

# PEOPLE-TRAFFICING in Australia

By Jennifer E. Brown

Trafficking, slavery and forced labour are violations of human rights and crimes under Australian law. The victims of these crimes are often traumatised, marginalised and highly vulnerable as a result of their experiences.

**T**he Anti-Slavery Project (Anti-Slavery) at the University of Technology, Sydney, is Australia's only specialist legal service for people who have been trafficked and enslaved in Australia. Lawyers at the Anti-Slavery Project have provided *pro bono* legal advice and representation to trafficked people since 2003. The Anti-Slavery Project researches, publishes and develops policy submissions to government on how better to respond to trafficking, slavery and worker exploitation.

Currently, the Anti-Slavery Project is assisting more than

South Korea and Malaysia, while smaller numbers have come from China, India, Philippines, Vietnam and Venezuela. In most cases, our clients came to Australia with the assistance of someone who promised them work. But when they arrived, they found out they had been deceived about the nature or conditions of the work.

Our clients are primarily women who have been exploited while working in the sex industry. However, trafficking can occur in any industry where workers are low paid and conditions are difficult to scrutinise. Two of our clients were exploited while holding valid working visas entitling them

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We assist people all around Australia, but most of our clients live in major cities in NSW, reflecting the national trend that most people identified by government agencies are located in NSW. Government statistics show that from January 2004 to June 2010, 97 people were identified as trafficked in NSW, while 58 people were identified as such in all the other states and territories combined.<sup>1</sup>

The provision of effective legal advice and representation is a critical part of enabling trafficking victims to rebuild their lives. Because of the precarious immigration situation of victims of trafficking, a large part of our work involves migration law, including obtaining visas under the people-smuggling visa framework, primary and review applications, and ministerial intervention requests. Our clients are also often involved in criminal investigations, prosecutions and civil law claims. Increasingly we are pursuing victims' compensation claims through the NSW Victims Compensation Tribunal and advising about other avenues of civil compensation where appropriate. Some of this work is done in partnership with members of the Anti-Slavery Project *pro bono* network. We also make referrals to the Fair Work Ombudsman for assistance in recovering unpaid wages.

### SLAVERY AND TRAFFICKING UNDER THE LAW

Labour exploitation is addressed by at least three international conventions and several domestic laws.

In Australia, offences of slavery, trafficking in persons, and debt bondage are contained in Commonwealth and state criminal legislative schemes. Harsh and exploitative working conditions are generally dealt with through civil law industrial provisions and the operation of statutory bodies, such as the Fair Work Ombudsman. Labour exploitation is also dealt with by other laws, such as the *Migration Amendment (Employer Sanctions) Act 2007* (Cth). This Act makes it an offence to knowingly or recklessly employ or refer to work a person who is not entitled to work, or who would be working in breach of their visa conditions.

Together, these laws provide the government with strong tools for taking action against people who are responsible for labour exploitation. While the specific trafficking in persons legislation is still relatively new and may need to be further evaluated by the legal profession and the judiciary, there would seem to be advantages in reviewing the effectiveness and appropriateness of current legislative schemes and the extent of co-ordination between state and federal agencies.

A central focus for our work at the Anti-Slavery Project involves distinguishing between the crimes of trafficking, slavery and forced labour, and employment conditions which are harsh and exploitative, and framing appropriate legal responses. As Chief Justice Gleeson cautioned in the landmark case of *The Queen v Tang*,<sup>2</sup> harsh and exploitative employment conditions do not of themselves constitute slavery.<sup>3</sup>

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Although primarily affecting women who have been exploited in the sex industry, trafficking can occur wherever workers are low paid and conditions are hard to scrutinise.

The circumstances of the exploitation are critical to determining whether a person is enslaved, trafficked or in forced labour or, as may well be the case, all three. The similarities and differences between people-trafficking, slavery and forced labour are outlined below.

### PEOPLE-TRAFFICKING

People-trafficking is defined by the *United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing the Convention on Transnational Crime 2000* (the *Trafficking Protocol*). The Trafficking Protocol defines trafficking as:

‘...the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.’<sup>4</sup>

The *Criminal Code Amendment (Trafficking in Persons Offences) Act 2005* (Cth) gives effect to Australia’s obligations as a signatory to the Trafficking Protocol by inserting people-trafficking offences into the *Australian Commonwealth Criminal Code* (Criminal Code).<sup>5</sup> These provisions apply where a trafficker organises or facilitates entry of a person into Australia by using threats or deception, or where the organiser is reckless as to whether the person’s entry will result in exploitation. Additional offences deal with cases where a person is deceived about their involvement in the provision of sexual services, the extent to which the person is free to leave, or whether the person owes a debt.<sup>6</sup> The Criminal Code also contains specific offences regarding trafficking in children and domestic trafficking.

