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Trafficking and the Sex Industry: from Impunity to Protection

This brief provides an overview of the trafficking of women and children into the Australian sex industry in the context of the global trade in people trafficking. It examines why there have been no prosecutions of traffickers under existing Commonwealth laws. It explains how Australia's emphasis on border control is working against the prosecution of traffickers and the human rights of trafficking victims and explains how existing Australian policy and law will need to change to meet the new internationally agreed standards to punish traffickers and support victims under the UN Trafficking Protocol.

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Executive Summary

This brief provides an overview of the growing global trade in trafficking sexual labour for the commercial sex industry. No consensus has been reached on the size or extent of the problem in Australia. Estimates vary because of a lack of reliable statistical data and the differing definitions of trafficking being applied. The incorrect use of 'smuggling' and 'trafficking' as interchangeable terms has created further confusion in the public debate. Regardless of the numbers, many women who migrate to work in the sex industry have found themselves to be victims of sexual servitude. While the consent of the women has been raised in defence of Australia's poor prosecutions record, under Australian law the original consent is irrelevant to whether or not an offence of sexual servitude has been committed.

A key issue in Australia's current practice is the priority given to the enforcement of immigration law. Women working illegally in the Australian sex industry are detained and promptly deported. It is arguable that the current approach negates proper consideration of the human rights of victims of trafficking and undermines the criminal justice objective of prosecuting traffickers.

To date there have been no prosecutions of traffickers under Commonwealth laws since their introduction in 1999. The successful prosecution of traffickers relies on the cooperation of the victims of traffickers, who without mandated support, protection or means of redress are unlikely to cooperate with law enforcement agencies. While the Australian Government has taken some steps in the right direction, current law and policy is now out of step with internationally agreed standards. The unintended consequence is that traffickers escape prosecution while trafficking victims are detained in inappropriate conditions, put at risk of being returned to an unsafe environment and exposed to possible re-victimisation.

The first internationally agreed definition of people trafficking is set out in the new UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. It also obliges signatory states to criminalise the conduct and to protect and support the victims of trafficking. Since re-modelling its domestic policy response to trafficking based on the Trafficking Protocol, the United States (US) has doubled its investigations and tripled its prosecutions for trafficking offences. Other European countries which have altered their approach from stigmatising victims to supporting them have similarly reported more success in prosecuting offenders.

Australia has signed the Convention and the Trafficking Protocol. As part of the domestic treaty process, the Federal Government will review domestic law before moving to ratification. This presents an opportunity to consult widely at the federal, state and territory government level, including with law enforcement agencies, social policy departments and Non-Government Organisations (NGOs), to develop a package of

measures and operational protocols designed to achieve the dual goals of prosecution and victim support and protection.

Introduction

This paper provides an overview of the global trade in the trafficking of women and children into the sex industry. It sets out the regulatory challenges posed by trans-national crimes of this nature; discusses some of the difficulties in reaching consensus on the extent of the problem in Australia; explains the confusion between people trafficking and people smuggling; analyses existing criminal and migration law and practice; and suggests reasons why, to date, there have been no prosecutions of traffickers under the Commonwealth Criminal Code. The analysis is informed by domestic and international research and recent developments in international law that provide an internationally agreed definition of people trafficking. The paper refers briefly to strategies adopted in the US and in Europe to combat this crime. These latest developments suggest that a comprehensive whole of government approach designed to meet the interrelated goals of the prosecution of traffickers and the protection and support of victims is required to combat the crime of people trafficking. Existing Australian law and policy is assessed in light of these developments.

Trafficking Sexual Labour: A Trans-national Crime

The globalisation of the world economy has provided new and lucrative opportunities for criminal entrepreneurs to be relatively free from detection and prosecution.¹ With the compression of time and distance, alongside the rapid development of information technologies, criminal syndicates operate in a global village criss-crossing national borders.² Yet the majority of the policy and legislative instruments and resources for responding, prosecuting and preventing crime tend to be limited by the boundaries of nation states. As such, single countries are strategically disadvantaged in curbing trans-national crimes involving fraud, money laundering, tax evasion, drug importation, firearms smuggling, terrorism, sex tourism, cyber-crime, people trafficking and the like. By operating outside the boundaries of the legal regulation of nation states, trans-national crime syndicates have been effective in evading law enforcement activities.³ Consequently their regulation poses a particularly difficult challenge for the 21st century.⁴

There is, however, an increasing recognition that a more effective response to combating trans-national crime requires international and regional cooperation. A series of UN treaties, regional agreements and memoranda of understanding (MOU) has been signed by Australia as a critical step toward cooperating in an international environment to combat trans-national crime.⁵ Additionally a Trans-national Crime Coordination Centre was established within the Australian Federal Police (AFP) in December 2002.⁶ The centre aims to collaborate internationally to prevent, dismantle and investigate trans-national crime and will target investigations into five key trans-national crimes: terrorism, illicit

drug trafficking, people smuggling, high tech crime and money laundering. There is no mention of the trafficking of women and children as a priority.⁷

Typically, trafficking is confused with smuggling when viewed simply as an illegal immigration issue or threat to national security and not as a human rights violation. Both people smuggling and trafficking are trans-national crimes that may *at times* involve organised crime syndicates in the illegal cross-border movement of people.⁸ However it is inaccurate to use these overlapping but distinct concepts as interchangeable terms. People trafficking into the sex industry involves the movement of people for the purpose of exploitation. It entails the violation of the human rights of trafficked victims, generally recruited from the poorest parts of the world and deceived, lured or abducted into servitude.

Unlike highly organised people smuggling operations, not all of those involved in people trafficking conform to the stereotype of organised criminality.⁹ As trans-national crime is organised around profit, a diverse array of loose knit criminal organisations or individuals may simply work together opportunistically motivated by material gain.¹⁰ Husbands, boyfriends, acquaintances, or family members may recruit and trade women into the international prostitution industry for profit, to repay debts or to support a family.¹¹ This makes the trafficking of women and children a more complex problem than the more organised smuggling of people for profit.

