

# Trafficking and Slavery in Australia: An Evaluation of Victim Support Strategies

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The paper evaluates legal protections and social support systems for victims of trafficking and slavery in Australia within a human rights framework based on the United Nations Protocol to Prevent and Suppress Trafficking in Persons, Especially Women and Children and the UN Principles and Guidelines on Human Rights and Human Trafficking. A major focus of the paper is the evaluation of a system of visas offered by the Australian government to victims of trafficking and slavery. The paper argues that the visa system and social support program is restricted to the assistance of victims who participate in the criminal justice process, thereby limiting state protection of victims of trafficking and slavery.

## *Introduction*

This paper adopts a human rights framework to evaluate legal protections and social support structures for victims of trafficking and slavery in Australia. It assesses Australia's response to trafficking in the context of the United Nations Protocol to Prevent and Suppress Trafficking in Persons, Especially Women and Children (hereafter the Trafficking Protocol) and the

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human rights principles set out in the Recommended Principles and Guidelines on Human Rights and Human Trafficking (hereafter the UN Principles and Guidelines) (UNHCHR, 2002). This approach places the human rights of trafficked persons at the heart of all attempts to prevent and combat trafficking and to protect trafficking victims.

The paper focuses on the operation of Australia's new visa arrangements and the victim support program for people who have been granted visas to assist police investigations or prosecutions of trafficking offences. Currently, visas are only available to suspected trafficking victims who are able to assist the investigation or prosecution of trafficking offences. This paper argues that this approach fails to adequately protect the human rights of trafficking victims.

Research for this paper is drawn from various sources. Since 2004, one of the authors (Jennifer Burn) has directly assisted over 30 trafficked women through the provision of legal representation and social support.<sup>1</sup> This work led to the identification and assessment of legal protections, the examination of social support programs for victims of trafficking and slavery and participation in law reform processes.

### ***Global Estimates of Trafficking***

Human trafficking is a transnational crime. Estimates of the true extent of trafficking are contested, due in part to obstacles to accurate data collection associated with any clandestine criminal activity as well as inconsistencies across jurisdictions about the definition of trafficking. The US State Department's *Trafficking in Persons Report* (2006) states that a minimum of 600,000-800,000 people are trafficked across borders each year and of those 80 percent are women and girls, and up to 50 percent are minors. The International Labour Organization reports that at any one time 12.3 million people are the victims of forced labor and, of those, 2.45 million are in forced labor due to trafficking (ILO, 2005:12-14.). Statistical differences may also reflect differences in definitions of slavery and trafficking. For example, the US TIP focuses on severe forms of trafficking while ILO covers forced labor. Difficulties in collecting reliable data have been identified (Makkai and McCusker, 2004:36; Jahic and Finckenauer, 2005; Laczko and Gramegna, 2003; US Government Accountability Office, 2006; IOM, 2005). A recent report of the United Nations Office on Drugs and Crime, *Trafficking in Persons Global Patterns*, concludes that the "lack of systematic reporting by authorities is the real problem" (UNODC, 2006:10).

<sup>1</sup> In response to a range of challenges including an appreciation of inadequacies in the victim support system and lack of research, the Anti-Slavery Project at the University of Technology, Sydney was established in 2005. See [www.antislavery.org.au](http://www.antislavery.org.au).

To date there has been no comprehensive research in Australia about the extent of trafficking and slavery. The research that has been published has been directed at trafficking for the purpose of sexual servitude, although there have been an increasing number of anecdotal and media reports of labor trafficking, slavery and debt bondage in industries other than the sex industry (Bachelard, 2006:2; *Sydney Morning Herald*, 2006). The Australian Government suggests that the number of women trafficked into sexual servitude is well below 100 (Attorney-General's Department, 2004:2). Project Respect (2004), an NGO, estimates about 300 are trafficked into Australia each year. The Parliamentary Joint Committee on the Australian Crime Commission's report published in August 2005 finds that "intelligence mainly concerns the trafficking of adult women, who come predominantly from South Korea, Thailand and the People's Republic of China. There appears to have been a fall in the number of Thai sex workers and an increase in the number of South Korean [sex] workers."<sup>2</sup> Australian research has suggested that women are trafficked to Australia from both South and East Asia, with smaller numbers from Latin America and the former Soviet States (Yea and Burn, 2006).