### SLAVERY

Slavery is defined in the *International Convention to Suppress the Slave Trade and Slavery 1926*<sup>7</sup> as ‘the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised’.<sup>8</sup> This was supplemented by the *Supplementary Convention on*

*the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery 1956*,<sup>9</sup> which prohibits ‘practice similar to slavery’, including debt bondage, serfdom, servi marriage and child labour, ‘whether or not [these practices are covered by the definition of slavery]’.<sup>10</sup>

In Australia, slavery offences are set out in Division 270 of the Criminal Code. Slavery is defined 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’.<sup>11</sup> In 2008, the High Court handed down the decision in *The Queen v Tang*,<sup>12</sup> unanimously holding that slavery provisions in the Criminal Code were appropriate and adapted to implement Australia’s international obligations.<sup>13</sup> The High Court identified four powers attaching to the right of ownership:

- the power to use a person’s labour in a substantially unrestricted manner;
- the entitlement to the fruits of a person’s labour without compensation commensurate to the value of the labour;
- the power to control and restrict a person’s movements; and
- the power to buy and sell a person.<sup>14</sup>

In distinguishing between the crime of slavery and harsh and exploitative working conditions, the High Court said that the capacity to deal with a person as an object of sale and purchase ‘may be a powerful indication that a case fall on one side of the line [between harsh employment and slavery]’.<sup>15</sup> Another factor, according to the Court, could be ‘the exercise of powers of control over movement which extend well beyond powers exercised even in the most exploitative of employment circumstances, and absence or extreme inadequacy of payment for services’.<sup>16</sup>

### FORCED LABOUR

The International Labour Organisation (ILO) conventions on forced labour, the *Forced Labour Convention 1930* and the *Abolition of Forced Labour Convention 1957*, define 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’.<sup>17</sup>

The ILO has explained that forced labour is not merely the payment of low wages or poor working conditions, or situations of economic necessity, where a person feels tied their job because of financial pressure or the lack of alternative employment.<sup>18</sup> Forced labour, like slavery and trafficking, is a severe violation of human rights and restriction of human freedom.

The term ‘penalty’ in the definition of forced labour is not limited to penal sanctions and may include loss of rights or privileges. According to the ILO, the ‘menace of a penalty’ is broadly defined to include physical violence or restraint, death threats to the worker or family, threats to report illegal workers to the police or immigration officials, or threats to shame workers to family members or more subtle forms of threat, such as psychological threats.<sup>19</sup> Other examples include financial penalties linked to debt, non-payment of

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vages accompanied by threats of dismissal for refusal to work overtime.

In the Australian Criminal Code, there is no specific offence of 'forced labour'. Rather, forced labour is part of the definition of 'exploitation' in relation to the trafficking offences. 'Exploitation' is defined in the Criminal Code as when the exploiter's conduct causes a person to enter into a situation of slavery, forced labour, sexual servitude or unlawful organ removal. Section 73.2(3) of the Criminal Code defines forced labour as '...the condition of a person who provides labour or services (other than sexual services) and who, because of the use of force or threats' is either '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'.

### AUSTRALIAN GOVERNMENT RESPONSE

The Australian government has taken significant steps to eradicate people-trafficking. In 2003, the government committed \$20 million to a range of measures designed to prevent trafficking, prosecute offences and protect witnesses. In 2007, a further \$38.3 million was made available for these purposes.

This money has been used to fund a range of strategies, including establishing a dedicated team within the Australian Federal Police to investigate trafficking and sexual exploitation, introducing legislation that criminalises trafficking of persons, establishing a victim support scheme, introducing a special visa scheme for trafficked people, conducting research into trafficking prevalence and trends, posting specialist immigration officers in Thailand, China and the Philippines to focus on prevention, and assisting victims of trafficking who are returned to their country of origin or another country to reintegrate.<sup>20</sup>

Investigations by the AFP of allegations of trafficking are often complex and span multiple jurisdictions.<sup>21</sup> As a striking example of the complexity of the investigation process, the Melbourne AFP team spent 2,976 police hours on a single operation between July 2005 and February 2006. The investigation required the team to identify key evidence from 27,000 telephone intercepts, many of which were in a foreign language.<sup>22</sup> More broadly, between January 2004 and June 2010, the AFP investigated over 270 allegations of trafficking-related offences, leading to 39 referrals to the Commonwealth Director of Public Prosecutions.<sup>23</sup> Between 1 May 2009 and 30 June 2010, six people were convicted of trafficking-related offences, and six other matters were still before the courts, three of those matters being subject to appeals.<sup>24</sup>