Size and Extent of Trafficking into the Sex Industry

International Picture

Due to the illicit nature of people trafficking, the number of women and children trafficked for commercial sex work is impossible to quantify. However, national and international sources agree that the global trade has increased substantially over the last decade.¹² People are trafficked to work as low-paid illegal labourers, domestic servants, or into various forms of sexual exploitation in the lucrative international commercial sex industry. The United Nations has estimated that trafficking in the global sex industry generates a US\$5 billion to US\$7 billion profit annually.¹³

In any market there are demand and supply forces at work. Some argue that the commercialisation of sex on the Internet and satellite television have increased the demand for women and children from the developing world to be trafficked into these new sexual entertainment industries in the western world.¹⁴ Rather than organised criminal syndicates being at the centre of the growth of trafficking in women and children, according to some experts, the key players in the international sex industry in the 21st century are more likely to be entrepreneurs operating in a liberalised global market.¹⁵ These entrepreneurs offer products in high demand by consumers prepared to pay substantial sums of money for the commercial sex services they offer.¹⁶

On the supply side, the rise in displaced persons during the 1990s and decreasing opportunity for regular migration are other factors contributing to the international growth of people trafficking. Refugee camps for displaced persons provide a ready pool of vulnerable women and children to be recruited into the global sex industry.¹⁷ According to the United Nations High Commissioner for Refugees (UNHCR) there are currently 19 783 100 persons of concern in the world. For a large number of displaced women and children, this displacement 'ends in sexual exploitation and debt bondage'.¹⁸

Estimates of the number of people trafficked around the world annually for sexual exploitation and other forms of exploitation vary from 700 000 to 4 million.¹⁹ In Europe the figure has been put at somewhere between 200 000 and 500 000 women and children.²⁰ In any one year it is estimated that around 50 000 women and children are trafficked into the United States, by lure, force, deception or coercion to work in the commercial sex industry.²¹ Many believe they are migrating across international borders to work as domestic workers, waitresses, or models for the fashion industry not the sex industry. Some women aware they are going to work as sex workers, are deceived about the conditions of work and find themselves in debt bondage, servitude or slavery.

Australian Estimates

In Australia, the high and continuing demand for young Asian sex workers, in excess of local supply, creates a market opportunity for traffickers in women and children from countries like Thailand, Philippines, China and Cambodia.²² Australian brothels advertising exotic, oriental and Asian women are not hard to find in the on-line Yellow Pages directory giving some indication of the demand for their sexual services.²³ According to one authoritative estimate, the Australian trafficking industry nets approximately A\$1 million per week to the organisers of the trade.²⁴

In 1995, the Joint Standing Committee on Foreign Affairs, Defence and Trade, was told that at any one time there might be 200 Asian prostitutes working in Australia who had been trafficked here by organised criminals suspected of being linked to drug trafficking.²⁵ In the same year, Chris Payne, the head of Australian Federal Police (AFP) investigation into sex trafficking, estimated that up to 500 trafficked women were working illegally in Sydney at any given time.²⁶

In 1996 the then Department of Immigration and Ethnic Affairs (DIEA) produced a *Report into Trafficking of Women into the Australian Sex Industry*.²⁷ While it accurately reports that the number of non-citizens working in the sex industry is 'unknown and estimates vary considerably' it presents a contradictory picture of the nature of trafficking into the sex industry in Australia.²⁸ The contradiction arises mainly from a lack of clarity around the definition of crimes involving trafficking. For on the one hand the report states there is 'no evidence' of women being coerced against their will to work in the Australian sex industry, yet acknowledges on the other that a 14-year-old Thai girl located in a brothel during a compliance inspection, was returned to Thailand. That report is now out of date

and of doubtful value, relying as it does on a very narrow and apparently confused definition of trafficking.²⁹

Nevertheless, in 1999, in the second reading speech for the Criminal Code Amendment (Slavery and Sexual Servitude) Bill 1999, Senator Ian Macdonald remarked that: 'intelligence from Australian and overseas sources confirms that the problem is a significant one for Australia'.³⁰ He noted that the AFP had received information relating to 14 cases over the previous eighteen months, and that the National Crime Authority (NCA) was aware of 25 women being trafficked into Australia between 1992 and 1996, one of whom was allegedly a 13-year-old girl brought to Australia to pay her father's debt.

Senator Vanstone, then Minister for Justice and Customs and responsible for the development of the Bill, clearly regarded the issue as an important one for Australia and has made similar statements about the significance of the problem.³¹ More recently, however, Senator Ellison, the current Minister for Justice and Customs, has stated that there is no evidence of any large scale problem within Australia.³²

By contrast, Kathleen Maltzahn, coordinator of Project Respect, an organisation that promotes the rights of trafficked sex workers, has claimed that approximately 1000 women are trafficked into the country each year.³³ Phillip Ruddock, the Minister for Immigration and Multicultural and Indigenous Affairs (DIMIA), has disputed the credibility of this claim:

It is not a credible suggestion that hundreds or thousands of people are being trafficked unwillingly into the industry and have escaped detection over many years ... While I do not diminish the concerns on trafficking, the actual complaints from individuals do not match the level of claims being made ... the claims being made about the wide extent of trafficking cannot be substantiated.³⁴

According to the Minister, since July 2002, only four women have made complaints about trafficking, 'that is they stated they were brought to Australia under false pretences by unscrupulous individuals for the express purpose of forcing them into a form of sexual slavery'.³⁵

These contradictory assessments arise partly from the lack of accurate statistical data and point to a need for independent research which can provide an up-to-date national picture drawing on an array of reliable sources. The under-reporting of crime is a common problem. This is especially the case for crimes of sexual violence.³⁶ Under-reporting is likely to be compounded for people trafficking offences where the victim may fear reprisal and may also be engaged in illegal activity. These problems led the Australian Institute of Criminology to conclude that the limited statistical data available on trafficking provides 'very few insights into the incidence of trafficking' in Australia.³⁷ In the absence of any reliable statistical data, it is not surprising that a number of widely varying estimates have been proffered drawing on an array of sources. Rough estimates of people trafficking into the sex industry are usually extrapolated from secondary sources such as NGO surveys, and estimates given by police investigators, sex workers or other professionals with local knowledge of the sex industry.