The 2006 US State Department's *Trafficking in Persons Report* indicates that Australia is a destination for women from "Southeast Asia, South Korea, and the People's Republic of China (P.R.C.) trafficked for the purposes of sexual exploitation" (US Department of State, 2006:62). In a global analysis of trafficking trends by the United Nations Office on Drugs and Crime (UNODC), data from private and public sources are used in an attempt to define global patterns of trafficking in persons (UNODC, 2006: 10). Countries are designated as high, medium or low risk based on the extent of reported information that a country is a source, transit or destination country for trafficked persons (UNODC, 2006:6). There is no reported information that Australia is a country of origin for trafficking outside Australia, or that Australia has been a transit country. However, Australia is reported to be a 'high' country of destination for women and girls trafficked for the purpose of sexual exploitation. In relation to Australia, Thailand is ranked as a 'high' country of origin while China, Indonesia, Malaysia, Philippines are 'medium' and Afghanistan, Belarus, Colombia, Fiji, Iraq, Maldives, Nepal, Pakistan, Russian Federation and Sri Lanka, Central and South Eastern Europe, Uzbekistan and Vietnam are reported as a 'low' countries of origin (UNODC, 2006: Appendix 6:27).

<sup>2</sup> Parliamentary Joint Committee on the Australian Joint Commission, Supplementary Report to the Inquiry into the Trafficking of Women for Sexual Servitude, August 2005, p. 2. Available at [www.aph.gov.au/senate/committee/acc\\_ctte/completed/inquiries/2002-04/sexual\\_servitude/round\\_table/report.pdf](http://www.aph.gov.au/senate/committee/acc_ctte/completed/inquiries/2002-04/sexual_servitude/round_table/report.pdf).

## *Australia's Response to Trafficking*

In 1999, in response to increasing concern about the trafficking of women into sexual servitude, the Australian government introduced the *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999*. However, the tragic death of Phuangthong Simaplee, in Villawood detention center on 26 September 2001 after being trafficked to Australia to work in sexual servitude, illustrated that legislation criminalizing trafficking will have little effect if the visa arrangements and victim support provided to trafficked persons are inadequate.<sup>3</sup>

The death of Phuangthong Simaplee resulted in media coverage of the problem of modern day trafficking and placed trafficking on the agenda of the Australian Government (Burn, Blay and Simmons, 2005). In October 2003, the government announced a four-year Aus\$20 million package, followed by the release in June 2004 of the Commonwealth Action Plan to Eradicate Trafficking in Persons (Attorney-General's Department, 2004). The introduction of the *Criminal Code Amendment (Trafficking in Persons Offences) Act 2005* (Commonwealth) had the effect of inserting people trafficking and debt bondage offences into the Commonwealth Criminal Code and amending the existing provisions related to deceptive recruiting for sexual services.<sup>4</sup>

The Action Plan has four elements: prevention, detection and investigation, criminal prosecution, victim support and rehabilitation. Under the Action Plan, the government established:

- a new community awareness campaign to raise awareness of trafficking issues within Australia;
- the creation of an Australian Federal Police Transnational Sexual Exploitation and Trafficking Team to investigate trafficking and sexual servitude;
- the location of Senior Migration Officer (Compliance) in Thailand, focused on trafficking in persons;

<sup>3</sup> Phangthong Simaplee was a Thai citizen who was detected by Immigration officials during a raid on a brothel in Sydney on 26 September 2001. As an unlawful non-citizen she was automatically detained and taken to an Immigration Detention Center. Ms Simaplee told immigration officials that she had been sold into sexual servitude by her parents and trafficked from Thailand to Malaysia and then re-trafficked to Australia as a young adult. Ms Simaplee died in the center three days after being detained. At the time of detention she weighed 38 kg and at the time of her death she weighed 31 kg. Two years after her death, the New South Wales Coroner concluded a report into the death of Ms Simplee making recommendations about the treatment of trafficked persons. The coronial inquiry was initiated through the perseverance of a Melbourne NGO, Project Respect and a pro bono lawyer, Ms Georgina Costello.

