
International focus

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COMBATING HUMAN TRAFFICKING: AUSTRALIA'S RESPONSES TO MODERN DAY SLAVERY

Introduction

In June 2005, the owner of a sweat shop factory in the United States was gaoled for 40 years in what was, according to United States officials, the largest case of “modern day slavery” ever prosecuted. The factory owner, Lee Soo-Kil, was convicted in 2003 of holding more than 200 victims from China and Vietnam as forced labourers at his clothing factory in American Samoa, where they were forced to work producing garments for major United States retailers. Commenting on the case, the United States Attorney-General, Alberto Gonzales observed that “human trafficking is a moral evil that is nothing less than modern-day slavery”.¹

The United Nations Office on Drugs and Crimes reports that in the past decade trafficking in human beings has reached epidemic proportions.² Estimates of the number of trafficking victims worldwide vary greatly. The United States State Department 2004 *Trafficking in Persons Report*³ estimates that between 600,000 and 800,000 persons are trafficked annually across borders. The International Labour Organisation 2005 report, *A Global Alliance Against Forced Labour*, estimates that, at any one time, 12.3 million people are victims of forced labour worldwide and, of that number, 2.45 million are in forced labour as a result of trafficking.⁴

Despite its geographic isolation, combating human trafficking is a vital issue for Australia. The United States State Department lists Australia as “a destination for women from Southeast Asia, South Korea, and the People’s Republic of China (PRC) who are trafficked for the purposes of sexual exploitation”.⁵ Estimates of the extent of trafficking in Australia focus on the number of women trafficked into Australia for sexual servitude. This should not be interpreted as evidence that the problem of human trafficking is exclusive to the sex industry in Australia. Instead, the absence of information about trafficking of people to work in a wide range of Australian industries, including agriculture and construction, reflects a lack of research and awareness about the broader issue of human trafficking in Australia. While there has been some media attention focusing on the plight of women trafficked into the sex industry, the broader issues of human trafficking, forced labour and slavery have attracted little community attention, despite their strong human rights implications.

Within Australia, estimates of women trafficked into sexual servitude vary widely. A Project Respect study suggests up to 1,000 women under “contract” at any given time,⁶ while the *Australian Government’s Action Plan to Eradicate Trafficking in Persons* states the number is “well below” 100.⁷ The New South Wales Police on the other hand has reported that thousands of Chinese and Thai women are being sold to brothel owners and have to work off the debt by having sex with up to 800 men.⁸ In early July a report in *The Sun Herald*⁹ noted that up to 44 people in New South

¹ Wright W, “Modern day slave driver jailed in the US for 40 years”, *Sydney Morning Herald*, 25 June 2005.

² UN Office on Drugs and Crimes, “Fact sheet on human trafficking”, www.unodc.org/unodc/en/trafficking_victim_consents.html viewed 23 August 2005.

³ US Department of State, *Trafficking in Persons Report* (June 2004), <http://www.state.gov/g/tip/rls/tiprpt/2004/> viewed 23 August 2005.

⁴ International Labour Office, *A Global Alliance Against Forced Labour* (Geneva, 2005) pp12-14.

⁵ US Department of State, *Trafficking in Persons Report* (June 2005), <http://www.state.gov/g/tip/rls/tiprpt/2005/> viewed 23 August 2005.

⁶ Project Respect, *One Victim of Trafficking is one too Many: Counting the human cost of trafficking*, March 2004.

⁷ Attorney-General’s Dept (Cth), *Australian Government’s Action Plan to Eradicate Trafficking in Persons*, <http://www.ag.gov.au/agd/www/Agdhome.nsf/Page/RWPA835B403668897F6CA256EB0000F7264?OpenDocument> viewed 23 August 2005.

⁸ Reported in the UNESCO Trafficking Statistics database: Australia – Official Sources, New South Wales Police, 1 January 2001 – 30 August 2002.