Under the Trafficking Protocol trafficking in persons is defined 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 of benefits to achieve the consent of a person having control over another person, for the purpose of exploitation'.⁵⁰ Exploitation is not limited to sexual exploitation but, at a minimum, includes the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery and servitude (art. 3). There is nothing in the definition that limits deception to the nature of the work. Thus a woman who consents to work in the sex industry but is deceived about the conditions is in fact trafficked for the purpose of sexual servitude.

The issue of consent and the link between the definition of trafficking and prostitution was a controversial subject during negotiations on the draft text. Some parties wanted the definition of trafficking to include the phrase 'irrespective of the consent of the person'.⁵¹ While others who support voluntary migration for sex work argued that such a broad definition would include those who choose to move to work in the sex industry, broadening the scope of the protocol beyond the problem. A compromise was struck with the definition including a qualification that consent is not relevant where the threat of use of force or other forms of coercion, abduction, fraud, deception or abuse of power were used for the purposes of exploitation.⁵² The breadth of the definition was intended to ensure that all victims of trafficking are recognised and protected, not only those where force or coercion can be proved.⁵³

Importantly, State parties to the Protocol have recognised that effective action to prevent and combat people trafficking requires a comprehensive international approach in countries of origin, transit and destination that combines both the punishment of traffickers and the protection of victims.⁵⁴ To this end States that ratify the Protocol make a commitment to criminalise people trafficking (as defined in the treaty), provide witness protection and special assistance to trafficked persons, paying special attention to the women and children, and to prevent re-victimisation of trafficked persons. In short, the prosecution of traffickers and protection of victims are seen as mutually reinforcing goals to achieve the overall aim of combating trafficking in the short and long term. But as the ensuing analysis indicates the existing law falls short of meeting these new internationally agreed standards in relation to people trafficking.

Domestic Law

Australian lawmakers have gone some way to addressing the problem of trafficking for the purpose of sexual servitude and slavery but it is arguable that existing law does not yet reflect fully the new internationally agreed standards set out by the Trafficking Protocol.

First, there is no separate offence of 'people trafficking' in the Commonwealth Criminal Code. Instead, in 1999 the offences of slavery, sexual servitude and deceptive recruiting

were introduced by the Commonwealth's Criminal Code Amendment (Slavery and Sexual Servitude) Act 2000. These new offences were intended to target traffickers and address the problem of international trafficking of people.⁵⁵ The Act was the Commonwealth's part of a proposed package of uniform commonwealth, state and territory offences to deal with the problem and apply where an international element is present.⁵⁶ The definitions of slavery and servitude are based on earlier international treaties from the 1920s and 1950s which predate the recent developments in international criminal law.⁵⁷ As such they are not entirely in step with recent developments, nor do they really address the nature of the problem in Australia.⁵⁸

Under the Commonwealth Criminal Code, 'slavery' is defined as occurring when ownership rights are exercised over another person and can arise from a debt incurred or contract entered into by the enslaved person (s. 270.1). It is not enough that the contract or debt is exploitative or oppressive alone, it must place that person in a condition where a power of ownership is exercised over him or her (s. 270.1). Slave trading also includes 'exercising control or direction over or providing finance for' the trade (s. 270.2). According to Senator McDonald, the definition was intended to catch 'those who lie at the heart of the trade—the organisers, managers and financiers'.⁵⁹

'Sexual servitude' is defined as occurring when sexual services are provided because of force or threats and the person is not free to cease providing those services (s. 270.4). Importantly, the definition of threat includes not only threat of force but also the threat of deportation recognising that women without valid visas are at risk of constant threat of deportation by their agents, pimps or brothel owners.⁶⁰ The offence applies where, as a matter of fact, the woman is held in servitude regardless of her original consent to sex work.

However, the additional offence of 'deceptive recruiting', intended to target traffickers, is limited to deception about the nature of the work and does not capture the situation where women agree to work in the sex industry but are deliberately deceived about the conditions of work (s. 270.7). Deceiving a person for the purpose of sexual servitude, debt bondage or other forms of sexual exploitation is therefore not covered. There is however the offence of 'causing a person to enter into or remain in sexual servitude' which is available (s. 270.6 (1)). Of course this offence is also limited to sexual servitude and depends on proof of causation. And a person who conducts a business that involves the sexual servitude of another, namely, the managers, financiers and organisers, are also captured by s. 270.6 (2). Again these provisions go some way toward addressing traffickers, but it is arguable that they are not entirely in step with the Trafficking Protocol.

Prosecutions for Slavery and Sexual Servitude

The only known case of a conviction related to trafficking in Australia is that of Gary Glasner prosecuted under Victorian law before the Commonwealth offences came into effect. This brothel keeper was convicted of importing and imprisoning around 20 Thai

women. The women were barred up in the Clifton Hotel until they repaid their debt to him for sponsoring their illegal entry into Australia through the provision of sexual services.⁶¹ He received a fine of \$31 000 and a suspended sentence.⁶² We understand that Criminal Justice Visas were used in this case to bring witnesses back into the country:

We regard sex slavery and bondage as abhorrent. We brought in laws to make sure that people could be specifically prosecuted for these offences.⁶³

Despite the Minister's reassurance, to date there have been no Commonwealth prosecutions for the offences of slavery or sexual servitude.⁶⁴ In March 2003, a Senate Estimates Committee was informed that the AFP had undertaken 13 investigations into offences related to sexual servitude, that three were still under way, but that none had led to a prosecution.⁶⁵ The Federal Minister for Justice and Customs, Senator Ellison explained that:

This is due in part to the reluctance of potential witnesses, many of whom are in the country illegally, to testify.⁶⁶

According to media sources even when potential witnesses offer to assist, they are still swiftly deported.⁶⁷ Noi, a Thai woman recently deported following a raid for illegal immigrants in a Melbourne brothel, has alleged that DIMIA officers were not interested in her offer to help apprehend the traffickers who had locked her in a brothel, refusing to release her until she repaid a \$50 000 debt by doing 750 jobs.⁶⁸ This allegation is disturbing as, on the available facts, if accurate, the case appears to meet the definition of sexual servitude. She was only in detention a few days before being deported. Wing, another Thai woman, currently in detention at the time of writing, has made a similar allegation.⁶⁹ DIMIA has in the past openly acknowledged that as the mandatory detention provisions of the Migration Act requires the detention and removal of unlawful non-citizens as soon as practical, 'there is little effective opportunity for such a person to remain in Australia to give evidence at the trial'.⁷⁰