<sup>4</sup> There has been increasing recognition, reflected in the 2005 Criminal Code Amendment (Trafficking in Persons Offences) Act, that people trafficking is not a problem which is restricted to the sex industry but that can occur in a wide range of industries.

- new visa arrangements for potentially trafficked persons who are of interest to, or can assist police investigations or prosecutions;
- a victim support program for persons who had been granted visas to assist police investigations or prosecutions; and
- the development of a reintegration assistance project for trafficking victims who are returned to source countries in Southeast Asia.

The Action Plan was designed to meet Australia's obligations under the Trafficking Protocol. Australia ratified the Protocol on 15 September 2005.

Article 2 of the Trafficking Protocol states the purpose of the Protocol is to prevent and combat trafficking in persons, paying particular attention to the trafficking of women and children; protect and assist the victims of trafficking; and ensure international cooperation to meet these objectives.

The Trafficking Protocol defines "trafficking in persons" as:

...the recruitment, transportation, transfer, harboring 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 labor or services, slavery or practices similar to slavery, servitude or the removal of organs.

The Protocol provides that "the consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) [above, defining traffic in persons] of this Article shall be irrelevant where any of the means set forth in subparagraph (a) have been used."<sup>5</sup>

Exploitation is not exhaustively defined but the Protocol states that exploitation includes, at a minimum refers to "the exploitation or the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs."

Principle 1, Guideline 2 of the UN Principles and Guidelines (2002) states that "[t]he human rights of trafficked persons shall be at the center of all efforts to prevent and combat trafficking and to protect, assist and provide redress to victims." Principle 2 provides that under international

<sup>5</sup> The "travaux preparatoires" state that the phrase "abuse of a position of vulnerability is understood to refer to any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved." See United Nations General Assembly, Interpretative notes for the official records (travaux préparatoires) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, UN Doc.A/55/383/Add.1, 3 November 2000, Interpretative Note 63.

law States have a responsibility to act with due diligence to prevent trafficking, to investigate and prosecute traffickers and to assist and protect trafficked persons. Principle 8 obliges States to "ensure that trafficked persons are protected from further exploitation and harm and have access to adequate physical and psychological care [which] shall not be made conditional on the capacity or willingness of trafficked persons to cooperate in legal proceedings" (Guideline 6, The UN Principles and Guidelines, 2002). Additionally, Gallagher (2005) has comprehensively reviewed the breadth of relevant human rights instruments within an Australian context.

### ***Witness Protection and Victim Support***

The Australian government's response to trafficking has been characterized by a strong law enforcement focus (Segrave, 2004; Sullivan, 2004). The solution to trafficking is often presented as simply the apprehension and prosecution of individual perpetrators, reflecting the belief that "...the real battle against trafficking of women for sexual exploitation will be won operationally, in the field, by police officers."<sup>6</sup> This law enforcement focus of the Commonwealth Action Plan is embodied in the visa regime for trafficking victims introduced in January 2004 which offers a gateway to victim support services, but only if victims are deemed able to assist police (Burn and Simmons, 2005a and b; Burn et al., 2005).

From 1 January 2004, the *Migration Regulations* were amended by the *Migration Amendment Regulations* (No.11) 2003. The amendments established two new witness protection (trafficking) visas providing temporary or permanent stay to persons who had made a significant contribution to the prosecution or investigation of alleged trafficking offences and who may be in danger upon returning to their home country.

The Witness protection (trafficking) visas are part of a four-step visa system consisting of:

- Stage 1: A new Bridging Visa F (subclass 060);
- Stage 2: The existing Criminal Justice Stay visa (Pt 2, Division 4 of the *Migration Act* 1958);
- Stage 3: Class UM, Subclass 787 (Witness Protection (Trafficking) (Temporary) Visa under Regulation 2.07AJ); and
- Stage 4: Class DH, Subclass 852 (Witness Protection (Trafficking) (Permanent) Visa under Regulation 2.07AK).

