

## The Road to Effective Remedies: Pragmatic reasons for treating cases of “sex trafficking” in the Australian sex industry as a form of “labour trafficking”

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### Abstract

Internationally, it is widely recognised that labour law and associated protections are a critical part of any comprehensive response to trafficking in persons. In this article, we argue that while Australia has taken some important steps to incorporate labour protection systems into the anti-trafficking response, there is still more work to be done. In particular, the federal, and state and territory governments have yet to take up the opportunity to link anti-trafficking efforts with initiatives aimed at improving the working conditions of workers in the sex industry. We suggest this reflects a common—but unjustified—assumption that “labour trafficking” and “sex trafficking” are distinct and different species of harm. As a result of this distinction, workers in the Australian sex industry—an industry where slavery and trafficking crimes have been detected—are missing out on a suite of potentially effective prevention interventions, and access to civil remedies. We argue that there is a need to provide practical and financial support, so that the national industrial regulator, the Fair Work Ombudsman, can work directly with sex worker advocacy groups, to examine opportunities and barriers to accessing the labour law system, particularly for migrant sex workers.

**Key words:** trafficking in persons, labour law, prostitution, sex work, labour trafficking, Australia.

## Introduction

This article seeks to promote greater accountability in the design of anti-trafficking strategies by examining how the assumed distinction between “sex trafficking” and “labour trafficking” has shaped Australia’s response to trafficking. We argue that the practical consequence of treating “sex trafficking” and “labour trafficking” as separate species of harm is that workers in the Australian sex industry—an industry where slavery and trafficking crimes have been detected—are missing out on a suite of potentially effective prevention interventions, and access to effective remedies.

Internationally, the growing awareness of trafficking crimes occurring outside the sex industry has encouraged governments to look beyond the crime control paradigm that characterised early anti-trafficking initiatives, and to consider the critical role that labour law can have in changing the conditions in which workers become vulnerable to exploitation. Organisations including the International Labour Organization (ILO) and the Organization for Security and Cooperation in Europe (OSCE) have recommended legal and policy initiatives that focus on improving the working conditions ‘of workers who are vulnerable to forced labour but who are still able to act’,<sup>1</sup> as part of a comprehensive response to trafficking in persons.<sup>2</sup>

These approaches reflect a human rights approach to trafficking but also the reality that trafficking crimes rarely occur in industry sectors where labour standards regarding working hours, health and safety, wages and employment are routinely monitored and enforced. Trafficking crime tends to occur in sectors that are poorly regulated and “out of sight” in some way, whether this is because the context is a private home or property (as in the case of both domestic work and

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<sup>1</sup> P Belser and B Andrees, ‘Strengthening Labor Market Governance Against Forced Labor’ in P Belser and B Andrees (eds), *Forced Labor: Coercion and exploitation in the private economy*, International Labour Organization, Switzerland, 2009, p. 123; see also, OSCE, *A Summary of Challenges on Addressing Human Trafficking for Labour Exploitation in the Agricultural Sector in the OSCE region*, 2009, <http://www.osce.org/cthb/37937> (discussing labour trafficking strategies) and International Labour Organization *International Labour Migration: A rights-based approach*, International Labour Organization, Geneva, 2010, pp. 262–263.

<sup>2</sup> See also, E Pearson, *The Mekong Challenge, Human Trafficking: Redefining demand*, International Labour Organization, Geneva, 2005.

agriculture) or employment in the informal sector.<sup>3</sup> This reality can be explained by reference to crime prevention theory. For example, Ekblom has argued that organised crime occurs when three variables are present: the presence of a motivated and capable offender, a suitable target (the victim), and a lack of empowered, capable oversight.<sup>4</sup>

Alongside criminal justice mechanisms, labour law has the capacity to address at least two of these three variables, by providing legal resources to empower the otherwise vulnerable target, and introducing a form of oversight (labour regulators) that differs from, but also complements, the role of criminal justice agencies. As the United Nations Special Rapporteur on Trafficking in Persons Joy Ngozi Ezeilo observed on her recent visit to Australia, ‘the lack of regulations and labour rights...[is] one of the key structural factors fostering trafficking in persons, whether for sexual exploitation or forced labour or domestic servitude or other services’.<sup>5</sup>

The Australian government has recently taken some important steps towards integrating a more labour-informed perspective into its anti-trafficking efforts. For example, in 2009, Australia’s national labour regulator, the Fair Work Ombudsman (FWO), began participating in the national Anti-People Trafficking Inter-Departmental Committee, a cross-governmental committee that implements national policy on trafficking. In 2011, the government gave nearly AU\$500,000 (approximately US\$512,000) in funding to a range of organisations including unions, an industry association, and the Australian Red Cross to undertake targeted awareness campaigns to combat ‘labour exploitation and trafficking’.<sup>6</sup>

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<sup>3</sup> See, for example, the discussion of the structural and regulatory factors that impact on vulnerability to exploitation of both domestic and sex workers, in B Anderson and J O’Connell, *Is Trafficking in Human Beings Demand Driven: A multi-country pilot study*, 15 IOM Migration Research Series 3, 2003, retrieved 7 March 2012, <http://www.compas.ox.ac.uk/fileadmin/files/Publications/Reports/Anderson04.pdf>.

