item will also ensure that the headings for sections within Division 271 of the Criminal Code are consistent. This Item does not have any substantive effect.

Item 45 – Section 271.10 of the *Criminal Code*

This Item omits the text, ‘271.8 or 271.9’ from existing section 271.10 of the Criminal Code and substitutes the text ‘271.7B, 271.7C, 271.7F, 271.7G, 271.8 or 271.9’.

Section 15.2 of the Criminal Code (extended geographical jurisdiction – category B) provides that, if section 15.2 applies to a Commonwealth offence, a person does not commit the offence unless (relevantly):

- the conduct constituting the offence either occurs wholly or partly in Australia, or wholly or partly on board an Australian aircraft or ship, or
- the conduct constituting the offence occurs wholly outside Australia, and a result of the conduct occurs wholly or partly in Australia, or wholly or partly on board an Australian aircraft or ship, or
- the conduct constituting the offence occurs wholly or outside Australia, and the offender was as Australian citizen, Australian resident, or a body corporate

incorporated by or under a law of the Commonwealth or of a State or Territory at the time of the offence.

Existing subsections 15.2(2) and 15.2(4) of the Criminal Code also provide defences to Commonwealth offences to which section 15.2 applies in certain circumstances. Existing section 271.10 of the Criminal Code provides that section 15.2 applies to the existing offences of trafficking in persons (section 271.2 of the Criminal Code), aggravated offence of trafficking in persons (section 271.3), offence of trafficking in children (section 271.4), offence of debt bondage (section 271.8), and aggravated offence of debt bondage (section 271.9).

The effect of this Item is to include references to the following new sections in existing section 271.10 of the Criminal Code:

- section 271.7B – Offence of organ trafficking—entry into and exit from Australia
- section 271.7C – Organ trafficking—aggravated offence
- section 271.7F – Harboursing a victim, and
- section 271.7G – Harboursing a victim—aggravated offence.

This means that section 15.2 of the Criminal Code applies to offences against section 271.7B, 271.7C, 271.7F or 271.7G of the Criminal Code.

Item 46 – Section 271.11 of the *Criminal Code* (heading)

This Item repeals the heading of existing section 271.11 of the Criminal Code and replaces it with a new heading.

Existing section 271.11 of the Criminal Code is titled, ‘Jurisdictional requirement for offences related to domestic trafficking in persons’. As a result of this Item, the heading of section 271.11 of the Criminal Code will be, ‘Jurisdictional requirements—offences of domestic trafficking in persons or organs’.

Existing section 271.11 of the Criminal Code contains a jurisdictional requirement for the offences of domestic trafficking in persons. As a result of Item 38 of Schedule 1 (see above), new domestic organ trafficking offences will be inserted into Division 271 of the Criminal Code. As a result of Item 47 of Schedule 1 (see below), a reference to the new domestic organ trafficking offences will be included in section 271.11 of the Criminal Code.

This Item is a consequential amendment necessary as a result of Item 38 of Schedule 1 (see above) and Item 47 of Schedule 1 (see below) to include a reference to the new offences of organ trafficking in the title of section 271.11. This will ensure the title appropriately reflects the contents of section 271.11, and that the headings for sections within Division 271 of the Criminal Code are consistent.

Item 47 – Section 271.11 of the *Criminal Code*

This Item omits the text, ‘or 271.7’ and replaces it with the text ‘, 271.7, 271.7D or 271.7E’ in existing section 271.11 of the Criminal Code.

Existing section 271.11 of the Criminal Code contains a jurisdictional requirement for the offences of domestic trafficking in persons, which limit their operation. Currently, a person only commits an offence against section 271.5 (offence of domestic trafficking in persons), 271.6 (aggravated offence of domestic trafficking in persons) or 271.7 (offence of domestic trafficking in children) of the Criminal Code if one of the paragraphs listed in 271.11 applies. Those paragraphs provide as follows:

- (a) the conduct constituting the offence occurs to any extent outside Australia
- (b) the conduct constituting the offence involves transportation across State borders, either for reward or in connection with a commercial arrangement
- (c) the conduct constituting the offence occurs within a Territory or involves transportation to or from a Territory
- (d) the conduct constituting the offence is engaged in by, or on behalf of, a constitutional corporation, or in circumstances where the victims of the trafficking conduct were intended to be employed by a constitutional corporation
- (e) some of the conduct constituting the offence is engaged in by communication using a postal, telegraphic or telephonic service within the meaning of paragraph 51(v) of the Constitution, or
- (f) the victim of the conduct constituting the offence is an alien for the purposes of paragraph 51(xix) of the Constitution.