Compliance actions by immigration officers bring them into frequent contact with a significant number of potential witnesses to, and victims of slavery and sexual servitude offences. For instance, from July 2002 to February 2003, 'immigration compliance staff located 134 people working illegally in the sex industry'.⁷¹ From 1998 to 2000 387 non-lawful citizens were picked up during immigration compliance actions.⁷² The contact is usually brief because, as confirmed by a senior DIMIA executive before a Senate Estimates Committee, 'people who are located working unlawfully in the community generally leave Australia promptly'.⁷³ In defence of this policy, DIMIA has argued that 'it has never been easy to obtain information on the organisers and the couriers in the illegal sex trade as sex workers are either fearful of reprisals against themselves or their families, or possibly may wish to use the organisation again'.⁷⁴ This begs the question whether Australia is discharging its duty to protect victims of trafficking from further violations of their human rights. It is not a justification for prompt removal.

The unintended consequence of this policy is that foreign and local agents and brothel owners and pimps are enjoying immunity from prosecution in Australia as investigation is impossible without the cooperation and testimony of witnesses who are routinely deported. Meanwhile victims are at risk of being returned to an unsafe environment, exposed to possible re-victimisation or worse, while brothel keepers and traffickers have the added incentive to recruit again in order to recoup their losses, or maintain their profits.⁷⁵

Mechanisms to Protect Witnesses and Support Victims

From a public policy viewpoint, there is an inextricable link between legislation criminalising slavery and sexual servitude and the implementation of mechanisms to protect the human rights of trafficking victims.⁷⁶ We argue below that the realisation of the criminal justice objectives of the legislation, to convict traffickers, requires more than the protection of witnesses, it requires the support of victims as well.

Protecting Witnesses

Under the Convention and Trafficking Protocol the State party is required to ensure the physical protection of the witnesses as well as the protection of victims from retaliation and intimidation.⁷⁷ This may include, for example, non-disclosure of the witness's identity, giving evidence by video link and relocating the person to another State.⁷⁸ These instruments also require that victims be provided with assistance for their recovery.⁷⁹ The ongoing assistance to victims must be considered as a separate issue because not all victims of trafficking will be selected by investigating and prosecuting authorities to act as witnesses in criminal prosecutions.⁸⁰ However, measures of protection and ongoing assistance work hand in hand with an effective prosecution strategy to convict traffickers.

To assist with an investigation or prosecution, potential witnesses can be temporarily retained or be allowed to re-enter Australia on a Criminal Justice Visa and in theory granted protection under the *Witness Protection Act 1994*. But these general measures are not sufficiently tailored to meet the specific needs of trafficking victims, especially of women and children. Importantly, a Criminal Justice Visa is only available to victims selected as witnesses. Even so, it is not linked to any statutory provision for witness protection or trigger any other forms of assistance. Additionally, the procedure for granting a Criminal Justice Visa is cumbersome, involving a multitude of agencies, militating against their use.

A Criminal Justice Certificate must first be granted by either the Commonwealth Attorney-General, Director of Public Prosecutions or Police Commissioner⁸¹ before DIMIA may consider issuing the visa.⁸² The process also assumes that law enforcement agencies have had sufficient time and access to potential witnesses to make a request to the relevant authorities. Media reports indicate that witnesses are routinely and promptly deported before being interviewed by law enforcement agencies.⁸³

None of the 124 sex workers picked up during compliance operations by DIMIA from July 2002 to February 2003 have been granted Criminal Justice Visas to remain in Australia.⁸⁴ This lends support to the argument that this mechanism is either underutilised or is inappropriate for this purpose. While it is possible that none were victims of trafficking, this seems highly unlikely. Of the trafficking victims located by DIMIA during compliance operations it also seems implausible that none were prepared to cooperate with the AFP. The problem may be lack of referral by DIMIA to the relevant law enforcement agencies, but some media reports also claim that the AFP have 'flatly refused to investigate allegations of sexual slavery'.⁸⁵ Under the current system, DIMIA may be put in a difficult position in cases where a victim is cooperating with a criminal investigation but the AFP fails to request a Criminal Justice Visa. Under the *Migration Act 1958* DIMIA must, subject to some qualifications, deport an unlawful non-citizen as soon as reasonably practicable. The lawfulness of the detention may come into question if the process of deportation is delayed for the purpose of facilitating an investigation.

The Minister for Justice and Customs Minister, Senator Chris Ellison, has now ordered a review into the policing of sexual servitude and slavery to examine the issue of coordination between law enforcement agencies whose responsibility it is to investigate these crimes.⁸⁶ It will be important that the review examine both the deficiencies in the current law and policy and the need for more effective cross-portfolio operational protocols between the relevant departments and units.⁸⁷ All these matters need to be considered together as part of a coherent legislative and policy response that aims to meet the dual goals of prosecuting traffickers while simultaneously supporting victims.

Supporting Victims

The successful prosecution of traffickers relies on the cooperation of the victims of traffickers, who without mandated support, protection or means of redress are understandably reluctant about cooperating with law enforcement agencies. The treatment of sex workers like Noi, deported despite her offer of assistance to convict her traffickers, reveals a systemic failure to come to grips with the necessary support for trafficking victims in Australia. This case and others like it highlight the inconsistency between the strident enforcement of immigration law and Australia's domestic and international criminal justice objectives to convict traffickers. It also raises a real question about the Commonwealth's ability to meet the new standards envisaged and encouraged by the Convention and the Trafficking Protocol to provide trafficking victims with adequate support.⁸⁸

The Protocol requires that State parties 'consider implementing measures' for the physical, psychological and social recovery of victims (art. 6.2). It recommends the provision of appropriate housing, counselling and information about their legal rights, medical, psychological and material assistance and access to employment, educational and training opportunities (art. 6.3).⁸⁹ To date, statutory rights to counselling, temporary accommodation or financial assistance of the kind urged under the Trafficking Protocol is

entirely missing from the Australian system. Thus the role social security and family and child services departments might play in supporting victims that would in turn increase their ability to cooperate with the police, has so far been overlooked. This will need to be addressed as part of Australia's preparation for ratifying the Trafficking Protocol.