⁹ O’Brien N, “Sex trafficking under the microscope”, *The Sun Herald*, 5 July 2005.

Wales, including brothel and karaoke employees, sex industry figures, suspect migration agents and women believed to have been trafficked, have been summonsed in an Australian Crime Commission (ACC) investigation into trafficking of women into sexual servitude. While the ACC is yet to produce a report of its findings, anecdotal reports suggest that there have been an increase of women trafficked from South Korea in recent times.¹⁰

The tragedy of human trafficking as compounded by inadequate government responses is illustrated by the case of Ms Puangthong Simaplee, who died in Villawood Detention Centre on 26 September 2001. Ms Simaplee was discovered by immigration officials during a raid on a Surry Hills brothel in 2001. She told the immigration officials that at a young age she had been sold into sexual servitude by her parents and trafficked from Thailand to Malaysia, then re-trafficked to Australia as a young adult. Following the immigration raid, Ms Simaplee was detained in Villawood on 23 September, as an unlawful non-citizen, weighing 38kg. Three days later, after losing almost 20% of her of her bodyweight and weighing only 31kg, Ms Simaplee died as a result of heroin withdrawal.¹¹ The coronial inquest into Ms Simaplee's death garnered media attention of trafficking of women into sexual servitude in Australia. The inquest underscored the lack of understanding of the problem of trafficking and highlighted failure in the Australian legal system to provide justice for the victims of trafficking.

In recent years there have been important efforts to combat trafficking, although media and political attention has, for the most part, remained focused on the issue of trafficking of women for sexual servitude instead of the broader issue of human trafficking. In June 2003, in the face of several complaints against law enforcement agencies and the ACC's response to trafficked persons, the Joint Parliamentary Committee on the Australian Crime Commission initiated an inquiry into the ACC's handling of the issue of trafficking. As noted in the terms of reference adopted by the Committee:

The Committee's inquiry stemmed in part from the emergence in the media of allegations of mishandling of cases of trafficked women by government agencies. Of particular concern was the allegation that women, who were in effect prisoners of traffickers who forced them into the sex trade against their will, were simply deported by government agencies with no regard for their condition as victims of crime.¹²

In 2003 during the course of the inquiry, the Australian Government introduced the National Action Plan to Combat Trafficking in Women, the stated aims of which included legislative review across all Australian jurisdictions, improved arrangements for co-operation between relevant Commonwealth agencies and, significantly, the review of "current operational arrangements" to "ensure victims of trafficking and sexual servitude are identified as victims of crime".¹³

This was followed in 2004 by the Commonwealth Action Plan to Eradicate Trafficking in Persons, which was more comprehensive, covering all forms of trafficking. It involved funding for a new community awareness campaign to raise awareness of trafficking issues within Australia,¹⁴ the creation of an Australian Federal Police Transnational Sexual Exploitation and Trafficking Team to investigate trafficking and sexual servitude, and the location of a Senior Migration Officer (Compliance) in Thailand, focused on trafficking in persons. It also included victim support measures comprising new visa arrangements for potentially trafficked persons and the development of a reintegration assistance project for trafficking victims who are returned to key source countries in South East Asia. As one commentator notes, the measures were meant to "focus on the full cycle of trafficking from recruitment to reintegration and to giving equal weight to the three critical areas of

¹⁰ O'Brien, n 9.

¹¹ See Deputy State Coroner (NSW), Carl Milovanoich "Inquest into the death of Puongthong Simaplee", 24 April 2003: Deputy State Coroner found that the direct cause of Ms Simaplee's death was narcotic withdrawal and the antecedent cause was malnutrition and early pneumonia.

¹² Parliamentary Joint Committee on the Australian Crime Commission, *Report of the Inquiry Into the Trafficking of Women for Sexual Servitude*, June 2004, p vii.