<sup>4</sup> P Ekblom, ‘Organised crime and the conjunction of criminal opportunity framework’ in A Edwards and P Gill (eds.), *Transnational Organised Crime: Perspectives on global security*, Routledge, London, 2003, p. 248.

<sup>5</sup> Joy Ngozi Ezeilo ‘The UN Special Rapporteur in Trafficking in Persons, Especially Women and Children concludes her country visit to Australia’ (media release, 30 November 2011), United Nations Human Rights, <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11664&LangID=E>.

<sup>6</sup> Anti-People Trafficking Interdepartmental Committee, Attorney-General’s Department, *Trafficking in Persons: The Australian government response: 1 July 2010-30 June 2011* (The Third Report of the Anti-People Trafficking Interdepartmental Committee), Australian Government, Canberra, 2011, pp. 9–10.

In this article, we argue that while this shift in focus is welcome, there is still more work to be done. In particular, the federal, and state and territory governments have yet to take up the opportunity to link anti-trafficking efforts with initiatives aimed at improving the working conditions of workers in the sex industry. We suggest this reflects a common—but unjustified—assumption that “labour trafficking” and “sex trafficking” are distinct and different species of harm. In our view, this distinction does not reflect the complex reality of women’s experiences of trafficking in the sex industry,<sup>7</sup> nor does it reflect the legal reality that in Australia the majority of forms of adult sex work are either decriminalised or legalised. As a result of this distinction, workers in the Australian sex industry—an industry where slavery and trafficking crimes have been detected—are missing out on a suite of potentially effective prevention activities, and access to civil remedies.

### Australia’s Evolving Response to Human Trafficking

The Australian response to trafficking has shifted and evolved over the past decade. Australia ratified the *United Nations Convention on Transnational Organized Crime* (UNTOC) in 2004<sup>8</sup> and the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, supplementing the *United Nations Convention against Transnational Organized Crime* (the Trafficking Protocol) in 2005.<sup>9</sup> Since that time, Australia has invested more than AU\$84 million in anti-people trafficking measures<sup>10</sup> and introduced a raft of criminal offences targeting trafficking, slavery, sexual servitude and debt bondage.<sup>11</sup>

<sup>7</sup> To date, all suspected victims of trafficking identified in the Australian sex industry are female.

<sup>8</sup> *United Nations Convention against Transnational Organized Crime*, GA RES 55/25, UN GAOR, 55<sup>th</sup> session, 8 January 2001.

<sup>9</sup> *United Nations Convention against Transnational Organized Crime*, GA Res 55/25, UN GAOR, 55<sup>th</sup> session, 62<sup>nd</sup> pen mtg, Agenda Item 105, Supp No 49, UN Doc A/RES/55/25 (8 January 2001), annex II (*Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*).

<sup>10</sup> Australian Government, Attorney-General’s Department, *People Trafficking* (last updated 23 November 2011) retrieved 30 March 2012, [http://www.ag.gov.au/www/agd/agd.nsf/Page/PeopleTrafficking\\_PeopleTrafficking](http://www.ag.gov.au/www/agd/agd.nsf/Page/PeopleTrafficking_PeopleTrafficking).

<sup>11</sup> See *Criminal Code Act 1995* (Cth), Divs 270–1.

Initial efforts to address trafficking crimes focused on the plight of women trafficked into the sex industry.<sup>12</sup> This early preoccupation with sex trafficking is reflected in Australia's criminal justice statistics: to date, by far the majority of suspected victims of trafficking identified by the Australian authorities have been women from countries in the Asia-Pacific region who have been exploited in the sex industry.<sup>13</sup> There have been 14 convictions under Australia's laws on slavery and human trafficking, but so far only two successful prosecutions of (non-sex industry) labour trafficking. This limited focus on the sex industry was also observed in recent research on (non-sex industry) labour trafficking.

There was...a noticeable lack of awareness among almost all participants, with the exception of those who worked daily on trafficking in persons issues, that the legal concept of "trafficking in persons" could be applied to contexts other than the sex industry.<sup>14</sup>

During a recent visit to Australia, the UN Special Rapporteur observed that '[t]here is a need to move away from the over-sexualising discourse on trafficking [in Australia]' and 'place equal emphasis on all forms and manifestations of trafficking'.<sup>15</sup>

While sex trafficking has monopolised the attention of Australian legislators, media, and the courts, the government has acknowledged, 'it is possible that women working in the sex industry are over-represented among statistics on identified victims of trafficking simply because other forms of trafficking are under-reported and under-

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<sup>12</sup> Parliamentary inquiries into trafficking in Australia have focused on trafficking for sexual servitude. See, for example, Senate Legal and Constitutional Legislation Committee, *Inquiry into Criminal Code Amendment (Trafficking in Persons Offences) Bill 2004*, Australian Government, Canberra, 2004; Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the Trafficking of Women for Sexual Servitude*, Australian Government, Canberra, 2004. For an overview, see: M Segrave and S Milivojevic, 'Auditing the Australian Response to Trafficking' *Current Issues in Criminal Justice*, vol. 22, no. 1:63.

<sup>13</sup> *supra* note 6, pp. 32–4.

<sup>14</sup> F David, *Labour Trafficking*, Australian Institute of Criminology Research and Public Policy Series no. 108, AIC, Canberra, 2010, p. 48, <http://www.aic.gov.au>.