Australia's failure to support the victims of traffickers was concretely highlighted by the death of Puangthong Simaplee in Villawood Detention Centre on 26 September 2001.⁹⁰ The inquest has sparked controversy with persistent questions being asked in the Senate and its committees about the Government's handling of victims trafficked into Australia to work in the sex industry.⁹¹

Ms Simaplee told immigration officials that she was trafficked into Australia in 1986 on a false Malaysian passport.⁹² While the Deputy Coroner, Carl Milovanovich, was unable to confirm her history of sexual slavery, this being outside his jurisdiction, he was concerned enough to urge law enforcement authorities to address the trafficking of women into prostitution with 'vigour and appropriate resources'.⁹³ The Deputy Coroner found that in September 2001 immigration officers detained Ms Simaplee following a raid on a Sydney brothel in Riley Street Surry Hills.⁹⁴ Three days later she died in an observation cell while being treated by detention centre staff for heroin withdrawal.⁹⁵ The Deputy Coroner expressed concern about the adequacy of her medical care while detained in Villawood Detention Centre and recommended that consideration be given to the hospitalisation of detainees in such instances. He also recommended that DIMIA and Australian Correctional Management (ACM) facilities work with organisations like Project Respect 'which might assist in identifying, assessing and providing the appropriate medical, community and translator services to women who might be identified as being victims of trafficking'.⁹⁶ Referring to the Trafficking Protocol, the Sex Discrimination Commissioner Pru Goward commented that, 'it is to be hoped that in the future this Protocol will protect the interests and needs of women like Simaplee and that her sad case is one never to be repeated'.⁹⁷

Special Visa Class, Temporary or Permanent Stay

A possible reason for the Government's apparent hesitance to address comprehensively concerns about its level of support for trafficking victims, is that the issue inevitably raises questions about their residency status. One way of reducing the black market in trafficked sex workers is to allow them to migrate lawfully to work in the sex industry under a special visa class of entry. Alternately the business migration stream could be expanded to include the sex industry, where there is high but unmet local demand for these workers. This idea, initially suggested by sex workers organisations,⁹⁸ was recently revived in Senate by Senator Greig.⁹⁹ While many may see the idea as politically unpalatable, it would go a long way to removing the exploitative conditions under which women from developing countries come to Australia to work in the sex industry. Once in Australia, they would no longer be vulnerable to the actions of traffickers or pimps who require their servitude in exchange for protecting them from immigration compliance operations. Nor

would they have to enter into debt bondage, for their immigration could be arranged lawfully through DIMIA.

As a signatory to the Trafficking Protocol, the Commonwealth Government is required to consider providing the victims of trafficking with temporary or permanent residency on humanitarian grounds.¹⁰⁰ However, the Government took the unusual step of making a declaration at the signature stage,¹⁰¹ stating that nothing in the Protocol is to be seen as imposing obligations on Australia to admit or retain any person within its national borders that it does not already have such an obligation toward.¹⁰² The statement is a clear indication of the Government's discomfort with the idea of humanitarian support for victims and it sends a clear message that it will not consider allowing temporary or permanent stay for the victims of trafficking into the sex industry. That said, neither the declaratory statement or the terms of articles 7 or 8,¹⁰³ displace Australia's obligations of *non-refoulement* under the 1951 Convention Relating to the Status of Refugees (CSR) and other international human rights treaties not to return a person to a country where they are at risk of persecution for a convention reason or otherwise at real risk of a violation of their internationally recognised human rights.¹⁰⁴

Applying for recognition as a refugee on the grounds of gender persecution is one of the few options open for trafficking victims to seek lawful residency status within Australia. But while Australia is one of the few countries to have gender guidelines the likelihood of success is remote. In some cases a trafficking victim might qualify for another type of substantive visa, such as a student or spouse visa, but this partial approach is not adequate either. Under the Migration Act 1958 there is no onshore mechanism by which a victim could apply for a protection visa on humanitarian grounds. Under the Act an applicant must have already been rejected for a protection or other visa before the Minister can exercise his discretion.¹⁰⁵ The Minister's discretion to grant a protection visa on humanitarian grounds is discretionary, non-compellable and therefore removed from the scrutiny of the courts.

Developments in the US and Europe

The approach of the US and in Europe stands in stark contrast to the current situation in Australia. As part of its overall strategy to deal with the global rise in trafficking the US State Department established a Trafficking Office. This office provides the victims of traffickers with access to services including immigration concessions, shelter, social assistance, medical care, privacy and protection, and voluntary repatriation.¹⁰⁶

Importantly, the US Trafficking Victims Protection Act of October 2000, created a new T visa for trafficking victims that allows for temporary residency of up to three years but may also lead to permanent residency in cases where repatriation could lead to further harm or extreme hardship.¹⁰⁷ This status is only available to those willing to provide information on traffickers to police and since introducing these measures the US has

doubled the number of investigations and tripled the number of convictions for trafficking.¹⁰⁸

The US model was possible because of a fundamental shift in the attitude toward the victims of trafficking. The shift was from stigmatising the victim as an undeserving lawbreaker to supporting the victim with a view to actively seeking their cooperation to combat trafficking. The approach can be criticised as pressuring victims into participating in investigation but it does go a long way toward the obligations of protecting victims while achieving law enforcement objectives at the same time.

In Europe, Italy has adopted measures to protect trafficking victims regardless of their cooperation with police¹⁰⁹ and Belgium, the Netherlands and Spain provide temporary residence permits to victims although they are limited to those willing to give evidence.¹¹⁰ The Italian government has since reported a significant increase in the incrimination of traffickers.¹¹¹ In other countries in Europe trafficked women may apply for residence on humanitarian grounds.

What Direction will Australia take?