As a result of Item 38 of Schedule 1 (see above), new domestic organ trafficking offences will be inserted into Division 271 of the Criminal Code. This Item inserts references to the new domestic organ trafficking offences in new sections 271.7D and 271.7E of the Criminal Code into existing section 271.11. This Item is a consequential amendment necessary as a result of Item 38 to insert references to the new domestic organ trafficking offences in section 271.11 of the Criminal Code.

Item 48 – After section 271.11 of the *Criminal Code*

This Item inserts two new provisions after existing section 271.11 of the Criminal Code. The new provisions are detailed below.

Section 271.11A – Offences against Division 271—relevant evidence

This Item inserts a new section 271.11A of the Criminal Code after existing section 271.11 of the Criminal Code. The section is titled ‘Offences against Division 271—relevant evidence’.

New section 271.11A provides a list of matters a trier of fact (that is, the judge or jury) may have regard to in determining:

- in the case of an offence against Subdivision B or Subdivision BB of Division 271 the

Criminal Code (that is, the offences of people trafficking, or harbouring a victim including the respective aggravated offences), if the alleged victim has been coerced, threatened or deceived

- in the case of an offence against Subdivision BA of Division 271 the Criminal Code (that is, the organ trafficking and aggravated organ trafficking offences), if the alleged victim, or the alleged victim's guardian, has consented to the removal of an organ of the alleged victim, or
- in the case of an offence against Subdivision C of Division 271 the Criminal Code (that is, the offences of debt bondage or aggravated debt bondage), if another person has caused if the alleged victim to enter into debt bondage.

The relevant matters are listed at new subsection 271.11A(2), and include the economic relationship between the alleged victim and alleged offender, the terms of any contract or agreement between the alleged victim and the alleged offender, and the personal circumstances of the alleged victim including their lawful presence in Australia, their understanding of English and the extent of their social and physical dependence on the alleged offender.

The list of matters at subsection 271.11A(2) is not intended to be exhaustive. That is, the trier of fact in a particular case may have regard other matters, not only those matters listed in new subsection 271.11A(2) of the Criminal Code.

As a result of new subsection 271.11A(3), in the case of an offence against Subdivision BA of Division 271 the Criminal Code, where the consent to the removal of the organ is made by the victim's guardian, the reference in new subsection 271.11A(2) to the 'alleged victim' is taken to include a reference to the victim's guardian. This means that, where consent to the removal of an organ of the victim is made by the victim's guardian, the court may have regard to the factors set out in subsection 271.11A(2) when considering whether the victim's guardian consented. For example, where a victim or their guardian consents to the removal of an organ of the victim in exchange for a sum of money, it may equate to an inducement depending on the circumstances of the victim or their guardian. Accordingly, the court may take the personal circumstances of the victim and/or their guardian in considering whether the consent to the removal of the organ was free and full.

New subsection 271.11A(4) provides that new subsection 271.11A(1) does not prevent the prosecution or the defence leading other evidence in the proceedings, limit the manner in which evidence may be given, or limit the admissibility of evidence.

A new general provision that applies to all offences under Division 271 ensures similar matters could be considered by a court in determining any whether an alleged victim was coerced, threatened or deceived. For example, many victims of slavery-like offences may be economically powerless, socially isolated, and from culturally and linguistically diverse backgrounds, making them particularly vulnerable to an offender's conduct.

It is intended that the matters listed in the new provision could be considered regardless of the circumstances of the offence against Subdivision B, BA, BB, or C of Division 271 of the Criminal Code. The new provision will not prevent the leading of any other evidence in the relevant proceedings, or limit the manner in which evidence may be adduced or the admissibility of evidence.

Section 271.11B – Offences against Division 271—no defence of victim consent or acquiescence

This Item inserts a new section 271.11B of the Criminal Code. New section 271.11B clarifies that a victim’s consent or acquiescence is not a defence to conduct that would otherwise be an offence under Division 271 of the Criminal Code.