<sup>15</sup> *supra* note 5.

researched'.<sup>16</sup> This observation is supported by research, which confirms that there have been instances of both unreported and unrecognised trafficking crimes, involving the exploitation of domestic workers, cooks and chefs, unskilled labourers and agricultural workers.<sup>17</sup>

In 2007, the initial focus on sex trafficking shifted as the Australian government started emphasising that trafficking crimes can and do occur in a range of settings and contexts, whether in private homes or small businesses. At the national level, this shift in focus has been reflected in a number of concrete changes. In 2011, Australian Police Ministers replaced what was the 'National Policing Strategy to Combat Trafficking in Women for Sexual Servitude'<sup>18</sup> with the more inclusive, and broadly focused 'Australian Policing Strategy to Combat Trafficking in Persons 2011-13'.<sup>19</sup> The Australian Federal Police (AFP) specialist trafficking unit, which was previously called the Transnational Sexual Exploitation Team, has been renamed as the Human Trafficking Team.

In 2008, in the landmark case of *R v Tang*,<sup>20</sup> the High Court of Australia provided important judicial guidance on the meaning of slavery. While this case concerned five Thai women who were trafficked to Australia to work in conditions of debt bondage in the sex industry, it is apparent that slavery offences could apply to egregious forms of exploitation in other industries if the prosecution could establish the requisite elements of the offence.<sup>21</sup> Indeed, the slavery offence had at that point already

<sup>16</sup> Australian Government, *The Criminal Justice Response to Slavery and People Trafficking; Reparation; and Vulnerable Witness Protections*, (Attorney-General's Department, 2010), para. [21] and also at [23] where the AGD notes that '[i]ncreasingly, Australian authorities are becoming aware of trafficking victims identified in sectors other than the sex industry, including in the agriculture, construction, hospitality, domestic services and recreation industries'.

<sup>17</sup> Global Alliance Against Traffic in Women, *Collateral Damage: The impact of anti-trafficking measures on human rights around the world*, GAATW, Bangkok, 2007, pp. 46–48, retrieved 30 March 2012, <http://www.gaatw.org>; F David, *supra* note 14, p. xii.

<sup>18</sup> Anti-People Trafficking Interdepartmental Committee, Attorney-General's Department, *Trafficking in Persons: The Australian government response: January 2004-April 2009*, Inaugural Report of the Anti-People Trafficking Interdepartmental Committee, Australian Government, Canberra, 2009, p. 8.

<sup>19</sup> *supra* note 6, p. 18.

<sup>20</sup> (2008) 237 CLR 1.

<sup>21</sup> M Cullen and B McSherry, 'Without Sex: Slavery, trafficking in persons and the exploitation of labour in Australia' *Alternative Law Journal*, vol. 34, no. 1, 2009, pp. 4–10; see also: J Jolly and A Schloenhardt, 'Honeymoon from Hell: Human trafficking and domestic servitude in Australia' *Sydney Law Review*, vol. 32, no. 4, 2010, pp. 671–92 (discussing Australia's evolving jurisprudence on slavery).

been used in the successful prosecution of two offenders found guilty of enslaving a domestic worker from the Philippines. However, although the *Criminal Code Act 1995* (Cth) (the Criminal Code) prohibits slavery and trafficking for forced labour, most of the existing offences in divisions 270 and 271 target ‘sex trafficking’, with specific offences prohibiting ‘sexual servitude’ and ‘deceptive recruiting for sexual services’.

At the time of writing, the federal government was seeking views on the introduction of stand-alone offence of forced labour, and replacing the existing offence of ‘sexual servitude’ with a broader offence of ‘servitude’.<sup>22</sup> While it is beyond the scope of this paper to consider the merits of the proposed changes, they are intended to respond to concerns about problems with the operation in practice of the anti-trafficking response, and information about the nature of the crime itself and also ensure that Australia’s trafficking laws cover all forms of trafficking in persons.<sup>23</sup>

### Shift in Federal Focus Not Seen at State/territory Level

While the focus of the national anti-trafficking response has broadened to include all forms of human trafficking, the same cannot be said for responses at the state and territory levels. In recent years, trafficking has been the subject of an increasing number of state and territory inquiries and law reform efforts, typically in the context of debates about regulation of the sex industry. For example, in 2011, the Government of Western Australia announced it was drafting new laws to regulate the sex industry in that state. According to the announcement, the new system will be based on a system of licences,

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<sup>22</sup> Exposure Draft, Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012 (Cth).

<sup>23</sup> *supra* note 6, p. 5; The Hon Brendan O’Connor, Minister for Home Affairs and Justice, ‘The Government’s Response to People Trafficking’ (Speech delivered at the Parliament of the Commonwealth of Australia, Canberra, 24 November 2011), retrieved 29 March 2012, <http://www.ag.gov.au/peopletrafficking>. See also, F David and A Gallagher, Submission on Exposure Draft of the Crime Legislation Amendment (Slavery, Slavery-Like Conditions and People Trafficking) Bill 2012, retrieved 31 March 2012, <http://fionadavid.com/publications>.

both for business operators, managers and “prostitutes”.<sup>24</sup> Significantly, the reforms have claimed an anti-trafficking angle:

There will be restrictions on who can hold any type of license, which will include that the person must have reached the age of 18 years, and must be a permanent resident of Australia or an Australian citizen. Holders of student or other visas will not be able to lawfully act as prostitutes. This will enhance the state’s ability to police human trafficking.