Some Australian Parliamentarians are already on record as favouring a more comprehensive approach to the issue. In 1995 for example, the Joint Standing Committee on Foreign Affairs, Defence and Trade recommended the Australian Government put in place 'programs which would recognise Australia's responsibilities for the protection and rehabilitation of the victims of trafficking' and where this was the case, 'consider this as a factor in any application which is made for a humanitarian visa'.¹¹²

Upon ratification the Government may make reservations to the Trafficking Protocol to avoid or limit further the obligations to provide assistance. This would avoid the existing contradictions between the Trafficking Protocol and the Migration Act 1958. However, as victim protection is one of the stated purposes of the Trafficking Protocol and integral to combating people trafficking, such a course may be seen as defeating the primary object and purpose of signing it.¹¹³

A more effective approach might be to accept the Trafficking Protocol in its entirety, remove the existing declaration, and consult widely within federal and state and territory governments and law enforcement agencies and the non-government agencies on the development of a package of measures and operational protocols that will achieve the goals of prosecution and victim support and protection. This approach would demonstrate our commitment to the governments of South East Asia that Australia is serious about protecting their nationals and complement our proven determination to combat the related but distinct crime of people smuggling. The UN Office of the High Commissioner for Human Rights has developed a comprehensive set of Recommended Principles and Guidelines on Human Rights and Human Trafficking that could usefully inform such a process.¹¹⁴ Agencies such as the Human Rights and Equal Opportunity Commission may also have a useful contribution to make, along with NGOs, the Office of Status of Women

and other Government departments such as Social Security, and Family and Community Services.

Conclusion

Despite the introduction of Federal criminal laws in 1999 designed to combat transnational trafficking of people for slavery and sexual servitude, to date there have been no prosecutions for any of these offences. The crux of the problem, identified by a variety of commentators,¹¹⁵ is that women trafficked into Australia to work in the sex industry are treated as commodities for exploitation by traffickers and brothel owners and illegal immigrants by the Government.

While securing the cooperation of potential witnesses may be difficult, recent developments in the US and Europe reviewed in this paper suggest that an approach which respects the human rights of victims is more effective in achieving the interrelated goals of prosecution and protection. In light of these recent developments and Australia's forthcoming ratification of the UN Convention Against Transnational Organized Crime and its supplementary Protocol on People Trafficking, it can be argued that it is timely to commission independent and thorough research into the extent and nature of the problem in Australia and review how best to align domestic law and policy with international best practice. While the Australian Government has taken some steps in this direction, this brief has demonstrated that existing law and policy relating to the victims and witnesses of trafficking is at best patchy and is now out of step with internationally agreed standards. At worse, the current approach of routinely deporting potential witnesses and victims can be seen to undermine the goals of protection and prosecution, putting victims at risk with sometimes life threatening consequences, while allowing traffickers to act with impunity in Australia and abroad.

Endnotes

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1. Mark Findlay, *The Globalisation of Crime*, Cambridge University Press, Cambridge, 1999.
 2. *ibid.*, pp. 2–3.
 3. *ibid.*, p. 3.
 4. Peter Grabosky, 'Crime in a shrinking world', *Current Issues in Criminal Justice*, no. 83, Australian Institute of Criminology, Canberra, 1998; Peter Grabosky and Russell Smith, *Crime in the Digital Age: Controlling Telecommunications and Cyberspace Illegalities*, Federation Press, Leichhardt, 1998.
 5. Such as the United Nations Convention Against Transnational Organized Crime; the Protocol Against the Smuggling of Migrants by Land, Sea and Air; regional agreements in the Asia Pacific region to cooperate to combat people smuggling and trafficking (see for details, Phillip Ruddock, MP, *Press Release*, 'Agreement Signed with Thailand on Fighting Illegal

Immigration', 6 June 2001; Alexander Downer, MP, *Press Release*, 'The Australia–Indonesia Ministerial Forum', 11 March 2003; Alexander Downer, MP, *Press Release*, 'Appointment of the Ambassador for People Smuggling', 28 February 2002). Additionally the AFP has signed a Memorandum of Understanding signed with the Indonesian International Police. The MOU provides a framework for bilateral collaboration in preventing, investigating and dismantling trans-national crime. (For details see Chris Ellison, *Media Release*, 'Indonesia and Australia Working Together to Combat Transnational Crime', 14 June 2002).

6. For an explanation of the Centre's role and priorities see Senator Chris Ellison, Minister for Justice and Customs, [Press Release](#), 11 December 2002.
7. For a list of the priorities targeted by the new Transnational Crime Co-ordination Centre see AFP, [Australian Federal Police Counter Terrorism Measures](#) web site last modified, 23 April 2003.
8. Alice Leuchtag, 'Human Rights, Sex Trafficking and Prostitution', *The Humanist*, vol. 63, no. 10, 2003, p. 12. Janice Raymond, 'The new UN Trafficking Protocol', *Women's Studies International Forum*, vol. 25, no. 5, 2002, p. 493.
9. Mark Findlay, *op. cit.*, p. 127.
10. *ibid.*
11. Janice Raymond, *op. cit.*, p. 493.
12. Peter Mameli, 'Stopping the Illegal Trafficking of Human Beings', *Crime, Law & Social Change*, no. 38, 2002, p. 67; Ian Taylor and Ruth Jamieson, 'Sex Trafficking and the Mainstream of Market Culture', *Crime, Law & Social Change*, vol. 32, 1999, p. 257; Donna Hughes, 'Humanitarian Sexploitation', *The Weekly Standard*, Washington, 24 February 2003; Susan Thorbek and Bandana Pattanaik (eds), *Transnational Prostitution: Changing Patterns in a Global Context*, Zed Books, London, 2002, p. 1; Linda Meaker, 'A social response to transnational prostitution in Queensland, Australia', in Susan Thorbek and Bandana Pattanaik, (eds), *Transnational Prostitution: Changing Patterns in a Global Context*, Zed Books, London, 2002, p. 57.
13. Alice Leuchtag, *op. cit.*, 2003, p. 12.
14. Mary Sullivan and Sheila Jeffreys, 'Legalisation: The Australian Experience', *Violence Against Women*, vol. 8, no. 9, 2002, p. 1145.
15. Ian Taylor and Ruth Jamieson, *op. cit.*, p. 274.
16. Mary Sullivan and Sheila Jeffreys, *op. cit.*, p. 1145.
17. Ian Taylor and Ruth Jamieson, *op. cit.*, p. 263.
18. Jenna Shearer Demir, 'The trafficking of women for sexual exploitation: a gender-based and well-founded fear of persecution?', *New Issues in Refugee Research*, [Working Paper No. 80](#), European School of Advanced Studies in International Cooperation and Development, Pavia, Italy, 2003.
19. US Department of State, *Trafficking in Persons Report*, [Report Home Page](#), Released by the Office to Monitor and Combat Trafficking in Persons, United States, 5 June 2002.