¹³ Minister for Justice & Customs, Ellison C (Sen), Media Release, "National Action Plan to Combat Trafficking in Women", 3 July 2003, http://www.ag.gov.au/agd/www/justiceministerHome.nsf/Page/Media_Releases viewed 23 August 2005.

¹⁴ To date the community awareness campaign has not been made public.

prevention, prosecution and victim support”.¹⁵ The objective in this note is to examine Australia’s efforts in these three crucial areas against a background of an analysis of the nature of human trafficking in general and the international dimension of the crime.

Australian responses to human trafficking

Prevention

Preventative measures in human trafficking comprise “external strategies” and “internal awareness programs”. External strategies involve the identification of potential or known source states and liaising with emigration and law enforcement agencies in such states to expose trafficking rings before they are able to lure their victims into their deceitful enterprises. But more importantly, it also requires aggressive programs to address the “push-pull” elements that underpin human trafficking.

In October 2003, Australia concluded an agreement with Cambodia to provide substantial assistance to Cambodia to fight people trafficking. The agreement is part of the \$8.5 million Asia Regional Cooperation to Prevent People Trafficking (ARCPPT) Project, which is funded by AusAID and completes a round of agreements reached with Thailand, Cambodia, Laos and Myanmar. The goal of the ARCPPT is to contribute to the prevention of people trafficking in South East Asia. The main focus of ARCPPT is on strengthening the criminal justice process to deal effectively with the crime of trafficking. The ARCPPT initiative has four elements:

- development of a criminal justice process for combating trafficking;
- strengthening specialist trafficking response institutions;
- collaboration and support services, and
- project management.¹⁶

The focus on the criminal justice system in preventing people trafficking is also evident in the Bali Process. At the Bali Regional Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime in February 2002, Ministers pledged their “strong commitment to developing *practical cooperative measures* to prevent, intercept and disrupt people smuggling, trafficking in persons and other forms of illegal migration” (emphasis added). But in more specific terms, the Ministers agreed that “an important strategy to deter and prevent these activities would be to adopt and *strengthen legislation*, as appropriate, *that specifically criminalises people smuggling and trafficking in persons*” (emphasis added). This laid the foundation for what has now become the Bali Process. At the 2004 Bali meeting it was agreed that “the Bali process had created an environment in which regional countries were cooperating increasingly ... in preventing and intercepting people smuggling (and, to a lesser extent, trafficking) activities, *prosecuting those responsible* and strengthening border management” (emphasis added).

While the ARCPPT initiative and the Bali Process are certainly steps in the right direction, they do not address the “push-pull” causes that underpin human trafficking. The focus on the criminal justice process, while understandable and indeed necessary, is by its very nature reactionary and not preventive. An effective preventive program must take account of the broader issues of development, gender equality and poverty reduction in source countries. While some trafficking victims are invariably poor and illiterate with little prospect of work in their home regions, experience indicates that, even where the victims are not necessarily illiterate, economic conditions in the source location, coupled with the promises of better job prospects in the trafficked destination, easily provide a great lure into trafficking. The situation is compounded in the relatively poorer source states in Asia and Africa, given their higher levels of illiteracy. Human trafficking is essentially an illicit movement of labour resources that at the same time involves enslavement of the victims. The “push” factors that make it desirable, if not necessary, to accept promises of job offers in the trafficking destination must be addressed if a preventive program is to be effective. The collaborative and support services

¹⁵ Blackburn, *Proof Committee Hansard*, 26 February 2004, p 14.

¹⁶ Minister for Justice & Customs, Ellison C (Sen), E190/03, 18 December 2003; see also <http://www.arcppt.org/eng/about.html>.

components of any agreement Australia has with identified sources states must therefore actively seek to promote economic reforms that assist potential victims, particularly in rural areas.