In other words, people who come to Western Australia from other countries, whether on a working-holiday visa or a student visa (both of which provide limited work rights) can work as fruit-pickers, baristas, cleaning staff, nurses or indeed any other occupation but not as sex workers. This is despite the fact that it will be potentially lawful for Australian citizens and residents to work as sex workers in Western Australia, and for non-citizens to work in the sex industry in other states, provided they have work rights under their relevant visa category. To our knowledge, there has been no research or other evidence-based consideration of the question of whether an outright ban on non-citizens working in the West Australian sex industry will in any way reduce (or indeed increase) the risk of trafficking in that industry.

In recent years, state and territory inquiries into the regulation of the sex industry have become a forum for advocates to promote the ‘Swedish’ or ‘Nordic’ model (whereby the purchase of sex is criminalised), typically in the name of preventing sex trafficking crimes in that industry.<sup>25</sup> In 2011, an inquiry into the regulation of the sex industry in the Australian Capital Territory became the focus of a (ultimately unsuccessful) campaign to introduce the Swedish model in

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<sup>24</sup> C Porter (Attorney General), ‘Prostitution Legislation Reforms’ (Statement by the Attorney General to Legislative Assembly, 25 November 2010), retrieved 31 March 2012, [http://www.department.dotag.wa.gov.au/\\_files/prostitution\\_reforms\\_speech.pdf](http://www.department.dotag.wa.gov.au/_files/prostitution_reforms_speech.pdf).

<sup>25</sup> For examples of submissions promoting the Swedish model, see: Coalition Against Trafficking in Women Australia, Submission No 28 to Standing Committee on Justice and Community Safety, *Inquiry into the Operation of the Prostitution Act 1992*, 17 March 2011; Australian Christian Lobby, Submission No 42 to Standing Committee on Justice and Community Safety, *Inquiry into the Operation of the Prostitution Act 1992*, April 2011.



that jurisdiction.<sup>26</sup> This followed a Victorian parliamentary inquiry into ‘people trafficking for sex work’ held in 2010, that examined various ‘demand-side strategies’. While the Victorian inquiry ultimately did not recommend the Nordic model, it did recommend the introduction of a new offence of knowingly or recklessly obtaining sexual services from a trafficked woman.<sup>27</sup> This was described as a ‘demand focused recommendation’ that ‘whilst not criminalizing the purchase of sexual services per se will act as a deterrent to men who may be tempted to knowingly purchase sex from trafficked women’.<sup>28</sup>

It is not clear why the Victorian inquiry did not consider the relevance of existing criminal laws on sexual assault that should already cover situations where the evidence establishes that a customer either knowingly or recklessly had non-consensual sex with a trafficked woman. In our view, while sexual assault laws should apply to instances of non-consensual sexual intercourse wherever they occur, the relationship between women who have experienced trafficking and their clients can be complex and care should be taken not to introduce legislation that ‘may add to the already stigmatized and precarious situation’ of women trafficked into the sex industry.<sup>29</sup>

Moreover, as we explore below, it is apparent that the experiences of women who have been trafficked into the Australian sex industry are diverse. In our experience, some identify the wrong they have suffered as labour exploitation, others as sexual exploitation, and still others as both. However, state and territory inquiries into the regulation of the sex industry, and concerns with criminality in that industry, are yet to seriously engage with the potential of labour law as a legitimate strategy for preventing trafficking. For example, the Victorian inquiry made thirty recommendations for reforms that it considered should be made in that state in order to address sex trafficking. However,

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<sup>26</sup> See, e.g. Collective Shout, Submission No 43 to Standing Committee on Justice and Community Safety, *Inquiry into the Operation of the Prostitution Act 1992*, 31 March 2011. All submissions to the Inquiry are available for download at <http://www.parliament.act.gov.au/committees/index1.asp?committee=114&inquiry=994&category=14>.

<sup>27</sup> Drugs and Crime Prevention Committee, Parliament of Victoria, *Inquiry into People Trafficking for Sex Work*, June 2010.

<sup>28</sup> *Ibid.*

<sup>29</sup> OHCHR, UNHCR, UNICEF, UNODC, UN Women, and ILO, *Joint UN Commentary on the EU Directive on Human Trafficking—A Human Rights-Based Approach*, Report, 7 March 2012, p. 100.

not a single recommendation addressed the role of labour law in protecting sex workers from exploitation in the Victorian sex industry, despite the fact that the industry is legalised in that state. Instead, the inquiry appeared to rest on an assumed distinction between sex and labour trafficking, with the former involving ‘the treatment of women as commodities’, as distinct from ‘forced labour’.<sup>30</sup> In its final recommendations, the committee noted that ‘there is growing concern with regard to the nature and extent of other forms of human trafficking in Victoria, especially labour trafficking and trafficking for the purpose of marriage’. Accordingly, the committee recommended holding an inquiry into ‘human trafficking for reasons other than sexual servitude’.<sup>31</sup>

At the state and territory level, concern about trafficking criminality in the sex industry has provoked calls for tougher licensing regimes for brothels, despite the fact that there is no evidence-based research in Australia indicating that the incidence of sex trafficking can be attributed to either legalisation or decriminalisation of the sex industry.<sup>32</sup> Indeed, research on the trafficking of women for sexual purposes has observed that the AFP has identified cases of sex trafficking in legal and illegal brothels and that several AFP agents consider ‘that this distinction had little relevance from the perspective of investigating trafficking’.<sup>33</sup> In this same research, it was also noted that clients of sex workers have been a source of information about trafficking crimes in Australia, and they have also acted as witnesses in prosecutions.<sup>34</sup>

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<sup>30</sup> *Ibid.* p. 2.