From 1 January 2004 to 20 October 2006, 54 suspected victims of trafficking were granted Bridging F visas. During the same period 43 suspected victims of trafficking were granted Criminal Justice Stay visas,

<sup>6</sup> Michael Turnbull, Parliamentary Debates, House of Representatives, Official Hansard, No. 7, 2005, Monday, 14 March 2005, p. 16.

and two victims of trafficking have been granted Witness Protection (Trafficking) (Temporary) visas.<sup>7</sup>

More broadly, it is important to recognize trafficked persons not just as potential witness in criminal proceedings but as victims of human rights violations that have occurred in Australia (Burn and Simmons, 2005a and b).

The trafficking visa framework is essential – without access to the visas, victims of trafficking may be subject to the mandatory detention provisions in the Migration Act and are unable to access the support package for victims of trafficking that was introduced by the Action Plan. The victim support program (now known as VotCare)<sup>8</sup> commenced operation in March 2004, when a commercial company, Southern Edge Training, gained the tender to provide victim support services under a contract for services issued by the Office of the Status of Women. The initial contract provided Aus\$2.7 million over four years to 2006-2007. The victim support program provides victims of trafficking with individualized case management services, including assistance to temporary accommodation, access to Medicare (the national health service available to all Australian residents) and other medical services, counselling, emergency and support funds, legal services, training and social support.<sup>9</sup>

The operation and administration of this new visa framework is crucial in evaluating the effectiveness of Australia's response to people trafficking. The *Criminal Code Amendment (Trafficking in Persons Offences) Act 2005* (Commonwealth)<sup>10</sup> will not be successful in securing prosecutions of traffickers if visa arrangements and victim support for trafficked persons are inadequate.

### *The Bridging Visa F*

For trafficking victims, the Bridging Visa F (BVF) is the gateway to victim support services. Where BVF holders are alleged victims of trafficking, they are given access to the Southern Edge Training Support for Victims of

<sup>7</sup> Australian Federal Police (personal communication, 21 December 2006). From 1999-31 December 2003 (before the operation of the new scheme) 11 suspected victims of trafficking were granted Criminal Justice Stay visa and one suspected victim of trafficking was granted a Criminal Justice Entry Visa.

<sup>8</sup> The victim support package is funded by the federal Department of Families, Community Services and Indigenous Affairs (FaCSIA) and is administered by the Office for Women. For further information about the victim support package, see Victims of People Trafficking (VotCare Program) in <http://www.southernedge.com.au/?MID=20061213012>.

<sup>9</sup> Michael Turnbull, Parliamentary Debates, House of Representatives, Official Hansard, No. 7, 2005, Monday, 14 March 2005.

<sup>10</sup> Amending Criminal Code Act 1995 (Cth).

People Trafficking Program (VotCare). If a person in immigration detention is granted a BVF, he or she will be released and allowed to stay lawfully in the community for a maximum of 30 days on that visa while the law enforcement agency assesses whether the person is able and willing to assist with investigations into people trafficking, sexual servitude and/or deceptive recruiting.

The grant of a BVF is inextricably tied to the criminal justice process. BVFs may be granted to "persons of interest" to the police in relation to offences or alleged offences of people trafficking, sexual servitude or deceptive recruiting.<sup>11</sup> The focus is on the person's potential as a witness rather than their status and needs as a trafficked person.<sup>12</sup>

While the Department of Immigration and Multicultural Affairs (DIMA), the federal department responsible for Australian immigration policy, recognizes 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 investigation and prosecution of people trafficking offenders" (DIMA, MSI 2002: para 4.1.5), not all BVF holders are given the maximum 30-day period to receive victim support and develop confidence to tell their stories. Under the *Migration Regulations*, a BVF can expire at a date specified by the Minister or if the Minister, acting on the advice of the Australian Federal Police (AFP) or a law enforcement agency, tells the BVF holder that their BVF is no longer in effect because they have ceased to be of interest to the police.<sup>13</sup>

Anecdotal evidence from the anti-trafficking NGO, Project Respect, suggests that the decision that a BVF holder is not a person of interest is frequently made within days of the grant of a BVF (Project Respect, 2006). On 12 January 2005, *The Australian* reported that "Julia," who claimed to have been trafficked, was "kicked off" the bridging visa program after the police told her statement was "useless" (Wynhausen, 2005:11).