Preventative measures must equally focus on the demand or “pull” factors in the trafficking destinations. A fundamental flaw with the Bali Process and the ARCPPT initiative is that they both seem to focus on the criminal justice process on the “supply side” and overlook the “demand” or “pull” element in trafficking. Human trafficking is a response in an illicit market environment to specific demand for people to perform or provide certain services. The response to trafficking must tackle the broader issue of the demand for forced labour and the vulnerability of illegal workers. It is fair to say that if there was no demand in Australia for the services of trafficked persons, there would hardly be any point in people traffickers choosing Australia as a destination. Accordingly any initiative in Australia to combat human trafficking that does not address the demand factors in this country is flawed from the outset.

Prosecution

Prosecution of traffickers is a central element in the criminal justice process. In 2005 the Commonwealth Parliament enacted the *Criminal Code Amendment (Trafficking in Persons Offences) Act 2005* (Cth) (the Act). Unlike the *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999*, which focused on the issue of trafficking in women for sexual servitude, the Act has the potential to focus attention on the wider issue of human trafficking and forced labour.

The Act adopts a broad definition of trafficking as conduct which causes the victim to enter into slavery, forced labour or sexual servitude or causes an organ of the victim to be removed. It expands the existing catalogue of trafficking-related offences¹⁷ with the introduction of Subdiv B, “Offences relating to trafficking in persons” (ss 271.2 – 271.12). Significantly, this new subdivision systematically categorises trafficking offences into:

- a general offence of trafficking and the aggravated offence of trafficking;
- the offence of trafficking in children in general;
- the offence of domestic trafficking in children;
- a general offence of domestic trafficking in persons and the aggravated offence of domestic trafficking in persons; and
- the offence of debt bondage.

The Act broadens the “deceptive recruiting for sexual services” offences in s 270.7 of the *Criminal Code* (1995) to cover deception about the conditions of work as well as deception about the nature of work. The Act also makes provision for jurisdictional requirements for domestic trafficking offences (s 271.11).

Offence of trafficking and the aggravated offence of trafficking

In December 2000, the United Nations adopted the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (see “International focus” (2001) 75 ALJ 16 for a comprehensive international definition of trafficking).¹⁸ Article 3(a) of the Protocol defines trafficking in persons as:

The recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a

¹⁷ The *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999* (Cth) created the offences of slavery, sexual servitude and deceptive recruiting for sexual services. The Act did not provide a specific offence for trafficking and the offence of deceptive recruiting for sexual services only applied if the victim was deceived about the fact that she would be working in the sex industry and not, as was more commonly the case, if the victim agreed to work in the sex industry but did not agree to the working conditions.

¹⁸ Australia became a signatory to the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons on 11 December 2002 and later agreed to ratify it “once all domestic requirements for ratification have been met”. It is expected that following the recent introduction of the *Criminal Code Amendment (Trafficking in Persons Offences) Act 2005* (Cth) Australia will now ratify the Protocol.

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.

While the Protocol does not offer an exhaustive definition of exploitation, it states that exploitation includes, at a minimum:

the exploitation or 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.

Article 3(b) of the Protocol provides that the consent of the victims of trafficking to the intended exploitation is irrelevant if it is obtained by any of the means set out in Art 3(a).

The offence of trafficking introduced in the Act reflects to a large degree the Protocol definition. It provides that a person commits an offence of trafficking in persons if he or she organises or facilitates the entry/exit or proposed entry/exit, or the receipt, of another person into Australia; and uses force or threats to obtain the other person's compliance in respect of that entry/exit or proposed entry/exit or in respect of that receipt (s 271.2). The Act broadens the mens rea of trafficking by providing that a person commits the offence where they facilitate the entry or exit of another person, and "the person is reckless as to whether the other person will be exploited, either by the first person or another, after that entry or receipt" (s 271.2(1B)(b)). The general offence of trafficking also includes deceit regarding the true purposes of the recruitment of the victim for entry into, or exit from, Australia. Exploitation, the end result of trafficking, is defined as conduct which causes the victim to enter into slavery, forced labour, or sexual servitude or causes an organ of the victim to be removed in circumstances where the removal is either illegal or non-consensual.¹⁹