Another important initiative of the Australian government was the establishment in 2008 of the National Roundtable on People Trafficking (NRPT), which is designed strengthen partnerships between government, NGOs, unions, and employer groups to prevent trafficking, protect witnesses and prosecute offenders. The NRPT has provided a valuable forum for concerns about Australian government responses to people trafficking to be discussed. At the first meeting of the NRPT, the Anti-Slavery Project and the Australian Human Rights Commission raised significant concerns about the

operation of the then visa scheme for trafficked people. As a result of these discussions and subsequent DIAC research, immigration law was changed on 1 July 2009 to provide more support and protection to trafficked people. Labour trafficking and victims' compensation are ongoing areas of concern, and Australia's legislative response to forced marriage and labour trafficking is currently under review.

### PREVALENCE OF TRAFFICKING-RELATED ACTIVITIES

Slavery, trafficking and forced labour are clandestine activities and, consequently, it is difficult to estimate accurately the number of people affected in Australia and worldwide.<sup>25</sup>

Globally, the ILO estimates that at least 12.4 million people are in forced labour, more than 2.4 million have been trafficked across borders and 9.8 million are exploited by private agents.<sup>26</sup> The Asia-Pacific region is the most severely affected region in the world, with the ILO estimating that 9.4 million people in the Asia-Pacific region experience these kinds of human rights abuses.<sup>27</sup>

In Australia, there is little reliable research about the prevalence of trafficking; however, some information can be drawn from official statistics regarding criminal and immigration processes. From 1 January 2004 to 30 June 2009, the AFP investigated 270 allegations of trafficking;<sup>28</sup> 131 people accessed the government-funded victim support >>

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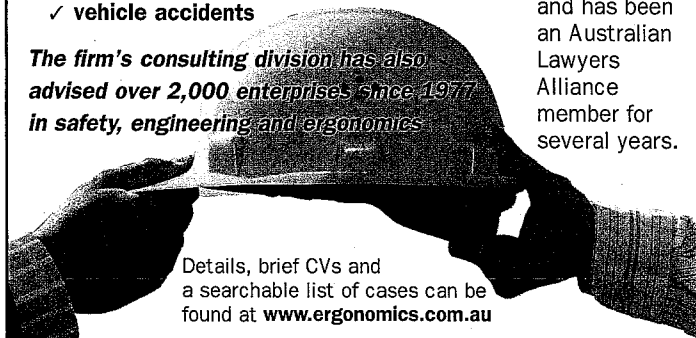
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program.<sup>29</sup> On 1 July 2009, a new trafficking visa scheme came into effect, which improved the ability of victims to obtain visas and access support.<sup>30</sup> Between 1 July 2009 and 30 June 2009, 15 people were granted a Bridging visa F, 11 suspected victims were given Criminal Justice Stay visas, and 15 people and 6 dependent children were granted a Witness Protection (Trafficking) (Permanent) visa.<sup>31</sup> The Witness Protection (Trafficking) (Permanent) visa is available to people who have made a contribution to, and co-operated closely with, a prosecution or investigation of a trafficking offence. It is also available to their immediate family members.

### HOW TO GET INVOLVED

The work of the Anti-Slavery Project is consistent with human rights standards and is grounded in international best practice. We know that our legal work changes the lives of trafficked people. Earlier this year, a woman who had been trafficked and enslaved in Australia received the letter granting her a permanent visa and said to me, 'now I have freedom'. All of us at the Anti-Slavery Project are enriched by the strength and resilience of our clients and are proud to make a positive difference to each of their lives.

However, our experience has given us an acute understanding of the fact that trafficked people face significant obstacles in accessing legal services. These obstacles include cultural and linguistic barriers, uncertainty about visa status, social isolation, lack of knowledge about legal rights, and participation in criminal investigations and prosecution proceedings, which are often lengthy and complex.

To increase the ability of this vulnerable group to access legal services, we are currently formalising the Anti-Slavery Pro Bono Lawyers Network – a national network of legal professionals with expertise in our primary areas of work, including immigration law, civil compensation and recovery of wages – which specialises in assisting victims of human trafficking and slavery. If you think you may be able to help us, please contact us by referring to the details below.