<sup>31</sup> *Ibid.* p. xii (Recommendation 27).

<sup>32</sup> See, Human Trafficking Working Group, TC Beirne School of Law, University of Queensland, Submission No 2 to Drugs and Prevention Crime Committee, *Inquiry into People Trafficking for Sex Work*, 22 October 2009, p. 20, retrieved 31 March 2012, <http://www.law.uq.edu.au/human-trafficking-reports-and-presentations>.

<sup>33</sup> F David, ‘Trafficking of Women for Sexual Purposes’ *Australian Institute of Criminology Research and Public Policy Series*, no. 95, Australian Institute of Criminology, Canberra, p. 34.

<sup>34</sup> *Ibid.* p. xiii, 25, 35, 45.

## Assumption at the National Level that Sex and Labour Trafficking are Different

While the state and territory governments continue to focus on sex trafficking, the federal government is developing a more considered response to trafficking in all its forms, including labour trafficking. In 2011, the relevant national coordinating committee ‘maintained its focus on combating trafficking for labour exploitation’.<sup>35</sup> The government called for expressions of interest to undertake projects for education and awareness-raising on labour exploitation, and to provide advocacy and outreach to industries and groups that may be vulnerable to these crimes. This resulted in funding for projects involving the Australian Council of Trade Unions, the Australian Hotels Association, the Australian Red Cross, Asian Women at Work (an NGO focused on working with migrant women in low paid and precarious employment) and the Construction, Forestry, Mining and Energy Union. These are all positive developments. However, what is curious is the way that the response to labour trafficking is discussed in government reports and announcements, as if this is a new, separate and distinct issue to what had previously been the focus – trafficking involving exploitation in the sex industry.

Despite significant reforms, the Australian response to trafficking continues to be underpinned by a widely held and rarely challenged assumption that labour trafficking and trafficking involving exploitation in the sex industry cause distinct forms of harm. The assumption that sex trafficking and labour trafficking are separate species of harm is not unique to Australia. For example, in the United States, the legal definition of ‘severe forms’ of trafficking clearly distinguishes between ‘sex trafficking’ and trafficking of a person ‘for labour or services’.<sup>36</sup>

The assumed difference between sex and labour trafficking is most readily apparent in Australia’s anti-trafficking laws. Under the Criminal Code, *sexual servitude* is a stand-alone offence, one of the elements

<sup>35</sup> *supra* note 6, p. iii, in the Minister’s Foreword.

<sup>36</sup> *Victims of Trafficking and Violence Protection Act of 2000*, Pub. L. No. 106-386, 114 Stat. 1464, section 103(8). Severe forms of trafficking are herein defined to include (a) *sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age or* (b) *the recruitment, harbouring, transportation, provision or obtaining of a person for labour or services, through the use of force, fraud, coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage or slavery.*

of which is a requirement of “commercial use” of the body. As such, this is an offence that is clearly directed at exploitation in the commercial sex industry; there is no comparable offence for sexual servitude in non-sex industry contexts.<sup>37</sup> Under the Criminal Code, *trafficking for the purpose of forced labour* is prohibited (there is presently no stand-alone offence of forced labour). However, forced labour is defined so as to specifically exclude labour of a sexual nature.<sup>38</sup>

This assumed division between sex and labour trafficking flows through to the entire anti-trafficking response in Australia. In some contexts, the validity of this distinction is questioned, either directly or implicitly.<sup>39</sup> However, in other contexts, it appears that this distinction is simply accepted. For example, in its 2011 report on anti-trafficking activities, the Australian government reported on the Trivedi case, which involved the alleged exploitation of an Indian chef. It was noted in the report that this case was ‘significant as it is just the second prosecution for labour trafficking since the introduction of the trafficking offences into the *Criminal Code* in 2005’.<sup>40</sup> This is despite the fact that the overwhelming majority of convictions for trafficking-related offences have been perpetrated in the sex industry.

In our view, it is time to challenge the assumed distinction between labour and sex trafficking. In most Australian states and territories, the majority of forms of adult sex work are either decriminalised or legalised (although aspects of sex work are still criminal in some states and prostitution is illegal in South Australia).<sup>41</sup> Further, the reported

<sup>37</sup> *Criminal Code Act 1995* (Cth), sections 270.4 and 270.6.

<sup>38</sup> Forced labour is defined 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’. The term “threat” means any threat of force, deportation or any other detrimental action unless there are reasonable grounds for that action (73.2(3)).