The Act does not prohibit recruitment of a person for the purposes of providing sexual services. However to ensure that trafficking does not take on the guise of "legitimate" recruitment, s 271.2(2B) provides that a person commits the offence of trafficking where there is an arrangement for the other person to provide sexual services in Australia *and*:

the first person deceives the other person about any of the following:

- (i) the nature of the sexual services to be provided;
- (ii) the extent to which the other person will be free to leave the place or area where the other person provides sexual services;
- (iii) the extent to which the other person will be free to cease providing sexual services;
- (iv) the extent to which the other person will be free to leave his or her place of residence;
- (v) if there is a debt owed or claimed to be owed by the other person in connection with the arrangement for the other person to provide sexual services—the quantum, or the existence, of the debt owed or claimed to be owed.

The penalty for any of these offences is 12 years imprisonment.

It is common practice for traffickers to subject trafficked persons to slavery conditions through coercive techniques, including beatings and deprivation of basic necessities. The Act thus provides for the *aggravated offence* of trafficking in the form of trafficking conduct that subjects the victim to cruel, inhuman or degrading treatment; or conduct that gives rise to a danger of death or serious harm to the victim and where the trafficker is reckless as to the danger (s 271.3).

Trafficking in children

In addition, the Act introduces a new offence of trafficking in children (s 271.4), which reflects Art 3(c) of the Protocol. Under s 271.4(1)(b), a child for the purposes of the Act is a person under 18.

¹⁹ The definition of exploitation inserted by the Act into the *Criminal Code* dictionary states, "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." Debt bondage is not included in the definition of exploitation.

Under the Act it is an offence where in organising the exit from or entry into Australia, a person “intends” or is reckless as to whether the child will be used to provide sexual services “or will be otherwise exploited” by the trafficker or another party. Given the vulnerability of children, the penalty for this offence is 25 years imprisonment and much higher than the “ordinary” offence of trafficking.

Offence of domestic trafficking in persons and the aggravated offence of domestic trafficking in persons

While human trafficking, particularly in the Australian context, is predominantly international in character, the international element is not itself an essential ingredient in trafficking. In any case, as was noted in the explanatory memorandum to the Act, it is necessary to “to address the conduct of persons who are not directly involved in organising a trafficking victim’s entry into Australia but who facilitate arrangements to exploit the victim within Australia”. Sections 271.5 – 271.7 thus address the question of domestic trafficking by making it an offence to “traffic” a person “from one place in Australia to another place in Australia”. The penalty for the “ordinary” offence of domestic trafficking is 12 years imprisonment, while the penalty for the aggravated offence of domestic trafficking is 20 years imprisonment.

Debt bondage

A new offence of debt bondage (s 271.8) targets traffickers’ tactics of using debt contracts to coerce victims to enter into sexual servitude or forced labour to pay off large debts that traffickers may claim were incurred by paying for the cost of the victim’s travel arrangements.

The Act defines “debt bondage” as the status or condition that arises from a pledge by a person:

- (a) of his or her personal services; or
- (b) of the personal services of another person under his or her control;

as security for a debt owed, or claimed to be owed, (including any debt incurred, or claimed to be incurred, after the pledge is given), by that person if:

- (ba) the debt owed or claimed to be owed is manifestly excessive; or
- (c) the reasonable value of those services is not applied toward the liquidation of the debt or purported debt; or
- (d) the length and nature of those services are not respectively limited and defined.

The offence of debt bondage states that a person commits an offence if she or he engages in conduct that causes and intends to cause another person to enter into debt bondage (s 271.8). This offence will cover the common practice of traffickers who pay \$2,000 for a victim’s air travel and then claim that the victim owes the trafficker a much higher sum \$20,000 and must work to pay off the debt.