In prosecutions for slavery and slavery-like offences, consent has been a difficult issue. While judges have generally directed juries that consent by a victim is not a defence to a charge, some judges have also indicated that consent may be relevant to an assessment of whether a person was in fact reduced to a state of slavery – for example, see *Ho v The Queen; Leech v The Queen* [2011] VSCA 344 (11 November 2011), at paragraphs 80 and 83. However, the Trafficking Protocol makes it clear that consent of a victim is irrelevant (see Article 3(b)).

People trafficking or reducing a person to a state of slavery or servitude often involves suppressing the person’s free will, their self-respect, as well as the ability to make decisions for themselves. 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.

Accordingly, a general provision will be inserted into Division 271 clarifying that a victim’s consent or acquiescence is not a defence to conduct that would otherwise constitute any element of an offence against the Division. A corresponding provision will be inserted into Division 270 as a result of Item 12 of Schedule 1 (see above).

Item 49 – Section 271.12 of the *Criminal Code* (heading)

This Item repeals the heading of existing section 271.12 of the Criminal Code and substitutes a new heading.

Existing section 271.12 of the Criminal Code is titled, ‘Other laws not excluded’. As a result of this Item, the heading of section 271.12 will be, ‘Offences against Division 271—other laws not excluded’.

This Item will ensure that the headings for sections within Division 271 of the Criminal Code are consistent. This Item does not have any substantive effect.

Item 50 – Section 271.12 of the *Criminal Code*

This Item inserts the text, ‘(1)’ before the text at existing section 271.12 of the Criminal Code.

This amendment means that the text in existing section 271.12 of the Criminal Code will become subsection 271.12(1) of the Criminal Code, and is a consequential amendment necessitated by the amendment at Item 51 of Schedule 1 (below), which adds additional subsections to the provision.

Item 51 – At the end of section 271.12 of the *Criminal Code*

This Item inserts two new subsections into existing section 271.12 of the Criminal Code following the existing text at section 271.12.

Without limiting the application of the existing savings provision in section 271.12 of the Criminal Code (as amended by this Bill), new subsection 271.12(2) provides that Division 271 of the Criminal Code is not intended to exclude or limit the concurrent operation of any other Commonwealth law, or a law of a State or Territory which either:

- criminalises an act or an omission that is criminalised by Division 271, or
- criminalises conduct which is similar to an act or an omission that is criminalised by Division 271.

New subsection 271.12(3) of the Criminal Code provides that new subsection 271.12(2) operates irrespective of whether the other law does one or more of the following:

- provides a different penalty from the offence in Division 271, and/or
- provides a different fault element or elements from an offence in Division 271, and/or
- provides for different defences from an offence in Division 271.

Most States and Territories have enacted sexual servitude and deceptive recruiting offences that would allow them to prosecute instances of trafficking for the purposes of sexual exploitation. Section 271.12 of the Criminal Code currently provides that Division 271 is not intended to exclude or limit the operation of any other law of the Commonwealth or any law of a State or Territory.

The effect of this Item is to strengthen the operation of the existing savings provision at section 271.12 by further clarifying that the concurrent operation of the Commonwealth and State and Territory offences is intended. This is intended to help to reduce any risk that a Constitutional inconsistency could be found between Division 271 and any State or Territory laws criminalising similar offences. For consistency, this amendment is modelled on savings provisions set out at existing section 300.4 of the Criminal Code.

Identical amendments are made to existing section 270.12 as a result of Item 15 of Schedule 1, above.

Item 52 – Dictionary in the *Criminal Code* (definition of *exploitation*)

This Item repeals the existing definition of the term ‘*exploitation*’ in the Dictionary in the Criminal Code, and replaces it with the words, ‘*exploitation* has the same meaning as in Division 271 (see section 271.1A)’.

The cross-reference to the definition of exploitation in new section 271.1A is inserted into the Dictionary for ease of reference. New section 271.1A defines exploitation as occurring if the exploiter’s conduct causes the victim to enter into slavery or a similar condition, servitude, forced labour, forced marriage, or debt bondage (see Item 22 of Schedule 1, above).

Item 53 – Dictionary in the *Criminal Code* (definition of *forced labour*)

This Item repeals the existing definition of the term ‘*forced labour*’ in the Dictionary in the Criminal Code, and replaces it with the words, ‘*forced labour* has the same meaning as in Division 270 (see section 270.6)’.