The Bridging Visa F was amended by the *Migration Amendment Regulations 2005 (No. 10)*. The explanatory statement states the purpose, inter alia, of the amendment is to enable a non-citizen who is outside Australia and who is a person of interest to law enforcement agencies in relation to an offence or alleged offence of people trafficking, sexual servitude or deceptive recruiting, can be granted a bridging visa F provided that the law

<sup>11</sup> Migration Regulations, Schedule 1, Item 1306, Bridging Visa F. See also Migration Regulations, Schedule 2, 060.22

<sup>12</sup> The applicant must be the subject of written advice from Federal, State or Territory police stating that the applicant is a person of interest in relation to an offence or alleged offence involving people trafficking, sexual servitude or deceptive recruiting or the member of the immediate family of such a person. See Migration Regulations, Schedule 1, Item 1306 Bridging Visa F; Migration Series Instruction 391: People Trafficking, para 8.2.3

<sup>13</sup> Migration Regulations, Schedule 2, 060.5.



enforcement officer had told DIMA that arrangements have been made for the care, safety and welfare of the non-citizen while they are in Australia.<sup>14</sup> A Bridging Visa F entitles the holder to access the victim support program for the duration of the visa (no more than 30 days). If law enforcement decides to continue to investigate, a Criminal Justice Stay visa will be issued. If law enforcement decides not to continue to support the victim then the holder loses the benefit of the victim support program and any recognition of status as a victim of crime so that general migration provisions operate. A person in this situation may be detained and removed from Australia unless there is another visa option in Australia.

### *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 may be granted a Criminal Justice Stay Visa (CJSV).<sup>15</sup> The grant of CJSV is discretionary. CJSV holders may remain in Australia for the period they are required for law enforcement purposes. This time frame is decided by law enforcement agencies and not the needs of trafficking victims. The consequence of the arbitrary character of a CJSV is that trafficking victims must live with the uncomfortable knowledge that their continued stay in Australia is conditional on their ability to be able to provide adequate assistance to police.

Once the investigation or prosecution is over, trafficking victims can not apply for a Witness Protection (Trafficking) (Temporary) Visa unless invited to apply by the Minister. In other words, a threshold requirement for the grant of a Witness Protection (Trafficking) (Temporary) visa is that the applicant holds a criminal justice visa. This requirement has the harsh effect of denying a victim of trafficking and slavery a period of lawful stay despite their contribution to the criminal justice process in Australia. For example, the author has seen individual cases (Anti-Slavery Project, 2006) where the Australian Federal Police have certified that victims have been trafficked to Australia and have provided credible evidence to Australian law enforcement bodies. However, if the nature of the evidence is insufficient to ground a successful prosecution then the Criminal Justice Visa will cease and the victim will not be entitled to a Witness Protection (Trafficking) (Temporary) visa.

While holding a CJSV a person is entitled to the full range of benefits provided by the victim support program. If a person does not qualify for the Witness Protection (Trafficking) (Temporary) visa, entitlement to the victim support program ceases and, unless there is a further visa entitlement, they will be obliged to leave Australia

<sup>14</sup> Migration Regulations 2.20(14); 2.20B and Schedule 1, item 1306.

<sup>15</sup> A CJSV is granted after the issue of a Criminal Justice Stay Certificate

*Witness Protection (Trafficking) Visas*

When a CJSV has expired a person may be eligible for a Subclass 787 Witness Protection (Temporary) Trafficking Visa. The grant of this visa is discretionary. A person who has assisted a police investigation or prosecution in a trafficking matter may be granted this visa if:

- (a) the person is in Australia; and
- (b) the person holds a criminal justice stay visa; and
- (c) the Attorney-General has issued a certificate in relation to the person to the effect that:
  - (i) the person made a significant contribution to, and cooperated closely with, the prosecution of a person who was alleged to have trafficked a person or who was alleged to have forced a person into exploitative conditions (whether or not the person was convicted); or
  - (ii) the person made a significant contribution to, and cooperated closely with, an investigation in relation to which the Director of Public Prosecutions has decided not to prosecute a person who was alleged to have trafficked a person or who was alleged to have forced a person into exploitative conditions; and
- (d) the Attorney-General's certificate is in force; and
- (e) the person is not the subject of a prosecution for an offence that is directly connected to the prosecution mentioned in the Attorney-General's certificate; and
- (f) the Minister is satisfied that the person would be in danger if he or she returned to his or her home country; and
- (g) an offer of temporary stay in Australia is made to the person by an authorised officer; and
- (h) the person indicates, in writing, to an officer that he or she accepts the Australian Government's offer of a temporary stay in Australia.<sup>16</sup>