The offence of debt bondage also recognises the differential power relationship that often exists between traffickers and their victims. Under s 271.8(2), a court or jury determining whether a person has committed the offence of debt bondage can have regard to evidence about: the economic relationship between the accused and the alleged victim, evidence of any written or oral contract or agreement; the personal circumstances of the alleged victim including whether they are entitled to be in Australia under the *Migration Act 1958* (Cth), her or his ability to speak English and her or his physical and social dependence on the accused. This evidence is also admissible in relation to the deceptive recruiting for sexual services offence (s 270.1).

Limitations of the new Act

The introduction of the Act is undoubtedly a step forward. However, it would be foolish to believe that the battle against trafficking can (or should) be fought exclusively within the criminal justice arena. The main limitation of these measures is that the Act, by its nature, only deals with trafficking within a criminal justice framework. While broadening the range and scope of trafficking offences is important to enable effective prosecutions of traffickers, criminal legislation does not address the root causes of trafficking; nor can it ensure adequate victim support.

Pursuing criminal prosecutions will not necessarily lead to justice for trafficking victims. Successfully prosecuting trafficking offenders is notoriously difficult.²⁰ The criminal prosecution of trafficking victims should only be seen as one aspect of attempts to seek justice for the victims of trafficking. In contrast to the United States, where trafficking victims have successfully pursued civil claims against their traffickers, in Australia there have been no civil cases brought by trafficking victims to claim compensation from traffickers.²¹

Fundamentally, human trafficking needs to be conceptualised as a human rights violation not simply a law enforcement issue. This entails recognising the importance of victim support for all victims of trafficking. The provision of a successful victim support program is not only necessary from a human rights perspective but complements the objectives of law enforcement. A number of commentators have observed that the countries which provide the most comprehensive victim support programs for trafficking victims also have the best records of prosecuting trafficking offenders.²²

Victim support: Trafficking visas

A new visa regime introduced in January 2004 acts as the gateway to victim support services; support is available if suspected trafficking victims are able to help police. The danger of conceiving trafficking as a law enforcement problem instead of a human rights violation is that the status of the victim becomes less important than the ability of the victim to act as a witness in a criminal investigation or prosecution. This is precisely the problem with the new trafficking visa framework.²³

The new visa framework is a four-step package, comprising:

- (a) the Bridging Visa F;
- (b) the existing Criminal Justice Stay Visa;
- (c) the Witness Protection (Trafficking) (Temporary) Visa;
- (d) the Witness Protection (Trafficking) (Permanent) Visa.

Bridging Visa f

The Bridging Visa F (BVF) is granted to “persons of interest” to the police in relation to offences or alleged offences of people trafficking, sexual servitude or deceptive recruiting.²⁴ The visas are valid for a maximum of 30 days but can be withdrawn at any stage. Thus, under the *Migration Regulations*, a BVF can expire at a date specified by the Minister or if the Australian Federal Police tells the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA), in writing, that the BVF holder is no longer a person of interest in relation to an offence involving people trafficking, sexual servitude or deceptive recruiting, and the Minister informs the BVF holder, in writing, that for this reason the BVF is no longer in effect.

While DIMIA policy recognises that “a trafficking victim/witness with confidence in government authority is more likely to reveal they have been trafficked and be willing to assist with the

²⁰ The difficulty of successfully prosecuting alleged trafficking offenders was recently demonstrated by a case in the NSW District Court. A Thai student who was discovered by police in a brothel after calling 000 told the court that she was trafficked to Australia and forced to have sex with up to 20 men a day. After a nine-week trial the jury acquitted a brothel owner of slave trading but was unable to reach a verdict on 10 other charges made under the *Criminal Code Amendment Act 1999*. The DPP (Cth) intends to retry the case: see O’Brien, n 9.

²¹ See further discussion in Costello G, *The Churchill Report* (May 2005, 2004 Donald Mackay Winston Churchill Fellowship to study people trafficking law and policy in Italy and the USA) p14.