<sup>39</sup> *supra* note 14, pp. 5–6; E Jeffreys, ‘Anti-trafficking Measures and Migrant Sex Workers in Australia’ *Intersections: Gender and sexuality in Asia and the Pacific*, issue 19, 2009; see also some recent publications of the Australian government which refer to trafficking in various industries, including “sex work”, in information sheets for employers and employees about “labour trafficking” at <http://www.ag.gov.au/peopletrafficking>.

<sup>40</sup> *supra* note 6, p. 16.

<sup>41</sup> For a summary of the regulatory frameworks regarding sex work in Australia, see: New South Wales Parliament, ‘Regulation of Brothels: An update’, NSW Parliamentary Library e-brief, November 2011, retrieved 31 March 2012, [http://www.parliament.nsw.gov.au/prod/parlament/publications.nsf/key/Regulationofbrothels:anupdate/\\$File/E-brief.regulation+of+brothels.pdf](http://www.parliament.nsw.gov.au/prod/parlament/publications.nsf/key/Regulationofbrothels:anupdate/$File/E-brief.regulation+of+brothels.pdf).

case law suggests that while not always the case, most women who have been subjected to trafficking crimes in the Australian sex industry had travelled to Australia intending to work in the sex industry.<sup>42</sup> In these cases, it is the working and living conditions the women were required to engage in upon arrival that were found to be extremely exploitative: trafficked women work extremely long hours without pay under conditions of debt bondage where they are required to pay “debts” of between \$35,000 and \$56,000 to the “contract owner”.<sup>43</sup> They may feel unable to leave their place of work because of threats to family or fears that if they complain, they will be detained by immigration authorities and promptly sent home, while still having a significant debt owing to the people who organised their travel and employment in Australia.<sup>44</sup>

For example, in the case of *R v Sieders; R v Somsri*,<sup>45</sup> four Thai women travelled to Australia intending to work in the sex industry. After they arrived, the women were exploited in a condition of “sexual servitude” (an Australian legal term). On appeal, the court observed that it was possible that all but one of the women made a deliberate choice in Thailand to undertake a debt bondage arrangement whereby each woman must work in the brothel to pay off \$45,000. Further, the women did not seem to have complained or done anything about seeking to free themselves from the conditions under which they worked, other than by diligent work over long hours to pay off the debt.<sup>46</sup> In finding it was still open to conclude that the women were in a condition of sexual servitude, the court noted:

The definition of sexual servitude [in the Commonwealth Criminal Code]...is concerned only with a very specific respect in which there is a limitation on the freedom of action of the person in question. A person can be free to do a multitude of different things, but if she is not free to cease providing sexual services, or not free to leave the place or area where she provides sexual services, she will, if the other condition of the section is met, be in sexual servitude.<sup>47</sup>

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<sup>42</sup> *supra* note 35, p. 39 (For commentary on the reported cases up until 2008).

<sup>43</sup> See *Sieders v R; Somsri v R* (2008) 72 NSWLR 417 and *R v Netthip* [2010] NSWDC 159.

<sup>44</sup> *supra* note 35, pp. 30–32.

<sup>45</sup> (2008) 72 NSWLR 417.

<sup>46</sup> *Ibid.* 439 [142].

<sup>47</sup> *Ibid.* 425 [95].

In Australia, the publicly reported cases of sex trafficking have involved women who remain in exploitative situations sometimes because of physical constraints but also because of a complex matrix of factors including cultural and family obligations, cultural and linguistic isolation, shame and stigma about sex work, suspicion of authority and the belief that they owe a debt to their traffickers.<sup>48</sup> In these cases:

coercion and control has involved a range of subtle methods such as threats of violence, obligations to repay debt, isolation, manipulation of tenuous or illegal migration situations and a general sense of obligation.<sup>49</sup>

It is noteworthy that a significant number of complainants in reported cases of sex trafficking have continued working in the sex industry, even after their period of servitude. For example, in the case of *R v Tang*,<sup>50</sup> where a brothel owner was convicted of using and possessing five Thai women as slaves, two of the complainants continued working in the sex industry free from debt bondage.<sup>51</sup>

We do not deny that sexual assault and sexual harms can be a consequence of trafficking involving exploitation in the sex industry. This is undoubtedly the case. However, unfortunately, sexual assault and sexual harms can also be the consequence of trafficking into other industry sectors. As recent research on labour trafficking in Australia has highlighted:

A focus on labour trafficking should not be allowed to obscure the potential for sexual violence to be part of a larger package of exploitation and abuse of migrant workers. Interview participants gave examples of domestic and agricultural workers who were physically and economically mistreated, as well as being sexually assaulted.<sup>52</sup>

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<sup>48</sup> See discussion of relevant cases in F David, 'Prosecuting Trafficking in Persons: Known issues, emerging responses' *Australian Institute of Criminology Trends and Issues*, no. 358, p. 4.

<sup>49</sup> *supra* note 35, p. 39. The concept of "psychological coercion" is captured in the phrase "an abuse of a position of power or vulnerability". See generally, United Nations Office of Drugs and Crime, *Model Law against Trafficking in Persons*, United Nations, Vienna, 2009, p. 22, retrieved 31 March 2012, [http://www.unodc.org/documents/legal-tools/Model\\_Law\\_TiP.pdf](http://www.unodc.org/documents/legal-tools/Model_Law_TiP.pdf).