56. The Commonwealth offences are limited to cases where there is an international element and state and territory governments are left with the responsibility of dealing with trafficking into slavery and sexual servitude that takes place wholly within Australia. To date NSW, ACT, Northern Territory and South Australia have introduced complementary provisions. WA has a bill before Parliament. See Second Reading Speech, Criminal Code Amendment (Slavery and Sexual Servitude) Bill 1999, 24 March 1999, Senate, *Hansard*, p. 3075.
57. 1926 International Convention to Suppress the Slave Trade and Slavery and its 1953 protocol and the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices similar to Slavery.
58. See Sandi Kerr, *The Trafficking of Women into Australia as Sex Workers*, unpublished Masters manuscript, ANU, Law Faculty, 2002, p. 36.
59. Second Reading Speech, Criminal Code Amendment (Slavery and Sexual Servitude) Bill 1999, 24 March 1999, Senate, *Hansard*, p. 3075.
60. Linda Meaker, op. cit., p. 60.
61. Elisabeth Wynhausen, 'One-Way Traffic of Sex Slave Trade', *The Weekend Australian*, 22 March 2003; Mary Sullivan and Sheila Jeffreys, op. cit., p. 1146.
62. Rebecca Tailby, 'Organised Crime and People Smuggling/Trafficking to Australia', *Trends and Issues in Crime and Criminal Justice*, no. 208, Australian Institute of Criminology, May 2001, p. 6.
63. The Hon. Minister Phillip Ruddock interviewed on *Meet the Press*, Sunday 20 April 2003.
64. See also the Annual Reports for the Commonwealth Department of Public Prosecutions for [2001](#) and [2002](#).
65. Senator Ellison, Question Without Notice, Immigration: Ms Puangthong Simaplee, Senate, *Hansard*, 24 March 2003.
66. *ibid.*
67. Natalie O'Brien and Elisabeth Wynhausen, 'Officials ignored sex slave's offer of help', *The Australian*, 2 April 2003; Elisabeth Wynhausen and Natalie O'Brien, 'Sex slave witness set to be deported', *The Australian*, 17 April 2003; Elisabeth Wynhausen, Natalie O'Brien, and Elisabeth Coleman, 'No visa for sex slave whistleblower', *The Australian*, 21 April 2003.
68. Natalie O'Brien and Elisabeth Wynhausen, 'Officials ignored sex slave's offer of help', *The Australian*, 2 April 2003.
69. Elisabeth Wynhausen, Natalie O'Brien, and Elisabeth Coleman, 'No visa for sex slave whistleblower', *The Australian*, 21 April 2003.
70. DIMIA, *Protecting the Border Immigration Compliance*, Commonwealth of Australia, Canberra, 1999, p. 31.
71. The Hon. Phillip Ruddock, MP, *Ministerial Press Release*, 1 April 2003.
72. DIMIA, *Protecting the Border: Immigration Compliance*, Commonwealth of Australia, Canberra, 2000.

73. Mr Moorhouse, First Assistant Secretary, Border Control and Compliance Division, DIMIA, answer to Senator Allison, Immigration and Multicultural and Indigenous Affairs portfolio, Senate, *Legal and Constitutional Legislation Committee*, 11 February 2002.
74. DIMIA, 1999, op. cit., p. 31.
75. A similar point was made by the Editor of the *Sydney Morning Herald*, almost two years ago, when he wrote, 'indeed, in the past three years, immigration raids have netted more than 600 women working illegally in Australian brothels. Shamefully, while such women have been deported, not one prosecution has been mounted against their exploiters'. (Editorial, *Sydney Morning Herald*, 8 June 2001).
76. Jennifer Norberry, op. cit., 1999, p. 7.
77. Article 24 Convention and Article 6 Trafficking Protocol.
78. Articles 24.2, 24.3.
79. Article 25 Convention, Article 6 Trafficking Protocol.
80. Observation by the UN High Commissioner for Human Rights and the UN High Commissioner for Refugees on the Proposal for the EU Council Framework Decision on Combating Trafficking in Human Being, para 6.
81. The Hon. Phillip Ruddock, MP, *Ministerial Press Release*, 1 April 2003.
82. Mr Moorhouse, First Assistant Secretary, Border Control and Compliance Division, DIMIA, answer to Senator Allison, Immigration and Multicultural and Indigenous Affairs portfolio, Senate, *Legal and Constitutional Legislation Committee*, 11 February 2002.
83. Natalie O'Brien and Elizabeth Wyndhausen, 'Bureaucrats ignored sex slave sting', *Weekend Australian*, 5 April 2003.
84. From July 2002 to February 2003, DIMIA had detained 124 sex workers, of whom 109 were removed, 16 released on temporary visas and two were in detention. None were reported to the committee as having been granted a criminal justice visa. Answer to Question Taken on Notice, Additional Estimates Hearing, Immigration and Multicultural and Indigenous Affairs Portfolio, Enforcement of Immigration Law, 11 February 2003. It was reported on Lateline ABC Television, 7 May 2003, that Wing, a Thai women who had offered to assist the AFP in investigating traffickers had been issued a Criminal Justice Visa the previous day.
85. Natalie O'Brien and Elizabeth Wynhausen, 'AFP refused to act on trafficking', *The Australian*, 12 April 2003.
86. Natalie O'Brien, Elisabeth Wynhausen and Kathryn Shine, 'Canberra to review sex slave policing', *The Australian*, 4 April 2003; see also comments made by The Hon. Phillip Ruddock, MP, Lateline, ABC Television, 7 May 2003.
87. This should include reviewing the method, quality and scope of interviewing by DIMIA compliance officers.
88. Jennifer Norberry, '[Criminal Code Amendment \(Slavery and Sexual Servitude\) Bill 1999](#)', *Bills Digest*, no. 167, Department of the Parliamentary Library, 1999, provides background to