²² See Shearer Demir J, “The Trafficking of Women for Sexual Exploitation: A Gender Based and Well-Founded Fear of Persecution?” UNHCR New Issues in Refugee Research, Working Paper No 80 (March 2003); see also Costello, n 21, p 14

²³ For a detailed analysis of the new visa framework see Burn J, Simmons F, “Rewarding Witnesses, Ignoring Victims: An Evaluation of the New Trafficking Visa Framework” (2005) 24 *Immigration Review* 387.

²⁴ *Migration Regulations*, Sch 1, Item 1306, Bridging Visa F.

investigation and prosecution of people trafficking offenders”²⁵ not all BVF holders are given the maximum 30-day period to receive victim support and develop confidence in government authority.²⁶

Criminal Justice Stay Visa

If a law enforcement agency certifies that a person on a BVF is required in Australia to assist in the administration of justice, the person will probably be granted a Criminal Justice Stay Visa (CJSV).²⁷ The grant of CJSV is discretionary. CJSV holders are allowed to remain in Australia for as long as they are required for law enforcement purposes. This is an arbitrary time frame determined by law enforcement agencies’ assessment of the trafficked person’s ability to assist police and not by the needs of trafficking victims.

Witness Protection (Trafficking) Visas

The grant of both temporary and permanent Witness Protection (Trafficking) Visas is discretionary. Trafficking victims must be invited by DIMIA to apply for the visa. The temporary Witness Protection (Trafficking) Visa may be granted if:

- the Attorney-General has certified the person has made a significant contribution to the prosecution or investigation of trafficking offences; or
- the person is not the subject of any related prosecutions; or
- the Minister is satisfied the person would be in danger if they returned home.

A permanent Witness Protection (Trafficking) Visa may be granted if the person has held the visa for at least two years and continues to meet the requirements for the temporary Witness Protection (Trafficking) Visa.

A temporary Witness Protection (Trafficking) Visa can only be granted at the conclusion of the criminal justice process while the victim still holds a CJSV. This means that during the daunting process of giving evidence, trafficking victims are unable to access the security of a two-year temporary visa and instead must remain on a CJSV which, they know, can end at any time and without any assurance that they will receive protection after the process of giving evidence is over. A better way of supporting trafficking victims and building trust between trafficking victims and law enforcement agencies would be to allow trafficking victims to apply for witness protection visas while they are in the process of assisting authorities.

Evaluating the trafficking visa framework

So far no witness protection visas have been granted to trafficking victims.²⁸ The central problem with the trafficking visa framework is that access to victim support services is contingent on whether or not a trafficked person is deemed to be a good witness, not on the person’s status as a victim. Whether the victim support continues is dependent on whether the person is deemed eligible for further visas – a CJSV or, eventually, a temporary witness protection trafficking visa.

The discretionary nature of the visas and absence of a transparent application process undermines the effectiveness of the visa system. Trafficking victims should be empowered to be able to apply for

²⁵ Migration Series Instruction 391: People Trafficking, para 4.1.5.

²⁶ Anecdotal evidence from anti-trafficking NGO Project Respect suggests that the decision that the holder of the BVF is not a person of interest is frequently made within days of the grant of the BVF; see “Use and Abuse”, *The Australian*, 12 January 2005, p 11 (“Julia” who claimed to have been trafficked, was “kicked off” the bridging visa program after the police told her statement was “useless”).

²⁷ A CJSV is granted after the issue of a Criminal Justice Stay Certificate.

²⁸ From 1 January 2004 to 30 June 2005, 42 suspected victims of trafficking have been granted Bridging F visas; during the same period 28 suspected victims of trafficking have been granted Criminal Justice Stay visas, and two suspected victims of trafficking have been granted Criminal Justice Entry visas; from 1999 to 31 December 2003, 11 suspected victims of trafficking were granted Criminal Justice Stay visas, and one suspected victim of trafficking was granted a Criminal Justice Entry visa; at the time of writing, no Witness Protection (Trafficking) Visas had been granted: DIMIA personal communication.

a trafficking visa instead of relying on the discretion of the Minister. The visa application process should be open and accessible.