<sup>50</sup> *R v Tang* (2008) 237 CLR 1.

<sup>51</sup> *Ibid.* 13, para [12].

<sup>52</sup> *supra* note 14, p. xi.

One example is the Kovacs case, involving the enslavement and repeated sexual assault of a domestic worker brought over from the Philippines, to work in the home and shop of Mr and Mrs Kovacs.<sup>53</sup>

The experiences of women who have been trafficked into the Australian sex industry and in particular, the ways they experience that harm, are diverse. In our experience, some identify the wrong they have suffered as labour exploitation, others as sexual exploitation, and still others as both. Some women characterise their experience as a form of sexual exploitation where they had no real freedom to refuse to provide sexual services. Others may state that while they had the freedom to refuse customers or to provide certain services, their working conditions were exploitative with no payment for services and no provision for sick leave. In our view, it is important to respect the diversity of these experiences.

### Pragmatic Reasons for Merging “Sex” and “Labour” Trafficking

Ultimately there are important pragmatic reasons for recognising that trafficking in the sex industry can result in both “labour” and “sexual” forms of harm. First, recognising that sex trafficking can involve labour exploitation may expand the opportunities for those who have experienced exploitation to obtain civil remedies. Second, this approach ensures that the benefits of labour trafficking prevention initiatives—which focus upon improving the availability and accessibility of labour law protection for vulnerable migrant workers—are made available to workers in the sex industry.

#### *Remedies and compensation*

When trafficking involving the sex industry is characterised as necessarily a problem of *sexual* exploitation, the remedies that may be available for labour exploitation may become invisible or inaccessible. As the Special Rapporteur on Trafficking in Persons has observed:

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<sup>53</sup> *Ibid.* pp. 18–19.

[i]n some countries, for example,...labour proceedings are not an option for trafficked persons engaging in sexual services, as the provision of sexual services itself is illegal and thus not recognized as a form of employment to which labour protection applies.<sup>54</sup>

In the Australian context, when women experience criminal exploitation in the sex industry, a range of civil remedies may be available, depending on the facts of the case, and the location. In the absence of a national compensation scheme for victims of crime, it is necessary to examine whether trafficked persons can claim compensation under one of the various state and territory victims of crime compensation schemes.<sup>55</sup> However, access to this remedy depends on the type of harm the victim has experienced and the eligibility criteria of the compensation scheme in state or territory where the crime occurred. In New South Wales, where most cases of trafficking involving exploitation in the sex industry have been identified, a trafficked person might be able to access criminal injuries compensation, provided they can show they have been subjected to sexual assault causing psychological injury.<sup>56</sup> If a trafficked person has not been sexually assaulted, payment of compensation is unlikely unless the trafficking crime resulted in permanent physical injuries, domestic violence or a severe psychological disorder.

Not all victims of sexual servitude will choose to characterise their experience as one of sexual violence. For example, a woman who has not been sexually assaulted but who has experienced debt bondage may want to recover unpaid wages and compensation for workplace injuries or hurt and humiliation. However, the potential for women to seek these sorts of remedies through industrial laws has yet to be fully examined.

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<sup>54</sup> Joy Ngozi Ezeilo, *Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children*, 17<sup>th</sup> Session, Agenda Item 3, UN Doc A/HRC/17/35, 13 April 2011, para 33.

<sup>55</sup> See *Victims of Crime (Financial Assistance) Act 1983* (ACT); *Victims Support & Rehabilitation Act 1996* (NSW); *Victims of Crime Assistance Act 2006* (NT); *Victims of Crime Assistance Act 1996* (Vic); *Criminal Injuries Compensation Act 2003* (WA); *Victims of Crime Assistance Act 2009* (Qld); *Victims of Crime Act 2001* (SA); *Victims of Crime Assistance Act 1976* (Tas).

<sup>56</sup> *Victims Support & Rehabilitation Act 1996* (NSW), Sch 1, cl 6, 'Sexual Assault'.



For example, it is unclear whether the *Fair Work Act 2009* (Cth) (FWA), can provide meaningful remedies for sex workers seeking redress for even fairly basic time and wage matters, let alone more severe instances of exploitation. As the FWA does not protect independent contractors,<sup>57</sup> a critical question will be whether a sex worker can in fact be categorised as an employee and not a contractor. The application of the FWA to sex workers is yet to be tested but the authors are aware that the FWO is now investigating the claims of women who were allegedly trafficked into the sex industry.

### *Harnessing the benefits of labour trafficking prevention initiatives*

Recent research on labour trafficking in the Australian context has highlighted the fact that substandard working conditions create the breeding ground for more serious forms of exploitation. As noted in the research: ‘instances of exploitation vary widely in nature and severity, ranging from simple time and wage matters, right through to clear-cut cases of slavery. However, it appears that in Australia, by far the largest number of cases of exploitation (broadly defined) fall somewhere short of slavery or trafficking in persons.’<sup>58</sup>

Accordingly, it was concluded that: ‘to be relevant, Australia’s laws need to focus on not only the extreme forms of slavery and forced labour, but also on the more prevalent lesser forms of exploitative behaviour that nonetheless have serious consequences for the people affected. These lesser forms of exploitative behavior are arguably precursors to more serious criminal conduct and they contribute to the creation of an environment that tolerates various forms of exploitation.’<sup>59</sup>

In our view, this logic applies just as readily to both sex and non-sex sectors. Long hours, restrictions on freedom of movement, the non-payment or underpayment of wages, unsafe working conditions, the failure to provide employees with written contracts or information

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<sup>57</sup> While the rights of independent contractors are set out in the *Independent Contractors Act 2006* (Cth), the FWA does prohibit sham contracting (sections 357–9). The sham contracting provisions prohibit a person and/or company from engaging, or proposing to engage, a worker as an independent contractor where the worker in reality is, or would be, an employee.