The cross-reference to the definition of forced labour in new section 270.6 will be contained in the Dictionary for ease of reference. New section 270.6 defines forced labour as the condition of a person (the *victim*) who provides labour or services if, because of the use of coercion, threat or deception, 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, or to leave the place or area where the victim provides the labour or services (see Item 12 of Schedule 1, above).

Item 54 – Dictionary in the *Criminal Code*

This Item inserts a definition of the term ‘*forced marriage*’ into the Dictionary of the Criminal Code. The definition provides that the term forced marriage has the same meaning as in Division 270 (see section 270.7A). Item 12 of Schedule 1 inserts a definition of forced marriage (see above).

The cross-reference to the definition of forced marriage will be contained in the Dictionary for ease of reference. New section 270.7A provides that a 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.

Item 55 – Dictionary in the *Criminal Code*

This Item inserts a definition of the term ‘*servitude*’ into the Dictionary of the Criminal Code. The definition provides that the term servitude has the same meaning as in Division 270 (see section 270.4). Item 12 of Schedule 1 inserts a definition of servitude (see above).

The cross-reference to the definition of servitude will be contained in the Dictionary in the Criminal Code for ease of reference. New section 270.4 defines servitude as the condition of a person (the *victim*) who provides labour or services, if, because of the use of coercion, threat or deception, 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, or to leave the place or area where the victim provides the labour or services; and the victim is significantly deprived of personal freedom in respect of aspects of his or her life other than the provision of the labour or services.

Item 56 – Dictionary in the *Criminal Code* (definition of *sexual service*)

This Item omits the word ‘commercial’ from the definition of ‘*sexual service*’ in the Dictionary in the Criminal Code. This ensures that offences relating to exploitation through sexual services are broad enough to capture circumstances where sexual services are not provided for remuneration.

Item 57 – Dictionary in the *Criminal Code* (definition of *sexual servitude*)

This Item repeals the definition of the term ‘*sexual servitude*’ in the Dictionary in the Criminal Code.

This Bill repeals the sexual servitude offence at existing section 270.6 of the Criminal Code and replaces it with a new offence of servitude at section 270.4 (see Item 12 of Schedule 1, above). This is intended to ensure that conduct amounting to an offence of servitude is criminalised regardless of the industry in which the exploitative conduct occurs. A new

definition of servitude is inserted into the Dictionary in the Criminal Code by Item 55 of Schedule 1 (see above).

As a result of this Bill, the phrase ‘sexual servitude’ will not appear in Divisions 270 and 271 of the Criminal Code. Accordingly, the definition is redundant.

Item 58 – Dictionary in the *Criminal Code*

This Item inserts a definition of the term ‘*slavery-like offence*’ into the Dictionary in the Criminal Code. The definition provides that the term slavery-like offence has the same meaning as in Division 270 of the Criminal Code. Section 270.1A of the Criminal Code defines slavery-like offence for the purposes of Division 270 of the Criminal Code as an offence against any of the following provisions (as inserted by this Bill):

- section 270.5 (servitude offences)
- section 270.6A (forced labour offences)
- section 270.7 (deceptive recruiting for labour or services), or
- section 270.7B (forced marriage offences).

The cross-reference to the definition of slavery-like offence will be contained in the Dictionary in the Criminal Code for ease of reference.

Schedule 2 — Amendments of other Acts

Crimes Act 1914

Item 1 – Paragraph 15Y(1)(c)

This Item omits the words, ‘(slavery, sexual servitude and deceptive recruiting)’ from existing paragraph 15Y(1)(c) of the *Crimes Act 1914* (the Crimes Act) and inserts the words, ‘(Slavery and slavery-like conditions)’.

Existing paragraph 15Y(1)(c) of the Crimes Act contains a cross-reference to the heading of Division 270 of the Criminal Code. As a result of Item 7 of Schedule 1 (above), the heading of Division 270 will be amended. Accordingly, the reference to Division 270 of the Criminal Code in paragraph 15Y(1)(c) the Crimes Act needs to be amended to ensure that the Crimes Act continues to operate effectively.

This Item has no substantive effect.

Item 2 – Paragraph 21B(1)(d)

This Item omits the words, ‘by the person as a direct result of the offence’ from existing paragraph 21B(1)(d) of the Crimes Act and inserts the words, ‘, or any expense incurred, by the person by reason of the offence’.