If we look beyond Australia we can see that Australia's approach to visas lags behind international best practice. In the United States, trafficking victims are able to commence a self-petitioning process for a visa. In Italy, Art 18 of the Alien Law provides a "social protection residence permit" to trafficking victims regardless of their co-operation with state authorities. The fear that providing visas to trafficking victims on the basis of need rather than their capacity to provide information to police will open the floodgates to bogus claims appears unfounded. In other countries, such as Italy, where visas are not linked to a criminal justice process, there is no evidence that there has been any significant abuse of trafficking visas by fraudulent claims.²⁹ Many trafficking victims wish to be repatriated (although they may require victim support before repatriation).

While trafficking victims can apply for protection visas it is important to recognise that the victim support program for trafficked persons is only provided through a grant of a BVF and then a CJSV. Currently, if a trafficked person makes a successful application for a protection visa he or she will not be able to access victim support.

The Australian Government has rightly identified victim protection as an essential issue in human trafficking.³⁰ However, in practice, victim support is contingent on the victim's involvement in the criminal justice process. In April 2004, the trafficking victim support contract was awarded to Southern Edge Training as part of the support for victims of trafficking program, co-ordinated by the then Office for the Status of Women. A 2003 media release by Senator Kay Patterson, the Minister Assisting the Prime Minister for the status of women cites "overseas research" that shows "the provision of support for victims significantly increases victims' willingness to act as witnesses against their traffickers – by up to 50%". However, this support is only available to victims who are willing to assist authorities with trafficking investigations. Thus, the government recognises that providing trafficking victims with reflection time and victim support increases the likelihood of their willingness to testify against their traffickers but fails to recognise that it is the actual provision of this support – not simply the promise of support if trafficking victims agree to assist authorities – that provides victims with the necessary reflection and recovery time to consider whether they want to assist police.

More fundamentally, making victim support conditional on victim co-operation is not consistent with the United Nations Recommended Principles and Guidelines on Human Rights and Human Trafficking, which state that the human rights of trafficked persons should be at the centre of all efforts to prevent and combat trafficking and to protect, assist and provide redress to victims. In particular, Recommendation 8 states:

States shall ensure that trafficked persons are protected from further exploitation and harm and have access to adequate physical and psychological care. Such protection and care shall not be made conditional upon the capacity or willingness of the trafficked person to cooperate in legal proceedings.³¹

The consequence of conceiving trafficking as a law enforcement problem first, and a human rights violation second, is that currently trafficking victims who cannot help the police will not receive assistance. From a human rights perspective this policy is unacceptable; from a law enforcement perspective it is self-defeating. While there is no doubt that the testimony of trafficked persons is essential in prosecuting traffickers, the focus in dealing with trafficked persons should not be witness protection but victim support.

²⁹ Costello, n 21, p 10.

³⁰ Attorney-General's Dept (Cth), n 7.

³¹ UN Economic and Social Council, "Recommended Principles and Guidelines on Human Rights and Human Trafficking", May 2002, E/2002/68/Add.1

Conclusion

The Australian Government's response to trafficking has improved. The new *Criminal Code Amendment (Trafficking in Persons Offences) Act* will strengthen the country's capacity to prosecute traffickers, particularly if it is combined with an accessible victim support program. Importantly, the Act also provides us with the opportunity to broaden the debate about trafficking in Australia from the trafficking of women into sexual servitude to the broader issue of human trafficking and forced labour.

Despite the improvements that have been made, this analysis of Australia's response to trafficking demonstrates that, to date, the emphasis has been too much on the successful prosecution of trafficking offenders. The broader and, in many respects, more difficult issues of prevention, demand and victim support have been consigned to the periphery.

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