If the CJSV holder meets the above criteria the person may be issued with a Subclass 787 visa. A permanent Witness Protection (Trafficking) visa (subclass 852) may be granted if the person has held the corresponding temporary visa for at least two years and continues to meet the criteria.<sup>17</sup> A permanent visa entitles the holder to remain indefinitely in Australia and

<sup>16</sup> Migration Regulation 2.07AJ, Applications for Witness Protection (Trafficking) (Temporary) (Class UM) visas.

<sup>17</sup> Migration Regulation 2.07AK Applications for Witness Protection (Trafficking) (Permanent) (Class DH).

after two years of residency apply for Australian citizenship.<sup>18</sup> A permanent visa allows the holder to benefit through a family reunion program entitling the visa holder to sponsor close relatives to Australia. Permanent visa holders have permission to work, are entitled to access the Australian health care system, to receive social security payments, and access public education at all levels, including vocational and tertiary education.

### *Evaluating the New Visa Framework*

The policy rationale for the Witness Protection (Trafficking) visas appears to be, at least in part, that witnesses in trafficking cases are often reluctant to testify in court for a range of reasons, including the fear that they may be required to return to their home country at the end of the trial, possibly to face their traffickers (Yea, 2004a:101).<sup>19</sup> On a pragmatic level, by failing to allay the fears of trafficking victims, the new visa framework fails to meet its own policy objectives. More broadly, the new visa framework reflects a law enforcement agenda where the human rights of trafficking victims are incidental to the main game: prosecutions. Conversely, such prioritization may act as a disincentive to participate in law enforcement investigations and criminal prosecutions (Yea, 2004a).

According to government policy, a temporary Witness Protection (Trafficking) visa will only be granted at the conclusion of the criminal justice process while the victim still holds a criminal justice stay visa (DIMA, 2005).<sup>20</sup> This approach fails to provide trafficking victims who are in the process of giving evidence with the feeling that their long term security is important to police. To support trafficking victims and build trust between survivors and law enforcement agencies, victims should be allowed to apply for witness protection visas, while they are in process of assisting authorities. There is nothing in the existing criteria that requires stay of grant until the conclusion of the criminal justice process, rather that practice reflects the application of government policy.

The grant of the Witness Protection (Trafficking) visas is highly discretionary: there are no application forms enabling the applicant to apply for

<sup>18</sup> The Australian Citizenship Bill 2006 extends the required period of residence from two to four years to apply to applications for citizenship made after the commencement of the Bill (foreshadowed for passage through Parliament in July 2007). For the text of the Bill, see <http://parlinfoweb.aph.gov.au/piweb/Repository/Legis/ems/Linked/30110609.pdf>.

<sup>19</sup> Other disincentives to testify in a criminal trial include 'victim control methods' explored by Yea (2004a).

<sup>20</sup> DIMA (2005) has stated "The Witness Protection (Trafficking) visa allows trafficking victims to remain in Australia following the conclusion of a criminal justice process where the victim has significantly contributed to the prosecution or investigation of people trafficking matters and who may be in danger if they return to their home country."

a visa.<sup>21</sup> Trafficked persons must wait for the Minister of Immigration to exercise a personal discretion and offer the trafficking victims the chance to apply for the visa. The discretionary nature of the visas and absence of a transparent application process undermines the effectiveness of the visa system. A better approach would be to enable trafficked persons to apply for a Witness Protection (Trafficking) visa through a transparent and accessible process, instead of relying on the discretion of the minister.