<sup>58</sup> *supra* note 14, p. 49.

<sup>59</sup> *Ibid.* pp. 49–50.

about their rights at work, refusal to provide sick leave or annual leave are problems which are common to both sex and non-sex sectors where victims of trafficking have been identified. In the context of the sex industry, these problems may be compounded by the stigma that attaches to sex work and the misinformation or ignorance of the fact that sex work is legal in most parts of Australia. Migrant sex workers may also be afraid that if they are identified as such by Australian authorities, they will be deported and publicly exposed as sex workers, an outcome that could result in their prosecution in their home country. This seems to be a legitimate concern, given recent statements by the Government of South Korea that it will prosecute its nationals found to have been working in the Australian sex industry.<sup>60</sup>

There is broad consensus that rights-based initiatives to improve access to labour law systems are a critical element of any strategy to prevent trafficking in non-sex sectors.<sup>61</sup> Instead of proposals to criminalise industries where incidences of forced labour have been identified (such as domestic work, agriculture or construction), strategies to prevent labour trafficking tend to focus on improving the substandard working conditions ‘that are a potential breeding ground for more serious forms of exploitation’.<sup>62</sup> It is time to apply this logic and link anti-trafficking efforts with initiatives aimed at improving the working conditions of workers in the sex industry.

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<sup>60</sup> ‘Korea Threatens Nationals Working Here in the Brothel Industry’ Crikey, 6 December 2011, <http://www.crikey.com.au/2011/12/06/korea-threatens-nationals-working-here-in-brothel-industry/>.

<sup>61</sup> A Gallagher, *The International Law of Human Trafficking*, Cambridge University Press, New York, 2010, p. 439; International Labour Organization, *International Labour Migration: A rights-based approach*, ILO, Geneva, 2010, pp. 262–3; Organization for Security and Co-operation in Europe, *Human Trafficking for Labour Exploitation/Forced and Bonded Labour: Identification-Prevention-Prosecution and; Prosecution of offenders, justice for victims* (2<sup>nd</sup> Occasional Paper), 2008, p. 36 citing Roger Plant, ‘[f]orced labour and human trafficking: the challenges ahead’ (Speech delivered at OSCE High-Level Conference, Vienna, 7–8 November 2005), explaining ‘[c]riminalizing forced labour is not enough....For an effective prosecution it is necessary to criminalize specific acts of coercion, while at the same time separately punishing substandard labour conditions. Of vital importance is that workers have access to labour tribunals and compensation, without running the risk of immediate deportation.’

<sup>62</sup> F David, *Labour Trafficking*, Australian Institute of Criminology Research and Public Policy Series No. 108, AIC, Canberra, p. xii, <http://www.aic.gov.au>.

## Conclusion

The assumption that sex trafficking and labour trafficking are distinct and different species of harm has shaped Australia's early efforts to address trafficking and continues to influence state and territory inquiries into the regulation of the sex industry. Despite political concern about sex trafficking, inadequate attention has been paid to providing people who are vulnerable to exploitation in the sex industry with the legal tools to avoid, challenge or contest coercive and abusive practices before they develop into situations of criminal exploitation.

At the time of writing, the Australian government is seeking to change Australia's anti-trafficking laws to replace the existing offence of "sexual servitude" with a broader offence of servitude and a stand-alone offence of forced labour. A bill introduced into the Australian parliament seeks to introduce new offences of forced labour and servitude cover trafficking in sex and non-sex sectors.<sup>63</sup> This would remove what we consider is an artificial and unhelpful distinction between "sex" and "labour" trafficking crimes, and focus instead on the nature of the conduct—criminal exploitation—wherever it occurs.

Just as reform of the criminal law is important, proper attention should be paid to the potential for labour law to reduce the vulnerability of workers to extreme forms of exploitation and provide remedies to the victims of such abuses. The authors are aware that labour law frameworks have been successfully used in Australia to seek recovery of unpaid wages and out-of-court settlements for persons who have allegedly experienced trafficking crimes in non-sex industry contexts.<sup>64</sup> At present, it is unclear if similar remedies are available for people who have experienced trafficking crimes in the sex industry.

In our view, there is a need for further research to identify and understand the challenges that sex workers will likely face in accessing protection under Australia's national labour law and state and territory workers' compensation schemes. We recommend that the Australian government provide practical and financial support, so that the national

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<sup>63</sup> Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012 (Cth).

<sup>64</sup> See, for example, *Fryer v Yoga Tandoori House* [2008] FMCA 288, para [22].

industrial regulator, the FWO, can work directly with sex worker advocacy groups, to examine opportunities and barriers to accessing the labour law system, particularly for migrant sex workers.

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