- the legislation. It encouraged consideration be given to amending the Migration Act to provide special status for the victims of trafficking.
89. The Protocol's weak protection provisions have been criticised by international law experts who predict 'is likely to undermine its effectiveness as a law enforcement instrument'. Ann Gallagher, *op. cit.*, p. 991.
 90. Deputy State Coroner, NSW, Carl Milovanovich, *Inquest into the Death of Puongtong Simaplee*, Westmead Coroners Court, 24 April 2003.
 91. For example, Senator Linda Kirk, ALP, Attorney-General's Portfolio: Attorney-General's Department, Legal and Constitutional Legislation Committee, Attorney-General's Portfolio: Australian Federal Police, Senate, 10 February 2002; Senator Joe Ludwig, ALP, Legal and Constitutional Legislation Committee, Attorney-General's Portfolio: Australian Federal Police, Senate, 10 February 2002; Senator Lyn Allison, Question Taken on Notice, Additional Estimates Hearing, Immigration and Multicultural and Indigenous Affairs Portfolio, Senate, 11 February 2003; Senator Brian Greig, Democrats, 'Question without Notice (Speech), Immigration: Ms Puangthong Simaplee', Senate, *Hansard*, 24 March 2003; Senator Brian Greig, Democrats, 'Question without Notice, Immigration: Ms Puangthong Simaplee', Senate, *Hansard*, 25 March 2003.
 92. Leoni Lamont, 'Sold at 12: nightmare ends in death', *Sydney Morning Herald*, 13 March 2002.
 93. Deputy State Coroner, NSW, Carl Milovanovich, *Inquest into the Death of Puongtong Simaplee*, Westmead Coroners Court, 24 April 2003, p. 2.
 94. *ibid.*, p. 1.
 95. *ibid.*
 96. *ibid.*, p. 15.
 97. Commissioner Pru Goward, *Media Release*, Australian Human Rights and Equal Opportunity Commission, 24 April 2003.
 98. For example Sex Workers Outreach Project (SWOP), 'proposes that sex workers be given a 12 month working visa with recommendations that they contact SWOP and sexual health clinics'. [SWOP Website](#), visited 8 May 2003.
 99. In a speech to Senate, Senator Greig stated 'I would argue that there are perhaps only two realistic responses that government has to this situation. The first would be to provide visas to those women overseas who wanted to come here as consenting adults and work lawfully in the sex industry, given that prostitution is regulated and lawful in several states ... Were this to happen, I believe it would effectively snuff out this black market. I do not think the government is going to give that suggestion the remotest consideration; visas on those grounds are currently denied. So it seems that the only other effective way to deal this is to get tough on trafficking.' Senator Brian Greig, Question Without Notice, (Speech) Immigration: Ms Puangthong Simaplee, Senate, *Hansard*, 24 March 2003.
 100. The UN Trafficking Protocol requires State signatories to 'consider adopting legislative or other measures' to allow for temporary or permanent stay and take into account humanitarian and compassionate factors when implementing its obligation under this provision (art. 7).

101. Australia's declaration states, 'The Government of Australia hereby declares that nothing in the Protocol shall be seen to be imposing obligations on Australia to admit or retain within its borders persons in respect of whom Australia would not otherwise have an obligation to admit or retain within its borders'. Multilateral Treaties deposited with the Secretary-General of the United Nations, Trafficking Protocol, [website](#), visited 8 May 2003.
102. A declaratory statement is a statement of interpretation not a reservation to the treaty. It is normal practice to enter declaratory statements and reservations at the ratification stage. Consequently, it is still open for Australia to enter a reservation limiting its obligations under the treaty.
103. Under Article 8, repatriation of the victims is to be facilitated by receiving States, but the safety of that person on return must be taken into account (art.8).
104. International Convention on Civil and Political Rights and the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment.
105. Section 417 Migration Act 1958 empowers the Minister to exercise his discretion in the public interest to substitute a decision of the Refugee Review Tribunal to grant a protection visa on humanitarian grounds if deportation of the person to their country of origin or another country would expose her to a serious risk of a violation of her human rights.
106. US Department of Justice, Fact Sheet, [Accomplishment in the Fight to Prevent Trafficking in Persons](#), Washington, 25 February 2003.
107. Sean Murphy, 'International trafficking in person, especially women and children', *The American Journal of International Law*, vol. 95, no. 2, p. 410.
108. US Department of Justice, Fact Sheet, [Accomplishment in the Fight to Prevent Trafficking in Persons](#), Washington, 25 February 2003.
109. Article 18 Alien Law provides a six month temporary social protection residence permit with the possibility of extension for up to eighteen months.
110. Commission of the European Communities (2002), 'Proposal for a Council Directive on the short-term residence permit issued to victims of action to facilitate illegal immigration or trafficking in human being who cooperate with the competent authorities', Brussels, Belgium, p. 5.
111. Italian Ministry of the Interior, *Rapporto sullo stato della sicurezza in Italia*, Rome Italy, 2001 reported in, Shear Demir J., 'The Trafficking of women for sexual exploitation: a gender based and well founded fear of persecution?', *New Issues in Refugee Research, Working Paper No. 80*, UNHCR, March 2003, p. 21.
112. Joint Standing Committee on Defence, Foreign Affairs and Trade, op. cit., p. 53.
113. The validity of a reservation that is inconsistent with the object and purpose of a treaty may be opposed by other State parties to the instrument and its legal effect would be put in doubt.
114. Recommended Principles and Guidelines on Human Rights and Human Trafficking, Office of the United Nations High Commissioner for Human Rights, UN, HR/PUB/02/03, Geneva, 2002.

115. Georgio Costello, [Jammed: Trafficked Women in Australia](#), speech presented at Project Respect's 'Stop the Traffic' Conference, Melbourne, 25 February 2002; Kathleen Maltzahn, [Trafficking in Women for Prostitution](#), speech presented at the Australian Women Conference Conference, Canberra, 28 August 2001; Sally Moyle, Director, Sex Discrimination Unit, 'Trafficking in Women', [speech](#) presented at the Stop the Traffick Symposium: Addressing Trafficking in Women for Prostitution, RMIT, 25 February 2002; [Coalition Against Trafficking in Women Australia](#), website, visited 6 May 2003.