In practice, the standard of evidence that suspected trafficking victims need to provide to obtain visas and gain access to victim support services has proved arduous. In the early months after the introduction of the new visa trafficking framework, the visa criteria were applied rigidly. For example, at the BVF and Criminal Justice Stay Visa stages, suspected trafficking victims had been told their evidence is "not good enough" in which case the visa ceased immediately. For example, *The Australian* reported that a woman was placed in immigration detention despite providing police with the names of traffickers and was going to be removed from Australia despite fears for her safety if she returns to Thailand - all because the information she had provided had not led to a prosecution (Wynhausen, 2005:11). More recently, there has been an apparent softening in the approach to the issue and maintenance of the BVF<sup>22</sup> (permitting women to have the full 30-day visa). However, the limitations and uncertainty of the trafficking visa scheme promotes a climate of uncertainty and acts as a disincentive for other victims to come forward and assist police investigations and prosecutions.

Fundamentally, trafficking visas should not be tied to the criminal justice process. However, in the event that visas and victim support for trafficking victims remains contingent on trafficking victims' providing assistance in police investigations or prosecutions, the level of assistance trafficking victims are required to provide to gain access to visas and victim support should be reassessed. In particular, the requirement that a trafficking victim must have made a "significant contribution" to, and "cooperated closely with" an investigation or prosecution is unduly onerous. The most that should be expected of trafficking victims is that they cooperate, to the best of their ability, with police investigations and prosecutions.

While the question of what exactly is a "significant contribution" is a matter for ministerial discretion it seems possible that a trafficking victim may provide all the evidence in his or her power and yet still be found to fall

<sup>21</sup> See Migration Regulations, Schedule 1, and Item 1224AA. Witness Protection (Trafficking) (Temporary) Class UM) and Item 1133. Witness Protection (Trafficking) (Permanent) Class DH.

<sup>22</sup> While the Australian Federal Police have developed an approach to the BVF that is more victim-focused - so that the BVF is not likely to be cancelled until the natural expiration of the visa after 30 days - this moderation reflects a change in policy rather than law.

short of making a significant contribution. Any trafficking victim who undertakes to assist police in anyway is undertaking a psychologically difficult and potentially dangerous task. If trafficking visas continue to be contingent on victims providing assistance to police investigations or prosecutions, the words "significant contribution" and "cooperated closely with" should be removed and replaced by the requirement that the person provided reasonable assistance to police investigations or prosecutions to the best of their ability.

Ultimately, the best way to allay the fears of trafficking victims is to provide protection and support on the basis of their status as victims, not their ability as witnesses. Protection for trafficking victims should not be contingent on their capacity to act as witnesses in a criminal investigation or prosecution. The vagaries of criminal investigations and prosecutions mean that, for a multitude of reasons that have nothing to do with the person's status as a trafficking victim, a trafficking victim's evidence may not be deemed to be useful. The Human Rights and Equal Opportunity Commission (HREOC) has observed making visas and victim support contingent on the standard of evidence provided could backfire in criminal proceedings "...[if] a person's evidence is required to be of a sufficient standard to allow them to receive support, it could well be argued during criminal proceedings that the evidence was fabricated in order to achieve that standard" (HREOC, 2005).

The credibility of the alleged victims of trafficking is inadvertently undermined by the government's decision to make victim support and visas dependent on the ability of a person to assist a prosecution or investigation into trafficking. During a recent trafficking trial it was revealed that most of the women who would be witnesses "were receiving certain benefits from the Commonwealth Government." The *Sunday Telegraph* quoted an unnamed lawyer claiming the income support alone was about Aus\$600 a week. Judge Keleman was reported as saying the payments could be seen as appropriate to facilitate the prosecution or, "on the other hand, as providing a powerful inducement to give false evidence" (Mercer, 2005:25).

In 2003, the Federal Minister for Justice and Customs, Senator Chris Ellison stated that the failure to prosecute any trafficking crime prior to that to that time was "due in part to the reluctance of potential witness, many of whom are in the country illegally, to testify" (Carrington and Hearn, 2003:10). The continuing inadequacy of visas for trafficking victims is likely to perpetuate this problem. As one commentator observed:

Fundamentally, the countries with the most supportive programs for victims of trafficking also have the most successful prosecution records. Success in criminal justice in the area of human trafficking requires a sophisticated and supportive approach to victim support (Costello, 2005: 14).

Well-supported victims are more likely to gain the confidence they need in order to testify in trafficking prosecutions.