Existing paragraph 21B(1)(c) of the Crimes Act provides that a court may order a federal offender to make reparation to the Commonwealth, or to a public authority under the Commonwealth, for any loss suffered or any expense incurred by reason of the offence. However, existing paragraph 21B(1)(d) provides that, if the victim is a person, a court may order a federal offender to make reparation only where the person has suffered loss ‘as a direct result of the offence’.

This Item removes the difference in operation between paragraphs 21B(1)(c) and 21B(1)(d) so that an individual victim of a federal offence is eligible for reparations in the same circumstances as the Commonwealth or a public authority of the Commonwealth.

The amendment allows an individual victim to be awarded reparations for any loss suffered or any expense incurred by reason of the offence. This ensures that reparation could be made in respect of individual victims of any federal offence for loss suffered by reason of the criminal conduct, even if the loss was not a direct result of that conduct.

Migration Act 1958

Item 3 – Section 233B (heading)

This Item repeals the heading of existing section 233B of the *Migration Act 1958* (the Migration Act) and replaces it with a new heading.

Currently, section 233B of the Migration Act is titled ‘Aggravated offence of people smuggling (exploitation, or danger of death or serious harm etc.)’. This Item is a consequential amendment to the heading of section 233B to better reflect the new contents of the section, which is amended by Items 4 – 9 of Schedule 2 (see below). As a result of this

Item, the new title for section 233B of the Migration Act will be, ‘Aggravated offence of people smuggling (danger of death or serious harm etc.)’.

Item 4 – Subsection 233B(1)

This Item omits the words, ‘any of the following applies’ from existing subsection 233B(1) of the Migration Act and replaces them with the words, ‘either or both of the following apply’.

This Item is a consequential amendment which is necessary as a result of the changes in Item 5 of Schedule 2 (see below). Item 5 of Schedule 2 repeals one of the paragraphs in section 233B of the Migration Act, and the changes in this Item are necessary to ensure section 233B of the Migration Act is structured appropriately.

Item 5 – Paragraph 233B(1)(a)

This Item repeals existing paragraph 233B(1)(a) of the Migration Act.

Existing paragraph 233B(1)(a) of the Migration Act currently provides that a person commits an offence if they commit the offence of people smuggling at existing section 233A of the Migration Act, intending the victim will be exploited after entry into the foreign country. This amendment means that exploitation of a victim after entry into the relevant country is no longer an element of the aggravated people smuggling offence at subsection 233B(1) of the Criminal Code.

The aggravated people smuggling offence involving exploitation, or a danger of death or serious harm was inserted into the Migration Act prior to the introduction of specific people trafficking offences in the Criminal Code in 2005. Conduct that involves the exploitation of a victim after entry into another country is a people trafficking offence, not a people smuggling offence, and as such it is appropriately criminalised by the people trafficking offences in Division 271 of the Criminal Code.

The remaining elements of the aggravated people smuggling offence in existing section 233B(1) of the Migration Act, including those elements relating to people smuggling that gives rise to a danger of death or serious harm, will not be affected.

Items 3 and 4 of Schedule 2 (see above) contain consequential amendments which are necessary as a result of this Item.

Item 6 – Subsection 233B(4) (definition of *exploit*)

This Item repeals the definition of the term ‘*exploit*’ from existing subsection 233B(4) of the Migration Act.

As a result of Item 5 of Schedule 2 (see above), paragraph 233B(1)(a) of the Migration Act will be repealed. Accordingly, the definition of the term *exploit* in existing subsection 233B(4) of the Migration Act is unnecessary.

This Item has no substantive effect.

Item 7 – Subsection 233B(4) (definition of *forced labour*)

This Item repeals the definition of the term '*forced labour*' from existing subsection 233B(4) of the Migration Act.

As a result of Item 5 of Schedule 2 (see above), paragraph 233B(1)(a) of the Migration Act will be repealed. Accordingly, the definition of the term forced labour in existing subsection 233B(4) of the Migration Act is unnecessary.

This Item has no substantive effect.

Item 8 – Subsection 233B(4) (definition of *sexual servitude*)

This Item repeals the definition of the term '*sexual servitude*' from existing subsection 233B(4) of the Migration Act.