The Anti-Slavery Project regularly holds seminars for legal professionals, community workers and members of the public. In response to discussion papers recently released by the Australian Attorney-General's Department on forced and servile marriage, and the criminal justice response to slavery and people-trafficking, reparations, and vulnerable witness protections, the Anti-Slavery Project ran two seminars in February 2011 to examine options for law reform and engage in consultation with practitioners, researchers, academics, NGO stakeholders and government representatives. For more information, please see our website at [www.antislavery.org.au](http://www.antislavery.org.au), or contact [antislavery@uts.edu.au](mailto:antislavery@uts.edu.au). ■

You can read more about the work of the Anti-Slavery Project on our website ([www.antislavery.org.au](http://www.antislavery.org.au)), follow us on twitter (@AntiSlaveryOz) or facebook (<http://www.facebook.com/AntiSlaveryOz>).

Circumstances determine whether a person is enslaved, trafficked, in forced labour, or all three.

**Notes:** 1 Australian government, *Trafficking in Persons: The Australian Government Response*, January 2004-April 2009, Anti-People Trafficking Interdepartmental Committee, Canberra, 2009, at p30; Australian government, *Trafficking in Persons: The Australian Government Response*, 1 May 2009-30 June 2010, Anti-People Trafficking Interdepartmental Committee, Canberra 2010, at p13. 2 *The Queen v Tang* [2008] HCA 39. 3 *Ibid*, at para 32. 4 *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*, GA Res. 25, annex II, UN GAOR, 55th Sess., Supp. No. 49, at 60, UN Doc. A/45/49 (Vol. I) (2001), entered into force 9 September 2003. At October 2009, the Trafficking Protocol had 117 signatories and 133 parties. (Trafficking Protocol). See <http://www.unodc.org/unodc/en/treaties/CTOC/countrylist-traffickingprotocol.html>. 5 *Australian Criminal Code Act 1995* (Cth), Division 271. 6 *Australian Criminal Code Act 1995* (Cth), Division 271. 7 Opened for signature 25 September 1926, 212 UNTS 17 (entered into force 18 June 1927). 8 Art 1(1). The language of article 1(1) has 'proved to be abiding' and is now accepted to define slavery at international customary law: UN, Security Council, International Criminal Tribunal for the former Yugoslavia, *Prosecutor v Kunarac, Kovac and Vukovic* (IT-96-23 & it-9-23/I-T) Judgment, 22 February 2001, [519]. 9 Opened for signature 30 April 1956, 226 UNTS 3 (entered into force 30 April 1957). 10 Art 1. 11 The Criminal Code Amendment (Slavery and Sexual Servitude) Bill 1999 repealed imperial Acts relating to slavery, such as the *Slave Trade Act 1824*, and inserted Division 270 into the Criminal Code. 12 *The Queen v Tang* [2008] HCA 39 at para 30. 13 *Ibid*, at para 34. 14 *Ibid*, at para 26. 15 *Ibid*, at para 32. 16 *Ibid*. 17 *Abolition of Force Labour Convention 1957* (ILO No. 150), article 2. 18 International Labour Organisation, *The Cost of Coercion*, Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, Geneva, ILO, 2009 at 5. 19 *Ibid*, 5-6. 20 Australian government, *Trafficking in Persons: The Australian Government Response*, January 2004-April 2009, Anti-People Trafficking Interdepartmental Committee, Canberra, 2009, at pp7-8. 21 *Ibid*, at p19. 22 Fiona David, 'Trafficking of women for sexual purposes', Research and Public Policy Series, No. 95, Australian Institute of Criminology, 2008, p ix. 23 Australian government, *Trafficking in Persons: The Australian Government Response*, 1 May 2009 - 30 June 2010, Anti-People Trafficking Interdepartmental Committee, Canberra, 2010, at 25. 24 *Ibid*, at p31. 25 Frances Simmons & Jennifer Burn, 'Evaluating Australia's response to all forms of trafficking: Towards rights-centred reform', (2010) 84 *ALJ* 7 12 at 713. 26 International Labour Organisation, *The Cost of Coercion*, ILO, Geneva, 2009, 1. 27 *Ibid*. 28 Australian government, *Trafficking in Persons: The Australian Government Response*, January 2004-April 2009, Anti-People Trafficking Interdepartmental Committee, Canberra, 2009, at p19. 29 *Ibid*, at p30. 30 For a detailed review of the new scheme, see Jennifer Burn & Frances Simmons, 'Prioritising protection – a new visa framework for trafficked people' *Immigration Review* (2009), 413-10 and Jennifer Burn & Frances Simmons, 'Trafficking and slavery in Australia: An evaluation of victim support strategies' (2006) 15 *Asian Pacific Migration Journal*, 553-7. 31 Australian government, *Trafficking in Persons: The Australian Government Response*, 1 May 2009 - 30 June 2010, Anti-People Trafficking Interdepartmental Committee, Canberra, 2010, at p9.

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