Australia's current approach to the provision of visas and victim support is contrary to the UN Principles and Guidelines which provides that:

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 (Recommendation 8).

Mary Robinson, the former United Nations High Commissioner for Human Rights, has stated that victim protection must be considered separately from witness protection and that "... [trafficking victims] should be entitled to adequate protection under any circumstances irrespective of any decision to instigate judicial proceedings" (ECPAT, 2002:4; UN Principles and Guidelines, 2002:3).

A visa system where the protection and support of trafficking victims is conditional on victims being both able and willing to make a "significant contribution" to a criminal investigation or prosecution fails to meet our moral obligation to those who have suffered gross human rights abuses. It leaves open the possibility that trafficking victims will not be protected: women who are so psychologically terrified that the thought of giving evidence cannot even be contemplated will be deported; the same fate awaits those willing witnesses whose evidence is deemed "not enough." The visa package needs to provide access to a victim support program for all trafficked persons not simply a witness protection scheme.

Although DIMA (2005) has expressed concern that "allowing ready access to residence may facilitate trafficking or increase the level of fraudulent claims, diverting criminal justice resources," there is no evidence to support the claim that if visas (and victim support) for trafficking victims are not contingent on the victim providing adequate assistance to a criminal investigation or prosecution, the floodgates will be opened to raft of fraudulent claims. Many trafficking victims wish to be repatriated (although they may require victim support before repatriation). 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 (Costello, 2005).

While in Australia's experience a small proportion of trafficked victims want to go home or believe that they will be safe on return, the country has an obligation to ensure that the process of repatriation is safe and that trafficking victims receive victim support prior to repatriation, regardless of whether or not they are involved in assisting police investigations or prosecutions. An independent process is needed to assess when trafficking victims are safe to return home. Although some trafficking victims will wish

to return home, others will not. Recommendation 8 of the Parliamentary Joint Committee on the Australian Crime Commission's inquiry into the trafficking of women into sexual servitude stated (2004:57):

...all trafficked women accepted onto the victim support program or receiving the Criminal Justice Stay Visa be exempt from compulsory return to their country of origin.

On a pragmatic level, the new visa framework fails to achieve its own objectives of creating a secure, trusting environment in which trafficking victims will be willing to testify against their traffickers. On a more fundamental level, if Australia were serious about addressing trafficking as a human rights issue, there is a need to separate the issues of victim support and witness protection. Until the visa framework is based on a person's status as a victim instead of their ability as a witness, criminals will not be prosecuted and victims will continue to be punished. Trafficking victims should be eligible for visas on the basis of their status as a victim of trafficking, their safety needs and their need for victim support. Protection for trafficking victims should not be contingent on victims' ability to act as witnesses.

Effective strategies designed to protect victims of trafficking and slavery regardless of the success of prosecutions will have the effect of encouraging victims to come forward. When "reasonable and appropriate" protections and preventive strategies are developed, Australia may significantly reduce the potential for trafficking and slavery by offering less conditional protection to those who have been exploited.

## *Conclusion*

Victims of trafficking and slavery have many needs and require substantial protection which should not be contingent on their ability to assist in the criminal justice process. Their needs include access to medical and psychological care, financial support, emergency and long-term housing, social support services, interpreting and legal advice, and access to voluntary return to the country of origin where appropriate through effective repatriation programs. Victims of trafficking may also be entitled to seek redress and compensation through civil law, via actions in tort, and through the criminal law, via criminal law victims' compensation schemes.

Australia has made significant advances towards eliminating trafficking, including the introduction of laws criminalizing all forms of trafficking. However, creating a victim support program which operates only in the narrow confines of a criminal justice framework fails to adequately protect the human rights of trafficking victims who are unable to assist in the criminal justice process. This failure is part of a broader trend to focus on the fight against trafficking as a law and order issue which can only be won by prosecuting the perpetrators. While prosecution is undoubtedly important,

simply addressing trafficking with a criminal justice framework, limits the Australian government's ability to address the more difficult and complex issues of prevention and protection. Currently, Australia's response to trafficking, with its emphasis on prosecution and witness protection, falls short of protecting the human rights of trafficking victims.

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