As a result of Item 5 of Schedule 2 (see above), paragraph 233B(1)(a) of the Migration Act will be repealed. Accordingly, the definition of the term sexual servitude in existing subsection 233B(4) of the Migration Act is unnecessary.

This Item has no substantive effect.

Item 9 – Subsection 233B(4) (definition of *slavery*)

This Item repeals the definition of the term '*slavery*' from existing subsection 233B(4) of the Migration Act.

As a result of Item 5 of Schedule 2 (see above), paragraph 233B(1)(a) of the Migration Act will be repealed. Accordingly, the definition of the term slavery in existing subsection 233B(4) of the Migration Act is unnecessary.

This Item has no substantive effect.

Item 10 – Paragraph 245AA(2)(c)

This Item omits the words, '(defines *exploited*);' from existing paragraph 245AA(2)(c) of the Migration Act and substitutes the words, '(defines *exploited*).'

This Item is a consequential amendment to reformat existing paragraph 245AA(2)(c) of the Migration Act. Item 11 of Schedule 2 repeals existing paragraph 245AA(2)(d) of the Migration Act, making paragraph 245AA(2)(c) the last paragraph in section 245AA.

This Item has no substantive effect.

Item 11 – Paragraph 245AA(2)(d)

This Item repeals paragraph 245AA(2)(d) of the Migration Act.

Existing paragraph 245AA(2)(d) of the Migration Act is a reference to section 245AI of the Migration Act, which will be repealed as a result of Item 13 of Schedule 2 (see below). As such, paragraph 245AA(2)(d) is redundant.

Item 12 – At the end of paragraph 245AG(2)(d)

This Item inserts the words, ‘within the meaning of the *Criminal Code* (see the Dictionary to the *Criminal Code*’ at the end of paragraph 245AG(2)(d) of the Migration Act.

Existing section 245AG of the Migration Act contains the only reference to the term ‘*sexual services*’ in the Migration Act (apart from the definition in section 245AI, which is being repealed by Item 13 of Schedule 2, below).

This amendment ensures that section 245AG cross-references the Criminal Code definition of the term ‘*sexual services*’, which is consistent with the general approach to definitions in legislation.

Item 13 – Sections 245AH and 245AI

This Item repeals existing sections 245AH and 245AI of the Migration Act, and replaces them with a new section 245AH, which is titled, ‘Meaning of *exploited*’.

Existing section 245AH states that a person is being exploited if the person is in a condition of forced labour, sexual servitude or slavery in Australia.

Existing section 245AI defines the terms ‘*forced labour*’, ‘*sexual service*’, ‘*sexual servitude*’ and ‘*slavery*’, which are only used in existing paragraph 233B(1)(a) of the Migration Act and not elsewhere in Subdivision A of Division 12 of Part 2 of the Migration Act. However, as Item 5 of Schedule 2 will repeal paragraph 233B(1)(a), definitions for these terms are redundant.

New section 245AH provides that, for the purposes of Subdivision A of Division 12 of Part 2 of the Migration Act, a person is exploited if the person is subject to exploitation (within the meaning of the Criminal Code). This amendment ensures the term ‘*exploitation*’ and its grammatical forms are defined consistently in Subdivision A of Division 12 of Part 2 of the Migration Act and the Criminal Code.

Proceeds of Crime Act 2002

Item 14 – Section 338 (subparagraph (b)(ii) of the definition of *serious offence*)

This Item omits the words, ‘exploitation, or’ from subparagraph (b)(ii) of the definition of ‘*serious offence*’ in section 338 of the *Proceeds of Crime Act 2002* (the Proceeds of Crime Act).

This Item is a consequential amendment necessary as a result of Items 3 – 9 of Schedule 2 (see above).

Existing paragraph (b) of the definition of ‘*serious offence*’ provides that an offence against any one of Migration Act provisions listed is a serious offence for the purposes of the Proceeds of Crime Act. Existing subparagraph (b)(ii) provides that the aggravated offence of people smuggling involving exploitation, or danger of death or serious harm etc. in section 233B of the Migration Act is a serious offence.

As a result of Items 3 – 9 of Schedule 2, section 233B of the Migration Act and its heading will be amended. As such, it is important that the cross-reference to section 233B of the

Migration Act in section 338 of the Proceeds of Crime Act is also amended. By removing the words ‘exploitation, or’ from subparagraph (b)(ii) of the definition of the term serious offence in the Proceeds of Crime Act, this Item ensures that Act remains effective in relation to offences under section 233B of the Migration Act.

Telecommunications (Interception and Access) Act 1979

Item 15 – Subparagraphs 5D(3A)(a)(ii) and (iii)

This Item repeals existing subparagraphs 5D(3A)(a)(ii) and (iii) of the *Telecommunications (Interception and Access) Act 1979* (the Telecommunications (Interception and Access) Act) and inserts new subparagraphs 5D(3A)(a)(ii), (iii), (iv), (v) and (vi).

Existing subparagraphs 5D(3A)(a)(ii) and (iii) of the Telecommunications (Interception and Access) Act provide that certain slavery, slavery-like and people trafficking offences are ‘serious offences’ for the purposes of the Telecommunications (Interception and Access) Act. As a result of Schedule 1, above, a number of those offences are being repealed and replaced, and a number of new offences are being inserted. This Item is a consequential amendment to ensure the Telecommunications (Interception and Access) Act remains effective.

This Item inserts references to the offences of servitude (section 270.5), forced labour (section 270.6A), deceptive recruiting for labour or services (section 270.7), and forced marriage (section 270.7B) (see Item 12 of Schedule 1, above), as well as the aggravated slavery-like offence provision (section 270.8), into subparagraph 5D(3A)(a)(ii) of the Telecommunications (Interception and Access) Act. The existing reference to the offence of slavery (section 270.3) will be replicated. New subparagraph 5D(3A)(a)(ii) of the Telecommunications (Interception and Access) Act will specify that the offences listed in that subparagraph are offences related to slavery or slavery-like conditions.

This Item replicates the text in existing subparagraph 5D(3A)(a)(iii) of the Telecommunications (Interception and Access) Act in new subparagraph 5D(3A)(a)(iii). New subparagraph 5D(3A)(a)(iii) of the Telecommunications (Interception and Access) Act will specify that the offences listed in that subparagraph are offences related to trafficking in persons. This aspect of this Item has no substantive effect.

This Item inserts a new subparagraph 5D(3A)(a)(iv) into the Telecommunications (Interception and Access) Act, which will include references to the new offences of organ trafficking (section 271.7B), aggravated organ trafficking (section 271.7C), domestic organ trafficking (section 271.7D), and aggravated domestic organ trafficking (section 271.7E) (see Item 38 of Schedule 1, above). New subparagraph 5D(3A)(a)(iv) of the Telecommunications (Interception and Access) Act will specify that the offences listed in that subparagraph are offences related to organ trafficking.

This Item inserts a new subparagraph 5D(3A)(a)(v) into the Telecommunications (Interception and Access) Act, which will include references to the new offence of harbouring a victim (section 271.7F), and the new aggravated offence of harbouring a victim (section 271.7G) (see Item 38 of Schedule 1, above). New subparagraph 5D(3A)(a)(v) of the Telecommunications (Interception and Access) Act will specify that the offences listed in that subparagraph are offences related to harbouring victims.

Finally, this Item also inserts a new subparagraph 5D(3A)(a)(vi) into the Telecommunications (Interception and Access) Act, which will include references to the offences of debt bondage (section 271.8) and aggravated debt bondage (section 271.9). New subparagraph 5D(3A)(a)(v) of the Telecommunications (Interception and Access) Act will specify that the offences listed in that subparagraph are offences related to debt bondage.

The inclusion of these offences as ‘serious offences’ within subparagraphs 5D(3A)(a)(ii), (iii), (iv), (v) and (vi) of the Telecommunications (Interception and Access) Act enables law enforcement agencies such as the Australian Federal Police and State and Territory police services to obtain warrants to intercept and access communications for the purposes of investigating these heinous crimes. The inclusion of these offences as ‘serious offences’ in the Telecommunications (Interception and Access) Act is consistent with the inclusion of the existing slavery, slavery-like and people trafficking offences as ‘serious offences’ under the Telecommunications (Interception and Access) Act.

Schedule 3 — Application of amendments

Item 1 – Application of amendments made by this Act

This is a formal clause that specifies that the amendments made by the *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2012* apply to offences against the law of the Commonwealth committed (or alleged to have been committed) on or after the day the Act commences.

The note in this Item provides a cross-reference to section 2 of this Act, which provides that the Act commences on the day after it receives the Royal Assent (see page 4, above).